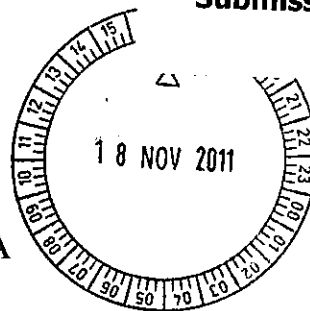




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**JOINT STANDING COMMITTEE ON THE CORRUPTION AND
CRIME COMMISSION**

18 November 2011

Hon Adele Farina MLC

Chairman

Standing Committee on Uniform Legislation and Statutes Review

Parliament House
PERTH WA 6000

rjewell@parliament.wa.gov.au

Dear Ms Farina

Re: Inquiry into *Criminal Investigation (Covert Powers) Bill 2011*

Thank you for your letter of 11 November 2011. I advise that the Joint Standing Committee on the Corruption and Crime Commission has prepared a submission in aid of your inquiry.

Introduction

This submission to the Standing Committee on Uniform Legislation and Statutes Review (SCULSR) regarding the *Criminal Investigation (Covert Powers) Bill 2011* has been prepared by the Joint Standing Committee on the Corruption and Crime Commission (JSCCCC) following receipt of a letter from SCULSR dated 11 November 2011.

The JSCCCC expresses interest in this matter by virtue of:

1. The Bill's consequential impact on existing provisions within the *Corruption and Crime Commission Act 2003* in which almost all controlled operations by WA Police require the independent authorisation of the CCC; and
2. The JSCCCC's discovery of existing deficiencies in the independent monitoring of controlled operations as revealed in its Report No. 15 tabled in the Legislative Assembly on 16 June 2011.¹

¹ This report was tabled in the Legislative Council on 21 June 2011.

Oversight and monitoring

The *Criminal Investigation (Covert Powers) Bill 2011* is, according to the Minister for Police's second reading speech, part of "a national project to develop model laws that aid criminal investigation across state and territory borders".

The provisions of the Bill are based on the model law proposed in the November 2003 *Cross-border investigative powers for law enforcement report* by the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers (JWG), which was subsequently endorsed by the Standing Committee of Attorneys-General in 2004.

The report from the JWG took into account submissions made in response to an earlier discussion paper issued by the JWG.

The report notes:

The Discussion Paper proposed independent oversight of controlled operations by a body such as the Ombudsman. Each jurisdiction will be able to determine which body will have the responsibility for oversight within that jurisdiction, or provide a different accountability regime, so long as the regime provides at least a comparable standard of scrutiny. The function of the independent oversight body will be to ensure that agencies are accountable for the conduct of controlled operations and comply with the requirements of the legislation.

The model in the Discussion Paper proposed a three-tiered independent oversight process:

- *six monthly reports by the chief officer of a law enforcement agency to the independent body;*
- *inspection of records of law enforcement agencies by the independent body; and*
- *annual reports by the independent body to the Minister.*

The purpose of the independent oversight process is to increase accountability and transparency, and to foster greater public confidence in the conduct of controlled operations. (p. 115) [Emphasis added]

The report essentially adopted the proposals in the discussion paper with some changes designed to strengthen oversight and accountability.

Clauses 24, 25 and 28 of the model law provide for the role of an independent body to oversight and monitor controlled operations by (i) receiving reports from the chief officer of each law enforcement agency; (ii) preparing an annual report and (iii) inspecting records.

Sections 37, 38 and 41 of the Bill are based respectively on each of these clauses of the model law.

Additionally Section 26 of the Bill would provide for the Parliamentary Commissioner for Administrative Investigations (the Ombudsman) to be notified of retrospective authorities granted by a chief officer (the Commissioner of Police, the Chief Executive Officer of the Australian Crime Commission or the Chief Executive Officer of the Department of Fisheries). The Parliamentary Commissioner would be empowered to "require the chief officer to furnish

such further information concerning the retrospective authority as is necessary for the Parliamentary Commissioner's proper consideration of it".

This provision is not based on the model law which does not provide for retrospective authorities.

Section 37 of the Bill would require chief officers to submit to the Ombudsman six monthly reports giving details of the number and nature of authorised operations. The Ombudsman would be empowered to "*require the chief officer to furnish additional information in relation to any authorised operation to which a report relates*".

Section 38 of the bill would require the Ombudsman to prepare an annual report which, after vetting by the Minister on the advice of the chief officer to remove any information which may "*endanger a person's safety; or (b) prejudice an investigation or prosecution; or (c) compromise any law enforcement agency's operational activities or methodologies*", must be laid before each House of Parliament.

In the annual report the Ombudsman would be required to "*include, for each law enforcement agency concerned, comments on the comprehensiveness and adequacy of the reports that were provided to the Parliamentary Commissioner by the chief officer of the law enforcement agency*".

Section 41 of the Bill would require the Ombudsman to "*from time to time and at least once every 12 months, inspect the records of a law enforcement agency to determine the extent of compliance with*" the record keeping obligations that the Bill would impose in relation to controlled operations "*by the agency and law enforcement officers of the agency.*"

The report notes that the model law limits this function to inspection rather than empowering the independent body to conduct investigations into particular controlled operations.

The JWG notes the Victorian Ombudsman's recommendation that the independent body should also be able to conduct investigations into particular controlled operations. The model proposals provide for detailed external oversight of cross-border controlled operations. As currently drafted, section 28 of the model bill permits the independent body to conduct inspections but not to conduct investigations if the independent body considers an investigation is necessary in the public interest.

The JWG believes that the proposed provision is sufficient. Each jurisdiction will nominate an independent oversight body. The type of body appointed may vary from jurisdiction to jurisdiction and the range of powers available will depend on the oversight body that is chosen by a jurisdiction. Under some regimes this body would already have an 'own motion' investigating power. (p. 137)

The Ombudsman does have an own motion investigation power under section 26 of the *Parliamentary Commissioner Act 1971*.

Nonetheless it is the Committee's submission that the oversight and monitoring powers in the Bill would be better entrusted to the Corruption and Crime Commission (the Commission) than to the Parliamentary Commissioner for Administrative Investigations (the Ombudsman).

The reasons for this submission are as follows:

- The Commission has considerable experience in relation to controlled operations conducted by the police by virtue of its current role in facilitating such operations through the making of exceptional powers findings under section 46 of the *Corruption*

And Crime Commission Act 2003 and the power to authorise controlled operations participated in by police officers under section 64 of the Act;

- This facilitation and authorisation role of the Commission is expected to be withdrawn in the light of the self-authorisation powers given to police under the Bill. This would mean that there would be no conflict in the Commission having a role in oversight and monitoring of controlled operations;
- A principal concern with controlled operations, because of their very nature, is the possibility of corruption. A controlled operation involves the committing of actions that would otherwise be criminal by law enforcement officials or persons authorised by law enforcement officials. The community is naturally concerned that the power to commit such acts with legal immunity is not misused. The Commission's main purpose is to *"to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector"* (*Corruption And Crime Commission Act 2003*, Section 7A (b)). In exercising the oversight and monitoring powers provided by the Bill the Commission, by its nature, is more likely to pay close attention to, take note of and respond appropriately to possible misuses of the controlled operations powers of law enforcement agencies;
- The Ombudsman's mission is to *"improve the standard of public administration"*. The focus of the Ombudsman is more likely to be on record keeping and efficient administration than on possible misconduct;
- The Ombudsman already has a very broad range of responsibilities across the whole range of public administration, as well as some very important specific functions such as reviewing certain child deaths. With limited resources the Ombudsman necessarily needs to decide how to deploy these resources most effectively. It may be difficult for the Ombudsman to give sufficient attention and resources to the new tasks of oversight and monitoring that the Bill would impose.

Recommendation 1

The Committee should recommend that clauses 26, 37, 38 and 41 be amended to replace references to the Parliamentary Commissioner with references to the Corruption and Crime Commission.

Relevant offences

Section 12 of the Bill would allow the authorisation of controlled operations when the chief officer is satisfied on reasonable grounds, among other things, that “*a relevant offence has been, is being or is likely to be committed*”.

Section 5 of the Bill would provide that “**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”.

Exceptional law enforcement powers such 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.

Allowing the use of controlled operations for offences for which the maximum penalty is less than 3 years imprisonment, in my submission, requires a comprehensive case to be made to Parliament by the relevant Minister by means of an amending statute rather than merely by way of regulation.

While a regulation can, of course, be disallowed by either House it is not subject to the same level of scrutiny, nor to the possibility of amendment to restrict or vary its operation, as a statutory provision.

There is a significant danger of “bracket creep” in the range of offences for which controlled operations may be considered as useful by law enforcement agencies. It seems more likely that a responsible check on any such “bracket creep” would be maintained by requiring full parliamentary debate on any new offences or range of offences for which controlled operations would be allowed than by leaving this process to regulations.

Recommendation 2

The Committee should consider recommending that the definition of “relevant offence” in clause 5 of the Bill should be amended by deleting the words “or (b) an offence against the law of this jurisdiction that is prescribed for the purposes of this definition”.

Fisheries

The proposal to amend the definition of “relevant offences” (to exclude offences where the maximum penalty is less than 3 years imprisonment being able to be prescribed by regulations) would have implications for the inclusion of the chief executive officer of the fisheries department as a chief officer who could authorise controlled operations.

No offences under the *Fish Resource Management Act 1994* have a maximum penalty higher than 2 years imprisonment.

Consequently, if the Committee were to take the view that it was inappropriate to allow offences with a maximum penalty of less than 3 years imprisonment to be prescribed as “relevant offences” then it should also recommend either that the references in the Bill to the fisheries department, fisheries officers and the chief executive officer of the fisheries department be removed or that the Minister amend the Bill to specify which offences under the *Fish Resource Management Act 1994* are proposed to be defined as “relevant offences”.

The latter approach would allow the Parliament to fully debate the merit or otherwise of allowing controlled operations in relation to these specific offences.

There is a further concern as to whether or not the fisheries department is an appropriate agency to be empowered to self-authorise controlled operations, in any event. An alternative approach would be to leave this power with the Commissioner of Police. The Bill already provides that where it is not practicable for a police officer to conduct a controlled operation the Commissioner can authorise another person to do so. This power could be used to authorise fisheries officers to conduct controlled operations in relation to fisheries offences where considered appropriate.

Recommendation 3

That the Committee give consideration to recommending that the references to the fisheries department, fisheries officers and the chief executive officer of the fisheries department be removed from the Bill and that the Minister be invited to propose an amendment specifying which offences under the *Fish Resource Management Act 1994* be defined as “relevant offences”.

Conclusion

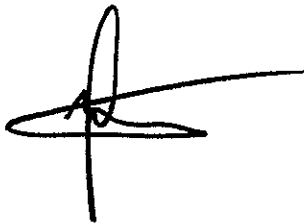
The JSCCCC encloses a copy of its Report No.15 tabled 16 June 2011 for the attention of the SCULSR.

The JSCCCC makes the following three recommendations by way of submission for the consideration of the SCULSR:

1. The Committee should recommend that clauses 26, 37, 38 and 41 be amended to replace references to the Parliamentary Commissioner with references to the Corruption and Crime Commission.
2. The Committee should consider recommending that the definition of "relevant offence" in clause 5 of the Bill should be amended by deleting the words "*or (b) an offence against the law of this jurisdiction that is prescribed for the purposes of this definition*".
3. That the Committee give consideration to recommending that the references to the fisheries department, fisheries officers and the chief executive officer of the fisheries department be removed from the Bill and that the Minister be invited to propose an amendment specifying which offences under the *Fish Resource Management Act 1994* be defined as "*relevant offences*".

The JSCCCC Committee Chairman is available to appear before the SCULSR, if required, to elaborate on any points within this submission.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized 'N' and 'G' with a horizontal line extending to the right.

HON NICK GOIRAN, MLC
CHAIRMAN