

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 57

Issued by the authority of the Attorney-General

Crimes Act 1914

Crimes Amendment Regulation 2013 (No. 2)

Section 91 of the *Crimes Act 1914* (the Crimes Act) provides that the Governor-General may make regulations, not inconsistent with the Crimes Act, prescribing all matters required or permitted by the Crimes Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Crimes Act.

The purpose of this Regulation is to amend the *Crimes Regulations 1990* (the Principal Regulations) to prescribe the *Criminal Investigation (Covert Powers) Act 2012* (WA) (the CICP Act) as a corresponding law on controlled operations, assumed identities and witness identity protection for the purposes of the Crimes Act.

A controlled operation is a law enforcement operation in which a person is authorised to engage in unlawful conduct in order to obtain evidence of a serious criminal offence. Controlled operations are a valuable tool for investigating organised criminal activity because they enable law enforcement officers to infiltrate criminal organisations and to target those in the higher echelons of those organisations.

An assumed identity is a false identity used for the purpose of investigating, or gathering intelligence on, criminal activity, or conducting other intelligence or security activities. Undercover operatives need to be able to substantiate their assumed identity with proper identification documents. Such documents include birth certificates, drivers' licences, passports and credit cards. In the absence of a verifiable identity the safety of undercover operatives can be jeopardised.

Witness identity protection certificates allow undercover operatives (those engaged in a controlled operation or using an assumed identity) to give evidence without disclosing their true identity. Under such provisions an undercover operative can apply to an authorising officer of their agency for a witness identity protection certificate if they need to give evidence in civil or criminal proceedings. The issuing of such a certificate may be necessary to protect the true identity of the operative to ensure their safety (or the safety of his or her family). In other cases, it may be necessary to conceal the operative's real identity to avoid prejudicing current or future investigations.

National model laws on controlled operations, assumed identities and witness identity protection were developed in 2003 by a Joint Working Group of the then Standing Committee of Attorneys-General. To ensure the effective cross-border operation of these powers, the model laws include provisions for the mutual recognition of laws in other jurisdictions. These mutual recognition arrangements apply where a jurisdiction recognises another jurisdiction's law as a corresponding law.

Effect of prescribing the CICIP Act as a corresponding law

In relation to controlled operations, Commonwealth recognition of the CICIP Act would ensure that officers participating in operations that have been validly authorised under Western Australian (WA) laws are protected against liability for Commonwealth offences, without requiring a separate Commonwealth authority to be sought for the controlled operation.

In relation to assumed identities, Commonwealth recognition of the CICIP Act would:

- allow the chief officer of a Commonwealth law enforcement agency or an intelligence agency to request a WA issuing agency to produce evidence to support an assumed identity validly authorised under the Commonwealth assumed identity provisions (under section 15KX of the Crimes Act). For example, the WA Driver and Vehicle Services could be requested to produce a drivers' license to support an assumed identity issued under the Crimes Act;
- allow an authority issued under the CICIP Act to authorise the production of evidence of the assumed identity from a Commonwealth government issuing agency (under section 15KY of the Crimes Act). For example, Medicare could be requested to produce a Medicare card to support an assumed identity issued under the CICIP Act; and
- ensure that officers who are authorised under the CICIP Act to acquire and use an assumed identity would be protected from criminal liability under Commonwealth law when using that identity, to the extent that the conduct would not be criminal if the identity was their real identity (under section 15LA of the Crimes Act). For example, in order to substantiate an assumed identity, a WA officer may be authorised to claim government unemployment benefits although doing so without being unemployed is a Commonwealth offence. The officer would be protected from criminal liability for this offence under section 15LA of the Crimes Act.

In relation to witness identity protection, Commonwealth recognition of the CICIP Act would ensure that a witness identity protection certificate issued under WA law would be treated as if it had been given under the Crimes Act, thereby providing protection for state operatives in proceedings held in federal courts and federal matters heard in state courts.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Crimes Amendment Regulation 2013 (No. 2)

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

In 2010, the Commonwealth implemented model laws on controlled operations (Part IAB of the Crimes Act), assumed identities (Part IAC) and witness identity protection (Part IACA).

A controlled operation is a law enforcement operation in which a person is authorised to engage in unlawful conduct in order to obtain evidence of a serious criminal offence. An assumed identity is a false identity used by a law enforcement officer or another person for the purposes of investigating an offence or gathering intelligence. Witness identity protection certificates allow undercover operatives (those engaged in a controlled operation or using an assumed identity) to give evidence without disclosing their true identity or location.

To ensure the effective cross-border operation of these powers, the model laws include provisions for the mutual recognition of laws in other jurisdictions. These mutual recognition arrangements apply where a jurisdiction recognises another jurisdiction's law as a corresponding law.

This legislative instrument prescribes Western Australian provisions on controlled operations, assumed identities and witness identity protection (contained in the CACP Act) as corresponding laws for the purposes of the Crimes Act. It does not make any substantive amendments to Commonwealth law or policy.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

[The Hon Mark Dreyfus QC MP, Attorney-General]

Details of the Regulation are set out in the Attachment.

The Crimes Act does not specify any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Relevant agencies were consulted on the development of these Regulations. These regulations are not likely to impact on business or restrict competition.

Authority: Section 91 of the *Crimes Act 1914*

Details of the *Crimes Amendment Regulation 2013 (No. 2)*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Crimes Amendment Regulation 2013 (No. 2)*.

Section 2 – Commencement

This section provides that the Regulation will commence on the day after it is registered.

Section 3 – Authority

This section identifies the *Crimes Act 1914* as the authority for the Regulation.

Section 4 – Schedule

This section provides that the *Crimes Regulations 1990* (the Principal Regulations) are amended as set out in Schedule 1.

Schedule 1 – Amendments

Item [1] – regulation 4A

Existing regulation 4A prescribes corresponding controlled operations laws, as defined in subsection 15GC of the Crimes Act.

Item 1 repeals the existing table of corresponding controlled operations laws and insert a new table which includes the *Criminal Investigation (Covert Powers) Act 2012* (WA). Part 2 of this Act is prescribed as corresponding.

Item [2] – regulation 4BAB

Existing regulation 4BAB prescribes corresponding assumed identities laws, as defined in subsection 15K of the Crimes Act.

Item 2 repeals the existing table of corresponding assumed identities laws and inserts a new table which includes the *Criminal Investigation (Covert Powers) Act 2012* (WA). Part 3 of this Act is prescribed as corresponding.

Item [3] – regulation 4D

Existing regulation 4D prescribes corresponding witness identity protection laws, as defined in subsection 15M(1) of the Crimes Act.

Item 3 repeals the existing table of corresponding witness identity protection laws and insert a new table which includes the *Criminal Investigation (Covert Powers) Act 2012* (WA). Part 4 of this Act is prescribed as corresponding.