



New South Wales

Law Enforcement (Controlled Operations) Act 1997 No 136

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New South Wales

Law Enforcement (Controlled Operations) Act 1997 No 136

Act No 136, 1997

An Act with respect to the authorisation, conduct and monitoring of certain operations conducted by law enforcement agencies; and for other purposes.
[Assented to 17 December 1997]

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Law Enforcement (Controlled Operations) Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

In this Act:

authorised operation means a controlled operation for which an authority is in force and, in Parts 3 and 5, includes any operation in the nature of a controlled operation that is authorised by or under the provisions of a corresponding law.

authority means an authority in force under Part 2, and includes any variation or renewal of such an authority and any retrospective authority granted under section 14.

chief executive officer means the person for the time being holding office or acting as:

- (a) in relation to the Police Service, the Commissioner of Police, and
- (b) in relation to the Independent Commission Against Corruption, the Commissioner for that Commission, and
- (c) in relation to the New South Wales Crime Commission, the Commissioner for that Commission, and
- (d) in relation to the Police Integrity Commission, the Commissioner for that Commission,

and, in relation to an authorised operation, means the chief executive officer of the law enforcement agency on whose behalf the operation has been, is being or is proposed to be conducted.

civilian participant in an authorised operation means a participant in the operation who is not a law enforcement officer.

code of conduct means a code of conduct referred to in section 20.

conduct, when used as a noun, includes any act or omission.

controlled activity means an activity that, but for section 16, would be unlawful.

controlled operation means an operation conducted for the purpose of

- (a) obtaining evidence of criminal activity or corrupt conduct, or
- (b) arresting any person involved in criminal activity or corrupt conduct, or
- (c) frustrating criminal activity or corrupt conduct,

being an operation that involves, or may involve, a controlled activity

corresponding law means a law of the Commonwealth, or of another State or Territory, referred to in Schedule 1.

corrupt conduct has the same meaning as it has in the *Independent Commission Against Corruption Act 1988*.

criminal activity means any activity that involves the commission of an offence by one or more persons.

exercise a function includes perform a duty.

function includes a power, authority or duty.

law enforcement agency means the Police Service, the Independent Commission Against Corruption, the New South Wales Crime Commission or the Police Integrity Commission.

law enforcement officer means an officer or employee of a law enforcement agency, including (but not limited to) a police officer.

law enforcement participant in an authorised operation means a participant in the operation who is a law enforcement officer.

participant in an authorised operation means a person who is authorised under this Act to engage in controlled activities for the purposes of the operation.

Presiding Officer, in relation to a House of Parliament, means the President of the Legislative Council or the Speaker of the Legislative Assembly.

principal law enforcement officer for an authorised operation means the law enforcement officer who is identified by the authority for the operation as the law enforcement officer who is to conduct the operation.

4 Amendment of Schedule 1

The regulations may amend Schedule 1 so as to insert, amend or omit the name of a law of the Commonwealth or a law of another State or Territory.

Part 2 Authorisation of controlled operations

5 Applications for authorities

- (1) A law enforcement officer for a law enforcement agency may apply to the chief executive officer of the agency for authority to conduct a controlled operation on behalf of the agency.
- (2) An application for authority to conduct a controlled operation:
 - (a) must be in writing, signed by the applicant, and
 - (b) must be accompanied by a plan of the proposed operation, and
 - (c) must identify the nature of the criminal activity or corrupt conduct in respect of which the proposed operation is to be conducted, and
 - (d) must identify the nature of the controlled activity in respect of which the authority is sought, and
 - (e) must specify 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 authority and, if so, whether or not any such authority was given.
- (3) The chief executive officer may require the applicant to furnish such additional information concerning the proposed controlled operation as is necessary for the chief executive officer's proper consideration of the application.

6 Determination of applications

- (1) After considering an application for authority to conduct a controlled operation, and any additional information furnished under section 5 (3), the chief executive officer:
 - (a) may authorise a law enforcement officer for the law enforcement agency concerned to conduct the operation, either unconditionally or subject to conditions, or
 - (b) may refuse the application.
- (2) An authority to conduct a controlled operation on behalf of a law enforcement agency may not be granted unless a code of conduct is prescribed by the regulations in relation to that agency.

- (3) An authority to conduct a controlled operation may not be granted unless the chief executive officer is satisfied as to the following matters:
- (a) that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency,
 - (b) that the nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation,
 - (c) that the nature and extent of the proposed controlled activities are appropriate to the suspected criminal activity or corrupt conduct,
 - (d) that the proposed controlled activities will be capable of being accounted for in sufficient detail to enable the reporting requirements of this Act to be fully complied with.
- (4) In considering the matters referred to in subsection (3), the chief executive officer must have regard to the following:
- (a) the reliability of any information as to the nature and extent of the suspected criminal activity or corrupt conduct,
 - (b) the likelihood of success of the proposed controlled operation compared with the likelihood of success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes,
 - (c) the duration of the proposed controlled operation.
- (5) The chief executive officer must keep a written record of the reasons for which the chief executive officer is satisfied as to the matters referred to in subsection (3) (a).

7 Certain matters not to be authorised

- (1) An authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation:

- (a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged, or
 - (b) engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property.
- (2) A person must not be authorised to participate in a controlled operation unless the chief executive officer is satisfied that the person has the appropriate skills to participate in the operation.
- (3) A civilian participant:
- (a) must not be authorised to participate in any aspect of a controlled operation unless the chief executive officer is satisfied that it is wholly impracticable for a law enforcement participant to participate in that aspect of the operation, and
 - (b) must not be authorised to engage in a controlled activity unless it is wholly impracticable for the civilian participant to participate in the aspect of the controlled operation referred to in paragraph (a) without engaging in that activity.

8 Form of authority

- (1) An authority to conduct a controlled operation:
- (a) must be in writing, signed by the chief executive officer, and
 - (b) must identify the operation by reference to the plan referred to in section 5 (2) (b), and
 - (c) must identify the law enforcement officer who is to conduct the operation, and
 - (d) must identify each person who may engage in controlled activities for the purposes of the operation, and
 - (e) must state whether or not any such person may operate under an assumed name, and

- (f) must identify:
 - (i) with respect to the law enforcement participants, the nature of the controlled activities that those participants may engage in, and
 - (ii) with respect to the civilian participants, the particular controlled activities (if any) that each such participant may engage in, and
 - (g) must specify the period (not exceeding 3 months) for which the authority is to remain in force, and
 - (h) must specify any conditions to which the conduct of the operation is subject under section 6 (1) (a).
- (2) A person is sufficiently identified for the purposes of subsection (1) (c) or (d) if the person is identified by the assumed name under which the person is operating, or by a code name or code number, that can be matched to the person's identity by reference to documentation kept by the chief executive officer.
 - (3) For the purposes of this Act, a copy of an authority that has been transmitted by facsimile has the same effect as the original authority.

9 Duration of authorities

Unless it is sooner cancelled, an authority has effect for the period specified in the authority in accordance with section 8 (1) (g).

10 Variation of authorities

- (1) The principal law enforcement officer for an authorised operation, or any other law enforcement participant on behalf of the principal law enforcement officer, may apply to the chief executive officer for a variation of the authority so as:
 - (a) to extend the period for which the authority has effect (but not so as to result in the authority having effect for more than 3 months), or
 - (b) to authorise an alternative principal law enforcement officer for the operation, or

- (c) to authorise additional or alternative persons to engage in controlled activities for the purposes of the operation, or
 - (d) to authorise participants in the operation to engage in additional or alternative controlled activities.
- (2) The chief executive officer may require the applicant to furnish such information concerning the proposed variation as is necessary for the chief executive officer's proper consideration of the application.
- (3) After considering an application for a variation of an authority, and any additional information furnished under subsection (2), the chief executive officer:
 - (a) may vary the authority in accordance with the application, either unconditionally or subject to conditions, or
 - (b) may refuse the application.
- (4) An authority may not be varied unless the chief executive officer is satisfied that:
 - (a) the success of the operation, or
 - (b) the protection of the health or safety of a participant in the operation or any other person, or
 - (c) the protection of property from loss or damage,can reasonably be expected to require the variation sought by the application.
- (5) Section 7 applies to an application under this section in the same way as it applies to an application under section 5.
- (6) The regulations may make provision for or with respect to:
 - (a) the manner in which an application for variation of an authority is to be made, and
 - (b) the form in which a variation of authority may be granted, and
 - (c) the procedure to be followed in the case of
 - (i) an application that is made otherwise than in writing signed by the applicant, and
 - (ii) a variation that is granted otherwise than in writing signed by the chief executive officer.

- (7) For the purposes of this Act, a copy of a variation of authority that has been transmitted by facsimile has the same effect as the original variation of authority.

11 Renewal of authorities

- (1) The principal law enforcement officer for an authorised operation may apply to the chief executive officer for a renewal of the authority for the controlled operation.
- (2) This Part applies to an application under this section in the same way as it applies to an application under section 5.
- (3) For the purposes of this Act, a copy of a renewal of authority that has been transmitted by facsimile has the same effect as the original renewal of authority.

12 Cancellation of authorities

- (1) An authority for a controlled operation may be cancelled by the chief executive officer, by order in writing, at any time and for any reason.
- (2) Cancellation of an authority for a controlled operation takes effect at the time the order is made or at such later time as may be specified in the order.
- (3) It is a sufficient defence to criminal or disciplinary proceedings arising from conduct that has been engaged in by the defendant in reliance on an authority that has been cancelled if the defendant satisfies the court or tribunal before which the proceedings are being heard:
- (a) that the defendant engaged in the conduct in good faith for the purposes of, and in the course of, a controlled operation for which the authority had been in force, and
 - (b) that, had the authority been in force when the defendant engaged in the conduct, the conduct would have been lawful by operation of section 16, and
 - (c) that the defendant was unaware, and could not reasonably be expected to have been aware, that the authority had been cancelled.

13 Effect of authorities

While it has effect, an authority for a controlled operation:

- (a) authorises each law enforcement participant to engage in the controlled activities specified in the authority in respect of the law enforcement participants, and
- (b) authorises each civilian participant (if any) to engage in the particular controlled activities (if any) specified in the authority in respect of that participant.

Part 3 Conduct of controlled operations

14 Life threatening situations

- (1) A participant in an authorised operation who engages in unlawful conduct for the purpose of protecting that or any other participant, or any other person, from death or serious injury may, within 24 hours after engaging in that conduct, apply to the chief executive officer for retrospective authority for that conduct.
- (2) Such an application may be made in such manner as the chief executive officer may permit.
- (3) The chief executive officer may require the applicant to furnish such information concerning the relevant conduct as is necessary to the chief executive officer's proper consideration of the application.
- (4) After considering an application under subsection (1), and any additional information furnished under subsection (3), the chief executive officer:
 - (a) may grant retrospective authority in accordance with the application, or
 - (b) may refuse the application.
- (5) Retrospective authority may not be granted unless the chief executive officer is satisfied:
 - (a) that the following circumstances existed when the relevant conduct occurred:
 - (i) that the applicant was being threatened, or reasonably believed, that the applicant or some other person was at risk of death or serious injury as a direct result of the conduct of the authorised operation, and
 - (ii) that the applicant could not avoid that risk otherwise than by engaging in the relevant conduct, and
 - (b) that, at all times prior to those circumstances arising, the applicant had been acting in good faith and in accordance with the relevant code of conduct, and
 - (c) that the applicant had not foreseen, and could not reasonably be expected to have foreseen, that those circumstances would arise.

- (6) Subsection (5) does not allow retrospective authority to be granted with respect to conduct giving rise to the offence of murder or of any other offence for which the common law defence of duress would not be available.

15 Reports on controlled operations

- (1) Within 28 days after completing an authorised operation, the principal law enforcement officer for the operation must cause a report on the operation to be given to the chief executive officer.
- (2) The regulations may make provision for or with respect to the matters to be included in such a report.

16 Lawfulness of controlled activities

Despite any other Act or law, an activity that is engaged in by a participant in an authorised operation in the course of, and for the purposes of, the operation is not unlawful, and does not constitute an offence or corrupt conduct, *so* long as it is authorised by, and is engaged in in accordance with, the authority for the operation.

17 Lawfulness of activities with respect to assumed names

- (1) Despite any other Act or law, the following activities:
- (a) the preparation of any false documentation (such as the preparation of a driver's licence, credit card or identity card under an assumed name) in accordance with a request by the chief executive officer of a law enforcement agency,
 - (b) the inclusion of any false information in any record or register (such as that relevant to the issue of a driver's licence, credit card or identity card under an assumed name) in accordance with a request by the chief executive officer of a law enforcement agency,
 - (c) the use of such documentation or information by any person in the course of, and for the purposes of, an authorised operation conducted on behalf of a law enforcement agency,

are not unlawful, and do not constitute offences or corrupt conduct, so long as the documentation or information is the subject of a certificate, signed by the chief executive officer of the agency, to the effect that the documentation or information is to be used for the purposes of this Act.

- (2) Subsection (1) does not render lawful the preparation of false documentation, the inclusion of false information in any record or register or the use of such documentation or information in relation to matters of the kind recorded or registered under the *Births, Deaths and Marriages Registration Act 1995*.

18 Lawfulness of certain ancillary activities

- (1) Despite any other Act or law, an activity that is engaged in by a person:
- (a) in connection with a controlled activity, or
 - (b) in connection with an activity referred to in section 17 (1) (a), (b) or (c),

is not unlawful, and does not constitute an offence or corrupt conduct, so long as it is engaged in (whether by a participant in an authorised operation or otherwise) in the course of, and for the purposes of, an authorised operation.

- (2) This section applies to an activity that (but for this section) would be unlawful because (ignoring the operation of sections 16 and 17) the activity in connection with which it is engaged in is unlawful (such as an activity that would otherwise give rise to the offence of aiding and abetting the commission of an offence or of conspiring to commit an offence), and does not apply to any other activity.

19 Exclusion of civil liability

Conduct of

- (a) a chief executive officer, or
- (b) the principal law enforcement officer for an authorised operation, or
- (c) a participant in an authorised operation, or

- (d) a person acting in accordance with the directions of:
- (i) a chief executive officer, or
 - (ii) the principal law enforcement officer for an authorised operation,

does not, if the conduct was in good faith and for the purpose of executing this Act, subject the chief executive officer, principal law enforcement officer, participant or person so acting personally to any action, claim, liability or demand.

20 Codes of conduct

- (1) The regulations may prescribe codes of conduct for authorised operations conducted on behalf of law enforcement agencies.
- (2) Different codes of conduct may be prescribed for different law enforcement agencies.
- (3) A code of conduct may make provision for or with respect to any aspect of the conduct of an authorised operation.
- (4) A regulation may not be made for the purposes of this section except on the recommendation of the Inspector of the Police Integrity Commission.
- (5) Contravention of the code of conduct for a law enforcement agency by any person (including a law enforcement officer) employed within that agency is taken to be misconduct for the purposes of any disciplinary proceedings taken against that person with respect to the contravention.

Part 4 Monitoring of controlled operations

21 Ombudsman to be notified of certain matters

- (1) Within 21 days after:
 - (a) granting an authority, variation of authority or renewal of authority, or
 - (b) receiving a report on the conduct of an authorised operation to which an authority relates,a chief executive officer must cause written notice of that fact to be given to the Ombudsman.
- (2) The Ombudsman may require the chief executive officer to furnish such information concerning the authority, variation, renewal or report as is necessary for the Ombudsman's proper consideration of it.

22 Inspection of records by Ombudsman

- (1) The Ombudsman:
 - (a) must inspect the records of each law enforcement agency at least once every 12 months, and
 - (b) may inspect the records of any law enforcement agency at any time,for the purpose of ascertaining whether or not the requirements of this Act are being complied with.
- (2) The provisions of the *Telecommunications (Interception) (New South Wales) Act 1987* apply to an inspection conducted under this section in the same way as they apply to an inspection conducted under that Act.
- (3) The Ombudsman may, at any time, make a special report to the Presiding Officer of each House of Parliament with respect to any inspection conducted under this section.

23 Annual reports by Ombudsman

- (1) The Ombudsman must, as soon as practicable after 30 June in each year, prepare a report of the Ombudsman's work and activities under this Act for the preceding 12 months and furnish the report to the Presiding Officer of each House of Parliament.

- (2) The report must include, for each law enforcement agency, the following particulars:
- (a) the number of authorities that have been granted, varied or renewed by the chief executive officer of that agency, and the number of applications for the granting, variation or renewal of authorities that have been refused by the chief executive officer of that agency, during the period to which the report relates,
 - (b) the nature of the criminal activity or corrupt conduct against which the controlled operations conducted under those authorities were directed,
 - (c) the number of law enforcement participants, and the number of civilian participants, involved in the controlled operations conducted under those authorities,
 - (d) the nature of the controlled activities engaged in for the purposes of the controlled operations conducted under those authorities,
 - (e) the number of law enforcement participants, and the number of civilian participants, who have engaged in controlled activities for the purposes of the controlled operations conducted under those authorities.

24 Ancillary matters concerning reports

- (1) A report prepared under this Part must not include any information that, if made public, could reasonably be expected:
- (a) to endanger the health or safety of any person, or
 - (b) to disclose the methodology used in any investigation (whether or not an authorised operation) that is being, has been or is proposed to be conducted by any law enforcement agency, or
 - (c) to prejudice any investigation (whether or not an authorised operation) that is being or is proposed to be conducted by a law enforcement agency, or
 - (d) to prejudice any legal proceedings arising from any such investigation.
- (2) Sections 30 (2) and 31AA of the *Ombudsman Act 1974* apply to a report prepared under this Part in the same way as they apply to an annual report prepared under section 30 of that Act.

- (3) The Ombudsman must give a copy of any report prepared under this Part to the chief executive officer of the law enforcement agency to which the report relates and to the Minister responsible for that agency.

Part 5 Miscellaneous

25 Act binds Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

26 DPP to be notified of evidence obtained in the course of an authorised operation

The chief executive officer of a law enforcement agency on whose behalf an authorised operation is conducted must ensure that any evidence obtained in the course of the operation that is sent to the Director of Public Prosecutions for the purposes of any legal proceedings is accompanied by:

- (a) a written notice to the effect that the evidence has been obtained in the course of an authorised operation conducted on behalf of the agency, and
- (b) a copy of the authority for the operation.

27 Evidentiary certificates

A certificate:

- (a) that is issued by the chief executive officer of a law enforcement agency, and
- (b) that states that, when granting, varying or renewing an authority, the chief executive officer was satisfied as to matters specified in the certificate,

is admissible in any legal proceedings and is evidence that the chief executive officer was satisfied as to those matters.

28 Identity of certain participants not to be disclosed in legal proceedings

- (1) If, in proceedings before a court, a tribunal or a Royal Commission or other commission of inquiry, the identity of a participant in an authorised operation is in issue or may be disclosed, the court, tribunal or commission must, unless it considers that the interests of justice otherwise require:
 - (a) ensure that such parts of the proceedings as relate to the identity of the participant are held in private, and

- (b) make such orders as to the suppression of evidence given before it as, in its opinion, will ensure that the identity of the participant is not disclosed.
- (2) In particular, the court, tribunal, Royal Commission or other commission of inquiry:
 - (a) may allow any participant in an authorised operation who has been authorised to participate in the operation under an assumed name to appear before it under that name, and
 - (b) may make orders prohibiting the publication of any information (including information derived from evidence given before it) that identifies, or might facilitate the identification of, any person who has been or is proposed to be called to give evidence.
- (3) A person must not make a publication in contravention of an order in force under this section.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

29 Delegations

- (1) Despite any other Act or law to the contrary, but subject to subsections (2) and (3):
 - (a) the functions of a chief executive officer under this Act may not be delegated to any other person, and
 - (b) the functions of the Ombudsman under this Act with respect to the inspection of documentation referred to in section 8 (2) may not be delegated to any other person.
- (2) The Commissioner of Police may delegate the Commissioner's functions under this Act to a Deputy Commissioner of Police.
- (3) The Ombudsman may delegate the Ombudsman's functions under this Act with respect to the inspection of documentation referred to in section 8 (2) to an Assistant Ombudsman.

30 Proceedings for offences

Proceedings for an offence against this Act are to be dealt with summarily by a Local Court constituted by a Magistrate sitting alone.

31 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

32 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 12 months from the commencement of this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 12 months.

Schedule 1 Corresponding laws

(Sections 3 and 4)

The *Crimes Act 1914* of the Commonwealth

The *Criminal Law (Undercover Operations) Act 1995* of South
Australia

[Minister's second reading speech made in—
Legislative Assembly on 20 November 1997
Legislative Council on 3 December 1997]