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Department of **Culture and Arts**  
**State Records Office of Western Australia**

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Hon Adele Farina MLC  
Chairman  
Standing Committee on Uniform Legislation and Statutes Review  
Legislative Council  
Parliament House  
PERTH WA 6000

Dear Adele

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

Thank you for the opportunity to comment on this legislation.

Please find attached my submission.

Please do not hesitate to contact my officer, Martin Fordham, should you have any queries or require clarification.

Yours sincerely

Cathrin Cassarchis  
State Archivist and Executive Director State Records

## Standing Committee on Uniform Legislation and Statutes Review

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### Criminal Investigation (Covert Powers) Bill 2011

While I do not wish to discuss the general scope, purpose and structure of the *Criminal Investigation (Covert Powers) Bill 2011* (the Bill), I do have concerns about the non-application of the *State Records Act 2000* to the activities or records under Part 2 (Controlled Operations) and Part 3 (Assumed Identities) of the Bill.

Pursuant to the letter of 6 December from the Standing Committee on Uniform Legislation and Statutes Review, this submission provides our view as to:

- “the exclusion of the *State Records Act 2000* in the Bill and the impact of this on the veracity of State records; and
- whether the exclusion should alternatively be for a specified period such as occurs with the ‘Cabinet in confidence’ documents.”

### Background

The *State Records Act 2000* (the SR Act) provides for the keeping of State records and for related purposes. Under the Act every government organization in Western Australia is required to have a Recordkeeping Plan including a Records Retention and Disposal Schedule approved by the State Records Commission of WA.

Among other things, the Recordkeeping Plan must set out matters about which records are to be created by the organization and how it is to keep them; which of its government records are to be State archives (i.e. kept permanently) and whether or not they will be restricted from public access; and, the retention period for those government records that are not State archives (i.e. how long the records must be kept before they may be destroyed).

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Moreover, the Recordkeeping Plan must comply with principles and standards established by the State Records Commission under section 61 of the Act. Section 42 of the *Interpretation Act 1984* applies to and in relation to the Commission's principles and standards as if they were regulations within the meaning of that section.

Clauses 9 and 45 of the Bill stipulate that the SR Act and the *Freedom of Information Act 1992* (the FOI Act) do not apply to investigations, operations, activities or records under Part 2 and the activities or records under Part 3, respectively. The Bill's Explanatory Memorandum indicates that the reasoning for the non-application of these Acts is the imperative that specific information under these Parts does not become public knowledge.

It is against this background, and on my interpretation of the Bill as drafted, that I provide the following comments.

### **Comment**

Whilst I do not want to provide specific comment on the proposed non-application of the FOI Act, the FOI Act does have crucial connection with the SR Act: as, under Part 6 of the SR Act;

- any right of access to a government record that is not a State archive (i.e. a temporary record held by a government organization) is to be determined under the FOI Act;
- any right of access to a State archive (i.e. a permanent record) that is not in the State archives collection and is less than 25 years old is to be determined under the FOI Act; and
- any right of access to a restricted access archive (i.e. a permanent record that the State Records Commission has authorised be restricted for a designated period), whether or not in the state archives collection, is to be determined under the FOI Act.

I agree entirely with the imperative to protect information about real and assumed identities and the authorisation and conduct of covert law enforcement operations. Should the records created under Parts 2 and 3 of the Bill become State archives the SR Act provides for access to be restricted and rights of access are determined by the FOI Act. It appears, subject to expert advice from the Office of the Information Commissioner, there is sufficient provision via Schedules 1 and 2 of the FOI Act to provide the necessary protections to the information.

The Bill provides for certain records to be created and 'kept', and provides for Parliamentary Commissioner for Administrative Investigations records inspection and reporting roles.

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However, non-application of the SR Act would mean that the law enforcement officers involved in the authorisation and conduct of covert law enforcement operations and those involved in the acquisition and use of assumed identities would not be accountable to the State Records Commission for the proper management and disposal of covert operations records which, under the SR Act, would be government records by virtue of being created by a government office specified in Schedule 1 of the SR Act. The keeping of records of covert operations would not be subject to compliance with the State Records Commission's Principles and Standards or the law enforcement agency's Recordkeeping Plan and Retention and Disposal Schedule. Therefore, the records' creation, capture, organization, storage, preservation, security, retention and disposal would not be subject to the proper authorisation and necessary accountability provisions of the SR Act.

Government organizations such as the Corruption and Crime Commission, the Director of Public Prosecutions and the Department of Premier and Cabinet create and keep highly sensitive information. These organizations are subject to the SR Act and operate approved Recordkeeping 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.

Brief discussions with the Western Australia Police indicated that the Bill was modelled on the Tasmanian *Police Powers (Controlled Operations) Act 2006*, in which, under section 7, the Tasmanian *Archives Act 1983*, the *Freedom of Information Act 1991* and the *Personal Information Protection Act 2004* do not apply to investigations, operations, activities and records under this Act. However, I note that the *Crimes Act 1914* (Commonwealth) and the *Crimes (Controlled Operations) Act 2004* (Victoria) contain very similar provisions as those in Parts 2 and 3 of the Bill, yet the former does not exclude the *Archives Act 1983* (Commonwealth) and the latter does not exclude the *Public Records Act 1973* (Victoria).

In conclusion, my view as to:

- "the exclusion of the *State Records Act 2000* in the Bill and the impact of this on the veracity of State records".

The SR Act should not be excluded from the *Criminal Investigation (Covert Powers) Bill 2011* and records of covert law enforcement operations must be subject to the same recordkeeping accountability and compliance requirements as any other government record.

And, my view as to:

- whether the exclusion should alternatively be for a specified period such as occurs with the 'Cabinet in confidence' documents."

The SR Act should not be excluded for a specified period as suggested. Any covert law enforcement operations records that are designated as State archives may have access restrictions placed on them according to operational requirements. The SR Act, in conjunction with the FOI Act, provides the necessary information disclosure protections.