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LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES (CONTROLLED OPERATIONS) BILL 2008

EXPLANATORY STATEMENT

Circulated by authority of
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Crimes (Controlled Operations) Bill 2008

Outline

A controlled operation is an investigative method used by law enforcement agencies to identify suspects and obtain evidence for criminal prosecution. The aim of a controlled operation is to gather evidence and intelligence against those who organise and finance crime, rather than merely focusing on couriers and intermediaries.

In a controlled operation, instead of seeking to terminate immediately a criminal scheme, law enforcement officers allow the scheme to unfold under controlled conditions. During the process of allowing this to occur, an informant, agent or undercover police officer may himself or herself need to commit acts that would be regarded as offences unless protected by law. For example, participating in the possession or sale of illegal drugs.

Prior to 1995 there was no legislation that comprehensively regulated the use of controlled operations in Australia. Until this time, police operatives who became involved in approved criminal activities as part of an operation were liable to be charged with criminal offences, but relied on other police and prosecutors to refrain from charging and prosecuting those offences. In making this decision, the test applied would be to take account of all the circumstances surrounding the offences and weigh up the public interest in pursuing a prosecution. Similarly, the courts needed to be persuaded to allow the evidence gathered during the operation to be used in the trial against the accused person.

This approach was changed following the High Court decision in *Ridgeway v The Queen* (1995) 184 CLR 19. The case involved the importation and distribution of heroin into Australia from Malaysia. A police informer had undertaken the importation with the assistance of the AFP and the Malaysian Police in a controlled delivery arranged for the purpose of apprehending Ridgeway. Ridgeway was charged, prosecuted and convicted in South Australia after being found with heroin. He appealed his conviction to the High Court, which allowed his appeal and granted a permanent stay of proceedings in his favour.

The High Court held that the importation of the heroin by law enforcement officers was illegal and therefore the evidence of the importation should have been excluded from the trial on the grounds of public policy. The High Court also said that in deciding whether to exclude evidence obtained during an illegal activity involving law enforcement officers the Court should weigh up the public interest in discouraging unlawful conduct by law enforcement officers against the public interest in the conviction of wrongdoers.

In acknowledging that sometimes law enforcement officers need to engage in illegal activities as part of investigations, the High Court recommended that the problems relating to the conduct of controlled operations should be addressed through the introduction of regulating legislation. The 1997 Wood Royal Commission into the NSW Police Services also supported the recommendation, as did the Parliamentary Joint Committee on the National Crime Authority in 1999, which further recommended that the Commonwealth, States and Territories work together to harmonise controlled operations regimes across Australia.

The Commonwealth, New South Wales and Queensland moved quickly to legislate for controlled operations. Other jurisdictions continued to rely on judicial and prosecutorial discretion.

In recognition of the problems that law enforcement agencies currently face in investigating criminal activity that crosses State and Territory borders, in 2002 the then Prime Minister and State and Territory Leaders agreed on a number of reforms to enhance arrangements for dealing with multi-jurisdictional crime. In particular, they agreed to introduce model laws for a national set of powers for cross-border investigations covering controlled operations, assumed identities, electronic surveillance devices and witness anonymity.

The task of developing the model laws was given to a national Joint Working Group established by the Standing Committee of Attorneys General and the Australasian Police Ministers Council (the JWG). The JWG is chaired by the Commonwealth, and includes representatives from law enforcement agencies and justice departments in each jurisdiction.

In February 2003 the JWG published a Discussion Paper Cross-Border Investigative Powers for Law Enforcement. The Discussion Paper was designed to facilitate public consultation on the model legislation by providing an overview of the existing law in each jurisdiction, and setting out the proposed provisions with an accompanying commentary. The JWG received 19 written submissions in response to the Discussion Paper.

The final report of November 2003 included a model Bill drafted to address issues raised in the consultation process.

This explanatory statement draws upon the commentary to the model Bill as set out in the final report of November 2003 by the Joint Working Group established by the Standing Committee of Attorneys General and the Australasian Police Ministers Council. This statement will refer to this report as the *JWG Report.*

The Australian Crime Commission (ACC) is contemplated by this Bill, as the ACC investigates organised crime on a national basis and it is intended that the ACC would be able to be involved in relevant cross-border operations. The ACC will operate under a combination of existing Commonwealth controlled operations legislation together with relevant State and Territory

legislation that confers powers, duties and functions on the ACC in accordance with the requirements of section 55A of the *Australian Crime Commission Act 2002* (Cwlth).

Controlled operations can engage the right to fair trial, under section 21 of the *Human Rights Act 2004* if the operation results in entrapping a person to commit a criminal offence or improperly inducing a person to commit an offence.
It is now well established in the case law of international courts and tribunals that "entrapment, and the use of evidence obtained by entrapment, may deprive a defendant of the right to a fair trial", and "the fairness of a trial is violated if the crime for which the defendant is prosecuted has been incited or instigated by police officers": *Loosely v R* [2001] UKHL 53, also *Teixeira de Castro v Portugal* (1998) 28 EHRR 101. In *Loosely,* the British House of Lords determined that to allow a defendant to be tried and convicted on the basis of acts committed as a result of entrapment would amount to an abuse of state power, and would bring the proper administration of justice into disrepute.

This Bill is not intended to modify the law that would prevent a defendant to be convicted on the basis of acts committed as a result of entrapment or improper police inducement. It is intended that in any prosecution involving evidence obtained by the powers exercised under the Bill, where it is alleged that the evidence is the result of inducement or entrapment, the court retains its discretion to receive and exclude evidence or stay proceedings consistent with the right to fair trial.

Crimes (Controlled Operations) Bill 2008

Detail

Part 1 — Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Crimes (Controlled Operations) Act 2008.*

Clause 2— Commencement

This clause enables the Act to commence the day after it is notified on the Legislation Register.

Clause 3— Dictionary

This is a technical clause identifying the dictionary and includes a note explaining conventions used to define words and terms.

Clause 4 — Notes

This is a technical clause explaining the status of notes to the Act.

Clause 5 — Offences against Act — application of Criminal Code etc

This clause makes it clear that the *Criminal Code 2002* applies to the Act. The subsequent Act should also be read in conjunction with the *Legislation Act 2001,* which provides for interpretation, common definitions, and legislative machinery for the ACT.

Clause 6 — Objects of Act

Clause 6 sets out the objects of the Act, which are self-explanatory.

In relation to (f) the *JWG Report* noted that the Bill should not seek to limit a court's discretion to admit or exclude evidence in proceedings or to stay criminal proceedings in the interests of justice. As discussed further in clause 18 below, "the approach taken in this model bill is to provide protection to people who are authorised to engage in controlled conduct, without changing the unlawful character of that conduct ... the JWG believes that it would be desirable to put beyond doubt that a court should not apply its discretion to exclude evidence obtained during a controlled operation solely because it was obtained through the commission of unlawful acts provided that the conduct was within the scope of the authority" [p 15].

In essence, the object in (f) is to enable evidence obtained under the foreshadowed Act to be admissible without restricting the courts discretion to determine that the evidence should, or should not, be admitted.

Clause 7 — Relationship to other laws and matters

Clause 7(1) clarifies that other controlled operations law, whether common law or statute law, may operate in parallel to the law set out in this Bill. For example, Part 6A of the *Tobacco Act 1927* authorises a procedure to obtain evidence that could be characterised as a controlled operation. A police operation that is a controlled operation governed by common law is not intended to be ousted by the enactment of this Bill.

Clause 7(2) clarifies that the Australian Crime Commission's authority to exercise controlled operations under the foreshadowed ACT is limited to the jurisdiction contemplated by the *Australian Crime Commission (ACT) Act 2003.*

Clauses 7(3) and (4) articulate the relationship between evidence obtained under the Bill and judicial proceedings.

Clause *7*(3) gives effect to the policy discussed in the *JWG Report* that the Bill does not seek to limit a court's discretion to admit or exclude evidence in proceedings or to stay criminal proceedings in the interests of justice.

Clause 7(4) requires the court to disregard the fact that evidence was obtained as a result of criminal conduct when exercising a discretion to exclude evidence. The Court is only to disregard the fact that the evidence was obtained as a result of criminal activity if the criminal activity was undertaken by a participant or corresponding participant acting in the course of an authorised operation, or a corresponding authorised operation, and the activity was controlled conduct authorised under the Act, or a corresponding law.

Clause 7(4) does not prevent the court from excluding evidence which was obtained as a result of criminal conduct if another reason recognised by law exists which would also justify the exclusion of the evidence. For example, if in addition to being the result of criminal activity, it would otherwise be unfairly prejudicial or otherwise unfair to the defendant to admit the evidence, it would continue to be open to the court to exclude that evidence under sections 135, 137 or 138 of the *Evidence Act 1995* (Cwlth).

Clause 7(4) would not prevent evidence obtained as a result of criminal activity from being excluded if it would otherwise be open to the court to exclude it under Part 3.4 of the *Evidence Act 1995* (Cwlth) on the basis that the evidence constitutes an improperly obtained or unreliable admission.

Clause 7(4) also does not prevent the court from excluding evidence or staying proceedings in cases that involve entrapment or inducement. In any prosecution where it is alleged that evidence is the result of inducement or entrapment, it remains open to the court to exercise its discretion to exclude evidence or stay proceedings in light of the right to a fair trial under section 21 of the *Human Rights Act 2004.*

In the ACT, it would be open to the Court to consider national and international jurisprudence discussing the considerations of whether evidence is the result of inducement or entrapment. Relevant cases include *Ridgeway v The Queen* (1995) 184 CLR 19, *Loosely v The Queen* [2001] UKHL 53, and *R v Mack* [1988] 2 SCR 903.

Clause 7(5) specifies that the *Territory Records Act 2002* and the *Freedom of Information Act 1989* do not apply to the Bill. The Government is of the view that the public interest in protecting the identity of people authorised under the Bill and protecting the criminal intelligence involved in controlled operations outweighs the public interest in disclosing information under the Acts listed.

Clause 8 — Controlled operation taken to be conducted in the ACT

Clause 8 enables the authority of a controlled operation under the Bill to extend to another jurisdiction if a law enforcement officer from the ACT's jurisdiction, such as ACT Policing or an ACC officer, is engaged in a controlled operation under the Bill.

For example, an ACT Policing officer may be engaged in a controlled operation to obtain evidence about internet fraud. The geographic source of the internet fraud could be in another jurisdiction. Likewise, a controlled operation authorised by the Bill to obtain evidence of drug trafficking may result in an ACC officer working covertly in the ACT and surrounding region outside of the ACT.

Part 2 — Authorisation of controlled operations

Clause 9 — Application for authority to conduct controlled operation

Clause 9 sets out the procedure for applying for an authority to conduct a controlled operation.

Clause 9(1) enables a law enforcement officer to apply to the chief officer for authority to conduct a controlled operation. The dictionary stipulates that a law enforcement officer is either a member of ACT Policing or the ACC. The chief officer is either the Chief Police Officer for ACT Policing or the Chief Executive Officer of the ACC.

Clause 9(2) contemplates two kinds of applications: a standard application and an urgent application. A standard application must be signed by the relevant law enforcement officer applying for the operation. An urgent application may be made in person, by phone, fax, e-mail or other form of communication.

An urgent application may be used if an applicant "believed that the delay caused by making a formal application might affect the success of the operation ... [T]he applicant would be required to provide details of any previous applications in relation to the controlled operation ... As soon as practicable after making an urgent application, the applicant must prepare a record in writing of the application and give a copy to the authorising officer.

"Under the model provisions, urgent applications would be determined using the same criteria as formal applications. If the authorising officer decided to grant the application, he or she must inform the applicant immediately and as soon as practicable give them an authorising certificate" [*JWG Report*, p 25].

Clause 9(3) clarifies that more than one application can be made in relation to a particular investigation.

Clause 9(4) stipulates the information that must be included in an application that justifies the controlled operation.

Clause 9(5) the chief officer may seek further information to justify the operation.

Clause 9(6) obliges the applicant to make a written record of an urgent application after the urgent application is made.

Clause 10 — Decision on application for authority

Clause 10(1) authorises the chief officer to grant authority for a controlled operation, subject to any conditions the chief officer decides to impose, or to decline to authorise the operation.

Clause 10(2) lists the criteria the chief officer must consider before authorising a controlled operation.

A relevant offence is defined by the dictionary to be an offence that carries a penalty of 3 years imprisonment or more. "The JWG considered the submissions and has concluded that the model bill should retain a three year offence threshold. This represents a compromise between existing controlled operations legislation and will be consistent with the surveillance devices model bill proposed threshold" [*JWG Report*, p 41].

In clauses 10(b) to (f) the chief officer has to be satisfied that the operation is conducted in the ACT, or the ACT and another jurisdiction; that the nature of the criminal activity warrants a controlled operation; any unlawful conduct by those authorised to engage in the controlled operation is kept to a minimum necessary; that the operation will not result in greater distribution of illicit material than necessary; and that the operation can be accounted for under reporting requirements.

Clause 10(g) is intended to "ensure that an authorising officer will not authorise a controlled operation unless satisfied on reasonable grounds that the operation will not be conducted in a manner that is likely to induce a person to commit an offence they had not intended to commit. An additional safeguard has been included in the [B]ill in clause [18] whereby a controlled operation participant will lose protection from criminal and civil liability if they engage in conduct intended to induce a person to commit an offence" [p 49].

Clause 10(h) requires the chief officer to consider if the controlled operation would result in participating in conduct that would harm individuals or cause damage to property. The Bill departs from the model Bill to the extent that the Government is of the view that a controlled operation should not be constructed to endanger any persons' health or cause injury.

The model Bill included the word 'serious', which suggested that some kind pre-conceived harm could be authorised. This would have raised the issue of the appropriate, planned, use of force, as considered in *McCann and Others v United Kingdom* (1996) 21 EHRR 97. The European Court of Human Rights determined that the individuals who actually used lethal force had not breached human rights, as they genuinely believed they had reasonable grounds to use the force. However, the Court decided that those responsible for managing the individuals had breached human rights because they created a context for the use of force that was disproportionate to the actual situation.

In clause 10(i) the chief officer must only assign a civilian a role in an operation that could not be performed by a law enforcement officer. For example, a police officer could not substitute for a person who is part of a criminal organisation who subsequently decides to cooperate with police.

Clause 11 — Form of authority

Clause 11 stipulates what must be recorded for the authority to conduct a controlled operation. An urgent application may be granted in a manner that is not written, however clause 11(5) requires that a written form of the authority must be made of the urgent authority. A standard authority requires the authority to be in writing.

Clause 11(3)(i) restricts the total length of a standard authority for a controlled operation to no more than a 3 month period. An urgent authority is limited to no more than a 7 day period. "If an operation authorised under the urgent procedure will exceed seven days, a formal application must be made and a formal authority granted. This ... process will ensure that an operation which has been given an urgent authority, and which needs to extend beyond seven days will be given the same level of scrutiny as a formal application" [*JWG Report*, p 57].

Clause 11(4) enables extra precautions to be taken to protect the identity of officers and other participants in the operation by allowing for assumed names, code names, or code numbers. The extra precaution does not oust the *prima facie* obligation to be able to identify the people for the purposes of prosecution or trial.

Clause 12 — Duration of authority

The total length of a standard authority for a controlled operation is no more than 3 months. An urgent authority is limited to no more than a 7 day period.

Clause 13 — Amendment of authority

Clause 13 would enable the authority for a controlled operation to be amended.

"In many cases it will not be possible to anticipate all eventualities at the time an authority is issued. The [JWG] Discussion Paper noted that providing a procedure for varying existing authorities allowed the necessary flexibility to address contingencies that arise as an operation progresses. The [JWG] Discussion Paper proposed that an applicant could make either a formal variation application or an urgent variation application (if he or she had reason to believe that a delay caused by making a formal variation application may affect the success of the operation). An authorising officer could also vary an authority of his or her own motion" [*JWG Report*, p 59].

A variation application requires the chief officer to consider the same range of factors as those for a wholly new application; the process effectively functions as a full review [*JWG Report*, p 61].

"Additionally, as part of the oversight and monitoring process ... the independent body conducting the inspections of the law enforcement agency's controlled operations records would be able to inspect this material. If the independent body found any irregularity in the duration of time for which a particular controlled operation had been authorised, the independent body could report on these concerns to the Minister. This will not only provide a further level of review of variations, but will also encourage law enforcement agencies to more closely monitor the effectiveness of operations" [*JWG Report*, p.61].

If an urgent authority needs to extend beyond seven days, then a formal application must be made and a formal authority obtained. Once ratified, the authority will be valid for up to three months [*JWG Report*, p 61].

Clause 13(13) obliges the chief officer to inform participants in the operation of any amendment within 48 hours.

Clause 14 — Form of amendment of authority

If an authority is amended under clause 13, then the amendment must be recorded in accord with clause 14.

Clause 15 — Cancellation of authority

Clause 15 provides the chief officer with a broad, discretionary, power to cancel the authority for a controlled operation. The cancellation may be made at the request of the relevant law enforcement officer or upon the chief officer's own volition.

Clause 16 — Effect of authority

Clause 16 authorises the relevant law enforcement officers and civilian participants to engage in the authorised controlled operation. Clause 16 also

authorises the participants to engage in the controlled operation in other participating jurisdictions.

Clause 17 — Defect in authority

Clause 17 clarifies that if there is a defect in the authority, or any of the forms or procedures leading to the authority, the defect does not affect the authority. However, if the defect would change the substance of the authority the defect may invalidate the authority.

Part 3 — Conduct of controlled operations

Division 3.1 — Controlled conduct engaged in for authorised operation

Clause 18 — Protection from criminal responsibility for controlled conduct during authorised operation

Clause 18 provides a statutory protection for participants in controlled operations from prosecution if the participant engages in conduct that comprises the physical elements of a criminal offence.

The protection only applies if:

- the conduct falls within the authority provided for the operation;
- the conduct does not amount to inducing a person to commit an offence;
- the conduct does not involve the risk of causing death or serious injury, or the commission of offences against the person of a sexual nature.

If the participant is not a law enforcement officer the protection is also displaced if the participant does not act in accord with the instructions of the law enforcement officer managing the participant's conduct.

The *JWG Report* noted that: "The approach taken in the model bill was to provide protection to participants without altering the lawfulness 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. This follows the Commonwealth approach and is similar to the approach taken in provisions in other legislation.

"The New South Wales controlled operations legislation takes a different approach. Rather than addressing the status of the participant, the New South Wales legislation addresses the status of the conduct. Section 16 of the New South Wales *Law Enforcement (Controlled Operations) Act 1997* provides that if certain requirements are met, a relevant activity is not unlawful and does not constitute an offence or corrupt conduct.

"Under the approach adopted in the model bill, the activity itself does not lose its character as an offence, but a participant who satisfies the requirements of the bill is not criminally responsible for the offence." [pp. 69–71]

The *JWG Report* also discusses the different approaches considered for assessing whether a participant should be protected from prosecution if entrapment occurred. In this context the *JWG Report* discussed the different approaches taken by *Ridgeway v The Queen* (1995) 184 CLR 19 and *Loosely v The Queen* [2001] UKHL 53. In relation to the issue of protections for individual participants, the *JWG* concluded that a subjective assessment of the conduct was appropriate.

"The JWG notes that McHugh J's comments [minority in *Ridgeway v The Queen* (1995) 184 CLR 19 and approved by *Loosely v The Queen* [2001] UKHL 53] were made in the context of a discussion about how a court should consider entrapment by a participant in a controlled operation when deciding whether or not to exclude evidence obtained as a consequence of the entrapment.

"Clause [18] presents a different context. It concerns the criminal responsibility of a participant. The JWG considers that it is appropriate for a participant to be criminally responsible for his or her conduct if he or she subjectively intends to induce another to commit an offence; however, the JWG does not consider that it is appropriate to attribute criminal responsibility on the basis of an objective standard.

"The JWG considers that in practice any difference between an objective and subjective test may be small. It would be unusual for a court to find that a law enforcement officer's conduct satisfied the objective criteria listed by McHugh J, but that the officer had not subjectively intended to entrap the suspect by that conduct.

"Even in such cases, the fact that clause [18] would prevent the law enforcement officer from being criminally responsible for his or her conduct would not necessarily mean that the evidence obtained through his or her conduct would be admissible. A court would still have to determine whether the evidence was obtained improperly or unfairly.

"The model bill does not preclude a court from applying an objective test in exercising that discretion." [*JWG Report,* p.81]

Clause 19 — Civil liability not incurred

This clause ousts any civil liability a participant in an authorised operation would have incurred for their actions.

The protection only applies if:

- the conduct falls within the authority provided for the operation;
- the conduct does not amount to inducing a person to commit an offence;
- the conduct does not involve the risk of causing death or serious injury, or the commission of offences against the person of a sexual nature.

If the participant is not a law enforcement officer the protection is also displaced if the participant does not act in accord with the instructions of the law enforcement officer managing the participant's conduct.

Clause 19(3) stipulates that any liability that would have been attributed to the individual participant acting within the terms of this clause is attached to the Territory.

Clause 20 — Effect of s 18 and s 19 on other laws relating to criminal investigation

Clause 20 clarifies that the protection of clauses 18 and 19 do not authorise a person to engage in conduct that is already provided for in Territory law under the subjects listed in (a) to (i). For example, a participant cannot use a controlled operation to obtain a forensic sample, without using the relevant Territory laws.

Clause 21 — Effect of being unaware of amendment or cancellation of authority

Clause 21 extends any protections available to a participant in an operation if the participant engages in conduct that is no longer authorised because of an amended authority or cancellation. The participant must be unaware of the amendment and not reckless about its existence.

Clause 13(13) provides that the relevant applicant for an authority must take all reasonable steps to inform participants of an amendment within 48 hours.

Clause 22 — Protection from criminal responsibility for certain ancillary conduct

This clause protects police and other people who are authorised to know and assist with a controlled operation but are not assigned as participants. Those people who are authorised would not be criminally liable for ancillary conduct, such as conspiracy, etc. For example, scientific officers could be providing technical assistance on storage or preparation of a sample drug.

Division 3.2 — Compensation and notification of third parties

Clause 23 — Compensation for property loss or serious damage

Clause 23 provides for compensation for property loss or serious damage to property owned by a third party, where the damage or loss arises directly from the controlled operation.

The Bill does not provide for compensation for injury, as this kind of compensation would be available under other laws.

The *JWG Report* notes:

"A majority of the JWG is of the view that an innocent third party who suffers loss and/or serious property damage as a direct result of a controlled operation should have recourse to some form of compensation. The provision

should be limited to cases in which the claimant did not contribute to the commission of an offence and is not a law enforcement officer.

"The JWG also considers that some form of compensation should be available to a person who is injured as a direct result of a controlled operation. However, this issue is complicated by the fact that the person may have entitlements under other statutory schemes, such as criminal injuries compensation regimes or transport accident or workers' compensation schemes. The nature and extent of entitlements under such legislative regimes will vary across jurisdictions.

"The JWG has concluded that the model bill should not include a reference to compensation for injury and claimants should rely on other forms of compensation mentioned above, which are likely to contain other features appropriate to their specific needs." [p.97]

Clause 24 — Notification requirements

This clause requires the chief officer to notify a property owner of any loss or damage caused to the property as a direct consequence of the controlled operation. The notification does not have to occur until it is safe to do so in accord with the criteria in (3).

The *JWG Report* noted that, "[g]iven 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.

"... the principal law enforcement officer should be required to report to the authorising officer any loss or serious damage to property and to ensure that the details are recorded in the general register. The authorising officer will then need to decide when it is practical to notify the person who suffered the loss or serious damage and must take all reasonable steps to notify the owner of the property.

"... the authorising officer should notify any person whose property was lost or seriously damaged as soon as practicable after the loss or damage. However, the authorising officer may decide not to notify the person until satisfied that notification would not:

(a) compromise or hinder an investigation of an offence;
(b) compromise the identity of a participant in an authorised operation; or
(c) endanger the life or safety of any person; or
(d) prejudice a legal proceeding; or
(e) otherwise be contrary to the public interest." [p. 101]

Division 3.3 — Mutual recognition

Clause 25 — Mutual recognition of corresponding authority

Clause 25 relies upon the definitions of corresponding authority and corresponding law. The dictionary of the Bill defines the terms the following way:

> ***corresponding authority*** means an authority authorising a controlled operation (within the meaning of a corresponding law) that is in force under a corresponding law.
>
> ***corresponding law*** means a law of another jurisdiction that corresponds to this Act, and includes a law of another jurisdiction that is declared by regulation to correspond to this Act.

The clause enables a controlled operation that is authorised by a corresponding law to operate in the ACT as if the operation was authorised by ACT law. The clause identifies the critical sections that hold relevant powers and protections for controlled operations.

It is the Government's intention that this clause should be interpreted purposefully by examining the substance of the foreshadowed Act and corresponding law. It is not intended that mutual recognition would be defeated if corresponding law was not cast in exactly the same terms as the Territory's law.

Part 4 — Compliance and monitoring

Division 4.1 — Restrictions on disclosure of information

Clause 26 — Unauthorised disclosure of information

Clause 26 creates three offences for disclosure of information.

The offences in clause 26 depart in a modest way from the model Bill. The use of person in the model Bill could be interpreted as any person, whereas the discussion around the offences suggests that the offence is directed at people who are authorised to know about a controlled operation.

To remove any doubt and to ensure that the offences do not apply to people who may accidentally find out about a controlled operation, 26(1)(a) limits the offences to participants in the operation and people who may be otherwise authorised to have information about a controlled operation. For example, there may be sworn or unsworn members of a police force who are assisting with a technical aspect of an operation, or there may be third parties who are necessarily taken into confidence by police to enable the operation to occur.

The offence in (1) is the basic offence of disclosing information unlawfully. The offence in (2) covers conduct where the disclosure is intended to

endanger the health or safety of someone, or is reckless about whether a person's safety or health will be endangered.

The offence in (3) covers conduct that is intended to prejudice a controlled operation or where the person is reckless about whether the disclosure will prejudice a controlled operation.

The mental elements of the offence in (2)(a) and (b), and (3)(a) and (b), namely intention or recklessness are defined in the *Criminal Code 2002.* The Code stipulates that proof of knowledge for an offence that holds recklessness as the mental element inherently proves recklessness.

Division 4.2 — Reporting and record-keeping

Clause 27 — Principal law enforcement officers' reports

Clause 27 obliges the law enforcement officer responsible for a controlled operation that has finished to make a report to the chief officer about the controlled operation.

Clause 27(2) sets out what must be included in the report to the chief officer.

Clause 28 — Chief officers' annual reports

Clause 28 obliges the relevant chief officer to provide a report to their Minister on controlled operations conducted in the immediately preceding financial year.

Clause 28(2) sets out what must be included in the report to the Minister.

Clause 28(3) requires the chief officer to provide any additional information if requested by the Minister.

Clause 28(4) obliges the chief officer to classify the controlled operations by way of jurisdiction: 1. those conducted in the ACT alone; 2. those conducted in the ACT and one or more other jurisdictions; and 3. those conducted in one or more participating jurisdictions. In the case of the third classification, the chief officer need only report upon the operation if the operation has some connection with the ACT. For example, the chief officer does not need to report upon an operation conducted between NSW and Queensland. But if during an operation between NSW and Victoria, the participants come into the ACT for operational reasons, the chief officer must report on the operation.

Clause 28(5) stipulates that the report must not disclose identifying information about suspects or participants.

Clause 28(6) clarifies that if an operation started in the old financial year and is still being conducted in the new financial year, the operation must be reported upon in the following financial year. For example, if an operation started in June 2009 and finished in August 2009, it would be included in the July 2010 report.

Clause 28(7) enables the chief officer to identify information in the report that should be excluded from any public version of the report in order to protect a person from harm, uphold an investigation or prosecution, or compromise operations.

Clause 28(8) obliges the Minister to exclude the information contemplated in clause 28(7) if the Minister is satisfied with the chief officer's advice.

Clause 28(9) requires the Minister to table the chief officer's report in the Assembly within 15 days from the day that the Minister receives the report.

Clause 29 — Keeping documents connected with authorised operation

Clause 29 lists the documents the chief officer is required to keep.

Clause 30 — General register

Clause 30 obliges the chief officer to keep a register of each application, authority and amendment of authority made under the foreshadowed Act.

Clause 30(a), (b) and (c) list the details that must be recorded in relation to every application, authority and amendment of authority.

Division 4.3 — Inspections

Clause 31 — Inspection of records by ombudsman

Clause 31 establishes independent oversight of the foreshadowed Act. The clause will require the ombudsman to examine records made under the Act and empowers the ombudsman to have full access to relevant records.

The ombudsman must prepare a report on the inspection results under the terms of the *Annual Reports (Government Agencies) Act 2004.* The ombudsman's report must comment on the adequacy of the records and the cooperation given to the ombudsman by the agency.

Part 5 — Miscellaneous

Clause 32 — Evidence of authorities

Clause 32 enables a document that purports to be an authority under section 10 of the Act to be taken as proof that the chief officer was satisfied of the grounds required to grant the authority.

However, if there is evidence that the chief officer was not satisfied, then the presumption made by clause 32 does not apply.

Clause 32(1) relates to authorities issued under the ACT law, while 32(2) relates to authorities issued under corresponding law.

The *JWG Report* concluded that a "conclusive evidence provision" was not required to meet the policy objective of reducing the need to call the relevant

chief officer to give evidence in person for any case involving a controlled operation governed by the Act.

"... a defendant who wishes to challenge the decision to issue the authority in the trial itself would need to apply to the trial judge for a ruling that the evidence obtained pursuant to the authority is inadmissible. In order to succeed, the defendant would need:

(a) show that the authority was flawed on its face; or
(b) obtain evidence about how the decision was made.

"A minor defect on the face of the authority would not matter. If there were a major defect, the court would need to consider whether the authorisation was invalid. If the authorisation were invalid, the evidence would have been obtained unlawfully. The court would then need to apply the law on unlawfully obtained evidence and decide whether the evidence should be admissible.

"... in order to obtain evidence about how the decision was made, the defendant would need to subpoena the authorising officer (or the law enforcement officers who applied to the authorising officer). However, a defendant's ability to subpoena the authorising officer would also be limited and is governed by the principles in *Alister v The Queen* (1983) 154 CLR 404. It cannot be a mere fishing expedition. The defendant would have to show that it is 'on the cards' that any evidence obtained by the subpoena would assist the defendant's case." [p. 141]

Clause 33 — Delegation

Clause 33 enables the relevant chief officers to delegate their powers or functions to a senior officer listed in (3). Under the foreshadowed Act, the powers or functions cannot be delegated to anyone else but the class of officers listed in (3).

Clause 34 — Regulation-making power

Clause 34 would authorise the Executive to make regulations for the Act.

Dictionary

The Bill includes a dictionary which draws upon the dictionary of the *Legislation Act 2001* and provides definitions for this Bill.

To remove any doubt, the meaning of corresponding law is intended to enable laws of other jurisdictions that substantially correspond with the ACT's law to be treated as corresponding law without the necessity to list every law in regulation. The regulation making power is intended to be used to enable another law to be declared despite the fact that the law does not substantially correspond to the ACT's law. It is the intention of the Government that the assessment of correspondence would be made in deliberations between the ACT and other jurisdictions.

At the time of the preparation of this Bill, the Government considers that the *Law Enforcement (Controlled Operations) Amendment Act 2006* (NSW), the *Crimes (Controlled Operations) Act 2004* (Vic) and the *Police Powers (Controlled Operations) Act 2006* (Tas) correspond with the provisions of this Bill.