THIRTY-EIGHTH PARLIAMENT

REPORT 69

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011

Presented by Hon Adele Farina MLC (Chairman)

March 2012

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are –

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

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

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REPORT

EXECUTIVE SUMMARY

1 The Criminal Investigation (Covert Powers) Bill 2011 proposes a uniform scheme of extraordinary law enforcement powers for Western Australia Police, the Department of Fisheries and the Australian Crime Commission. These powers will be used for both local and cross-border covert 'controlled' operations under the supervision of those agencies' respective chief officers.

2 No qualitative external oversight of the agencies' use of the powers and investigation into the conducting of their operations will occur. A gatekeeper is an essential tool for combatting the spectre of corruption around those who will exercise the extraordinary powers provided by the Bill.

3 The Committee is of the view that the power to conduct a controlled operation or assume an identity for the purpose of conducting a controlled operation should be used judiciously to deal with proportionately serious matters or matters where normal methods of law enforcement are, for particular reasons, ineffective.

4 The Committee has a particular concern that the creation of new offences in subsidiary legislation for which a controlled operation may subsequently be undertaken is an inappropriate delegation of legislative power from the Parliament to the Executive. The creation of new offences is a subject matter that should remain within the purview of the Parliament and to propose otherwise, diminishes the sovereignty of the Western Australian Parliament.

5 The Committee made four Findings, three narrative-form Recommendations and 25 statutory-form Recommendations.

FINDINGS AND RECOMMENDATIONS

6 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

Page 8

Finding 1: The Committee finds that a gatekeeper is an essential tool for combatting the spectre of corruption by those who will exercise the extraordinary powers provided by the Criminal Investigation (Covert Powers) Bill 2011.

Page 21

Recommendation 1: The Committee recommends that in terms of the implementation of the policy decision to include "*the fisheries department*" in the definition of "*law enforcement agency*" in the Criminal Investigation (Covert Powers) Bill 2011, the Department of Fisheries should be excluded. This may be effected in the following manner:

Page 3, lines 13 to 14 – To delete –

or (c) the fisheries department;

Page 23

Finding 2: The Committee finds that the powers conferred on the three prescribed law enforcement agencies and their respective chief officers are extraordinary. These powers should be confined to the most serious of crimes, not just for any offence.

Page 25

Finding 3: The Committee finds that the controlled operations powers being proposed in the Criminal Investigation (Covert Powers) Bill 2011 should only be used judiciously to deal with proportionately serious matters or matters where normal methods of law enforcement are, for particular reasons, ineffective.

Page 26

Finding 4: The Committee finds that the creation of new offences attracting controlled operations powers in regulations is a serious subject matter and constitutes an inappropriate delegation of legislative power from the Parliament to the Executive. No substantive scrutiny of the offences will occur. This diminishes the Parliament's role in authorising appropriate offences for a controlled operation.

Page 27

Recommendation 2: The Committee recommends that the definition of "*relevant offence*" in clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to exclude the prescribing of additional relevant offences in regulations. This may be effected in the following manner:

Page 6, lines 25 to 27 – to delete -

or (b) an offence against the law of this jurisdiction that is prescribed for the purposes of this definition;

Page 29

Recommendation 3: The Committee recommends that in the event recommendation 2 is not supported by the Legislative Council, clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to provide for greater Parliamentary scrutiny of the prescribing of relevant offences in regulations where the punishment is less than three years imprisonment. This may be effected in the following manner:

Page 6, line 27 — To delete "definition;" and insert -

definition if and only if the prescribing of that offence has been recommended by resolution passed by both Houses of Parliament of this State;

Page 29

Recommendation 4: The Committee recommends that the definition of "*sexual offence*" in clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to exclude the prescribing of additional sexual offences in regulations. This may be effected in the following manner:

Page 6, lines 30 to 32 – to delete -

or (b) any other offence of a similar kind prescribed for the purposes of this definition;

Page 29

Recommendation 5: The Committee recommends that in the event Recommendation 4 is not supported by the Legislative Council, clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to provide for greater parliamentary scrutiny of the prescribing of additional sexual offences in regulations. This may be effected in the following manner:

Page 6, line 32 — To delete "definition;" and insert -

definition if and only if the prescribing of that offence has been recommended by resolution passed by both Houses of Parliament of this State;

Page 34

Recommendation 6: The Committee recommends that clause 9 of the Criminal Investigation (Covert Powers) Bill 2011 be deleted. This may be effected in the following manner:

Page 8, lines 10 to 15 – To delete the lines

Page 34

Recommendation 7: The Committee recommends that if the Legislative Council does not support recommendation 6, clause 9 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so that the *Freedom of Information Act 1992* and the *State Records Act 2000* do not apply to investigations, operations activities or records under Part 2 but to apply after a period of 30 years. This may be effected in the following manner:

Page 8, line 12 – To delete "Part –" and insert -

Part for 30 years after the commencement of this section –

Page 35

Recommendation 8: The Committee recommends that the Minister representing the Minister for Police respond to the Information Commissioner's comments in a letter to the Committee reproduced at Appendix 5 that:

(1) the use of different oversight models in different regulatory schemes increases the complexity and fragmentation of oversight laws resulting in inefficiencies and unnecessary duplication of effort and expenditure; and

(2) the problem appears to have arisen inadvertently as a result of various Ministerial Councils each deciding on different oversight models for the areas of national law reform for which they are responsible.

Page 35

Recommendation 9: The Committee recommends that clause 12(1)(f) of the Criminal Investigation (Covert Powers) Bill 2011 be amended to insert the word "*been*" between the words "*have*" and "*expected*" at Line 33. This may be effected in the following manner:

Page 10, line 33 — To insert after "have"-

been

Page 37

Recommendation 10: The Committee recommends that the words: "*as soon as practicable*" and "*record in writing*" be inserted in clause 15(8) of the Criminal Investigation (Covert Powers) Bill 2011. This may be effected in the following manner:

Page 14, line 28 — To delete "must ensure that written notes are" and insert -

must, as soon as practicable after the authority is granted, ensure that a record in writing is

Page 39

Recommendation 11: The Committee recommends that clause 25(2) of the Criminal Investigation (Covert Powers) Bill 2011 be amended to make it mandatory for the principal law enforcement officer to apply to the chief officer for a retrospective authority within 24 hours and in exceptional circumstances, outside the 24 hour period. This may be effected in the following manner:

Page 21, line 7 — After "hours" insert -

(or any longer period that the chief officer may, in exceptional circumstances, allow)

Page 41

Recommendation 12: The Committee recommends that clause 25 of the Criminal Investigation (Covert Powers) Bill 2011 be deleted from the Bill. This may be effected in the following manner:

Page 21, lines 1 to 31 – To delete the lines

Page 22, lines 1 to 31 – To delete the lines

Page 42

Recommendation 13: The Committee recommends that in the event Recommendation 12 is not supported by the Legislative Council, the terms of reference of the Joint Standing Committee on the Corruption and Crime Commission be extended to provide oversight of retrospective authorities.

Page 44

Recommendation 14: The Committee recommends that the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to ensure that a victim of crime may make a claim for compensation under the *Criminal Injuries Compensation Act 2003* in the event an offence has been committed under an authority. This may be effected by inserting a new Part 7A in the following manner:

Part 7A - *Criminal Injuries Compensation Act 2003 amended*

106A. Act amended

This Part amends the *Criminal Injuries Compensation Act 2003*.

106B. Section 13 amended

In section 13(5) delete "section 27." and insert:

section 27 or the *Criminal Investigation (Covert Powers) Act 2012* section 27, 31 or 34.

106C. Section 16 amended

In section 16(5) delete "section 27." and insert:

section 27 or the *Criminal Investigation (Covert Powers) Act 2012* section 27, 31 or 34.

106D. Section 17 amended

In section 17(5) delete "section 27." and insert:

section 27 or the *Criminal Investigation (Covert Powers) Act 2012* section 27, 31 or 34.

Page 45

Recommendation 15: The Committee recommends that clause 35(2) of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to provide a fifth exception to the rule that a person who has had access to operational information must not disclose it. This may be effected in the following manner:

Page 29, line 12 – To delete "." and insert -

; or (e) for the purpose of seeking legal advice.

Page 49

Recommendation 16: The Committee recommends that clause 36 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so that the principal law enforcement officers' reports must include additional information. This may be effected in the following manner:

Page 30, after line 8 — to insert -

(g) information as to whether —

(i) in the course of the operation, any person engaged in conduct of a kind authorised by the authority for the operation (the relevant conduct) when the person was not so authorised; and

(ii) any criminal activity other than the relevant conduct was engaged in during the operation; and

(iii) any person is, because of section 31, not criminally responsible for ancillary conduct (as defined in that section) related to the relevant conduct; and

(iv) any variations were made to an authority for the operation; and

(v) any of those variations were to extend the period of validity of the authority; and

(vi) any retrospective authority was granted in respect of the operation; and

(vii) any urgent authority was granted in respect of the operation, and if so, whether the conduct authorised by that authority should, in the opinion of the principal law enforcement officer, have been authorised by a formal authority instead; and

(viii) any conditions of an authority for the operation were breached; and

(ix) any loss of or serious damage to property, or any personal injuries, occurred as an indirect result of the operation.

Page 50

Recommendation 17: The Committee recommends that clause 38 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to ensure that the Parliament is aware that information of the kind referred to in clause 38(2) has been excluded in the annual report of the Parliamentary Commissioner to the Parliament. This may be effected in the following manner:

Page 32, lines 14 to 16 — To delete the lines and insert -

(3) The Minister must —

(a) exclude information from the report if satisfied on the advice of the chief officer of any of the grounds set out in subsection (2); and

(b) insert a statement to the effect that information has been excluded from the report under paragraph (a).

Page 53

Recommendation 18: The Committee recommends that the Parliamentary Commissioner should be given the power to conduct investigations into particular controlled operations. This may be effected in the following manner:

Part 2 Division 4 Subdivision 3 heading

Page 35, line 18 — To insert after "Inspections"-

and investigations

Page 36, after line 7 - To insert -

(5) For the purposes of the *Parliamentary Commissioner Act 1971* section 14(1) the grant, variation or cancellation of, or refusal to grant, vary or cancel, an authority is to be taken —

(a) to be a decision or recommendation made, or an act done or omitted, that relates to a matter of administration; and

(b) to affect a person or body of persons in his, her or its personal capacity.

Page 54

Recommendation 19: The Committee recommends that clause 43(1)(b) of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to overcome the difficulty identified by the Australian Crime Commission with respect to the definition of "*senior officer*". This may be effected in the following manner:

Page 37, line 8 — To delete "Director of National Operations;" and insert -

Executive Director;

Page 55

Recommendation 20: The Committee recommends that clause 45 of the Criminal Investigation (Covert Powers) Bill 2011 be deleted. This may be effected in the following manner:

Page 40, lines 1 to 6 – To delete the lines

Page 55

Recommendation 21: The Committee recommends that that if the Legislative Council does not support recommendation 20, clause 45 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so that the *Freedom of Information Act 1992* and the *State Records Act 2000* do not apply to activities or records under Part 3 but to apply after a period of 30 years. This may be effected in the following manner:

Page 40, line 3 - To delete "Part –" and insert -

Part for 30 years after the commencement of this section –

Page 56

Recommendation 22: The Committee recommends that subclauses 48(2)(a)(ii) and (iii) of the Criminal Investigation (Covert Powers) Bill 2011 be deleted. This may be effected in the following manner:

Page 42, lines 22 to 25 – To delete the lines

Page 57

Recommendation 23: The Committee recommends that clause 76 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to ensure that the Parliament is aware that information of the kind referred to in clause 76(2) has been excluded in the annual report of the Parliamentary Commissioner to the Parliament. This may be effected in the following manner:

Page 61, lines 18 to 20 — To delete the lines and insert -

(3) The Minister must —

(a) exclude information from the report if satisfied on the advice of the chief officer of any of the grounds set out in subsection (2); and

(b) insert a statement to the effect that information has been excluded from the report under paragraph (a).

Page 58

Recommendation 24: The Committee recommends that the words "*both Houses*" in clause 76(2) of the Criminal Investigation (Covert Powers) Bill 2011 be deleted and the words "*each House*" inserted instead. This may be effected in the following manner:

Page 61, line 11 – To delete "both Houses" and insert –

each House

Page 67

Recommendation 25: The Committee recommends that clause 80(c) of the Criminal Investigation (Covert Powers) Bill 2011 be amended. This may be effected in the following manner.

Page 65, lines 21 to 24 – To delete the lines and insert –

(c) a commission, board, committee or other body established by the Governor or by the Government of the State to inquire into any matter;

Page 68

Recommendation 26: The Committee recommends that clause 88(1)(a) of the Criminal Investigation (Covert Powers) Bill 2011 be amended to clarify its meaning. This may be effected in the following manner:

Page 72, lines 17 to 19 – To delete the lines and insert -

(a) must hear the proceeding (including any application made under section 86 or 90 or order made under section 88(1)(b) relating to the proceeding, in a closed court; and

Page 70

Recommendation 27: The Committee recommends that the Criminal Investigation (Covert Powers) Bill 2011 be amended by inserting a five year review of Parts 2 and 3. This may be effected in the following manner:

Page 82, after line 6 — To insert —

102A Parts 2 and 3 to be reviewed

(1) The Minister must carry out a review of the operation of Parts 2 and 3 of this Act as soon as practicable after the expiration of 5 years after the date on which the Act commences.

(2) The Minister must prepare a report based on the review and, as soon as practicable after the report is prepared and in any event not more than 18 months after the expiry of the period referred to in subsection (1), cause it to be laid before each House of Parliament.

Page 71

Recommendation 28: The Committee recommends that the terms of reference of the Joint Standing Committee on the Corruption and Crime Commission be extended to provide oversight of Part 2 of the Criminal Investigation (Covert Powers) Bill 2011.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011

REPORT

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1 REFERRAL

1.1 On 1 November 2011, Hon Peter Collier MLC, the Minister for Energy representing the Minister for Police, introduced the Criminal Investigation (Covert Powers) Bill 2011 (**Bill**) into the Legislative Council.

1.2 Following its Second Reading, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. Under Temporary Standing Orders of the Legislative Council which expired on 31 December 2011, the Committee must report to the Legislative Council within 45 days of referral of a bill. Therefore the last date for tabling the Committee's report was Saturday, 17 December 2011 or the first sitting date thereafter, this being 6 March 2012.

2 INQUIRY PROCEDURE

2.1 The Committee's inquiry was advertised in *The West Australian* at the first opportunity on 5 November 2011 and again on 12 November 2011. Details of the inquiry were published on the Committee's webpage. The Committee wrote to stakeholders inviting submissions. The list of stakeholders and those who made submissions is at **Appendix 1**. The Committee extends it appreciation to those who made submissions.

2.2 Hearings were held on 30 November, 5 and 16 December 2011 as well as 17 January 2012. A list of those who appeared is at **Appendix 2**.

3 UNIFORM LEGISLATION

3.1 The structure chosen to achieve the desired nationally consistent legal framework was that of model laws which may be adopted by each jurisdiction and then mutually recognised by each other's jurisdiction. This resembles *Structure 5 - A combination of structures* a description of which is attached along with others in **Appendix 3**.

4 SUPPORTING DOCUMENTS

4.1 On 30 September 2011, well before the Bill was referred, the Committee received from the Minister for Police:

- a Standing Committee of Attorney-Generals (**SCAG**) *Communiqué* dated 25-26 July 2002 referring to a meeting resulting in broad agreement on the terms of model legislation;

- a second SCAG *Communiqué* dated 16-17 April 2009 (**2009 SCAG Communiqué**) following up on implementation of the model laws by States and Territories;
- the November 2003 Final Report of the SCAG and Australasian Police Ministers Council Joint Working Group on National Investigation Powers (**JWG**) titled *Cross-Border Investigative Powers for Law Enforcement* (**JWG Report**)[1]; and
- a copy of the Explanatory Memorandum (**EM**).

4.2 The Committee extends its appreciation to the Minister for the early provision of the above supporting documents.

4.3 Of the documents provided, the Minister said no Intergovernmental Agreement or Memorandum of Understanding is "*applicable*"[2] and the 2009 SCAG *Communiqué* stated that Ministers "*Agreed to the States and Territories considering the introduction of various legislative measures … where they have not already done so*".[3] All this is indicative of the lack of a specific agreement. The cover page of the 2003 JWG Report on which the Bill is modelled reinforces this by stating:

> *This Report was prepared by officers who are members of the Joint Working Group as an initiative of the Leaders' Summit on Terrorism and Multijurisdictional Crime.*
>
> *It does not represent the views of the Standing Committee of Attorney-Generals or the Australasian Police Ministers Council,*[4] *nor any individual Minister, or any leader of an Australian government".*

4.4 The 2009 SCAG Communiqué refers to how Ministers "*agreed to establish a SCAG Officers' Group to undertake work on legislative, interoperability and information sharing measures in consultation with MCPEMP*[5] *officers and report back to SCAG as soon as possible.*"[6]

Other supporting documents

4.5 Not provided by the Minister but located in Appendix 3 of the former Committee's 15th Report into the Australian Crime Commission (Western Australia) Bill 2003, is a copy of an unsigned *Commonwealth and State and Territories Agreement on Terrorism and Multijurisdictional Crime* dated 5 April 2002 which at Items 15 and 16 states:

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1 The Committee also accessed a Discussion Paper published by the JWG in February 2003 which resulted in the November 2003 final report of the JWG.

2 Letter from Hon Rob Johnson, MLA, Minister for Police, 28 September 2011, p1.

3 2009 SCAG Communique, p9.

4 Now called the Ministerial Council for Police and Emergency Management - Police (**MCPEMP**).

5 MCPEMP is an acronym for Ministerial Council for Police and Emergency Management - Police. It was formerly called the Australasian Police Ministers' Council (**APMC**).

6 2009 SCAG Communique, p9.

> *In relation to arrangements for dealing with multi-jurisdictional crime, Leaders agreed:*
>
> *15. To legislate through model laws for all jurisdictions and mutual recognition for a national set of powers for cross border investigations covering controlled operations and assumed identities legislation; electronic surveillance devices and witness anonymity. Legislation to be settled within 12 months.*
>
> *16. To legislate and develop administrative arrangements to allow investigations by the Australian Federal Police into State offences incidental to multijurisdictional crime.*[7]

4.6 This appears to be the genesis agreement underpinning the Bill and demonstrates how the Leaders agreed to introduce model laws for a national set of powers for cross-border investigations covering controlled operations, assumed identities, electronic surveillance devices and witness anonymity.[8] However, of this document, the Minister advised that "*although this agreement was made at Ministerial level, no formal agreement was ever signed off*".[9]

4.7 The Committee noted that electronic surveillance devices provisions are not included in the Bill and will be the subject of a separate enactment.[10]

5 OVERVIEW OF THE BILL

5.1 The Bill introduces a new regime permitting law enforcement agencies to authorise some law enforcement officers and civilian participants in an agency investigation to:

- commit criminal offences without incurring criminal responsibility (Part 2- "*controlled operations*");
- create and use assumed identities without incurring criminal responsibility for any offence this entails (Part 3); and
- restrict the evidence that may be given in various legal, executive and Parliamentary proceedings to protect investigations and participants (Part 4),

in Western Australia and other jurisdictions with corresponding laws.

5.2 The Bill also provides for mutual recognition, so that the release from criminal responsibility and restriction of evidence of equivalent authorities issued by law

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7 Provided as an Annexure to a letter from Hon Michelle Roberts MLA, then Minister for Police and Emergency Services, 16 February 2003, into the Inquiry into the Australian Crime Commission (Western Australia) Bill 2003.

8 Leaders' Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement, Discussion Paper*, Commonwealth Government, Unknown, February 2003, pi.

9 Letter from Hon Rob Johnson MLA, Minister for Police, 28 September 2011, p2.

10 Minister Johnson advised the Committee by letter on 24 August 2011 of a Surveillance Devices Amendment Bill 2011l which was originally part of the Bill but during the amalgamation process, it was recommended the reforms be progressed separately.

enforcement agencies of other jurisdictions are given effect in Western Australia. In addition, the Bill:

- permits local authorisations for release from criminal responsibility to be issued retrospectively; prevents a court from considering whether evidence has been obtained as the result of each law enforcement agency authorising criminal conduct when deciding whether to admit that evidence;
- provides that the *State Records Act 2000* (***SR Act***) and *Freedom of Information Act 1992* (***FOI Act***) do not apply to investigations, operations, activities or records relating to authorisations releasing from criminal responsibility and assumed identities;
- prohibits disclosure of information relating to authorisations releasing individuals from criminal responsibility and assumed identities;
- identifies the information, records and registers to be kept by law enforcement agencies in respect of the various authorities;
- provides for internal and external reports to be made in respect of the exercise of the authorisation powers it confers; and
- provides for oversight by the Parliamentary Commissioner of authorisation of criminal activity and the information that may be reported to the Parliament in respect of authorisation of criminal activity and witness identity protection certificates (the Minister is not required to report information in the event of risk of danger to a person; prejudice to an investigation or prosecution; or compromise of an operational methodology or activity).

5.3 A list of deviations from the Model Law is included at **Appendix 4**. The Committee is of the view that deviations diminish the uniformity of the national scheme.

5.4 In evidence to the Committee, Western Australia Police disclosed that the Bill is not specifically designed to fight organised crime. There is a range of other criminal activity (including unsolved homicide[11]) in the community that is not organised in nature for which Western Australia Police will use these powers.[12] This is in contrast to the Second Reading Speech which refers to organised criminal networks such as drug cartels and motor cycle gangs operating with relative ease across jurisdictional borders and that the Bill address that emerging threat.[13]

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11 Western Australia Police advised in an *Answer to a Question on Notice* Number 5 from a hearing on 16 December 2011, pp3-4 that evidence from Canada suggests the Homicide Undercover Technique has been used since the early 1990s and deployed in almost 400 cases with consistent high success rates. It has also been effective in solving historical homicides dating back 30 years and locating the remains of missing persons.

12 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Session One, Transcript of Evidence*, 16 December 2011, pp4-5 and *Transcript of Evidence*, 17 January 2012, p2.

13 The Second Reading Speech, p1.

5.5 The Committee noted that in 2006, during the developmental stage of the Bill, a former Minister for Police pointed out that unless the uniform scheme was expanded to include operations within the State, an anomaly would be created whereby the Commissioner of Police could give approval for a police officer to conduct a covert operation in another State or Territory that could not be approved if it were to be conducted within Western Australia.[14]

Current regulation of covert operations

5.6 Until 2002 Western Australia had no regulation of covert operations. Then the *Royal Commission (Police) Act 2002* was enacted and in 2003, the *Corruption and Crime Commission Act 2003* (***CCC Act***).

5.7 For certain covert operations, the 'risk of prosecution' issue is addressed in the *CCC Act*, *Misuse of Drugs Act 1981*, *Prostitution Act 2000* and (relevantly for the inclusion of the Department of Fisheries as a "*law enforcement agency*") the *Fish Resources Management Act 1994.*

- The *CCC Act* allows a police officer of the rank of Assistant Commissioner for Police or above to apply to the Corruption and Crime Commission (**CCC**) for a controlled operation authority when investigating specified organised crime offences. When a controlled operation authority is in effect, designated participants in the police operation are not criminally responsible for the criminal activity authorised for that operation. The CCC enjoys a power to itself conduct a controlled operation.[15]
- The *Misuse of Drugs Act 1981* permits a police officer of the rank of Inspector or above to authorise a person to have a prohibited drug or plant in their possession for the purpose of detecting the commission of an offence by providing that this does not constitute an offence.
- The *Prostitution Act 2000* permits the Commissioner of Police to authorise an undercover police officer to do "*anything specified*" for the purpose of detecting an offence, such as "*solicit to capture people who kerb crawl*".[16] In the event the undercover officer does anything described in the authority, it is not an offence. This power to authorise an undercover officer cannot be delegated to lower level ranks.
- The *Fish Resources Management Act 1994* provides a Ministerial exemption for 11 breaches of the Act and 38 breaches of the principal regulations

14 *Answer to a Question on Notice* Number 1 received 20 January 2012 as a letter from the then Minister for Police, Hon John Kobelke MLA to Western Australia Police, 12 December 2006, pp1-2.

15 Commissioner Roger Macknay QC, Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p7.

16 Commander Murray Smalpage, Director, Intelligence, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p12.

pursuant to section 7(1)(g).[17] The current exemption issued in September 2010 allows "*all Fisheries and Marine officers and those assisting fisheries and Marine officers*" to "*undertake activities that may be required in order to investigate possible breaches of Fisheries legislation*". This Serious Offences Unit uses this exemption to take, buy, sell or trade fish.

Operational statistics

5.8 Western Australia Police advised that in the eight years since the commencement of the *CCC Act* on 1 January 2004, 468 covert operations have been conducted which did not require operatives to break the law.[18] Of these 468, 11 were in relation to the provisions of the *Prostitution Act 2000* but Western Australia Police could not advise of the number of operations under the powers in the *CCC Act* or *Misuse of Drugs Act 1981*.[19] From these 468 covert operations, there were with 611 arrests made as the direct result of those operations, but the number of convictions is unknown.[20] Western Australia Police have no record of any joint covert operations having been undertaken with the CCC.[21]

5.9 The inability to provide any detail as to the basis under which all but 11 of the 468 covert operations were authorised is astonishing given the administrative obligation of all State organisations under the *SR Act* to strengthen organisational accountability and transparency through effective record keeping practices. The Committee is of the view that this does not inspire confidence in Western Australia Police to properly document controlled operations under the Bill. Further, the proposed statutory regime does not provide a qualitative review.

5.10 The Department of Fisheries advised that since 2007, 74 entities or persons have been the subject of, to use its parlance, a 'controlled operation'.[22]

Comparison with the Corruption and Crime Commission Act 2003

5.11 The *CCC Act* provides similar powers to the Bill such as granting the right to use an assumed identity and mounting a controlled operation. However, these are dependent on Western Australia Police persuading the CCC that these ought to be granted under section 46 of the *CCC Act*, for example, to show that the use of 'exceptional powers' would be in the public interest. By comparison, the Bill provides for an internal, self-authorisation process, a process the oversighting Joint Standing Committee on the Corruption and Crime Commission (**JSCCCC**) claims will lead to an "*an*

17 It states that the Minister may exempt a specified person or specified class of persons from all or any of the provisions of the Act, for the purpose of enforcement of the Act.

18 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p8 and also Commander Murray Smalpage, Director, Intelligence, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p66.

19 *Answer to a Question on Notice* Number 38 arising from a Hearing on 17 January 2012.

20 *Answer to a Question on Notice* Number 4 arising from a Hearing on 17 January 2012.

21 *Answer to a Question on Notice* Number 5 arising from a Hearing on 17 January 2012.

22 Mr Carl Grossetti, Officer in Charge, Serious Offences Unit, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p4.

unacceptable and unnecessary erosion of civil liberties and increase the risk of harm to the public".[23]

5.12 There are four types of exceptional powers in the *CCC Act*:

- controlled operations;
- assumed identities;
- examination; and
- enter and search.

5.13 Commissioner Macknay advised that since 2003 the CCC has received 11 applications from the Commissioner for Police to use exceptional powers with ten granted.[24] Western Australia Police advised of slightly different statistics since the *CCC Act* became operational and that up until 30 June 2011:

> *WA Police have applied on 12 occasions for exceptional powers findings. 11 of these applications were granted by the Corruption and Crime Commission. These applications resulted in the use of examination hearings and enhanced search powers in respect of 3 applications; and use of examination hearings powers only in respect of 7 applications. In respect of the other application, use of controlled operation powers were authorised but not exercised.*[25]

5.14 The discrepancy between the statistics provided by each of the Western Australia Police and the CCC does not inspire confidence in their respective administrative record keeping practices.

5.15 The CCC stated that there has been a "*paucity of applications*"[26] for controlled operations (only one has been granted and was in fact not exercised[27]) and assumed identities. This demonstrates the under-utilisation of the *CCC Act* and the unlikelihood of its future use. Of the legislative proposal, Commissioner Roger Macknay QC, CCC, stated:

> *It might therefore be said that the task confronting the police officer wishing to obtain either of those things* [assumed identity or a

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23 Western Australia, Legislative Assembly, Joint Standing Committee on the Corruption and Crime Commission, Report 15, *Corruption Risks of Controlled Operations an Informants*, 21 June 2011, pix.

24 Letter from Commissioner Roger Macknay QC, Corruption and Crime Commission, 15 December 2011, p2.

25 *Answer to a Question on Notice* from a Hearing on 17 January 2012. In an *Answer to a Question on Notice* dated 13 February 2012, Western Australia Police advised that as a result of the time taken to prepare the necessary papers for presentation to the CCC and the time taken to make the exceptional powers finding and authorise the use of controlled operations powers, the "*operational window of opportunity to use the powers had passed*".

26 Mr Michael Silverstone, Executive Director, Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p6.

27 Commissioner Roger Macknay QC, Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p5.

controlled operation] *is less onerous than the task would be under the CCC Act.*[28]

5.16 The Commissioner of Police in a frank response said that Western Australia Police "*will no longer need to use the Corruption and Crime Commission Act except in terms of anti-fortification laws and the use of coercive powers*"[29] of which only two applications for anti-fortification have been made.[30]

5.17 The Parliamentary Inspector of the Corruption and Crime Commission is of the view that the under-utilisation of the *CCC Act* is not because of the less onerous oversight mechanisms by the Parliamentary Commissioner but because it is "*much easier … and they will not have to share information with the Commission which they would otherwise have to do*".[31] The Inspector commented that the CCC is currently the gatekeeper of the exceptional powers available to Western Australia Police and "*that gatekeeper will be removed*"[32] by the Bill.

5.18 The Committee concurs with the view of the Parliamentary Inspector of the Corruption and Crime Commission and makes the following finding.

Finding 1: The Committee finds that a gatekeeper is an essential tool for combatting the spectre of corruption by those who will exercise the extraordinary powers provided by the Criminal Investigation (Covert Powers) Bill 2011.

6 IMPETUS FOR THE BILL

The decision in *Ridgeway v The Queen*

6.1 There are two impetuses for the Bill. The first arises from the High Court of Australia decision in *Ridgeway v The Queen*.[33] Ridgeway was arrested by the Australian Federal Police (**AFP**) with 203 grams of heroin in his possession and convicted of possessing a prohibited import. The prosecution alleged that Ridgeway initiated a deal to import heroin into Australia and to purchase the drug when it arrived. The importation of the drug had been undertaken by an informer with the assistance of the AFP and the Malaysian Police in a 'controlled delivery' arranged for the purpose of apprehending Ridgeway.

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28 Commissioner Roger Macknay QC, Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p2.

29 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p2.

30 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p67.

31 Mr Christopher Steytler, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, pp3-4.

32 Ibid, p4.

33 (1995) 184 CLR 19.

6.2 Ridgeway appealed his conviction to the High Court, which allowed his appeal and granted a permanent stay of proceedings in his favour. The High Court decided that the importation of the heroin by law enforcement officers was illegal and therefore the evidence of that importation should have been excluded from the trial on the grounds of public policy. The Court explained that judges may decide to exclude evidence obtained during an illegal activity involving law enforcement officers, a judicial practice which has been "*settled law*" since 1978.[34]

6.3 In deciding, the Court weighs up the public interest in discouraging unlawful conduct by law enforcement officers against the public interest in the conviction of wrongdoers. In this case, the Court took into account the nature and the degree of the law enforcement officers' unlawful conduct and the fact that the unlawful importation of the drug by the police created an element of the offence charged against Ridgeway (possession of a prohibited import).

6.4 The Court was also concerned that there was no official disapproval of the criminal activity undertaken by the officers. In the particular circumstances of *Ridgeway v The Queen*, the Court decided that the public interest was better served by excluding the evidence obtained through the illegal importation of the heroin. The Court acknowledged that sometimes law enforcement officers need to engage in a range of activities, in some cases illegal, to uncover organised crime, and recommended that the problems relating to the conduct of controlled operations should be addressed by introducing regulating legislation.[35]

6.5 *Ridgeway v The Queen* is a paradigmatic case in Australian law. It highlighted the High Court's concern with administratively sanctioned unlawful conduct that led to a culture of inducing people to commit crimes which was then 'normalised' by those active in law enforcement.

The emerging threat of organised crime

6.6 The second impetus is the belief that organised crime groups have reached "*macro-economic proportions*"[36] and is an "*ever evolving transnational phenomenon of immense size*"[37] though the Committee could find little statistical evidence for this belief. Two agencies to benefit from the Bill (the Department of Fisheries and Western Australia Police) appeared before the Committee but were unable to provide convincing evidence of an increase in organised crime.

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34 *Bunning v Cross* (1978) 141 CLR 54 at 69 per Stephen and Aickin JJ with the concurrence of Barwick CJ.

35 Extracted from the JWG Report, p2.

36 Western Australia Police, *Serious Organised Crime Strategy 2011-2014*, Tabled Paper #1 by Western Australia Police at a Hearing on 16 December 2011, p2.

37 Australian Crime Commission, *Organised Crime in Australia*, Tabled Paper #3 by Western Australia Police at a Hearing on 16 December 2011.

The Department of Fisheries

6.7 The Department said "*we have certainly seen evidence of organised crime in some of the Fisheries investigations that we have done*"[38] but little statistical evidence was provided, just anecdotal evidence, such as *"lots of studies by the Australian Institute of Criminology showing the extent of it.*"[39] However, one such study from 2007 states (to the contrary):

> *Some measure of noncompliance in the fishing sector has always been present, although only a small proportion could be characterised as high level systematic or organised criminal activity. The national survey of fisheries officers found that the majority believed that, in their district, less than 20 percent of the fishing industry (defined in the study as including commercial, recreational and Indigenous sectors) was involved in fishing-related crime. Both the consultations and the results from the national survey of fisheries officers suggest that only a fraction of illegal activity is believed to be linked to organised crime (defined in the survey as being a structured group of three or more persons who work together with the purpose of committing a serious offence).*
>
> *There was, however, the perception by officers that organised criminal activity was more common across a state or territory, in comparison to the level they believed existed at the local level. Except for a small number of fisheries officers who did not know, all the fisheries officers agreed that organised criminal activity was present to some degree across the fishing industry in their jurisdiction – 26 percent said there was a lot, 58 percent said there was some and 14 percent said there was a little. In addition, over half of the officers believed their district was indirectly affected by this activity, with 58 percent of them believing that their district was a transit point for the movement interstate or overseas of illegal fish or fish product.*[40]

6.8 The Committee is dissatisfied with the assertion by the Department of Fisheries that there is evidence of organised crime. The little statistical evidence or other evidence such as the 2007 study referred to above, fails to indicate an emerging threat.

6.9 The Committee noted that between 2007 and 2011 there were seven covert operations within the Department of Fisheries of which four resulted in successful prosecutions with one still pending.[41] This attests to the prevalence of crime within the industry

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38 Mr Stuart Smith, Director General, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p5.

39 Mr Carl Grossetti, Officer in Charge, Serious Offences Unit, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p5.

40 Judy Putt and Katharine Anderson, Research and Public Policy Series, No 76, 2007, *A National Study of Crime in the Australian Fishing Industry*, Australian Institute of Criminology, Executive Summary, pxi.

41 *Answer to a Question on Notice* Number 2 received from the Department of Fisheries, 3 January 2012.

being successfully dealt with in the absence of the powers contemplated by the Bill. Of these operations the Committee noted that the 104 'controlled approaches' for intelligence or evidence gathering by the Serious Offences Unit were administratively authorised.[42] The Department referred to a recent operation involving the sale of dhufish, a high-value product and its uptake if offered on the black market around Perth.[43] The Department said the operation identified that "*38% of retailers approached were prepared to purchase fish products from unofficial sources*".[44]

6.10 The Committee is of the view that seven operations over a four year period do not indicate an emerging threat of organised crime.

Western Australia Police

6.11 The Committee noted a decrease in all reported crime rates across the measurable categories[45] for the financial year 2009-10 compared with 2008-2009.[46] Evidence from Western Australia Police regarding weapons and drugs seized by serious and organised crime squads between 2007 and 2011 show a reduction in seizures.[47]

6.12 Western Australia Police *Crime Statistics* between 2006 and 2011 also demonstrate that verified, total detected offences between 2006 and 2011 in relation to drugs trafficking, possession and receiving decreased from 19,280 to 15,491. In the same period, verified, total selected offences against property decreased from 206,330 to 184,583.[48] This evidence demonstrates the success of Western Australia Police and the Government in the absence of controlled operations or assumed identities legislation.[49]

6.13 The Commissioner of Police said in his 2011 *Foreword to the Annual Crime Statistics* that in the past year there has been an unprecedented increase in the number of improvised drug manufacture sites producing small amounts of methamphetamine but

42 *Answer to a Question on Notice* Number 2 received from the Department of Fisheries, 3 January 2012.

43 Mr John Looby, Manager, Compliance and Regional Support (Special Projects), Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p6.

44 *Answer to a Question on Notice* Number 2 received from the Department of Fisheries, 3 January 2012.

45 Offences against the person, against property, burglaries, theft, public assaults, robbery and sexual assault.

46 Hon Christian Porter MLA, Attorney General, *Questions Without Notice*, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 12 August 2010, p5509b and Western Australia Police, Annual Crime Statistics, http://www.police.wa.gov.au/ABOUTUS/Statiscics/Crime, viewed on 21 December 2011.

47 Western Australia Police, *Weapons and drugs seized by serious and organised crime squads between 2007 and 2011*, Tabled Paper #2 by Western Australia Police at a Hearing on 16 December 2011, p2.

48 Western Australia Police, Crime Statistics, Crime Information, Statistical Summary, Annual Crime Statistics, http://www.police.wa.gov.au/ABOUTUS/Statistices/Crime, viewed on 21 December 2011, p35.

49 Western Australia Police, *Weapons and drugs seized by serious and organised crime squads between 2007 and 2011*, Tabled Paper #2 by Western Australia Police at a Hearing on 16 December 2011, p2.

"*nearly all these sites have been addiction based and little evidence of significant commercial operations has been uncovered.*"[50]

6.14 Western Australia Police referred the Committee to the Annual Reports of the NSW Ombudsman into their equivalent legislation. There, the NSW Ombudsman noted that the supply of prohibited drugs was the criminal activity targeted by the NSW Police Force for its 2010-2011 controlled operations where 204 grants or 72% of all grants were made.[51] No cross-border applications were authorised.[52] The Committee noted similar statistics in the NSW Ombudsman's 2009-2010 Annual Report.[53]

6.15 Targeting the supply of prohibited drugs and hence the volume of grants for controlled operations is appropriate given the Australian Crime Commission's position that "*most organised criminal activities in Australia are focused on illicit drug markets*".[54] However, the Committee noted that in 2007, the Law Council of Australia warned:

> *The push to expand the powers of law enforcement agencies is often justified by broad claims that criminal networks are expanding or morphing or entering different areas of crime or becoming more mobile or sophisticated or difficult to penetrate or detect. Other than the agency seeking the expanded power, few people are well placed to challenge such claims authoritatively. As a result, the asserted risk becomes a fact against which the suitability of any proposed measures must be weighed.*
>
> *Dissenting claims that the expanded power sought by law enforcement agencies is too unfettered or comes at too high a cost to citizens' rights and privacy are deflected on the basis that the power already exists and that the relevant rights have already been modified without any apparent adverse effects.*
>
> *The onus is thus placed on those who resist any proposed amendments to demonstrate why the additional powers sought are excessive, rather than on the proposing authority to justify fully the need for expanding existing powers.*
>
> *Sometimes any opportunity to successfully oppose or alter a Bill is even further constrained by the fact that the proposed amendments are presented as a fait accompli.*
>
> *National legislative uniformity is a worthy goal, where justified, and one that is strongly supported by the Law Council. However, on its*

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50 Dr Karl O'Callaghan, Commissioner of Police, 28 September 2011, Annual Crime Statistics, http://www.police.wa.gov.au/ABOUTUS/Statistices/Crime, viewed on 21 December 2011.

51 Ombudsman of NSW, *Annual Report 2010- 2011*, Law Enforcement (Controlled Operations) Act 1997, p12.

52 Ibid, p4.

53 83% for the supply of prohibited drugs and no cross border operations.

54 Australian Crime Commission, *Organised Crime in Australia 2011*, p3.

own, such an objective should not be considered sufficient to justify an expansion of an extraordinary Executive power.[55]

6.16 The Committee finds there is little statistical evidence supporting the legislative proposal for controlled operations or assumed identities powers in Western Australia and that crime rates are decreasing. The two agencies that gave evidence justifying the need for controlled operations and assumed identities powers (and in particular, the Department of Fisheries) appear to be focused on a perceived rather than actual threat of organised crime. There is statistical evidence from Western Australia Police, (despite the Commissioner's comment that although the incidence of property crime rates is going down, "*the resolution rate is not going up*"[56]) that crime in Western Australia is being successfully managed in the absence of controlled operations and assumed identities powers.

7 PART 1 OF THE BILL - PRELIMINARY

7.1 Part 1 contains the usual short title and commencement clauses as well as a list of terms used in the Bill.

8 SPECIFIC CLAUSES IN PART 1 OF THE BILL

Clause 3(c) - the definition of *"law enforcement agency"*

8.1 The definition states:

> ***law enforcement agency means —***
>
> *(a) the Police Force; or*
>
> *(b) the Australian Crime Commission; or*
>
> *(c) the fisheries department;*

8.2 The Committee noted that no other jurisdiction includes their fisheries departments in the equivalent definition though the Model Law allows for other agencies to be prescribed.

8.3 While section 3 of the *Crimes (Controlled Operations) Act 2004* (Vic) defines "*law enforcement agency*" as per the Model Law, Part 6, section 49 inserted a new 'Part 7A – Controlled Operations' into the *Fisheries Act 1995* (Vic) "*to incorporate most of the accountability, monitoring and oversight features of the national model laws.*"[57]

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55 Law Council of Australia, *Submission on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (Cth)*, 19 January 2007, pp4-5.

56 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p60. He said: "*If you look at things like theft and burglary and those sorts of property crime rates, although the incidence of them is going down, the resolution rate is not going up. So around about 80 per cent of property theft crime is never resolved. It is never brought to a conclusion. The files are written off because there is no line of inquiry. There is still a lot of property out there being stolen and not recovered and offenders not being brought to justice. I think the numbers are somewhere between 17 per cent and 20 per cent that we actually resolve, which is on par with the national average, but is still very low in terms of the numbers of offenders that have been caught.*"

57 *Answer to an Additional Question on Notice* provided by Western Australia Police, 13 February 2012, p5.

8.4 This clause raises that fundamental legislative principle the Committee routinely considers - *Does the Bill have sufficient regard to the rights and liberties of individuals?* In particular:

- the right of fishers to conduct business unimpeded and without being induced to commit crimes;
- the right of innocent people caught up in a controlled operation not to be placed at risk of personal injury or damage to property;
- the right of a defendant to a fair trial by testing the credibility of a covert fisheries officer; and
- the right of fisheries officers to be protected from having to swap drugs and firearms for fish during a controlled operation when they have no expertise or training in drugs or firearms management. Arguably, such activity should only be within the purview of Western Australia Police.

8.5 Although the inclusion of the fisheries department was a policy decision (precluding the Committee from inquiry), evidence from both Western Australia Police and the Department of Fisheries reveals the implementation of that policy is far from certain. Confusion exists as to:

- the interaction of officers in the Serious Offences Unit with police officers;
- the interaction between the chief officers with respect to the granting of a retrospective authority for unlawful conduct;
- the point at which the Department of Fisheries should involve Western Australia Police; and
- the scope of protection from what would otherwise be offences outside the *Fish Resources Management Act 1994*. This was demonstrated in the following exchange:

> ***Mr Grossetti:*** *We cannot possess drugs because it is an offence as soon as we do. We cannot possess a firearm because it is an offence as soon as we do. Stolen property—can I possess it? Yes, but if I get caught with it—so those types of offences There are restrictions on the act, obviously, I think for criminal damage, murder and sexual assaults. They are the three restrictors or limiters. I mean, when you are dealing with these types of people and you are dealing with echelons of organised crime, they do not restrict what they do, so we should not be able to restrict what we do.*[58]
>
> …

[58] Mr Carl Grossetti, Officer in Charge, Serious Offences Unit, Department of Fisheries, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p4.

***Hon Linda Savage**: … You used the example of your officers being in a situation in which drugs could be involved —*

***Mr Grossetti**: Yes.*

***Hon Linda Savage**: — as part of what is used to … barter for … weapons.*

***Mr Grossetti**: Yes.*

***Hon Linda Savage**: You used that as a specific example of a limitation on what your Fisheries officers currently find themselves in because they could not either accept the drugs or accept the weapons.*

…You then said that you would not be authorising that in terms of the application; that was not something you envisaged when you received the application.

***Mr Smith**: When I get the original application—I am talking about when I first get it—and look at the activities, if I think it is, say weapons or something like that, if I think there is a reasonable likelihood of our staff being involved with weapons that may require the discharging of them or so on, I will not authorise them to participate. It just will not happen.*[59]

***Hon Linda Savage**: Would you authorise them to use—to receive drugs?*

***Mr Smith**: … If it was drugs, that would be one that I would consider, but I would want to know more about the nature of it: the nature of the investigation and the likely scenarios.*

***Hon Linda Savage**: Because it seems like a likely scenario given that you use both of those as the limitation—as an example of the current limitations …of your officers.*

***Mr Grossetti**: We have not reached that position …*

***Hon Linda Savage:** … I understood that you had pushed back or had had your current operations or your capacity to operate limited by specific elements like that—very specifically, things like in the—with the organised crime, drugs or illegal weapons were something that you were likely to find yourself having to deal with and at that point your office had to stop and hand over to the police.*

***Mr Grossetti**: If that was your misunderstanding—we, certainly in the almost five years that I have been in the SOU, have never been in a controlled operation position where we have been asked to swap firearms, weapons or otherwise. I do not know that I said*

[59] However the Bill will allow this to happen.

categorically that that is what we do. Certainly the drug scenario is a real scenario and any of those, potentially, are scenarios that we could be up against. So they would be our limitations.

***Hon Linda Savage**: … I understood it to be one of the issues that you faced and one of the reasons that you need these greater powers: because currently you are not protected, you cannot allow your officers to engage any further at that point.*

***Mr Grossetti**: Correct.*

***The CHAIRMAN**:…Clause 12 states —(1)An authority to conduct a controlled operation must not be granted unless the chief officer is satisfied on reasonable grounds — (b) that the authority is within the administrative responsibility of the law enforcement agency; …*

***Mr Grossetti**: Yes.*

***The CHAIRMAN**: Which means that you cannot be authorised to possess or take illicit drugs.*

***Mr Grossetti**: But nobody is asking that, Madam Chair.*

***The CHAIRMAN**: Well, if you are not asking that, why do you need this?*

***Mr Grossetti**: Because that is where the retrospective authority comes in. When you make the original application, it is to gauge the extent of the black market—whatever—and we want to buy and sell or trade black market rock lobster. We do not seek preapproval to possess drugs because we do not know that is going to happen; we do not seek preapproval to swap a rock lobster for a handgun because we do not know that is going to happen. Retrospectively, the approval process is that the operative, on reasonable grounds, says, "I was painted into a corner, and I had to do this thing. I have broken the law."*[60] *The Director General, retrospectively—through me or through the principal law enforcement officer—will say, "This was the scenario that was posed; this is the position the operative was in, so as not to", and there are a whole pile of criteria, such as so not to lose evidence or jeopardise the fact that he is an undercover operative. There are about five, without reading them by rote. He says, "This is what I had to do." The authority is then given retrospectively for that offence that was committed, be it within the fisheries act—probably not, because we would have covered it in our planning phase, and the under three-year-threshold offences will be listed. But, for instance, it may be a drug-type offence—swapping drugs over—and the operative says, "I*

[60] However, the Department of Fisheries stated it would involve Western Australia Police which then begs the question: Why does the Department need the power?

had no other option other than to do this, and it is an offence. I know it is an offence, but I now am telling you and I need it authorised retrospectively." They are the two distinctions in this process.

***The CHAIRMAN**: … But if you are dealing with high-level organised crime, as you say you are, and it is understood that the officer could be put in the position of being involved in this sort of activity, retrospective authorisation, clause 25, says that you cannot grant a retrospective authority unless the chief officer is satisfied that the participant had not foreseen, or could not reasonably be expected to have foreseen, that those circumstances would arise. I would argue that from the evidence we have heard today, you could reasonably foresee that a fisheries officer is going to be placed in a situation where they may be asked to take drugs or deal in firearms, to test them.*

…

***Mr Grossetti**: ... We cannot foresee what a criminal enterprise is or is not involved in; that is the whole purpose of doing undercover work. We are not intending to do the police's role; they have a well-established undercover program. The purpose of the original application would be to deal with offences within the FRMA and get approval to undertake controlled conduct. If every criminal organisation is a gun run or a drug deal or otherwise, then I understand and I accept your assertion that we should all expect that this is going to happen; that is certainly not the case. We cannot pre-empt that everybody might trade drugs, might swap guns, may be involved in sex crimes, sex trafficking, pornography—do I go on? We cannot pre-empt that.*[61]

8.6 This exchange led the Committee to conclude that the Department of Fisheries is confused as to what the powers in the Bill will actually allow their officers to undertake. This uncertainty is clearly a concern for the Commissioner of Police (see paragraph 8.12) and in a submission, the JSCCCC queried whether the fisheries department is an appropriate agency to be empowered to self-authorise controlled operations, suggesting that this power lie with the Commissioner of Police.[62] The Director General stating that he will not use the powers, although the Bill proposes to allow him to, begs the question - why are they needed?

8.7 The Parliament is being asked to include the fisheries department in the definition of "*law enforcement agency*" in the face of clear uncertainty about how the controlled

[61] Exchange in a Hearing between the Department of Fisheries, the Chairman and Hon Linda Savage MLC, Uniform Legislation and Statutes Review Committee, *Transcript of Evidence*, 5 December 2011, pp19-21.

[62] Submission Number 1 from the Joint Standing Committee on the Corruption and Crime Commission, p6.

operations powers in particular, will work in practice. Against this background, the Committee queried the need for the 'fisheries department' to be included in the above definition given that the Department of Fisheries is currently operating under a Ministerial exemption to conduct controlled operations with internal authorisation processes which Mr Stuart Smith, Director General, Department of Fisheries said:

> *Seem*[s] *to have been working well, and certainly have led to matters that we were able to pursue through the court, and we will see some prosecutions. In fact, we have had some successful prosecutions, so I think it is working well.*[63]

8.8 The Department also disclosed that its need is not so much for controlled operations powers (useful in order not to "*fudge things or risk themselves*"[64]) but for the Part 3 provisions because "*the legislation dealing predominantly with the assumed identity is the underpinning tool that we need to do this type of work.*"[65] However, the Department could not provide persuasive evidence that organised crime is occurring in the industry. This was demonstrated in the following exchange:

> ***The CHAIRMAN****: Can you provide us with any statistical evidence rather than just a statement?*
>
> ***Mr Grossetti****: The short answer is no. Anecdotally, there have been lots of studies by the Australian Institute of Criminology showing the extent of it. If you are asking me to give you a number, I do not know how to provide that to you.*
>
> ***The CHAIRMAN****: Okay, but the Parliament is being asked to pass legislation that will give the Department of Fisheries quite extensive powers to undertake covert operations and you are asking us to do that on a wink and a nod and a word of faith.*
>
> ***Mr Grossetti****: I can give you an example of* [one]. *If I say one out of 20 that we have done, there is a statistic, but I cannot just give you a number. I do not know how to address that.*[66]

8.9 The Department acknowledged that "*talking about emerging trends, and organised crime involvement is anecdotal*" not statistical in nature because "*what is not discovered and detected, you will never measure*".[67] Taking fish out of the ocean is a victimless crime:

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63 Mr Stuart Smith, Director General, Department of Fisheries *Transcript of Evidence*, 5 December 2011, p9.

64 Ibid, p17.

65 Mr Carl Grossetti, Officer in Charge, Serious Offences Unit, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p3.

66 The Chairman and Mr Carl Grossetti, Officer in Charge, Serious Offences Unit, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p5.

67 Mr Carl Grossetti, Officer in Charge, Serious Offences Unit, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p31.

> *No-one rings up and says, "Look, my neighbouring abalone just got whipped off the reef." So, it is very difficult to find the fine detail about saying what it is. I think what we can say is that we are not seeing large amounts of black market abalone and lobster being marketed around Perth in large quantities.*
>
> *So, we know that it is probably controlled within the current framework. We know we will never stop it because they are high-value products and there is always a profit and an easy dollar, to get them. But we have never been able to find them.*[68]

8.10 Thus, with:

> *the type of offending we have where people trade in black market lobster or abalone behind the scenes, really the only really effective methodology to catch these people is by actually running these styles of operations*.[69]

8.11 The Committee disagrees with that position. The Bill is providing fisheries officers with extraordinary powers to conduct controlled operations on the basis of a perceived rather than actual threat of organised crime. The organised crime here extends beyond fish and deals with exchange of fish for firearms and/or drugs. Instead of giving the Department of Fisheries the powers in the Bill, there is merit in the chief officer of Western Australia Police granting a controlled operation authority or assumed identity on a request from the Department of Fisheries, especially given that:

- the Department's mandate is serious commercial offences as evidenced in a recent amendment to the *Fish Resources Management Act 2004* "*to deal with trafficking … in large volumes of black market fish,*"[70] not drugs trafficking;
- Western Australia Police are *ex officio*, fisheries officers;[71] and
- the Director General of the Department of Fisheries in his proposed capacity of "*chief officer*" has no expertise in drugs or firearms trafficking and/or management and/or other aspects of *The Criminal Code*, yet the Bill gives him power to issue a retrospective authority for their possession under *The Criminal Code*.

8.12 The Commissioner of Police also has concerns that Department of Fisheries is straying into areas perhaps better suited to Western Australia Police and how to deal with that, possibly swearing them in as Special Constables, "*so they have the powers*

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68 Mr John Looby, Manager, Compliance and Regional Support (Special Projects), Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p32.

69 Ibid, p7.

70 Ibid, p3. This was the insertion of Part 15A 'Fish trafficking' into the principal enactment which was assented to on 12 October 2011.

71 Mr Carl Grossetti, Officer in Charge, Serious Offences Unit, Department of Fisheries, *Transcript of Evidence*, 5 December 2011, p3.

and the legitimate authority to have those things when they are authorised to do so. Otherwise, it seems to me that it is going to be quite messy unless the police are involved."[72] Dr O'Callaghan said:

> *I guess what I would like to understand is how many of their covert operations are actually just about fish, and how many result in something more than that. If the numbers are very small, we do not necessarily need to know, but I think the question raises a whole raft of issues about the powers of fisheries officers, and when certain people should be advised. Certainly I have not applied my mind to how that works in practice.*[73]

8.13 The Committee noted that the Bill does not require the Department of Fisheries to notify Western Australia Police of a controlled operation.[74] Western Australia Police expressed the view that "*if it was just to do with fish, we probably would not want to know, but if there was something else we might*".[75]

8.14 The Committee finds that:

- Western Australia is the only jurisdiction to prescribe the Department in the definition of "*law enforcement agency*";
- the Department currently (and lawfully) operates under a Ministerial exemption to conduct covert operations (called controlled operations) pursuant to section 7 of the *Fish Resources Management Act 1994*;
- since 2007, the Serious Offences Unit has dealt with seven covert operations of which four have been resulted in successful prosecutions of breaches of many provisions of the *Fish Resources Management Act 1994*;
- as stated at paragraph 6.16, there is a perception that organised crime is emerging rather than any actual statistical evidence that it exists;
- by the Department's own admission, the assumed identity provisions in Part 3 of the Bill is the predominant tool the Serious Offences Unit needs and is seeking;
- the Commissioner of Police's personal reservations about how the Bill will operate in practice with the Department of Fisheries are of concern; and

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72 As occurs with transit officers on the rail system: per Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, pp56-57.

73 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p57.

74 Ibid, p57.

75 Ibid, p57.

- the JSCCCC's view that the various references to fisheries in clause 3 be deleted from the Bill and instead, prescribe offences under the *Fish Resources Management Act 1994* as "*relevant offences*"[76] is reasonable.

8.15 The Committee is of the view that the implementation of the policy to include the fisheries department in the definition of "*law enforcement agency*" is ill-considered and unprepared. It is irresponsible to place fisheries officers in a position that endangers them, such as trading in drugs or firearms when they are neither police officers nor adequately trained. Further:

- the Director General should inform the Commissioner of Police of any controlled operations so that undercover operatives are not put at risk or arrested;
- where a controlled operation goes beyond subject matters in the *Fish Resources Management Act 1994,* such as firearms and drugs, the Director General should be required to advise the Commissioner of Police accordingly. This means the operatives will not be drawn into areas beyond the expertise and knowledge of the Department and may promote joint operations; and
- any retrospective authority which involves criminal offences under *The Criminal Code* and/or are beyond the purview of the *Fish Resources Management Act 1994* should only be granted by the Commissioner for Police.

8.16 Therefore, the Committee makes the following recommendation.

Recommendation 1: The Committee recommends that in terms of the implementation of the policy decision to include "*the fisheries department*" in the definition of "*law enforcement agency*" in the Criminal Investigation (Covert Powers) Bill 2011, the Department of Fisheries should be excluded. This may be effected in the following manner:

Page 3, lines 13 to 14 – To delete –

or (c) the fisheries department;

9 PART 2 OF THE BILL – CONTROLLED OPERATIONS

9.1 Part 2 provides for both local and cross-border controlled operations. Part 2 is the statutory response to the problem identified by the High Court in *Ridgeway v The Queen* that regulating legislation be introduced so that law enforcement officers can lawfully engage in illegal activities to uncover organised crime.[77]

[76] Submission Number 1 from the Joint Standing Committee on the Corruption and Crime Commission, p7.

[77] Extracted from the JWG Report, p2.

10 SPECIFIC CLAUSES IN PART 2 OF THE BILL

Clause 5 - the definition of "*relevant offence*"

10.1 Clause 5 states:

> ***relevant offence*** *means —*
>
> *(a) an offence against the law of this jurisdiction punishable by imprisonment for 3 years or more; or*
>
> *(b) an offence against the law of this jurisdiction that is prescribed for the purposes of this definition;*

10.2 The clause raises that fundamental legislative principle the Committee routinely considers - *Does the Bill have sufficient regard for the institution of Parliament* and in particular, (1) *does it allow the delegation of legislative power only in appropriate cases and to appropriate persons* and (2) *does it sufficiently subject the exercise of a proposed delegated legislative power to the scrutiny of the Legislative Council*?

10.3 These questions are of paramount importance to the Parliament having an ability to scrutinise delegation of legislative power and in being able to, through legislation, to establish a form of Parliamentary control. In the case of the definition in clause 5, the Committee questioned the appropriate balance between the Parliament and the Executive. Put another way, what is the appropriate mechanism by which members of Parliament, as representatives of the people, maintain oversight of legislation?

10.4 The combined effect of the proposed definition is that there will be no limits on the type of offence for which controlled operations may be authorised by a chief officer. In contrast, Schedule 1 of the *CCC Act* lists only 20 offences primarily with penalties in the 7, 14 and 20 years or 'life' range that attract applications for the use of 'exceptional powers'[78], two of which are the power to conduct a controlled operation and assumed identities.[79]

10.5 The Parliamentary Inspector of the Corruption and Crime Commission said:

> *The reason they* [Western Australia Police] *prefer to use the bill rather than the Act is because of the different definitions in terms of what is required for an authority. Under the Act, it has to be a relevant offence, which is an offence carrying more than three years' imprisonment that is being investigated.*
>
> *Under the Corruption and Crime Commission Act it has to be a schedule 5 offence committed in the course of organised crime. An organised crime definition requires that there be two or more persons*

[78] However, section 147 of *The Criminal Code*, concerning an officer of a prison or police officer permitting the escape of a prisoner, attracts three years.

[79] In Part 4, Division 5 of the *CCC Act*. The other three powers in Part 4 are: examination before the Corruption and Crime Commission in Division 2; the power to enter and search in Division 3; and assumed identities in Division 4.

> *conspiring to commit two or more offences that are schedule 5 offences. It is a much bigger hoop to jump through.*[80]

10.6 Further, it is the view of the Parliamentary Inspector of the Corruption and Crime Commission that the three year bar has been set too low "*as there are many, many offences that carry a penalty of three years that would be comparatively trivial offences*." [81] The Inspector suggested the bar be set at seven years.[82]

10.7 In 2007, the Law Council of Australia said (responding to the submission phase of the Commonwealth equivalent legislation):

> *The controlled operations provisions … confer extraordinary powers on authorising officers to license police and civilian informants to commit otherwise unlawful acts with impunity. Controlled operations should therefore be subject to strict limitations and their use confined to the investigations of the most serious crimes. In the view of the Law Council this means offences which carry a maximum penalty of at least ten years imprisonment or offences which relate to a pattern of criminal activity, the scope and nature of which justifies its treatment as exceptional. On the contrary, over the course of little more than a decade, the range of offences in relation to which a controlled operation may be carried out has increased exponentially.*[83]

10.8 The Committee concurs with the above statement by the Law Council and makes the following finding.

Finding 2: The Committee finds that the powers conferred on the three prescribed law enforcement agencies and their respective chief officers are extraordinary. These powers should be confined to the most serious of crimes, not just for any offence.

10.9 The Committee noted that the definition in clause 5 was contentious during the submission phase of the JWG Report with the 'three years or more' definition a compromise.[84] The fact that many other offences can be prescribed in regulations under (b) means law enforcement agencies have the potential to carry out a controlled operation on an enormous number of offences over a wide variety of subject matters. The power to prescribe offences is considerable with no criteria provided for the exercise of this power.

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80 Mr Christopher Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p4.

81 Ibid, p6.

82 Ibid, p6.

83 Law Council of Australia, Submission on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, Canberra, 19 January 2007, p8.

84 JWG Report, p41.

10.10 The Department of Fisheries has to date, identified an additional 15 offences for which regulations will sought to be made. Western Australia Police has identified 30 preliminary, precursor offences[85] committed by organised crime groups as a prelude to more serious offending[86] including, for example, the offence of "*taking part in an unlawful assembly*".[87] However, as the Parliamentary Inspector of the Corruption and Crime Commission aptly put it, the bar has been set so low, "*it would cover an armed robbery by threat of removing a bicycle from somebody*".[88]

10.11 The breadth of the definition may be contrasted with the JWG Report which recommended that the ability to prescribe offences below the three year threshold be limited to child pornography, gaming, fisheries, firearms, prostitution and corruption[89] but as the Model Law only applies to cross-border operations, no restriction on the offences that can be prescribed within Western Australia was proposed.[90] Western Australia Police explained that it was policy decision not to limit the scope of offences to what the JWG recommended as there are other forms of offences such as identity theft which the definition will capture.[91] The Committee is of the view that every deviation from the Model Law based on a local policy decision diminishes the uniformity of the national scheme.

10.12 The Committee has a concern that the breadth of the definition diminishes the role of the Parliament in the creation of new offences by delegating this role to the Executive. The Committee noted that in 2001, a former Parliamentary Counsel, Mr Greg Calcutt said:

> *The only inappropriate delegations per se are in relation to offences. Any delegation of power to create serious offences is inappropriate.*
>
> *There may be other powers beyond those which the Parliament considers inappropriate; however, that is strictly a matter for the Parliament.*[92]

10.13 The Committee concurs with the Parliamentary Inspector of the Corruption and Crime Commission and also the JSCCCC[93] that extraordinary law enforcement powers such

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85 *Answer to a Question on Notice* Number 6 provided by Western Australia Police, 10 January 2012, p3.

86 *Answer to a Question on Notice* Number 1 provided by Western Australia Police from a Hearing on 17 January 2012.

87 Section 63 of *The Criminal Code*.

88 The Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p6.

89 JWG Report, p43.

90 Mr Liam McNamara, Acting Senior Research and Legislation Officer, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p4.

91 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 16 December 2011, pp4-5.

92 Mr Greg Calcutt, then Parliamentary Counsel, *Transcript of Evidence*, 11 June 2001, p26 as part of the *Inquiry into the Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001*, tabled 28 June 2011, p23.

93 In Submission Number 1 of the Joint Standing Committee on the Corruption and Crime Commission, 18 November 2011, p5.

as controlled operations should only be used judiciously to deal with proportionately serious matters or matters where normal methods of law enforcement are, for particular reasons, ineffective.[94]

10.14 The Committee makes the following finding.

Finding 3: The Committee finds that the controlled operations powers being proposed in the Criminal Investigation (Covert Powers) Bill 2011 should only be used judiciously to deal with proportionately serious matters or matters where normal methods of law enforcement are, for particular reasons, ineffective.

10.15 The Committee can see no reason why offences cannot be listed in a Schedule to the Bill and as more offences are required, the Schedule amended by the Parliament rather than by subsidiary means. Although all regulations are routinely scrutinised by the Joint Standing Committee on Delegated Legislation after gazettal, the only requisite for the regulations to continue in force is that they be 'authorised or contemplated by the empowering enactment', a criterion that is easily met by the current drafting of (b) of the definition in clause 5.[95]

10.16 In contrast, the Commonwealth legislation is more restrictive, specifying particular categories of offences punishable by three years imprisonment which may be the subject of an application and not permitting prescription of offences punishable by less than three years imprisonment.

10.17 Western Australia Police disclosed it is a simpler and quicker process to prescribe offences in regulations:

> *All I can indicate there is that it is government policy to do it that way to make it certainly easier if controlled operations need to be authorised, without having to go through the parliamentary process to add a new category of offence.*
>
> *By making it by way of regulations, it is a simpler process then for controlled operations to take place quicker*.[96]

10.18 Another rationale is demonstrated in the following exchange:

> ***Dr O'Callaghan**: … there might be another process that has to be put in place to satisfy a committee, or something, so that at least due consideration is being given to any prescribed offences that are going into the schedule. We are saying that we are not objecting to another*

94 Mr Christopher Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p7.

95 However, the Joint Standing Committee on Delegated Legislation has another term of reference in its armoury which is that it can recommend disallowance if the instrument contains provisions that, for any reason, would be more appropriately contained in an Act.

96 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 16 December 2011, p7.

> *step in the process, if that is what the committee thinks is a useful thing to do.*
>
> ***Hon Nigel Hallett:*** *Why cannot that be provided with the bill and make it a complete bill to start with?*
>
> ***Dr O'Callaghan:*** *Because crimes change, crime trends change and challenges change and it may be that in the future we are faced with something that is outside of the bill that we need to include. The reason I think the schedule is part of regulations is so you can make these changes fairly quickly if you need to.*
>
> *The problem with that, of course, is that Parliament does not get a chance to debate any changes to the act in the schedule, because it is a regulation change. One way of keeping it streamlined but allowing an extra level of oversight is, for argument sake, to come and talk to the committee about what is being proposed. I do not think you can have a finite number of offences in the act. The problem with that is if we get a new type of offence or a new type of crime problem and we have to deal with it in a reasonably quick way, sometimes legislation can take years to get through.*[97]

10.19 The Committee is of the view that the Commissioner of Police understands and has attempted to grapple with the issue of parliamentary oversight of additional offences being created in regulations.[98] Justifying the prescribing of additional offences via Executive regulation making because it is simple and quick, is no justification.

10.20 The Committee makes the following finding.

Finding 4: The Committee finds that the creation of new offences attracting controlled operations powers in regulations is a serious subject matter and constitutes an inappropriate delegation of legislative power from the Parliament to the Executive. No substantive scrutiny of the offences will occur. This diminishes the Parliament's role in authorising appropriate offences for a controlled operation.

10.21 As a result of Finding 4, the Committee makes the following recommendation.

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97 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, pp4-5.

98 Ibid, p4 where Dr O'Callaghan said: "*I think one of the issues with the process where a Minister can just issue regulations is that it does not go through the normal parliamentary process, so it does not get debated. One of the discussions we had … is whether it may be possible, when there is consideration of an amendment to the schedule, that at least the standing committee gets briefed on that process. That is something we would not object to, if it was felt to be useful*."

Recommendation 2: The Committee recommends that the definition of "*relevant offence*" in clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to exclude the prescribing of additional relevant offences in regulations. This may be effected in the following manner:

Page 6, lines 25 to 27 – to delete -

or (b) an offence against the law of this jurisdiction that is prescribed for the purposes of this definition;

10.22 In the event the Legislative Council does not support recommendation 2, the Committee provides the following comment and recommendation.

10.23 In July 2011, the Committee attended the *Australia - New Zealand Scrutiny of Legislation Conference*. Mr Stephen Argument, Barrister, author and Legal Adviser to the Australian Capital Territory's Standing Committee on Justice and Community and Legislative Drafter, Commonwealth Office of Legislative Drafting and Publishing presented a paper titled: "*Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation.*" In that paper, the benefit of making regulations subject to an affirmative resolution procedure was raised.

10.24 Essentially, the procedure requires that when regulations are made and gazetted, both Houses of Parliament must then approve rather than disallow the regulations before they can come into operation. During that interval they may be subject to criticism and objection.

10.25 A former Legislation Committee of the 35th Parliament inquiring into the Sentencing Matrix Bill 1999,[99] heard evidence from the then Attorney General who described the procedure in the following way:

> *The regulations* [are] *passed and laid before Parliament. It will then be up to the Government to try to get an affirmatory motion passed as the regulations will have no effect until that occurs.*
>
> *The regulations … have a legal effect as a regulation, but will have no impact until a positive resolution is achieved. No limit will apply to how long it may take to do that, in the same way that no limit applies to how long it takes to bring in and pass a Bill.*
>
> …
>
> *It may be a long process. It may be some period before a resolution is made by both Houses of Parliament.*
>
> *The matter will then eventually be passed in the negative or affirmative. A negative result will repeal the regulation, and an*

[99] Western Australia, Legislative Council, Legislation Committee 1989-2001, Report 53, *Sentencing Matrix Bill 1999*, 18 October 2000, pp84-90.

> *affirmative result will bring it into effect at a fixed time or a time stipulated in the regulation.*[100]

10.26 Of this procedure, Mr Argument said:

> *The obvious advantage, for the Parliament, of requiring affirmative resolution of both Houses before subordinate legislation can take effect is the capacity to amend such legislation.*
>
> *Another advantage is that affirmative resolution procedures prevent subordinate legislation from operating until such time as the Parliament sits and moves to disallow the subordinate legislation* (*which can take several months, particularly when subordinate legislation is made in a long parliamentary recess*).[101]

10.27 Western Australia Police have the following view of an affirmative resolution procedure:

> *As it is, it would take approximately 6-8 weeks to get such offences listed and made law using the general regulation making process. If WA Police had to wait for the affirmative regulation making process, it could take many months before we were then able to authorise the related controlled operation to target that criminal behaviour. Apart from the delay, there would also be a degree of uncertainty as to whether Parliament would either approve the draft Regulations or disallow them, as the case may be.*
>
> *Limited sitting days of Parliament through the year, and the prorogation of Parliament early next year for the State Election, also complicate matters. Furthermore, by having the proposed regulation subject to a significant degree of public scrutiny, through the parliamentary process of affirmative regulations, could tip off the sector of organised crime etc, that WA Police are seeking to infiltrate and disrupt.*[102]

10.28 The Committee is of the view that a positive, rather than negative[103] affirmative resolution procedure will enhance the sovereignty of the Parliament in the creation of

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100 Then Hon P G Foss QC, former Attorney General, Minister for Justice, Attorney General and former MLC, *Transcript of Evidence,* 13 September 2000, pp16-17.

101 Stephen Argument, "*Leaving it to the Regs" – The pros and cons of dealing with issues in subordinate legislation*", Paper for Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011, p19.

102 *Answer to a Question on Notice* Number 2 provided from a Hearing on 17 January 2012.

103 A negative procedure means the regulations prescribing the additional offences come into operation on gazettal and remain in force until the affirmation motion is heard. Being operational, this presents legal challenges when attempting to charge people with the new offences. In contrast, a positive procedure means any proposed regulations cannot come into force until the House first passes the affirmation motion.

new offences for which a controlled operation may be undertaken and therefore makes the following recommendation.

Recommendation 3: The Committee recommends that in the event recommendation 2 is not supported by the Legislative Council, clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to provide for greater Parliamentary scrutiny of the prescribing of relevant offences in regulations where the punishment is less than three years imprisonment. This may be effected in the following manner:

Page 6, line 27 — To delete "definition;" and insert -

definition if and only if the prescribing of that offence has been recommended by resolution passed by both Houses of Parliament of this State;

Clause 5 - the definition of "*sexual offence*"

10.29 The Committee's Finding Number 4 with respect to the definition of "*relevant offence*" applies also to the definition of "*sexual offence*". Therefore the Committee makes the following identical recommendations.

Recommendation 4: The Committee recommends that the definition of "*sexual offence*" in clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to exclude the prescribing of additional sexual offences in regulations. This may be effected in the following manner:

Page 6, lines 30 to 32 – to delete -

or (b) any other offence of a similar kind prescribed for the purposes of this definition;

10.30 In the event Recommendation 4 is not supported by the Legislative Council, the Committee makes the following recommendation.

Recommendation 5: The Committee recommends that in the event Recommendation 4 is not supported by the Legislative Council, clause 5 of the Criminal Investigation (Covert Powers) Bill 2011 be amended to provide for greater parliamentary scrutiny of the prescribing of additional sexual offences in regulations. This may be effected in the following manner:

Page 6, line 32 — To delete "definition;" and insert -

definition if and only if the prescribing of that offence has been recommended by resolution passed by both Houses of Parliament of this State;

Clause 9 - the non-application of certain Acts (and similarly, clause 45)

10.31 Clause 9 states:

> ***Non-application of certain Acts***
>
> *The following Acts do not apply to investigations, operations, activities or records under this Part —*
>
> *(a) the State Records Act 2000;*
>
> *(b) the Freedom of Information Act 1992, despite section 8(1)*[104] *of that Act*.

10.32 The clause raises that fundamental legislative principle the Committee routinely considers - *Does the Bill have sufficient regard to the rights and liberties of individuals* and in particular, questions *whether rights, freedoms or obligations, are dependent on administrative power only if sufficiently defined and subject to appropriate review*?

10.33 The clause states that neither the *SR Act* nor the *FOI Act* apply to investigations, operations and records under the controlled operations part of the Bill (and for the assumed identities part of the Bill – just "*activities or records*" under clause 45).

10.34 The EM states that "*the nature of controlled operations makes it imperative that specific information relating to individuals not become public knowledge*."[105] The comment by Commander Murray Smalpage, Director, Intelligence, Western Australia Police, that "*there is a degree of paranoia and a degree of concern by people who work in this field that people can elicit a lot of information*"[106] reinforces this view.

10.35 A submission from Western Australia Police reveals that the clause is modelled on Tasmania's equivalent enactment with an acknowledgment that "*specific units within Western Australia Police … are exempt agencies for the purposes of the release of information under the FOI Act*."[107]

10.36 The exclusion of normal accountability provisions here (which would otherwise require the limited release of certain information) are not excluded under the *CCC Act*. The exclusion is not part of the Model Law.

10.37 The EM advises that an urgent application for a controlled operation may be made by various means, including telephone, videophone, Skype or Yahoo Messenger.[108] The dubious security of some of these means (for example, by clause 10(4), an email is a

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104 That section is titled ***Effect on other enactments*** and states at (1): "*Access to documents is to be given under Parts 2 and 4 despite any prohibitions or restrictions imposed by other enactments (whether enacted before or after the commencement of this Act) on the communication or divulging of information, and a person does not commit an offence against any such enactment merely by complying with this Act*."

105 The Explanatory Memorandum, p4.

106 Commander Murray Smalpage, Director, Intelligence, Western Australia Police, *Transcript of Evidence*, 17 January 2012, pp14-15.

107 Submission No 6 from Western Australia Police, 19 December 2011, unnumbered page.

108 The Explanatory Memorandum, p4.

written document that is considered a formal application) is a factor in considering the proposed exclusion of the two enactments and the proposed record-keeping provisions. Arguably, for such means, the exclusion is inappropriate.

10.38 Both the Information Commissioner and the State Archivist are of the view that the *FOI Act* and the *SR Act* should not be excluded so that records of controlled operations and assumed identities be subject to the same records keeping accountability and compliance requirements as other government records.[109]

10.39 The State Archivist referred to government organisations such as the CCC, the Director of Public Prosecutions (**DPP**) and Department of Premier and Cabinet which "*create and keep highly sensitive information and are subject to the State Records Act 2000 and operate approved record keeping plans and retention and disposal schedules with appropriate and approved restrictions on access to certain categories of State archives such as investigations, prosecutions and Cabinet documents.*"[110]

10.40 Similarly, the Information Commissioner referred to a range of exemptions set out in clauses 1 to 15 in Schedule 1 of the *FOI Act* which are "*designed to protect significant public interests that compete with the public interest in the openness and accountability of government and its agencies.*"[111] Further, various discrete sections of Western Australian Police are already exempt agencies under Schedule 2 to the *FOI Act*. These are the:

- Bureau of Criminal Intelligence, now the State Intelligence Division which is the division responsible for controlled operations;
- Protective Services Unit, now known as the Tactical Protection Division,
- Witness Security Unit, now known as the Witness Protection Unit; and
- Internal Affairs Unit.

10.41 As exempt agencies, their documents will not be accessible and the effect of being listed in Schedule 2 is that documents of those agencies are quarantined from the application of the *FOI Act*.[112] However, Western Australia Police argued that:

> *All of the other business units within WAPOL are not automatically protected by the FOI exemption of Schedule 2. This would include investigative units like Major Crime Squad, Organised Crime Squad and the Gang Crime Squad who are tasked with investigation of the*

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109 Submission No 4 from Mr Sven Bluemmel, Information Commissioner, Office of the Information Commissioner, 15 December 2011 and Submission No 8 from Ms Cathrin Cassarchis, State Archivist and Executive Director of State Records, State Records Office, 21 December 2011.

110 Submission No 8 from Ms Cathrin Cassarchis, State Archivist and Executive Director of State Records, State Records Office, 21 December 2011, p3.

111 Submission No 4 from Mr Sven Bluemmel, Information Commissioner, Office of the Information Commissioner, 15 December 2011, p3.

112 Ibid, p4.

> *most serious offences and therefore who will be significant users of this legislation.*
>
> *Importantly, the Fisheries Department records are not exempt. Any disclosure of the Fisheries Department records may severely impact the operational methodologies of WAPOL.*[113]

10.42 The Committee disagrees and finds that Western Australia Police have failed to justify the exclusion of the *SR Act* and the *FOI Act* in the Bill. To date, there is no record of any freedom of information applications being made to Western Australia Police for access to documents concerning covert operations conducted under the *Prostitution Act 2000* or *Misuse of Drugs Act 1981*.[114] Therefore this begs the question: why are the exclusions needed?

10.43 In *Re MacKenzie and Police Force of Western Australia*, a former Information Commissioner said:

> *The effect of being listed as an exempt agency in Schedule 2 is to quarantine documents of that body, and hence the activities of that body, from the provisions of the FOI Act. Generally speaking, the sections of the agency which are exempt agencies under the FOI Act are those concerned with, inter alia, the gathering of information on, and the investigation of, corrupt and illegal activities, and those concerned with the safety and protection of certain public figures.*
>
> *The Parliament of Western Australia has decided that the public interest is served by those bodies being exempt agencies and, therefore, not subject to the provisions of the FOI Act.*[115]

10.44 The Committee queried why the exemptions in the *FOI Act* are insufficient. Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, said:

> *I suppose the issue about clauses 9 and 45 is not just in relation to the records of WA Police. There are the records, obviously, that Fisheries would have in relation to their controlled operations, the records that the Australian Crime Commission would have in relation to investigation into state offences, and you also have those records et cetera that the Ombudsman may be maintaining in relation to their activities. Our view is that because of the nature of the information contained in those records, regardless of where they are, there should be a high degree of protection from application under the FOI act.*
>
> *It is not just providing protection for WA Police, but for those records that come about through the legislation regardless of who happens to*

113 *Answer to a Question on Notice* Number 33 provided from a Hearing on 17 January 2012.

114 Email from Western Australia Police received 13 February 2012.

115 [1999] WAICmr 27 at 7.

> *have them. I was just thinking then in the context of the applications for the acquiring of an assumed identity, where we might write to another government agency et cetera. You want to have some degree of protection against that as well. It may not just be the agencies conducting the controlled operation, but it may be correspondence that we have sent to Transport or something about the creation of an assumed identity. So there needs to be some protection right across the board.*[116]

10.45 The Committee is of the view that the rationale for including clause 9 is merely that it is a feature of the Tasmania enactment[117] upon which the Bill is modelled whereas, had the Bill not deviated from the Model Law, Western Australia would have contributed to the uniformity of the scheme. As it is, other jurisdictions have disparate provisions on this subject[118] yet the whole reason for implementing a uniform scheme is that it be uniform, thus avoiding the complexities associated with fragmented legislative provisions. As a minimum, the Committee is of the view that investigations, operations, activities or records covered by the *SR Act* and *FOI Act* be unavailable for 30 years similar to the 30-year Cabinet documents rule.[119]

10.46 The danger of disparate oversight mechanisms was referred to by the Information Commissioner in a letter to the Committee titled *COAG's Reform Agenda and the Impact on 'State Oversight Laws'* (defined as legislation dealing with freedom of information, privacy, public record keeping and the role of the Ombudsman) where he said:

> *Recently introduced national schemes have not adopted a consistent approach to how oversight laws apply to the people and organisations which play a role under the national schemes. Instead different oversight models have been developed for education and child care services, occupational licensing and health practitioner legislation. It appears likely that a further variety of models will follow in other legislative reforms including national rail safety and heavy vehicle licensing.*

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116 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p60.

117 Also the Australian Capital Territory, Submission No 4 from Mr Sven Bluemmel, Information Commissioner, Office of the Information Commissioner, 15 December 2011, p2. Western Australia Police advised that South Australia and Queensland include provisions to exclude their equivalent State Records legislation.

118 Submission No 8 from Ms Cathrin Cassarchis, State Archivist and Executive Director of State Records, State Records Office, 21 December 2011, p3 who said: "*Such as the Crimes Act 1914 (Cth) and the Crimes (Controlled Operations) Act 2004 (Vic). Each contain very similar provisions as those in Parts 2 and 3 of the Bill, yet the former does not exclude the Archives Act 1983 (Cth) and the latter does not exclude the Public Records Act 1973 (Vic).*"

119 In 1984, the Department of Premier and Cabinet made the first transfer of Cabinet Papers, including those from 1951 to 1980 to the State Archives. At a meeting on 27 October 1986, Cabinet decided that a 30 year embargo would apply to the release of those Cabinet Papers.

> *The OIC is concerned that the use of different oversight models in different regulatory schemes will increase the complexity and fragmentation of oversight laws and will result in inefficiencies and unnecessary duplication of effort and expenditure. The problem appears to have arisen inadvertently as a result of various Ministerial Councils each deciding on different oversight models for the areas of national law reform for which they are responsible.*[120]

10.47 The Information Commissioner's entire letter to the Committee on this important subject matter of COAG's reform agenda and the impact on state oversight laws is replicated at **Appendix 5** for the benefit of the Parliament.

10.48 The Information Commissioner's comments (above) resonate with the proposal to exclude the *FOI Act* and *SR Act* in clause 9 (and 45) of the Bill where the exclusion of the equivalents of these enactments are treated differently in other jurisdictions' equivalents of the Bill. It is the view of the Committee that the protections in the *FOI Act* in particular and the *SR Act* provide appropriate review of administrative action and are sufficient to protect operatives' identity and covert Western Australia Police methodologies as the information is either exempt or not readily available to the general public. The Committee therefore recommends that clause 9 be deleted from the Bill.

Recommendation 6: The Committee recommends that clause 9 of the Criminal Investigation (Covert Powers) Bill 2011 be deleted. This may be effected in the following manner:

Page 8, lines 10 to 15 – To delete the lines

10.49 If the Legislative Council does not agree with recommendation 6, the Committee makes the following recommendation.

Recommendation 7: The Committee recommends that if the Legislative Council does not support recommendation 6, clause 9 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so that the *Freedom of Information Act 1992* and the *State Records Act 2000* do not apply to investigations, operations activities or records under Part 2 but to apply after a period of 30 years. This may be effected in the following manner:

Page 8, line 12 – To delete "Part –" and insert -

Part for 30 years after the commencement of this section –

[120] Letter from Mr Sven Bluemmel, Information Commissioner, Office of the Information Commissioner, 16 December 2011, p3.

10.50 With respect to the correspondence from the Information Commissioner discussed at paragraphs 10.46 to 10.48, the Committee makes the following recommendation.

Recommendation 8: The Committee recommends that the Minister representing the Minister for Police respond to the Information Commissioner's comments in a letter to the Committee reproduced at Appendix 5 that:

(1) the use of different oversight models in different regulatory schemes increases the complexity and fragmentation of oversight laws resulting in inefficiencies and unnecessary duplication of effort and expenditure; and

(2) the problem appears to have arisen inadvertently as a result of various Ministerial Councils each deciding on different oversight models for the areas of national law reform for which they are responsible.

Clause 12(1)(f)

10.51 This clause states:

> ***Matters to be taken into account — all controlled operations***
>
> *(1) An authority to conduct a controlled operation must not be granted unless the chief officer is satisfied on reasonable grounds —*
>
> …
>
> *(f) that the operation does not involve any participant in the operation inducing or encouraging another person to engage in criminal activity of a kind that the other person could not reasonably have expected to engage in unless so induced or encouraged; …*

10.52 During a hearing with the Chief Assessor of Criminal Injuries Compensation, a drafting error in the clause was noted. The word "*been*" between the words "*have"* and "*expected*" in line 33 was inadvertently omitted. Although Western Australia Police acknowledged the omission and that it would be rectified during the committee phase of the Bill's passage, the Committee makes the following recommendation.

Recommendation 9: The Committee recommends that clause 12(1)(f) of the Criminal Investigation (Covert Powers) Bill 2011 be amended to insert the word "*been*" between the words "*have*" and "*expected*" at Line 33. This may be effected in the following manner:

Page 10, line 33 — To insert after "have"-

been

Clause 12(1)(g)(i) to (iv)

10.53 Clause 12(1)(g) states that an authority to conduct a controlled operation must not be granted unless the chief officer is satisfied that any conduct involved in the operation will not:

> *(i) seriously endanger the health or safety of any person; or*
>
> *(ii) cause the death of, or serious injury to, any person; or*
>
> *(iii) involve the commission of a sexual offence against any person; or*
>
> *(iv) result in unlawful loss of or serious damage to property (other than illicit goods).*

10.54 The Committee considered a submission from the Commissioner for Children and Young People regarding the absence of an explicit requirement in clause 12(1)(g) or elsewhere in the Bill that the potential presence of children and young people should be considered during the planning and implementing of controlled operations. The Commissioner said significant impacts for them may be deduced should they be present during an operation.[121]

10.55 The Committee noted that children and young people do not especially feature in the Model Law.

10.56 Western Australia Police are of the view that an express reference to persons under 18 years in the Bill is not required as they are included in the phrase "*any person*" in subclauses (i), (ii) and (iii). Further, children and young people are taken into consideration during operational planning.[122] Western Australia Police further advised that:

> *One of the purposes of operational planning is to ensure that operatives consider, prior to deployment, the impact of the investigation on the target person and those associated with him or her. If relevant this will include an assessment of the impact of the investigation on juveniles and planning to ensure that any impact is negated or if unavoidable, minimised.*[123]

10.57 The Committee draws this matter to the attention of the Legislative Council.

Clause 15 - Form of authority to conduct a controlled operation

Clause 15(8)

10.58 This clause states:

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121 Submission No 2 from the Commissioner for Children and Young People, 9 December 2011, p2.

122 Commander Murray Smalpage, Director, Intelligence, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p63.

123 *Answer to a Question on Notice* provided on 13 February 2012.

> *(8) The chief officer must ensure that written notes are kept of the particulars referred to in subsection (6) for each urgent authority.*

10.59 Clause 15(8) requires the chief officer to ensure written notes are kept of the particulars referred to in clause 15(6) for an urgent authority whereas clause 10(9) requires an applicant to make record in writing of an urgent application "*as soon as practicable after making*" the application.

10.60 The Committee queried why the requirement in clause 10(6) that the record be made "*as soon as practicable*" is missing in clause 15(8). Western Australia Police acknowledged that the distinction between clauses 15(8) and 10(6) was not requested during drafting of the Bill and that it is a distinction contained in the Model Law as replicated in the Tasmanian enactment upon which our Bill is modelled. Western Australia Police agreed there is justification for an amendment to rectify the omission in clause 15(8).[124]

10.61 With respect to another aspect of clause 15(8), the Committee noted that it uses the phrase "*written notes*" whereas clause 10(9) uses the phrase "*record in writing*". Clause 10(9) states:

> *(9) As soon as practicable after making an urgent application, the applicant must make a record in writing of the application and give a copy of it to the chief officer.*

10.62 Similar to paragraph 10.60 above, Western Australia Police acknowledged that the distinction in the terminology was not requested during drafting of the Bill and that it is a distinction contained in the Model Law as replicated in the Tasmanian enactment upon which our Bill is modelled. Western Australia Police agreed the distinction is unnecessary.[125] The Committee therefore makes the following recommendation.

Recommendation 10: The Committee recommends that the words: "*as soon as practicable*" and "*record in writing*" be inserted in clause 15(8) of the Criminal Investigation (Covert Powers) Bill 2011. This may be effected in the following manner:

Page 14, line 28 — To delete "must ensure that written notes are" and insert -

must, as soon as practicable after the authority is granted, ensure that a record in writing is

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124 *Answer to a Question on Notice* Number 9 from Mr Liam McNamara, Acting Senior Research and Legislation Officer, Western Australia Police, 10 January 2012, p5.

125 Ibid, p5.

Clause 25

10.63 The clause provides for retrospective authorisation of unlawful conduct. It raises that fundamental legislative principle the Committee routinely considers - *Does the Bill impose obligations retrospectively*?

10.64 Neither the Model Law nor the *CCC Act* provide for retrospective authorisation. Clause 25(1) provides that the chief officer may retrospectively authorise, unlawful conduct engaged in during the course of a local controlled operation. It is not available for cross-border controlled operations.

10.65 The EM explains clause 25 as providing protection for scenarios that arise outside normal controlled operations planning. The context is that crime syndicates are known to 'test' associates by inciting them to commit offences they know a police officer is not authorised to commit, although arguably, this can be foreseen. Refusal may place an officer's life at risk. The criteria for grant and an inability to delegate power to authorise are identified as safeguards.

10.66 This availability of retrospective authorisation for a local controlled operation is subject to the principal law enforcement officer for the operation applying for a controlled operation within 24 hours after a participant who is authorised to take part in a controlled operation, engages in that unlawful conduct (other than conduct which is authorised for the purposes of the controlled operation). The power to issue a retrospective authorisation cannot be delegated by the chief officer. The formal requirements in respect of an application for a variation of an authority do not apply.

10.67 The Commissioner of Police said clause 25 would be "*used very, very rarely indeed*"[126] and that for example under the NSW equivalent legislation (the only other jurisdiction to have retrospective authority) it has only been required twice since 1998.[127]

Clause 25(2)

10.68 It states:

> *(2) If a participant in an authorised operation engages in unlawful conduct (other than controlled conduct) in the course of the operation, the principal law enforcement officer for the operation may, within 24 hours after the participant engages in that conduct, apply to the chief officer for retrospective authority for the conduct.*

126 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p23.

127 Ibid, p23.

10.69 The Committee noted that the word "*may*" imports a discretion under section 56 of the *Interpretation Act.*[128] The Committee considered whether this should be amended to 'shall', especially as the Commissioner of Police was emphatic that Western Australia Police's internal policy "*will certainly say you need to contact the chief officer within 24 hours*"[129] other than in the case of an extraordinary emergency. Western Australia Police said:

> *It is acknowledged that the 24 hour time limit for making the application to the chief officer could be problematic, as there may be occasions where a participant, because of their proximity to a target, may not be able to notify their principal law enforcement officer (PLEO) in a timely enough manner, to then enable their PLEO (if he/she so chooses) to make application to their Chief Officer within 24 hours. It may be that the Bill could be framed to allow for an application to be made outside of the 24 hour time period, but only in exceptional circumstances. Consideration will be given to drafting an appropriate amendment in committee to resolve this concern.*[130]

10.70 Given this acknowledged concern, the Committee makes the following recommendation.

Recommendation 11: The Committee recommends that clause 25(2) of the Criminal Investigation (Covert Powers) Bill 2011 be amended to make it mandatory for the principal law enforcement officer to apply to the chief officer for a retrospective authority within 24 hours and in exceptional circumstances, outside the 24 hour period. This may be effected in the following manner:

Page 21, line 7 — After "hours" insert -

(or any longer period that the chief officer may, in exceptional circumstances, allow)

10.71 The Committee noted that an application for a retrospective authority may be made by a participant, not a law enforcement officer generally, and the chief officer may consult with the principal law enforcement officer. The ground for grant is satisfaction that the participant believed on reasonable grounds that there was a substantial risk:

- to the success of the operation;

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128 Section 56 states: "*May" imports a discretion, "shall" is imperative (1) Where in a written law the word may is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion. (2) Where in a written law the word shall is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.*"

129 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p25.

130 *Answer to a Question on Notice* Number 10 provided from a Hearing on 17 January 2012.

- to the health or safety of a person; or
- that evidence in respect of criminal activity different from that in respect of which the operation was authorised would be lost,

and the only way to avoid the risk was to engage in the criminal activity.

10.72 Under clause 25(6), the chief officer must also be satisfied that the participant had acted in good faith, that the participant could not have foreseen or been reasonably expected to foresee the circumstances would arise, that had the events been foreseeable an authority would have been sought and that it was not reasonable for the participant to seek a variation of the authority.

Clause 25(7)

10.73 This subclause states:

> *(7) Subsection (6) does not allow retrospective authority to be granted with respect to any conduct that —*
>
> *(a) seriously endangered the health or safety of any person; or*
>
> *(b) caused the death of, or serious injury to, any person; or*
>
> *(c) involved the commission of a sexual offence against any person; or*
>
> *(d) resulted in unlawful loss of or serious damage to property (other than illicit goods).*

10.74 The Committee is concerned that the express inclusion of these four matters is a menu by which criminals will be able to test operatives. Western Australia Police said they are able to mitigate the risk through appropriate training.[131] The Committee was advised that:

> *if all the techniques utilised during the course of the operation failed to prevent the operative being requested to commit an offence described in 12(g) then the operative would refuse and the operation terminated if necessary.*[132]

10.75 The Committee expresses its concern at the inclusion of clause 25(7) which arguably, raises the threat level to operatives. However, the Committee sees merit in limiting the power of the chief officers to retrospectively authorise a range of other conduct.

10.76 The Committee makes the following general findings with respect to clause 25:

- It is not a feature of the Model Law yet the policy of the Bill is to enter into a uniform scheme to avoid fragmentation and complexity amongst participating

131 Commander Murray Smalpage, Director, Intelligence, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p18.

132 *Answer to a Question on Notice* Number 8 provided from a Hearing on 17 January 2012, p1.

jurisdictions' corresponding laws. Deviations lose that principle of uniformity essential to the operation of any national scheme.

- The equivalent of clause 25 has been used only twice in 14 years in NSW.
- It is anticipated by Western Australia Police that clause 25 will be rarely used in Western Australia.
- NSW is the only other jurisdiction to include the equivalent of clause 25.
- The testing of operatives is foreseeable.

10.77 Therefore the Committee makes the following recommendation.

Recommendation 12: The Committee recommends that clause 25 of the Criminal Investigation (Covert Powers) Bill 2011 be deleted from the Bill. This may be effected in the following manner:

Page 21, lines 1 to 31 – To delete the lines

Page 22, lines 1 to 31 – To delete the lines

10.78 In the event the Legislative Council does not support recommendation 12, the Committee provides the following comment and recommendation.

10.79 The Committee noted that pursuant to clause 26 of the Bill, the chief officers are required to give written details of a retrospective authority and the circumstances justifying it to the Parliamentary Commissioner within seven days. The Parliamentary Commissioner can require the chief officers to furnish such other information concerning the authority as is necessary for the Commissioner to give proper consideration to it. However, the Parliamentary Commissioner "*lacks the power to overturn an authority, whether retrospective or not*".[133]

10.80 The Committee is dissatisfied at the lack of qualitative oversight of retrospective authorities by the Parliamentary Commissioner and is of the view that the terms of reference of the JSCCCC should be extended to encompass an oversight function of clause 25 authorities.

10.81 Once the Bill is passed, the opportunity for parliamentary oversight will be lost. Such an oversight mechanism would enhance the sovereignty of the Western Australian Parliament. Therefore the Committee makes the following recommendation.

133 Mr Christopher Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p4.

Recommendation 13: The Committee recommends that in the event Recommendation 12 is not supported by the Legislative Council, the terms of reference of the Joint Standing Committee on the Corruption and Crime Commission be extended to provide oversight of retrospective authorities.

Clause 27

10.82 This clause concerns the protection for participants from criminal responsibility for controlled conduct during authorised operations. By clause 27(a), a participant who engages in conduct in an authorised operation is not criminally responsible for the offence. The release from criminal responsibility reflects the current *CCC Act* provision.[134] However, unlike the *CCC Act*, the requirement in clause 27(b) that the conduct does not involve inducing or encouraging another person to engage in criminal activity of a kind that person could not reasonably be expected to engage in unless induced and is not likely to cause the death or serious injury of a person or involve the commission of a sexual offence, is new.

10.83 An authority to engage in the conduct is issued on the basis of "*reasonable belief*" as to these matters. Clauses 27(b) and (c) are aimed at preserving criminal responsibility where that belief turns out to be mistaken. It also limits the potential for corruption or abuse in issuing (or using) an authority to provide protection for conduct that should not have been (or was not) authorised on the basis of claims as to "*reasonable belief*" or that the conduct was authorised notwithstanding the outcome in the event.

10.84 The Committee noted that clause 27 prevents a victim of crime from making a claim for compensation under the *Criminal Injuries Compensation Act 2003* in the event the offence has been committed under the authority issued under the Bill. This raises that fundamental legislative principle the Committee routinely considers: *Does the legislation have sufficient regard to the rights and liberties of individuals*?

10.85 The *Criminal Injuries Compensation Act 2003* provides that a person who suffers personal injury as a consequence of the commission of an alleged offence where no person has been charged may apply for compensation for that injury and any loss also suffered. Injury is defined in the Act to mean bodily harm, mental and nervous shock or pregnancy. However, if under section 17(4), the Chief Assessor is satisfied that the person who committed the alleged offence was not criminally responsible for it (unless by reason of insanity), then the alleged offence is taken not to have been committed and the assessor cannot make an award for compensation. Thus, removal of criminal responsibility for criminal activity has an adverse effect on victim's rights and the victim will not have their day in court or the vindication of public sanction of the wrong they have suffered. Further, a victim will be unable to apply for

[134] Section 128 of the *CCC Act*.

compensation for loss and damage to property and reasonable expenses incurred as a result of the offence against a convicted offender.

10.86 Thus, clause 27 effectively removes these rights (this may more properly be characterised as a legitimate expectation, as the rights do not arise in the absence of criminal responsibility or until conviction). When a retrospective controlled operations authority is granted the Bill removes existing rights retrospectively.

10.87 Evidence led at a hearing with Western Australia Police reveals that the absence of provisions in the Bill conferring rights equivalent to those under the *Criminal Injuries Compensation Act 2003* was unintentional.[135] Western Australia Police, as the instructing department, agreed to put forward an amendment to the Bill in consultation with the Chief Assessor of Criminal Injuries Compensation, given that it is likely a consequential amendment may also be needed to the *Criminal Injuries Compensation Act 2003*.

10.88 The Committee makes the following recommendation.

[135] Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 16 December 2011, p12.

Recommendation 14: The Committee recommends that the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to ensure that a victim of crime may make a claim for compensation under the *Criminal Injuries Compensation Act 2003* in the event an offence has been committed under an authority. This may be effected by inserting a new Part 7A in the following manner:

Part 7A - *Criminal Injuries Compensation Act 2003 amended*

106A. Act amended

This Part amends the *Criminal Injuries Compensation Act 2003*.

106B. Section 13 amended

In section 13(5) delete "section 27." and insert:

section 27 or the *Criminal Investigation (Covert Powers) Act 2012* section 27, 31 or 34.

106C. Section 16 amended

In section 16(5) delete "section 27." and insert:

section 27 or the *Criminal Investigation (Covert Powers) Act 2012* section 27, 31 or 34.

106D. Section 17 amended

In section 17(5) delete "section 27." and insert:

section 27 or the *Criminal Investigation (Covert Powers) Act 2012* section 27, 31 or 34.

Clause 35(2) – Disclosure of operational information

10.89 This clause contains four exceptions to the rule that a person who has had access to operational information must not disclose it. The DPP said clause 35(2) should be expanded to also include the situation where a person discloses operational information in the course of seeking legal advice.[136]

10.90 Western Australia Police said a fifth exception is unnecessary, that sub-clauses 35(2)(a), (b) and (d) provide adequate protection and provisions for any person involved in a controlled operation to seek and obtain legal advice or opinion. The "*concept of legal professional privilege … extends between the client and the lawyer under these clauses*."[137]

136 Submission No 5 from Mr Joseph McGrath SC, Director of Public Prosecutions, for Western Australia, 19 December 2011, p2.

137 *Answer to a Question on Notice* Number 27 provided from a Hearing on 17 January 2012, p6.

10.91 The Committee noted that the clause as proposed is consistent with the Model Law and other jurisdictions' equivalent legislation, for example, section 20R of the *Law Enforcement (Controlled Operations) Act 1997* (NSW) and section 36 of the *Crimes (Controlled Operations) Act 2004* (Vic).

10.92 The Committee is of the view that clause 88 should be amended to clarify and put beyond doubt the matter raised by the DPP. Therefore the Committee makes the following recommendation.

Recommendation 15: The Committee recommends that clause 35(2) of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to provide a fifth exception to the rule that a person who has had access to operational information must not disclose it. This may be effected in the following manner:

Page 29, line 12 – To delete "." and insert -

; or (e) for the purpose of seeking legal advice.

Clauses 36 to 41 – Reporting and record-keeping; and inspection

10.93 The Committee noted that during the developmental stage of the Bill, Western Australia Police suggested the CCC take on the role of oversight, inspection and auditing[138] but the CCC rejected this, stating that its role is one of facilitation, not oversight and that the role would be better suited to the Parliamentary Commissioner.[139]

10.94 In a submission, the JSCCCC claimed that oversight is better entrusted to the CCC because of the possibility of corruption and the community's concern that legal immunity is not misused.[140] The JSCCCC pointed out that the CCC's main purpose under section 7A(b) of the *CCC Act* is to "*improve continuously the integrity of, and to reduce the incidence of misconduct in the public sector*" whereas the mission of the Parliamentary Commissioner is to "*improve the standard of public administration*". These foci are very different.

Clauses 36 to 40 – reporting and record-keeping

10.95 Clauses 36 to 40 provide a successive system of reporting whereby the various record-keeping obligations are imposed on each of :

- (first) the principal law enforcement officer;
- (second) the chief officer; and

138 *Answer to a Question on Notice* Number 1 received as a letter to the CCC by Western Australia Police 27 April 2007, p2.

139 Ibid, p1.

140 Submission No 1 from the Joint Standing Committee on the Corruption and Crime Commission, 18 November 2011, p4.

- (third), the Parliamentary Commissioner.

10.96 The annual report of the Parliamentary Commissioner which is laid before each House of Parliament is arguably dependent on the quality of information provided in the two preceding stages:

- The principal law enforcement officer's report of all completed authorised operations must be done after two months and contains six prescribed matters that must be included in the report which is then given to the chief officer.
- The chief officer must then, twice a year, submit a report into eight prescribed matters to the Parliamentary Commissioner. The Parliamentary Commissioner uses this information to draft an annual report of the work and activities of each law enforcement agency for (firstly) the Minister and (ultimately) for the benefit of the Parliament.

Clause 36(2)(a) to(f)

10.97 Subclauses (a) to (f) provide the detail of what must be included in a principal law enforcement officer's report. These are:

> *(a) the dates and times when the authorised operation began and was completed;*
>
> *(b) whether the operation was a cross-border controlled operation or a local controlled operation;*
>
> *(c) the nature of the controlled conduct engaged in for the purposes of the operation;*
>
> *(d) details of the outcome of the operation*
>
> *(e) if the operation involved illicit goods, a statement (to the extent known) of —*
>
> > *(i) the nature and quantity of the illicit goods; and*
> >
> > *(ii) the route through which the illicit goods passed in the course of the operation;*
>
> *(f) details of any loss of or serious damage to property, or any personal injuries, occurring in the course of or as a direct result of the operation.*

10.98 These subclauses raise that overarching fundamental legislative principle the Committee routinely considers: *Does the Bill have sufficient regard to the institution of Parliament*? Arguably, the six prescribed matters that must be included in the report which is then given to the chief officer are insufficient for the chief officer to then draft his or her report for the Parliamentary Commissioner to then present to the Parliament.

10.99 Clause 36(2) prescribes the reporting of essentially technical information whereas the chief officer is required to keep a register under clause 40 recording information in respect of each application (whether for an authority or a variation), including:

- whether the application was granted or refused;
- whether the application was for a retrospective authority;
- the matters noted above; and
- each relevant offence in respect of which the controlled conduct under the authority was to be engaged.

10.100 A chief officer's bi-annual report to the Parliamentary Commissioner must include:

- statistical information on the number of applications for authorities and variations and the number of grants, distinguishing between formal and urgent applications. There is no requirement to identify retrospective authorities or extensions of authorities (simply the number that have been varied);
- the nature of the criminal activities against which the controlled operations were conducted (but not the specific "*relevant offence*" that justified the issue of an authority);
- the nature of controlled conduct engaged;
- details of illicit goods and loss or damage to property and injury to person;
- the number of authorities cancelled or expired; and
- seizures, arrests and prosecutions.

10.101 The EM states that the intent of clause 36 is "*to ensure that within a law enforcement agency there is a mechanism to report back on the outcomes of operations*". It identifies the chief officer's report in clause 37 as "*an important accountability mechanism*", emphasising that this report is made to an "*external, independent oversight body*". It also states that the intent of this "*detailed*" record-keeping provision in respect of retention of documents is to enhance the oversight process by ensuring that the Parliamentary Commissioner has sufficient information on which to conduct inspections and provide a meaningful annual report to the Minister on the agency's compliance with the Bill; and that external, independent oversight of controlled operations is a necessary and important accountability measure. However, the principal law enforcement officers' reports do not provide the information necessary to monitor whether:

- unauthorised law enforcement officers or civilians have engaged in controlled conduct;
- any unauthorised criminal activity has occurred in the course of the controlled operation;

- any person has obtained immunity from criminal responsibility through the ancillary conduct provisions;
- (without recourse to separate records) there were any variations to the authority;
- (without recourse to separate records) there were any retrospective authorities issued;
- there were any extensions of the authority (on this, authorities may have been granted for less than six months and extended);
- any urgent authority was justified or could have proceeded by way of formal application and grant;
- any conditions of the authority were breached;
- there was any indirect loss or damage to person or property arising from the operation; or
- whether any controlled operations have been conducted by other jurisdictions within Western Australia and, if so, whether any conduct that would constitute a criminal offence has occurred and, if so, the nature of that conduct and the outcome of the controlled operation.

10.102 Arguably, clause 36(2) is quantitative rather than qualitative. It is also restrictive because under rules of statutory interpretation, what is expressly prescribed in a list impliedly excludes other matters. This means the principal law enforcement agency cannot be required to provide any information other than what is prescribed in 36(2).

10.103 Western Australia Police said it has no objection to the items listed in paragraph 10.101 (above) being included in clause 36(2) except for a controlled operation authorised in other states that comes into Western Australia.[141]

10.104 The Committee is of the view that the inclusion of the items listed at paragraph 10.101 will enhance the quality of the principal law enforcement officers' reports given to the chief officers and ultimately via the Parliamentary Commissioner, to the Parliament for the benefit of the Parliament. This is because the Parliamentary Commissioner is required to comment on the "*comprehensiveness and adequacy*" of the chief officers' reports under clause 38(5), to the Parliament.

10.105 The importance of the quality of information tabled in the Parliament cannot be overstated. *Egan v Chadwick* supports a broad construction of the Parliament's need to be informed against the need for confidentiality in the public interest.[142]

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141 Commander Murray Smalpage, Director, Intelligence, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p27.

142 Christos Mantziaris, Law and Bills Digest Group, *Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege*, Parliamentary Library, Parliament of Australia Research Paper 12 1999-2000, 14 December 1999.

10.106 The Committee therefore makes the following recommendation.

Recommendation 16: The Committee recommends that clause 36 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so that the principal law enforcement officers' reports must include additional information. This may be effected in the following manner:

Page 30, after line 8 — to insert -

(g) information as to whether —

(i) in the course of the operation, any person engaged in conduct of a kind authorised by the authority for the operation (the relevant conduct) when the person was not so authorised; and

(ii) any criminal activity other than the relevant conduct was engaged in during the operation; and

(iii) any person is, because of section 31, not criminally responsible for ancillary conduct (as defined in that section) related to the relevant conduct; and

(iv) any variations were made to an authority for the operation; and

(v) any of those variations were to extend the period of validity of the authority; and

(vi) any retrospective authority was granted in respect of the operation; and

(vii) any urgent authority was granted in respect of the operation, and if so, whether the conduct authorised by that authority should, in the opinion of the principal law enforcement officer, have been authorised by a formal authority instead; and

(viii) any conditions of an authority for the operation were breached; and

(ix) any loss of or serious damage to property, or any personal injuries, occurred as an indirect result of the operation.

Clause 38 – Annual reports of the Parliamentary Commissioner

10.107 Pursuant to clause 38, the Parliamentary Commissioner is to prepare annual reports of the "*work and activities of the law enforcement agencies*" and give them to the Minister and chief officers. Again, the EM to the Bill identifies this "*oversight*" as an "*important accountability mechanism*", but the emphasis is on process, not substance as no particular information is required.

Clause 38 – Exclusion of some information

10.108 Clause 38(2) states:

> *(2) The chief officer must advise the Minister of any information in the report that, in the chief officer's opinion, should be excluded from the*

> *report before the report is laid before each House of Parliament because the information, if made public, could reasonably be expected to —*
>
> *(a) endanger a person's safety; or*
>
> *(b) prejudice an investigation or prosecution; or*
>
> *(c) compromise any law enforcement agency's operational activities or methodologies.*

10.109 This raises that overarching fundamental legislative principle the Committee routinely considers: *Does the Bill have sufficient regard to the institution of the Parliament* and in particular *does the Bill affects parliamentary privilege in any manner*?

10.110 Parliamentary privileges serve one essential purpose: to enable the Houses of Parliament and their Members to carry out their functions effectively. One role is to oversee the activities of the Executive arm of government. Arguably, this is impeded if full information is not disclosed and sensitive information can be kept in the custody of the Clerk. However, given the risks outlined in clause 38(2), the Committee is of the view that the Bill should be amended so as to include a statement to the effect that certain information has been excluded from the Parliamentary Commissioner's annual report. This is not an unusual feature of some legislation, for example, section 82 of the *Financial Management Act 2006*.[143]

10.111 The Committee recommends that clause 38 be amended so as to ensure the Parliament is alerted to the fact that information of the kind in clause 38(2) has been excluded.

Recommendation 17: The Committee recommends that clause 38 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to ensure that the Parliament is aware that information of the kind referred to in clause 38(2) has been excluded in the annual report of the Parliamentary Commissioner to the Parliament. This may be effected in the following manner:

Page 32, lines 14 to 16 — To delete the lines and insert -

(3) The Minister must —

(a) exclude information from the report if satisfied on the advice of the chief officer of any of the grounds set out in subsection (2); and

(b) insert a statement to the effect that information has been excluded from the report under paragraph (a).

[143] Section 82 states: "***Minister to report decisions not to provide certain information about agencies*** *(1) If the Minister decides that it is reasonable and appropriate not to provide to Parliament certain information concerning any conduct or operation of an agency, then within 14 days after making the decision the Minister is to cause written notice of the decision — (a) to be laid before each House of Parliament or dealt with under section 83; and (b) to be given to the Auditor General. (2) A notice under subsection (1)(a) is to include the Minister's reasons for making the decision that is the subject of the notice.*"

Clause 41 – Inspections of records by the Parliamentary Commissioner

10.112 The Parliamentary Commissioner's power to inspect was inserted in response to the complaints as to the statistical nature of the information to be provided in reports.

10.113 The extent to which this extends to examining issues such as whether authorities are being issued too easily when the criteria have ostensibly been met, or are being used to mask unauthorised criminal conduct by participants, is unclear. Part III of the *Parliamentary Commissioner Act 1971* applies and this enables, amongst other things, that Commissioner to:

> *investigate any decision or recommendation made, or any act done or omitted, that relates to a matter of administration and affects any person or body of persons in his or its personal capacity in or by any department or authority to which this Act applies in the exercise of any power or function.*[144]

10.114 It is questionable whether sufficient information is provided for the Parliamentary Commissioner to be alerted to any possible issues. The *Parliamentary Commissioner Act 1971* also empowers the Parliamentary Commissioner to investigate a matter raised through a complaint. But, again, it is questionable whether there will be sufficient information available for a person to appreciate or substantiate the grounds to complain.

10.115 The Parliamentary Commissioner may report any breach of duty or misconduct found in the course of an investigation conducted under that Act (as applied by clause 41 of the Bill) to the Minister and has broad powers to order rectification or refer matters to other authorities for action.

10.116 The Parliamentary Inspector of the Corruption and Crime Commission is of the view that the Parliamentary Commissioner's role is "*essentially an audit function*"[145] and "*when you have an audit function and all you have is documents that reflect the procedures that have been followed and you have no way of going behind those documents, it is a very limited role and I think that will be the effect of it.*" [146]

10.117 Although the Parliamentary Commissioner's report is to comment on the "*comprehensiveness and adequacy*" of the reports provided by the chief officer, this is in the context of the requirements of the legislation - not in the context of whether the reports enable proper evaluation and accountability. Certainly the Parliamentary Commissioner sees his oversight function as strict compliance with the legislation. He said:

> *As I read the oversight provisions, they are there to ensure and report upon the extent of compliance to the legislation, and that is very much*

144 Section 14(1).

145 Mr Christopher Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p3.

146 Ibid, p6.

> *what the annual report ought to be informing, ultimately, the Parliament about: is there compliance or not compliance and the extent of it with the relevant provisions of the legislation? I certainly have had an opportunity to have a look at the report of the New South Wales Ombudsman, which has a similar, not exactly the same, regime—not at this stage saying its report would be exactly the same, less or more. But certainly it is one example and I think there is a capacity from that, as being an example of a jurisdiction that is a little bit further down the track and a reporting that has actually been made, it is clearly the capacity to talk about the extent of compliance with the legislation.*[147]

10.118 The annual report is to be tabled in each House of Parliament but the Minister can excise information on the chief officer's advice that, separate from endangering a person's safety or prejudicing an investigation or prosecution, it compromises an agency's operational activities or methodologies. There is no obligation for the Parliamentary Commissioner to include in the annual report any inappropriate use of the controlled operation powers, breach of duty or misconduct found under an investigation.

10.119 The Parliamentary Commissioner's report on an investigation under clause 41 is made to the chief officer, with a copy to the Minister. In the event of non-compliance with a recommendation, the Commissioner may report to the Premier. The Parliamentary Commissioner may also lay the report before the Parliament.

Clause 41 – Investigation of controlled operations by the Parliamentary Commissioner

10.120 The Committee noted an absence of power for the Parliamentary Commissioner to conduct investigations into particular controlled operations. The Parliamentary Commissioner's role is limited in clause 41(2) to that of entry and search to inspect records. The Parliamentary Commissioner cannot, for example:

- provide advice to the Parliament as to the misuse of controlled operations; or
- reverse an authority whether retrospective or not,

and it is the view of the Parliamentary Inspector of the Corruption and Crime Commission that the Parliamentary Commissioner should have the power to conduct investigations into particular controlled operations.[148] The following comment from the Inspector highlights the Committee's concern over the weakness of clause 41:

> *These are extraordinary powers and they should be used in extraordinary circumstances. There is always a risk when you grant extraordinary powers that each time you grant one, people become*

147 Mr Chris Field, Western Australian Ombudsman (Parliamentary Commissioner), *Transcript of Evidence*, 30 November 2011, p4.

148 Mr Christopher Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p5.

used to that power and it becomes easier to grant the next and abuse becomes more likely over time as people get used to these powers.

I think it is very important to have an effective oversight role that is not simply auditing whether the paper requirements have been met but actually looking to see whether what has been put in the paper is what happened on the ground. There are difficulties in doing that because you do not want people to necessarily know too much information when some of that information is going to be very sensitive. Nonetheless, I think it is an important safeguard.[149]

10.121 The Committee is of the view that in light of the Inspector's comments, the Parliamentary Commissioner should be given the power to conduct fulsome inquiries or investigations into particular controlled operations given that under the Bill, no-one has the capacity to review the decision to grant an authorisation. Arguably, such an investigatory power should continue to rest with the CCC but as a minimum, the Committee is of the view it should be given to the Parliamentary Commissioner, especially as Part III of the *Parliamentary Commissioner Act 1971* limits the Commissioner to only investigating decisions, recommendations, actions or omissions relating to "*a matter of administration*". There is an absence of being able to conduct a substantive investigation. For this reason, the Committee makes the following recommendation.

Recommendation 18: The Committee recommends that the Parliamentary Commissioner should be given the power to conduct investigations into particular controlled operations. This may be effected in the following manner:

Part 2 Division 4 Subdivision 3 heading

Page 35, line 18 — To insert after "Inspections"-

and investigations

Page 36, after line 7 - To insert -

(5) For the purposes of the *Parliamentary Commissioner Act 1971* section 14(1) the grant, variation or cancellation of, or refusal to grant, vary or cancel, an authority is to be taken —

(a) to be a decision or recommendation made, or an act done or omitted, that relates to a matter of administration; and

(b) to affect a person or body of persons in his, her or its personal capacity.

149 Mr Christopher Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 30 November 2011, p5.

Clause 43(1)(b)

10.122 The Australian Crime Commission (**ACC**) advised that clause 43(1)(b) defines a "*senior officer*" for the purposes of the ACC as meaning the "*Director of National Operations*" or a "*person holding a prescribed office in the ACC*". The position of "*Director of National Operations*" no longer exists within the ACC and any reference to it in the Bill could create confusion. The current position which could be referenced is "*Executive Director*".[150] Western Australia Police said:

> *On the face of it I do not think there will be any issue with that. I think at the previous hearing there were a couple of other matters where we indicated that there were some cosmetic changes to be made to the bill, so on the face of it I do not think there is going to be any issue with the seeking approval to do an amendment along those lines.*[151]

10.123 In light of the above admission, the Committee makes the following recommendation.

Recommendation 19: The Committee recommends that clause 43(1)(b) of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to overcome the difficulty identified by the Australian Crime Commission with respect to the definition of "*senior officer*". This may be effected in the following manner:

Page 37, line 8 — To delete "Director of National Operations;" and insert -

Executive Director;

11 PART 3 OF THE BILL – ASSUMED IDENTITIES

11.1 An assumed identity is a false identity that is used by an officer or other intelligence person. Assumed identities provide protection for undercover operatives engaged in investigating crimes and infiltrating organised crime groups. Undercover operatives need to be able to substantiate their assumed identity with proper identification documents. Such documents include birth certificates, drivers' licences, passports and credit cards. In the absence of a verifiable identity the safety of undercover operatives can be jeopardised.

11.2 In 1997, the Wood Royal Commission into the New South Wales Police Service criticised the fact that no legislative regime existed in any Australian jurisdiction to regulate police use of assumed names or identities in controlled and undercover operations.

11.3 Many of the clauses in Part 2 of the Bill are replicated in Part 3. For example:

150 Submission No 9 from Ms Karen Harfield, Acting Chief Executive Officer, Australian Crime Commission, 22 December 2011, p1.

151 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p62.

- whether the authority to acquire or use an assumed identity should be an internal or external authorisation process;
- the process for applying for an assumed identity by both law enforcement officers and authorised civilians is highly prescriptive but in this Part alone extends to allowing the making of false records in the Register of Births, Deaths and Marriages; and
- there is protection from criminal liability in clause 65 and the provision of an indemnity for any liability incurred if done in the course of acquiring or using an assumed identity.

12 SPECIFIC CLAUSES IN PART 3 OF THE BILL – ASSUMED IDENTITIES

Clause 45 - The non-application of certain Acts

12.1 The Committee's comments and recommendations at paragraphs 10.31 to 10.50 regarding clause 9 are applicable to clause 45. Thus the Committee makes the following recommendation.

Recommendation 20: The Committee recommends that clause 45 of the Criminal Investigation (Covert Powers) Bill 2011 be deleted. This may be effected in the following manner:

Page 40, lines 1 to 6 – To delete the lines

12.2 If the Legislative Council does not support recommendation 20, the Committee makes the following recommendation.

Recommendation 21: The Committee recommends that that if the Legislative Council does not support recommendation 20, clause 45 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so that the *Freedom of Information Act 1992* and the *State Records Act 2000* do not apply to activities or records under Part 3 but to apply after a period of 30 years. This may be effected in the following manner:

Page 40, line 3 - To delete "Part –" and insert -

Part for 30 years after the commencement of this section –

Clause 48 – Determination of application

12.3 As per the Model Law, clause 48 provides that the chief officers must be satisfied that the assumed identity is necessary for investigation or intelligence gathering of criminal activity "*in relation to, criminal activity (whether a particular criminal activity or criminal activity generally)*"; and that the risk of abuse of the assumed identity by the authorised person is minimal.

12.4 There are two significant deviations from the Model Law in this clause. The JWG did not recommend the granting of an assumed identity for:

- "*the training of persons*" for the above purposes; or
- "*any administrative function in support of*" the above purposes.

12.5 The Committee noted that the creation of an assumed identity merely for training purposes or administrative support diminishes the integrity of the birth, deaths and marriages register. Western Australia Police said the Model Law provisions were not considered adequate[152] but even the Commissioner of Police queried with his own staff why an assumed identity cannot be role played.[153]

12.6 Western Australia Police said NSW and the Commonwealth include these deviations and that if the clause is not passed, the current practice of obtaining administrative authority would continue. Western Australia Police need the deviations to legitimise a longstanding administrative process which it would return to if the proposed clause is not enacted.[154]

12.7 The Committee repeats its claim that any deviation from the Model Law fragments the uniformity of the scheme and introduces complexity. The Committee is of the view that on balance, Western Australia Police has not provided convincing evidence of the need for the two deviations. The integrity of the birth, deaths and marriages register is already compromised and to compromise it further merely for training purposes or administrative support, diminishes the integrity of the register even further. For this reason the Committee makes the following recommendation.

Recommendation 22: The Committee recommends that subclauses 48(2)(a)(ii) and (iii) of the Criminal Investigation (Covert Powers) Bill 2011 be deleted. This may be effected in the following manner:

Page 42, lines 22 to 25 – To delete the lines

Clause 76(2) - Reports about authorities for assumed identities

12.8 Clause 76(2) states:

> *The chief officer must advise the Minister of any information in the report that, in the chief officer's opinion, should be excluded from the report before the report is laid before both Houses of Parliament*

152 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p34.

153 Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p36.

154 Commander Murray Smalpage, Director, Intelligence, Western Australia Police, *Transcript of Evidence*, 17 January 2012, p38.

because the information, if made public, could reasonably be expected to —

(a) endanger a person's safety; or

(b) prejudice an investigation or prosecution; or

(c) compromise any law enforcement agency's operational activities or methodologies.

12.9 Similar to clause 38(2), clause 76(2) also raises that overarching fundamental legislative principle the Committee routinely considers: *Does the Bill have sufficient regard to the institution of Parliament* and in particular *does the Bill affect parliamentary privilege in any manner*?

12.10 For the same reasons discussed at paragraphs 10.108 to 10.111 of this Report, the Committee recommends that clause 76 be amended so as to alert the Parliament that information of the kind in clause 76(2) has been excluded.

Recommendation 23: The Committee recommends that clause 76 of the Criminal Investigation (Covert Powers) Bill 2011 be amended so as to ensure that the Parliament is aware that information of the kind referred to in clause 76(2) has been excluded in the annual report of the Parliamentary Commissioner to the Parliament. This may be effected in the following manner:

Page 61, lines 18 to 20 — To delete the lines and insert -

(3) The Minister must —

(a) exclude information from the report if satisfied on the advice of the chief officer of any of the grounds set out in subsection (2); and

(b) insert a statement to the effect that information has been excluded from the report under paragraph (a).

"*Each*" *or* "*both*" *Houses of Parliament?*

12.11 The Committee noted that clause 76(2) is identical to clause 38(2) except for references to the Houses of Parliament. Clause 76(2) uses the phrase "*both Houses of Parliament*" whereas clause 38(2) uses the "*each House of Parliament*".

12.12 The Committee noted that the *Interpretation Act 1984* uses these terms interchangeably.[155] However, given that they are otherwise identical provisions and in the absence of any other explanation from the Minister representing the Minister for Police during *committee of the whole*, the Committee recommends that clause 76(2) be amended for consistency with clause 38(2).

[155] For example, in section 42(1) the term "*each*" is used, whereas section 42(2) uses the term "*both*".

Recommendation 24: The Committee recommends that the words "*both Houses*" in clause 76(2) of the Criminal Investigation (Covert Powers) Bill 2011 be deleted and the words "*each House*" inserted instead. This may be effected in the following manner:

Page 61, line 11 – To delete "both Houses" and insert –

each House

13 PART 4 OF THE BILL – WITNESS IDENTITY PROTECTION

13.1 The JWG Report states:

> *Occasionally it is necessary to allow a witness to give evidence without disclosing his or her true identity, in order to protect the personal safety of the witness or his or her family. Several Australian jurisdictions provide specific measures to protect the true identity of covert operatives who give evidence in court. These measures include holding the part of the court proceedings relating to the person's identity in private; suppressing the publication of evidence relating to the person's identity; excusing the witness from disclosing identifying details; and enabling the person to use a false name or code name during court proceedings.*[156]

13.2 Witnesses who are covert operatives currently rely on public interest immunity to protect their identity. In 2003, the JWG Report noted that the "*Western Australia Police Service supported a statutory protection for undercover operatives, rather than leaving protection of their identities to judicial discretion.*"[157] As Western Australia Police said, "*this is a matter of discretion for the trial judge and there is no assurance that an operative will be granted that immunity.*"[158] Western Australia Police have a particular concern with members of outlaw motor cycle groups attending court and obtaining photographs of covert operatives being called as witnesses in public waiting areas of the court. These photographs are then circulated amongst the gangs. This compromises the covert operatives' utility and has a high financial cost on training replacements.[159]

13.3 It is not the intention of the Model Law that the operative will be a 'secret' or 'anonymous' witness who does not appear before the court. Part 4 of the Bill proposes the giving of evidence under a pseudonym and by clause 83, a certificate is issued to protect the identity of an operative. However, Part 4 raises the issue of balancing competing aspects of the public interest. As the JWG Report states:

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156 JWG Report, p245.

157 Ibid, p245.

158 *Answer to a Question on Notice* Number 16 provided from a Hearing on 17 January 2012, pp3-4.

159 Ibid, pp3-4.

> *Concealing the true identity of undercover operatives can achieve two purposes which are in the public interest. The first is protecting the personal safety of the witness (or other persons connected to the witness, such as his or her family). The second is enhancing the efficacy of undercover operations.*
>
> *By protecting the true identity of the witness, he or she is preserved as a useful undercover officer, an important tool in fighting organised crime. Concealing an undercover operative's true identity may also be necessary to encourage police officers to participate in undercover operations, confident that, if necessary, their identity and safety will be protected*.[160]

13.4 Part 4 raises that overarching fundamental legislative principle the Committee routinely considers - *Does the legislation have sufficient regard to the rights and liberties of individuals?* In this case, the right to a fair trial. As the JWG Report states:

> *There is a competing public interest in the right of an accused to be tried fairly and in the conduct of criminal proceedings in public. In order to protect a witness' identity, court proceedings may be closed to the public, or orders may be made suppressing the publication of details about the witness' identity.*
>
> *These restrictions have the potential to undermine the public interest in open court proceedings. Additionally, measures which conceal the true identity of a witness may detract from the right of an accused to be tried fairly, to the extent that they may impinge on the defendant's ability to test properly the credibility of the witness.*

13.5 In *Dietrich v The Queen*, Mason CJ and McHugh J said: "*the right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.*"[161] Deane J said:

> *That such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilization. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle. And if the right be admitted, it would be an empty thing, unless the law adequately protected it. It seems*

160 JWG Report, pp245-6.

161 (1992) 177 CLR 292.

> *necessary, however, to adduce authority. Fortunately it is clear and weighty.*
>
> *Isaacs J.'s statement that the requirement that the trial of an accused person be "fair and impartial" is deeply rooted in our system of law and was not the stuff of empty rhetoric.*[162]

13.6 As was said by the Criminal Law Committee of the Law Society of South Australia, in a submission to the South Australian Attorney-General:

> *It is a long established principle of the common law that a defendant in a criminal trial should be confronted by his accusers so that he/she may cross-examine them and challenge their evidence. The principle originated in ancient Rome and has been recognised throughout history and even in cases where the problem of witness intimidation has been extreme.*
>
> *That right is recognised in the United States as a constitutional right. It is as an essential and fundamental requirement of a fair trial.*
>
> *It is an important right that has been recognised in New Zealand, Canada, Australia, South Africa and elsewhere.*
>
> *The right to confront a witness is basic to any civilised nation of a fair trial. That right includes the right for an accused person to ascertain the true identity of a witness where questions of credibility are in issue. Protective measures for witnesses are recognised, such as with a closed court, suppression orders and other current provisions in the Evidence Act for giving of evidence by closed circuit television or other ways that protect a witness.*
>
> *It is not a new problem and hence demonstrates how such processes have historically been recognised as infringing fundamental rights.*[163]

13.7 However, as the JWG Report argued:

> *A defendant's capacity to test the credibility of a witness is in all cases subject to restrictions on the use of credibility evidence. Questions may be asked in cross-examination which are relevant to credibility, but only if the questions relate to issues which (if proven) would seriously affect the court's assessment of the witness' credibility. The types of issues which may go to credibility are:*
>
> *• the witness' general honesty, expertise or standing in the community;*
>
> *• the witness' motive to lie;*

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162 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, pp541-542.

163 12 November 2008 and quoted in the South Australian Legislative Council debate on the equivalent bill, 19 February 2009, p1381.

> *• the consistency, or inconsistency, of the witness' evidence with previous statements made by the witness; or*
>
> *• the witness' capacity for accurate observation and recollection.*
>
> *The true identity of the witness will not always be required for credibility to be tested. Issues such as the witness' motive to lie or capacity for accurate recollection will not usually hinge on the actual name or address of the witness.*
>
> *While there is a possibility that protecting the identity of a witness may affect the defendant's ability to pursue questioning about credibility, this is balanced against the competing public interests in the protection of the witness and in the effective investigation of serious crime. In order to strike this balance, protection of a witness' identity will only be available in exceptional circumstances and subject to strict criteria.*
>
> *A model legislative system for protection of witness identity for covert operatives has the advantage of providing transparency and certainty as to when identity will be protected. It will also provide consistency for law enforcement agencies and operatives who operate in cross-border investigations.*[164]

13.8 The Committee lacked the time to consider this issue further but noted witnesses currently give evidence under a court name or number which clearly reveals to the defendant that the witness is in all likelihood an operative. However, with an assumed identity, the defendant will never know if the witness is an operative.

13.9 The Committee is satisfied that in balancing the competing public interests, the Bill provides an accused with a fair trial as it is the intention of the Model Law that a witness with an assumed identity appears to give evidence, the veracity of which, is still subject to cross examination. Further, the assumed identity is necessary in order to protect the witness from the potential repercussion of giving evidence.

14 SPECIFIC CLAUSES IN PART 4 OF THE BILL – WITNESS IDENTITY PROTECTION

Clause 80

14.1 Clause 80 raises that fundamental legislative principle the Committee routinely considers - *Does the Bill have sufficient regard to the institution of Parliament* and in particular *does the clause affect parliamentary privilege in any manner*?

14.2 Clause 80 states:

> ***Terms used***
>
> *In this Part, unless the contrary intention appears —*
>
> ***court** includes —*

[164] JWG Report, p245-246.

> *(a) a tribunal or other body established or continued under a written law and having a power to obtain evidence or information;*
>
> *(b) a Royal Commission established under the Royal Commissions Act 1968;*
>
> *(c) a commission, board, committee or other body established by the Governor or by either or both Houses of Parliament or by the Government of the State to inquire into any matter;*

14.3 The Committee noted that the definition of "*court*" deviates from the Model Law in a significant way. The Model Law limits the definition to including "*any tribunal or person authorised by law or consent of parties to receive evidence.*"[165] However, unlike other jurisdictions,[166] Western Australia Police expanded the definition to "*allow for maximum protections to operatives and protected witnesses when giving evidence, information or producing documents.*"[167]

14.4 The rationale for clause 80 is the need to extend the protection to any proceeding where a person is required to attend and give their name. A further justification is that it is "*in line with*" the definition of "*court*" in the *Witness Protection (Western Australia) Act 1996* and the *CCC Act*.[168] Whilst that is true of the *Witness Protection (Western Australia) Act 1996* it is not true with respect to the *CCC Act.* There, sections 114, 134, 152, 153, 208 and 209 do not expressly prescribe for the Houses of Parliament or its committees.[169] Section 114 for example states:

> ***Identity of certain officers not to be disclosed in legal proceedings*** *(1) In this section — court includes any tribunal, authority or person having power to require the production of documents or the answering of questions.*

14.5 Clearly the definition of "*court*" in those sections, although broad, does not apply to the Parliament or its committees when read with section 3(2) of the *CCC Act* which reinforces that nothing in that Act:

> *affects, or is intended to affect, the operation of the Parliamentary Privileges Act 1891 or the Parliamentary Papers Act 1891 and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.*

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165 JWG Report, p250.

166 Mr Malcolm Peacock, Clerk of the Parliaments, *Transcript of Evidence*, 16 December 2011, p3.

167 Submission No 6 from Western Australia Police, 19 December 2011, unnumbered page.

168 Ibid.

169 Section 114 by way of example states: "***Identity of certain officers not to be disclosed in legal proceedings*** *(1) In this section — court includes any tribunal, authority or person having power to require the production of documents or the answering of questions*."

14.6 The view of Western Australia Police is as follows:

> *In the context of the issues of parliamentary privilege, what it is about is protecting the identity of the actual person, not preventing any publication of evidence that they may give. So I do not know to what extent there will be any problems with parliamentary privilege.*
>
> *For example, the name of the person giving evidence is not published or included in any report, the information given by the operative is subject to parliamentary privilege; however, their identity is protected.*
>
> *I do not know whether it is likely that the operative's true identity would have any bearing on the evidence they would give; it is more a case of the evidence they are giving than their identity.*
>
> *It is not about putting any sort of restrictions in terms of parliamentary privilege about what evidence they may give to parliamentary committees et cetera but about protecting the true identity of who it is.*[170]

14.7 Further, Western Australia Police advised that no other jurisdiction expressly prescribes parliamentary committees in their respective definitions of "*court*" and that this was:

> *possibly not contemplated by the JWG on model laws as they would not have foreseen the necessity for operatives to give evidence at parliamentary committee hearings but rather concentrated on the traditional places an operative would be called to give evidence (usually criminal proceedings). Western Australia included Parliamentary Committees to assure that a mandated provision would assure the protection of an operative's true name.*[171]

14.8 Although the Explanatory Memorandum states that its definition "*is broad to ensure maximum protection to operatives when giving evidence*"[172], the Committee is of the view that the inclusion of the Parliament and its committees diminishes the sovereignty of the Western Australian Parliament. As a fundamental principle, it would only be in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations and legislate so as to limit itself in some way.[173]

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170 Mr Malcolm Penn, Assistant Director, Legal and Legislative Services, Western Australia Police, *Transcript of Evidence*, 17 January 2012, pp49-50.

171 *Answer to a Question on Notice* Number 17 from a Hearing on 17 January 2012.

172 The Explanatory Memorandum, p31.

173 Report into Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (referred 18 March 2010), tabled 4 June 2010, viewed on 15 November 2011.

14.9 Arguably, the intent of clause 80 is to waive parliamentary privilege and impacts on Article 9 of the *Bill of Rights 1689.* Article 9, which is incorporated as section 1 in the *Parliamentary Privileges Act 1891*[174], provides that the "*freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*."

14.10 By Article 9, each House of Parliament, its committees, Members and attending witnesses are able to operate without their proceedings being questioned or interfered with in any way. Arguably, clause 80, which seeks to limit this freedom is fundamentally obnoxious and inconsistent with Article 9. As stated by Emeritus Professor Enid Campbell:

> *Australian Parliaments have not shown any inclination to remove or "qualify" the protections accorded by Article 9 of the Bill of Rights 1689. The freedoms enshrined in Article 9 are undoubtedly the most important of the privileges of Parliaments and are essential in parliamentary democracies.*[175]

14.11 Article 9 established the right of the Parliament to determine what matters were to be considered by it. 'Proceedings in Parliament' includes evidence before a committee, submissions made and the report of that committee. A related question arises as to its impact on section 7 of the *Parliamentary Privileges Act 1891*, which limits the ground on which a person can refuse to answer a Parliamentary inquiry due to the matter being of "*a private nature*" and "*not affecting the subject of inquiry*" with the House determining whether that refusal will be accepted. If clause 80 was applied to proceedings in the Parliament, section 7 would be diminished.

14.12 Concealing the true identity of an operative who may appear before the Parliament is directed at two public interests:

- protecting the personal safety of the operative witness (their family and associates); and
- enhancing the efficacy of the controlled operations by preserving the cover of an operative and providing some security for other police officers when participating in controlled operations.[176]

14.13 The competing public interests are the right of an accused to be tried fairly and the conduct of criminal proceedings in public. Limitations on the latter have potential to undermine public confidence in court proceedings.[177] The same is true for Parliamentary inquiries.

14.14 The assumed identity provisions will deny a "*court*" (here, the Parliament or a committee), any role in evaluating whether there is a need to protect the true identity

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174 Emeritus Professor Enid Campbell, *Parliamentary Privilege*, The Federation Press, (Sydney) 2003, p10.

175 Ibid, p10.

176 JWG Report, p246.

177 Ibid, p246.

of a witness and in balancing that need against other competing interests, such as the interests of justice. In contrast, sections 114, 134, 152, 153, 208 and 209 of the *CCC Act* allow the Commission to ask an operative to reveal their true identity. The Committee finds it extraordinary that a person with an assumed identity within the Department of Fisheries or Western Australia Police appearing before a Parliamentary committee cannot be asked to reveal their true identity, yet can if before the CCC.

14.15 The following clauses in Part 4 of the Bill give context to the term "*court*".

- Clause 87(3) defines a person involved in a proceeding to include "*the court*" (which would include members of the Parliament) and "*any other officer of the court or person assisting the court in the proceeding*"; (this would include all parliamentary staff, including Hansard).
- Clause 90(8) provides for a "*court*" (again being a Parliamentary committee) to make orders suppressing the publication of anything said in a hearing and how subsequent transcripts are to be dealt with in order to protect the operative's true identity and location.
- Clause 93(4) allows for appeals to a court that has jurisdiction to hear and determine appeals from a judgment given pursuant to clauses 86 and 90. If, in a parliamentary committee hearing, the operative is asked to identify him or herself and refuses, the clause allows the person to seek an adjournment of the proceeding and apply to a court for a judgment on appeal against the decision to give or refuse leave or to make or refuse to make an order. The person leaves the committee hearing and goes to court. At that stage, there is interference in the processes of a Parliamentary committee by another court.

14.16 The Committee is of the view that clause 80(c) seeks to constrain the Parliament in the conduct of its inquiries and places conditions on the access by Parliamentary committees to certain information. In so doing, this fundamentally undermines both the powers and immunities of parliamentary committees and the rights of unfettered access to persons by parliamentary committees.

14.17 A particular feature of Parliamentary inquiries is their power to compel evidence, which exists independent of any explicit prescription as an aspect of the power to legislate. The Bill may necessarily impose a limit on the general power to inquire - so that compulsory inquiries cannot be conducted into matters beyond the Parliament's legislative competence. As noted, legal and police submissions to the JWG were that:

- the criteria were too light - every covert operation would meet the test; and
- it is inappropriate for the Executive to take over a judicial function.

14.18 These criticisms apply equally to the Executive's usurpation of Parliamentary privileges.

14.19 The requirement that a Parliamentary hearing must be held in a closed "*court*" is not in accord with the power of the Parliament to fundamentally determine its own process.

14.20 Further, to override the operation of Parliamentary privilege by making Parliamentary committee operations bound by a statute:

- setting conditions of access between parliamentary committees and their witnesses,
- dictating the manner in which parliamentary committees must hear evidence, and
- making any disclosure of a witness's identity a criminal offence,

is a departure from the long-standing supremacy of Parliamentary privilege and a significant trespass on the powers, privileges and immunities of the Houses and their committees and on the rights of witnesses of the Parliament.

14.21 To date, there are no known instances where a committee has requested an individual to disclose their real identity. As to whether a committee would ever inquire into the identity of an individual, this is highly unlikely.[178] Parliamentary committees have been known to respect the wishes of persons appearing before them by using non-identifying information in tabled reports. In comparison, Western Australia Police wish to retain clause 80(c) on the cryptic basis that they "*have had some experience in relation to disclosure of details relating to covert operatives who appeared before a parliamentary committee*".[179] Western Australia Police said:

> *A previous Parliamentary Committee did not heed a confidentiality agreement and allowed the names of covert operatives to be published. The Western Australia Police seeks to assure that the protection of an operatives name cannot be left to chance and that future administrative errors cannot occur or result in harm to an operative.*[180]

14.22 It is the Committee's view that Western Australia Police has not justified the definition of "*court*" in clause 80 as it applies to the Parliament and its committees. The Committee therefore makes the following recommendation.

178 Mr Malcolm Peacock, Clerk of the Parliaments, *Transcript of Evidence*, 16 December 2011, p8.

179 *Answer to a Question on Notice* Number 19 arising from a Hearing on 17 January 2012, p9.

180 *Answer to a Question on Notice* Number 17 from a Hearing on 17 January 2012.

Recommendation 25: The Committee recommends that clause 80(c) of the Criminal Investigation (Covert Powers) Bill 2011 be amended. This may be effected in the following manner.

Page 65, lines 21 to 24 – To delete the lines and insert –

(c) a commission, board, committee or other body established by the Governor or by the Government of the State to inquire into any matter;

Clause 85

14.23 This clause provides that a witness identity protection certificate for an operative must be filed by a "*person*" in the court before the operative gives evidence. The DPP said that it is unclear who will actually be responsible for the filing – is it the chief officer or the prosecuting authority?[181] Western Australia Police said:

> *This should be a matter of policy for WAPOL or the issuing agency of the certificate. As the issuing authority the head of power can then direct that the requirements contained within the clause of the Bill are fulfilled. This will alleviate the issue where a court matter is not a criminal prosecution and therefore does not involve the DPP, for example a civil or family law court matter where a covert operative maybe required to give evidence.*[182]

14.24 Due to time constraints, the Committee was unable to investigate this further. However, the Legislative Council may wish to consider this clause further in *committee of the whole*.

Clause 88(1)(a)

14.25 The DPP claimed that the reference in subclause (a) to section 88 may be an error because section 88 refers to Orders that can be made by the Court but does not refer to the actual application that needs to be made to obtain those Orders. The DPP queried whether the reference should be section 89.[183]

14.26 Western Australia Police said they disagreed with the DPP because clause 89 deals with the disclosure of the operative's true identity to a presiding officer which does not require any application by the operative. However, Western Australia Police acknowledged that the wording of clause 88(1)(a) is ambiguous and requires amendment. The following wording was suggested:

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181 Submission No 5 from Mr Joseph McGrath SC, Director of Public Prosecutions, for Western Australia, 19 December 2011, p2.

182 *Answer to a Question on Notice* Number 28 provided from a Hearing on 17 January 2012, p11.

183 Submission No 5 from Mr Joseph McGrath SC, Director of Public Prosecutions for Western Australia, 19 December 2011, p2.

> *The court in which a witness identity protection certificate is filed-*
>
> *(a) must hear the proceeding (including any application made under section 86 or 90 or order made under section 88(1)(b) relating to the proceeding, in a closed court, and*

14.27 The Committee agrees with this proposed amendment and therefore makes the following recommendation.

Recommendation 26: The Committee recommends that clause 88(1)(a) of the Criminal Investigation (Covert Powers) Bill 2011 be amended to clarify its meaning. This may be effected in the following manner:

Page 72, lines 17 to 19 – To delete the lines and insert -

(a) must hear the proceeding (including any application made under section 86 or 90 or order made under section 88(1)(b) relating to the proceeding, in a closed court; and

Clause 96 – Disclosure offences

14.28 This clause states that a person must not do something that leads to the disclosure of a true identity. The DPP stated it is unclear whether the true identity of an operative must also remain suppressed for the subsequent prosecution of any disclosure offences.[184] Western Australia Police said:

> *The true identity of the operative would remain suppressed and therefore the wording of clause 96 is correct. The crux of this clause is that a valid witness identity certificate is in force at the time of the offence of disclosure. An evidentiary certificate under section 97 will be issued in the instance where a Witness Identity Protection certificate is in force and the disclosure offence was detected at that time.*
>
> *Where the disclosure offence occurred and a valid Witness Identity Protection Certificate was in force and the Witness Identity Protection Certificate was later cancelled and the disclosure offence was then discovered, evidence would be adduced that the Witness Identity Certificate was valid at the time of the alleged offence.*
>
> *Disclosure of the identity of the operative maybe still be suppressed on the basis of ongoing operational matters (new certificate issued)*

[184] Submission No 5 from Mr Joseph McGrath SC, Director of Public Prosecutions for Western Australia, 19 December 2011, p2.

> *or the identity may be disclosed to the court by way of evidence as the requirement to protect the identity no longer exists.*[185]

14.29 The Committee is satisfied with this explanation.

14.30 Of this same clause, the DPP also queried whether the protections of a witness identity protection certificate carry over into the breach proceedings in section 96, or if once disclosed, protection of that information is then lost for the subsequent proceedings.[186] Western Australia Police said:

> *The name remains protected whilst a valid certificate is in force whether the offence of disclosing the name has been committed. If the name was disclosed on subsequent occasions and the certificate was still in force the offence of disclosure continues to be committed.*
>
> *An alternate example of this is where a person is charged with a Driving Under the Influence offence and then gets picked up again a short time later and is charged a second or third time for the same offence. They are under the influence and driving so it doesn't matter how many times they are stopped they will be charged for committing the offence.*[187]

14.31 The Committee is satisfied with this explanation.

Clause 98 – Reports about witness identity protection certificates

14.32 The DPP suggested that the annual, witness identity protection certificates report submitted to the Minister be amended to include the number of disclosure offences prosecuted under section 96. Western Australia Police said:

> *As stated in the model law discussion paper on page 185 and the final report on page 325, the purpose of the report is to propose a mechanism for reporting the issuing of certificates and to check they are issued only in appropriate circumstances. The report is about the certificates and not about other matters or breaches that arise around the operational use of the certificate. Information about breaches can be captured and recorded by way of other statistical or reporting mechanisms provided by the agency or the courts in annual reports.*
>
> *The Minister under section 98(2)(f) may ask for additional information to be furnished. This provides for flexibility in reporting should the Minister see fit. Reports regarding disclosure offences*

185 *Answer to a Question on Notice* Number 30 provided by Western Australia Police from a Hearing on 17 January 2012, p11.

186 Submission No 5 from Mr Joseph McGrath SC, Director of Public Prosecutions, for Western Australia, 19 December 2011, p2.

187 *Answer to a Question on Notice* Number 31, Part A provided by Western Australia Police from a Hearing on 17 January 2012, pp11-12.

were not contemplated by the JWG, were not part of the model laws and therefore were not included in this bill.[188]

14.33 The Committee is satisfied with this explanation.

15 REVIEW OF THE ACT

15.1 The Committee noted that there is no review of the powers being provided to law enforcement agencies. The Committee is of the view that given the extraordinary nature of these powers being granted and that the process of reporting to the Parliament is process driven rather than evaluative, a review of Parts 2 and 3 of the Bill should be undertaken five years after commencement.

15.2 The Committee therefore makes the following recommendation.

Recommendation 27: The Committee recommends that the Criminal Investigation (Covert Powers) Bill 2011 be amended by inserting a five year review of Parts 2 and 3. This may be effected in the following manner:

Page 82, after line 6 — To insert —

102A Parts 2 and 3 to be reviewed

(1) The Minister must carry out a review of the operation of Parts 2 and 3 of this Act as soon as practicable after the expiration of 5 years after the date on which the Act commences.

(2) The Minister must prepare a report based on the review and, as soon as practicable after the report is prepared and in any event not more than 18 months after the expiry of the period referred to in subsection (1), cause it to be laid before each House of Parliament.

16 OTHER – PROPOSED NEW TERM OF REFERENCE FOR THE JSCCCC

16.1 As stated at paragraphs 10.78 to 10.81, the Committee is dissatisfied at the level of qualitative oversight of retrospective authorities granted by the Parliamentary Commissioner, recommending that the JSCCCC be given an oversight role.

16.2 Given the reluctance of the CCC to oversee controlled operations, there is merit in the JSCCCC having its terms of reference extended to oversighting the whole of Part 2 of the Bill. This would enhance the sovereignty of the Western Australian Parliament. Therefore the Committee makes the following recommendation.

188 *Answer to a Question on Notice* Number 31, Part B provided by Western Australia Police from a Hearing on 17 January 2012, p12.

Recommendation 28: The Committee recommends that the terms of reference of the Joint Standing Committee on the Corruption and Crime Commission be extended to provide oversight of Part 2 of the Criminal Investigation (Covert Powers) Bill 2011.

17 AMENDMENTS TO THE BILL

17.1 The Committee was advised in two separate hearings that the Government proposes three amendments.

18 CONCLUSION

18.1 As it applies to cross-border operations, the Bill deviates from the Model Law in some significant respects. Otherwise, the Bill implements other provisions in the Model Law and is consistent with Item 15 of the *Commonwealth and State and Territories Agreement on Terrorism and Multi-jurisdictional Crime* dated 5 April 2002. Although this agreement was made at Ministerial level, no formal agreement was ever signed.

18.2 The Bill is also opportunistic in that the controlled operations and assumed identities provisions will be used for detecting criminal activity within Western Australia.

Hon Adele Farina MLC
Chairman
6 March 2012

APPENDIX 1

LIST OF STAKEHOLDERS AND SUBMISSIONS

APPENDIX 1

LIST OF STAKEHOLDERS AND SUBMISSIONS

Dr Karl O'Callaghan **(Submission No 6)** Commissioner Western Australia Police
Mr Stuart Smith Chief Executive Officer Department of Fisheries
Mr Brad Adams Chairman The Western Australian Fishing Industry Council
Mr John Newby Chairman The Western Rock Lobster Council
Ms Cheryl Gwilliam Director General Department of the Attorney General
Mr Keiran McNamara **(Submission No 3)** Director General Department of Environment and Conservation
Mr Peter Halliday Office Manager Australian Crime Commission
Mr Mark Herron Acting Commissioner Corrruption and Crime Commission
Mr Hylton Quail President The Law Society of WA
Mr Philip Urquhart President The Criminal Lawyers Association (Inc)
Associate Professor Frank Morgan Director Crime Research Centre
Mr Russell Armstrong General President WA Police Union of Workers
Mr Chris Field Ombudsman Western Australia
The Hon Wayne Martin QC Chief Justice of Western Australia Supreme Court of Western Australia
His Honour Judge Peter Dominic Martino Chief Judge District Court of Western Australia
Mr Joseph McGrath **(Submission No 5)** Director of Public Prosecutions Office of the Director of Public Prosecutions, Western Australia

Mr Chris Craigie SC Director of Public Prosecutions Office of the Director of Public Prosecutions, Commonwealth
Ms Cathrin Cassarchis **(Submission No 8)** State Archivist and Executive Director State Records State Records Office
Mr Sven Bluemmel **(Submission No 4)** Information Commissioner Office of the Information Commissioner
Ms Helen Porter Chief Assessor Criminal Injuries Compensation
Mr Dennis Eggington Chief Executive Officer Aboriginal Legal Service of Western Australia
Mr Peter Weygers JP President Council for Civil Liberties in Western Australia Inc
Mr Neil Morgan Inspector of Custodial Services Office of the Inspector of Custodial Services
Mr George Turnbull Director Legal Aid Western Australia
Ms Cheryl Cassidy-Vernon Director Youth Legal Service
Mr Myles Kunzly Executive Director The Community Legal Centres Association (WA)
Professor Stuart Kaye Dean Faculty of Law University of Western Australia
Associate Professor Jane Power Executive Dean School of Law Fremantle and Sydney Campus University of Notre Dame
Dr Pamela Henry Head of School School of Law and Justice Edith Cown University
Professor Gabriel Moens Dean of Law School of Law Murdoch University
Mr Tom Percy QC WA Director Australian Lawyers Alliance
His Honour Judge Dennis Reynolds President Children's Court of Western Australia
Ms Michelle Scott **(Submission No 2)** Commissioner for Children and Young People

Mr Steven Heath Chief Magistrate Magistrates Court of Western Australia
Hon Nick Goiran MLC **(Submission No 1)** Chairman Joint Standing Committee on the Corruption and Crime Commission
Mr Christopher Steytler QC Parliamentary Inspector of the Corruption and Crime Commission
Mr Mal Wauchope Public Sector Commissioner Public Sector Commission

Other submissions received
Mr Malcolm Peacock **(Submission No 7)** Clerk of the Legislative Council and Clerk of the Parliaments Parliament of Western Australia
Ms Karen Harfield **(Submission No 9)** Acting Chief Executive Officer Australian Crime and Corruption Commission

APPENDIX 2
LIST OF HEARINGS AND WITNESSES

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LIST OF HEARINGS AND WITNESSES

Wednesday, 30 November 2011

Mr Roger Anthony MACKNAY
Commissioner, Corruption and Crime Commission

Mr Michael Joseph William SILVERSTONE
Executive Director, Corruption and Crime Commission

Mr Paul Richard O'CONNOR
Director, Legal Services, Corruption and Crime Commission

Mr Christopher STEYTLER QC
Parliamentary Inspector of the Corruption and Crime Commission

Mr Murray ALDER
Assistant to the Parliamentary Inspector of the Corruption and Crime Commission

Mr Christopher James FIELD
Western Australian Ombudsman

Mrs Mary WHITE
Principal Assistant Ombudsman

Monday, 5 December 2011

Mr Stuart SMITH
Director General, Department of Fisheries

Mr Bruno MEZZATESTA
Executive Director, Regional Services, Department of Fisheries

Mr Carl GROSSETTI
Officer in Charge, Serious Offences Unit, Department of Fisheries

Mr Phillip SHAW
Manager, Compliance and Regional Support, Department of Fisheries

Mr John LOOBY
Manager, Compliance and Regional Support (Special Projects), Department of Fisheries

Mrs Helen PORTER,
Chief Assessor, Criminal Injuries Compensation, Office of Criminal Injuries Compensation

Friday, 16 December 2011

Commander Murray SMALPAGE
Director, Intelligence, Western Australia Police

Mr Malcolm PENN
Assistant Director, Legal and Legislative Services, Western Australia Police

Mr Liam McNAMARA
Acting Senior Research and Legislation Officer, Legal and Legislative Services Division, Western Australia Police

Mr Malcolm PEACOCK
Clerk of the Legislative Council and Clerk of the Parliaments
Parliament House

Tuesday, 17 January 2012

Dr Karl O'CALLAGHAN
Commissioner of Police, Western Australia Police

Commander Murray SMALPAGE
Director, Intelligence, Western Australia Police

Mr Malcolm PENN
Assistant Director, Legal and Legislative Services, Western Australia Police

Mr Liam McNAMARA
Acting Senior Research and Legislation Officer, Legal and Legislative Services Division, Western Australia Police

APPENDIX 3

IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation*. The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation*. For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation*. Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation*. Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism*. Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition*. A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 4

DEVIATIONS FROM THE MODEL LAW

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DEVIATIONS FROM THE MODEL LAW

- The definition of "*controlled operations*" in clause 5 is broader in that it is expanded to include a frustration or disruption function. Western Australia Police advised that NSW has this and it is similar to what is in the *CCC Act*.
- There is no use of the term 'disciplinary proceeding' in the Model Law. The Bill provides that a formal authority must be in physical form (clauses 10(3) and 15(2)) whereas the Model Law states it must be in written form, signed by the chief officer (clause 7(1)).
- Clause 15(6)(j) provides the period of validity of a formal authority is a maximum of six months, whereas the Model Law has a maximum of three months (clause 7(3)(i)). The maximum in the Model Law was changed from six months following feedback received after consultation by the JWG. Western Australia Police advised this is the same in NSW and Queensland.
- Clause 18 of the Bill sets out the purposes for which a variation can be granted on the chief officer's own initiative, whereas the Model Law just sets out these purposes of an application by the principal law enforcement officer.
- Clause 22(4) of the Bill states that an order cancelling an authority must specify the reasons for this, whereas the Model Law does not.
- The addition of clauses 23(2) and (3) of the Bill, as compared with the Model Law, can be explained by virtue of them being necessary as part of the law of a particular jurisdiction which is required to refer to both local and cross-border controlled operations (they have the same effect as clause 12(1)(c) of the Model Law).
- There is no similar provision in the Model Law to clause 25 of the Bill (retrospective authority).
- Clause 30 of the Bill does not contain a corresponding provision to clause 17(2)(b) and (3) of the Model Law which provides for a participant in a controlled operation continuing to have the protection of the immunity if they are unaware the authority for the controlled operation has been cancelled, unless the participant is not reckless about the existence of the cancellation. So, it could be argued the Bill gives greater protection to participants in these circumstances than the Model Law.
- Clause 32(2) of the Bill, in addition to what is stated in clause 18 of the Model Law providing for protection from criminal responsibility for certain ancillary conduct, also provides that the person must have been a participant in the operation or was otherwise authorised to know about it. This is an important

difference in light of the concern that the Model Law can be read even more broadly than the terms of the Bill.

- Clause 35(2) of the Bill, dealing with the disclosure of operational information, is less prescriptive than clause 22 of the Model Law, which specifies different elements to be satisfied for different penalties. The Model Law does not provide for a fine, whereas the Bill provides for a summary conviction penalty of $24,000 as an alternative to a summary conviction penalty of imprisonment for two years.
- Clause 37(2) of the Bill, setting out what a report by the chief officer to the Parliamentary Commissioner must contain, includes a requirement the report must include details of any seizure, arrest and prosecution arising from the authorised operations, whereas the Model Law does not contain this provision. But clause 24(1) of the Model Law contemplates there will be an "*appropriate body*".
- Clause 39 of the Bill, providing for the keeping of documents connected with authorised operations, refers to (all) applications and authorities, whereas the Model Law only refers to formal applications and formal authorities. There is also no reference to a retrospective authority in the model law.
- Clause 40 of the Bill, providing for the chief officer to keep a general register, refers to retrospective authorities whereas the Model Law does not.
- Clause 41(4) of the Bill provides for a record of a person engaged in the public service to be a record of a person employed or engaged in the Police Force. The Model Law does not contain such a provision.
- Clause 43 of the Bill defines 'senior officer' to mean, in relation to the Australian Crime Commission, the Director National Operations as well as a person holding a prescribed office in the Australian Crime Commission. The Model Law contains both of these as well as 'Director' and defines 'senior officer' to mean in relation to the Police Force, a police officer of or above the rank of Commander whereas the Model Law states a rank of or above Assistant Commissioner.
- Subclauses 48(2)(a)(ii) and (iii) in relation to assumed identities for training purposes and their administrative support are not in the Model Law.
- Clause 80(c) of the Bill in relation to the definition of "court" is not in the Model Law.
- None of clauses 86, 88(1)(a), 89, 91 or 93 are in the Model Law.

APPENDIX 5

LETTER FROM THE INFORMATION COMMISSIONER DATED 16 DECEMBER 2011

APPENDIX 5

LETTER FROM THE INFORMATION COMMISSIONER DATED 16 DECEMBER 2011

Office of the **Information Commissioner**

WESTERN AUSTRALIA

Our Ref: 16/064/01

14 December 2011

Hon. Adele Farina MLC
Chair of the Uniform Legislation
and Statutes Review Committee
Legislative Council
GPO Box A11
PERTH WA 6837

Dear Ms Farina

COAG REFORM AGENDA – IMPACT ON STATE OVERSIGHT LAWS

I am writing to you to express my concerns about the potential proliferation of oversight laws and bodies under national harmonisation schemes being developed under the Council of Australian Governments (COAG) regulatory reform agenda. These concerns are outlined in the attached issues paper and I consider that they may be of interest to the Committee. These issues were also discussed in my appearance before the Estimates and Financial Operations Committee on 11 November 2011.

On 7 December 2010, the Uniform Legislation and Statutes Review Committee invited my submission in response to its inquiry into the *Occupational Licensing National Law (WA) Bill 2010*. In particular, the Committee sought my views on the proposed non-application of the *Freedom of Information Act 1992* (the FOI Act) to the proposed scheme. I provided my submission by letter dated 11 January 2011. My view was that, as the proposed scheme would be covered by Commonwealth FOI legislation, the proposed non-application of the FOI Act was acceptable.

Since December 2010, an increasing number of proposed COAG reforms are being progressed. I have now had the opportunity to consider the overall potential impact of these reforms on State oversight laws and mechanisms. As a result, I now have serious concerns as outlined in the attached issues paper.

Given my office's statutory remit, I do not consider that it is appropriate for my agency to take a leading role in addressing these issues. Instead, I have suggested to the Director General of the Department of the Premier and Cabinet that his Department take steps to raise the issue in discussions under the COAG process.

Yours faithfully

Sven Bluemmel
INFORMATION COMMISSIONER
Enc.

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Office of the Information Commissioner

COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms

Issues Paper

Office of the Information Commissioner
13 December 2011

Purpose of this Paper

The purpose of this paper is to highlight concerns about the potential confusion and proliferation of oversight laws and bodies under national harmonisation schemes being developed under the Council of Australian Governments (COAG) regulatory reform agenda. These concerns are shared by Information Commissioners in other Australian jurisdictions and were raised in the 2010-11 annual report of the Office of the Information Commissioner (OIC).

For the reasons given in this paper, the Information Commissioner does not consider it appropriate for OIC to take a lead role in addressing these concerns. Instead, OIC considers that COAG should look at this issue holistically by commissioning a targeted body of work that examines the different models for applying oversight legislation (including freedom of information) to national harmonisation initiatives under the COAG national reform agenda.

The role of the Information Commissioner

The Western Australian Information Commissioner is appointed by the Governor under s.56 of the *Freedom of Information Act 1992* (the FOI Act) and reports directly to Parliament. The Commissioner's main function is to deal with complaints made under the FOI Act about decisions made by agencies in respect of FOI applications and applications for amendment of personal information. The Commissioner's functions also include ensuring that agencies are aware of their obligations under the FOI Act and ensuring that members of the public are aware of their rights under the Act.

The FOI Act does not expressly confer on the Information Commissioner any policy functions, nor is the Commissioner's office resourced or staffed to discharge such functions. Information Commissioners in some other jurisdictions have a broader policy function. This has allowed Commissioners in those jurisdictions to be more proactive about identifying and responding to the issues in this paper.

For these reasons, the Information Commissioner does not consider it appropriate to take a lead role in resolving the issues identified in the paper. Instead, the Commissioner has brought these issues to the attention of the Department of the Premier and Cabinet for further action.

It is also important to note that this paper reflects the views of OIC as an independent accountability agency. It does not necessarily reflect the views of the Western Australian Government.

The COAG Reform Agenda

OIC understands that COAG has prioritised 36 areas of law for harmonisation to address the regulatory burden and equity issues arising out of inconsistent regulation across Australia.

It appears that, in order to implement these national legislative schemes, an 'applied laws' process is generally being used where a host jurisdiction enacts the national law in that state or territory's Parliament and other states and territories then adopt that law or pass corresponding legislation. The national laws are not Commonwealth laws. OIC's

understanding of the current status of a number of the national regulatory schemes is set out in the Appendix.

Potential Impact on State Oversight Laws and Mechanisms

This paper uses the term 'oversight laws' to include legislation dealing with freedom of information, privacy, public record keeping and the role of Ombudsmen. In some contexts, this may also include laws relating to public audit and public sector management. However, given the role of the Information Commissioner, the main focus of this paper is limited to freedom of information legislation and mechanisms.

The recently introduced national schemes have not adopted a consistent approach to how oversight laws apply to the people and organisations which play a role under the national schemes. Instead, different oversight models have been developed for education and child care services, occupational licensing and health practitioner regulation. It appears likely that a further variety of models will follow in other legislative reforms including national rail safety and heavy vehicle licensing. OIC is concerned that the use of different oversight models in different national regulatory schemes will increase the complexity and fragmentation of oversight laws and will result in inefficiencies and unnecessary duplication of effort and expenditure. The problem appears to have arisen inadvertently as a result of various Ministerial councils each deciding on different oversight models for the areas of national law reform for which they are responsible.

The Australian Information Commissioner, Professor John McMillan, has publicly noted[1] that it appears that *"...the application of FOI and Privacy laws to the national schemes has not been properly thought through...This lack of clarity concerning the application of FOI and Privacy Acts is a great concern, as those laws are regarded nowadays as a fundamental feature of democratic government in Australia. There is likely to be strong public criticism of any scheme of government regulation that does not make adequate or sensible provision for privacy and FOI laws to apply".*

The adoption of the national laws by participating jurisdictions has generally resulted in certain Commonwealth oversight laws, including the *Freedom of Information Act 1982* ('the Commonwealth FOI Act'), being applied as state law for the purpose of the schemes in place of jurisdiction-specific FOI and privacy legislation. OIC understands that this approach has been adopted to ensure *"matters relating to privacy and freedom of information are managed consistently across all State and Territories.*[2]

However, this approach raises a number of issues including which body should be responsible for administering the Commonwealth FOI Act as a state law. OIC understands that the main options in this regard are as follows:

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[1] In his submission to the COAG Business Regulation and Competition Working Group Secretariat on 24 October 2011, publicly available at http://www.oaic.gov.au

[2] Page 12, Explanatory Notes to the *Educational and Care Services National Law (Queensland) Bill 2011* available at http://www.parliament.qld.gov.au

- the Australian Information Commissioner performs the oversight role;
- existing state bodies, such as OIC, perform the oversight role on a territorial basis;
- the oversight role is conferred on a single existing state oversight body which would provide oversight for all participating jurisdictions; or
- a dedicated stand alone oversight body is created.

OIC understands that the Commonwealth opposes the first option on the basis that it would face constitutional difficulties and would in any event be inappropriate.

OIC considers that the option of state oversight agencies, such as OIC, performing the oversight role and applying the Commonwealth FOI Act would be problematic. The application and interpretation of both state and Commonwealth FOI legislation could create conflicting obligations.

Of great concern is that some of the national law schemes - notably the *Health Practitioner Regulation National Law 2009* and the *Education and Care Services National Law Act 2010* - have adopted the fourth option outlined above. Those schemes have established new separate national oversight bodies (not Commonwealth bodies) – the National Health Practitioner Ombudsman and the National Education and Care Services Freedom of Information Commissioner, respectively – who have responsibility for FOI regulation specifically for that scheme.

Although it may be considered that the creation of new stand alone oversight bodies will create nationally consistent oversight within each scheme, OIC is concerned that the potential proliferation of new scheme-specific oversight bodies across the national regulatory scheme raises issues of efficiency and duplication of resources with the existing Commonwealth and state oversight bodies, and will result in a highly fractured oversight framework. An increase in the number of oversight bodies is likely to create confusion for the public, as well as increasing overall bureaucracy.

This approach will also result in multiple bodies applying and interpreting the same law, that is, the Commonwealth FOI Act, currently administered by the Australian Information Commissioner. This is likely to lead to confusion. Also, the national laws generally provide that state review and appeal bodies will fulfil the role of the Administrative Appeals Tribunal and the Federal Court under the Commonwealth FOI Act and the Commonwealth *Privacy Act 1988* ('the Commonwealth Privacy Act'). OIC understands that in Western Australia this role will be performed by the State Administrative Tribunal and the Supreme Court, which means those bodies will be required to interpret and apply the provisions of the Commonwealth Privacy and FOI Acts. This model creates potential for inconsistency in the application and interpretation of the Commonwealth FOI Act by different bodies. As the Queensland Office of the Information Commissioner (Queensland OIC) has noted, *"...the certainty the common law delivers through judicial oversight would be frayed"*[3].

[3] See page 13 of Submission October 2011 re '*Future COAG Regulatory Reform Agenda Stakeholder Consultation Paper*'

The Australian Information Commissioner has publicly noted[4] that the establishment of a new national oversight body for the National Rail Safety Scheme *"...would add to the existing multiple layers, fragmentation and lack of consistency in information law regulation. Multiple regulators can lead to confusion about to whom to complain, differing legislative interpretations and complaints outcomes, and unnecessary duplication of effort and expenditure..."* and that there is a *"...distinct risk of inconsistency, confusion and disharmony" "if, under each scheme, a separate regulator* [is] *appointed with responsibility for interpreting and applying the FOI and Privacy Acts to that scheme"*[5]. OIC agrees with Professor McMillan that it is doubtful that the values of independence, impartiality, accessibility and expertise that underpin the schemes of OIC and of other oversight bodies *"can be truly met by the substitute regulators adopted for some of the schemes"*[6], who may have limited experience administering FOI legislation.

Another issue of concern is that the national regulatory schemes have adopted different approaches regarding the application of Commonwealth and state oversight laws under the national laws. For example, some schemes such as occupational licensing, rail safety and heavy vehicle regulation provide that the Commonwealth FOI Act applies for the purpose of the national law except to the extent that functions are being exercised under the national law by a state entity, whereas under the National Education and Care Services Scheme, the Commonwealth FOI Act applies to state and territory Regulatory Authorities and to the national authority established under that scheme.

State agencies will potentially be required simultaneously to comply with both the State and Commonwealth FOI Acts and in some circumstances it will be unclear and confusing as to which Act applies to any given situation. Accordingly, the application of State and Commonwealth FOI Acts needs to be readily ascertainable and precisely defined in the national laws.

For example, consideration should be given to the potential overlap in application of the Commonwealth and State FOI Acts to documents held by Western Australia's Regulatory Authority under this State's equivalent of the Education and Care Services National Law (for example, to the extent that the Regulatory Authority will exercise functions outside the scope of the national law). This issue of overlapping application of FOI legislation in this scheme has been extensively examined by the Queensland OIC[7] and the subsequent Queensland bill adopting the national law – the *Education and Care Services National Law (Queensland) Bill 2011*, which was passed by the Queensland Parliament on 16 November 2011 – includes a clause[8] which provides that the provisions of the law which exclude the operation of Queensland privacy and FOI legislation[9] do not affect the operation of the those acts in

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[4] In his submission to the National Transport Commission 'Draft National Rail Safety Law 2011', August 2011 available at http://www.oaic.gov.au

[5] See above n 1

[6] Ibid

[7] In its submission '*Education and Care Services Regulation 2010*' dated 13 April 2011 publicly available at http://www.oic.qld.gov.au

[8] Clause 30

[9] Sections 5(1)(b) and (c)

relation to the *Child Care Act 2002 (Qld)* or instruments made under that Act. OIC understands that clause was included "*to remove any doubt that applications may continue to be made under the* Information Privacy Act 2009 *and* Right to Information Act 2009 *about matters pertaining to the* Child Care Act 2002" [10].

The application of Commonwealth laws to state entities may raise complex jurisdictional issues and will increase the regulatory burden on State agencies, requiring affected officers to have an adequate understanding of both state and Commonwealth FOI Acts and to apply and comply with two different laws. While there are similarities between the WA FOI Act and the Commonwealth FOI Act, there are substantial differences. In particular, the Commonwealth FOI Act has recently adopted a 'push model' in which agencies proactively make more information available to the public and are required to publish in a 'disclosure log' information that has been released in response to each FOI access request, subject to certain exceptions. In comparison, Western Australia has a more reactive or 'pull' model by which agencies disclose information in response to FOI requests. There are also substantial differences in the exemptions, the imposition of charges and the relevant timeframes under both Acts.

As the Queensland OIC has noted[11], the application of both Commonwealth Privacy and FOI Acts to state agencies will require participating jurisdictions to, among other things, identify similarities and differences between their laws and the Commonwealth Acts and train officers in two additional bodies of law and their precedents, which will come at a financial cost. The regulatory burden in relation to privacy will be high in Western Australia because State agencies, not currently subject to state privacy legislation, will be required to become familiar with and comply with the Commonwealth Privacy Act.

Another issue of concern is that the application of the Commonwealth FOI Act under the national laws can generally be modified by regulations to be made by the relevant ministerial council. This approach could result in the potential dilution of the current provisions in the Commonwealth FOI Act and the fragmentation of oversight arrangements. It can also be argued that this allows regulations to make legislative determinations of a kind that should properly be the preserve of Parliaments.

OIC is also concerned at the limited level of consultation which has taken place with existing oversight bodies, including OIC, about the proposed schemes, a concern which is also shared by other jurisdictions. As the Australian Information Commissioner has publicly noted:

"Though we have a substantial interest in the oversight arrangements for national schemes, our experience is that we are either not consulted or contacted late in the development of the scheme. The same concern has been expressed by our state and territory counterparts. We are left with the feeling that information law issues are treated as a minor technical issue to be resolved in the closing stages of deliberation" [12].

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[10] See above n 2, page 53. The Explanatory Notes includes useful consideration of oversight issues under the national law

[11] See above n 3, page 10

[12] See above n 1

Next Steps

The Australian Information Commissioner has made the following suggestion to address the oversight issue:[13]

"A better framework for consultation is required to ensure that the attention of the governmental representatives developing national regulatory schemes is drawn to [oversight laws and mechanisms] *at an early stage of development. It may assist policy development in this area if COAG commissioned a research paper that sets out the different models for national intergovernmental regulatory schemes and the options for applying privacy, access to information and ombudsman legislation to each model. Such a paper could serve to guide the development of future regulatory proposals and ensure that appropriate information law oversight arrangements are applied".*

OIC considers that it is vitally important that the application of oversight laws to the national regulatory schemes is given adequate and proper consideration. Failing to do so runs the real risk of any benefits of national harmonisation being outweighed by an increase in the complexity, cost and opacity of oversight legislation and mechanisms.

To that end, OIC considers that COAG should look at this issue holistically by commissioning a targeted body of work that examines the different models for applying oversight legislation (including freedom of information) to national harmonisation initiatives under the COAG national reform agenda.

[13] Ibid

APPENDIX

The National Health Practitioner Scheme

This scheme has been operational since 1 July 2010 and provides national regulation of health practitioners from ten professions under the *Health Practitioner Regulation National Law 2009* (enacted in Western Australia as the *Health Practitioner Regulation National Law (WA) Act 2010*).

The national law established the Australian Health Practitioner Regulation Agency (AHPRA), the Agency Management Committee and national boards for ten regulated health professionals.

The scheme applies the Commonwealth FOI and Privacy Acts for the purpose of the national law. However, it did not adopt the significant changes that were made to those Acts in 2010 nor does the Australian Information Commissioner provide FOI or privacy oversight for the scheme. Instead, the scheme has created new national oversight bodies with responsibility for FOI and privacy regulation specifically for the scheme (the National Health Practitioner Privacy Commissioner and the National Health Practitioners Ombudsman). OIC understands that this arrangement was intended to be temporary (until June 2012) and there is concern about the appropriateness of this arrangement continuing.[14]

The National Occupational Licensing Scheme

In 2008 COAG agreed to establish a national licensing system for certain occupations. Victoria is the host jurisdiction for the scheme and passed the *Occupational Licensing National Law Act* (2010) on 17 September 2010 ('the national law').

The scheme creates a new 'National Occupational Licensing Authority' ('NOLA') to administer the national occupational licensing system. NOLA was established on 1 January 2011 and is based in New South Wales.

OIC understands that the national law was drafted along similar lines to the Health Practitioner Scheme. However, unlike that scheme, this is a 'delegated scheme' whereby NOLA may delegate all regulatory functions for licensing to existing jurisdictional regulatory agencies (for example, the issuing of licences).[15]

Under the national law, the Commonwealth Privacy and FOI Acts apply for the purposes of the national licensing system, except to the extent that functions are being exercised under the national law by a state entity.[16] State privacy and FOI laws apply only when functions are being exercised under the national law by a state entity and do not relate to national registers

[14] See draft policy options paper dated 31 October 2011 prepared by the National Heavy Vehicle Regulator Project Office entitled *"Oversight arrangements under the Heavy Vehicle National Law – Policy options paper (issue number 049)"*

[15] Section 102 of the national law

[16] Section 135 and 137 of the national law

kept under the national law.[17] It is not clear from the national law who is proposed to administer the FOI oversight role and OIC understands this issue will be addressed in the national regulations.

The national licensing scheme is scheduled to commence operation from July 2012 for the following occupations: property; electrical; plumbing and gas fitting; and refrigeration and air conditioning. The national law has been adopted by New South Wales, Queensland, South Australia, Tasmania and the Northern Territory but OIC understands but that the Australian Capital Territory is still in discussions about its participation in national licensing.[18]

In Western Australia, the *Occupational Licensing National Law (WA) Bill 2010* ('the Bill') is currently before the Parliament. On 25 November 2010, the Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review. The Committee tabled its report on 14 April 2011, concluding that the Bill was *"too uncertain to be good law"* and recommended that the Bill should not be passed.[19] In relation to the oversight issue, the Committee noted at paragraphs 3.11 and 3.12:

> *"The Bill provides that Commonwealth Acts - the Privacy Act 1988, Freedom of Information Act 1982 and Archives Act 1983 - apply to the Occupational Licensing National Law applied by the Bill. Equivalent State Acts are excluded except to the extent that functions are exercised by State entities. On each occasion of application of a Commonwealth Act, power is conferred for regulations to be made amending the primary legislation as it applies to the national law.*
>
> *This raises two issues: uncertainty in where the lines will be drawn when records are both State and national and Henry VIII clauses".*

The Committee considered that there is uncertainty in clause 6 of the Bill as to whether the WA FOI Act or the Commonwealth FOI Act will apply to documents.[20]

National Education and Care Services Scheme

In December 2009 COAG agreed to establish a National Quality Framework (NQF) for early childhood education and care. The NQF is established by the Education and Care Services National Law and the Education and Care Services National Regulations. Under the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care, the states and territories agreed to enact as applied law the legislation establishing a national system enacted by the host jurisdiction – in this case Victoria – with the exception of Western Australia which will pass its own corresponding legislation.

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[17] Section 5 of the national law and clause 6 of the *Occupational Licensing National Law (WA) Bill 2010*

[18] see http://nola.gov.au/legislation-2/

[19] See page ii and paragraph 1.8 of *"Report 61 Standing Committee on Uniform Legislation and Statutes Review Occupational Licensing National Law (WA) Bill 2010"* available at http://www.parliament.wa.gov.au

[20] Ibid, page 25

In October 2010, Victoria enacted the *Education and Care Services National Law 2010 (Vic).*

According to information on the Department for Communities website[21] "[i]*n Western Australia the law will be introduced through corresponding legislation. This means there may be some local variation due to Western Australia's specific needs, but that it will be consistent with the national law".*

The national law establishes a joint national body - the Australian Children's Education and Care Quality Authority (ACEQA) - to oversee the implementation of the NCF and provides that state and territory Regulatory Authorities will have primary responsibility for the approval, monitoring and quality assessment of services. OIC understands that in Western Australia the Regulatory Authority is proposed to be the Child Care Licensing and Standards Unit of the Department for Communities.[22]

Under the national law, the Commonwealth FOI Acts applies as a law of a participating jurisdiction for the purposes of the NQF. [23] However, this scheme has adopted the Health Practitioner Scheme approach and modified the application of the Commonwealth Act by creating a new national oversight commissioner, the National Education and Care Services Freedom of Information Commissioner.[24] The same approach has been used for privacy oversight.

On 14 October 2011 the Ministerial Council for Education, Early Childhood Development and Youth Affairs approved for publication "Draft Education and Care Services National Regulations". [25]

Under the Regulations, the Commonwealth FOI Act applies to both ACEQA and to each Regulatory Authority in each participating jurisdiction.[26]

According to the Department for Communities website[27], *"*[t]*hese National Regulations will serve as a template for the Western Australian corresponding version which will be developed shortly."*

National Rail Safety Scheme

The National Rail Safety Scheme establishes the National Rail Safety Regulator which will have responsibility for regulatory oversight of rail safety across all of Australia.

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[21] http://www.communities.wa.gov.au/childrenandfamilies/NQFEECS/Pages/default.aspx

[22] Ibid

[23] Sections 264 of the *Education and Care Services National Law 2010 (Vic)*

[24] Ibid

[25] Publicly available at http://www.eduweb.vic.gov.au/edulibrary/public/earlychildhood/childrensservices/draft-edu-care-regs.pdf

[26] Clause 208 of the Regulations

[27] See above n 22

At the inaugural Standing Committee on Infrastructure and Transport (SCOTI) on 4 November 2011, Australia's transport ministers approved the laws which underpin the scheme, the Rail Safety National Law Bill and the Rail Safety National Law Regulations 2011. According to information on the National Rail Safety Regulator Project Office's website[28], *"the legislation will now be progressed through the South Australian parliament during the first half of next year, allowing all other jurisdictions to pass their applying laws in time for the National Rail Safety Regulator to commence operations in January 2013"*.

The Bill establishes the Office of the National Rail Safety Regulator (ONRSR)[29] which consists of a person appointed as the National Rail Safety Regulator (the Regulator) and two non-executive members.[30] Both the ONRSS and the Regulator may delegate its and his or her functions under the law to a person or body.[31] In addition, the ONRSR may enter into a service agreement with a State or Territory that makes provision for the State or Territory to provide services to ONRSR that assist ONRSR in exercising its functions[32] and the Regulator may appoint authorised persons (such as rail safety officers) which appointment may be limited to a part of a particular jurisdiction.

Clause 263 of the Bill provides that the Commonwealth Privacy and FOI Acts apply as laws of a participating jurisdiction for the purposes of the law, except to the extent that functions are being exercised under the national law by a state entity.

It is not clear from the Bill which body will have responsibility for FOI oversight. Part 8 of the draft Regulations headed *"Application of certain Commonwealth Acts to the Law"* currently says *"Drafting note – Details as to how the oversight arrangements will work are still being developed"*. Further, regulation 36 in Part 8 headed *"Application of FOI Act"* says *"For the purposes of section 263(3)* (Application of certain Commonwealth Acts to this Law) *of the Law, this Division sets out modifications of the Freedom of Information Act 1982 of the Commonwealth as it applies as a law of a participating jurisdiction for the purposes of the national rail safety scheme"*.

National Heavy Vehicle Regulator Scheme

The scheme establishes the National Heavy Vehicle Regulator which will be responsible for regulating all vehicles in Australia over 4.5 tonnes and is proposed to become operational by 1 January 2013.

The National Transport Commission's website[33] notes as follows.

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[28] See http://www.nrsrproject.sa.gov.au/news

[29] Section 12

[30] Section 16

[31] Section 45

[32] Section 15

[33] http://www.ntc.gov.au

> *"In November 2011, Australia's transport ministers approved the laws to underpin the new National Heavy Vehicle Regulator at the inaugural Standing Committee on Infrastructure and Transport (SCOTI) meeting.*
>
> *The NTC is working with the National Heavy Vehicle Regulator Project Office and stakeholders to prepare a second Bill to resolve minor issues raised by industry and government during consultation. This second Bill will amend the Heavy Vehicle National Law that was submitted to SCOTI".*

The law establishes the National Heavy Vehicle Regulator as a body corporate.[34] The Regulator may delegate any of its functions to, among others, the chief executive of an entity or a department of government of a participating jurisdiction or the Commonwealth.[35] OIC understands that certain functions of the Regulator are proposed to be contracted to State road and traffic authorities[36]and that the Regulator may appoint employees of the State or local government authorities as 'authorised officers' who are given compliance and enforcement powers.[37]

Clause 619 of the Bill provides that the Commonwealth Privacy and FOI Acts apply for the purposes of the national licensing system, except to the extent that functions are being exercised under the national law by a state entity. However, OIC understands that the Queensland OIC has viewed a discussion paper commissioned by the National Transport Commission (after release of the Bill for comment) wherein it is proposed that the Commonwealth Privacy and FOI Acts should apply to all functions under the national law, including those exercised by state entities. It is the Queensland OIC's understanding that the National Transport Commission is currently considering this proposal, and that a second Bill will provide further detail regarding oversight arrangements.

The National Heavy Vehicle Regulator (NHVR) Project Office recently sought comments from jurisdictional transport offices, oversight bodies and industry in response to a draft policy options paper entitled *"Oversight arrangements under the Heavy Vehicle National Law – Policy options paper (issue number 049)"* which outlined four different oversight models under consideration. These can be summarised as follows:

1. New, dedicated oversight bodies such as a HVNL Information Commissioner and a HVNL Ombudsman are created.

2. Existing jurisdictional bodies perform the oversight role on a territorial basis, which would involve each jurisdiction's oversight body retaining their oversight role for the matters that relate to the administration of the HVNL in their jurisdiction.

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[34] Sections 597 and 598

[35] Section 602

[36] See section 599

[37] See Part 9.1 of the Bill

3. One state oversight body administers the oversight role on a national basis, which would involve a single existing jurisdictional oversight body administering the oversight function for all parties under the HVNL scheme.

4. A model suggested by the Queensland OIC, which would involve one jurisdiction providing oversight for the new Regulator's activities, using that jurisdiction's existing oversight laws and mechanisms, while local jurisdictional laws and bodies would continue to provide oversight for activities of jurisdictions, including where the Regulator's functions are performed by an authorised officer or delegate/subdelegate employed by the jurisdiction.

While OIC considers that each of these models has drawbacks, the model suggested by the Queensland OIC in option 4 has considerable merit which warrants closer consideration.