

EVIDENCE (WITNESS ANONYMITY) AMENDMENT BILL 2000

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

To enable the giving and filing of witness anonymity certificates by the chief executive officer of the crime commission, the criminal justice commission or the police service where it is considered reasonably necessary to do so to protect a covert operative who is or may be required to give evidence that was obtained when the covert operative was engaged in activities for a controlled operation.

Reasons for the objectives and how they will be achieved

The nature of controlled operations is such that on occasion, the life of the covert operative or his or her family is at risk if his/her true identity is ever disclosed. The potential for such disclosure can arise when a covert operative is required to give evidence in court. Whilst there is always disclosure to the court and the defence that the witness operated as a covert operative under an assumed name, there is a concern that to disclose the covert operative's actual identity may endanger his/her life or that of his/her family.

The fundamental right to a fair trial recognised at common law includes the right of an accused person to challenge his or her accusers. A successful challenge to his or her accusers by an accused person necessarily involves the witness disclosing his or her true identity. The courts have had to consider whether or not this basic right can be qualified to enable a covert operative to give evidence under an assumed name in certain circumstances including a real threat to the life of the operative or his or her family.

In Queensland the common law position was stated in the case of R v Stipendiary Magistrate at Southport ex parte Gibson [1993], 2 Queensland Reports 687 (Gibson's case) where the Full Court held that a Magistrate at committal for a drug related matter had no power to make an order that a covert operative give evidence under the assumed name that he had used in the course of the controlled operation.

The *Evidence (Witness Anonymity) Amendment Bill 2000*, which is broadly based on similar provisions in respect of witness anonymity for covert operatives contained in section 13A of the New Zealand *Evidence Act 1908*, enables the giving of a witness anonymity certificate by the chief executive of the criminal justice commission, the crime commission or the police if he or she considers it reasonably necessary to do so to protect a covert operative who is or may be required to give evidence that was obtained when the covert operative was engaged in activities for a controlled operation.

The term “covert operative” is defined to mean, for a controlled operation conducted by the crime commission, the criminal justice commission or the police service, a police officer or another named as a covert operative in an approval under the *Police Powers and Responsibilities Act 2000*, section 178.

The term “controlled operation” is defined to mean a controlled operation approved under the *Police Powers and Responsibilities Act 2000* chapter 5, part 2, division 3 for the purposes of an investigation being conducted by the police service, the criminal justice commission or the crime commission.

The witness anonymity certificate must state the following in relation to the witness—

- (a) the name the witness used in the relevant controlled operation;
- (b) for a stated period the witness was a covert operative for a stated law enforcement agency;
- (c) the witness has not been convicted of any offences other than a stated offence;

- (d) if the witness is a police officer, whether the witness has at any time been found guilty of misconduct or a breach of discipline within the meaning of either the *Police Service Administration Act 1990* or a law of the Commonwealth or State that corresponds to the *Police Service Administration Act 1990*, and if so; details of the misconduct or breach of discipline;
- (e) if to the knowledge of the person giving the certificate, a court or judge has made any adverse comment on the credibility of the witness and if so, what was said about the witness.

The effect of the filing of the certificate is that the witness may give evidence in the relevant proceeding under the name that the witness used in the relevant controlled operation. Further, no question may be put or statement made which may disclose the actual identity of the witness or where the witness lives.

The Bill enables the relevant entity overseeing the proceedings in which the certificate has been filed to give leave for questions to be asked and statements to be made which, if answered or made, may disclose the protected witness's actual identity or where the protected witness lives. This can occur where the relevant entity is satisfied—

- (a) there is some evidence that, if believed, would call into question the credibility of the witness; and
- (b) it is in the interests of justice for the relevant party to be able to test the credibility of the witness; and
- (c) it would be impractical to properly test the credibility of the witness without knowing the actual identity of the witness.

The Bill specifically allows for the review by the chairperson of the criminal justice commission of the giving of the certificates by the police service or the crime commission. Under section 118R(2) of the *Criminal Justice Act 1989*, the parliamentary commissioner has the functions, as required by the parliamentary criminal justice committee, to audit the records kept by the criminal justice commission and the criminal justice commission's operational files including for the purpose of deciding whether the way the criminal justice commission has exercised power is appropriate. This provision will enable audits of the giving of certificates by the criminal justice commission.

The Bill also provides for a review of the operation of the legislation within five years after its commencement.

Administrative cost to Government of implementation

The administrative costs to Government of implementation are minimal and include the preparation of certificates by the relevant law enforcement agencies. These costs can be absorbed in existing budgets.

Fundamental legislative principles

Section 4(2) of the *Legislative Standards Act 1992* provides that fundamental legislative principles include requiring that legislation have sufficient regard to the rights and liberties of individuals. Section 4(3) of the *Legislative Standards Act 1992* further provides that whether or not legislation has regard to the rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

This Bill affects the rights and liberties of accused and others by interfering with their right to confront their accusers. Arguably the right of an accused to a fair trial (ie being able to confront his/her accusers) is dependent upon the administrative act of the giving and filing of the certificate. The Bill however allows the entity presiding over the proceedings in which the certificate has been filed to allow questions to be put in certain circumstances, namely where there is some evidence which, if believed, would call into question the credibility of the witness and it is in the interests of justice that the witness's credibility be tested and it would be impractical to test the credibility of the witness without knowing his/her actual identity. The review of the giving of certificates provides a further protection against the arbitrary filing of certificates.

Consultation

In 1999 consultation occurred with the Queensland Police Service, the Department of Premier and Cabinet, the Department of Corrective Services, the Director of Public Prosecutions, the Chairperson of the Criminal Justice Commission, the Crime Commissioner, the Queensland Council for Civil Liberties, Legal Aid Queensland, the Law Society, the Bar Association, the Chief Justice, the Chief Judge and the Chief Stipendiary Magistrate in relation to witness anonymity generally.

The Bill has been developed in close consultation with the Queensland Police Service.

In addition a draft Bill was forwarded to the Department of Premier and Cabinet, the Department of Corrective Services, the Director of Public Prosecutions, the Chairperson of the Criminal Justice Commission, the Crime Commissioner, the Queensland Council for Civil Liberties, Legal Aid Queensland, the Law Society, the Bar Association, the Chief Justice, the Chief Judge and the Chief Stipendiary Magistrate for comment.

NOTES ON PROVISIONS**Short Title**

Evidence (Witness Anonymity) Amendment Act 2000

PART 1—PRELIMINARY

Clause 1 Sets out the short title of the Bill.

Clause 2 Provides for the commencement of the Bill on a date to fixed by proclamation.

PART 2—AMENDMENT OF EVIDENCE ACT 1977

Clause 3 Provides that the Act amends the *Evidence Act 1977*.

Clause 4 Inserts a new part 2 division 5 into the *Evidence Act 1977* which contains the following sections:

Section 21 B: provides the following definitions for the division:

controlled operation: means a controlled operation approved under the *Police Powers and Responsibilities Act 2000*, chapter 5, part 2, division 3 for the purposes of an investigation conducted by a law enforcement agency.

covert operative: for a controlled operation conducted by a law enforcement agency, means a police officer or another person named as a covert operative in an approval under the *Police Powers and Responsibilities Act 2000*, section 178.

law enforcement agency: means the crime commission, the criminal justice commission or the police service.

protected witness: has the meaning given by section 21F.

relevant entity: for a relevant proceeding, means the entity before whom the relevant proceeding is being heard or conducted.

relevant proceeding: means a proceeding before a court, including a criminal proceeding.

(Note: Section 3 of the *Evidence Act 1977* contains the following definitions:

“court”: means the court, tribunal, judge, justice, arbitrator, body or person before whom or which a proceeding is held or taken.

“criminal proceeding”: includes a proceeding wherein a person is charged with a simple offence, and an examination of witnesses in relation to an indictable offence.

“proceeding”: means any civil, criminal or other proceeding or inquiry, reference or examination in which by law or by consent of parties evidence is given or may be given, and includes an arbitration.)

Section 21C: provides that the new division applies to a relevant proceeding in which a witness who is or was a covert operative is or may be required to give evidence that was obtained when the covert operative was engaged in activities for a controlled operation.

Section 21D(1): allows the chief executive of a law enforcement agency to give a witness anonymity certificate in the approved form for the purposes of a relevant proceeding where the chief executive considers it is reasonably necessary to protect a person who is or was a covert operative and who is or may be required to give evidence in the relevant proceeding.

Section 21D(2): provides that for the police service the witness anonymity certificate may also be given by a senior police officer. The term “senior police officer” is defined in section 21D(7) to mean a person performing the functions of deputy commissioner or assistant commissioner for crime operations.

Section 21D(3): provides that the law enforcement agency must—

- (a) file the witness anonymity certificate with the relevant entity before the person for whom the certificate was given is called to give evidence; and
- (b) if the agency is not the criminal justice commission, give to the chairperson of the criminal justice commission a copy of the certificate and notice of the date it was filed.

Section 21D(4): provides that the power to give witness anonymity certificates in section 21D(1) and 21D(2) may not be delegated.

Section 21D(5): provides that the limitation on delegation in section 21D(4) applies despite any other Act.

Section 21D(6): provides that the decision to give a witness anonymity certificate is final and conclusive and cannot be impeached, appealed against, reviewed, quashed or invalidated in any court.

Section 21D(7): provides that in this section the term “senior police officer” means a person performing functions in the police service as—

- (a) a deputy commissioner; or
- (b) the assistant commissioner responsible for crime operations.

Section 21E(1): provides that a witness anonymity certificate must state:

- (a) the name the witness used in the relevant controlled operation;
- (b) for a stated period the witness was a covert operative for a stated law enforcement agency;
- (c) the witness has not been convicted of any offences other than a stated offence;

- (d) if the witness is a police officer, whether the witness has been found guilty of misconduct or a breach of discipline within the meaning of either the *Police Service Administration Act 1990* or a law of the Commonwealth or another State that corresponds to the *Police Service Administration Act 1990*, and if so, details of the misconduct or breach of discipline;
- (e) if to the knowledge of the person giving the certificate, a court (defined in section 3 of the *Evidence Act 1977* to mean the court, tribunal, judge, justice, arbitrator, body or person before whom or which a proceeding is held or taken) or judge (defined in section 3 of the *Evidence Act 1977* to mean the member or members of a court) has made any adverse comment on the credibility of the witness and if so, what was said about the witness.

Section 21E(2): provides that a witness anonymity certificate must not include information that may enable the actual identity of the witness or where the witness lives to be disclosed.

Section 21F(a): provides that once the witness anonymity certificate is filed, the witness (protected witness) may give evidence in the relevant proceeding under the name he or she used in the controlled operation; and

Section 21F(b): provides that subject to section 21I—

- (i) a question may not be asked that may lead to the disclosure of the actual identity of the protected witness or where the protected witness lives; and
- (ii) a witness, including a protected witness, is not required to answer any question, give any evidence or provide any information that may lead to the disclosure of the actual identity of the protected witness or where the protected witness lives; and
- (iii) a person involved in the relevant proceeding must not make a statement that discloses or could disclose the actual identity of the protected witness or where the witness lives.

Section 21G(1): provides that on the filing of a witness anonymity certificate, a copy is to be given:

- (a) for a criminal proceeding—to each accused person to whom the relevant proceeding relates or the person's lawyer;

- (b) for a civil proceeding—to each party to the relevant proceeding or the party’s lawyer;
- (c) for another proceeding—to a person who has been given leave to appear in the relevant proceeding or the person’s lawyer.

Section 21G(2): provides that the relevant entity may also require a copy of the certificate to be given to a person the relevant entity considers should be given a copy.

Section 21H(1): provides that the relevant entity may make any order it considers necessary to protect the identity of the protected witness.

Section 21H(2): provides an offence for contravention of an order under subsection (1).

Section 21H(3): provides that the offence does not limit the relevant entity’s power to punish for contempt.

Section 21I(1): provides that on application to it the relevant entity may give leave to the following (“relevant party”) to ask questions of a witness, including the protected witness, or make a statement that, if answered or made, may disclose the protected witness’s actual identity or where the protected witness lives-

- (a) for a criminal proceeding—an accused person to whom the relevant proceeding relates or the person’s lawyer;
- (b) for a civil proceeding—a party to the relevant proceeding or the person’s lawyer;
- (c) for another proceeding—a person who has been given leave to appear in the relevant proceeding or the person’s lawyer;
- (d) a lawyer assisting the relevant entity.

Section 21I(2): provides that the relevant entity may direct that the application be heard in the absence of a jury empanelled for the proceeding and the public.

Section 21I(3): provides that leave cannot be given unless the relevant entity is satisfied—

- (a) there is some evidence that, if believed, would call into question the credibility of the protected witness; and
- (b) it is in the interests of justice for the relevant party to be able to test the credibility of the protected witness; and

- (c) it would be impractical to properly test the credibility of the protected witness without knowing the actual identity of the witness.

Section 21I(4): provides that if leave is given, a person may, in accordance with the leave-

- (a) ask a question that may lead to the disclosure of the actual identity of the protected witness or where the protected witness lives; or
- (b) answer a question, give evidence, or provide information that may lead to the disclosure of the actual identity of the protected witness or where the protected witness lives; or
- (c) make a statement that discloses or could disclose the actual identity of the protected witness or where the protected witness lives.

Section 21I(5): provides that the relevant entity may also make any orders it considers appropriate. Examples are given including the hearing of the relevant part of the proceedings in the absence of the public and the suppression of publication of anything said in the relevant part of the proceeding.

Section 21I(6): provides an offence for contravention of an order made under the previous section.

Section 21I(7): provides that the offence in the previous section does not limit the relevant entity's power to punish for contempt.

Section 21J(1): provides that this section applies to all witness anonymity certificates filed by law enforcement agencies other than the criminal justice commission.

Section 21J(2): provides that as soon as practicable after the end of a proceeding in which a witness anonymity certificate is filed by the crime commission or the police service, the chief executive officer of the relevant law enforcement agency must give the chairperson notice of the date the proceeding to which the certificate relates ended.

Section 21J(3): provides that the chairperson of the criminal justice commission must—

- (a) review the giving of each witness anonymity certificate as soon as practicable after the end of the proceeding to which the certificate relates; and in any event, within 3 months after the end of the year in which the certificate is filed; and
- (b) consider whether, in the circumstances, it was appropriate to give the certificate; and
- (c) if the chairperson considers it was inappropriate to give the certificate, the chairperson must notify whichever of the following is relevant of that fact as soon as practicable—
 - (i) for a criminal proceeding—an accused person to whom the relevant proceeding relates or the person’s lawyer;
 - (ii) for a civil proceeding—a party to the relevant proceeding or the party’s lawyer;
 - (iii) for another proceeding—a person who has been given leave to appear in the relevant proceeding or the person’s lawyer;
 - (iv) a lawyer assisting the relevant entity.

Section 21J(4): provides that the chief executive of the law enforcement agency, if asked, is to give the chairperson—

- (a) all information used by the chief executive in deciding whether or not to file the certificate; and
- (b) particulars relating to each person to whom a copy of the certificate was given under section 21G.

Section 21J(5): provides that the chairperson—

- (a) must give a copy of any report on the review to the law enforcement agency affected by the review as soon as practicable after the report is completed; and
- (b) may include a report about the reviews in the annual report of the criminal justice commission’s operations.

(Note: Under section 118R(2) of the *Criminal Justice Act 1989*, the parliamentary commissioner has the functions, as required by the parliamentary criminal justice committee (PCJC), to audit the records kept by the criminal justice commission and the criminal justice commission's operational files including for the purpose of deciding whether the way the criminal justice commission has exercised power is appropriate. This provision will enable audits of the giving of certificates by the criminal justice commission.)

Section 21K(1): provides that the Attorney-General must ensure that the operation of this division is reviewed within 5 years after it commences.

Section 21K(2): provides that the Attorney-General must table a report on the review in the Parliament within 3 months after the review is complete.

PART 3—AMENDMENT OF *JUDICIAL REVIEW ACT 1991*

Clause 5 Provides that this part amends the *Judicial Review Act 1991*.

Clause 6 Amends part 1 of schedule 1 of the *Judicial Review Act 1991* (which provides enactments that provide for non-review or limited review of decisions) by adding section 21D of the *Evidence Act 1977* to the schedule.