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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES (ASSUMED IDENTITIES) BILL 2009

EXPLANATORY STATEMENT

Circulated by authority of
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Crimes (Assumed Identities) Bill 2009

Outline

In June 2009 the Government's Report on Serious Organised Crime [SOC Report] noted that:

The ACT is uniquely in the position where it can afford to respond in a timely and informed fashion by examining the legislative responses in all other Australian jurisdictions, and international trends and developments to ensure that the ACT maintains a robust position against serious organised crime groups and activities. [page 46.]

The SOC Report also explained the national process to make consistent cross-border laws dealing with criminal investigation:

In 2002, the Leaders Summit on Terrorism and Multi-jurisdictional Crime agreed to the development of model laws and mutual recognition for a national set of powers for cross border investigations covering controlled operations, assumed identities legislation, surveillance devices and witness anonymity. These powers are often used across jurisdictional borders and involve covert methods of investigation. The creation of a national set of investigative powers is intended to facilitate seamless law enforcement across jurisdictions. [Page 6.]

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 was chaired by the Commonwealth, and included 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 *Cross-Border Investigative Powers for Law Enforcement – Report November 2003* included a model Bill drafted to address issues raised in the consultation process.

The Crimes (Assumed Identities) Bill 2009 will provide the ACT with a law to authorise assumed identities in the ACT that can also be used in other jurisdictions with corresponding law. Conversely, the Bill will enable other jurisdictions with corresponding law to use their authorised assumed identities in the ACT.

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 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* (Cth).

“An assumed identity is a false identity that is used by an officer or other person for a period of time for the purpose of investigating an offence or gathering intelligence. Assumed identities provide protection for undercover operatives engaged in investigating crimes and infiltrating organised crime groups.” [*JWG Report*, page 149.]

The type of documents and records that would be created under this Bill to substantiate an assumed identity include: birth certificates, drivers licences, passports and credit cards.

The Bill will create a statutory framework for:

- the authorisation of assumed identities;
- the lawful provision of fictitious documentation by relevant government and non-government entities;
- the lawful amendment of relevant records to support fictitious documentation;
- protection of law enforcement officers, agencies and other authorised operatives from civil or criminal action arising from the lawful creation or use of assumed identities;
- mutual recognition of laws with other corresponding jurisdictions; and
- compliance and monitoring of the use of assumed identities.

Assumed identities can engage the right to fair trial, under section 21 of the *Human Rights Act 2004* if an operation using an assumed identity results in entrapping a person to commit a criminal offence or improperly inducing a person to commit an offence. The same issue was contemplated in the preparation of the *Crimes (Controlled Operations) Act 2008*. The explanatory statement of the *Crimes (Controlled Operations) Act 2008* states:

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 E.H.R.R. 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.

The Crimes (Controlled Operations) 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. [page 4.]

Like the *Crimes (Controlled Operations) Act 2008*, this Bill will not modify the law on entrapment or improper police inducement.

Crimes (Assumed Identities) Bill 2009

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 (Assumed Identities) Act 2009*.

Clause 2— Commencement

This clause enables the Act to commence by way of a notice by the Minister after the Act is notified on the Legislation Register. If the Act is not commenced within six months of notification, the provisions of the *Legislation Act 2001* will automatically commence the Act.

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 — Purpose of Act

Clause 6 sets out the purpose of the Act, consistent with the explanation in the ‘Outline’ above.

Clause 7 — Relationship to other laws

Clause 7 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 police, operatives, the assumed identities and agencies authorised by the Bill outweighs the public interest in disclosing information under the Acts listed.

Part 6 of the Bill provides for record keeping and inspection by the Ombudsman.

Part 2 — Authorisation to acquire or use assumed identity

Clause 8 — Application for authority

Clause 8 sets out the procedure for applying for an authority to acquire an assumed identity and use an assumed identity.

Clause 8(1) enables a law enforcement officer to apply to the chief officer for authority to acquire and/or use an assumed identity. The dictionary states 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 8(2) requires a separate application for each assumed identity. This obligation assists to clarify the decision made in each case and assists in transparent record-keeping.

Clause 8(3) stipulates that applications must be in writing and in a form approved by the relevant chief officer.

Clause 8(4) sets out the information and reasons that must be included in the application. The Government envisages that the information provided for clause 8(4)(f) may vary and may be absent in cases where assumed identities are established well before they are applied to specific investigations.

For example, police investigating child sex offences via the internet may need to draw upon an assumed identity of a person of a particular age group and gender. Establishing these identities in advance of their use in an investigation provides the police with the flexibility to respond to opportunities as they arise.

Under clause 8(5) the chief officer may seek further information to justify the application.

Clause 9 — Decision on application for authority

Clause 9(1) authorises the chief officer to grant authority to acquire or use an assumed identity, subject to any conditions the chief officer decides to impose. The chief officer may decide to refuse the application.

Clause 9(2) lists the criteria the chief officer must consider before making a decision on an application.

For 9(2)(a) the chief officer must be satisfied that the assumed identity will be necessary for an investigation or gathering intelligence on criminal activity.

For 9(2)(b) the chief officer must be satisfied that any risk of abuse of the assumed identity by the person using the identity is a minimal risk.

For 9(2)(c) the chief officer must be satisfied that it would be impossible or impracticable for a law enforcement officer to use the assumed identity if the application proposes that the assumed identity would be for a person who is not a law enforcement officer.

Clause 9(3) empowers the chief officer to authorise three other things:

(a) an application to be made to the Supreme Court to order a fictitious entry into the register of births, deaths and marriages;

(b) a request to a government or non-government agency in the ACT, or other jurisdiction with corresponding law, to create fictitious evidence of an identity; and

(c) the use of an assumed identity in a jurisdiction with corresponding law.

Clause 9(4) stipulates that if authority is requested and given for all or any of the things in clause 9(3), then each authority must be made for each assumed identity that is authorised by the chief officer.

For example, an application is made for three assumed identities: Mary Phillips, Jane Antill and Terry Majura. The application seeks authority for the creation of fictitious evidence to support the identities and that the identities can be used in NSW and Victoria. In approving the authority for each assumed identity, the chief officer must also stipulate the approved authority for things in 9(3) for each identity.

Clause 10 — Authorised civilian’s authority not longer than 3 months

If a person who is not a law enforcement officer is authorised to use an assumed identity, under clause 9(2)(c), the authority is limited by clause 10 to a duration of three months.

The *JWG Report* notes that the JWG decided that an authority for civilian participants should specify a time limit, and that the authority should be no longer than three months. [page 173.]

Clause 11 — Authorised civilian’s supervisor

If the chief officer authorises a civilian to use an assumed identity, then clause 11 requires the chief officer to appoint a law enforcement officer to supervise the acquisition and/or use of the assumed identity.

Clause 11 also requires the supervising officer appointed to be of the rank of sergeant or above. In the case of the ACC, of the rank of senior investigator or above.

Clause 12 — Form of authority

Clause 12 sets out what must be recorded for the authority to acquire and use an assumed identity. The authority must be in writing, in a form approved by the relevant chief officer, and signed by the chief officer or their relevant delegate.

Clause 12(2) lists the detail that must be included in the written authority. Clauses 12(2)(g) and (h) ensure that the authority distinguishes between law enforcement officers and civilians. There is more detail prescribed for civilians who are authorised to use assumed identities.

Clause 12(3) requires the written authority to specify the other powers the chief officer may exercise in making an authority.

Clause 12(3)(a) obliges the chief officer to list each local agency or participating jurisdiction agency that will be requested to provide fictitious evidence to support an assumed identity.

Clause 12(3)(b) obliges the chief officer to note whether an application to the Supreme Court for a fictitious entry to the register of births, deaths or marriages is authorised.

Clause 12(3)(c) obliges the chief officer to list the participating jurisdictions the chief officer has decided the authorisation may be exercised.

Clause 13 — Period of authority

For law enforcement officers, the authority is in force until it is cancelled under clause 14.

The *JWG Report* recognised that law enforcement agencies need tactical and strategic flexibility in relation to the creation and use of assumed identities. Rather than setting a time limit the JWG concluded that a periodic review of authorities would better meet the needs of probity and accountability. [*JWG Report*, page 175.] The review is discussed in clause 15 below.

An authority for a civilian however, is limited to a maximum of three months (see clause 10 above). Clause 13(2) stipulates that the authority for civilians is limited to the maximum time set in clause 10, or earlier if the authority is cancelled under clause 14.

Clause 14 — Amendment or cancellation of authority

Clause 14 empowers the chief officer to amend or cancel an authority.

The chief officer must cancel the authority if satisfied that the use of the assumed identity is no longer necessary.

Clause 14(2) obliges the chief officer to notify the relevant law enforcement officer of the cancellation or amendment of the authority for an assumed identity. In the case of a civilian, the chief officer must notify the civilian's supervisor.

Clause 14(3) provides that any cancellation or amendment notice must set out the reason why the authority is amended or cancelled.

Clause 14(4) stipulates that the amendment or cancellation takes effect on the date the notice is given to the relevant officer or supervisor of a civilian. Alternatively, the notice can state a later date of effect.

Clause 15 — Review of authority granted to authorised officer

Clause 15 requires the chief officer to review authorities made under clause 9 at least once every 12 months.

Clause 15(3) requires the chief officer to cancel an authority if following the review the chief officer is satisfied on reasonable grounds that the authority is no longer necessary. Cancellation is set out in clause 14.

Clause 15(4) requires the chief officer to record a decision to allow the authority to continue to be in force, if following a review the chief officer is satisfied on reasonable grounds that the authority remains necessary.

The *JWG Report* noted:

In order to ensure that the review process has integrity, the reviewing officer should consider and state in writing, that the use of the assumed identity is still needed, and provide reasons as to this decision. If the review reveals that the assumed identity is no longer needed, there should be a requirement for the chief officer to cancel the authority immediately. [page 177.]

To remove any doubt, this clause is intended to authorise a delegate of the chief officer to conduct reviews of authorisations.

Clause 16 — Making entries in register of births, deaths or marriages

Clause 16 empowers the Supreme Court to order the registrar-general to make a fictitious entry, or entries, under the *Births, Deaths and Marriages Registration Act 1997*, to support an assumed identity created by a relevant authorisation.

The application must be made by the chief officer or their delegate, or by a relevant chief officer from a jurisdiction with corresponding law.

The Supreme Court may make the order if satisfied that the order is justified given the tasks of the controlled operation or the investigation contemplated by the ACT authority or the authority from another jurisdiction with corresponding law.

Clause 16(3) obliges the Supreme Court to hear the matter in closed court.

Clause 16(4) applies if the Supreme Court makes the order. Clause 16(4) requires the registrar-general to implement the order by the time stated in the order or within 28 days if the order is silent on timing.

This clause authorises any other relevant or consequential changes to the register that may need to be made to substantiate the assumed identity. The *JWG Report* sums up the intent:

. . . The order would authorise the Registrar of Births, Deaths and Marriages to make any entries in a register of births, deaths or marriages that are necessary to give effect to the order.

It may also be necessary to create entries in a register of births, deaths or marriages for fictitious “parents” and “relatives” of the assumed identity. This will assist the law enforcement officer in substantiating his or her background and credibility. [page 183.]

Clause 16(5) requires the registrar-general to provide the chief officer with relevant fictitious evidence, in the form of relevant certificates, that match any entries made in the register required by the order.

Clause 17 — Cancellation of authority affecting entry in register of births, deaths or marriages

Clause 17 requires the chief officer to apply to a relevant court for an order to reverse the creation of a fictitious entry into a register of births, deaths or marriages if an authority is cancelled.

If the order made an entry into the ACT register, the chief officer must apply to the ACT Supreme Court under clause 18. If an order was made to amend the register of a jurisdiction with corresponding law, then chief officer must make an application under the law of the corresponding jurisdiction.

The chief officer must make an application to reverse a fictitious entry within 28 days of an authority being cancelled.

Clause 18 — Cancelling entries in register of births, deaths or marriages

Clause 18 empowers the Supreme Court to order the registrar-general to remove a fictitious entry made by an order under clause 16 above.

The court may only make the order upon an application by the chief officer.

The Supreme Court must hear the application in closed court.

The registrar-general must implement the order within 28 days of the order being made.

Clause 18(5) requires the chief officer to return any certificate relating to the fictitious entry to the registrar-general.

Part 3 — Evidence of assumed identity

Clause 19 — Request for evidence of assumed identity

The power in clause 19 is enlivened by a decision under clause 9 to request the creation of fictitious documentation and other evidence to support the creation of an assumed identity.

The chief officer may ask an agency that issues documentation and creates other records that substantiates identity to create evidence of an assumed identity and give any relevant physical items substantiating identity to a person stipulated in the authority.

The meaning of ‘evidence’ for the purposes of identity is defined in the dictionary and means a ‘document or other thing that evidences, or indicates, or can be used to evidence or indicate, a person’s identity or any aspect of a person’s identity’. Examples include drivers licence, birth certificate, credit card or identity card.

Other examples include: creation of a bank account, creation of a record of ownership, a land revenue record, creation of a utilities bill, fictitious entry into a relevant database and fictitious entry into a public record.

The request must provide the agency with a reasonable period of time for compliance with the request.

Clause 19(4) prohibits this clause from being used to create a fictitious entry into the register of births, deaths and marriages. A fictitious entry and subsequent certificate may only be made under clause 16 above.

Clause 20 — Government issuing agency to comply with request

Clause 20 obliges ACT Government agencies to comply with the request under clause 19 within the time set out in the request.

Clause 21 — Non-government issuing agency may comply with request

Clause 21 clarifies that a non-government agency is not obliged to comply with a request made under clause 19.

Clause 22 — Cancellation of evidence of assumed identity

Clause 22 obliges both government and non-government agencies to cancel fictitious evidence if directed to do so by the chief officer, or delegate, of the law enforcement agency that made the request to create the evidence.

Cancel is defined broadly to include any task that needs to be done to remove fictitious evidence from a record or documentation.

Clause 23 — Protection from criminal responsibility — officers of issuing agency

Clause 23 provides government and non-government agencies with a protection from criminal liability if the agency creates fictitious evidence for an assumed identity in accord with a lawful request.

Clause 23(2) clarifies that the protection applies to both compliance with the original request and compliance with the cancellation direction.

Clause 24 — Protection from criminal responsibility for certain ancillary conduct

Part 2.4 of the *Criminal Code 2002*, ‘extensions of criminal responsibility’ provides for ancillary and inchoate offences that apply in the ACT.

Ancillary conduct is conduct that is not the direct conduct that raises criminal liability but conduct that may contribute or prepare for the conduct. For example, assisting, conspiring, inciting etc.

Clause 24 provides a protection from criminal liability to staff, agents or other people who may give effect to the work of a government or non-government agency that provides fictitious evidence under this foreshadowed Act.

The clause ensures that people who assist agencies, or do something that relies upon the agency’s information, are not inadvertently liable for ancillary conduct.

Clause 25 — Protection from civil liability — issuing agency and officers

Clause 25 provides a protection for agencies and their officers against any civil liability that may arise as a consequence of meeting a request under clause 19 or following a direction in clause 22.

The *JWG Report* noted that the JWG:

. . . proposed that if issuing agencies and their employees (for example, bank officers or staff of Medicare) incur any civil liability as a consequence of complying with a request or direction, they will be indemnified against civil liability by the law enforcement agency that made the request for the evidence of the assumed identity. These provisions would apply to both officers and employees of government agencies as well as to employees of non-government bodies. It is envisaged that the law enforcement agency that authorised the assumed identity authority would indemnify officers and employees for conduct occurring in both the home jurisdiction and in other jurisdictions. [page 203.]

Part 4 — Effect of authority

Clause 26 — Assumed identity may be acquired and used

The dictionary to the Bill defines authorised officer as a law enforcement officer who is contemplated by a written authority to acquire or use an assumed identity. An authorised civilian is a person who is contemplated by a written authority to acquire or use an assumed identity. Authority is discussed in clause 9 and 12 above.

Clause 26(1) permits authorised officers to acquire and use an assumed identity in accord with an authority and in the course of their duty.

Clause 26(2) permits the authorised officer to use the assumed identity in accord with an authority for a controlled operation. The intent of clause 26(2) is to provide the officer with any authority or protections allowed by the *Crimes (Controlled Operations) Act 2008* when using an assumed identity in a controlled operation under the *Crimes (Controlled Operations) Act 2008*. In some controlled operations, officers may need to engage in what would normally be illegal activity while using an assumed identity.

Clause 26(3) permits authorised civilians to acquire and use an assumed identity in accord with an authority and in accord with any direction by their supervisor contemplated by the authority. An authorised civilian's supervisor is discussed in clause 11 above.

Clause 26(4) permits the authorised civilian officer to use the assumed identity in accord with an authority for a controlled operation and any direction by their supervisor. The intent of clause 26(4) is to provide the civilian with any authority or protections allowed by the *Crimes (Controlled Operations) Act 2008* when using an assumed identity in a controlled operation under the *Crimes (Controlled Operations) Act 2008*. The provision also ensures that the civilian would have to comply with any direction under the *Crimes (Controlled Operations) Act 2008* when using an assumed identity. Akin to authorised officers, in some controlled operations authorised

civilians may need to engage in what would normally be illegal activity while using an assumed identity.

Clause 27 — Protection from criminal responsibility — authorised people

The dictionary defines ‘authorised person’ as being an authorised officer or an authorised civilian (see discussion in clause 26).

Clause 27 provides a protection to authorised people from criminal liability if the conduct involves acquiring or using an assumed identity in the course of duty or in a controlled operation under the *Crimes (Controlled Operations) Act 2008*. It is intended that clause 27(2)(c) should be read in conjunction with the protections of the *Crimes (Controlled Operations) Act 2008* if a controlled operation is conducted under that Act which also involves an assumed identity under this foreshadowed Act. It is intended that the protection against criminal liability for unlawful conduct authorised by the *Crimes (Controlled Operations) Act 2008* would apply to the use of an assumed identity by a person authorised under the *Crimes (Controlled Operations) Act 2008*.

Absent from any protection from the *Crimes (Controlled Operations) Act 2008*, clause 27(2)(c) ensures that a person using an assumed identity is not immune from liability for criminality simply because they have an assumed identity.

The *JWG Report* gives a clear example:

. . . an officer using a driver’s licence issued in an assumed identity to drive a car would still be liable for criminal offences committed while driving a vehicle, such as culpable driving. [page 213.]

Clause 28 — Protection from civil liability — authorised people

Clause 28 provides a protection from civil liability for authorised people if the liability arises from conduct involved in acquiring or using an assumed identity. (Clause 27 explains ‘authorised people’.)

The *JWG Report* explains the intention of the provision:

. . . authorised persons would be indemnified by the agency authorising the use of the assumed identity against liability for any loss or damage suffered by other persons as a result of his or her conduct.

Authorised officers and persons will only receive the protection from criminal liability and the indemnity against civil liability if their conduct meets specified conditions.

An authorised officer will only receive the indemnity for civil liability for conduct engaged in the course of duty and in accordance with the authorisation conditions. An authorised civilian would only receive the indemnity for civil liability for conduct in accordance with the instructions of a supervising officer and any authorisation conditions. [page 211.]

Clause 29 — Particular qualifications

Consistent with the intent of clause 27(2)(c), clause 29 ensures that authorised people are not excused from civil or criminal liability if they engage in conduct that requires a qualification and the person in fact does not have that qualification.

For example, an authorised person may have an assumed identity of a nurse. This does not permit the person to perform medical procedures unless the person is actually qualified to be a nurse.

Another example could be driving a truck or operating a crane. The authorised person using an assumed identity of a truck driver, or crane operator, would not have a protection from civil or criminal liability set out in clauses 27 and 28 unless the person in reality was qualified to drive a truck or operate a crane.

Clause 30 — Effect of being unaware of amendment or cancellation of authority

Clause 30 clarifies that if an authorised person is unaware of an amendment or cancellation of an authority, the foreshadowed Act applies to the person as if no change had been made to the authority.

However, the protection contemplated by this clause does not apply if the authorised person is reckless about the existence of an amendment or cancellation. Clause 30(3) provides a meaning of ‘reckless’ for the clause. Reckless contemplates the person being aware of a substantial risk that the authority has changed, and having regard to the known circumstances, it is unjustifiable to take the risk.

Part 5 — Mutual recognition under corresponding laws

Part 5 relies upon the definitions of corresponding authority, corresponding law and participating jurisdiction. The dictionary of the Bill defines the terms the following way:

corresponding authority means—

- (a) an authority under a corresponding law to acquire or use an assumed identity in the ACT; or
- (b) an authority under a corresponding law to request the production of evidence of an assumed identity.

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.

participating jurisdiction means a jurisdiction in which a corresponding law is in force.

The part enables relevant powers and functions to acquire and use an assumed identity in a participating jurisdiction to operate in the ACT as if the operation was authorised by ACT law. It also enables the ACT to exercise its powers and functions to acquire and use an assumed identity in a participating jurisdiction.

It is the Government’s intention that the meaning of corresponding law, and this part, 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.

Clause 31 — Request to participating jurisdiction for evidence of assumed identity

Clause 31 enables a chief officer in the ACT to make a request to a government or non-government agency in another participating jurisdiction for fictitious evidence to support an assumed identity.

Clause 32 — Request from participating jurisdiction for evidence of assumed identity

Clause 32 enables a chief officer in a participating jurisdiction to make a request to a government or non-government agency in the ACT for fictitious evidence to support an assumed identity.

Subsections (2) and (3) mean that ACT government agencies would be required to comply, while non-government agencies may comply.

Clause 33 — Direction from participating jurisdiction to cancel evidence of assumed identity

Clause 33 requires a government or non-government agency in the ACT to cancel any fictitious evidence if directed by the chief officer from a participating jurisdiction's law enforcement agency that made the request to create the evidence.

Cancel is defined broadly to include any task that needs to be done to remove fictitious evidence from a record or documentation.

Clause 34 — Protection from civil liability — issuing agencies and officers of participating jurisdictions

Clause 34 provides a protection for ACT agencies and their officers against any civil liability that may arise as a consequence of meeting a request under clause 31 or 33.

Clause 35 — Application of this Act to corresponding authorities

The intention of clause 35 is to enable an assumed identity authority made by a law enforcement agency in a participating jurisdiction to be recognised as if the authority was made in the ACT.

Clause 35 stipulates the critical provisions of the foreshadowed Act that are to apply to the authority of a participating jurisdiction.

Part 6 — Compliance and monitoring

Division 6.1 — Misuse of assumed identity and information

Clause 36 — Misuse of assumed identity

Clause 36 creates a number of offences for the misuse of an assumed identity.

Clause 36(1) is an offence for an officer who does not acquire evidence of an assumed identity in accord with the authority or is in accord with the authority but not in accord with the course of their duty. The mental element for the offence is recklessness. What constitutes recklessness is set out in section 20 of the *Criminal Code 2002*:

20 Recklessness

- (1) A person is *reckless* in relation to a result if—
 - (a) the person is aware of a substantial risk that the result will happen; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (2) A person is *reckless* in relation to a circumstance if—
 - (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is a question of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

Note that ‘recklessness’ is established if either of the fault elements of intention or knowledge are established.

Clause 36(2) is an offence for an officer who does not use an assumed identity in accord with the authority or for a controlled operation, or is in accord with the authority but not in accord with the course of their duty. The mental element for the offence is recklessness.

Clause 36(3) is an offence for an authorised civilian who does not acquire evidence of an assumed identity in accord with the authority or is in accord with the authority but not in accord with a direction by their supervisor. The mental element for the offence is recklessness.

Clause 36(4) is an offence for an authorised civilian who does not use an assumed identity in accord with the authority or for a controlled operation, or is in accord with the authority but not in accord with a direction by their supervisor. The mental element for the offence is recklessness.

Clause 37 — Unauthorised disclosure of information about assumed identity

Clause 37 creates four offences for unauthorised disclosure of information about an assumed identity.

Clause 37(1) creates an offence if any person discloses information that reveals or is likely to reveal an assumed identity. The offence requires that it be proven that the person must know that the information would reveal, or would be likely to reveal, the assumed identity.

Clause 37(1)(d) ensures that the offence does not prevent lawful disclosure. However, clause 37(1)(e) clarifies that the offence is still engaged if the person is reckless about whether the lawful disclosures set out in (d) actually apply.

Clause 37(2) creates an offence if any person discloses information that reveals or is likely to reveal an assumed identity. The offence requires that it be proven that the person was reckless about whether the information would reveal, or would be likely to reveal, the assumed identity.

Clause 37(2)(d) ensures that the offence does not prevent lawful disclosure. However, clause 37(2)(e) clarifies that the offence is still engaged if the person is reckless about whether the lawful disclosures set out in (d) actually apply.

Clause 37(3) is an offence that applies if any person reveals information that would disclose, or would be likely to disclose, an assumed identity, and the person knows or is reckless about that fact. In addition, the offence applies if there are circumstances in which the person intends to endanger the health or safety of any other person or is reckless about whether any other person's health or safety will be endangered.

The Government considers the offence created by clause 37(3) to be very serious and proposes a maximum penalty of ten years imprisonment.

Clause 37(4) is an offence that applies if any person reveals information that would disclose, or would be likely to disclose, an assumed identity, and the person knows or is reckless about that fact. In addition, the offence applies if there are circumstances in which the person intends to prejudice an investigation or intelligence operation, or is reckless about whether the disclosure would prejudice an investigation intelligence operation.

The Government considers the offence created by clause 37(4) to be very serious and proposes a maximum penalty of ten years imprisonment.

Furthermore, the penalties attached to clauses 37(3) and (4) are comparable with the maximum penalties for offences in the Criminal Code, chapter 7 — administration of justice offences. For example, aggravated perjury (section 702) carries a maximum penalty of 14 years imprisonment and perjury (section 703) carries a maximum penalty of 7 years.

Division 6.2 — Reporting and record keeping

Clause 38 — Report about authorities for assumed identities etc

Clause 38 obliges the relevant chief officer to provide a report to their Minister on authorities for assumed identities made or considered in the immediately preceding financial year.

Clause 38(1)(a) to (e) sets out what must be included in the report to the Minister.

Clause 38(2) 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 38(3) obliges the Minister to exclude the information contemplated in clause 38(2) if the Minister is satisfied with the chief officer's advice.

Clause 38(4) requires the Minister to table the chief officer's report in the Legislative Assembly within 15 sitting days from the day that the Minister receives the report.

Clause 39 — Record keeping

Clause 39 sets out what records the chief officer is required to keep.

Clause 40 — Audit of records

Clause 40 requires the chief officer to conduct an internal audit of authorities made under the foreshadowed Act at least once every six months an authority is in effect and once every six months after an authority ends.

The chief officer may appoint a law enforcement officer to conduct the audit. The chief officer cannot appoint an officer who has been involved in: making of an authority; acquiring an assumed identity; or using an assumed identity.

A written report of the results of the audit must be provided to the chief officer.

Division 6.3 — Inspection

Clause 41 — Inspection of records by ombudsman

Clause 41 establishes independent oversight of the foreshadowed Act. The clause enables 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.

The report must not include any information that could possibly endanger anyone, prejudice an investigation or prosecution, or compromise any operational matter.

This provision differs from the *JWG Report* and model Bill. The provision follows the precedent set in section 31 of *Crimes (Controlled Operations) Act 2008* which mandates inspection by the ombudsman. Given that assumed identities will often be used in conjunction with controlled operations, it would be very difficult for the chief officer and the ombudsman to meet their obligations under the *Crimes (Controlled Operations) Act 2008* without ombudsman access to records under this foreshadowed Act.

Part 7 — General

Clause 42 — Delegation

Clause 42 enables the relevant chief officers to delegate their powers or functions to a senior officer listed in (4). Under the foreshadowed Act, the powers or functions cannot be delegated to anyone else but the class of officers listed in (4) and no more than four delegations can be in force at any one time for each law enforcement agency.

Clause 43 — Regulation-making power

Clause 43 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.