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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES (PROTECTION OF WITNESS IDENTITY) BILL 2011

EXPLANATORY STATEMENT

Circulated by authority of
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Crimes (Protection of Witness Identity) Bill 2011

Outline

Background and Context:

In June 2009 the *Government Report on Serious Organised Crime Groups and Activities* (the 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 [at 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 [at 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 titled *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.

Following this, the JWG released the *Cross-Border Investigative Powers for Law Enforcement – Report November 2003* which included a model Bill drafted to address issues raised during the consultation process ('*JWG Report*'). This model bill covered controlled operations, assumed identities, surveillance devices and the protection of witness identifies.

The model Protection of Witness Identity legislation has been adopted in the following jurisdictions:

- Victoria (applies to cross-border operations, not Victoria-only operations): *Evidence (Witness Identity Protection) Act 2004*
- Queensland: *Cross-Border Law Enforcement Legislation Amendment Act 2005*
- Tasmania: *Witness Identity Protection Act 2006*
- South Australia: *Criminal Investigation (Covert Operations) Act 2009*
- Commonwealth: *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*

This explanatory statement draws upon the commentary to the model Bill as set out in the JWG Report.

Purpose of the Bill

The Crimes (Protection of Witness Identity) Bill 2011 will provide a scheme to protect the identities of undercover operatives both within the ACT and in other jurisdictions, in the context of court proceedings.

The Bill empowers the chief officer (the ACT Chief Police Officer (ACT CPO) or the Chief Executive Officer of the Australian Crime Commission (ACC CEO)) to give a witness identity protection certificate in relation to a proceeding. The effect of such a certificate is to:

- enable an operative to give evidence under his or her assumed name or a court name;
- excuse an operative from stating his or her real name or address during the proceeding; and
- prevent the asking of any question or the making of any statements during the proceeding that may lead to the disclosure of the operative's real identity or where the operative lives.

The purposes of providing such a scheme are:

- to protect the personal safety of witnesses (or others connected to the witness); and
- to enhance the efficacy of undercover operations.

By protecting the true identity of a witness, the witness is preserved as a useful undercover officer. It also encourages police officers to participate in undercover operations, as they can be confident that, if necessary, their identity and safety will be protected.

As part of a model legislative scheme, applying across jurisdictions, the Bill provides transparency and certainty as to when identity will be protected. It also provides consistency for law enforcement agencies and operatives who operate in cross-border investigations and will allow for seamless cross-border investigations.

To protect police and other operatives, the Bill also creates offences for disclosing information that reveals or is likely to reveal the real identity of an operative covered by a witness identity protection certificate. Where the disclosure occurs in

circumstances where a person may be endangered or an investigation prejudiced, the offence is more serious and a higher penalty applies.

The Bill also requires that the chief officer provide a yearly report to the Minister about witness identity protection certificates given by the chief officer during that year, including details of any proceeding in which leave was given to disclose an operative's identity despite a witness identity protection certificate. A copy of that report will also be tabled in the Legislative Assembly.

The Australian Crime Commission (ACC) is included in the definition of 'law enforcement agency' for the purposes of the 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).

Like the *Crimes (Controlled Operations) Act 2008*, the *Crimes (Assumed Identities) Act 2009* and the *Crimes (Surveillance Devices) Act 2010* this Bill will not modify the law on entrapment or improper police inducement.

Public Interest Immunity

A significant body of jurisprudence already exists in Australia allowing for the protection of an undercover police operative's identity where they appear as a witness in proceedings. The Bill takes this jurisprudence into account.

The common law doctrine of public interest immunity allows for a court to provide for the protection of an undercover police operative's identity where the operative is a witness in a court proceeding by preventing the disclosure of the operative's identity.

Section 130 of the *Evidence Act 1995* (Cth), which currently applies in the ACT, governs the operation of public interest immunity.¹ The position under section 130 is effectively the same as the common law. Section 130 provides that if the public interest in admitting into evidence information that relates to "matters of state" is outweighed by the public interest in preserving confidentiality, the court may direct that the information or document not be adduced as evidence. "Matters of state" include prejudice to the prevention, investigation or prosecution of an offence. Disclosure of the identity of an undercover operative may prejudice the prevention, investigation or prosecution of an offence where the personal safety of the operative cannot be assured.

Once the court has determined that the proposed evidence does relate to "matters of state" it then determines whether the public interest in admitting the evidence is outweighed by the public interest in non-disclosure. Where this is the case, the court may direct that the information or document not be adduced as evidence.

¹ The *Evidence Act 2011* (ACT), notified on 13 April 2011, will cease the application of the *Evidence Act 1995* (Cth) in the Territory, upon commencement. Section 130 of the *Evidence Act 2011* (ACT) is substantially the same as section 130 of the *Evidence Act 1995* (Cth).

There is currently authority that the only excuse for granting disclosure of the operative's identity is where the information is necessary to allow the accused in a criminal trial to fully answer the case against him or her.²

The common law continues to apply to pre-trial procedures where issues of non-disclosure on ground of public interest immunity arise.

Human Rights Considerations

The right to a fair trial and rights in criminal proceedings contained in sections 21 and 22 (respectively) of the *Human Rights Act 2004* (HR Act) are engaged by this Bill.

The Bill engages the right to a fair trial as the effect of a witness identity protection certificate is to prevent the disclosing of an operative's true identity in the context of a proceeding.

The right to a fair trial is contained in section 21 of the HR Act and provides that "Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing."

Section 22 (b) and (g) of the HR Act provides that "Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:

- to have adequate time and facilities to prepare his or her defence; and
- to examine prosecution witnesses."

However, the right to a fair trial and rights in criminal proceedings are not absolute rights. Section 28 of the HR Act states that "human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society".

Concealing the true identity of undercover operatives (and thereby limiting the right to a fair trial and certain rights in criminal proceedings) achieves two important purposes which are in the public interest. Firstly, the personal safety of witnesses (or other people connected to the witness, such as his or her family) is protected. Secondly, the efficacy of undercover operations is preserved. Protecting the true identity of the witness means that he or she is preserved as a useful undercover officer, an important tool in fighting organised crime. In addition, concealing an undercover operative's true identity may also be necessary to encourage police officers to participate in undercover operations, confident that, if necessary, their identity and safety will be protected.

While a witness identity protection certificate prevents the disclosure of an operative's true identity in a court proceeding, this limitation on the right to a fair trial and rights in criminal proceedings is reasonable and justified. As outlined above at 'Purpose of

² *Maloney v New South Wales National Coursing Assn Ltd* [1978] 1 NSWLR 60; *Signorotto v Nicholson* [1982] VR 413; *Cain v Glass [No 2]* (1985) 3 NSWLR 230

the Bill', the primary purpose of this limitation is to protect the personal safety of witnesses (or others connected to the witness). This purpose engages and promotes the right to protection of the family and children (at section 11 of the HR Act) as the families of witnesses are protected by concealing the true identity of the witness. It also engages and promotes the right to privacy (section 12) and freedom of movement (section 13) as it protects the operative's right not to have his or her privacy, family and home interfered with unlawfully and his or her right to choose his or her residence in the Australian Capital Territory.

The limitation on the right to a fair trial and rights in criminal proceedings is reasonable and only goes as far as is necessary for the purpose of protecting the personal safety of witnesses and their families. The witness in the proceeding to which a witness identity protection certificate applies is not 'anonymous' in the sense that they appear in person to give evidence, can be cross-examined and their demeanour can be assessed by the court. The limitation is proportionate as it only goes so far as to require that their true name and address are withheld. It is not proposed that the operative will be a 'secret' or 'anonymous' witness who does not appear before the court.

There is authority recognising the need to limit human rights in order to protect the safety of witnesses and the investigation of criminal matters. In *Roberts (FC) v Parole Board* the House of Lords stated that:

“In *R v H* [2004] UKHL 3, [2004] 2 AC 134, para 23, the House acknowledged the need to reconcile an individual defendant's right to a fair trial with such secrecy as is necessary in a democratic society in the interests of national security or the prevention or investigation of crime.”

In *Doorson v Netherlands* (1996) 22 EHRR 330 the European Court of Human Rights considered witness anonymity with regard to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) which states that:

“In the determination...of any criminal charge against him, everyone is entitled to a fair ...hearing...by an...impartial tribunal...”.

The European Court found that witness anonymity in criminal proceedings does not necessarily result in a violation of Article 6. The Court explained that:

“It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”

The Court found that in the particular circumstances of the *Doorson* case any disadvantage to the defence in maintaining witness anonymity was “sufficiently counterbalanced by the procedures followed by the judicial authorities”. These procedures included that the investigating judge was aware of the identity of the witnesses and subsequently made a record of their impression as witnesses and the applicant’s counsel was able to put questions to the witnesses, even though he did not know the witnesses’ identities.

The reasoning in *Doorson* was followed in *Van Mechelen and Others v Netherlands* (1998) 25 EHRR 647 however the case was distinguished on its facts, which involved maintaining the anonymity of police witnesses. The court in *Van Mechelen* stated that:

“the police officers in question were in a separate room with the investigating judge, from which the accused and even their counsel were excluded. All communication was via a sound link. The defence was thus not only unaware of the identity of the police witnesses but were also prevented from observing their demeanour under direct questioning, and thus from testing their reliability.”

This Bill, however, ensures that the defence has the opportunity to question the witness in the presence of the court allowing the tribunal of fact to make its own judgment as to their demeanour and reliability.

The circumstances of the witness anonymity in *Doorson* were found by the Court to not be in violation of Article 6. It is important to note that the Bill provides even greater ‘counterbalancing procedures’ than existed in that case. The Bill provides that the accused would also be able to physically observe the witness while he/she is giving evidence and being cross-examined (in *Doorson* only the accused’s counsel was present for the questioning of the witnesses about their evidence). “Witness anonymity” for the purposes of the Bill is strictly limited to undercover police operatives and only goes so far as to prevent disclosure of an operative witness’ true name and address. It does not prevent the defence from observing the witness and hearing the witness’ actual voice during proceedings.

Other specific protections or ‘counterbalancing procedures’ are provided by the Bill to ensure that the right to a fair trial and rights in criminal proceedings are only limited to the extent necessary to achieve the purposes of the Bill. Clause 11 provides that a witness identity protection certificate can only be given where it is necessary for the protection of an operative’s (or another person’s) safety or an investigation. The chief officer giving the certificate must be satisfied that disclosing the operative’s true identity in a proceeding is likely to endanger the operative’s safety or that of someone else or prejudice an investigation.

Clause 12 sets out the information that must be included on a witness identity protection certificate. The information required by the Bill will allow parties to the proceeding, including the accused in criminal trials, to challenge the credibility of the operative without disclosing the operative’s identity.

Most importantly, clause 18 of the Bill provides that the court may give leave to allow the disclosure of a witness' identity, despite the existence of a witness identity protection certificate. The court may give leave where the interests of justice, specifically the interests in a fair trial, require the witness' identity to be disclosed to explore credibility.

Furthermore, if there were cases where the protection of the witness' identity means that the defendant is unable to properly test the facts in issue, the court has a discretion to stay the proceedings in the interest of justice.

There are no less restrictive means reasonably available to achieve the purposes of the Bill. In particular, the means by which the witness identity protection certificate is issued are the least restrictive in the circumstances. It is the role of the chief officer of a law enforcement agency to give a witness identity protection certificate where satisfied on reasonable grounds that disclosing the operative's true identity in a proceeding is likely to endanger the operative's safety or that of someone else or prejudice an investigation. The question of the risk posed by disclosure (to a person or to an investigation) of an operative's identity sits firmly with the law enforcement agency. It is the law enforcement agency that has information about these risks, and that is responsible for the health and safety of operatives and for the conduct of investigations.

The means by which the court can allow for disclosure, despite a witness identity protection certificate, are the least restrictive in the circumstances. The court can only give leave for disclosure where:

- there is evidence that would substantially call into question the operative's credibility;
- it would be impractical to test this evidence without disclosure of the operative's true identity; and
- it is in the interest of justice for the operative's credibility to be tested.

The question then for the court is what is in the interest of justice – whether a fair trial can be had without disclosing the operative's true identity. It is not appropriate to call on the court to assess operational law enforcement issues such as the possible risks to a person or to an investigation if an operative's true identity is disclosed. The court cannot be informed of the possible risks without disclosing highly sensitive information about operational matters and ongoing investigations.

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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 (Protection of Witness Identity) Act 2011*.

Clause 2— Commencement

This clause commences the Act on the day after it is notified on the ACT 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 and a note explaining the application of the dictionary to the Act.

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 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 under the heading of ‘Purpose of the Bill’ above. The scheme will apply to both local and cross border criminal investigations.

Clause 7 – Relationship to other laws

Clause 7 specifies that the *Freedom of Information Act 1989* and the *Territory Records Act 2002* do not apply in relation to activities, documents and records under the Act. The public interest in protecting the identity of police, operatives, the assumed identities and agencies authorised by the Act outweighs the public interest in disclosing information under the Acts listed.

Clause 8 – Powers of party’s lawyer

Clause 8 makes it clear that anything that may be done by a party to a proceeding may be done by that party’s lawyer and that a requirement to give something to a party to a proceeding is satisfied by giving the thing to the party’s lawyer. This clarifies that parties can act through their lawyers for the Act.

Part 2 – Witness identity protection certificates for operatives

Division 2.1 Preliminary

Clause 9 – Meaning of *relevant proceeding*

This clause provides that in the Act, *relevant proceeding*, in relation to an operative, means a proceeding where an operative is required to give evidence or where the operative may be required to give evidence they have obtained as an operative. This allows the Act to operate in relation to covert operations.

Clause 10 – Common law not affected by pt 2

Clause 10 provides that the provisions in part 2 of the Act do not affect existing laws and the common law in relation to ordinary witnesses. Those laws allow the Court to make orders about the physical protection of a witness or the use of physical screens or voice modification. An application for such orders is still able to be made to the court where appropriate.

Division 2.2 Witness identity protection certificates

Clause 11 – Giving certificates

Clause 11(1) provides that the chief officer (ACT Chief Police Officer or the Chief Executive Officer of the Australian Crime Commission) can give a witness identity protection certificate where satisfied on reasonable grounds that disclosing the operative's true identity in a proceeding is likely to endanger the operative's safety or that of someone else or prejudice an investigation.

This clause restricts the circumstances where a witness identity protection certificate can be given so that a certificate is only given where it is necessary for the protection of an operative's (or another person's) safety or an investigation.

Allowing this decision to be made within a law enforcement agency enables an informed decision to be made about the need for protection, without possible security risks. The decision is to be made only at the highest levels of the agency and the court retains an overriding discretion to allow the operative's true identity to be revealed where to do so is in the interests of justice (see clause 18, below).

Clause 11(2) provides that a decision by the chief officer to give a witness identity protection certificate is not appealable in any court as the decision is based on sensitive information and the process of review may result in disclosure of the operative's name or address.

Clause 11(3) provides that although a decision to give a witness identity protection certificate is not appealable, such a decision can nevertheless be called into question in a disciplinary proceeding against the decision-maker. This means that the conduct of the person giving a certificate could be reviewed in disciplinary proceedings if

there is an allegation of misconduct. Any such proceedings would be internal and therefore the sensitive information involved could be properly protected.

Clause 12 – Form of certificates

Clause 12(1) sets out the information that must be included in a witness identity protection certificate. The information includes:

- the operative’s assumed name (if the operative is known to a party to the proceeding or a party’s lawyer by a name other than the operative’s real name);
- the operative’s court name (if the operative is not known to any party to the proceeding or any party’s lawyer by a name);
- the period the operative was involved in the operation;
- the name of the agency;
- the date of the certificate;
- the ‘reasonable grounds’ for giving the certificate and whether it is issued on the grounds of a risk to personal safety (clause 11(1)(a)) or on the grounds of possible prejudice to an investigation (clause 11(1)(b)) or both;
- whether the operative has been convicted or found guilty of any offence (and, if so, particulars of each offence);
- whether any charges against the operative for an offence are pending or outstanding (and, if so, particulars of each charge);
- if the operative is (or was) a law enforcement officer, whether there have been any findings of professional misconduct, or are outstanding allegations of professional misconduct (and, if so, particulars of each finding or allegation);
- whether a court has made any adverse comment about the operative’s credibility (and, if so, particulars of the comment);
- whether the operative has made a false representation when the truth was required (and, if so, particulars of the representation). However this excludes representations made under the *Crimes (Assumed Identities) Act 2009* or the *Crimes (Controlled Operations Act 2008*. See the definition of **false representation** at clause 12(4); and
- if there is anything else known to the person giving the certificate that may be relevant to the operative’s credibility - particulars of the thing.

The information included on the certificate will 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 12(2) provides that a witness identity protection certificate must not contain information that may allow the operative’s identity or address to be revealed. For

example, a description of the specific details of the risk of disclosing the operative's true identity would not be provided. To provide that information might reveal sensitive facts and would defeat the purpose of protecting the operative's identity.

Clause 12(3) provides that the chief officer must make all reasonable enquiries to ascertain the information required to be included on the certificate by clause 12(1). This creates a specific statutory obligation on the chief officer and clarifies expectations rather than relying on the implicit obligation of the issuer to make enquiries.

Clause 12(4) provides definitions for terms used in the section:

false representation excludes a representation made under the *Crimes (Assumed Identities) Act 2009* or the *Crimes (Controlled Operations) Act 2008*.

law enforcement officer is defined by the *Crimes (Assumed Identities) Act 2009* and (a) means—

- (i) a police officer; or
- (ii) a member of staff of the Australian Crime Commission; and
- (b) includes a person who is seconded to a law enforcement agency, including (but not limited to) a member of the police force or police service, and a police officer (however described), of another jurisdiction.

outstanding and pending are defined. The definition clarifies when a charge against a person for an offence has been finally dealt with and therefore is not still outstanding or pending for the purposes of the section.

professional misconduct is defined. The definition clarifies that the term means misconduct or a breach of discipline under certain Acts governing the conduct of Australian Federal Police Officers and Australian Crime Commission Officers.

Clause 13 – Filing and notification of certificates

Clause 13 provides the filing and notification requirements that must be complied with before a witness identity protection certificate can be relied on in a proceeding. Parties to a proceeding to which a certificate applies must be given a copy of the certificate, at least 14 days before the operative is to give evidence. This gives the parties notice that a witness will give evidence under an assumed name or court name, and allows time to consider whether an application for leave under clause 18 may be necessary.

In some situations, a copy of the certificate may not be provided 14 days in advance, but the other party may be prepared to consent to the certificate being effective sooner than the usual 14 day period (see clause 13(b), definition of **relevant day**). Alternatively, the court may order that the certificate is effective despite a copy not being provided 14 days in advance (see clause 14(1)(b)). This allows for flexibility in appropriate circumstances.

Clause 14 – Effect of certificates

Clause 14(1) provides that the section applies where a witness identity protection certificate has been filed and notified in accordance with clause 13 or the court has given leave to file despite the certificate not being served as prescribed under clause 13(2).

Clause 14(2) provides that an operative may give evidence in the proceeding under the assumed name or court name stated in the certificate. An assumed name is a false name which is used by a person participating in undercover law enforcement activity (see clause 12(1)(a)(i)).

In some situations, an operative may be using the same assumed identity in a number of simultaneous operations. One of the investigations may result in a prosecution while the others are ongoing. If the operative discloses in court that he or she is a police officer and is working undercover under a specific assumed identity, the other investigations in which that assumed identity is being used are placed in jeopardy. However, the witness must be identified to the defendant by the name by which the defendant knew that witness (i.e. the assumed identity), in order for the defendant to place the witness. In order to protect an assumed identity which is in use in other operations, the court may make suppression orders preventing disclosure of the assumed identity outside the court (see clause 17(1)).

A ‘court name’ is a name placed on court documents and used for giving evidence in situations where an operative did not use an assumed name (and it is necessary to protect his or her real identity) or did use an assumed name but was not known to the defendant by that assumed name (see dictionary). For example, an undercover operative may have been operating under an assumed identity but have had a supporting role in the investigation, and never have been introduced to the defendant by name. In this case, providing the assumed identity to the defendant will not assist the defendant and will mean that the future use of the assumed identity is prejudiced. Instead, the witness would be known by a court name.

The defendant would be able to place the witness from the evidence given by the witness about his or her activities in the investigation, and by seeing the witness in court.

Clause 14(3) provides that unless permission is granted under clause 18 witnesses (including operatives) must not be asked questions, or be required to answer questions, give evidence or provide information that discloses or may disclose the operative’s identity or address.

Clause 14 (4) provides that a person involved in the proceeding is also prevented from making statements that may disclose this information.

Clause 14(5) provides that subsections (3) and (4) are subject to section 18, which provides for authorised disclosure of an operative’s identity, by court leave or order.

Clause 14(6) broadly defines ‘person involved in the proceeding’ to include the court; a party to the proceeding; a person given leave to be heard or make submission in the proceeding; a lawyer representing parties or assisting the court in the proceeding; any other officer of the court or person assisting the court in the proceeding; and a person acting in the execution of any process or the enforcement of any order in the proceeding.

The effect of the certificate may be that some inquiries that might otherwise be made by the defence about an operative will not be possible. However, much of the information that such inquiries would uncover will already be known from the certificate (e.g. criminal and disciplinary histories). For example, the defendant may wish to challenge the operative’s general reputation for veracity, and may argue that this cannot be done unless the operative’s true name is known and investigations into the operative’s background can be conducted. However, the kind of information which the defendant is likely to uncover in such investigations is the criminal and disciplinary history of the operative. This information would be available on the certificate without the identity of the operative being revealed.

In many jurisdictions in Australia where witness identity protection is available under the common law, the defendant currently will not know a witness’ true identity and is therefore unable to make the ‘usual inquiries’ about that witness.³ While the prosecution has a duty of disclosure which may extend to disclosing matters such as criminal convictions of a witness that may impact on credibility, in most cases where a prosecution witness’ identity is protected, the defence is not likely to have the breadth of information about the witness that the proposed certificate would provide.

If a witness protected by a certificate gave evidence which was later discovered to be false, it would be possible to charge the person with perjury under the name under which he or she gave evidence. In addition, the certificate could be cancelled (see clause 15, below) and the true identity of the witness passed to the court and parties by the law enforcement agency.

Clause 15 – Cancelling certificates

Clause 15 provides that a chief officer must cancel a witness identity protection certificate if the chief officer believes that it is no longer necessary or appropriate to prevent the disclosure of the operative’s identity or address.

If a certificate has already been filed in a court, the chief officer must immediately give written notice to the court (by filing the cancellation notice in court) and each party to the proceeding that the certificate has been cancelled.

³ As discussed in the Outline to this explanatory statement, the court may allow for the non-disclosure of the identity of undercover operatives and police informers under the common law. See for example, *R v Keane* [1994] 1 WLR 746 and *Jarvie v Magistrates’ Court (Vic)* [1995] 1 VR 84. This protection may fall under the doctrine of public interest immunity. In the ACT s130 of the *Evidence Act 1995* (Cth) governs the operation of public interest immunity. Section 130 of the *Evidence Act 1995* (Cth) provides that if the public interest in admitting into evidence information or a document that relates to “matters of state” is outweighed by the public interest in preserving confidentiality, the court may direct that the information or document not be adduced as evidence.

This clause provides a safeguard against the identity protection certificate being used as a shield against investigation or prosecution in the event of any improper conduct. The certificate might be cancelled, for example, where the operative's conduct in giving evidence while protected by a certificate leads to an investigation, such as where it is alleged that the operative gave false evidence during the proceeding.

Clause 16 – Directions to jury

Clause 16 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 operative's evidence more or less weight or draw any adverse inferences against the defendant because of the certificate or as a result of any orders made to protect the witness.

Division 2.3 Protection and disclosure of operative's identity or where operative lives

Clause 17 – Orders to protect operative's identity

Clause 17 provides that a court in which a witness identity protection certificate is filed may make any order necessary to protect the identity or address of the operative.

A person commits an offence if the person is reckless as to whether an order has been made and the person recklessly contravenes the order. The maximum penalty for this offence is imprisonment for 2 years (see clause 17(2)).

This provision does not limit the court's power to punish for contempt (see clause 17(3)).

Clause 18 – Authorised disclosure of operative's identity – court leave or order

Clause 18(2) allows a party to a proceeding where a certificate has been filed to apply to the court:

- for leave to ask a witness a question; or
- for leave to request that a person involved in the proceeding make a statement; or
- for an order requiring a witness to answer a question, give evidence, or provide information

that discloses or may lead to the disclosure of the operative's identity or address.

Clause 18(3) provides for the court to give leave or make an order for a person to do any of the things mentioned in clause 18(2).

Clause 18(4) provides that the court must not give leave or make an order 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 for possible disclosure of their identity or address. It must also be in the interests of justice for the operative's credibility to be tested.

Clause 18(5) provides that the application must be heard in the absence of any jury. This avoids information from the application being heard by the jury in case the application is unsuccessful.

Clause 18 reflects the view that the relevance of the true identity of each witness will vary, depending on the nature of the evidence being given by the witness. For example, an undercover operative may be called to give evidence about her role in an investigation in which she wore a concealed recording device and taped conversations between the defendant and herself, and between the defendant and third parties in her presence. The defendant has seen transcripts of the tapes, and does not dispute that the conversations took place. The defendant may argue that credibility is in issue and the real identity of the operative must be revealed to allow the defendant to fully test her credibility. However, leave should not be granted unless the defence can show the court some reason why credibility is in fact in issue (given that the defence does not dispute that the conversations took place as taped) and that credibility can only be tested if the operative's identity is revealed. Aspects of the operative's credibility, in the 'wide sense' (that is, everything that may affect the reliability of the evidence such as eyesight, memory), could still be tested without revealing her identity. For example, questions about the context surrounding the conversations could be asked and answered without the operative's identity being disclosed.

The clause also recognises that there may be circumstances where a witness' credit in the 'narrow sense' (that is, the trustworthiness of the witness) is in issue, but can be tested without revealing the witness' true identity. For example, an undercover police officer may be giving evidence under an assumed name used in an investigation in which he acted as a buyer, purchasing heroin from the defendant. The defendant may admit that he sold heroin to the undercover operative, but dispute the amount of heroin which was sold. In this case, where the operative and the defendant were the only people present at the transaction, whether the operative's evidence is accepted as credible will affect the outcome, and so credibility is in issue. However, it may not be necessary to reveal the identity of the operative to test credibility. The defendant may wish to pursue questioning about the operative's bias, and motive to lie in order to secure a conviction for the serious offence of trafficking in a commercial quantity of heroin (as opposed to the sale of a smaller amount of heroin, to which the defendant will admit). It may be possible for questioning along this line to proceed without revealing the operative's identity. It is then up to the jury or judge to decide whether the argument about bias is convincing.

Clause 18(6) provides that unless the court decides that the interests of justice require otherwise, the court must also be closed when an application under the section is made. If leave is given by the court or an order made under clause 18(3), the court must also be closed when the question is asked, the evidence is given, the information is provided or the statement is made.

Clause 18(7) provides that the court must make a suppression order in relation to applications, and questions of evidence, information or statements made as a consequence of applications.

Clause 18(8) ensures that clause 18(7) does not prevent a transcript being taken but allows the court to make an order as to how the transcript is to be dealt with.

Clause 18(9) 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.

Clause 18(10) provides that a person commits an offence if he or she is reckless as to whether a suppression or protection order has been made, and the person recklessly contravenes the order. The maximum penalty for this offence is imprisonment for 2 years.

The provisions for granting leave do not require the court to 'balance' the competing public interests in a fair and open trial (which may require disclosure) against the protection of a witness' identity. Rather, under clause 18, these competing interests are taken into account by being considered separately by law enforcement (which would consider the need for protection) and the court (which would consider the necessity for disclosure of identity to ensure a fair trial).

The question of the risk posed by disclosure (to a person or to an investigation) should be a question for the law enforcement or intelligence agency. It is the law enforcement agency that has information about these risks, and that is responsible for the health and safety of operatives and for the conduct of investigations. If the chief officer (or delegate) considers that it is necessary to protect the operative's identity, a certificate should be issued.

The question for the court is what is in the interests of justice – whether a fair trial can be had without disclosing the operative's true identity. The court is in the best position to assess whether credibility is in issue, whether it can only be tested by disclosing the true identity, and whether the issue of credibility needs to be tested for the trial to be fair.

It is not appropriate to call on the court to assess operational law enforcement or intelligence issues such as the possible risks to a person or to an investigation or security activity if an operative's true identity is disclosed. The court cannot be informed of the possible risks without disclosing highly sensitive information about operational matters and ongoing investigations. The court is unlikely to be able to test the information given (for example, about death threats to an operative) as it would not be practicable to call and cross-examine witnesses. It is the role of the law enforcement agency to ensure the security and success of investigations into criminal activity and the safety of operatives.

Clause 18(11) provides that clause 18(10) does not limit the court's power to punish for contempt.

Clause 18(12) provides that for the purposes of clause 18 a *person involved in the proceeding* is defined by clause 14(6).

Clause 19 – Authorised disclosure of operative’s identity – chief officer notice

Clause 19 provides that a 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 operative’s identity or address. 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 recognises that there may be situations where ongoing identity protection is required, yet the operative’s true identity also needs 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.

Clause 20 – Offences – disclosure of operative’s identity

Clause 20 creates two offences that relate to the disclosure of an operative’s identity or address where the operative has been given a witness identity protection certificate.

Clause 20(1) provides that a person commits an offence where a witness identity protection certificate has been given and the person is reckless as to whether the certificate has been given and the person recklessly discloses or does something likely to lead to the disclosure of the operative’s identity or address. The person must also be reckless as to whether the certificate has been cancelled and whether the disclosure is authorised or permitted. The maximum penalty for this offence is imprisonment for 2 years.

Clause 20(3) provides that a person is guilty of an offence if the person commits an offence against clause 20(1) and the person is reckless as to whether their conduct will endanger the health or safety of any person or prejudice the conduct of an investigation. The maximum penalty for this offence is imprisonment for 10 years.

The fault element in relation to whether a witness identity protection certificate has been given is ‘recklessness’. This means that both offences created by this clause require the person to be aware of the risk that a certificate may have been given. This confines the application of the offences to people who would have some understanding of the nature of the operative’s work or be otherwise aware of the risk that a certificate may have been given.

Part 3 — Miscellaneous

Clause 21 – Annual report

Clause 21 provides that annual reports 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. These reports are to be provided to the Minister and presented to the Legislative Assembly within 15 sitting days after receiving the report.

This external reporting mechanism will provide a check against the arbitrary issuing of certificates. This aims to ensure that certificates are issued only in appropriate circumstances, namely, to protect the safety of people or the integrity of investigations.

Clause 22 – Mutual recognition of certificates under corresponding laws

Clause 22 provides that a witness identity protection certificate issued under a corresponding law is recognised as if it was issued under clause 11 of the Act. For example, the offences relating to disclosure of the operative's identity (clause 20) will apply whether the certificate was issued in the ACT or in another jurisdiction in which these model provisions apply.

The model provisions developed in the JWG Report are intended to provide a consistent framework for the protection of the identities of undercover operatives across Australia. This is so that undercover operatives, and the law enforcement agencies for which they work, can be sure that, if necessary, protection will be available in all participating jurisdictions in which the operative works.

Under clause 22 a witness identity protection certificate issued in a different jurisdiction will be recognised and will have effect in all other participating jurisdictions, without the need for any further steps to be taken.

Clause 23 – Delegation

Clause 23 provides that a chief officer of a law enforcement agency may delegate any of their functions under the Act to a senior officer of the law enforcement agency. The clause provides that senior officer means a deputy chief police officer (in relation to the Australian Federal Police); the Director National Operations or a position of the Australian Crime Commission prescribed by regulation (in relation to the Australian Crime Commission). There is an operational necessity for delegation of this authority. However, given the very serious nature of the certificate and its impact on court proceedings, the delegation is limited to the highest levels of a law enforcement agency.

Clause 24 – Regulation-making power

Clause 24 authorises 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 intended that the assessment of whether laws correspond would be made in deliberations between the ACT and other jurisdictions.