

South Australia

# **Criminal Investigation (Covert Operations) Act 2009**

An Act to authorise the use of undercover operations and assumed identities for the purposes of criminal investigation and the gathering of criminal intelligence within and outside the State; to establish a certification scheme for the protection of the identity of certain witnesses; to provide for cross border recognition of undercover operations, assumed identities and the certification scheme; to repeal the *Criminal Law (Undercover Operations) Act 1995*; and for other purposes.

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### Legislative history

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## The Parliament of South Australia enacts as follows:

### Part 1—Preliminary

#### 1—Short title

This Act may be cited as the *Criminal Investigation (Covert Operations) Act 2009*.

#### 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

#### 3—Interpretation

(1) In this Act, unless the contrary intention appears—

**acquire** an assumed identity, means acquire evidence of the identity, and includes taking steps towards acquiring evidence of the identity;

**agency** means—

- (a) an issuing agency; or
- (b) a law enforcement agency,

as the case requires;

**approval** means an approval under Part 2;

**approved undercover operations** means—

- (a) undercover operations approved under Part 2; or
- (b) undercover operations approved—
  - (i) under the repealed Act; or
  - (ii) by a law enforcement authority before the commencement of the repealed Act that are of a type that could reasonably have been approved under the repealed Act if the repealed Act had been in force when the operations commenced;

***assumed identity***—see Part 3;

***assumed name***—

- (a) of a local operative—has the meaning given in section 33(1)(d)(i);
- (b) of an interstate operative—means the name (if any) stated in the interstate witness identity protection certificate as the interstate operative's assumed name;

***authorised civilian*** means a person (other than a law enforcement officer) who is authorised under an authority to acquire or use an assumed identity;

***authorised officer*** means a law enforcement officer who is authorised under an authority to acquire or use an assumed identity;

***authorised participant*** in approved undercover operations means—

- (a) a person authorised under the terms of the approval to take part in the operations; or
- (b) in the case of operations that began before the commencement of Part 2 but after the commencement of the repealed Act—a person authorised under the terms of an approval under the repealed Act to take part in the operations; or
- (c) in the case of operations that began before the commencement of the repealed Act—a person authorised by a law enforcement authority to take part in the operations;

***authorised person*** means—

- (a) an authorised civilian; or
- (b) an authorised officer;

***authority*** means an authority under Part 3;

***chief officer***—

- (a) of a law enforcement agency—
  - (i) in relation to SA Police—means the Commissioner of Police;
  - (ii) in relation to the Australian Crime Commission—means the Chief Executive Officer of the Australian Crime Commission;
- (b) of an issuing agency—means the chief executive officer (however described) of the agency;

***conduct*** includes any act or omission;

***corresponding approval*** means an approval under a corresponding law approving undercover operations;

***corresponding authority*** means—

- (a) an authority under a corresponding law to acquire or use an assumed identity in this State; or
- (b) an authority under a corresponding law to request the production of evidence of an assumed identity;

**corresponding law** means a law of another jurisdiction declared by the regulations to correspond to this Act, or to a Part (or Parts) of this Act;

**court** includes a tribunal or body or person invested by law with judicial or quasi-judicial powers, or with authority to make an inquiry or to receive evidence;

**court name** for an operative (whether a local or an interstate operative) in relation to proceedings, means a name, other than the operative's real name, or code used to identify the operative in the proceedings;

**criminal activity** means conduct that involves the commission of an offence by 1 or more persons;

**doing** a thing includes failing to do the thing;

**evidence** of identity, means a document or other thing that evidences or indicates, or can be used to evidence or indicate, a person's identity or an aspect of a person's identity;

**false representation** does not include a representation made under an authority under this Act;

**government issuing agency**, in relation to an authority, means any of the following named in the authority that issues evidence of identity:

- (a) a person or body (whether incorporated or not) that performs any function of the government of this State;
- (b) a person or body (whether incorporated or not) prescribed by the regulations for the purposes of this definition;

**interstate operative** means a person in respect of whom an interstate witness identity protection certificate is in force;

**interstate witness identity protection certificate** means a certificate given under a provision of a corresponding law that corresponds to section 31;

**investigation** means an investigation in relation to criminal activity, including an investigation extending beyond this State;

**issuing agency** means—

- (a) a government issuing agency; or
- (b) a non-government issuing agency;

**jurisdiction** means the Commonwealth or a State or Territory of the Commonwealth;

**law enforcement agency** means—

- (a) SA Police; or
- (b) the Australian Crime Commission;

**law enforcement officer** means—

- (a) in relation to SA Police—a police officer;
- (b) in relation to the Australian Crime Commission—a member of staff of the Australian Crime Commission,

and includes a person who is seconded to a law enforcement agency, including (but not limited to) a police officer (however described) of another jurisdiction;

**local operative** means a person who is or was—

- (a) an authorised participant under Part 2; or
- (b) an authorised person under Part 3;

**non-government issuing agency**, in relation to an authority, means a person, body or entity (other than a government issuing agency) named in the authority that issues evidence of identity;

**officer** of an agency includes a person employed or engaged in the agency;

**operative** means—

- (a) an interstate operative; or
- (b) a local operative,

as the case requires;

**participating jurisdiction** means a jurisdiction in which a corresponding law is in force;

**party** to proceedings means—

- (a) in relation to criminal proceedings—the prosecutor and each accused person;
- (b) in relation to civil proceedings—each person who is a party to the proceedings;
- (c) in relation to any other proceedings—each person who may appear or give evidence in the proceedings;

**presiding officer**, in relation to proceedings, means the person constituting the court, or presiding over the court, in the proceedings;

**proceedings** means any criminal, civil or other proceeding or inquiry, reference or examination in which, by law or consent of parties, evidence is or may be given, and includes an arbitration;

**professional misconduct** means misconduct or a breach of discipline—

- (a) under the *Police Act 1998*; or
- (b) under a law of another jurisdiction that corresponds to the *Police Act 1998*; or
- (c) under a law of the Commonwealth that governs the conduct of members of staff of the Australian Crime Commission,

but does not mean misconduct or a breach of discipline—

- (d) that constitutes minor misconduct, or is the subject of an informal inquiry only, under the *Police Act 1998*; or
- (e) that constitutes minor misconduct (however referred to), or is the subject of an informal inquiry only, under any of the laws referred to in paragraph (b) or (c);

**repealed Act** means the *Criminal Law (Undercover Operations) Act 1995* repealed under Schedule 1;

**SA Police** means South Australia Police;

***serious criminal behaviour*** means behaviour involving the commission of—

- (a) an indictable offence; or
- (b) an offence against the *Controlled Substances Act 1984*; or
- (c) an offence against section 52, 53, 72 or 74 of the *Fisheries Management Act 2007*; or
- (d) an offence against section 63 or 75 of the *Lottery and Gaming Act 1936*; or
- (e) an offence against section 47(1), (2) or (4), 48(1), 48A(1), 51(1) or 60(1) of the *National Parks and Wildlife Act 1972*;

***supervisor*** of an authorised civilian means the law enforcement officer who supervises, or is to supervise, the acquisition or use of an assumed identity by the authorised civilian;

***undercover operations*** means operations (which may include conduct that is apart from this Act illegal) of which the intended purpose is to provide persons engaging or about to engage in serious criminal behaviour an opportunity to—

- (a) manifest that behaviour; or
- (b) provide other evidence of that behaviour;

***use*** an assumed identity, includes representing (whether expressly or impliedly, or by saying or doing something) the identity to be real when it is not;

***witness identity protection certificate*** means a certificate given under section 31 in respect of a local operative in relation to proceedings.

- (2) For the purposes of this Act, a person is reckless about whether or not an act has been done if—
  - (a) the person is aware of a substantial risk that the act has been done; and
  - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

## **Part 2—Undercover operations**

### **4—Approval of undercover operations**

- (1) A senior police officer may approve undercover operations for the purpose of gathering evidence of serious criminal behaviour.
- (2) An approval may not be given unless the senior police officer—
  - (a) suspects, on reasonable grounds, that persons (whose identity may—but need not—be known to the officer) have engaged, are engaging or are about to engage in serious criminal behaviour of the kind to which the proposed undercover operations relate; and
  - (b) is satisfied on reasonable grounds that the ambit of the proposed undercover operations is not more extensive than could reasonably be justified in view of the nature and extent of the suspected serious criminal behaviour; and
  - (c) is satisfied on reasonable grounds that the means are proportionate to the end; that is, that the proposed undercover operations are justified by the social harm of the serious criminal behaviour against which they are directed; and

- (d) is satisfied on reasonable grounds that the undercover operations are properly designed to provide persons who have engaged, or are engaging or about to engage, in serious criminal behaviour an opportunity—
- (i) to manifest that behaviour; or
  - (ii) to provide other evidence of that behaviour,
- without undue risk that persons without a predisposition to serious criminal behaviour will be encouraged into serious criminal behaviour that they would otherwise have avoided.
- (3) Before giving approval, the senior police officer must consider whether approval for similar operations has previously been sought, and, if sought and refused, the reasons for that refusal.
- (4) The approval must—
- (a) be in writing; and
  - (b) be signed by the senior police officer giving the approval; and
  - (c) specify—
    - (i) the date and time of the signing, and the time from which the approval takes effect (which may be contemporaneous with or later than the time of signing but cannot be earlier); and
    - (ii) the persons who are authorised to participate in the operations; and
    - (iii) the nature of the conduct in which the participants are authorised to engage; and
    - (iv) a period (not exceeding 3 months) for which the approval is given.
- (5) A senior police officer may renew, from time to time, an approval for 1 or more further periods.
- (6) A senior police officer must, within 14 days after giving or renewing an approval, cause a copy of the instrument of approval or renewal to be given to the Attorney-General.
- (7) In this section—
- senior police officer* means a police officer of or above the rank of Superintendent.

## **5—Legal immunity of persons taking part in approved undercover operations**

- (1) Despite any other law, an authorised participant in approved undercover operations incurs no criminal liability by taking part in undercover operations in accordance with the terms of the approval.
- (2) This section operates both prospectively and retrospectively.



## **Part 3—Assumed identities**

### **Division 1—Authority to acquire or use assumed identity**

#### **6—Application for authority**

- (1) A law enforcement officer of a law enforcement agency may apply to the chief officer of the law enforcement agency for an authority for the law enforcement officer, or another person, to do either or both of the following:
  - (a) acquire an assumed identity;
  - (b) use an assumed identity.
- (2) A separate application must be made in respect of each assumed identity to be acquired or used.
- (3) An application—
  - (a) must be in writing in the form approved by the chief officer; and
  - (b) must contain the following information:
    - (i) the name of the applicant;
    - (ii) the name of the person to be authorised to acquire or use an assumed identity (if not the applicant);
    - (iii) if the person to be authorised is not a law enforcement officer—the name and rank or position of the person proposed to be appointed as supervisor and an explanation of why it is necessary for a person who is not a law enforcement officer to acquire or use the assumed identity;
    - (iv) details of the proposed assumed identity;
    - (v) reasons for the need to acquire or use an assumed identity;
    - (vi) to the extent known—details of the investigation or intelligence gathering exercise in which the assumed identity will be used;
    - (vii) details of the issuing agencies (if any) and the types of evidence to be issued by them;
    - (viii) details of any application to be made for an order under section 12 in respect of the assumed identity.
- (4) An applicant must provide the chief officer with any other information required by the chief officer for the purposes of determining the application.

#### **7—Determination of applications**

- (1) The chief officer of a law enforcement agency may, on application under section 6 for an authority, grant the authority subject to such conditions as the chief officer thinks fit.

- (2) The chief officer may not grant any such authority unless satisfied on reasonable grounds—
  - (a) that the assumed identity is necessary for the purposes of an investigation or intelligence gathering in relation to criminal activity; and
  - (b) that the risk of abuse of the assumed identity by the authorised person is minimal; and
  - (c) if the application is for authorisation of an assumed identity for a person who is not a law enforcement officer—that it would be impossible or impracticable in the circumstances to authorise the acquisition or use (or both) of the assumed identity by a law enforcement officer for the purpose sought.
- (3) If an authority is granted in respect of an authorised civilian, the chief officer must appoint a law enforcement officer of the agency to supervise the acquisition or use (or both) of the assumed identity by the authorised civilian.
- (4) A law enforcement officer appointed as supervisor under subsection (3) must be—
  - (a) in the case of SA Police—of or above the rank of Sergeant;
  - (b) in the case of the Australian Crime Commission—of or above the rank of Senior Investigator.
- (5) An authority may also authorise any 1 or more of the following:
  - (a) an application for an order for an entry in a register of births, deaths or marriages under section 12 or a corresponding law;
  - (b) a request under section 14 or 23;
  - (c) the use of an assumed identity in a participating jurisdiction.
- (6) A separate authority is required for each assumed identity.

## **8—Form of authority**

An authority must—

- (a) be in writing in the form approved by the chief officer of the law enforcement agency granting the authority; and
- (b) be signed by the person granting the authority; and
- (c) specify—
  - (i) the name of the person granting the authority;
  - (ii) the date on which the authority comes into effect;
  - (iii) details of the assumed identity authorised;
  - (iv) details of evidence of the assumed identity that may be acquired under the authority;
  - (v) the conditions (if any) to which the authority is subject;
  - (vi) the reason why the authority is granted;
  - (vii) if the authority relates to an authorised officer—the name of the authorised officer;

- (viii) if the authority relates to an authorised civilian—
  - (A) the name of the authorised civilian; and
  - (B) the name of his or her supervisor under the authority; and
  - (C) the period (which may not exceed 3 months) for which the authority will remain in force;
- (ix) each issuing agency to which a request may be made under section 14 or 23;
- (x) whether it authorises an application for an order for an entry in a register of births, deaths or marriages under section 12 or a corresponding law;
- (xi) each participating jurisdiction in which the assumed identity may be used.

### **9—Period of authority**

- (1) An authority for an authorised officer remains in force until cancelled.
- (2) An authority for an authorised civilian remains in force until the end of the period specified in the authority (which may not exceed 3 months), unless the authority is cancelled sooner.

### **10—Variation or cancellation of authority**

- (1) The chief officer of a law enforcement agency who grants an authority—
  - (a) may vary or cancel the authority at any time; and
  - (b) must cancel the authority if satisfied (on a review or otherwise) that any of the grounds for the granting of the authority no longer exist.
- (2) The chief officer must give written notice of the variation or cancellation to—
  - (a) the authorised person to whom it relates; and
  - (b) if the authorised person is an authorised civilian—the authorised person's supervisor.
- (3) The notice must specify the reason why the authority is varied or cancelled.
- (4) The variation or cancellation takes effect—
  - (a) on the day the written notice is given to the authorised person; or
  - (b) if a later date is specified in the notice—on that day.

### **11—Yearly review of authority**

- (1) The chief officer of a law enforcement agency must, at least once in every 12 month period, review each authority granted under this Part.
- (2) The purpose of a review is to determine whether the grounds for the granting of the authority still exist.
- (3) If on a review the chief officer is satisfied—
  - (a) that the grounds for the granting of the authority still exist—the chief officer must record his or her opinion and the reasons for it in writing;

- (b) that any of the grounds for the granting of the authority no longer exist—the chief officer must cancel the authority under section 10.

## **12—Making entries in register of births, deaths and marriages**

- (1) The Supreme Court may order the Registrar of Births, Deaths and Marriages to make an entry in the Register under the *Births, Deaths and Marriages Registration Act 1996* in relation to the acquisition of an assumed identity under an authority or corresponding authority.
- (2) The Court may only make an order under this section—
  - (a) on application by—
    - (i) the chief officer of a law enforcement agency; or
    - (ii) the chief officer of a law enforcement agency under a corresponding law; and
  - (b) if satisfied that the order is justified having regard to the nature of the activities undertaken or to be undertaken by the officer or person under the authority or corresponding authority.
- (3) An application for an order under this section must be heard in closed court.
- (4) The Registrar of Births, Deaths and Marriages must give effect to an order under this section—
  - (a) within the period specified in the order; or
  - (b) if no period is specified in the order—within 28 days after the day on which the order is made.

## **13—Cancellation of authority affecting entry in register of births, deaths and marriages**

- (1) This section applies if—
  - (a) the chief officer of a law enforcement agency cancels an authority for an assumed identity; and
  - (b) there is an entry in relation to that identity—
    - (i) in the Register under the *Births, Deaths and Marriages Registration Act 1996* as a consequence of an order under section 12; or
    - (ii) in a register of births, deaths or marriages in a participating jurisdiction as a consequence of an order under a corresponding law of the jurisdiction.
- (2) If subsection (1)(b)(i) applies—
  - (a) the chief officer must, within 28 days after the day on which the authority is cancelled, apply to the Supreme Court for an order that the Registrar of Births, Deaths and Marriages cancel the entry; and
  - (b) the Registrar of Births, Deaths and Marriages must give effect to the order within 28 days after the day on which the order is made.
- (3) An application under subsection (2)(a) must be heard in closed court.

- (4) If subsection (1)(b)(ii) applies, the chief officer must apply for an order under the corresponding law to cancel the entry within 28 days after the day on which the authority is cancelled.

## **Division 2—Evidence of assumed identity**

### **14—Request for evidence of assumed identity**

- (1) Subject to this section, the chief officer of a law enforcement agency who grants an authority under this Part may request the chief officer of an issuing agency specified in the authority—
- (a) to produce evidence of an assumed identity in accordance with the authority; and
  - (b) to provide the authorised person named in the authority with evidence of the assumed identity.
- (2) A request under this section must specify a reasonable period for compliance with the request.
- (3) The chief officer of—
- (a) a government issuing agency must comply with a request under this section within the period specified in the request;
  - (b) a non-government issuing agency may comply with a request under this section.
- (4) A request cannot be made under this section for an entry in the Register under the *Births, Deaths and Marriages Registration Act 1996*.
- (5) In this section—
- evidence* means evidence similar to that ordinarily produced or given by the issuing authority.

### **15—Cancellation of evidence of assumed identity**

- (1) The chief officer of an issuing agency must cancel evidence of an assumed identity produced by the agency if directed in writing to do so by the chief officer for the time being of the law enforcement agency that requested the evidence be produced.
- (2) In this section—
- cancel* includes delete or alter an entry in a record of information.

### **16—Legal immunity of officers of issuing agencies**

The chief officer or any other officer of an issuing agency (whether government or non-government) who does something that, apart from this section, would be an offence, is not criminally responsible for the offence if the thing is done to comply with a request under this Division.

## **17—Indemnity for issuing agencies and officers**

Where the chief officer of a law enforcement agency makes a request or gives a direction under this Division to the chief officer of an issuing agency (whether government or non-government), the law enforcement agency must indemnify the issuing agency, or an officer of the agency, for any liability incurred by the agency or officer (including reasonable costs) if—

- (a) the liability is incurred because of something done by the agency or officer to comply with the request or direction in the course of duty; and
- (b) the requirements (if any) prescribed by the regulations have been met.

## **Division 3—Effect of authority**

### **18—Assumed identity may be acquired and used**

- (1) An authorised officer may acquire or use (or acquire and use) an assumed identity if the acquisition or use (or acquisition and use) is—
  - (a) in accordance with an authority; and
  - (b) in the course of duty.
- (2) An authorised civilian may acquire or use (or acquire and use) an assumed identity if the acquisition or use (or acquisition and use) is in accordance with—
  - (a) an authority; and
  - (b) any direction by the person's supervisor under the authority.

### **19—Legal immunity of authorised persons acting under authority**

Where an authorised person does something (whether in this State or elsewhere) that, apart from this section, would be an offence, the officer or person is not criminally responsible for the offence if—

- (a) the act is done in the course of acquiring or using an assumed identity in accordance with an authority; and
- (b) the act is done—
  - (i) in the case of an authorised officer—in the course of his or her duty; or
  - (ii) in the case of an authorised civilian—in accordance with any direction by his or her supervisor under the authority; and
- (c) doing the act would not be an offence if the assumed identity were the person's real identity.

### **20—Indemnity for authorised persons**

Where the chief officer of a law enforcement agency grants an authority, the law enforcement agency must indemnify the authorised person under the authority for any liability incurred by the person (including reasonable costs) because of something done by the person (whether in this State or elsewhere) if—

- (a) the act is done in the course of acquiring or using an assumed identity in accordance with the authority; and

- (b) the act is done—
  - (i) in the case of an authorised officer—in the course of his or her duty;  
or
  - (ii) in the case of an authorised civilian—in accordance with any direction by his or her supervisor under the authority; and
- (c) the requirements (if any) prescribed by the regulations have been met.

## **21—Particular qualifications**

- (1) Sections 19 and 20 do not apply to anything done by an authorised person if—
  - (a) a particular qualification is needed to do the thing; and
  - (b) the person does not have that qualification.
- (2) This section applies whether or not the person has acquired as evidence of an assumed identity a document indicating that he or she has that qualification.

## **22—Effect of being unaware of variation or cancellation of authority**

- (1) If an authority has been varied in a way that limits its scope, this Division continues to apply to the authorised person to whom it relates as if it had not been so varied for as long as the person—
  - (a) is unaware of the variation; and
  - (b) is not reckless about the existence of the variation.
- (2) If an authority has been cancelled, this Division continues to apply to the authorised person to whom it related as if it had not been cancelled for as long as the person—
  - (a) is unaware of the cancellation; and
  - (b) is not reckless about the existence of the cancellation.

## **Division 4—Mutual recognition**

### **23—Requests to participating jurisdiction for evidence of assumed identity**

- (1) The chief officer of a law enforcement agency granting an authority may, if the authority authorises a request under this section, request the chief officer of an issuing agency of a participating jurisdiction specified in the authority—
  - (a) to produce evidence of the assumed identity in accordance with the authority;  
and
  - (b) to give evidence of the assumed identity to the authorised person named in the authority.
- (2) If the chief officer of a law enforcement agency makes a request to the chief officer of an issuing agency of a participating jurisdiction under this section, the law enforcement agency must indemnify the issuing agency, and any officer of the issuing agency, for any liability incurred by the agency or officer (including reasonable costs) if—
  - (a) the liability is incurred because of something done (whether in this State or elsewhere) by the agency or officer to comply with the request in the course of duty; and

- (b) the requirements (if any) prescribed by the regulations have been met.

## **24—Requests from participating jurisdiction for evidence of assumed identity**

- (1) This section applies if—
- (a) an authority under a corresponding law authorises a request—
    - (i) to produce evidence of an assumed identity in this State; and
    - (ii) to provide evidence of the assumed identity to the authorised person named in the authority; and
  - (b) the request is made to the chief officer of an issuing agency in this State; and
  - (c) the request specifies a reasonable period for compliance with the request.
- (2) The chief officer of an issuing agency—
- (a) in the case of a government issuing agency—must comply with any such request within the period specified in the request;
  - (b) in the case of a non-government issuing agency—may comply with any such request.
- (3) The chief officer of an issuing agency that produces evidence of an assumed identity as the result of a request under this section must cancel the evidence if directed in writing to do so by the chief officer for the time being of the law enforcement agency that requested the evidence be produced.
- (4) In this section—  
*cancel* includes delete or alter an entry in a record of information.

## **Division 5—Compliance and monitoring**

### **25—Misuse of assumed identity**

- (1) An authorised officer is guilty of an offence if—
- (a) he or she intentionally, knowingly or recklessly acquires evidence of, or uses, an assumed identity covered by his or her authority; and
  - (b) he or she knows that, or is reckless as to whether, the acquisition or use is not—
    - (i) in accordance with his or her authority; or
    - (ii) in the course of duty.

Maximum penalty: Imprisonment for 2 years.

- (2) An authorised civilian is guilty of an offence if—
- (a) he or she intentionally, knowingly or recklessly acquires evidence of, or uses, an assumed identity covered by his or her authority; and
  - (b) he or she knows that, or is reckless as to whether, the acquisition or use is not in accordance with—
    - (i) his or her authority; or



- (ii) the directions of his or her supervisor under the authority.

Maximum penalty: Imprisonment for 2 years.

## 26—Disclosing information about assumed identity

- (1) A person is guilty of an offence if—
  - (a) the person intentionally, knowingly or recklessly discloses information that the person knows or is reckless as to whether it reveals, or is likely to reveal, that an assumed identity acquired or used by another person is not the other person's real identity; and
  - (b) the person knows, or is reckless as to whether, the disclosure is not made—
    - (i) in connection with the administration or execution of this Act or a corresponding law; or
    - (ii) for the purposes of proceedings arising out of or otherwise related to this Act or a corresponding law or of a report of any such proceedings; or
    - (iii) in accordance with any requirement imposed by law.

Maximum penalty: Imprisonment for 2 years.

- (2) A person is guilty of an offence against this subsection if the person commits an offence against subsection (1) in circumstances in which—
  - (a) the person intends to endanger the health or safety of another or prejudice the effective conduct of an investigation or intelligence gathering in relation to criminal activity; or
  - (b) the person knows, or is reckless as to whether, the disclosure of the information—
    - (i) endangers or will endanger the health or safety of another; or
    - (ii) prejudices or will prejudice the effective conduct of an investigation or intelligence gathering in relation to criminal activity.

Maximum penalty: Imprisonment for 10 years.

## 27—Record keeping

- (1) The chief officer of a law enforcement agency must cause appropriate records to be kept about the operation of this Part in respect of the agency.
- (2) For the purposes of subsection (1), the records of the agency must include the following information in respect of each authority granted, varied or cancelled under this Part:
  - (a) the date on which the authority was granted, varied or cancelled and the name of the person who granted, varied or cancelled the authority;
  - (b) the name of the authorised person under the authority, together with details of the assumed identity to which the authority applies;
  - (c) details of any request made to an issuing agency under section 14 in respect of the authority;

- (d) the general nature of the duties undertaken by the authorised person under the assumed identity;
- (e) general details of relevant financial transactions entered into using the assumed identity;
- (f) details of the annual reviews of the authority.

## **28—Audit of records**

- (1) The chief officer of a law enforcement agency must arrange for the records kept for each authority in respect of the agency to be audited—
  - (a) at least once every 6 months while the authority is in force; and
  - (b) at least once in the 6 months following the cancellation or expiry of the authority.
- (2) An audit must be conducted by a person appointed by the chief officer.
- (3) The person appointed to conduct an audit—
  - (a) may but need not be an officer of the law enforcement agency;
  - (b) must not be a person—
    - (i) who granted, varied or cancelled any of the authorities to which the records relate; or
    - (ii) who is or was an authorised person under any of the authorities to which the records relate.
- (4) The results of an audit are to be reported to the chief officer.

## **Division 6—Delegation**

### **29—Delegation**

- (1) Despite any other Act or law to the contrary, the functions of a chief officer of a law enforcement agency under this Part may not be delegated to any other person except as provided by this section.
- (2) A chief officer of a law enforcement agency may delegate to a senior officer of the agency any of the chief officer's functions under this Part.
- (3) No more than 4 delegations may be in force under this section at any 1 time in respect of any 1 law enforcement agency.
- (4) In this section—

*senior officer* means—

  - (a) in relation to SA Police—a police officer of or above the rank of Superintendent;
  - (b) in relation to the Australian Crime Commission—
    - (i) the Director National Operations; or
    - (ii) a Director; or
    - (iii) the General Manager National Operations; or

- (iv) a member of staff of the Australian Crime Commission who is an SES employee or acting SES employee (within the meaning of the *Australian Crime Commission Act 2002* of the Commonwealth) and who holds a position that is prescribed by the regulations for the purposes of this definition.

## Part 4—Witness identity protection

### Division 1—Interpretation

#### 30—Interpretation

For the purposes of this Part—

- (a) a charge against a person for an offence is ***outstanding*** until the charge is finally dealt with in any of the following ways:
  - (i) the charge is withdrawn;
  - (ii) the charge is dismissed by a court;
  - (iii) the person is discharged by a court following a preliminary examination;
  - (iv) the person is acquitted or found guilty of the offence;
  - (v) the person is declared under Part 8A of the *Criminal Law Consolidation Act 1935* to be liable to supervision;
  - (vi) in any other case—when proceedings relating to the charge are otherwise concluded or terminated; and
- (b) anything permitted to be done by a party to proceedings may be done by the party's lawyer; and
- (c) any requirement to give something to a party to proceedings is satisfied by giving the thing to the party's lawyer.

### Division 2—Witness identity protection certificates for local operatives

#### 31—Chief officer may give witness identity protection certificate to local operative

- (1) The chief officer of a law enforcement agency may give a certificate in respect of a local operative in relation to proceedings (a ***witness identity protection certificate***) if—
  - (a) the local operative is, or may be, required to give evidence in the proceedings; and
  - (b) the chief officer is satisfied on reasonable grounds that the disclosure in the proceedings of the local operative's identity or where the local operative lives is likely—
    - (i) to endanger the safety of the local operative or another person; or
    - (ii) to prejudice an investigation.

- (2) The chief officer may not give a witness identity protection certificate in respect of the local operative until the chief officer has received the following information from the local operative verified by statutory declaration:
- (a) whether he or she has ever been convicted or found guilty of an offence (in this State or elsewhere) and, if so, particulars of each offence;
  - (b) whether any charges against the local operative for an offence are pending or outstanding (in this State or elsewhere) and, if so, particulars of each charge;
  - (c) if the local operative is or was a law enforcement officer—
    - (i) whether he or she has ever been found guilty of professional misconduct and, if so, particulars of each finding; and
    - (ii) whether to his or her knowledge any allegations of professional misconduct against him or her are outstanding and, if so, particulars of each allegation;
  - (d) whether to the local operative's knowledge a court (in this State or elsewhere) has ever made any adverse comment about his or her credibility and, if so, particulars of the comment;
  - (e) whether the local operative has ever made a false representation when the truth was required and, if so, particulars of the representation;
  - (f) particulars of anything else known to the local operative that may be relevant to his or her credibility.
- (3) A person cannot be compelled to disclose or produce a statutory declaration made under this section in any proceedings.
- (4) However, subsection (3) does not apply to—
- (a) proceedings for perjury or otherwise in respect of the falsity of the statutory declaration; or
  - (b) proceedings of a disciplinary nature against a law enforcement officer; or
  - (c) investigations or inquiries by a person or body in any jurisdiction having jurisdiction to investigate or inquire into the conduct of a law enforcement officer.
- (5) The chief officer must make all reasonable enquiries to enable him or her to ascertain the information required to be included in the certificate under this Part.

### **32—Protection of decision to give witness identity protection certificate**

- (1) A decision to give a witness identity protection certificate—
- (a) is final; and
  - (b) cannot be appealed against, reviewed, called into question, quashed or invalidated in any court.
- (2) Subsection (1) does not prevent a decision to give a witness identity protection certificate from being called into question in the course of any proceedings of a disciplinary nature against the person who made the decision.

### 33—Form of witness identity protection certificate

- (1) The chief officer of a law enforcement agency must ensure that a witness identity protection certificate given in respect of a local operative in relation to proceedings includes the following information:
  - (a) the name of the law enforcement agency of which he or she is the chief officer;
  - (b) the date on which the certificate is given;
  - (c) the grounds for giving the certificate;
  - (d) if the local operative—
    - (i) is known to a party to the proceedings or a party's lawyer by a name other than the local operative's real name—that name (the *assumed name*); or
    - (ii) is not known to any party to the proceedings or any party's lawyer by a name—the local operative's court name for the proceedings;
  - (e) the period during which the local operative was involved in the investigation to which the proceedings relate;
  - (f) whether the local operative has ever been convicted or found guilty of an offence (in this State or elsewhere) and, if so, particulars of each offence;
  - (g) whether any charges against the local operative for an offence are pending or outstanding (in this State or elsewhere) and, if so, particulars of each charge;
  - (h) if the local operative is or was a law enforcement officer—
    - (i) whether the local operative has ever been found guilty of professional misconduct and, if so, particulars of each finding; and
    - (ii) whether to the local operative's knowledge any allegations of professional misconduct against him or her are outstanding and, if so, particulars of each allegation;
  - (i) whether, to the knowledge of the person giving the certificate, a court (in this State or elsewhere) has ever made any adverse comment about the local operative's credibility and, if so, particulars of the comment;
  - (j) whether, to the knowledge of the person giving the certificate, the local operative has ever made a false representation when the truth was required and, if so, particulars of the representation;
  - (k) if there is anything else known to the person giving the certificate that may be relevant to the local operative's credibility, particulars of the thing.
- (2) A witness identity protection certificate must not contain information that may allow the local operative's identity, or where the local operative lives, to be revealed.

### 34—Cancellation of witness identity protection certificate

- (1) If, in relation to proceedings, the chief officer of a law enforcement agency considers that it is no longer necessary or appropriate to prevent the disclosure of the identity of a local operative or where he or she lives, the chief officer may cancel a witness identity protection certificate in respect of the local operative.

- (2) If a witness identity protection certificate is cancelled after it has been filed in court under section 37, the chief officer must immediately give written notice to the court and each party to the proceedings that the certificate has been cancelled.

### **35—Permission to give information disclosing operative's identity etc**

- (1) Where the chief officer of a law enforcement agency gives a witness identity protection certificate in respect of a local operative in relation to proceedings, the chief officer may, if he or she considers it necessary or appropriate for information that discloses, or may lead to the disclosure of, the local operative's identity or where he or she lives to be given otherwise than in the proceedings, give written permission to a person to give the information.
- (2) The permission—
  - (a) must—
    - (i) identify the person who may give the information; and
    - (ii) identify the person to whom the information may be given; and
    - (iii) specify the information that may be given; and
  - (b) may specify how the information may be given.

## **Division 3—Use of witness identity protection certificates in proceedings**

### **36—Application and interpretation of Division**

- (1) This Division applies to proceedings in this State in which an operative is, or may be, required to give evidence obtained as an operative.
- (2) To remove any doubt, this Division does not affect the operation of the common law in relation to the protection of the identity of a person who is not an operative who gives or intends to give evidence in proceedings in this State.
- (3) In this Division—

*witness identity protection certificate* means—

- (a) a witness identity protection certificate given in respect of a local operative;  
or
  - (b) an interstate witness identity protection certificate,
- as the case requires.

### **37—Filing and effect of filing of witness identity protection certificate in court**

- (1) A witness identity protection certificate for an operative in relation to proceedings in this State must be filed in court before the operative gives evidence in the proceedings.
- (2) A person who files a witness identity protection certificate in court under this section must serve a copy of the certificate—
  - (a) on each party to the proceedings at least 14 days (or such shorter period as may be agreed by the parties) before the day on which the operative is to give evidence; and
  - (b) by order of the court—on any other person specified in the order.

- (3) If—
- (a) a witness identity protection certificate given in respect of an operative is filed under this section; and
  - (b) either—
    - (i) a copy of the certificate is served in accordance with this section; or
    - (ii) the court gives permission for this section to apply despite non-compliance with this section,
- then—
- (c) the operative may give evidence in the proceedings under the assumed name, or court name, specified in the certificate; and
  - (d) subject to this Division—
    - (i) a question must not be asked of a witness (including the operative) that may lead to the disclosure of the operative's identity or where the operative lives; and
    - (ii) a witness (including the operative) cannot be required to (and must not) answer a question, give evidence or provide information that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives; and
    - (iii) a person involved in the proceedings must not make a statement that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives.
- (4) The presiding officer in proceedings in a court in which a witness identity protection certificate in respect of an operative has been filed may require the operative—
- (a) to disclose his or her true identity to the presiding officer; and
  - (b) to provide the presiding officer with photographic evidence of that identity.
- (5) For the purposes of this section, a *person involved in proceedings* includes—
- (a) the court; and
  - (b) a party to the proceedings; and
  - (c) a person given permission to be heard or make submissions in the proceedings; and
  - (d) a lawyer representing a person referred to in paragraph (b) or (c) or a lawyer assisting the court in the proceedings; and
  - (e) any other officer of the court or person assisting the court in the proceedings; and
  - (f) a person acting in the execution of any process or the enforcement of any order in the proceedings.

### **38—Orders to protect operative's identity etc**

- (1) The court in which a witness identity protection certificate is filed may make any order it considers necessary or desirable to protect the identity of the operative in respect of whom the certificate has been filed or to prevent the disclosure of where the operative lives.
- (2) A person is guilty of an offence if—
  - (a) the person knows, or is reckless as to whether, an order has been made under this section; and
  - (b) the person intentionally, knowingly or recklessly contravenes the order.Maximum penalty: Imprisonment for 2 years.
- (3) Subsection (2) does not limit the court's power to punish for contempt.

### **39—Directions to jury**

Subject to section 40(4)(b), if an operative in respect of whom a witness identity protection certificate has been filed in court in relation to proceedings gives evidence in the proceedings, the court must (unless it considers it inappropriate) direct the jury not to give the operative's evidence any more or less weight, or draw any adverse inferences against the defendant or another party to the proceedings because the certificate has been filed or the court has made an order under section 38.

### **40—Application for disclosure of operative's identity etc in proceedings**

- (1) If a witness identity protection certificate in respect of an operative has been filed in a court in relation to proceedings, a party to the proceedings or a lawyer assisting the court in the proceedings may, at any time after the certificate has been filed, apply to the court—
  - (a) for permission—
    - (i) to ask a question of a witness (including the operative) that may lead to the disclosure of the operative's identity or where the operative lives; or
    - (ii) for a person involved in the proceedings to make a statement that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives; or
  - (b) for an order requiring a witness (including the operative) to answer a question, give evidence or provide information that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives.
- (2) An application under this section must be heard in the absence of the jury (if any).
- (3) The court may give permission or make an order under this section if (and only if) the court is satisfied that—
  - (a) there is evidence that, if accepted, would substantially call into question the operative's credibility; and
  - (b) it would be impractical to test properly the credibility of the operative without risking the disclosure of, or disclosing, the operative's identity or where the operative lives; and



- (c) it is in the interests of justice that the operative's credibility be tested.
- (4) Each party to the proceedings must be informed of any proposal by the court to give permission or make an order under this section and, if the proposed permission or order relates to a witness who is the operative in respect of whom the witness identity protection certificate has been filed—
  - (a) if the witness has not yet given evidence in the proceedings—the party calling the witness must be given the opportunity to withdraw the witness (in which case, the permission or order relating to that witness lapses);
  - (b) if the witness has already given evidence in the proceedings—the court may, and if a party so requests must, warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
- (5) Unless the court considers that the interests of justice require otherwise, the court must be closed—
  - (a) when an application is made under this section; and
  - (b) if permission is given or an order made in response to the application—when the evidence is given or information provided that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives.
- (6) The court must make an order suppressing the publication of anything said—
  - (a) when an application is made under this section; and
  - (b) if permission is given or an order made in response to the application—when the evidence is given or information provided that discloses, or may lead to the disclosure of, the operative's identity or where the operative lives.
- (7) The court may, under this section, make any other order it considers appropriate to protect the operative's identity or to prevent the disclosure of where the operative lives.
- (8) Nothing in this section prevents the taking of a transcript of court proceedings but the court may make an order for how the transcript is to be dealt with, including an order suppressing its publication.
- (9) A person is guilty of an offence if—
  - (a) the person knows, or is reckless as to whether, an order has been made under this section; and
  - (b) the person intentionally, knowingly or recklessly contravenes the order.

Maximum penalty: Imprisonment for 2 years.
- (10) Subsection (9) does not limit the court's power to punish for contempt.

#### **41—Offences**

- (1) A person commits an offence if—
  - (a) a witness identity protection certificate in respect of an operative has been given; and
  - (b) the person knows, or is reckless as to whether, the certificate has been given; and

- (c) the person intentionally, knowingly or recklessly does something (the *disclosure action*) that discloses, or is likely to lead to the disclosure of, the operative's identity or where the operative lives; and
- (d) the person knows, or is reckless as to whether, the certificate has not been cancelled (whether under this Act or a corresponding law) before the person does the disclosure action; and
- (e) the person knows, or is reckless as to whether—
  - (i) the disclosure action is not permitted under this Act; or
  - (ii) the disclosure action is not authorised under a corresponding law.

Maximum penalty: Imprisonment for 2 years.

- (2) A person is guilty of an offence against this subsection if the person commits an offence against subsection (1) in circumstances in which the person—
  - (a) intends to endanger the health or safety of another or prejudice the effective conduct of an investigation; or
  - (b) knows, or is reckless as to whether, the disclosure action—
    - (i) endangers or will endanger the health or safety of another; or
    - (ii) prejudices or will prejudice the effective conduct of an investigation.

Maximum penalty: Imprisonment for 10 years.

## **Division 4—Delegation**

### **42—Delegation**

- (1) Despite any other Act or law to the contrary, the functions of a chief officer of a law enforcement agency under this Part may not be delegated to any other person except as provided by this Division.
- (2) A chief officer of a law enforcement agency may delegate any of the chief officer's functions under this Part (except this power of delegation) to a senior officer of the agency.
- (3) In this Division—

*senior officer* means—

- (a) in relation to SA Police—a Deputy Commissioner;
- (b) in relation to the Australian Crime Commission—
  - (i) the Director National Operations; or
  - (ii) the General Manager National Operations; or
  - (iii) a member of staff of the Australian Crime Commission who is an SES employee or acting SES employee (within the meaning of the *Australian Crime Commission Act 2002* of the Commonwealth) and who holds a position that is prescribed by the regulations for the purposes of this definition.

## **Part 5—Application of Act to approvals, authorities or certificates under corresponding laws**

### **43—Application of Act to approvals under corresponding laws**

The following provision applies to anything done in this State in relation to a corresponding approval as if it were an approval given under Part 2:

section 5 (Legal immunity of persons taking part in approved undercover operations).

### **44—Application of Act to authorities under corresponding laws**

The following provisions apply to anything done in this State in relation to a corresponding authority as if it were an authority granted under Part 3:

- (a) section 16 (Legal immunity of officers of issuing agencies);
- (b) section 18 (Assumed identity may be acquired and used);
- (c) section 19 (Legal immunity of authorised persons acting under authority);
- (d) section 21 (Particular qualifications);
- (e) section 22 (Effect of being unaware of variation or cancellation of authority);
- (f) section 25 (Misuse of assumed identity);
- (g) section 26 (Disclosing information about assumed identity).

### **45—Application of Act to witness identity protection certificates under corresponding laws**

The following provisions apply (with any necessary modifications) to a witness identity protection certificate given under a corresponding law as if it were a witness identity protection certificate given under Part 4:

- (a) section 37 (Filing and effect of filing of witness identity protection certificate in court);
- (b) section 38 (Orders to protect operative's identity etc);
- (c) section 39 (Directions to jury);
- (d) section 41 (Offences).

## **Part 6—Miscellaneous**

### **46—*State Records Act 1997* and *Freedom of Information Act 1991* not to apply**

- (1) The *State Records Act 1997* does not apply to information obtained under this Act.
- (2) Information obtained under this Act is not liable to disclosure under the *Freedom of Information Act 1991*.

## **47—Annual report**

- (1) As soon as practicable after 30 June in each year, the chief officer of a law enforcement agency must submit a report to the Minister that includes the following information:
  - (a) in relation to Part 2—
    - (i) the classes of offence for which approvals were given or renewed during the period of 12 months ending on the preceding 30 June; and
    - (ii) the number of approvals given or renewed during that period for offences of each class;
  - (b) in relation to Part 3—
    - (i) the number of authorities granted during the period of 12 months ending on the preceding 30 June; and
    - (ii) a general description of the activities undertaken by authorised persons when using assumed identities under this Act during that period; and
    - (iii) the number of applications for authorities that were refused during that period; and
    - (iv) a statement as to whether or not any fraud or other unlawful activity was identified by an audit under that Part during that period; and
    - (v) any other information relating to authorities and assumed identities that the Minister considers appropriate;
  - (c) in relation to Part 4—
    - (i) the number of witness identity protection certificates given during the period of 12 months ending on the preceding 30 June; and
    - (ii) the basis on which the chief officer was satisfied about the matters mentioned in section 31(1)(b) for each certificate; and
    - (iii) if permission was given or an order made under a provision of a corresponding law that corresponds to section 40 in interstate proceedings in which a witness identity protection certificate in respect of a local operative of the agency was filed—details of the interstate proceedings that relate to the permission or order; and
    - (iv) if a witness identity protection certificate was cancelled—the reason why the certificate was cancelled; and
    - (v) if permission was given under section 35—the reason why the permission was given; and
    - (vi) any other information relating to witness identity protection certificates that the Minister considers appropriate;
  - (d) any other information relating to the administration of this Act that the Minister considers appropriate.
- (2) The report relating to Part 4 must not include information that discloses, or may lead to the disclosure of, an operative's identity, or where the operative lives, unless the witness identity protection certificate in respect of the operative has been cancelled.

- (3) The chief officer must advise the Minister of any information in the report that should, in the chief officer's opinion, be excluded from the report before the report is laid before Parliament because the information, if made public, could reasonably be expected to—
  - (a) endanger a person's safety; or
  - (b) prejudice an investigation or prosecution; or
  - (c) compromise a law enforcement agency's operational activities or methodologies.
- (4) The Minister must—
  - (a) exclude information from the report if satisfied on the advice of the chief officer of any of the grounds set out in subsection (3); and
  - (b) on or before 30 September in each year—cause a copy of the report to be laid before each House of Parliament.

## **48—Regulations**

- (1) The Governor may make such regulations as are necessary or expedient for the purposes of this Act.
- (2) Without limiting the generality of subsection (1), the regulations may—
  - (a) be of general or limited application;
  - (b) differ according to differences in time, place or circumstances.

## **Schedule 1—Repeal and transitional provisions**

### **Part 1—Interpretation**

#### **1—Interpretation**

- (1) In this Schedule—

*commencement day* means the day on which this Schedule comes into operation.
- (2) A reference in an Act, a statutory instrument or any other instrument or document to an undercover operation approved under the *Criminal Law (Undercover Operations) Act 1995* is to be read as a reference to an undercover operation approved under this Act and is to be construed accordingly.

### **Part 2—Repeal of *Criminal Law (Undercover Operations) Act 1995***

#### **2—Repeal of *Criminal Law (Undercover Operations) Act 1995***

The *Criminal Law (Undercover Operations) Act 1995* is repealed.

### **Part 3—Transitional provisions**

#### **3—Approved undercover operations**

An undercover operation that was approved under the repealed Act immediately before the commencement day will be taken to be an undercover operation approved under Part 2.

#### **4—Assumed identities**

- (1) An authority to use an assumed identity granted in accordance with the policies and procedures of SA Police to a member of SA Police that was in force immediately before the commencement day will be taken, for the period referred to in subclause (2), to be an authority granted under Part 3 to use the assumed identity.
- (2) The period is from the start of the commencement day until the earlier of the following:
  - (a) the day on which cancellation of the authority under Part 3 takes effect; or
  - (b) 6 months after the commencement day.
- (3) Nothing in this clause prevents the law enforcement officer from applying for and being granted an authority under Part 3 in relation to the assumed identity.
- (4) An authority may be granted under Part 3 in relation to criminal activity occurring before, on or after the commencement day.

#### **5—Witness identity protection**

- (1) A witness identity protection certificate may be given under Part 4 in relation to interstate proceedings (within the meaning of that Part) that is commenced on or after the commencement day.
- (2) An interstate witness identity protection certificate may be filed under Part 4 in proceedings in this State that is commenced on or after the commencement day.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act

Year	No	Title	Assent	Commencement
2009	7	<i>Criminal Investigation (Covert Operations) Act 2009</i>	26.2.2009	1.7.2009 ( <i>Gazette 25.6.2009 p2999</i> )