



DIRECTOR OF PUBLIC PROSECUTIONS
for WESTERN AUSTRALIA

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Our Ref: DPP:NV:ADM2011/449
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Hon. Adele Farina MLC
Chairman
Uniform Legislation and Statutes Review Committee
Parliament House
PERTH WA 6000

By Email : rjewell@parliament.wa.gov.au

Dear Ms Farina

Inquiry into Criminal Investigation (Covert Powers) Bill 2011

I refer to your letter dated 11 November 2011 inviting the Office of the Director of Public Prosecutions ("ODPP") to make a submission in relation to the *Criminal Investigation (Covert Powers) Bill 2011*.

I submit the following observations in relation to the Bill :

- Page 5 – Lines 13 and 14 - Definition of "controlled conduct"

This definition is amorphous; it is circuitous and presently expressed in the negative. The ODPP suggests that "controlled conduct" be defined by reference to Section 27 (at page 23, starting at line 17), for example :

controlled conduct means conduct of the kind referred to in Section 27, which, but for that provision, the person would be criminally responsible.

- Page 10 – Lines 14 and 15 - "administrative responsibility"

"Administrative responsibility" is not defined in the Bill and it is unclear what this may amount to for the purposes of the Bill.

- Page 12 – Line 19 - 15. Form of authority
Page 20 - Line 24- 24. Defect in authority

When reading these two provisions together it is unclear what impact it has if the formalities of an "authority" are not met. This is made more difficult by the absence of any clear directive as to what may amount to a "material particular" for the purposes of Section 24.

- Page 23 – Line 24 - Grammatical error

There appears to be a grammatical error at line 24; a second "in" is needed after the final "in" at the end of the line. Alternatively, the wording of clause 27(a) requires re-drafting to avoid the use of a second "in".

- Page 29 – Line 1 - Disclosure of operational information

Section 35(2) should be expanded to also include the situation where a person who has access, or has had access, to operational information, discloses the information in the course of seeking legal advice.

- Page 70 – Line 15 - 85. Filing and notification

It is unclear on the face of the Bill who will be responsible for the filing of the witness identity protection certificate. Is it the Chief Officer or the prosecuting authority ?

- Page 72 – Line 19 - "sections 86, 88 and 90"

The reference to section 88 in this line appears to be an error and should perhaps be a reference to section 89. Section 88 refers to the 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. Section 89 refers to certain action that must be taken to disclose an operative's true identity to a presiding officer (but again, does not refer to any application that must be made). By contrast, sections 86 and 90 clearly refer to court applications.

- Page 78 – Line 8 - 96. Disclosure Offences

It is unclear whether the true identity of an operative must also remain suppressed in the prosecution of any disclosure offences. It is unclear whether the protections of a witness identity protection certificate carry over into the breach proceedings contained in Section 96, or if, once disclosed, protection of that information is then lost for the subsequent proceedings.

- Page 79 – Line 7 – 98. Reports about witness identity protection certificates

In Section 98(2) there may be merit in the report including the number of disclosure offences prosecuted under section 96 in relation to witness identity protection certificates.

I trust that this information is helpful to your review.

In the meantime, if there is anything else specifically that you wish me to comment on as part of your review, please contact my Legal Policy Officer, Nari Vanderzanden.

Yours sincerely



Joseph McGrath SC
DIRECTOR OF PUBLIC PROSECUTIONS

19 December 2011