



New South Wales

Law Enforcement (Controlled Operations) Amendment Bill 1999

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Law Enforcement (Controlled Operations) Act 1997* to provide for the following:

- (a) to enable the Australian Federal Police, the National Crime Authority and the Australian Customs Service to be prescribed as law enforcement agencies,
- (b) to include officers or employees of the Australian Federal Police, the National Crime Authority, the Australian Customs Service and a police force of another State, a territory or another country as law enforcement officers for the purposes of the Principal Act,
- (c) to enable an application for, and the granting of, an authority or a variation of authority to be made by telephone or other means,
- (d) to enable a chief executive officer of an agency to delegate his or her functions under the Principal Act to certain other officers within the relevant agency,

- (e) to make it clear that the Principal Act does not affect certain discretions, including administrative and judicial discretions,
- (f) to provide for a further review of the Principal Act as soon as possible after 1 March 2001,
- (g) to make other miscellaneous amendments to the Principal Act.

Outline of provisions

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 a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Law Enforcement (Controlled Operations) Act 1997* set out in Schedule 1.

Schedule 1 Amendments

Law enforcement agencies and law enforcement officers

Schedule 1 [4] amends the definitions of *law enforcement agency* and *law enforcement officer* in section 3 of the Principal Act to provide for the matters referred to in paragraphs (a) and (b) of the overview above. Schedule 1 [2] makes a consequential amendment to the definition of *chief executive officer* in section 3.

Urgent applications and grants

Schedule 1 [6], [7], [9] and [10] amend sections 5, 8 and 10 of the Principal Act to provide for the matters referred to in paragraph (c) of the overview above.

Section 5 of the Principal Act currently provides that an application for an authority in relation to a proposed controlled operation is to be made in writing or by facsimile transmission of a written application (to be known as a *formal application*).

Schedule 1 [6] amends section 5 to enable an application for an authority to be made by any other available means, including in person or by telephone or 2-way radio (known as an *urgent application*). Schedule 1 [9] makes similar amendments to section 10 in relation to an application for a variation of an authority. Schedule 1 [6] and [9] also amend sections 5 and 10 to enable the regulations to provide for

various matters, including the circumstances in which an urgent application may be made and the form that a formal application for an authority or a variation of an authority may take.

Sections 8 and 10 of the Principal Act currently provide that an authority, or a variation of authority, is to be granted in writing (to be known as a *formal authority* and a *formal variation of authority*). Schedule 1 [7] and [10] amend sections 8 and 10 to provide that an authority or a variation of an authority may also be granted by any other available means, including in person or by telephone or 2-way radio (known as an *urgent authority* and an *urgent variation of authority*). Such authorities cease to have effect 72 hours after being granted, unless it sooner ceases to have effect. Schedule 1 [8] makes a consequential amendment to section 9. Schedule 1 [7] and [10] also amend sections 8 and 10 to enable the regulations to provide for various matters, including the procedure for the granting of an urgent authority or urgent variation of authority and the form that a formal authority or formal variation of authority may take.

Schedule 1 [19] amends section 23 of the Principal Act to require the Ombudsman to include details of the numbers of urgent authorities and variation of authorities granted, as well as applications for authorities and variation of authorities that have been refused by the chief executive officer of the relevant agency, in the annual report of the Ombudsman.

Delegations

Schedule 1 [23] amends the Principal Act in the manner referred to in paragraph (d) of the overview above. In particular, Schedule 1 [23] substitutes section 29 of the Principal Act so that the Commissioner of Police may delegate any of the Commissioner's functions under the Act, other than the power of delegation, to no more than 5 persons. Such a person must be of or above the position of Superintendent. The proposed amendment also provides that in the case of the chief executive officer of any other law enforcement agency, the chief executive officer may delegate such functions to no more than one person.

Act not to affect certain matters

Schedule 1 [5] amends the Principal Act in the manner referred to in paragraph (e) of the overview above by inserting proposed section 3A in the Principal Act. Proposed section 3A provides that the Principal Act does not affect, and is never taken to have affected, the existence or exercise of certain discretions, including judicial and administrative discretions, in relation to legal proceedings.

Further review

Schedule 1 [24] amends section 32 of the Act in the manner described in paragraph (f) of the overview above.

Miscellaneous amendments

Schedule 1 [3] amends the definition of *controlled operation* in section 3 of the Principal Act to include activities that are reasonably necessary to facilitate the achievement of any existing purpose of a controlled operation.

Schedule 1 [9] amends section 10 of the Principal Act to enable any law enforcement officer, on behalf of the principal law enforcement officer for an authorised operation, to make an application for a variation of an authority. That amendment, together with the amendment to section 8 by Schedule 1 [7], also extends, from 3 months to 6 months, the maximum period for which an authority, and any subsequent variations, may be in place.

Schedule 1 [11] omits section 11 which enables an authority to be renewed. Schedule 1 [1], [14], [15], [17], [18] and [21] make consequential amendments.

Schedule 1 [12] inserts proposed section 13A in the Principal Act to provide that an authority or a variation of authority is not invalidated by any procedural defect unless it is a defect that affects the substance of the authority or variation in a material particular.

Schedule 1 [13] amends section 15 of the Principal Act by extending, from 28 days to 2 months, the period in which a final report regarding a controlled operation is to be submitted to the chief executive officer.

Schedule 1 [20] amends section 23 of the Principal Act to make it clear that the Ombudsman is not required to include in his or her annual report details of an authorised operation that was not completed as at 30 June in the year to which the report relates. Schedule 1 [16] makes a consequential amendment in relation to the inspection of records by the Ombudsman.

Schedule 1 [22] amends section 27 of the Principal Act to provide that an evidentiary certificate is conclusive evidence that a chief executive officer was satisfied as to the matters specified in the certificate.

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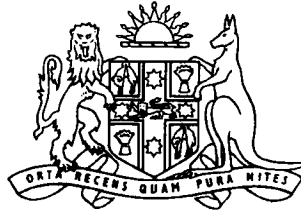


New South Wales

Law Enforcement (Controlled Operations) Amendment Bill 1999

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New South Wales

Law Enforcement (Controlled Operations) Amendment Bill 1999

No. , 1999

A Bill for

An Act to amend the *Law Enforcement (Controlled Operations) Act 1997* to enable urgent applications to be made and urgent authorities to be granted with respect to controlled operations; to extend the range of persons who may be involved in controlled operations; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Law Enforcement (Controlled Operations) Amendment Act 1999</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6 7
3 Amendment of Law Enforcement (Controlled Operations) Act 1997 No 136	8 9
The <i>Law Enforcement (Controlled Operations) Act 1997</i> is amended as set out in Schedule 1.	10 11

Schedule 1 Amendments

1

(Section 3)

2

[1] Section 3 Definitions

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Omit “or renewal” from the definition of *authority*.

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[2] Section 3, definition of “chief executive officer”

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Insert at the end of paragraph (d) of the definition:

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and

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- (e) in relation to a law enforcement agency prescribed by the regulations, the chief executive officer (however described) of that agency,

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[3] Section 3, definition of “controlled operation”

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Insert at the end of paragraph (c) of the definition:

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or

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- (d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c),

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[4] Section 3, definitions of “law enforcement agency” and “law enforcement officer”

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Omit the definitions. Insert instead:

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law enforcement agency means each of the following:

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- (a) the Police Service,
(b) the Independent Commission Against Corruption,
(c) the New South Wales Crime Commission,
(d) the Police Integrity Commission,
(e) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the purposes of this Act:
(i) the Australian Federal Police,

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- (ii) the National Crime Authority, 1
- (iii) the Australian Customs Service. 2

law enforcement officer means: 3

- (a) an officer or employee of a law enforcement agency or 4
a person who is seconded to such an agency, including 5
(but not limited to) a police officer, or 6
- (b) a member of a police force or police service (however 7
described) of another State, a Territory or another 8
country. 9

[5] Section 3A 10

Insert after section 3: 11

3A Act not to affect certain matters 12

- (1) This Act does not affect, and is taken never to have affected, 13
the existence or exercise of any discretions (including any 14
administrative or judicial discretions) that, apart from this Act, 15
may lawfully be exercised in relation to the commencement, 16
conduct or conclusion of legal proceedings. 17
- (2) Without limiting subsection (1), the discretions referred to in 18
that subsection include the following: 19
 - (a) any discretion as to whether or not legal proceedings 20
should be commenced or terminated, 21
 - (b) any discretion as to whether or not evidence should be 22
admitted in legal proceedings, 23
 - (c) any discretion as to how a person found guilty in 24
respect of a charge should be dealt with. 25
- (3) This section applies to all activities, whether or not they are 26
engaged in for the purposes of, or in the course of, an 27
authorised operation. 28
- (4) In this section, *legal proceedings* includes disciplinary 29
proceedings. 30

[6] Section 5 Applications for authorities	1
Omit section 5 (2), (2A) and (2B). Insert instead:	2
(2) An application for an authority may be made:	3
(a) by means of a written document, signed by the applicant, or by means of a facsimile transmission of a document so signed (a <i>formal application</i>), or	4 5 6
(b) by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an <i>urgent application</i>).	7 8 9
(2A) In any application, whether formal or urgent, the applicant must provide the following particulars:	10 11
(a) a plan of the proposed operation,	12
(b) the nature of the criminal activity or corrupt conduct in respect of which the proposed operation is to be conducted,	13 14 15
(c) the nature of the controlled activity in respect of which an authority is sought,	16 17
(d) a statement of whether or not the proposed operation, or any other controlled operation with respect to the same criminal activity or corrupt conduct, has been the subject of an earlier application for an authority or variation of an authority and, if so, whether or not the authority was given or variation granted.	18 19 20 21 22 23
(2B) The regulations may make provision for or with respect to the following matters:	24 25
(a) the circumstances in which an urgent application may be made,	26 27
(b) the procedure for making an urgent application,	28
(c) the extent to which a chief executive officer is to be satisfied as to the validity of the circumstances in which an urgent application is made,	29 30 31
(d) the keeping of records in relation to an urgent application,	32 33
(e) the form in which a formal application may be made.	34

[7] Section 8	1
Omit the section. Insert instead:	2
8 Form of authority	3
(1) An authority to conduct a controlled operation may be granted:	4
(a) by means of a written document, signed by the chief executive officer, or by means of a facsimile transmission of a document so signed (a <i>formal authority</i>), or	5 6 7 8
(b) by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an <i>urgent authority</i>).	9 10 11
(2) An authority, whether formal or urgent:	12
(a) must identify the operation by reference to the plan referred to in section 5 (2A) (a), and	13 14
(b) must identify the law enforcement officer who is to conduct the operation, and	15 16
(c) must identify each person who may engage in controlled activities for the purposes of the operation, and	17 18
(d) must state whether or not any such person may operate under an assumed name, and	19 20
(e) must identify:	21
(i) with respect to the law enforcement participants, the nature of the controlled activities that those participants may engage in, and	22 23 24
(ii) with respect to the civilian participants, the particular controlled activities (if any) that each such participant may engage in, and	25 26 27
(f) in respect of an urgent authority, must specify the period (not exceeding 72 hours) for which the authority is to remain in force, and	28 29 30
(g) in respect of a formal authority, must specify the period (not exceeding 6 months) for which the authority is to remain in force, and	31 32 33
(h) must specify any conditions to which the conduct of the operation is subject under section 6 (1) (a).	34 35

<p>(3) A person is sufficiently identified for the purposes of subsection (2) (b) or (c) if the person is identified:</p> <p style="padding-left: 2em;">(a) by an assumed name under which the person is operating, or</p> <p style="padding-left: 2em;">(b) by a code name or code number,</p> <p style="padding-left: 2em;">so long as the assumed name, code name or code number can be matched to the person’s identity by reference to documentation kept by the chief executive officer.</p> <p>(4) Unless it sooner ceases to have effect, an urgent authority ceases to have effect 72 hours after it is granted.</p> <p>(5) A chief executive officer who grants an urgent authority must ensure that written notes are kept of the following matters:</p> <p style="padding-left: 2em;">(a) the date and time when the authority was granted,</p> <p style="padding-left: 2em;">(b) the identity of the law enforcement officer to whom the authority was granted,</p> <p style="padding-left: 2em;">(c) the particulars referred to in subsection (2).</p> <p>(6) The regulations may make provision for or with respect to the following matters:</p> <p style="padding-left: 2em;">(a) the procedure for granting an urgent authority,</p> <p style="padding-left: 2em;">(b) the keeping of records in relation to an urgent authority,</p> <p style="padding-left: 2em;">(c) the form in which a formal authority may be granted.</p> <p>[8] Section 9 Duration of authorities</p> <p>Omit “section 8 (1) (g)”. Insert instead “section 8 (2) (f) or (g)”.</p> <p>[9] Section 10 Variation of authority</p> <p>Omit section 10 (1). Insert instead:</p> <p style="padding-left: 2em;">(1) The principal law enforcement officer for an authorised operation, or any other law enforcement officer on behalf of the principal law enforcement officer, may apply to the chief executive officer for a variation of an authority for any one or more of the following purposes:</p> <p style="padding-left: 4em;">(a) to extend the period for which the authority has effect,</p> <p style="padding-left: 4em;">(b) to provide for an alternative principal law enforcement officer for the operation,</p>	<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p> <p>29</p> <p>30</p> <p>31</p> <p>32</p> <p>33</p>
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(c)	to authorise additional or alternative persons to engage in controlled activities for the purposes of the operation,	1 2
(d)	to authorise participants in the operation to engage in additional or alternative controlled activities.	3 4
(1A)	More than one application for a variation may be made in respect of the same authority, but no single variation may extend an authority for more than 6 months at a time.	5 6 7
(1B)	An application for a variation of an authority may be made:	8
(a)	by means of a written document, signed by the applicant, or by means of a facsimile transmission of a document so signed (a <i>formal application</i>), or	9 10 11
(b)	by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an <i>urgent application</i>).	12 13 14
(1C)	The regulations may make provision for or with respect to the following matters:	15 16
(a)	the circumstances in which an urgent application may be made,	17 18
(b)	the procedure for making an urgent application,	19
(c)	the extent to which a chief executive officer is to be satisfied as to the validity of the circumstances in which an urgent application is made,	20 21 22
(d)	the keeping of records in relation to an urgent application,	23 24
(e)	the form in which a formal application may be made.	25
[10]	Section 10 (6) and (7)	26
	Omit the subsections. Insert instead:	27
(6)	A variation of authority may be granted:	28
(a)	by means of a written document, signed by the chief executive officer, or by means of a facsimile transmission of a document so signed (a <i>formal variation of authority</i>), or	29 30 31 32
(b)	by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an <i>urgent variation of authority</i>).	33 34 35

(7) Unless it sooner ceases to have effect, an urgent variation of authority ceases to have effect 72 hours after it is granted.	1 2
(8) A chief executive officer who grants an urgent variation of authority is to ensure that written notes are kept of the following matters:	3 4 5
(a) the date and time when the variation of authority was granted,	6 7
(b) the identity of the law enforcement officer to whom the variation of authority was granted,	8 9
(c) the terms of the variation.	10
(9) The regulations may make provision for or with respect to the following matters:	11 12
(a) the procedure for granting an urgent variation of authority,	13 14
(b) the keeping of records in relation to an urgent variation of authority,	15 16
(c) the form in which a formal variation of authority may be granted.	17 18
[11] Section 11	19
Omit the section.	20
[12] Section 13A	21
Insert after section 13:	22
13A Defect in authority	23
An application for an authority or variation of authority, and any authority or variation of authority granted on the basis of such an application, is not invalidated by any procedural defect, other than a defect that affects the substance of the application, authority or variation in a material particular.	24 25 26 27 28
[13] Section 15 Reports on controlled operations	29
Omit “28 days” from section 15 (1). Insert instead “ 2 months”.	30

[14] Section 21 Ombudsman to be notified of certain matters	1
Omit section 21 (1) (a). Insert instead:	2
(a) granting an authority or variation of authority, or	3
[15] Section 21 (2)	4
Omit “, renewal”.	5
[16] Section 22 Inspection of records by Ombudsman	6
Insert after section 22 (3):	7
(4) Nothing in this section requires the Ombudsman to inspect records in relation to an authorised operation that has not been completed.	8 9 10
[17] Section 23 Annual reports by Ombudsman	11
Omit “authorities that have been granted, varied or renewed” from section 23 (2) (a).	12 13
Insert instead “formal authorities that have been granted or varied”.	14
[18] Section 23 (2) (a)	15
Omit “applications for the granting, variation or renewal”.	16
Insert instead “formal applications for the granting or variation”.	17
[19] Section 23 (2) (a1)	18
Insert after section 23 (2) (a):	19
(a1) the number of urgent authorities or urgent variations of authorities that have been granted by the chief executive officer of that agency, and the number of urgent applications for authorities or urgent variations of authorities that have been refused by the chief executive officer of that agency, during the period to which the report relates,	20 21 22 23 24 25 26

[20] Section 23 (3)	1
Insert after section 23 (2):	2
(3) Nothing in this section requires particulars of an authorised operation to be included in a report for a year if the operation had not been completed as at 30 June in that year, but the particulars must instead be included in the report for the year in which the operation is completed.	3 4 5 6 7
[21] Section 27 Evidentiary certificates	8
Omit “, varying or renewing” from section 27 (b).	9
Insert instead “or varying”.	10
[22] Section 27	11
Insert “conclusive” before “evidence”.	12
[23] Section 29	13
Omit the section. Insert instead:	14
29 Delegations	15
(1) Except as provided by this section (and despite any other Act or law to the contrary):	16 17
(a) the functions of a chief executive officer under this Act may not be delegated to any other person, and	18 19
(b) the functions of the Ombudsman under this Act with respect to the inspection of documentation referred to in section 8 (3) may not be delegated to any other person.	20 21 22
(2) A chief executive officer may delegate any of the chief executive officer’s functions under this Act (except this power of delegation) to a person for the time being holding or acting in a position prescribed by the regulations as a position to which functions under this Act may be delegated.	23 24 25 26 27
(3) A position cannot be prescribed as a position to which functions under this Act may be delegated unless it is a position within the body or agency concerned.	28 29 30

(4) In the case of the Police Service, no more than 5 delegations may be in force under this section at any one time, and no more than 5 positions may be prescribed at any one time as positions to which functions under this Act may be delegated. The positions prescribed can only be positions that are of or above the rank of Superintendent.	1 2 3 4 5 6
(5) In the case of any other law enforcement agency, no more than one delegation may be in force under this section at any one time, and no more than one position may be prescribed at any one time as a position to which functions under this Act may be delegated.	7 8 9 10 11
(6) The functions of the Ombudsman under this Act with respect to the inspection of documentation referred to in section 8 (3) may be delegated to an Assistant Ombudsman.	12 13 14
[24] Section 32 Review of Act	15
Insert at the end of the section:	16
(4) A further review is to be undertaken as soon as possible after 1 March 2001.	17 18
(5) A report on the outcome of the review undertaken in accordance with subsection (4) is to be tabled in each House of Parliament by 1 June 2001.	19 20 21