

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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<b>Part 1 - Preliminary</b>
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### **Clause 1. Short title**

Clause 1 cites the short title of the proposed Act as the *Criminal Investigation (Covert Powers) Act 2011*.

### **Clause 2. Commencement**

Clause 2 provides for the proposed Act to be enacted in two parts. Sections 1 and 2 are to come into operation on the day the Act receives Royal Assent. The remainder of the Act comes into operation on a day fixed by proclamation, different days may be fixed for different provisions. Proclamation is dependent upon establishment of a new database system and training of relevant officers in the new procedures.

### **Clause 3. Terms Used**

Clause 3 defines certain words and expressions used in the proposed Act. The key definitions are:

#### **‘chief officer’**

Means

- (a) in relation to the Police Force – The Commissioner of Police
- (b) in relation to the Australian Crime Commission – the Chief Executive Officer of the Australian Crime Commission
- (c) in relation to the fisheries department – the chief executive officer of the department.

#### **‘fisheries officer’**

Has the meaning given in the *Fish Resources Management Act 1994* section 4(1). This section refers to the definition in section 11 which is as follows:

#### **11. Fisheries officers and other staff**

There are to be appointed under Part 3 of the *Public Sector Management Act 1994* such fisheries officers and other staff as are required for the purposes of the administration of this Act.

#### **‘Law Enforcement agency’**

Means the Police Force, the Australian Crime Commission and the fisheries department.

#### **‘Law Enforcement officer’**

Means a police officer, a member of staff of the Australian Crime Commission or a fisheries officer holding a prescribed office in the fisheries department.

#### **‘Minister’**

Means –

- (a) in relation to the Police Force, means the Minister administering the *Police Act 1892*;

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

- (b) in relation to the Australian Crime Commission, means the Minister administering the *Australian Crime Commission (Western Australia) Act 2004*;
- (c) in relation to the fisheries department, means the Minister administering the *Fish Resources Management Act 1994*.

### **Clause 4. Crown bound**

Clause 4 is a standard provision that is used in “Crown bound” clauses. It is inserted so as to avoid the often absurd position of the Crown prosecuting itself.

Clause 4 binds the State and so far as the legislative power of the Parliament permits, the Crown in all its other capacities. Nothing in the proposed Act makes the State, or the Crown in any of its other capacities, liable to be prosecuted for an offence.

## **Part 2 – Controlled Operations**

This proposed Part provides a scheme for the authorisation, conduct and monitoring of controlled operations in which either a law enforcement or civilian participant may engage in unlawful conduct in order to gather evidence and intelligence on criminals and in particular those people who organise and finance serious and organised crime.

### **Division 1 – General**

#### **Clause 5. Terms used**

Some of the key definitions used in this Part are:

##### **‘Authorised Operation’**

Means a controlled operation for which a written authority granted by the chief officer or a senior officer is in force.

##### **‘Authority’**

The authority is the document issued by the chief officer or a senior officer that authorises the controlled operation and unlawful conduct and includes any variation of such an authority and any retrospective authority granted under clause 25.

##### **‘Controlled Conduct’**

An authority may authorise a participant to engage in unlawful, criminal conduct during the course of the operation in order to obtain intelligence, evidence or conceal their law enforcement role. This authorised unlawful conduct is referred to in this Part as “controlled conduct.”

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **‘Controlled Operation’**

Refers to a law enforcement operation that authorises or may authorise a person to commit certain offences (controlled conduct).

### **‘Corresponding authorised operation’**

Means any operation in the nature of a controlled operation that is authorised under the controlled operation provisions of another jurisdiction.

### **‘Corresponding authority’**

Means an authority authorising a controlled operation that is in force under a corresponding law.

### **‘Corresponding law’**

Means a controlled operations law of another jurisdiction that corresponds to this Part, and includes a controlled operations law of another jurisdiction that is prescribed in the regulations.

### **‘Illicit Goods’**

Means goods the possession of which is a contravention of the law of this jurisdiction in the circumstances of the particular case.

### **‘Participant’**

Refers to a person (either a law enforcement officer or a civilian) who is authorised to commit certain criminal offences (controlled conduct) during an authorised operation.

### **‘Participating jurisdiction’**

Means a jurisdiction (other than Western Australia) in which a corresponding law is in force.

### **‘Principal law enforcement officer’**

In an authorised operation is the law enforcement officer who is nominated to be responsible for the conduct of the operation and is responsible for reporting to the chief officer upon the completion of an operation.

### **‘Relevant Offence’**

A controlled operation can only be authorised for a relevant offence. A relevant offence is an offence against the law of this jurisdiction punishable on conviction by a maximum penalty of imprisonment for 3 years or more or a limited number of less serious offences that are prescribed in regulations.

### **Clause 6. Cross-border controlled operations**

Sometimes an investigation into criminal activity will extend beyond the boundary of this state. A cross-border controlled operation is a controlled operation that is, or is intended to be conducted in Western Australia and one or more other participating jurisdictions. The definition of cross-border controlled operation includes an operation in respect of a Western Australian offence where the operation is conducted wholly in

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

another participating jurisdiction. For example, a murder is committed in Western Australia and the offender flees to Queensland.

### **Clause 7. Local controlled operation**

Means a controlled operation that is conducted, or is intended to be conducted, wholly in Western Australia.

### **Clause 8. Evidence obtained in controlled operation**

This clause enables the court to admit the evidence obtained from an operative, even though this evidence may have been obtained as a result of committing an unlawful act, provided that this unlawful act was authorised and within the scope of the controlled operations authority.

### **Clause 9. Non-application of certain Acts**

The nature of controlled operations makes it imperative that specific information relating to individuals not become public knowledge. To provide the necessary protection the *State Records Act 2000* and the *Freedom of Information Act 1992* do not apply to investigations, operations, activities or records under this Part.

## **Division 2 – Authorisation of controlled operations**

### **Clause 10. Applications for authorities to conduct controlled operations**

This clause sets out the procedure to apply for an authority to conduct a controlled operation.

There are two types of ways an application may be made —

- **"formal application"**— in writing; or
- **"urgent application"**— oral.

An urgent application may be made if the applicant has reason to believe that the delay caused by making a formal application may affect the success of the operation.

Applications for authority to conduct a controlled operation are made to the chief officer of the agency. The chief officer may delegate this function (see clause 43).

A **formal application** must be in a physical form, signed by the applicant. However, if it is impracticable for a physical document to be delivered to the chief officer (for example due to distance) a formal application may take the form of a fax, email or other electronic document (for example an I phone). In this case, the document need not be signed. This is a variation from the Model Laws to cater for applications from remote places in circumstances where an urgent application is not appropriate. This is necessary given the geographical vastness of Western Australia and the fact that all senior officer's eligible to be delegated this function are located in the Perth metropolitan area.

As a consequence, an **urgent application** may only be made by oral means be it in person, by telephone or any other electronic means (for example videophone, Skype or Yahoo messenger).

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

Either type of application must provide sufficient information to enable the chief officer to decide whether or not to grant the application. It must also provide details of any previous applications and authorities granted in respect of the same criminal activity. The authorising officer may ask the applicant for additional information about the proposed controlled operation to assist his/her decision making on the matter.

As mentioned, an urgent oral application may be made if the applicant has reason to believe that the delay caused by making a formal written application may affect the success of the operation. In this case, an obligation is placed on the applicant to, as soon as practicable, make a written record of the oral application and give a copy of it to the chief officer.

### **Clause 11. Determination of applications**

This clause provides that the chief officer after considering the application and any additional information may either authorise the operation by granting the authority (this may be subject to conditions) or may refuse the application. The chief officer may delegate this function (see clause 43).

### **Clause 12. Matters to be taken into account – all controlled operations**

This clause sets out the decision-making criteria that must be considered by the chief officer. The chief officer must not grant an authority unless satisfied on reasonable grounds of the following matters:-

- that a relevant offence has, is or is likely to be committed;
- that the criminal activity falls within the administrative responsibility of that particular law enforcement agency;
- that any unlawful conduct will be limited to the maximum extent necessary to conduct an effective operation;
- since many controlled operations involve illicit goods offences (see definition in clause 5) the authorising officer must be satisfied on reasonable grounds that the operation will be conducted in such a way that will minimise the amount/quantity of these illicit goods left remaining in the community at the end of the operation;
- the proposed controlled conduct (see definition in clause 5) can be accounted for so that the reporting requirements of Division 4 are complied with;
- that the controlled operation will not be conducted in such a way that an operative would induce a person to commit any offence that they would not otherwise have intended to commit.

There are further restrictions on the type of controlled conduct that can be authorised. Any conduct involved in the operation cannot:-

- seriously endanger the health or safety of any person; or
- cause the death of, or serious injury to, any person; or

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

- involve the commission of a sexual offence against any person; or
- result in unlawful loss of or serious damage to property (other than illicit goods).

The chief officer must also be satisfied the person authorised to participate in the operation has the appropriate skills and training to do so.

Civilians may be authorised to participate in a controlled operation in limited circumstances. This clause provides that the authorising officer must be satisfied on reasonable grounds that the role given to a civilian is not one that could be adequately performed by a law enforcement officer. For example, the civilian may speak a language or dialect that is spoken by the persons under investigation but that is not spoken by any available law enforcement officer. Also a civilian must not be authorised to engage in controlled conduct unless this is absolutely necessary.

### **Clause 13. Further matters to be taken into account – cross-border controlled operations**

This clause sets out further requirements (in addition to that in clause 12 for the granting of an authority to conduct a cross-border controlled operation. An authority must not be granted unless the chief officer is satisfied on reasonable grounds:-

- That the controlled operation will or is likely to be conducted (i) in this jurisdiction and in one or more participating jurisdictions (see definition in clause 5) or (ii) in one or more participating jurisdictions;
- That the nature and extent of the suspected criminal activity are such as to justify the conduct of a controlled operation.

### **Clause 14. Further matters to be taken into account – local controlled operations**

This clause sets out further requirements (in addition to that in clause 12 for the granting of an authority to conduct a local controlled operation. An authority must not be granted unless the chief officer is satisfied on reasonable grounds:-

- That the controlled operation will or is likely to be conducted wholly in this jurisdiction;
- That the nature and extent of the suspected criminal activity are such as to justify the conduct of a controlled operation in this jurisdiction.

### **Clause 15. Form of authority**

This clause sets out how an application for authority to conduct a controlled operation may be granted.

There are two types of ways an authority may be granted:-

- in writing a "**formal authority**"; or
- orally an "**urgent authority**"

An urgent authority may be granted if the chief officer is satisfied that the delay caused by granting a formal authority may affect the success of the operation.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

As with the application process, a **formal authority** must be in a physical form, signed by the chief officer. However, if it is impracticable for a physical document to be delivered to the applicant (for example due to distance) a formal authority may take the form of a fax, email or other electronic document (for example an I phone). In this case, the document need not be signed. As a consequence, an **urgent authority** may only be granted by oral means be it in person, by telephone or any other electronic means (for example videophone, Skype or Yahoo messenger).

Subclause (6) lists the detail that must be included in an authority (whether formal or urgent). In particular, the authority must:-

- Identify the principal law enforcement officer;
- State whether it is for a cross-border or local controlled operation;
- State whether the authority is for a formal or urgent authority;
- Identify each person who may engage in controlled conduct;
- Identify with respect to the law enforcement and civilian participants the nature of the controlled conduct they may engage in; and
- Specify the duration of the authority being a period not exceeding 6 months for a formal authority and 7 days for an urgent.

The chief officer must ensure that written notes are kept of the particulars referred to in subclause (6) for each urgent authority. The chief officer may delegate this function (see clause 43).

### **Clause 16. Duration of authorities**

Unless it is sooner cancelled, an authority has effect for the duration specified in it which cannot exceed 6 months for a formal authority and 7 days for an urgent authority.

### **Clause 17. Variation of authority**

This clause recognises that in many cases it may not be possible to anticipate all eventualities at the time a controlled operations authority is issued. This clause provides a procedure for varying existing authorities to address contingencies that arise as an operation progresses.

This clause provides the chief officer may vary an authority at any time on the chief officer's own initiative or on application under clause 19(1).

A variation cannot be made that has the effect of extending the period of validity of an urgent authority. The object of this clause is to ensure that urgent authorities are used only for one-off, short term operations and if further time is needed then the operative should seek a formal authority.

The chief officer is required to prepare and give to the principal law enforcement officer for the authorised operation a written document with reasons why the variation is made. This is important, given the principal law enforcement officer may be unaware of these reasons if the chief officer varies an authority on his/her own initiative.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Clause 18. Variations on chief officer's own initiative**

This clause restricts the scope of the chief officer's discretion to vary an authority under clause 17(1)(a) on his/her own initiative to a list of five prescribed reasons.

### **Clause 19. Applications for variation of authority**

This clause relates to the power in clause 17(1)(b) for an application to be made to the chief officer to vary an authority.

The clause provides the principal law enforcement officer or any law enforcement officer on behalf of the principal may apply to the chief officer for a variation of authority of an authority. The purpose for which an application may be made is restricted to the list of five prescribed reasons in clause 18.

More than one application for a variation may be made in respect of the same authority, but no single variation may extend the duration of a formal authority for more than 6 months.

There are two types of ways an application for a variation of an authority may be made –

- **"formal variation application"**—in writing; or
- **"urgent variation application"**—orally.

An urgent variation application may be made if the applicant has reason to believe that the delay caused by making a formal variation application may affect the success of the operation.

A **formal variation application** must be in a physical form, signed by the applicant. However, if it is impracticable for a physical document to be delivered to the chief officer (for example due to distance) a formal variation application may take the form of a fax, email or other electronic document (for example an 'I phone'). In this case, the document need not be signed. As a consequence, an **urgent variation application** may be made in person, by telephone or any other electronic means (for example videophone, Skype or Yahoo messenger).

After making an urgent variation application, the applicant must make a record in writing and give a copy of it to the chief officer.

### **Clause 20. Determining applications for variation of authority**

This clause gives the chief officer the power to consider an application for a variation and then decide whether to grant the application to vary the authority in whole or in part either unconditionally or subject to conditions or refuse the application.

The chief officer must be satisfied on reasonable grounds of the factors mentioned in:-

- Clause 12: Matters to be taken into account – all controlled operations
- Clause 13: Further Matters to be taken into account – cross-border controlled operations



# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

- Clause 14: Further Matters to be taken into account – local controlled operations  
as applicable to each individual application for a variation of authority.

As an additional safeguard and to make sure that applications for a variation are consistent with the nature of the original existing authority, subclause (3) provides a variation of authority must not be granted unless the chief officer is satisfied on reasonable grounds that the variation will not authorise a significant alteration of the nature of the authorised operation concerned.

### **Clause 21. Form of variation of authority**

This clause provides that if the chief officer grants a variation specific information must be included in the variation authority.

There are two types of ways a variation of authority may be granted –

- "**formal variation of authority**"— in writing; or
- "**urgent variation of authority**"— orally.

An urgent variation of authority may be made if the person making the variation is satisfied that the delay caused by making a formal variation of authority may affect the success of the operation.

A **formal variation of authority** must be in a physical form, signed by the chief officer. However, if it is impracticable for a physical document to be delivered to the principal law enforcement officer for the authorised operation (for example due to distance) a formal variation of authority may take the form of a fax, email or other electronic document (for example an 'I phone'). In this case, the document need not be signed. As a consequence, an **urgent variation of authority** may be made in person, by telephone or any other electronic means (for example videophone, Skype or Yahoo messenger).

The specific information that must be included in a variation of authority is:-

- Identification of the existing authorised operation;
- Name and rank of person making the variation of authority;
- Identification of whether the variation is a formal variation or an urgent variation of authority;
- If the variation is made on the chief officer's own initiative describe the variation having regard to the purposes referred to in clause 18 and specify the reasons why the variation has been made; and
- If the variation is made after an application under clause 19(1) state the name of the applicant and describe the variation having regard to the purposes referred to in clause 19(1) and state date/time when the variation is made.

Subclause (6) provides the chief officer must ensure that written notes are kept of the specific information listed above for each urgent variation of authority.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Clause 22. Cancellation of authorities**

Subclauses (1) and (2) provide the chief officer with the power to cancel a controlled operations authority at any time by two means (i) acting on his/her own discretion the chief officer may, by order in writing given to the principal law enforcement officer, cancel an authority at any time and for any reason or (ii) acting at the request of the principal law enforcement officer.

Subclause (3) advises when cancellation of an authority takes effect. Cancellation takes effect at the time when the written order is made or at a later time specified in the written order.

Subclause (4) is a control measure to ensure that the principal law enforcement officer is, in all cases, aware of the reasons why the cancellation of the authority is made. This is necessary, because the principal law enforcement officer is obliged by clause 36 to make a written report to the chief officer within 2 months after the completion of an authorised operation.

### **Clause 23. Effect of authorities**

An authority for a controlled operation may authorise a law enforcement or civilian participant to engage in controlled conduct that is specified in the authority.

If the authority is for a local controlled operation (see clause 7) then each participant (law enforcement or civilian) is authorised to engage in controlled conduct only within Western Australia.

If the authority is for a cross-border controlled operation then each participant is authorised to engage in controlled conduct as specified in the authority either (i) in this jurisdiction and in one or more participating jurisdictions or (ii) in one or more participating jurisdictions, subject to any corresponding law of that other participating jurisdiction.

Subclause (4) provides the authority to engage in controlled conduct given to a participant cannot be delegated to any other person.

### **Clause 24. Defect in authority**

The intention of this clause is that only defects of a substantive nature can invalidate an application, authority or variation. Minor matters relating to form or process should not invalidate any application, authority or variation.

### **Clause 25. Retrospective authority**

The Model Law provisions did not provide for a retrospective authority for cross border controlled operations and neither does this Bill. Subclause (1) clearly states a retrospective authority applies to a local controlled operation but not to a cross-border controlled operation. Therefore, this clause in no way jeopardises our mutual recognition with other participating jurisdictions.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

The intent of this clause is to protect a participant in a controlled operation against scenarios that may arise during an operation that are outside of the control of normal controlled operations planning.

Organised crime syndicates such as Outlaw Motorcycle Gangs are known to 'test' associates in the belief they may be undercover operatives and so incite them to commit offences they know an officer is not permitted by law to undertake. However, any refusal may put an officer's life at risk. This power to seek a retrospective authority, which covers unlawful activity not specified in the original authority, will enable the undercover operative to maintain his or her cover and not react inappropriately in a criminal situation that would normally compromise them by refusing to commit an act outside of their authority.

Subclauses (2) to (5) detail the application and approval process. A significant control measure is that only the principal law enforcement officer may apply to the chief officer for retrospective authority for an operative's conduct. This application must be made within 24 hours of the conduct in question. The chief officer may either grant or refuse the application and in accordance with subclause (8) this decision making responsibility cannot be delegated to any other person.

There are significant safeguards against abuse of this power.

Subclause (6) lists the considerations to which an undercover operative must have regard before commission of an offence outside the scope of their authority and to which the chief officer must be satisfied before granting any retrospective authority.

Subclause (7) places some significant controls on the seriousness of the criminal conduct that can be approved retrospectively. For example, retrospective authority cannot be granted for any conduct that seriously endangers the health or safety of any person, causes the death of or serious injury to any person or involves the commission of a sexual offence.

### **Clause 26. Parliamentary Commissioner to be notified of retrospective authorities**

In addition to the safeguards outlined in the previous clause, this clause provides for independent scrutiny of the approval of retrospective authorities by the State Ombudsman.

Subclauses (1)-(2) require the chief officer who grants a retrospective authority under the previous clause to provide the State Ombudsman, within 7 days, with written details of the circumstances justifying that authority. The State Ombudsman also has the power to request from the chief officer any further information that is necessary to carry out this function.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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### **Division 3 – Conduct of controlled operations**

#### ***Subdivision 1 – Controlled conduct engaged in for purposes of controlled operations authorised by Division 2***

##### **Clause 27. Protection from criminal responsibility for controlled conduct during authorised operations**

This clause provides certainty of protection from criminal responsibility for an offence committed during an authorised controlled operation for an undercover law enforcement and civilian participant.

The approach taken in this clause in adopting the Model Laws is to provide protection to participants (law enforcement or civilian) without altering the unlawfulness of the controlled conduct. Participants may commit an unlawful act but will not be held criminally responsible for that conduct as long as certain conditions are met. The conduct does not lose its character as an offence and remains unlawful.

The unlawful conduct may occur in this jurisdiction or elsewhere.

The conditions that have to be met are listed in subparagraphs (a) to (d).

Subparagraph (d) lists an additional condition to be met by a civilian participant. The Bill provides in limited circumstances, this protection from criminal responsibility also applies to a civilian participant only where his or her conduct is in accordance with the instructions given by a law enforcement officer.

##### **Clause 28. Indemnification of participants against civil liability**

This clause provides certainty to a law enforcement or civilian participant of the Australian Crime Commission or the fisheries department and a civilian participant of the Police Force that their chief officer will meet the liability resulting from loss of damage to persons caused by their conduct in a controlled operation.

Please note, a law enforcement participant of the Police Force is protected from liability under section 137 of the *Police Act 1892*. While fisheries officers are protected under section 244 of the *Fish Resources Management Act 1994* that protection only applies in relation to things done under that Act.

A law enforcement or civilian participant of the Australian Crime Commission or the fisheries department who engages in controlled conduct will only be indemnified against civil liability where they act in accordance with their authority and their conduct does not involve the participant breaching any of the thresholds mentioned in subclause (2)(b) to (2)(e).

##### **Clause 29. Effect of sections 27 and 28 on other laws relating to criminal investigation**

This clause will ensure that participants in a controlled operation are aware that should they need to forcibly enter someone else's house and seize private property

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

or conduct a physical examination and take samples of bodily tissue then they are required to comply with the requirements of the relevant laws governing those particular procedures, in order to obtain the protections offered under the Bill. The clause is intended to ensure that the controlled operations legislation is not used as a substitute for other laws. That is, that the provisions of this Part will not be used instead of the relevant search warrant legislation or forensic or identification legislation.

### **Clause 30. Effect of being unaware of variation or cancellation of authority**

This clause seeks to protect a participant in a controlled operation who is unaware of the existence of a variation or cancellation of an authority. In such a case, the authority continues to have effect as if it were not varied or cancelled for as long as the participant is unaware of this fact.

### **Clause 31. Protection from criminal responsibility for certain ancillary conduct**

This clause proposes to offer protection from criminal liability for people who have some connection with the controlled operation but who are not necessarily authorised participants in the operation. For example, a ‘controller’. A ‘controller’ is a law enforcement officer who provides supervision and guidance to a participant in a controlled operation and acts as the participant’s link to the law enforcement agency during the course of the operation. This supervision and guidance may amount to “ancillary conduct.”

This clause provides a person who engages in ancillary conduct that is an offence is not criminally responsible for the offence if the person believed that the “related controlled conduct” was being engaged in, or would be engaged in, by a participant in an authorised operation.

## ***Subdivision 2 – Compensation and notification of third parties***

### **Clause 32. Compensation for property loss or damage**

This clause seeks to protect an innocent third party who suffers loss of or damage to property as a direct result of an authorised operation. The clause provides such a person with a right to compensation from the State. The provision is limited to cases in which the claimant did not contribute to the commission of an offence and is not a law enforcement or civilian participant.

### **Clause 33. Notification requirements**

Given the covert nature of controlled operations, a person who suffers property loss or damage is unlikely to have any way of knowing that the loss or damage occurred in the course of a controlled operation and that compensation might be sought.

This clause provides if any loss of or damage to property does occur then the principal law enforcement officer for the operation must report the loss or damage to the chief officer as soon as practicable. The chief officer must then decide whether or not notification of the loss or damage to the owner of the property would (a) compromise or hinder the authorised operation; (b) compromise the identity of a participant in the authorised operation; (c) endanger the life or safety of any person;

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

(d) prejudice any legal proceedings or (e) otherwise be contrary to the public interest. If not, then the chief officer must take all reasonable steps to notify the owner of the property of the loss or damage.

### ***Subdivision 3 – Mutual recognition***

#### **Clause 34. Mutual recognition of corresponding authorities**

The approach agreed to at the Commonwealth level was to develop model laws which may be adopted by each jurisdiction and mutually recognised by each other jurisdiction. Authorities issued by a participating jurisdiction would then be recognised in other such jurisdictions as if they were authorities issued in those other jurisdictions.

The participating jurisdictions are the Commonwealth, Australian Capital Territory, New South Wales, Queensland, Victoria and Tasmania. Western Australia is seeking to become part of this scheme.

Once the controlled operations legislation is enacted in Western Australia authorities that are issued in this state will be recognised in all these participating jurisdictions. This clause also ensures that a corresponding authority issued under a corresponding law of a participating jurisdiction will be recognised in this state as if it was issued under this Bill.

### **Division 4 – Compliance and monitoring**

#### ***Subdivision 1 – Restrictions on use, communication and publication of information***

#### **Clause 35. Disclosure of operational information**

This penalty provision is designed to protect persons participating in controlled operations and to ensure the integrity of investigations. Operational information is defined in subclause (1) very broadly to mean “any information relating to an authorised operation or a corresponding authorised operation”.

The indictable offence in subclause (2) provides a person who has access or has had access to operational information must not disclose the information except for a lawful purpose mentioned in paragraphs (a) to (d).

The maximum penalty is imprisonment for 10 years. An alternative summary conviction penalty of a fine of \$24,000 or imprisonment for 2 years is provided.

If the disclosure has very serious consequences it is expected that the courts will impose a high penalty. If the disclosure is minor and does not have serious consequences, then the court has a very wide discretion to impose a much lower penalty.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Clause 36. Principal law enforcement officers' reports**

The intent of this clause is to ensure that within a law enforcement agency there is a mechanism to report back on the outcomes of operations.

This clause places an obligation on the principal law enforcement officer, within 2 months of the completion of the operation, to make a report to the chief officer of the law enforcement agency.

The clause then lists the details that must be included in the report including; whether the operation was a cross-border controlled operation or a local controlled operation, the nature of the controlled conduct engaged in for the purposes of the operation and details of the outcome of the operation.

### **Clause 37. Chief officers' reports**

This clause provides an important accountability mechanism. The clause details the process by which the chief officer reports each 6 months to the external, independent oversight body.

Subclause (1) provides that the chief officer of each law enforcement agency must, as soon as practicable after 30 June and 31 December in each year, submit a report to the State Ombudsman on completed controlled operations conducted during the previous 6 months.

The report must include all of the details listed in subclause (2).

Subclause (4) requires these details to be classified into cross-border controlled operations and local controlled operations.

Subclause (5) provides the report must not disclose any information that identifies any suspect or a participant in an authorised operation or that is likely to lead to such a person or participant being identified.

### **Clause 38. Annual report by Parliamentary Commissioner**

This clause provides the process by which the State Ombudsman prepares an annual report and the tabling of this report in Parliament. This external, independent oversight is an important accountability mechanism in this Part of the Bill.

Subclause (1) provides the State Ombudsman must, as soon as practicable after 30 June in each year, prepare a report of the work and activities of the law enforcement agencies under this Part and give a copy to the Minister and chief officer of each law enforcement agency.

The chief officer must advise the Minister under subclause (2) of any information in the annual report that should be excluded before the report is tabled in Parliament because the information, if made public could reasonably be expected to (a) endanger a person's safety (b) prejudice an investigation/prosecution (c) compromise an agency's operational activities or methodologies.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

Subclause (3) requires the Minister to exclude information if satisfied on the advice of the chief officer of any of the grounds set out in subclause (2).

The Minister is required under subclause (4) to table the report before each House of Parliament within 15 sitting days of receiving the report under subclause (1).

Subclause (6) provides the report must not disclose any information that identifies any suspect or participant in an authorised operation, or that is likely to lead to their identification.

In addition, subclause (7) provides that only particulars of completed controlled operations should be included in the annual report for the year in which the operation is completed.

### **Clause 39. Keeping documents connected with authorised operations**

The intent behind this clause is to require a law enforcement agency to keep detailed record-keeping provisions to enhance the oversight process by ensuring that the State Ombudsman 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.

The clause requires the chief officer of a law enforcement agency to keep the following records:

- a) Each application made;
- b) Each controlled operations authority granted;
- c) Each variation application made;
- d) Each variation of a controlled operations authority granted;
- e) Each order canceling an authority granted
- f) Each retrospective authority granted under clause 25 and details of the application and authority to which the retrospective authority relates;
- g) Each report of a principal law enforcement officer under 33(1) or 36.

### **Clause 40. General register**

This clause recognises the importance of keeping appropriate records for proper accountability and oversight purposes.

Subclause (1) obliges the chief officer of a law enforcement agency to ensure that a general register is kept.

Subclause (2) paragraphs (a)-(c) specify what the general register is to contain. Paragraph (a) requires records of applications made for a controlled operations authority (including applications made for a variation of any such authority) to be kept. Paragraph (b) requires records of controlled operations authorities granted to be kept. Paragraph (c) requires records of variations of any controlled operations authority granted to be kept in the general register.



# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Clause 41. Inspection of records by Parliamentary Commissioner**

This clause recognises that external, independent oversight of controlled operations is a necessary and important accountability measure.

Subclause (1) provides the State Ombudsman must, at least once every 12 months, inspect the records of a law enforcement agency to determine the extent of compliance with this Part.

Subclause (2) provides the entry and access powers of the State Ombudsman are to be derived from section 11 'Delegation of functions of Commissioner' and Part III 'Jurisdiction and functions of the Commissioner' of the *Parliamentary Commissioner Act 1971*. This is a variation from the Model Laws which provided for its own separate entry and access powers. This variation was suggested by Parliamentary Counsel's Office during drafting on the Bill.

Subclause (3) requires the chief officer of the law enforcement agency being inspected to ensure that the State Ombudsman is given any assistance reasonably required to enable the Ombudsman to perform or exercise functions under this section.

### **Clause 42. Evidence of authorities**

This clause enables an authority granted either in Western Australia or under a corresponding law of a participating jurisdiction, to be tendered in evidence in legal proceedings in this jurisdiction. In absence of evidence to the contrary, the authority will be proof that the person who granted the authority was satisfied of the facts that he or she was required to be satisfied of to grant the authority.

### **Clause 43. Delegation**

This clause provides the chief officer of a law enforcement agency with the power to delegate some of his functions for reasons of operational necessity.

Subclause (1) provides a definition of "**senior officer**" to mean –

- (a) in relation to the Police Force – a police officer of or above the rank of Commander; or
- (b) in relation to the Australian Crime Commission, any of the following
  - (i) the Director National Operations
  - (ii) a person holding a prescribed office in the Australian Crime Commission;or
- (c) in relation to the fisheries department – a fisheries officer holding a prescribed office in the department.

The definition of "*senior officer*" in relation to the Police Force is a variation from the Model Laws. The Model Laws specified that the delegation should be to an officer of or above the rank of Assistant Commissioner. However, the division of Western Australian Police responsible for controlled operations is the State Intelligence

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

Division ("SID"). The organisational structure of Western Australian Police is unique in that SID does not have an Assistant Commissioner as its portfolio head, rather it has a Commander. The delegation provision enables the Commander of SID to be able to authorise his own portfolios controlled operations, rather than having to refer these applications to an Assistant Commissioner of another portfolio or a Deputy Commissioner.

Subclause (2) is self explanatory.

Subclause (3) says what functions of the chief officer may be delegated. It does not refer to all of the functions of the chief officer under this Part but only to his/her power to authorise a controlled operation, vary or cancel a controlled operations authority and the giving of notification to an innocent third party who has suffered loss or damage to their property as a direct result of an authorised operation. This subclause also makes clear that the chief officer's power to grant a retrospective authority under clause 25(8) cannot be delegated to any other person.

### **Part 3 – Assumed Identities**

Part 3 of the Bill creates a statutory framework for the authorisation of assumed identities. An assumed identity is a false identity used by a police officer or other authorised person to gather intelligence or investigate an offence including investigations extending beyond this jurisdiction. Assumed identities provide protection for law enforcement officers or civilians acting on their behalf engaged in criminal investigations.

#### **Division 1 - General**

##### **Clause 44. Terms used**

This clause defines certain words and expressions used in Part 3 of the Bill. In particular:-

##### **'acquire'**

Acquire an assumed identity, means acquire evidence of the identity and includes taking steps towards acquiring evidence of the identity.

##### **'authorised person'**

Refers to a person who is authorised under this Part to acquire or use an assumed identity. An authorised person will usually be a law enforcement officer, but in some cases may be a civilian.

##### **'authority'**

Means an authority granted under section 48 to acquire or use an assumed identity, including the authority as varied under section 51.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **‘chief officer’**

Chief Officer of an issuing agency, means the chief executive officer of the agency.

### **‘corresponding authority’**

Means an authority under a corresponding law to acquire or use an assumed identity in this jurisdiction or an authority under a corresponding law to request the production of evidence of an assumed identity in this jurisdiction. The mutual recognition provisions in Division 5 provide for corresponding authorities to be recognised as if they were granted in Western Australia under this Bill.

### **‘evidence’**

Evidence of identity, means a document or other thing (such as a driver’s licence, birth certificate, credit card etc) that evidences, indicates or supports, or can be used to support a person’s identity or any aspect of a person’s identity.

### **‘issuing agency’**

Means a government issuing agency (for example road traffic authorities) or a non-government issuing agency (for example banks and other financial institutions).

### **‘participating jurisdiction’**

Means a jurisdiction in which a corresponding law is in force.

### **‘use’**

To an assumed identity, includes representing (whether expressly or impliedly, or by saying or doing something) the identity to be real when it is not.

### **Clause 45. Non-application of certain Acts**

This clause specifies that the State Records Act 2000 and the Freedom of Information Act 1992 do not apply to activities and records of Part 3 of the Bill. The Government is of the view that the public interest in protecting the identity of police, operatives, the assumed identities and agencies authorised by this Part outweighs the public interest in disclosing information under the Acts listed.

### **Clause 46. Relationship to other laws relating to assumed identities**

This clause makes clear the independence of this legislation from any other written law in Western Australia which provides for the acquisition and use of an assumed identity, for example the Corruption and Crime Commission Act 2003 and the Witness Protection (Western Australia) Act 1998.

## **Division 2 – Authority for assumed identity**

### **Clause 47. Application for authority to acquire or use assumed identity**

This clause introduces a formal procedure for applying for an authority to acquire and/or use an assumed identity. The procedure allows a law enforcement officer to apply to the chief officer of the law enforcement agency for an authority to acquire and/or use an assumed identity. Only a law enforcement officer can make an application and a separate application is required for each assumed identity.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

An application for an authority for an assumed identity may be made in writing in a physical form and signed by the applicant (formal application). Where it is impracticable for a physical document to be delivered to the chief officer (for example, due to distance) a formal application may take the form of a fax or email or other electronic document and need not be signed.

Provision is also made for an urgent application. This may be chosen in circumstances where the applicant has reason to believe that the delay caused by making a formal application may affect the success of a law enforcement operation. An urgent application may be made orally in person, by telephone or any other electronic means. Importantly, an urgent application may only be made for the use of an assumed identity, not for the acquisition of evidence of an assumed identity.

This clause also sets out the particulars that an application must contain. The application must include:-

- the name of the applicant;
- the name or names of the persons to be authorised to acquire or use the assumed identity;
- If an assumed identity application is made for a civilian, the application must record the name, rank or position of the person to be appointed the supervisor of the civilian and an explanation of why it is necessary for the civilian to acquire or use the assumed identity;
- details of the proposed assumed identity (for example address, date of birth, nationality);
- reasons for the need to acquire or use an assumed identity;
- details of the investigation or intelligence gathering exercise in which the assumed identity will be used;
- details of the issuing agencies and types of evidence those agencies will be requested to issue;
- details of any application for a birth, death or marriage certificate made to the Supreme Court.

The chief officer of the law enforcement agency may require the applicant to provide any additional information necessary for his or her proper consideration of the application.

Where an urgent application is made, the applicant must make a record in writing of the application and give a copy to the chief officer who grants the authority.

### **Clause 48. Determination of application**

This clause outlines the process to be followed by a chief officer when determining an application for an authority. After considering the application and any additional information, a chief officer may:-

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

- (a) grant an authority, with or without conditions; or
- (b) refuse the application.

An authority may only be granted if the chief officer is satisfied on reasonable grounds that the assumed identity is necessary for the investigation of, or intelligence gathering in relation to criminal activity or the training of persons for this purpose, or any administration function in support of the above purposes.

The chief officer must be satisfied:-

- that the risk of abuse of the assumed identity by the authorised person is minimal;
- If authorising the acquisition or use of an assumed identity by a civilian, that it would be impossible or impracticable for a law enforcement officer to acquire or use the assumed identity for the purpose sought. This is to ensure that the use of a civilian, who may not have the same high level of training as a law enforcement officer, is carefully considered by the chief officer.

This clause also provides for supervisory arrangements that a law enforcement agency must comply with should an authority be granted for a civilian.

A separate authority is required for each assumed identity. This requirement will facilitate the audit process under clause 78 and ensure that the chief officer gives appropriate consideration to the need for the acquisition and use of each assumed identity.

### **Clause 49. Form of authority**

This clause outlines the form an authority is to take and the particulars it must contain regardless of whether the authority is formal or urgent. The chief officer must ensure that written notes are kept of particulars relating to each urgent authority.

An authority, whether formal or urgent must:-

- record the name of the authorising officer;
- record the date of the authority;
- state whether the authority is formal or urgent;
- record details of the assumed identity;
- record details of any items of evidence that may be acquired for example a drivers licence;
- state any conditions to which the authority is subject;
- state why the authority is granted;
- include the name of each officer authorised to use the identity;

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

- in the case of an authorised civilian, record their name and the name of their supervisor; and
- state the period of validity of the civilian authority being a period not exceeding 3 months.

### **Clause 50. Duration of authority**

Clause 50 sets out the period of time an authority is valid.

A formal authority granted to a law enforcement officer remains in force until it is cancelled. This allows flexibility for operational law enforcement purposes. To provide suitable oversight and accountability, however, clause 53 requires the chief officer of the law enforcement agency to ensure each authority is reviewed annually.

In the case of a civilian, an assumed identity must be for a limited period of 3 months or less (clause 49(5)(j)(iii)). The authority remains in force until the end of the period specified in the authority unless cancelled sooner under clause 52. A subsequent authority may be issued to an authorised civilian before or after the period specified in the initial authority expires.

An urgent authority is confined to a maximum period of 7 days or less (clause 49(5)(d)). The authority remains in force until the end of the specified period unless cancelled sooner under clause 52.

### **Clause 51. Variation of authority**

This clause allows the chief officer who grants an authority, wide discretion to vary the authority at any time provided it does not have the effect of extending the period of validity of (a) a formal authority for an authorised civilian or (b) an urgent authority. Written notice of the variation must be provided to the authorised person and, if applicable, to their supervisor.

The clause sets out the form of the notice which must be provided according to whether it is a formal variation or an urgent variation of authority and specifies the particulars it must contain.

A formal variation of authority for an assumed identity must be in writing in a physical form and signed by the chief officer. Where it is impracticable for a physical document to be delivered to the authorised person (for example, due to distance) a formal variation of authority may take the form of a fax or email or other electronic document and need not be signed.

Provision is also made for an urgent variation of authority. This may be chosen in circumstances where the applicant has reason to believe that the delay caused by making a formal variation may affect the success of a law enforcement operation. An urgent variation may be made orally in person, by telephone or any other electronic means.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

A variation of authority takes effect in the case of a formal variation of authority on the day stated on the authority or in any other case when it is given to the authorised person.

The chief officer must ensure that written notes are kept of the particulars referred to in subclause (9) for each urgent variation of authority.

### **Clause 52. Cancellation of authority**

This clause requires the chief officer who grants an authority to cancel the authority if satisfied, whether on yearly review under clause 53 or otherwise, that use of the assumed identity is no longer required. The chief officer must give written notice of the cancellation to the authorised person and, if applicable, to their supervisor.

The clause sets out the form of the notice which must be provided according to whether it is a formal cancellation of authority or an urgent cancellation of authority and specifies the particulars it must contain.

A formal cancellation of authority for an assumed identity must be in writing in a physical form and signed by the chief officer. Where it is impracticable for a physical document to be delivered to the authorised person (for example, due to distance) a formal cancellation of authority may take the form of a fax or email or other electronic document and need not be signed.

Provision is also made for an urgent cancellation of authority. This may be chosen in circumstances where the chief officer is satisfied that the delay caused by making a formal cancellation may affect the success of a law enforcement operation or is otherwise urgently required. An urgent cancellation may be made orally in person, by telephone or any other electronic means.

A cancellation of authority takes effect in the case of a formal cancellation on the day stated in the cancellation of authority or when it is given to the authorised person.

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

### **Clause 53. Yearly review of formal authority**

This clause requires the chief officer of a law enforcement agency to review each formal authority granted by the chief officer. Each formal authority must be reviewed at least once every 12 months to determine whether use of the assumed identity is still necessary. If the chief officer is satisfied that use of the assumed identity is no longer required, he or she must cancel the authority in accordance with clause 52. If the chief officer considers use of the assumed identity is still necessary, he or she must record in writing his or her opinion and the reasons for it.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Division 3 – Evidence of assumed identity**

#### **Clause 54. Making records of births, death or marriages**

This clause provides for making entries in the Register of Births, Deaths and Marriages to support an assumed identity.

The chief officer of a law enforcement agency of this jurisdiction or the chief officer of a law enforcement agency of another participating jurisdiction may apply to the Western Australian Supreme Court for an order for the Registrar of Births, Deaths and Marriages to make an entry in the Register. The Supreme Court may only make such an order if satisfied that the order is justified having regard to the nature of the activities undertaken or to be undertaken by a law enforcement officer or civilian under an authority or corresponding authority. For security reasons the application for the order must be heard in a closed court.

The Registrar of Births, Deaths and Marriages must give effect to the order either within the period stated in the order or within 28 days after the day on which the order is made.

#### **Clause 55. Cancellation of authority affecting records of births, deaths or marriages**

This clause applies if the chief officer cancels an authority for an assumed identity in relation to which an entry has been made in the Register of Births, Deaths and Marriages in Western Australia or in a Register of another participating jurisdiction. In these circumstances, the chief officer of the law enforcement agency must apply to the Supreme Court of the relevant jurisdiction within 28 days for an order cancelling that entry in the Register.

#### **Clause 56. Cancelling entries in Register**

Clause 56 allows the Supreme Court to order the Registrar of Births, Deaths and Marriages to cancel an entry that has been made in the Register under clause 54 on application by the chief officer who applied for the order to make the entry. The Registrar must give effect to the order within 28 days. For security reasons, such applications must be heard in closed court.

#### **Clause 57. Restriction about access to application for entry in Register**

This clause defines the term “relevant proceeding” and denies access to information held by the Supreme Court in relation to applications and orders for entries in the Register of Births, Deaths and Marriages unless the Court otherwise orders access in the interests of justice.

A “*relevant proceeding*” means:-

- an application under clause 54 or 56 for an order to make or cancel an entry in the Register; or
- an order given under the application.



# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Clause 58. Request for evidence of assumed identity**

This clause allows a chief officer who grants an authority to request the chief officer of an issuing agency stated in the authority to produce evidence of an assumed identity and give that evidence to the authorised person named in the authority or to another person specified by the chief officer making the request. The request must state a reasonable time for compliance. Evidence of an assumed identity means evidence similar to that ordinarily produced or given by the issuing agency, for example a Motor Drivers Licence issued by the Department of Transport

Importantly, this clause does not authorise any request for an entry in the Register of Births, Deaths and Marriages or for the issue of a certificate of birth, death or marriage as evidence of an assumed identity.

### **Clause 59. Government issuing agencies to comply with request**

This clause requires the chief officer of a government issuing agency, such as the Department of Transport, to issue evidence of an assumed identity (for example a Motor Driver's Licence) if requested to do so under clause 58. The chief officer of the government issuing agency must create and maintain records to support the evidence of the assumed identity produced in response to the request.

### **Clause 60. Non-government issuing agencies may comply with request**

This clause gives the chief officer of a non-government issuing agency, such as a bank or other financial institution, discretion to issue evidence of an assumed identity if requested to do so under clause 58. The chief officer of a non-government issuing agency may choose to maintain such records as he or she thinks necessary to support evidence of the assumed identity produced in response to a request.

### **Clause 61. Cancellation of evidence of assumed identity**

A definition of cancel is provided in this clause. Cancel includes delete or alter an entry in a record of information.

This clause provides that the chief officer of an issuing agency who produces evidence of an assumed identity is required to cancel that evidence if directed in writing to do so by the chief officer of the law enforcement agency who requested the evidence. This is to ensure that evidence of an assumed identity is cancelled when it is no longer necessary. Any request for a cancellation must be complied with within the reasonable period stated in the direction.

### **Clause 62. Protection from criminal liability – officers of issuing agencies**

Clause 62 provides protection from criminal liability for the chief officer or another officer of an issuing agency who does something to comply with a request under clause 58 or a direction under clause 61. This means that officers of agencies that issue assumed identity documents will not be criminally liable for any acts pursuant to a request under clause 58 or a direction under clause 61.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Clause 63. Indemnity for issuing agencies and officers**

This clause applies when a chief officer of a law enforcement agency makes a request under clause 58 or gives a direction under clause 61 to the chief officer of an issuing agency. In these circumstances, the law enforcement agency must indemnify the issuing agency, or an officer of that agency, for any civil liability incurred by that agency or officer in complying with the request or direction in the course of their duty.

### **Division 4 – Effect of authority**

### **Clause 64. Assumed identity may be acquired and used**

This clause provides that an authorised officer (a law enforcement officer) may acquire and/or use an assumed identity if the acquisition and/or use is in accordance with an authority and in the course of duty. An authorised civilian (a civilian in respect of whom an authority applies) may acquire and/or use an assumed identity if the acquisition and/or use is in accordance with the authority and with any directions given by the person's supervisor.

Importantly, an authority also allows the authorised person to lawfully make a false or misleading representation about themselves for the purposes of, or in connection with the acquisition or use of an assumed identity or to obtain further evidence of the identity. This power is crucial in allowing a law enforcement officer to use, for example the initially obtained evidence of assumed identity to obtain the second and subsequent items of identity without necessarily in every instance declaring their law enforcement existence to the issuing agency. Such is the reach of organised criminal networks that it is necessary to consider any possible corruption link in relation to officers and employees of issuing agencies by these groups. These obstacles may hinder the operational effectiveness of assumed identities and the operations to which they are connected whilst causing risk to the health and safety of the authorised law enforcement officer or civilian using the identity.

### **Clause 65. Protection from criminal liability – authorised persons**

This clause provides that authorised persons will receive protection from criminal liability for an act which, apart from this clause, would otherwise be an offence, as long as the act is done in the course of acquiring or using an assumed identity in accordance with the authority.

In the case of an authorised law enforcement officer, the act must have been done in the course of the officer's duty. In the case of an authorised civilian, the act must have been done in accordance with any directions given by his or her supervisor. The act done, must not be an offence if the holder of the assumed identity was to do the act in his or her real identity. For example, an officer using a driver's licence issued in an assumed identity to drive a motor vehicle would still be liable for culpable driving.

### **Clause 66. Indemnity for authorised persons**

This clause applies when the chief officer of a law enforcement agency grants an assumed identity authority. The chief officer of the law enforcement agency must

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

indemnify the authorised law enforcement officer for any liability incurred by that officer because of something the officer does in the course of acquiring or using an assumed identity, which is in accordance with the authority and in the course of duty. For an authorised civilian to receive the indemnity their act must be in accordance with the authority and any directions issued to them by their law enforcement supervisor.

### **Clause 67. Particular qualifications**

This clause makes it clear that an authorised person will not be protected from liability under clause 65 or indemnified under clause 66 for anything the person does that requires a particular qualification, if the person does not in fact have that qualification (regardless of whether the person has acquired documentation that establishes that he or she has that qualification). This means that an authorised person may indicate he has the particular qualification but may not do a thing if he does not in his true identity actually have that qualification. For example an authorised officer may acquire, use or produce documentation supporting him or her having a crane driver's ticket but unless the person actually currently holds a crane driver's ticket in his true identity, he/she must not operate a crane. If they do, they will not receive the protections under this Part.

This limitation ensures that authorised officers or persons cannot use an assumed identity to engage in activities they are not trained or qualified to engage in.

### **Clause 68. Effect of being unaware of variation or cancellation of authority**

This clause allows a person whose authority is varied or cancelled to continue to be protected from liability under clause 65, or indemnified under clause 66, so long as the person is unaware of the variation or cancellation.

## **Division 5 – Mutual recognition under corresponding laws**

### **Clause 69. Requests to participating jurisdiction for evidence of assumed identity**

This clause applies if an authority under clause 48 authorises a request for assumed identity documentation from a participating jurisdiction. The chief officer who grants the authority may request the chief officer of the issuing agency in a participating jurisdiction stated in the authority to produce evidence of the assumed identity in accordance with the authority, give that evidence to the authorised person named in the authority or other person, and maintain such records as he or she thinks necessary to support evidence of the assumed identity produced in response to the request. The request must state a reasonable time for compliance.

### **Clause 70. Requests from participating jurisdiction for evidence of assumed identity**

Clause 70 applies if an authority under a corresponding law in a participating jurisdiction authorises a request for the production of evidence of an assumed identity in Western Australia. The chief officer of a Western Australian government issuing agency who receives a request must comply with the request, whereas the chief officer of a Western Australian non-government issuing agency who receives a

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

request may comply but is not required to do so. This provision mirrors those in clauses 59 and 60.

### **Clause 71. Directions from participating jurisdiction to cancel evidence of assumed identity**

Clause 71 applies when the chief officer of an issuing agency produces evidence of an assumed identity pursuant to a request made under clause 70. The chief officer of that issuing agency must cancel that evidence if directed to do so by the chief officer of the law enforcement agency who made the request. This is to ensure that evidence of an assumed identity is cancelled when no longer necessary. This clause mirrors the cancellation provision in clause 61.

### **Clause 72. Indemnity for issuing agencies and officers**

This clause provides an indemnity for issuing agencies and officers in a participating jurisdiction who issue assumed identity documents in response to a request under clause 69 from the chief officer of a law enforcement agency. The chief officer of the law enforcement agency that made the request must indemnify the issuing agency and any officer of the issuing agency for any civil liability incurred if that liability is incurred because of any act done by the agency or officer of the agency to comply with the request. This clause reflects the position in clause 63.

### **Clause 73. Application of Division to authorities under corresponding laws**

Clause 73 lists a number of provisions in this Part which apply to anything done in Western Australia under a corresponding authority as if that authority had been granted under clause 48. This means that an authority validly granted under, for example, a New South Wales corresponding law would be recognised as a corresponding authority in Western Australia. This clause also lists the provisions that apply to acts done pursuant to that corresponding authority as if it was an authority granted under clause 48.

## **Division 6 – Compliance and monitoring**

### ***Subdivision 1 – Misuse of assumed identity and information***

#### **Clause 74. Misuse of assumed identity**

This clause makes it an offence for an authorised officer or authorised civilian to misuse an assumed identity. The maximum penalty for the offence is 2 years' imprisonment. An authorised person commits an offence if he or she acquires or uses an assumed identity without it being in accordance with his or her authority; or in the course of his or her duty.

#### **Clause 75. Disclosing information about assumed identity**

This clause makes it an offence for a person to disclose information that reveals, or is likely to reveal, that an assumed identity is not a person's real identity. This is an indictable offence which carries a maximum penalty of 10 years' imprisonment. Provision is made for summary conviction which carries a maximum penalty of a \$24,000 fine or 2 years' imprisonment.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

A person does not commit an offence if he or she discloses information about the assumed identity in connection with the administration or execution of this part or a corresponding law; for the purposes of any legal proceedings related to this part or corresponding law; to a government agency for the purposes of a law enforcement operation; or in accordance with a requirement imposed by law.

### ***Subdivision 2 – Reporting and record-keeping***

#### **Clause 76. Reports about authorities for assumed identities**

This clause requires the chief officer of a law enforcement agency to submit an annual report to the Minister which includes the information contained in clause 76(1). The information includes statistical information about assumed identity authorities, a general description of the activities that were undertaken by authorised persons, whether any fraud or other unlawful activity was identified by the audit under clause 78, and any other information in relation to assumed identities that the Minister considers appropriate.

The chief officer of the law enforcement agency must advise the Minister whether there is any information in the report that should be excluded from the report before it is tabled in Parliament. This is information that, if made public, could be reasonably expected to endanger a person's safety, prejudice an investigation or prosecution, or compromise law enforcement agencies' operations or methodologies.

The Minister must table the report in Parliament within 15 sitting days of receiving it.

#### **Clause 77. Record-keeping**

This clause requires the chief officer of a law enforcement agency to cause appropriate records to be kept in relation to assumed identities and sets out what those records must include. Records are kept in relation to authorities granted, varied or cancelled and include general details of financial transactions entered into using an assumed identity. Financial records must be kept to fulfil a reporting requirement under clause 76 which includes a statement as to whether or not any fraud or other unlawful activity was identified as a result of an audit.

#### **Clause 78. Audit of records**

This clause requires the chief officer of a law enforcement agency to arrange for assumed identity records for each authority to be audited at least once every 6 months while the authority is in force, and at least once in the 6 months after the cancellation of the authority. The person conducting the audit, appointed by the chief officer, may (but need not be) a law enforcement officer, and must not be a person who either (a) granted, varied or cancelled an assumed identity authority or (b) was authorised to acquire and/or use an assumed identity. Results of audits must be reported to the chief officer of the law enforcement agency.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Division 7 – Miscellaneous**

#### **Clause 79. Delegation**

Clause 79 is a power of delegation allowing a chief officer of a law enforcement agency to delegate any of the chief officer's functions under this Part (except the power of delegation). The clause imposes limits on the officers to whom functions can be delegated and provides that the functions of a chief officer of a law enforcement agency cannot be delegated to any other person except as provided for in this clause. In Western Australia, the Commissioner of Police will be able to delegate his or her functions to a senior officer of, or above the rank of Superintendent. The chief officer of the Australian Crime Commission will be able to delegate functions to the Director - National Operations or a person holding a prescribed office in the Australian Crime Commission. The Chief Officer of the fisheries department will be able to delegate functions to an officer holding a prescribed office in the department.

<h3><b>Part 4 – Witness Identity Protection</b></h3>
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Part 4 of the bill puts in place a comprehensive witness identity protection scheme for operatives namely (a) a participant in an authorised operation under Part 2 of the bill (b) a person authorised to acquire and use an assumed identity under Part 3 or (c) a law enforcement officer using an assumed identity for the purposes of a law enforcement operation, when they give evidence as witnesses in proceedings in a court, tribunal, Royal Commission, statutory board, committee or other body. The scheme enables these “operatives” to use an assumed name or court name when giving evidence so that their true identities or the place where they live are not disclosed in such proceedings.

The introduction of witness identity protection scheme for operatives has required amendments to the *Witness Protection (Western Australia) Act 1996* in order to provide a parallel scheme for the protection of civilian witnesses that are, or have been participants in the State Witness Protection Program. These amendments are further discussed in Part 10 of the Bill.

#### **Clause 80. Terms used**

Clause 80 defines certain words and expressions used in the proposed Act. Some of the key definitions used in this Part are:

##### **‘Assumed name’**

An assumed name is a false name issued to an operative that is stated in the witness identity protection certificate to ensure that the operative's true identity is protected when giving evidence in proceedings. Where the operative is known by that assumed name by a party in court proceedings, that assumed name will be used.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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### **‘Court’**

The definition of court is broad to ensure maximum protection to operatives when giving evidence in a tribunal or other body established or continued under a written law and having a power to obtain evidence or information. It also includes a Royal Commission established under the *Royal Commissions Act 1968*; and also includes 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.

### **‘Corresponding law’**

Means a law of another jurisdiction that corresponds to this Part, and includes a law of another jurisdiction that is prescribed in the regulations.

### **‘Corresponding witness identity protection certificate’**

Jurisdictions implementing the model witness identity protection certificate provisions will be complimented by a mutual recognition provision. This will have the effect of a witness identity protection certificate issued in one jurisdiction being recognised by all jurisdictions that have enacted corresponding legislation.

This provision will support cross border controlled operations by allowing the operative to give evidence in a participating jurisdiction whilst being afforded the protection of his or her real identity.

### **‘Court name’**

A court name refers to a name or code (other than the operative’s real name or assumed name) given to an operative for use when giving evidence in a court proceeding. The court name is used when the operative’s assumed name is not known to a party to the proceedings. For example, an undercover operative may have been operating under an assumed name that was not known to the accused. In this case, using a court name will preserve the operative’s assumed name for future use.

### **‘Operative’**

The definition of an operative means a person who is or was a participant in an authorised operation (controlled operation) or who is authorised to acquire and use an assumed identity under the Bill. An operative may also be a law enforcement officer (or in some cases an authorised civilian) acting under the direction of a law enforcement officer. The definition also includes for the purposes of obtaining a Witness Identity Protection Certificate, a law enforcement officer using an assumed identity for the purposes of a law enforcement operation (as defined in clause 3 of the Bill).

### **‘Party to a proceeding’**

A ‘party’ to a proceeding means:-

- for a criminal proceeding, the prosecutor and each accused person; or

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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- for a civil proceeding, each person who is a party to the proceeding; or
- for any other proceeding, each person who may appear or give evidence in the proceeding.

A **'proceeding'** means any criminal, civil or other proceeding before, or inquiry, reference or examination by, a court, and includes arbitration.

### **'Witness Identity Protection Certificate'**

This definition refers to a certificate that is issued to an 'operative' who has been a participant in an authorised operation or who has been issued an assumed identity. The purpose of the certificate is to protect the operative's true identity when giving evidence in a proceeding.

### **Clause 81. Things done by, or given to, party's lawyer**

Clause 81 provides that a party's lawyer in any proceedings may exercise powers on behalf of the party, and that requirements to give something to a party are satisfied by giving the thing to the party's lawyer.

### **Clause 82. Application of Division**

Currently an operative's true identity is protected by the common law doctrine of public interest immunity. Part 4 of the bill replaces the common law doctrine of public interest immunity and provides better protection to operative's when giving evidence.

This clause also ensures that the bill will not affect any witness who is not an operative. When the safety of these other witnesses may be at risk, the common law relating to public interest immunity will continue to govern the protection of their identity when giving evidence in proceedings.

This scheme will apply in proceedings arising out of cross-border investigations as well as proceedings relating to purely intrastate (local) investigations.

### **Clause 83. Witness Identity Protection Certificate – giving**

Clause 83 (1) empowers the Chief Officer of a Law Enforcement Agency to issue a Witness Identity Protection Certificate to an operative of the agency when the operative is required to give evidence in a proceeding. Before giving the certificate, the Chief Officer must be satisfied that disclosing the operative's identity or place where they live would endanger the safety of the operative or someone else; or prejudice an investigation. The Witness Identity Protection Certificate must not contain information that would allow the operative's identity or where he or she lives to be revealed. The court will retain an overriding discretion to disclose the operative's true identity where to do so is in the interests of justice.

Clause 83(2) requires the Chief Officer to undertake enquiries to ascertain the information required to be included on the certificate. Those requirements are set out in clause 84 and include matters relating to the operative's credibility such as:

- prior convictions and findings of guilt;



# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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- outstanding charges;
- proven and outstanding allegations of professional misconduct;
- adverse court comments about his or her credibility;
- false representations; and
- other particulars relevant to his or her credibility.

Clause 83(3) provides that a decision to give a Witness Identity Protection Certificate is final, and cannot be appealed against, reviewed, called into question, quashed or invalidated in any court. Given the decision to issue a certificate is based on highly sensitive operational information, the decision would not be able to be reviewed without disclosing this information. This may put at risk the safety of certain people, and may jeopardise ongoing investigations. This would defeat the purpose of the witness identity protection regime.

Clause 83(4) provides a waiver and allows the certificate to be reviewed should the decision to issue the certificate be called in to question during an internal disciplinary proceeding against the person who made the decision.

Clause 83(5) provides that the decision to give a certificate may be judicially reviewed for a jurisdictional error.

### **Clause 84. Form of Witness Identity Protection Certificate**

Clause 84 relates to the form that a certificate must take and states what information must be recorded on the certificate. It also explains what constitutes an outstanding charge or outstanding allegation of misconduct against the operative named in the certificate. These things must be recorded because the certificate must state details of any outstanding matters of credibility relating to the operative. The information included on the certificate may allow parties to the proceeding, including the accused in criminal trials, to challenge the credibility of the operative without disclosing the operative's identity.

Clause 84(1)(a) and (b) record what constitutes an outstanding charge or outstanding allegation of professional misconduct and finds that a charge is outstanding until it is finally dealt with in any of the following ways:-

- The charge is withdrawn;
- The charge is dismissed by the court;
- The person is discharged by the court; or
- The person is acquitted or found guilty of the offence by the court.

An allegation of professional misconduct is outstanding until it is finally dealt with in the following ways:-

- in the case of a police officer — the *Police Act 1892*;
- in relation to a member of staff of the Australian Crime Commission — the *Australian Crime Commission Act 2002* (Commonwealth);
- in relation to a fisheries officer — the *Public Sector Management Act 1994*.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

Clause 84(2) requires what additional information must be included on the certificate and includes:

- the operative's assumed name (if the operative is known to a party to the proceeding by a name other than the operative's real name);
- the local operative's court name (if the operative is not known to any party to the proceeding by a name);
- the name of the agency;
- the date of the certificate;
- the grounds for giving the certificate

### **Clause 85. Filing and notification**

Clause 85 sets out the filing and notification requirements in relation to Witness Identity Protection Certificates. The certificate must be filed with the court prior to the operative giving evidence and a copy given to the operative and all parties to the proceeding at least 14 days (or such shorter period as is agreed to by the party) prior to the date on which the operative is required to give evidence. This gives the parties notice that a witness will give evidence in an assumed name or court name, and allows time to consider whether an application for leave to disclose the operatives true identity under clause 90 may be necessary. - (Disclosure of operative's identity despite a certificate)

### **Clause 86. Leave for non-compliance**

The intention of clause 86 is to provide flexibility for the court to waive some or all of the requirements of the filing and notification obligations. A person who has or intends to file a Witness Identity Protection Certificate may apply to the court for leave not to comply with one or more of the requirements of clause 85. The court will be able to grant the request if satisfied that it was not practicable to comply with any requirement of clause 85. If leave is given, it is deemed that the requirements of clause 85 have been met. This clause will be necessary in the circumstance where an operative is required to give evidence in court at late notice or within a period inside 14 days.

### **Clause 87. Effect of Witness Identity Protection Certificate**

Clause 87(1) takes effect provided the filing and notification requirements of clauses 85 and 86 have been fulfilled.

Clause 87(2) enables operatives to give evidence using their assumed or court name.

Unless permission is granted under clauses 89 and 90, a witness including an operative cannot be required to (and must not) answer questions, give evidence or provide information or make a statement that discloses or may disclose the operative's true identity or the place where the operative lives.

Clause 87(3) ensures that a person involved in a proceeding is also prevented from making a statement that discloses or may lead to the disclosure of the operative's

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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identity or where the operative lives. A “*person involved in a proceeding*” is defined in this clause to include:-

- the court;
- a party to the proceeding;
- a person given leave to be heard or make submissions in the proceeding
- a lawyer representing a person referred to the above or a lawyer assisting the court in the proceeding;
- any other officer of the court or person assisting the court in the proceeding;
- a person acting in the execution of any process or the enforcement of any order in the proceeding.

### **Clause 88. Orders to protect operative’s true identity or location**

Clause 88(1) makes certain that all proceedings where a Witness Identity Protection Certificate is filed, including any applications relating to the proceeding such as those referred to in clause 86 (leave for non-compliance); clause 88 (orders); and clause 90 (disclosure of operative’s true identity despite certificate) - are held in a closed court.

Clause 88(1) also enables the court to make any order it considers appropriate to protect the operative's identity or prevent disclosure of where the operative lives.

Clause 88(2) affords that a person who contravenes an order commits an offence and is subject to a maximum penalty of 10 years imprisonment. A summary conviction penalty of 2 years imprisonment or a fine of \$24,000 may be also considered by the court. A person may also be punished for contempt.

### **Clause 89. Disclosure of operative’s true identity to presiding officer**

Clause 89 gives the presiding officer in a proceeding where a Witness Identity Protection Certificate has been filed the discretion to require the operative to disclose to him or her, their true identity and provide photographic evidence of that identity. The reason for this is so that the presiding officer is aware of any potential bias in relation to that witness. For example, there may be a situation where a recently appointed Judge has come from a criminal law practice. The witness appearing may be a civilian operative and former client. Alternatively an operative may have some former involvement with the Judge that may cause the trial to abort. To address this, the Judge may require the operative to confidentially disclose his or her true identity. However the Judge must not record the information disclosed by the operative or retain or copy a document or thing provided to the presiding officer.

### **Clause 90. Disclosure of operative’s true identity or location despite certificate**

Clause 90 allows a party to the proceeding or a lawyer assisting the court to apply to the court for leave to ask a witness including an operative a question; or leave to request that a person involved in the proceeding make a statement; or for an order requiring a witness including an operative to answer a question, give evidence, or provide information that discloses or leads to the disclosure of the operative's identity or where the operative lives.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

The court may give leave or make an order but must not do so unless there is evidence that, if accepted, would substantially call into question the operative's credibility, and it would be impractical to test properly the credibility of the operative without allowing the risk of disclosure or disclosing the operative's true identity or where the operative lives. It must also be in the interests of justice for the operative's credibility to be tested. The application must be heard in the absence of any jury.

Clause 90 also provides that a court must make a suppression order in relation to applications, and questions, evidence, information or statements made as a consequence of applications. Transcripts of hearings may be taken and the court may also make an order stipulating how transcripts may be dealt with including orders suppressing the publication of them. This clause also provides that the court may make any order it considers appropriate to protect the operative's identity or prevent disclosure of where the operative lives.

It is an offence for a person to contravene an order made under clause 90. The maximum penalty for this offence is 10 years imprisonment with a summary conviction provision of 2 years imprisonment or a fine of \$24,000. A person may also be punished for contempt.

### **Clause 91. Application for leave – joinder as respondent**

Clause 91 provides that a court in which a person is applying for leave or an order in relation to a matter under this part of the bill may allow another person to join in the application as a respondent. The purpose of this section is to give the court the discretion to allow a person who is the operative stated in the Witness Identity Protection Certificate or the Chief Officer of the agency who issued the certificate to be joined as a respondent to applications for leave for non-compliance or an order to protect the operative's identity; or disclose an operative's identity despite a certificate. (Clauses 86, 88 or 90) When joined, that person or their legal representative will be allowed to appear and be heard.

The reason for this is a situation may arise particularly in civil proceedings where the operative the subject of the certificate will not have standing to be heard on the question of whether or not their true identity should be disclosed in the court despite the certificate. For example, there will be situations where the operative appears as witness for the plaintiff and the defendant applies to the court for leave under clause 86 or 90 or for an order under clauses 88 or 90. It may not be prejudicial to the plaintiff's case if the operative's true identity is revealed and as such, the plaintiff's lawyer may not object to the application. In these circumstances, this clause 91 will provide standing to the operative or the Chief Officer of the relevant agency, to be heard on this application.

### **Clause 92. Directions to jury**

Clause 92 applies if an operative who has been given a Witness Identity Protection Certificate gives evidence in a proceeding that has a jury. In this situation, the court must, unless it considers it inappropriate, direct the jury not to give the evidence of

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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the operative any more or less weight, or draw any adverse inferences, because of the existence of a certificate or as a result of any order made under clause 88 or 90.

### **Clause 93. Adjournment for appeal decision**

If a court makes a decision (grants or refuses) an appeal or order under clauses 86, 88 or 90 clause 93 allows a party to the proceeding to apply to that court for an immediate adjournment to enable the party to consider and appeal the decision. The court must grant an adjournment and the proceedings cannot continue until either a decision has been made by the party not to appeal or the appeal has been heard.

The reason for this clause is because if an appeal was to wait until after the conclusion of the proceedings, the operative's true identity may have already been revealed. By allowing an appeal at the time the original decision is made by the court, the matter can be heard by the appeal court before the operative's true identity is revealed. The original matter would proceed after that time.

### **Clause 94. Witness Identity Protection Certificate – cancellation**

Clause 94 provides that a Chief Officer may cancel a Witness Identity Protection Certificate if he or she believes that it is no longer necessary, or appropriate to prevent the disclosure of an operative's identity or place where they live. If the Chief Officer cancels the certificate after it has been filed in court and before the matter is finalised, he or she must give written notice to the court and each party to the proceeding as notification that the certificate has been cancelled.

This clause provides a safeguard against the certificate being used by the operative as a shield against investigation or prosecution.

### **Clause 95. Permission to give information disclosing operative's true identity or location**

Clause 95 provides in certain circumstances the Chief Officer may give written permission to a person to give information, other than in the proceeding, that discloses or may lead to the disclosure of the local operative's identity or place where they live. This may be done if the Chief Officer believes it is necessary or appropriate for the information to be given. The written permission must name the person who may give the information, the person to whom the information may be given, the information that may be given and may state how the information may be given.

This clause is necessary as there may be situations where ongoing identity protection is required, yet the operative's identity may need to be disclosed in a specific and restricted context. For example, the operative may have given evidence under a certificate in a criminal trial, but may be required to give evidence at a police disciplinary tribunal which is investigating another police officer. Permission may be given for the disclosure of the operative's true identity in that disciplinary tribunal, but the certificate would remain in force otherwise and the operative's true identity could not be disclosed for any other reason.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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### **Clause 96. Disclosure offences**

Clause 96 makes it an offence for any person to do something (the disclosure action) that discloses, or is likely to lead to the disclosure of, the true identity of an operative for whom a Witness Identity Protection Certificate has been given or where the operative lives unless the certificate has been cancelled prior to the disclosure action.

An offence will not be committed if the disclosure action is required under clause 89, authorised under clause 90 or permitted under clause 95. The penalty for a disclosure under this clause is 10 years imprisonment with provision for summary conviction of 2 years imprisonment or a fine of \$24,000.

The disclosure offences within this clause are intended to protect the health and safety of operatives, and assist the effective conduct of undercover and other covert operations. An offence against subclause (1) of clause 96 that is, an action that discloses, or is likely to lead to disclosure of the true identity or place where an operative lives is an indictable offence.

### **Clause 97. Evidentiary certificates**

Clause 97 allows the Chief Officer of an agency to issue an evidentiary certificate stating that for the purposes of the disclosure offences in clause 96, that a certificate has not been cancelled under clause 94 or that the conduct amounting to an offence was permitted by leave or by an order under part 95. The evidentiary certificate will be sufficient evidence of the matters certified therein.

### **Clause 98. Reports about Witness Identity Protection Certificates**

Clause 98 provides that an annual report must be prepared by the Chief Officer of a Law Enforcement Agency. These reports must include information relating to the issuing and use of Witness Identity Protection Certificates in that year and includes the number of certificates issued, the reasons they were issued, details of proceedings relating to leave or orders relating to proceedings, the reasons why certificates were cancelled, why permissions were given under clause 95, and any information relating to certificates and part 4 that the Minister considers appropriate.

A report must not include information that discloses, or may lead to the disclosure of, an operative's true identity, or where the operative lives, unless the Witness Identity Protection Certificate for the operative has been cancelled. These reports are submitted to the agency's relevant Minister, who must cause the report to be tabled before each House of Parliament within 15 sitting days of receiving them.

### **Clause 99. Recognition of Witness Identity Protection Certificates under corresponding laws**

Clause 99 allows for Witness Identity Protection Certificates issued in another participating jurisdiction to be recognised in Western Australia as if the certificate was issued under clause 83 in this state.

Mutual recognition is intended to complement the model provisions and a certificate issued in one jurisdiction will be recognised and will have effect in all participating

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

jurisdictions without the need for any further steps to be taken. The protection afforded to the operative, and the application of the certificate in court proceedings will extend to all participating jurisdictions in which the operative works and is required to give evidence.

### **Clause 100. Delegation**

Clause 100 allows the Chief Officer of a Law Enforcement Agency to delegate his or her powers to a “senior officer”. In the case of Western Australia Police, the Commissioner may delegate his or her power to a Deputy Commissioner. The Chief Officer of the Australian Crime Commission may delegate his or her power to the Director National Operations, or an employee who holds an office that is prescribed by the regulations. In relation to the Department of Fisheries, the Chief Officer may delegate his or her power to a fisheries officer holding a prescribed office in the department.

## **Part 5 — Miscellaneous**

### **Clause 101. Regulations**

This clause enables a regulation making power to provide for the prescription of certain matters permitted and pertaining to the act. Matters included in the regulations will include:

- Prescribed offences that fall below the three-year threshold relating to a ‘*relevant offence*’ but are considered sufficiently important to be included because of their seriousness. For cross border investigations, it was recommended by the Joint Working Group on the model laws that prescribed offences be derived from the areas of child pornography, corruption, firearms, prostitution and fisheries. Specific offences against the *Fish Resources Management Act 1994* (WA) will be included as prescribed offences because those offences are not punishable by imprisonment but by large fines proportionate to the weights of illegal fish stock involved in the offence. The inclusion of fisheries offences as prescribed offences will ensure that members of the Serious Offences Unit of the Department of Fisheries will be able to undertake controlled operations against persons or groups involved in the illegal catching, trading and selling of Western Australia’s restricted fish stocks.

For purely local investigations, offences will be prescribed from those five areas and any other area considered necessary to support the investigation of precursor offences undertaken by serious and organised crime groups

- Prescribed ‘*offices*’ relating to the department of fisheries and the Australian Crime Commission. It is necessary to name in the regulations the position or office within each department that a person must hold to enable him or her to have the power to do certain things within the act. It is necessary to name the particular office as it relates to the following clauses:-

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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- Clause 3 – This relates to the definition of a “*Law Enforcement Officer*” who is a fisheries officer holding the prescribed office in the fisheries department.
- Clauses 43, 79 and 100 – These clauses enable the chief officer to delegate his or her powers to a ‘*senior officer*’ holding a prescribed office in the Australian Crime Commission or the fisheries department, to authorise a controlled operation, to authorise an assumed identity and to grant a witness identity protection certificate.
- Clause 48(4)(c) – With regard to the authority for assumed identities, this clause requires that the law enforcement officer appointed as a ‘supervisor’ must be a person holding a prescribed office in the fisheries department.

### **Part 6 — Savings provisions**

Part 6 explains that Part 2 (controlled operations) of the bill will come into effect on the ‘commencement day’ of the *Criminal Investigation (Covert Powers) Act 2011*. Part 6 also allows for undercover operations that were authorised and commenced under the *Prostitution Act 2000 (WA)* [“PA”] or the *Misuse of Drugs Act 1981 (WA)* [“MDA”] prior to the commencement of the bill to be recognised as lawful once the act commences.

Parts 6 to 9 of the bill include amendments to, or repeal of, specific sections of Western Australian acts that relate to Part 2 of the bill (controlled operations). Part 5 (Repeal of written law) of the *Interpretation Act 1984 (WA)* applies in this instance.

**Clause 102. Term used: commencement day**  
**‘commencement day’**

Means the day on which Part 6 of the bill comes into operation.

**Clause 103. Savings provision relating to *Misuse of Drugs Act 1981 (WA)***

Clause 103 provides a definition of a ‘*former authorisation*’ and enables an authority that was in force under section 31(1) of the MDA prior to the commencement day of the *Criminal Investigation (Covert Powers) Act* is taken to be an authority under Part 2 of the bill.

**‘former authorisation’**

Means an authorisation under section 31(1) of the MDA as in force immediately before the day on which Part 8 of the bill (amendment to the MDA) comes into effect.

**Clause 104. Savings provision relating to *Prostitution Act 2000***

Clause 104 provides a definition of a ‘*former authorisation*’ and enables an authority that was in force under section 35(1) of the PA prior to the commencement day of the *Criminal Investigation (Covert Powers) Act 2011* is taken to be an authority under Part 2 of the bill.



# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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### **‘former authorisation’**

Means an authorisation under section 35(1) of the PA as in force immediately before the day on which Part 9 of the bill (amendment to the PA) comes into effect.

## **Part 7 — *Corruption and Crime Commission Act 2003* amended**

### **Clause 105. Act amended**

Part 7 facilitates a minor amendment to the *Corruption and Crime Commission Act 2003* (WA).

### **Clause 106. Section 91 amended**

Section 91 of the *Corruption and Crime Commission Act 2003* (WA) [“CCCA”] requires that a report on the activities of the Commission must be laid before Parliament within 3 months after June 30 of each year. Section 91(2)(n) of the CCCA relates to reports about the use of surveillance devices issued to the Commission under the *Surveillance Devices Act 1998* (WA) [“SDA”]. A minor amendment is required to clarify that the report must be issued in relation to the activities of officers of the Commission rather than the Commission itself.

## **Part 8 — *Misuse of Drugs Act 1981* amended**

### **Clause 107. Act amended**

This Part amends the *Misuse of Drugs Act 1981* [“MDA”].

### **Clause 108. Section 3 amended**

Clause 108 provides the definitions of an ‘*undercover officer*’ and an ‘*undercover operation*’. These definitions are necessary to give meaning to and allow for the transition of previous powers used under the MDA where those terms were referred to. Undercover operations using undercover officers that were commenced prior to the commencement of the bill will continue to apply with the necessary modification to Part 2 of the bill.

### **‘undercover officer’**

Means a ‘*participant*’ or a ‘*corresponding participant*’ as those terms are defined in the *Criminal Investigation (Covert Powers) Act 2011* section 5

### **‘undercover operation’**

Means an ‘*authorised operation*’ or ‘*corresponding authorised operation*’ as defined in the *Criminal Investigation (Covert Powers) Act 2011* section 5.

### **Clause 109. Section 26 amended**

Section 26(2) of the MDA allows a police officer who is an authorised person acting as an undercover officer, to acquire and therefore possess a prohibited drug or prohibited plant for the purposes of detecting the commission of an offence. The

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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officer is permitted to possess the prohibited drug until such time it is dealt with under section 27 of the MDA (namely, the disposal of prohibited drugs and plants).

Section 26(2) is amended by removing any reference to an ‘*authorised person*’ and ‘*authorised operation*’ and replacing them with the terms ‘*undercover officer*’ and ‘*undercover operation*’, respectively. This amendment will allow for the smooth transition of these definitions when referencing operations commenced under the MDA and prior to enactment of the *Criminal Investigation (Covert Powers) Act 2011*.

Section 26(3) will be deleted because the definitions for “undercover officer” and “undercover operation” will be provided in section 3 to the MDA through Clause 108 of the bill.

### **Clause 110. Section 31 replaced**

Clause 110 has the effect of removing the power of the Commissioner to appoint an undercover officer under the MDA. This is because the necessity to do so will become redundant. Powers to authorise undercover or controlled operations will be given to the Commissioner as a ‘chief officer’ within the *Criminal Investigation (Covert Powers) Act 2011*. This act will become the ‘one stop shop’ for what was known as ‘undercover operations’ and will now be known as ‘controlled operations’. Therefore, the repeal of the undercover provisions of the MDA and amendment to section 31 is necessary. The replaced section 31 will also provide for a simple offence to be committed by an undercover officer who is not a police officer (civilian participant) who fails to deliver a prohibited drug or prohibited plant to a police officer as soon as practicable after the acquisition of the drug or the plant. The civilian undercover officer must be warned in writing by the Commissioner of his or her obligations to do so.

### **Clause 111. Section 34 amended**

Section 34(1)(e) relates to offences that are committed within the MDA and the penalties relating to them. A minor amendment to Section 31(4) is required to include and reference the amended section 31(1) which relates to the civilian undercover officer should he or she not deliver a prohibited drug or plant to a police officer as soon as practicable.

<b>Part 9 — Prostitution Act 2000 amended</b>
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### **Clause 112. Act amended**

This Part amends the *Prostitution Act 2000* (WA) [“PA”].

### **Clause 113. Section 35 deleted**

Section 35 of the PA empowers the Commissioner of Police to authorise a police officer to act as an undercover officer for the purposes of detecting the commission of an offence. The authorised officer is able to misrepresent him or herself and is indemnified from committing or being a party to an offence.

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

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This section is deleted because it will become redundant once the controlled operation power of Part 2 of the *Criminal Investigation (Covert Powers) Act 2011* (WA) is enacted. This section also removes the obligation for the Commissioner to provide to the Minister a report about the activities of undercover officers. This obligation will be included in the compliance section of the new act.

### **Clause 114. Section 36 amended**

Section 36 pertains to the Commissioner's powers to delegate certain functions under the PA. However, this section, does not allow for the Commissioner to delegate his or her obligation under section 35(6), to furnish a report on the activities of undercover officers to the Minister. Clause 114 has the effect of removing this restriction on that specific delegation power as section 35 will be deleted and in any case, is not longer necessary

### **Clause 115. Section 53 deleted**

Section 53 allows the Commissioner to issue a certificate stating that an undercover officer was authorised to undertake undercover duties. This section will be deleted as it is no longer necessary.

## **Part 10 – *Witness Protection (Western Australia) Act 1996* amended**

The bill also amends the *Witness Protection (Western Australia) Act 1996* to provide a parallel witness identity protection scheme for civilian witnesses that are, or have been participants in the State Witness Protection Program. That is, a person who has been issued with a new identity because he or she has been placed in serious danger by giving evidence. In this instance, the certificate is known as a Non-disclosure Certificate and is issued by the Commissioner of Police. A Non-disclosure Certificate is issued when a protected witness is required to give evidence in proceedings (either under their former identity or their new identity). A person who is or may be required to give evidence must notify the Commissioner of Police accordingly. The Commissioner may then issue a Non-disclosure Certificate to the court in which the person will give evidence. The effect of such a certificate is to prevent the disclosure in the proceedings of the person's protected identity. The protected identity may be their new identity or their former identity, depending upon the capacity in which they are giving evidence.

### **Clause 116. Act amended**

Clause 116 conveys that Part 10 will make the necessary amendments to the *Witness Protection (Western Australia) Act 1996*.

### **Clause 117. Section 22A inserted**

Clause 117 has the effect of inserting new section 22A after section 21. Section 22 sets out the details of when a Supreme Court may make a 'New Identity Order' in relation to a protected witness. Section 22A will precede section 22 and is required as it is necessary to restore a power that is lost because of the replacement of

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

section 33 of the act. Section 33 has been replaced to accommodate the new regime of 'Non-disclosure Certificates' which may be issued to participants in the State Witness Protection Program when required to give evidence in proceedings. The power lost to the replacement of section 33 concerns the ability of the witness to claim their new identity as their only identity despite any statutory obligation to provide any details of a previous or former identity. To remedy this situation, new section 22A has been created to replicate this lost power. The power for a protected witness to claim his or her new identity as their only identity has been moved to Division 5 of the Act which is considered appropriate as this division relates to New Identity Orders issued by the Supreme Court.

The new section 22A provides that a person who has been granted a New Identity Order may claim their new identity as their one and only identity and in doing so, have no legal obligation to provide their former identity but only if that requirement is unrelated to a proceeding.

### **Clause 118. Section 25 amended**

Clause 118 makes an amendment to section 25 of the act to allow a penalty for a participant in a witness protection program who fails to notify the Commissioner of Police that he or she is required to be a witness in a proceeding. The reason a participant is required to notify the Commissioner is so the Commissioner can provide a copy of the participant's criminal record to the court, the prosecutor and the accused.

The amendment is necessary because the former requirement under section 31(1) to notify the Commissioner has been replaced by new section 34A (2). This section although adequate in its other aspects did not appear to provide a suitable penalty in the instance where a participant fails to notify the Commissioner of a requirement to give evidence in a proceeding. A suitable penalty for the failure to notify the Commissioner, as like other breaches by the witness under section 25, is the termination from the State Witness Protection Program. This penalty has been placed in section 25 which is deemed the appropriate section. This section deals with the conditions that must be met before the Commissioner may terminate the witness from the State Witness Protection Program.

### **Clause 119. Part 3 Division 1 heading inserted**

Clause 119 inserts a new heading under Part 3 and will be called "Division 1 – General".

### **Clause 120. Section 30 and 31 deleted**

Clause 120 has the effect of deleting existing sections 30 and 31. These sections are deleted because they duplicate the powers in new sections 34A and 34B which deal with Non-disclosure Certificates. New sections 34A and 34B are considered more appropriate to the Non-disclosure Certificate regime.

### **Clause 121. Section 32 amended**

Clause 121 amends section 32(1) by inserting a new section 32(1A). Section 32(1A) has the effect of ensuring that any requirement under new section 34D which allows the disclosure of a protected person's identity as a result of an appeal or the making

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

of an order, is negated. This is so that ‘sensitive information’ is not disclosed. Section 32(1) relates to the disclosure of ‘sensitive information’ in court. ‘Sensitive information’ is defined as information about a person who is, was or has undergone assessment for inclusion in a Witness Protection Program; information about how a program operates; or information about any Police Officer who is, or has been involved; or any person assisting the program. Section 32(1A) has been inserted to make sure that “sensitive information” is not disclosed in court under section 34D. The new section 32(1A) ensures that no sensitive information will be disclosed under section 34D.

### **Clause 122. Part 3 Division 2 heading inserted**

Clause 122 inserts a new heading under Part 3 and will be called Division 2 – Evidence by participants. This section relates to Non-disclosure Certificates and the rules surrounding the giving of evidence by a protected person. It will include new sections that are very similar and run parallel to the functions of a Witness Identity Protection Certificate.

### **Clause 123. Section 33 replaced**

**Note: Clause 123 has the effect of replacing existing section 33 of the *Witness Protection (Western Australia) Act 1996* with new sections 33 to 34H from the Cross Border Model Laws.**

These sections introduce the provisions of the model laws relating to the issuing and regulation surrounding the use of Non-disclosure Certificates to shield the identities of protected witnesses.

New section 33 includes the terms used in relation to the Non-disclosure Certificate scheme. Clause 123 defines certain words and expressions used in the part that relates to Non-disclosure Certificates and the protection of the identity of a witness.

Some of the key definitions used in this Part are:

**“corresponding Non-disclosure Certificate”** means a certificate given under the provision of a corresponding law that corresponds to section 34A(3)

**“protected address”** of a protected person, means —

- for proceedings in which the protected person is or may be required to give evidence under the person’s new identity, the last place where the person lived under the person’s former identity; or
- for proceedings in which the protected person is or may be required to give evidence under the person’s former identity, the place where the person lives

**“protected identity”**, of a protected person, means —

- for proceedings in which the protected person is or may be required to give evidence under the person’s new identity, the person’s former identity; or
- for proceedings in which the protected person is or may be required to give evidence under the person’s former identity, the person’s new identity;

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

“**protected person**” means a person who, having been given a new identity under the State Witness Protection Program (SWPP), keeps the identity whether or not the person remains a participant.

### **New section 34A – Non-disclosure Certificates**

This section applies to a protected person who has been given a new identity as a participant in the State Witness Protection Program. The clause provides that such a person must notify the Commissioner of Police if the person is or may be required to give evidence in a proceeding. Failure to notify the Commissioner will result in the protected person being terminated from the program under section 25. Once notified, the Commissioner may give a certificate for the protected person in relation to the proceeding and file a copy with the court.

### **New section 34B – What a Non-disclosure Certificate must state**

This section ensures that the Non-disclosure Certificate must state certain information about the protected person in the certificate (including their criminal history, if any), without including any information that may disclose their protected identity or their protected address.

### **New section 34C – Effect of Non-disclosure Certificate**

This section provides that the effect of issuing a Non-disclosure Certificate to a protected person is that no question may be asked or answered, evidence or information given, or statement made in the proceeding that may disclose the identity of the protected person subject of the Non-disclosure Certificate or their protected address. The court may disclose to each party to the proceeding that a certificate has been given. However, the contents of the certificate can only be disclosed to the parties but only in the absence of the jury and the public. If the court makes a disclosure about the contents of the certificate, it must inform the parties of the effect of the certificate in section 34(3)(c).

### **New section 34D – Disclosure of protected person’s identity despite certificate**

This section also gives the court the power to grant leave to a party or make an order requiring a protected person to disclose their protected identity but must not do so unless there is evidence that, if accepted, would call into question the protected person’s credibility; and it would be impractical to test properly the credibility of the person without allowing the risk of disclosure or disclosing the witness’s protected identity or protected address. It must also be in the interests of justice for the person’s credibility to be tested. The application must be heard in the absence of any jury and the court closed unless the court considers otherwise in the interest of justice.

Further, this section ensures that a court makes a suppression order in relation to applications, and questions, evidence, information or statements made as a consequence of applications. Transcripts of hearings may be taken and the court may also make an order stipulating how transcripts may be dealt with including orders suppressing the publication of them. This clause also provides that the court

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

may make any order it considers appropriate to safeguard the protected person's identity or protected address.

It is an offence for a person to contravene an order. The maximum penalty for this offence is 2 years imprisonment. A person may also be punished for contempt.

### **New Section 34E – Directions to jury**

This section applies if a protected person who has been given a Non-disclosure Certificate gives evidence in a proceeding with a jury present. In this situation, the court must unless it considers it inappropriate, direct the jury not to give the evidence of the protected person any more or less weight, or draw any adverse inferences, because of the certificate or as a result of any order.

### **New Section 34F – Adjournment to appeal decision**

If a court gives or refuses leave or makes, or refuses to make, an order in relation to the protected person whose identity is protected, this clause allows a party to the proceeding to apply immediately to the court making the original decision for an adjournment to enable the party to consider and appeal that decision. The court must grant an adjournment and the proceedings cannot continue until either a decision has been made by the party not to appeal or the appeal has been heard.

The reason for this clause is because if an appeal was to wait until after the conclusion of the proceedings, the protected person's identity may have already been revealed. By allowing an appeal at the time the original court decision is made, the matter can be heard by the appeal court before the protected person's protected identity is revealed.

### **New Section 34G – Jurisdiction to hear and determine appeals**

This section enables a court that has the jurisdiction to hear and determine appeals from a judgment, order or direction in the proceeding, to have the jurisdiction to hear and determine an appeal against the decision to give or refuse leave or to make or refuse to make the order.

### **New Section 34H – Recognition of Non-disclosure Certificates under corresponding laws**

In line with the intention of creating uniform provisions with mutual recognition, it is intended that the same procedure will be followed in a participating jurisdiction that the protected person is to give evidence. Mutual recognition provisions have been added to section 34H as it is intended that, for example, if a witness is in a protection program administered in Western Australia, but is to give evidence in Tasmania, he or she must still notify Western Australia Police. The Non-disclosure Certificate would be issued by the Western Australia Police. The certificate would then be recognised in any court in any jurisdiction with a corresponding law.

### **Clause 124. Part 3 Division 3 heading inserted**

Clause 124 inserts a new heading under Part 3 and will be called "*Division 3 – Miscellaneous*".

# **CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011**

## **Explanatory Memorandum**

---

### **Clause 125. Part 5 heading inserted**

A new heading called "Part 5 - Transitional and savings provisions" will be inserted after section 39 of the *Witness Protection (Western Australia) Act 1996*.

### **Clause 126. Section 41 inserted – Savings provisions relating to Criminal Investigation (Covert Powers) Act 2011**

Clause 126 inserts after section 40, a provision to allow a protected person who, prior to the commencement of the Non-disclosure Certificate regime, had been given permission by the Commissioner of Police under previous sections 33(1)(b) and 33(2) of the *Witness Protection (Western Australia) Act 1996*, not to disclose his or her former identity in a proceeding. The new sections 33 to 34H (Non-disclosure Certificates) will apply in relation to these former permission and will be taken to be a Non-disclosure Certificate as defined in new section 33. Part 3 Division 3 of the *Witness Protection (Western Australia) Act 1996* applies with any necessary modifications to that certificate.

Clauses 126 also provides a definition of 'commencement day' and 'permission' and are as follows:

#### **'commencement day'**

Means a day on which the *Criminal Investigation (Covert Powers) Act 2001* section 126 comes into operation.

#### **'permission'**

Means a permission under section 33(1)(b) of the *Witness Protection (Western Australia) Act 1996* as in force immediately before the commencement day.