

CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011

Introduction and First Reading

Bill introduced, on motion by **Mr R.F. Johnson (Minister for Police)**, and read a first time.

Explanatory memorandum presented by the minister.

Second Reading

MR R.F. JOHNSON (Hillarys — Minister for Police) [12.09 pm]: I move —

That the bill be now read a second time.

The Criminal Investigation (Covert Powers) Bill 2011 is part of a national project to develop model laws that aid criminal investigation across state and territory borders. The task of developing the model laws was given to a national joint working group established by the Standing Committee of Attorneys-General and the then Australasian Police Ministers' Council. The joint working group was chaired by the commonwealth and included representatives of police and justice agencies from each jurisdiction.

The objective of the model laws is to enable seamless cross-border investigation of serious offences. Under these model laws, officers in this state will be able to continue their investigations in another state or territory under an authorisation issued in this state, instead of having to seek a fresh authorisation in each new jurisdiction they enter. Organised criminal networks, such as drug cartels and motorcycle gangs, operate with relative ease across jurisdictional borders. The bill addresses this emerging threat. The three areas of law enforcement contained in this bill—controlled operations, assumed identities and witness identity protection—are all inter-related and tend to be used in combination to investigate and prosecute serious crime. Additionally, these three areas all relate to covert methods of investigation.

At the same time, police in this state have been hampered by a lack of broad statutory covert powers and presently rely on a patchwork of restrictive provisions in the Corruption and Crime Commission Act 2003, Prostitution Act 2000 and Misuse of Drugs Act 1981 to conduct controlled operations; administrative arrangements to authorise assumed identities; and the common law to regulate the protection of a law enforcement operative's identity in court. The bill remedies this situation by repealing the undercover provisions in the Misuse of Drugs Act 1981 and Prostitution Act 2000 and by adopting the model laws' minimum standards for these three areas of law enforcement for use within this state, but with several significant modifications to provide our police with the necessary tools and flexibility to disrupt and frustrate contemporary organised crime groups. These modifications to the local controlled operations scheme in no way jeopardise the objective of the model laws because the model laws are binding only in respect of cross-border controlled operations.

It is worth noting that WA Police will be the main users of the legislation. However, the bill is drafted so that the Department of Fisheries and the Australian Crime Commission can utilise its provisions. The fisheries department has been included in the scheme as it has a team of specialist investigators who conduct controlled operations into offences occurring in high-value, high-risk fisheries and target serious and organised criminal networks. The Australian Crime Commission generally investigates commonwealth or state offences that have a federal aspect. The commission is also authorised to investigate state offences without a federal aspect, and consequently may utilise the powers in this bill. A similar approach has been taken in most other jurisdictions.

Before I turn to the detail of the bill, I will briefly explain what each of these three areas deal with. A "controlled operation" is an undercover operation that authorises an undercover law enforcement officer to engage in unlawful conduct under controlled conditions to investigate serious offences. An "assumed identity" is a false identity that protects an undercover operative engaged in investigating crimes and infiltrating organised crime groups. "Witness identity protection" provides for the protection of the true identity of a covert operative and of other protected witnesses who give evidence in court.

Controlled operations authorisation process: The bill sets out a rigorous process for authorising controlled operations. In the case of police, a controlled operation may be authorised only by a senior officer of or above the rank of commander. In accordance with the model laws, a controlled operation may be undertaken only for criminal offences that attract a penalty of a minimum of three years' imprisonment or for a lesser offence that is prescribed in regulations. The senior officer must be satisfied in regard to a number of key controls and safeguards. They include that any unlawful conduct will be limited to the maximum extent possible, that the operative has the appropriate skills and training and that any conduct will not seriously endanger health, cause the death of any person or involve the commission of a sexual offence.

The bill proposes that a retrospective authority be available only when a controlled operation is conducted solely within Western Australia. Organised crime groups are known to test people in the belief that they may be

undercover operatives and so incite them to commit offences. Any refusal may put officers' lives at risk. A power to seek a retrospective authority, which covers unlawful activity not included in the original authority, will enable undercover operatives to maintain their cover and to not react inappropriately by refusing to commit an act outside their authority. There are strict conditions under which a retrospective authority may be granted. For example, the authorising officer must be satisfied that the operative had not foreseen, and could not reasonably be expected to have foreseen, that the circumstances would arise. Retrospective authority cannot be granted for any conduct that seriously endangers health, causes the death of a person or involves the commission of a sexual offence.

Conduct of controlled operation: The authority of the senior officer sets clear parameters for the conduct of and the limited protection from criminal responsibility for each operative in a controlled operation. For example, there is no protection from criminal responsibility if the operative induces a person to commit an offence they would not have otherwise been likely to commit. The protection of operatives against personal liability for civil claims arising from their conduct is provided in section 137 of the Police Act 1892.

The bill also provides that an innocent third party who suffers loss of or damage to their property as a direct result of an authorised operation has recourse to compensation. The provision is limited to cases in which the loss or damage did not occur as a direct result of the claimant engaging in any criminal activity, and innocent third parties will be notified of their right to compensation.

As I said previously, the bill is part of a national scheme for investigations that may need to be undertaken in more than one jurisdiction. Clause 34 of the bill provides for the mutual recognition of the corresponding provisions of the controlled operations laws of another jurisdiction. This means an authority for a controlled operation issued in another interstate jurisdiction will have the same effect and give the same protections in this state as would a locally issued authority. Likewise, other participating jurisdictions will extend the same protections to Western Australian police whose covert investigations cross their borders.

Compliance and monitoring of controlled operations: The bill requires the relevant law enforcement agencies to keep adequate records of all controlled operations, including a general register that includes summary details for each application made, each authority granted and each variation to an authority. The bill also requires law enforcement agencies to report on the nature and outcomes of controlled operations. Each authority names the law enforcement officer who is responsible for the conduct of the operation. This officer is required to report to the chief officer in detail on the outcome of the operation within two months of its completion. The chief officer must report every six months to the Western Australian Ombudsman on, among other things, the number of authorities refused, granted, varied or cancelled, and on any arrests or prosecutions arising from an authorised operation.

The bill creates an oversight role for the Western Australian Ombudsman, who will inspect the records of the law enforcement agency at least once every 12 months and report to the Parliament on the work and activities of each agency and the extent to which controlled operations conducted in the previous 12 months complied with the legislation. The Ombudsman will also be notified as soon as practicable and in any case within seven days in the event of a retrospective authority being granted.

Assumed identities: Assumed identities provide vital protection for undercover operatives engaged in infiltrating organised crime groups. Undercover operatives must be able to obtain and use proper identification documents—that is, a driver's licence, passport and credit card—to enable them to maintain their assumed identity. Without a credible and verifiable identity, the safety of undercover operatives can be jeopardised.

This bill provides a scheme for the acquisition of evidence to support false identities, and their use, for law enforcement purposes. Western Australia—like Tasmania and Victoria prior to adopting the model laws—currently has no assumed identity legislation. Western Australia Police and the Department of Fisheries presently obtain authorisation to use an assumed identity by way of administrative arrangement with the chief officer of the respective agencies. The acquisition of evidence to support a fictitious identity is done by way of an exercise of goodwill with the issuing agencies. The proposed legislation will introduce a comprehensive regulatory scheme with provision for regular review of each formal assumed identity to determine whether it is still necessary, six-monthly auditing of current assumed identities and a requirement to provide an annual report to the relevant minister.

The bill provides for a formal application process to ensure assumed identities are granted only in appropriate circumstances. A law enforcement officer must apply to the chief officer of the agency for authority to acquire and use an assumed identity. The application must contain detail on the reasons for the need to acquire or use the assumed identity, the types of evidence of identity required and which agencies will be requested to issue this evidence. To ensure that an authority is granted only when appropriate, the chief officer must be satisfied that the assumed identity is necessary for the purposes of investigation or intelligence gathering in relation to criminal

activity, and for the training of persons for this purpose or any administrative function in support of either of these purposes. The chief officer must also be satisfied that the risk of abuse of the assumed identity is minimal.

The bill will enable government issuing agencies, such as Medicare and the Department of Transport, and non-government issuing agencies, such as banks and financial institutions, to lawfully create fictitious documentation and other evidence to support an assumed identity. Agencies and their staff assisting in the creation of documentation to support an assumed identity will be protected from any criminal or civil liability. Birth and marriage certificates are a basic source for the creation of false identities and it is essential that the creation of such documents be strictly controlled. An entry will be made in the Registry of Births, Deaths and Marriages only if authorised by a Supreme Court judge, and entries must be cancelled by the same means.

In the course of acquiring and using an assumed identity, law enforcement officers and other authorised persons—that is, civilians—may commit minor offences such as making a false statement or giving a false name or address. The bill offers protection from criminal and civil liability for authorised persons for these types of minor offences.

The model laws provided for “point forward” creation of an assumed identity, but did not provide for a “historical record” to be made in a register regarding an assumed identity. For example, a motor driver’s licence is created for a 35-year-old operative and the record made to appear as though the licence was obtained when the operative was 17 years old. Research indicates that organised crime syndicates often have extensive networks and corrupt connections in government departments that enable them to check the assumed identity and background of persons suspected of being undercover operatives. A watertight long-term history similar to a person’s true identity is necessary to ensure minimal threat to the safety of the operative, whilst also minimising financial losses that occur when operations are compromised.

A key feature of this part of the bill is mutual recognition. The bill enables an assumed identity issued in a participating state or territory to be recognised as valid for use in Western Australia. Similarly, an assumed identity authority issued in this state will be recognised as valid and effective in any other participating jurisdiction.

The bill creates an offence for the misuse of an assumed identity, punishable by a maximum penalty of two years’ imprisonment. In addition, a disclosure offence is included in the bill. This aims to ensure that the safety of undercover operatives using assumed identities is not compromised by disclosures that may reveal the fact that an assumed identity is not a person’s real identity. The offence is punishable by a maximum penalty of 10 years’ imprisonment.

The bill requires record keeping and regular auditing of assumed identity authorities. Law enforcement agencies must keep detailed records relating to all assumed identity authorities granted, varied or cancelled. These records are audited every six months while the authority is in force and at least once in the six months after cancellation of the authority. The results of an audit are to be reported to the relevant chief officer. The bill imposes an additional level of accountability and oversight by requiring the chief officer to submit an annual report to the relevant minister. This report must include information on whether any fraud or other unlawful activity was identified by an audit, as well as any other information that the relevant minister considers appropriate.

Witness identity protection: Like controlled operations and assumed identities, witness identity protection is part of the model laws. A legislative scheme will fit hand in glove with controlled operations and the use of assumed identities, as witnesses, covert operatives and participants will be able to give evidence with the confidence of knowing their true identity will be protected. Unfortunately, there will be cases in which a witness may be intimidated or have their personal safety threatened as a consequence of giving evidence in legal proceedings. A legislative scheme for the protection of a witness’s identity will ensure that they are more prepared to come forward and testify if they can be assured that their true identity can be protected.

Currently, covert operatives rely on the doctrine of public interest immunity—that is, the discretion of the judiciary to allow them to give evidence without revealing their real name. However, when a matter is left to judicial discretion, the potential witness is left uncertain whether the court will exercise the discretion in their favour and therefore afford them protection. The bill will serve a number of public interests; it will not only protect the witness, but also provide a law enforcement agency the ability to allow an undercover officer to continue to operate long after he or she has given evidence in a particular case. Protecting an undercover operative’s true identity will encourage police officers and others to participate in the often dangerous environment of undercover operations. The witness protection provisions also extend to providing certainty for civilian witnesses when giving evidence in court.

The bill introduces a statutory scheme under which operatives in controlled operations or those using an assumed identity in law enforcement operations will be afforded the protection of a witness identity protection certificate

when giving evidence in court. The relevant chief officer will be able to issue a certificate when he or she is satisfied that the disclosure of the witness's true identity may endanger the safety of the operative or someone else; or may prejudice an investigation. The chief officer must ensure that the certificate records information relevant to the credibility of the evidence given by the operative. This is important as it ensures the accused's right to a fair trial, whilst being able to challenge the credibility of the witness, without disclosing the witness's true identity.

Information on the certificate will include a variety of information such as the operative's prior convictions and outstanding charges, but the certificate must not contain any information that will allow the operative's true identity to be revealed. A certificate must be filed with the relevant court prior to the operative giving evidence and all proceedings involving an operative who has been issued a certificate must be held in a closed court. The certificate allows the operative to give evidence in an assumed or court name and requires that an operative not be asked questions or be required to answer questions or make statements that may lead to the disclosure of their true identity or where they live. The bill provides that a party to the proceeding may apply to the court for leave to ask a witness questions or to answer questions or to make statements that may reveal their true identity but only if there is evidence that would substantially call into question the witness's credibility.

The definition of "court" is expansive and includes a tribunal; a royal commission; and a commission, board, committee or other body established by the Governor to inquire into any matter. By definition, "proceeding" includes any criminal, civil or other proceeding before, or inquiry, reference or examination by, a court, and includes arbitration. These definitions afford maximum protection for operatives required to give evidence in many types of proceedings.

The bill allows the presiding officer the power to require the operative to disclose their true identity to the presiding officer so he or she can determine whether a conflict of interest or a question of bias exists. This is intended to avoid a potential miscarriage of justice or the need to abort a trial that is already underway.

The bill also allows the chief officer to issue a certificate for an operative who is required to give evidence in another participating jurisdiction. Likewise, an interstate operative who has been issued a certificate in their home state will have that certificate recognised when giving evidence in a Western Australian court. Such consistent protection is necessary to facilitate and encourage cross-border investigation and to protect the safety of covert operatives. This mutual recognition provision will operate between those states and territories that have been recognised as participating jurisdictions.

It is an indictable offence for a person to do something that may disclose the true identity of an operative for whom a certificate is in force. A penalty of imprisonment for 10 years applies, with a provision for a summary conviction penalty of two years' imprisonment or a fine of \$24 000. The relevant chief officer of the issuing law enforcement agency must prepare an annual report regarding certificates issued by their agency. This report must be given to the agency's respective minister who must table the report in Parliament.

The bill also amends the Witness Protection (Western Australia) Act 1996 to provide a parallel scheme for the protection of civilian witnesses who are or have been participants in the state witness protection program. In this instance, the certificate is known as a non-disclosure certificate and is issued by the Commissioner of Police. The certificate is filed with the court in which the witness—the protected person—is required to give evidence and must also detail any offences the protected person has been convicted of. Like a witness identity protection certificate, a non-disclosure certificate must not state any information that discloses, or is likely to disclose, the protected person's true identity or where they live.

Once a certificate is issued, a protected person must not be asked to answer a question or make a statement that may lead to the disclosure of their protected identity. The court retains the discretion to disclose to parties to the proceedings the existence of the certificate and what it states, but must do so in the absence of any jury.

All states and territories have committed to the package of cross-border covert investigative powers and these model laws will in time be implemented by all remaining states and territories. All parts of this bill build in a number of controls and levels of accountability.

In closing, the bill seeks to give Western Australia Police, the Department of Fisheries and the Australian Crime Commission the necessary tools to fight serious and organised crime within this state and to promote cooperation between jurisdictions.

I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.