

Law Enforcement (Controlled Operations) Amendment Bill 2006

Explanatory note

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

Overview of Bill

The principal object of this Bill is to provide, within the *Law Enforcement (Controlled Operations) Act 1997* (**the Principal Act**), a legislative scheme under which law enforcement agencies may carry out cross-border investigations in relation to criminal activities. The Bill substantially adopts the provisions of a model law for such a scheme.

This Bill also makes miscellaneous amendments to the Principal Act, including amendments that:

- (a) replace the provision of the Principal Act that provides for the granting of retrospective authority for unlawful activities, and
- (b) expand the number of police officers to whom the chief executive officer of NSW Police (that is, the Commissioner of Police) may delegate his or her functions under the Principal Act, and
- (c) provide for a further review of the Principal Act to be undertaken as soon as possible after the period of 5 years from the date of assent to the proposed Act and for a report on the outcome of the review to be tabled in each House of Parliament, and
- (d) are consequential on, or ancillary to, the amendments referred to above.

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 that gives effect to the amendments to the *Law Enforcement (Controlled Operations) Act 1997* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendment to the *Law Enforcement (Controlled Operations) Regulation 1998* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendment to the *Criminal Procedure Act 1986* set out in Schedule 3.

Clause 6 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Law Enforcement (Controlled Operations) Act 1997

Schedule 1 [1] inserts new definitions in section 3 (Definitions) of the Principal Act in consequence of the other amendments proposed to be made to the Principal Act. The definitions are of the terms **controlled conduct**, **corresponding authorised operation**, **corresponding authority**, **corresponding participant**, **cross-border controlled operation**, **participating jurisdiction**, **sexual offence** and **this jurisdiction**.

Schedule 1 [2] amends the definition of **principal law enforcement officer** in section 3 of the Principal Act so as to provide that that officer is to have responsibility for, as well as to conduct, the relevant **controlled operation** (within the meaning of the Principal Act)—that is, an operation involving an activity that would be illegal were it not authorised under the Principal Act (or, in the case of proposed cross-border controlled operations, involving an activity that is illegal but in respect of which protection from criminal liability is conferred on the participants in the operation).

Schedule 1 [3] inserts proposed section 3 (2) and (3) in the Principal Act. Proposed section 3 (2) sets out, for the purposes of the Principal Act, the circumstances in which a cross-border controlled operation is taken to be conducted in New South Wales. Proposed section 3 (3) makes it clear that notes included in the Principal Act do not form part of the Principal Act.

Schedule 1 [4] inserts proposed section 3A (3A) in the Principal Act. Proposed section 3A (3A) provides that the fact that particular evidence was obtained as the result of a person engaging in criminal activity is to be disregarded in determining whether to admit or exclude the evidence in any proceedings if the person concerned was a participant acting in the course of an authorised operation or corresponding authorised operation that authorised the activity. (This provision is required because, while the Principal Act currently provides that such authorised activity does not constitute an offence, the provisions relating to cross-border controlled operations in proposed Part 3A do not. They provide, instead, that the person concerned is not criminally responsible for the offence: see proposed sections 20K and 20L.)

Schedule 1 [5] inserts a note after the heading to Part 2 (Authorisation of controlled operations) of the Principal Act to draw attention to the fact that Part 3A of the Principal Act (which is proposed to be inserted by Schedule 1 [9]) contains additional provisions relating to cross-border controlled operations.

Schedule 1 [6] repeals a provision requiring the person authorising a controlled operation to keep a written record of the reasons why the person is satisfied as to the matters about which the Principal Act requires the person to be satisfied before he or she may grant the authority.

Schedule 1 [7] inserts a new paragraph in section 7 (Certain matters not to be authorised) so as to provide that an authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation engaging in conduct that involves the commission of a sexual offence against any person.

Schedule 1 [8] repeals and re-enacts section 14 of the Principal Act, which is concerned with the granting of retrospective authority for unlawful activities undertaken in the course of a controlled operation and not authorised by the authority for that operation. At present, for authorisation to be granted, the unlawful activity must have been undertaken for the purpose of protecting any person (including the person who undertook the activity) from death or serious injury.

The section as it is proposed to be re-enacted dispenses with that requirement and provides, instead, that the authorisation may be granted if the person who undertook the activity believed on reasonable grounds that there was a substantial risk:

- (a) to the success of the operation, or
 - (b) to the health or safety of any person, or
 - (c) that evidence relating to criminal activity or corrupt conduct other than that the subject of the operation would be lost,
- and that the person who undertook the unlawful activity could not avoid the risk otherwise than by undertaking the activity.

The proposed section retains other requirements of the current section 14 (for example, that the person who undertook the unlawful activity had not foreseen, and could not reasonably be expected to have foreseen, that the relevant circumstances would arise).

Schedule 1 [9] inserts proposed Part 3A (Cross-border controlled operations) in the Principal Act to give effect to the principal object of the Bill referred to in the Overview above. The proposed Part consists of proposed sections 20A–20S.

Proposed section 20A provides that the Principal Act (other than section 14) applies in respect of cross-border controlled operations (with any necessary modifications), subject to the modifications set out in the proposed Part.

Proposed section 20B inserts definitions for the purposes of the proposed Part. The

definitions include a definition of **relevant offence**, which is an offence against the law of New South Wales that carries a maximum penalty of imprisonment for 3 years or more, or any other offence prescribed by the regulations.

Proposed section 20C deals with applications for authorities to conduct cross-border controlled operations. Such applications must be made to the chief executive officer of the law enforcement agency proposing to conduct the operation. The authorities may be granted only in respect of investigations of **relevant offences**.

Proposed section 20D provides that an authority to conduct a cross-border controlled operation is not to be granted unless the chief executive officer satisfies himself or herself as to the matters set out in the proposed section (as well as the matters set out in section 6 of the Principal Act in relation to authorities to conduct other controlled operations). These include being satisfied that the nature and extent of the suspected criminal activity the subject of the proposed operation are such as to justify the conduct of a controlled operation in New South Wales and in one or more **participating jurisdictions**.

Proposed section 20E sets out requirements relating to the form that an authorisation to conduct a cross-border controlled operation is to take (in addition to the requirements set out in section 8 (2) of the Principal Act in relation to authorities to conduct other controlled operations).

Proposed section 20F (effectively) provides that authorities to conduct cross-border controlled operations are not to remain in force for longer than 7 days (in the case of an **urgent authority**) or 3 months (in the case of a **formal authority**), rather than the 72 hours and 6 months provided under section 8 (2) (f) and (g) of the Principal Act in respect of authorities to conduct other controlled operations.

Proposed section 20G provides for the variation of authorities to conduct cross-border controlled operations. It provides that an application for a variation of an authority to conduct a cross-border controlled operation may be made on the ground (in addition to the grounds provided under section 10 of the Principal Act for variation of an authority to conduct other controlled operations) that the variation is for the purpose of identifying additional suspects in relation to the relevant offence. Proposed section 20G also provides that no single variation may extend the period for which an authority has effect for more than 3 months at a time, rather than the 6 months allowed under section 10 (1A) in respect of authorities to conduct other controlled operations.

Proposed section 20H provides that an authority to conduct a cross-border controlled operation authorises each **participant** in the operation to engage in the activities referred to in section 13 of the Principal Act in New South Wales and in any participating jurisdiction (subject to any corresponding law of that jurisdiction).

Proposed section 20I requires the chief executive officer of a law enforcement agency to cause the documents specified in the proposed section to be kept in relation to cross-border controlled operations.

Proposed section 20J requires the chief executive officer of a law enforcement agency to cause a register relating to cross-border controlled operations to be kept, and sets out the matters that the register must specify.

Proposed section 20K provides that section 16 (Lawfulness of controlled activities) of the Principal Act does not apply in relation to cross-border controlled operations. Section 16 effectively renders certain unlawful activities lawful. Instead, proposed section 20K protects a participant in a cross-border controlled operation from any criminal liability for engaging in unlawful conduct in the course of, and for the purpose of, the operation, in the circumstances set out in the proposed section.

Proposed section 20L is a similar provision relating to ancillary conduct. It replaces section 18 (Lawfulness of certain ancillary activities) of the Principal Act in relation to cross-border controlled operations.

Proposed section 20M is a similar provision relating to civil liability. It replaces

section 19 (Exclusion of civil liability) of the Principal Act in relation to cross-border controlled operations and provides, instead, for the indemnification of participants in the cross-border controlled operations to which the proposed section applies, in the circumstances set out in the proposed section.

Proposed section 20N is to the effect that protection from criminal liability conferred by proposed sections 20K and 20L does not apply in respect of a person's conduct in the course of a cross-border controlled operation if the unlawful conduct concerned is, or could have been, authorised under a law of New South Wales relating to the matters set out in the proposed section. Those matters include searches of individuals and premises.

Proposed section 20O deals with the effect of a participant being unaware that an authority for a controlled operation has been varied or cancelled.

Proposed section 20P provides for compensation to certain persons who suffer loss of, or serious damage to, property as a direct result of an authorised cross-border controlled operation.

Proposed section 20Q requires the principal law enforcement officer of an authorised cross-border controlled operation to report any loss or damage of the kind referred to in proposed section 20P to the chief executive officer of the agency, who must take all reasonable steps to notify the owner of the property concerned of the loss or damage.

Proposed section 20R prohibits the unauthorised disclosure of information relating to cross-border controlled operations.

Proposed section 20S provides that certain provisions of the Principal Act apply (with any necessary changes) in respect of various operations in the nature of cross-border controlled operations that are authorised by or under the provisions of a corresponding law.

Schedule 1 [10] amends section 21 (1) (a) of the Principal Act in relation to retrospective authorities in consequence of proposed section 21 (1A) and (1B) (proposed to be inserted by Schedule 1 [11]).

Schedule 1 [11] inserts proposed section 21 (1A) and (1B) in the Principal Act. Section 21 requires a chief executive officer who grants an authorisation for a controlled operation (or a variation of an authority), or receives a report on the conduct of a controlled operation, to give the Ombudsman written notice of that fact within 21 days. The proposed subsections require the chief executive officer granting a retrospective authority to provide the Ombudsman with written details of the authority and the circumstances justifying it, and to do so as soon as practicable after granting the authority (but, in any case, no later than 7 days after it is granted).

Schedule 1 [12] repeals and re-enacts section 29 (Delegations) of the Principal Act in view of the new functions conferred on chief executive officers of law enforcement agencies by proposed Part 3A of the Principal Act. Currently, section 29 provides for the regulations to prescribe the positions to which functions under the Principal Act of chief executive officers may be delegated. Section 29 as proposed to be re-enacted specifies the police officers to whom those functions of the Commissioner of Police may be delegated and provides (as at present) for the regulations to prescribe the relevant positions in respect of other law enforcement agencies.

Schedule 1 [13] amends section 30 (Proceedings for offences) of the Principal Act in consequence of proposed section 20R (2).

Schedule 1 [14] inserts proposed section 32 (6) and (7) in the Principal Act to require further review of the Principal Act to be undertaken as soon as possible after the period of 5 years from the date of assent to the proposed Act and for a report on the outcome of the review to be tabled in each House of Parliament.

Schedule 1 [15] inserts proposed section 33 in the Principal Act. The proposed section is a formal provision giving effect to the new Schedule proposed to be

inserted by Schedule 1 [16].

Schedule 1 [16] inserts a new Schedule in the Principal Act to allow the making of savings and transitional regulations consequent on the enactment of the proposed Act and to preserve certain delegations existing immediately before the repeal and re-enactment of section 29.

**Schedule 2 Amendment of Law Enforcement
(Controlled Operations) Regulation 1998**

Schedule 2 repeals and re-makes clause 13 (Delegations: section 29) of the *Law Enforcement (Controlled Operations) Regulation 1998* in consequence of the repeal and re-enactment of section 29 of the Principal Act.

**Schedule 3 Amendment of Criminal Procedure
Act 1986**

Schedule 3 inserts a reference to an offence under proposed section 20R (2) of the *Law Enforcement (Controlled Operations) Act 1997* in Table 2 in Schedule 1 to the *Criminal Procedure Act 1986*. That Table specifies the indictable offences that a Local Court is required to deal with summarily unless the prosecuting authority elects otherwise.