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31 March 2011

Mr Les Tree  
Deputy Director General  
Law Enforcement and Regional Coordination Division  
Department of Premier and Cabinet  
GPO BOX 5341  
SYDNEY NSW 2001

Dear Mr Tree,

**Statutory Review of the Law Enforcement (Controlled Operations) Act 1997**

Thank you for inviting the Law Society to make a submission to the review of the *Law Enforcement (Controlled Operations) Act 1997* (Act). The Law Society's Criminal Law Committee (Committee) has reviewed the Act and brings the following comments for your attention.

Section 16 confers extraordinary immunity upon law enforcement and civil participants in controlled operations for what would otherwise be criminal or corrupt conduct. Perhaps because of that extraordinary immunity, the Act and the Regulation provide extensive safeguards so as to ensure the privileges conferred are not abused (see for example sections 5-8).

The safeguards are primarily directed to ensuring that an authority is not granted unless:

- There are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted.
- The nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation.
- The nature and extent of any proposed controlled activities are appropriate to the suspected criminal activity or controlled conduct.
- The proposed controlled activities will be capable of being accounted for in sufficient detail to enable reporting requirements of the Act to be fully complied with (see section 6(3)).

The safeguards also aim to ensure that controlled operations are not authorised which would involve participants in controlled operations:

- 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.

- Engaging in conduct that is likely to seriously endanger the health or safety of any person or to result in serious loss or damage to property.
- Engaging in conduct that involves the commission of a sexual offence against any person (see section 7(1)).

The safeguards also aim to limit the involvement of civilian participants in controlled operations only to a level which is no more than that which is absolutely necessary to the conduct of the controlled operation (see section 7(3)).

It is the Committee's view that compliance with the safeguards (at a minimum) is absolutely fundamental to ensuring that the citizens of NSW can have faith that the extraordinary immunities conferred by the Act have not been abused.

Whilst the Committee sees these safeguards as fundamental, it is also of the view that in the current Act there is no real mechanism provided to ensure that any failure to comply with the safeguards will be identified or for that matter sanctioned.

The Act is deficient in that it does not provide any mechanism for a proper case by case review of whether the safeguards have been complied with.

The reporting required by section 15 is internal to the relevant law enforcement agency and not susceptible to external review. The review by the Ombudsman provided for in Part 4 results in an essentially statistical report which does not focus upon whether the safeguards have been complied with. The Ombudsman does have power pursuant to section 22 to inspect records and ascertain whether the requirements of the Act are being complied with. However, given that in excess of 300 controlled authorities were granted during the most recent reporting period it is unlikely that he/she has the resources to do so thoroughly in every case. The Ministerial Review provided for by section 32 is likely to have a systemic focus which may only incidentally identify occasions where the safeguards have not been complied with.

Similarly, the common law as expressed in the decision of *Attorney General (NSW) v Chidgey* [2008] NSWCCA 65, 182 A Crim R 536 means that an individual accused person who wishes to "check compliance with the Act" by means of subpoena will ordinarily be held not to have a "legitimate forensic purpose" and will therefore be denied access to information necessary to ascertain whether the safeguards have been infringed in any way.

Given that there is no effective case by case review of compliance with the safeguards it is not possible to say whether the current safeguards are always being complied with. Neither is it possible to say in the absence of such a review that the current terms of the Act remain appropriate to securing its objectives.

The case of *Gedeon v NSW Crime Commission* [2008] HCA 43, (2008) 236 CLR 120 is illustrative of the fact that failures to comply with the safeguards have occurred in the past. The problem is that the frequency and extent of such failures is not able to be identified.

Instituting an effective case by case "external" review of every controlled operation may involve considerable public expense. If an external case by case review of every controlled operation is considered infeasible, then the Committee recommends implementing a system of thorough random audits as an alternate approach which goes some way towards facilitating identification of any non-compliance with the Act.

It is noted that section 26 currently requires that where evidence obtained during the course of a controlled operation is sent to the DPP for the purposes of any legal proceedings it must be accompanied with a written notice to that effect and a copy of the authority.

The Committee proposes that section 26 be amended so as to require not only those documents be served upon the DPP but also the following documents:

- (a) A copy of the application for authority to conduct the controlled operation.
- (b) Where the application is not in writing a copy of the records made in respect of an urgent application.
- (c) A statement setting out any additional information provided to the chief executive officer pursuant to subsection (3) of section 5.
- (d) A statement setting out the chief executive officer's conclusions as to the matters set out in subsection (4) of section 6.
- (e) Similar documents to those set out above in respect of any variation of the authority.

There should also be a requirement of the Act that the same documents must be served upon the accused.

The Committee looks forward to reviewing the report on the outcome of the review when it is tabled in Parliament this year.

Yours sincerely,



Stuart Westgarth  
**President**