

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

### Overview of Bill

The main object of this Bill is to repeal and re-enact the Law Enforcement and National Security (Assumed Identities) Act 1998 (the 1998 Act) to provide a legislative scheme for acquiring and issuing false identity documents for use in cross-border criminal investigations and in the exercise of functions in implementing witness protection programs. The Bill substantially adopts the provisions of a model law for such a scheme (the model law). The model law formed part of the Cross-Border Investigative Powers for Law Enforcement Report published in 2003 by the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers.

Much of the 1998 Act (which provides for the acquisition and use of assumed identities by law enforcement officers of certain State and Federal agencies having law enforcement and national security functions) is restated in the Bill in the terms of the model law. The main matters in respect of which this Bill makes new provision are as follows:

(a) the procedure for applying for an authority to acquire and use an assumed identity (an authority),

(b) the grounds for authorising the acquisition and use of an assumed identity,

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(c) the contents of an authority,

(d) the authorising of persons who are not law enforcement officers to acquire or use an assumed identity,

(e) the mutual recognition of corresponding authorities and laws so that an authority issued in one jurisdiction will be recognised and have effect in all other jurisdictions that have enacted legislation based on the model law,

(f) sanctions for misusing an assumed identity or disclosing information about an assumed identity in certain aggravating circumstances,

(g) the effect of a person the subject of an authority being unaware of its variation or cancellation.

In adopting the model law, this Bill changes certain requirements in the 1998 Act (including by providing for civil indemnity, rather than exclusion from civil liability, for persons using assumed identities and persons issuing false identity documents, and increasing the number of delegations of the functions under the Act of a chief officer of a law enforcement agency that may be in force at any one time in respect of the agency).

This Bill also re-enacts certain provisions of the 1998 Act that are not provided for in the model law (including provisions relating to eligible Judges and provisions imposing restrictions on the disclosure in legal proceedings of the identity of officers (extended to civilians, in the Bill) in respect of whom an authority is in force) and makes consequential amendments to the Criminal Procedure Act 1986 and other legislation.

### Outline of provisions

#### Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 3 provides for the objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act. In particular, a law enforcement agency (referred to as an authorised agency in the 1998 Act) means the following agencies:

- (a) the NSW Police Force,
- (b) the Independent Commission Against Corruption,
- (c) the New South Wales Crime Commission,
- (d) the Police Integrity Commission,
- (e) Corrective Services NSW,
- (f) the Australian Crime Commission,

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(g) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the proposed Act:

- (i) the Australian Federal Police,
- (ii) the Australian Security Intelligence Organisation,
- (iii) the Australian Secret Intelligence Service,
- (iv) Customs (within the meaning of the Customs Administration Act 1985 of the Commonwealth),
- (v) the Australian Taxation Office.

Part 2 Authority for assumed identity

Clause 5 sets out the procedure for applying for an authority. The procedure allows a law enforcement officer of a law enforcement agency to apply to the chief officer of the agency for an authority for the law enforcement officer or any other person (a civilian). The application must be in writing and contain various specified details in support of the application and any additional information the chief officer may require. A separate application must be made in respect of each assumed identity to be acquired or used.

Clause 6 sets out the procedure for determining an application for an authority. After considering the application and any additional information, a chief officer to whom an application is made may either grant the authority (with or without conditions) or refuse the application. However, the chief officer may only grant the application if satisfied on reasonable grounds that certain specified circumstances exist. A separate authority is required for each assumed identity.

Clause 6 also provides for supervisory arrangements that a law enforcement agency must comply with if an authority is granted for a civilian.

Clause 7 requires an authority to be in writing and sets out the particulars that it must contain.

Clause 8 provides for the duration of an authority (being until cancellation if the authority is for a law enforcement officer and, if the authority is for a civilian, until the end of the period (of no longer than 3 months) specified in the authority, unless sooner cancelled).

Clause 9 allows a chief officer who grants an authority, to vary or cancel it at any time. However, the chief officer must cancel an authority if satisfied that it is no longer necessary. Clause 9 also provides for notification of a cancellation or variation of an authority and for when the variation or cancellation takes effect.

Clause 10 requires a chief officer to conduct a minimum 12-monthly review of each authority granted by the chief officer that authorises the use of an assumed identity in a participating jurisdiction. The chief officer must cancel the authority if satisfied on a review that the assumed identity is no longer necessary.

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Clause 11 sets out the procedure for making an entry in the Births, Deaths and Marriages Register in relation to an assumed identity. A chief officer of a law enforcement agency of this jurisdiction, or under a corresponding law, may apply to an eligible Judge (under clause 12) to order the Registrar to make such an entry. An

eligible Judge may make such an order only on being satisfied that it is justified having regard to the nature of the activities undertaken or to be undertaken by a law enforcement officer or civilian under an authority. The application for the order must be heard in a closed court.

Clause 11 also provides for the period within which the Registrar must give effect to the order.

Clause 12 provides for the declaration of Supreme Court Judges as eligible Judges for the purposes of clauses 11 and 14.

Clause 13 requires a chief officer who cancels an authority for an assumed identity in relation to which an entry has been made in the Births, Deaths and Marriages Register or a corresponding register in a participating jurisdiction to apply for an order to cancel the entry within 28 days.

Clause 14 allows an eligible Judge to order the Registrar to cancel an entry that has been made in the Births, Deaths and Marriages Register under clause 11 on application by the chief officer who applied for the order to make the entry. The Registrar must give effect to the order within 28 days. The application for the order must be heard in a closed court.

#### Part 3 Evidence of assumed identity

Clause 15 allows a chief officer who grants an authority, to request the chief officer of an issuing agency (being a government or non-government agency that issues evidence of identity) specified in the authority to produce evidence of an assumed identity and give that evidence to the law enforcement officer or civilian in respect of whom the authority applies.

Clause 16 requires the chief officer of a government issuing agency to issue evidence of an assumed identity if requested to do so under clause 15 by the chief officer granting the authority for the assumed identity.

Clause 17 gives the chief officer of a non-government issuing agency a discretion to issue evidence of an assumed identity if requested to do so under clause 15 by the chief officer granting the authority for the assumed identity.

Clause 18 requires the chief officer of an issuing agency to cancel evidence of an assumed identity if directed to do so in writing by the chief officer granting the authority for the assumed identity.

Clause 19 makes lawful things done by the chief officer or other officer of an issuing agency in good faith to comply with a request for evidence of an assumed identity under clause 15 or a direction to cancel evidence of an assumed identity under clause 18.

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Clause 20 requires a law enforcement agency, the chief officer of which makes a request to an issuing agency under clause 15 or gives a direction to an issuing agency under clause 18, to indemnify the issuing agency and its officers for any civil liability they incur in complying with the request or direction in the course of duty.

#### Part 4 Effect of authority

Clause 21 allows an authorised officer or an authorised civilian (being a law enforcement officer or civilian in respect of whom an authority applies) to acquire and use an assumed identity if the acquisition or use is in accordance with the authority. The acquisition or use must also be in the course of duty (in the case of an authorised officer) or (in the case of an authorised civilian) in accordance with any direction by the person's supervisor.

Clause 22 makes lawful anything done by an authorised officer or authorised civilian in the course of acquiring or using an assumed identity if doing the thing would not be unlawful if the assumed identity were the person's real identity and if it is done in accordance with the authority and in the course of duty (in the case of an

authorised officer) or (in the case of an authorised civilian) in accordance with any direction of the person's supervisor.

Clause 23 requires a law enforcement agency, the chief officer of which grants an authority to a law enforcement officer or civilian, to indemnify the authorised officer or authorised civilian for any civil liability he or she incurs because of something he or she has done in accordance with the authority and (in the case of an authorised officer) in the course of duty or (in the case of an authorised civilian) in accordance with any direction of the person's supervisor.

Clause 24 makes it clear that an authorised person (being an authorised officer or an authorised civilian) will not be protected from liability under clause 22 or indemnified under clause 23 for anything the person does that requires a particular qualification, if the person does not in fact have that qualification (regardless of whether the person has acquired documentation that establishes that he or she has that qualification).

Clause 25 allows a person whose authority is cancelled or varied to continue to be protected from liability, or indemnified, under Part 4 of the proposed Act so long as the person is unaware of the variation or cancellation and not reckless about its existence.

Clause 26 restates the power (provided for in the 1998 Act in relation to authorised officers) of a chief officer who grants an authority under the proposed Act, to make any false or misleading representation about the authorised person to whom it relates, in connection with the acquisition or use of the assumed identity by that person.

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Part 5 Mutual recognition under corresponding laws

Clause 27 allows a chief officer who grants an authority, to request an issuing agency in a participating jurisdiction (being a jurisdiction in which a law corresponding to the proposed Act (a corresponding law) is in force) to issue evidence of the assumed identity the subject of the authority.

Clause 28 requires a chief officer of a government issuing agency who receives a request from a participating jurisdiction for evidence of an assumed identity, to issue that evidence but gives a chief officer of a non-government issuing agency a discretion to comply with such a request.

Clause 29 requires a chief officer of an issuing agency who has issued evidence of an assumed identity on request from a participating jurisdiction to cancel it if directed to do so by the chief officer who granted the authority for the assumed identity.

Clause 30 requires a law enforcement agency, the chief officer of which makes a request to an issuing agency in a participating jurisdiction under clause 27, to indemnify the issuing agency and its officers for any civil liability they incur in complying with the request in the course of duty.

Clause 31 allows an authority granted by a law enforcement agency in a participating jurisdiction to be recognised in this jurisdiction for the purposes of applying specified provisions of the proposed Act to things done in this jurisdiction in relation to the authority.

Part 6 Compliance and monitoring

Division 1 Misuse of assumed identity and information

Clause 32 makes it an offence for an authorised officer or authorised civilian to misuse an assumed identity. The maximum penalty for the offence is 2 years imprisonment.

Clause 33 makes it an offence for a person to disclose information (except in certain specified circumstances) that reveals, or is likely to reveal, that an assumed identity is not a person's real identity. A maximum penalty of 10 years imprisonment applies where the disclosure endangers or will endanger the health or safety of a person or

prejudices or will prejudice the effective conduct of an operation or implementation of a witness protection program, or if the person making the disclosure intends that outcome. A maximum penalty of 5 years imprisonment applies to other disclosures.  
Division 2 Disclosure of identity in legal proceedings

Clause 34 imposes restrictions (provided for in the 1998 Act in relation to authorised officers) on the disclosure in legal proceedings of the identity of a person in respect of whom an authority is or was in force. The maximum penalty for contravening an order in force under the clause with respect to the suppression of evidence given in such proceedings is 50 penalty units (currently \$5,500) or 12 months imprisonment, or both.

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Division 3 Reporting and record-keeping

Clause 35 requires a chief officer of a law enforcement agency to submit a report to the Minister that includes certain specified information relating to authorities, assumed identities and the administration of the proposed Act. The report (excluding specified types of sensitive information) must be laid before each House of Parliament within 15 sitting days after the Minister receives it.

Clause 36 provides for the keeping of records by a chief officer of a law enforcement agency in relation to authorities, assumed identities and the operation of the proposed Act in respect of the agency concerned.

Clause 37 requires a minimum 6-monthly audit of the records relating to an authority issued by a law enforcement agency that authorises the use of an assumed identity in a participating jurisdiction and a minimum 12-monthly audit of the records relating to each other authority issued by the agency. The clause also limits the persons who may conduct an audit.

Part 7 General

Clause 38 provides that the proposed Act binds the Crown.

Clause 39 is a power of delegation allowing a chief officer of a law enforcement agency to delegate any of the chief officer's functions under the proposed Act (except the power of delegation). The clause limits to 4 the number of delegations that may be in force at any one time in respect of any one law enforcement agency. The clause also imposes limits on the officers to whom functions can be delegated.

Clause 40 makes it clear that the proposed Act does not limit or otherwise affect the Law Enforcement (Controlled Operations) Act 1997 or the Witness Protection Act 1995.

Clause 41 provides for the taking of proceedings for offences under the proposed Act.

Clause 42 is a general regulation-making power.

Clause 43 provides for the Minister to review the operation of the proposed Act as soon as possible after the period of 12 months from its commencement.

Clause 44 repeals the Law Enforcement and National Security (Assumed Identities) Act 1998 and the Law Enforcement and National Security (Assumed Identities) Regulation 2004.

Schedule 1 Savings and transitional provisions

Schedule 1 contains provisions of a savings and transitional nature consequent on the enactment of the proposed Act.

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Schedule 2 Consequential amendment of other legislation

Schedule 2 makes consequential amendments to the Criminal Procedure Act 1986

and other legislation.