**The Parliament of the Commonwealth of Australia**

# Senate Legal and Constitutional Legislation Committee

## Consideration of legislation referred to the Committee

## Inquiry into the Provisions of the Measures to Combat Serious and Organised Crime Bill 2001

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# CHAPTER 1

# INTRODUCTION

## Background

1.1 On 4 April 2001, the Senate Selection of Bills Committee referred the provisions of the Measures to Combat Serious and Organised Crime Bill 2001 ('the Bill') to the Legal and Constitutional Legislation Committee ('the Committee') for inquiry and report by 19 June 2001. The Senate agreed to this reference. On 19 June 2001, the Committee sought and was granted an extension of time to report until 25 June 2001.

## Reason for Referral

1.2 The Selection of Bills Committee stated that the referral of this Bill was to consider the following issues:[1]

- Extension of the scope of controlled operations;
- Facilitation of the use by Commonwealth intelligence agencies and Commonwealth and State and Territory law enforcement agencies of assumed identities;
- Provisions for the protection of child victims and witnesses in Commonwealth sex offences proceedings;
- Detention and questioning issues;
- Use of listening devices in circumstances where it is not possible to identify suspected offenders; and
- Clarification and updating of the legislative definitions of 'cash dealers' and 'underground bankers'.

## Earlier Committee inquiries into similar legislation

1.3 In 1991, the Committee considered the amendments which would form Part 1C of the *Crimes Act 1914*.[2] In 1995 it also considered the controlled operations provisions which became Part 1AB of the Crimes Act,[3] and which the current Bill seeks to extend.

*Parliamentary Joint Committee on the National Crime Authority (PJCNCA)*

1.4 In December 1999, the PJCNCA tabled its report *Street Legal* which considered the use of controlled operations by the National Crime Authority (NCA). The Committee made several recommendations concerning the need for controlled operations, including uniform

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1 Selection of Bills Committee, *Report No. 6 of 2001*, 5 April 2001

2 See below, Chapter 4

3 *Crimes Amendment (Controlled Operations) Bill 1995*

legislation in the Commonwealth, States and Territories.[4] The PJCNCA also recommended that there be an independent oversighting body to monitor the management of controlled operations,[5] a measure which has not been incorporated into the current Bill.

*Cases of importance*

1.5 There are two legal cases which have had a considerable impact on the development of matters which are dealt with in the Bill, the Ridgeway and Nicholas cases. The Ridgeway[6] case was considered in *Street Legal*,[7] and concerns the freedom or otherwise which law enforcement officers have to commit crimes in order to pursue and catch criminals. In the 1996 legislation relating to controlled operations,[8] the concept of exemption from liability in respect of criminal matters was introduced with respect to the limited controlled operations power permitted by the legislation.[9]

1.6 The Nicholas case, among other matters, concerns the use of listening devices in a manner not authorised by the warrant. The outcome of the case – which was that the warrant itself was illegal – has limited the use of listening device warrants from that time (2000).[10] It is the intention of Schedule 5 to overcome this problem by extending the type of legally available warrants to include specific item warrants.

**Purpose of the Bill**

1.7 The Bill proposes to amend the *Crimes Act 1914* (Crimes Act), *Australian Federal Police Act 1979* (AFP Act), *Customs Act 1901* (Customs Act) and *Financial Transaction Reports Act 1988* (FTR Act) to :

> extend the use of controlled operations to all Commonwealth offences. [11]

1.8 Controlled operations are currently limited to narcotics offences, and the Bill proposes to allow controlled operations in respect of all Commonwealth offences.

> The Bill ensures that the important controlled operation technique will be available to investigate other forms of serious criminal activity, including money laundering, people smuggling (and other forms of smuggling such as the trade in illegal firearms) that put the community at serious risk.[12]

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4 See Parliamentary Joint Committee on the National Crime Authority, *Street Legal*, Recommendation 1, p. xiii

5 Parliamentary Joint Committee on the National Crime Authority, *Street Legal*, Recommendation 10, p. xiv. It was proposed that the Commonwealth Ombudsman fulfil this role

6 *Ridgeway v The Queen* 184 CLR 19

7 Parliamentary Joint Committee on the National Crime Authority, *Street Legal*, pp. 8-9

8 *Crimes Amendment (Controlled Operations) Act 1996*

9 That is, narcotic matters under S 233 of the *Customs Act 1901.*

10 See *Submission 3*, Australian Federal Police, p. 16

11 *Measures to Combat Serious and Organised Crime Bill 2001*, Explanatory Memorandum, p. 3

12 *Submission 3*, Australian Federal Police, p. 2

- increase the Commonwealth agencies which can run controlled operations and the officers who can authorise such operations;
- extend to a much wider range of persons than at present the exemption from criminal liability, and **introduce** an exemption from civil liability in respect of offences committed as part of a controlled operation. [13] This civil exemption will be available to law enforcement officers and to other persons; and
- permit the use of assumed identities;

1.9 The main objective of the legislation in respect of assumed identities is to both authorise the identity and lengthen the period of time for which an identity may be assumed by a law enforcement officer or another person.

1.10 Currently, there are no provisions in the Crimes Act relating to assumed identities.[14] The objective of the provisions is to allow the creation and maintenance of such identities both by 'approved officers' and 'approved persons'.[15] An approved officer would appear to be an officer of any of a large number of organisations, including ASIO, DIO, ASIS, DSD, ATO, as well as NCA and the AFP. This is on the basis that approved officers would come from 'participating agencies', and the participating Commonwealth agencies include the above, but may also include:

> …any other Commonwealth agency specified in the regulations.[16]

1.11 State and Territory participating agencies increase the source of approved officers, the level of which is not specified, and include police forces, ICAC and similar bodies in Queensland and Western Australia, the NSW Crime Commission and the Queensland Crime Commission, and bodies similar to the ICAC and the NSW Crime Commission that may be established at a later time in other states and territories. In addition, regulations may specify another body or agency of a State or Territory. [17]

1.12 The Bill and submissions from relevant organisations do not provide details of existing powers for members of the AFP, NCA or other Federal bodies to assume identities. Nor is there detailed information available on previous use of such identities, the purpose of various other agencies being involved in their use, the links between the AFP and certain of the participating agencies, and the extent to which this procedure has been developed in

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13 *Measures to Combat Serious and Organised Crime Bill 2001*, Explanatory Memorandum, p. 3. At present only law enforcement officers may commit such crimes, such as importing or transporting drugs, as part of an operation

14 *Ridgeway v The Queen*, in which the issue of entrapment and also the illegality of offences committed during controlled operations was considered. See Parliamentary Joint Parliamentary Committee on the National Crime Authority, *Street Legal* , Paragraphs 1.28-1.32

15 It is not entirely clear who such 'approved' persons might be, as the only definition is by way of a form (15X I *Measures to Combat Serious and Organised Crime Bill 2001*, Explanatory Memorandum, p. 29

16 *Measures to Combat Serious and Organised Crime Bill 2001,* S 15XA and *Measures to Combat Serious and Organised Crime Bill 2001*, Explanatory Memorandum , pp 22-23

17 *Measures to Combat Serious and Organised Crime Bill 2001*, S 15XA

response to particular changes in crime patterns and tools and to the favourable mention of it by other reports. [18] The AFP has stated only that:

> The AFP needs assumed identities to protect federal agents (and officers from cooperating law enforcement and intelligence agencies) when they infiltrate serious and organised crime groups, and for essential support duties such as surveillance. New provisions for assumed identities are required to establish the legislative authority to obtain and use assumed identities, and for safety reasons, to protect the real identity of officers and approved persons who use them to perform law enforcement and related functions.[19]

- allow the same exemptions from civil and criminal liability in respect of approved officers and approved persons as are sought for those persons involved in controlled operations.

1.13 Thus, both major provisions seek to extend powers, to expand the areas in which or from which participants and others may be drawn, extend exemptions and introduce new exemptions.

*Part IC of the Crimes Act 1914*

1.14 Part 1C allows investigating officials to lawfully detain suspects for questioning and confers a range of rights and protections on suspects. The amendments seek to clarify the operation of the Part and to improve the effectiveness of existing mechanisms. One of the objectives of the amendments is to clarify the distinction between persons who are lawfully arrested and those who, for the purpose of applying certain rights and protections, are 'taken to be arrested'. Police may only detain people who are lawfully arrested. Other amendments would enhance some safeguards or address problems that have hampered effective law enforcement.

1.15 The Bill also seeks to:

- Provide protection for child victims and witnesses appearing in Commonwealth sex offence proceedings;
- Permit a warrant authorising the use of a listening device in relation to a particular item to be sought;
- Clarify that financial transaction intelligence provided to AUSTRAC by comparable foreign agencies is FTR information and give AUSTRAC a power to inspect the record keeping systems of cash carriers; and
- Prescribe CrimTrac for the purposes of the Part VIIC (pardons, quashed convictions and spent conviction).[20]

1.16 The Committee has relatively few concerns in respect of the protections developed in respect of child victims and witnesses giving evidence in Commonwealth sexual assault

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18 See *Submission 3*, Australian Federal Police, p. 9

19 *Submission 3*, Australian Federal Police, p. 2

20 See *Measures to Combat Serious and Organised Crime Bill 2001 ,* Explanatory Memorandum, p.1

cases. However, there are some issues in respect of rights, including the right to a fair trial, that require consideration. The provisions concerning listening device warrants are also the issue of more detailed consideration, as are the amendments to Part 1C. The Committee has no concerns in respect of the last two items.

**Conduct of the present inquiry**

1.17 The Committee wrote to a range of organisations and individuals on 9 April 2001 inviting submissions. The Committee received 20 submissions, including supplementaries, which are listed in Appendix 1.

1.18 The Committee held two public hearings. The first hearing was in Canberra on 7 June 2001, and the second was in Sydney on 12 June 2001. Witnesses who gave evidence at these hearings are listed in Appendix 2.

1.19 The Committee also wrote to State and Territory Attorneys-General to obtain their comments on certain aspects of the bill, particularly the proposal to extend civil and criminal indemnity in respect of both law enforcement officers and other persons in respect of State, as well as Commonwealth, offences.

1.20 References made in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary slightly between the proof and the official Hansard transcript.

# CHAPTER 2

## NEED FOR THE BILL

## MONITORING AND ACCOUNTABILITY

2.1 There are several issues which are of concern to the Committee in this legislation. For ease of consideration, these have been grouped by subject, rather than by location in a specific part of the Bill.

**Lack of information about reasons for Bill**

2.2 The Committee is concerned as a matter of process that the Bill offers very little explanation or reason for the amendments, and provides almost no detail on who is affected by them or to whom they may apply. This point was made by the Victorian Criminal Bar Association which stated:

> The Association notes that virtually no objective material has been advanced in support of the need for the proposed extension of the controlled operations provisions to cover all Commonwealth offences. Although the Bill and associated documentation exceeds 140 pages, less than 2 pages purport to illuminate the underlying justification to extend the ambit of the controlled operations provisions to such a vast range of quite disparate offences as are created by myriad pieces of Commonwealth legislation. [1]

2.3 Other witnesses suggested that there were a range of reasons for the bill: the operations that could not run because there were no appropriate powers;[2] previous inquiries such as the Wood Royal Commission;[3] and the existence of legislation in some states.

*Explanatory Memorandum*

2.4 The Explanatory Memorandum provides virtually no background information on the reasons for change. It merely indicates the effect of changes, rather than the reasons for them.

*Second Reading Speech*

2.5 The Second Reading speech gives a very limited background , noting only that:

> The Government is committed to a modern, effective approach to law enforcement. In the twenty-first century, we cannot afford to assume that laws and procedures that were adequate 5, 10 or 15 years ago are appropriate today. Some parts of Commonwealth investigation and procedure law are in need of updating and

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1 *Submission 4,*Victorian Criminal Bar Association, p. 2; see also *Transcript of evidence*, Senator Ludwig, p. 41

2 See below, Paragraphs 2.9-2.10

3 *Transcript of evidence*, Australian Federal Police, p. 41; *Submission 3A*, *Australian Federal Police*, pp. 3-4

> reform, so I have brought forward the Measures to Combat Serious and Organised Crime Bill.[4]

2.6 Some detail is then provided on changes that have occurred and developments in other states and overseas which have led to new crime fighting procedures. While these do provide a broader context in which to view the amendments, it is still a limited context given the extensive powers that are sought. The Committee also considers that further information could have been provided on the extent to which there had been consultation on a number of other issues, such as privacy,[5] the rights of defendants in cases relating to sexual offences,[6] and the rights of persons 'who believe they would not be able to leave [police 'custody'] if they wished to do so.'[7] As a general note, the Committee would observe that greater clarity and information in presenting complex legislation such as this by way of explanatory memorandum and/or the second reading speech would add considerably to the transparency and efficiency of the parliamentary process.

Information provided at public hearings

2.7 Both the Attorney-General's department and the AFP provided some background information on the reasons for the bill at public hearings. With respect to the former, the main argument advanced was that this bill was part of a series of changes:

> This bill is mainly concerned with updating existing law enforcement investigative powers and safeguards in the light of operational experience with existing legislation during the last 10 years. Since the early 1990's the Commonwealth has embarked on a series of amendments which have resulted in the codification of procedures, the aim being to provide clear guidance as to the limits of various powers and at the same time to build in accountability measures to guard against abuse.[8]

2.8 The Department also noted that there was an intention to increase powers in respect of fighting serious and organised crime:

> It is therefore important that we do not develop procedures that are so complex that they become impractical and therefore a hindrance to the objects of the legislation.[9]

2.9 The basis of certain of the amendments was the report by the Parliamentary Joint Committee on the National Crime Authority (PJCNCA), *Street Legal.*[10] However, not all of the recommendations of that report have been accepted by Government.[11] The Attorney-

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4 *Measures to Combat Serious and Organised Crime Bill 2001*, Second Reading Speech, p. 1

5 Especially in relation to listening devices in public areas – see below, Chapter 3

6 See below, Chapter 3

7 *Measures to Combat Serious and Organised Crime Bill 2001*, Second Reading speech, p. 2. Although there is an emphasis on the rights of people in this situation, it would be more to the point were it an obligation on the 'holding' party to ensure that such misapprehension did not arise. See Chapter 4

8 *Transcript of evidence*, Attorney-General's Department, p. 9, and see also p. 13 where a similar point is made

9 *Transcript of evidence*, Attorney-General's Department, p. 9

10 This report was tabled in December 1999, with a Government response being made in March 2001

11 *Transcript of evidence*, Attorney-General's Department, p. 10

General's Department also advised the Committee that there had been consultations in respect of each of the parts of the bill, as well as consideration of relevant reviews which 'involved extensive consultation with the general community and with interested stakeholders – the legal profession and so forth.'[12]

2.10 The Australian Federal Police noted that one of the reasons why the Bill was necessary was that it would provide powers which, all other things being equal, would facilitate more effective crime fighting.[13] In its original submission to the Committee, the AFP had stated that the lack of various provisions had severely limited its capacity – for example, it had not applied for listening device warrants since the year 2000 because of the problems concerned with the legality of using warrants in respect of an item, and the issues of admissibility of evidence from such devices.[14]

2.11 This issue arose also in context of the discussion concerning the capacity of law enforcement agencies to actually take on additional investigations because of limited resources. If they were unable to, then the use of various powers could be of limited benefit.[15] However, of the other relevant factors mentioned by the AFP,[16] human resource issues were not mentioned. The NCA believed the Bill was necessary because it would standardise or harmonise powers between agencies, and therefore facilitate operations:

> Both the NCA and the AFP can point to successes that have flowed from the regularisation of the albeit limited provisions sanctioning controlled operations since the enactment of the [principal] legislation.[17]

*Part 1C*

2.12 The amendments to Part 1C of the *Crimes Act 1914* are badly drafted, and need to be placed in a context. In part this results from the fact that the amendments are an attempt to clarify the earlier provisions which were themselves unclear and to an extent incomplete.[18] The result is more to increase than reduce confusion,[19] at least as far as the ordinary reader is

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12 *Transcript of evidence*, Attorney-General's Department, p. 55

13 *Submission 3A*, Australian Federal Police, pp. 3-4

14 *Submission 3*, Australian Federal Police, p. 16; see also below, Chapter 3, Paragraph 3.34

15 Although it is noted that they may be of considerable benefit in those areas where they are the only useful method: *Transcript of evidence*, Australian Federal Police, p. 37

16 See below, Paragraphs 2.16, 2.47, 2.69

17 *Submission 7A*, National Crime Authority, p. 1

18 See below, Chapter 4. Some of the amendments are stated as being the 'result of a review' of Part 1C *(Measures to Combat Serious and Organised Crime Bill 2001*, Second Reading speech, p. 5, but little information was provided about this review. However, the review was undertaken in 1995 and was considered to have limited connection with the amendments in the bill

19 The confusion is typified by the statement in *Measures to Combat Serious and Organised Crime Bill 2001*, Second Reading speech, p. 5, that:

'The distinction [between persons who are lawfully arrested and those who are deemed to be arrested] is important in ensuring that persons who believe they would not be allowed to leave if they wished to do so are afforded the same rights and protections as persons who have been lawfully arrested'

The Committee is unable to understand how drawing a distinction between two groups of people ensures that they are treated in the same way.

concerned. Insofar as this section of the legislation deals with the rights of individuals, and both the AFP and the Attorney-General's Department have stated that it is intended to ensure those rights are enforced,[20] it is essential that they are easily understood.

2.13 However, the Committee is also concerned that neither the AFP nor the Attorney-General's Department has clearly stated that some of the difficulties arising from the drafting of Part 1C result from the way in which rights are provided to persons who are not lawfully arrested but who are 'taken to be arrested'. The more straightforward approach would be to clearly state to persons that they are either arrested or not arrested. If they are not arrested, they cannot be detained, and therefore the 'rights' available to them are unnecessary if they choose to leave. If they agree to remain, even though they cannot be detained, obviously certain rights should be available. The Committee has made recommendations concerning Part 1C at Chapter 4 below.

*The Meaning of 'Serious' Crime*

2.14 One of the issues that was canvassed during public hearings was the fact that the bill applies to all Commonwealth offences, not only those that could be considered to fall within the category of 'serious' or 'organised' crime:

> It is practically impossible to reach an informed view as to the necessity or otherwise of extending the controlled operations provisions from carefully targeted, offence specific provisions to wholly generalised regime. [21]

2.15 Similarly, the Victorian Criminal Bar Association commented on the ambiguity in relation to what might constitute serious offences:

> … the message that appears to come out from the flavour of a reading of the bill is that it is too difficult to create a statement of what might constitute serious offences. … it is not beyond the wit of a draftsperson to come up with a form of words which makes it quite plain that the target here is either serious criminal offences per se or systemic breaches of perhaps less serious criminal offences as an adjunct to some greater criminal conduct. So one would not necessarily say that, because a matter was a summary offence, it could not properly come within this, because it might be that it is systemic and cumulatively very significant.[22]

2.16 In contrast, the AFP stated that it was important not to be too specific about the nature of the crime covered by the provisions because of the constantly changing types of crimes that constituted serious crime, much of which was likely to be organised.[23] As was

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20 See *Submission 3*, Australian Federal Police, p. 14, *Measures to Combat Serious and Organised Crime Bill 2001*, Second Reading speech, p. 5, *Submission 10*, Attorney-General's Department, p. 1

21 See *Submission 4*, Victorian Criminal Bar Association, p. 3; *Transcript of evidence*, Senator Ludwig, p. 16

22 *Transcript of evidence*, Victorian Criminal Bar Association, p. 20

23 See also *Transcript of evidence*, Attorney-General's Department, p. 16; a further issue is whether only certain agencies should be involved in pursuing serious crime, with other less serious matters possibly being pursued by agencies which do not have the same powers (see *Transcript of evidence*, Australian Customs Service, pp. 4-7). However, it is also argued that crimes which may appear less serious - because of the amount of money or drugs involved - may nonetheless be part of a network of organised crime

noted by the AFP[24] and also the NCA, it is likely that the cost of controlled operations is such that it would in reality only be applied to matters that were serious. Further, the NCA can only become involved in issues which are 'serious' in terms of their nature and size of the operation.[25]

2.17 The Committee is conscious of the argument by the AFP that the nature of the crimes that constitute 'serious crime' is constantly changing. However, the Committee supports the view that clarification of what might constitute serious crime would assist the parliament in consideration of the present bill and decision-makers in its application in the future.

**Recommendation 1**

The Committee **recommends** that 'serious and organised crime' be defined for the purposes of this Bill.

2.18 An additional factor that was considered important in the issue of 'serious' crime is the possible effect on agency staff of both being involved in serious crime issues and, possibly, in the committing of serious crimes themselves:

> What concerns me, then, is whether the ACS has internal disciplinary measures to deal with the effect of that: the effect on the officers should they be involved in these sorts of criminal activities, although with immunity – as they pass through, the effect on them emotionally, psychologically. Does the ACS have the facilities at their disposal?[26]

2.19 This is related to the issue, discussed below,[27] of whether there will be a detrimental effect among police and among the community in general from the extension of exemption from liability.

2.20 With respect to these matters, the Committee believes that there are sufficient guidelines in place within agencies to ensure that inappropriate actions will not be taken in respect of minor Commonwealth offences.

**Demonstrated Need for the Controlled Operations and Assumed Identities Power**

2.21 The measures which are proposed in respect of controlled operations and assumed identities are similar. Both seek extensive powers not only for a wide range of law enforcement officers, but for other persons. The bill seeks to extend the right to controlled operations to all Commonwealth offences and to several agencies, including the Australian Customs Service. It also seeks an extension of indemnity from prosecution for law enforcement officers and others, for both Commonwealth and state offences. The assumed

24 *Transcript of evidence*, Australian Federal Police, p. 37

25 *Transcript of evidence*, National Crime Authority, p. 31

26 See *Transcript of evidence*, Senator Ludwig, p. 17

27 See below, Paragraphs 2.41-2.46

identities power is also sought for staff of a wide range of agencies,[28] participating State agencies,[29] and other 'approved' persons.

2.22 The monitoring and control of such authorisations is limited primarily to in-house procedures. With respect to assumed identities, there is no requirement to cancel or terminate the identity, and the authorisation is in force until revoked.[30] While there may be a requirement for the NCA to run long-term assumed identities,[31] there was no evidence provided to suggest that other agencies had such needs. The Australian Customs Service, for example, has operated with minimal false identification for some time. In evidence to the Committee it stated that 'it would be valuable if [ACS officers] were able to assume an identity other than their customs identity'.[32] The creation of complex false identities, however, did not appear to be necessary.

*Indemnity*

2.23 The bill grants protection from criminal liability and indemnification in respect of both controlled operations and the use of assumed identities.[33] Some limits are placed on the extent of approved or authorised actions. Persons who are acting outside of the authority do not obtain such exemptions. Further, controlled operations may not involve inducing people to commit actions they would not otherwise undertake, or involve the commission of a sexual offence 'or an offence involving the death of or serious injury to any person.'[34] However, it is not clear what liability exists if, during the course of the operation, any prohibited action occurred and was considered unavoidable or necessary.

*Consultations with State governments on controlled operations*

2.24 The controlled operations powers include an extension of exemption from criminal liability for actions committed during the course of a controlled operation. Currently, the legislation provides this exemption for law enforcement officers as defined, in respect of narcotics operations. The bill seeks to extend the exemption to offences committed during all controlled operations, not only to law enforcement officers but to persons who are 'involved' in such operations. These persons may include informants. The bill also seeks exemption from civil liability in respect of offences committed, both by law enforcement officers and by other persons.

2.25 The exemption, with some limitations, is intended to cover Commonwealth and State offences. Given this, the Committee sought information on the extent of consultations that had occurred with relevant state parties, and also wrote to State Attorneys-General. It also sought to determine if there had been any broader discussion with relevant community groups.

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28 *Measures to Combat Serious and Organised Crime Bill 2001*

29 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 28, S 15XH

30 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 29, S 15XJ

31 See *Transcript of evidence*, National Crime Authority, p. 32

32 *Transcript of evidence*, Australian Customs Service, p. 2

33 See *Measures to Combat Serious and Organised Crime Bill 2001*, p. 4, S15G(1)(a), pp. 6-7, Ss15I and 15IA(controlled operations), pp. 25-26, S 15XC, 15XD(assumed identities)

34 *Measures to Combat Serious and Organised Crime Bill 2001*, pp.8-9, S 15IB (1) and (2)

2.26 From available information, it appeared that there had been virtually no public discussion and rather limited consultation with state bodies:

> …in terms of public discussion at state level…obviously that is more limited or certainly has not occurred. But, as far as the states or territories advisers are concerned, we have discussed this as one of a number of issues. It will not be a total surprise to the states and territories. [35]

2.27 According to other witnesses, there had been increasing emphasis by State governments on the Commonwealth assuming increased control in respect of some law enforcement activities, or in 'the introduction of appropriate legislation as a means of establishing complementarity.'[36] Thus, although there was limited evidence about the extent and nature of discussions, it was assumed by the AFP that the measures would be welcomed by State governments:

> In November 1999 the Standing Committee of Attorneys-General formed a joint working group with the Australian Police Ministers Council, with the aim of developing appropriate legislation in relation to controlled operations and assumed identities. The development of the current legislation has been a standing agenda item since the joint working group first met in March last year.[37]

2.28 In subsequent evidence, the AFP also noted that the need for powers, though not always linked to a request from specific agencies, had nonetheless been discussed over some years.[38] However, evidence as to the specific involvement of relevant state parties was lacking, an issue of particular concern in considering the issue of indemnity for offences against State laws. [39]

2.29 The relationship with state governments was noted as still being an issue for the NCA, even if the legislation was passed: 'it is a problem we have to address – dealing with the different provisions and the way they will impact upon the one operation that will cross borders.'[40] However, although there appears to be no difficulty acting in other jurisdictions in relation to Commonwealth offences, it appeared that the opposite did not apply:

> We could implement the bill as it exists without reciprocal arrangements, because the Commonwealth legislation would just have force of its own effect, but the reciprocal arrangements would be if there was … a uniform state-Commonwealth scheme. [41]

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35 *Transcript of evidence*, Attorney-General's Department, p. 10; see also *Transcript of evidence*, National Crime Authority, p. 28 where reference is made to discussions with some other bodies

36 *Transcript of evidence*, Australian Federal Police, p. 38

37 *Transcript of evidence*, Australian Federal Police, pp. 38, 39; see also *Transcript of evidence*, Attorney-General's Department, p. 58

38 *Transcript of evidence*, Australian Federal Police, p.41

39 See *Transcript of evidence*, Australian Customs Service, p. 1: the ACS considered there were limitations with respect to their current authority, but believed the bill would grant appropriate protection with respect to actions interstate

40 *Transcript of evidence*, National Crime Authority, p. 29

41 *Transcript of evidence*, National Crime Authority, p. 30; see also *Submission 7A*, National Crime Authority, p. 2

2.30 The issue of indemnity in respect of state offences committed by Commonwealth law enforcement officers and other persons was not addressed in this discussion, but was dealt with more specifically at a later stage. The provisions of the New South Wales controlled operations legislation, as amended in 1999, exempted some Commonwealth agencies from prosecution.[42] However, unless other states have equivalent provisions, it appears that the Commonwealth legislation cannot have full effect in relation to immunities or indemnity.[43] In addition, the issue of other persons who are not law enforcement officers also receiving indemnity remains unanswered.

Constitutional power in respect of exemption from liability and indemnity for State offences

2.31 The power of the Commonwealth under Sections 51 and 109 of the Constitution to legislate in respect of 'Commonwealth' matters and to override state legislation that is contrary or inconsistent, appears to have been the basis for the belief that the legislation may claim immunity from prosecution in respect of offences against State legislation.[44] The Attorney-General's Department stated that they were satisfied with advice received on this matter,[45] relating back to the 1995 bill: [46]

> The legal view that was taken at that point was that as long as the Commonwealth had an appropriate head of power – for example, if there is an investigation of a drug trafficking offence which is within the Commonwealth's external affairs power – then the Commonwealth has the capacity to override state law.

2.32 This explanation lacks sufficient detail to demonstrate that the States are fully aware of the implications. The bill notes in respect of both the controlled operations provisions and the provisions concerning assumed identities that:

> It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.[47]

State and Territory legislative coverage for controlled operations and assumed identities

2.33 As mentioned in Chapter 1, the High Court's decision in the *Ridgeway* case in 1995 highlighted problems associated with the use of controlled operations, particularly the evidentiary problems that arise in any prosecutions following a controlled operation. State and Territory responses to the problems associated with controlled operations have varied. While the Commonwealth legislated to regulate such operations, not all States and Territories followed suit.

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42 *Transcript of evidence*, National Crime Authority, p. 34

43 *Transcript of evidence*, National Crime Authority, p. 34; see also *Submission 9*, Victorian Bar, p. 4: 'the Commonwealth cannot exempt persons from criminal liability with respect to State offences, except for those offences which are incidental to exercise of a head of Commonwealth legislative power. Clause 15I may be unconstitutional to the extent that it purports to exempt a law enforcement officer from criminal liability for the offences falling outside S51 of the Constitution.'

44 *Transcript of evidence*, Attorney-General's Department, p.60, and see also p. 55

45 *Transcript of evidence*, Attorney-General's Department, p. 15

46 The *Crimes Amendment (Controlled Operations) Bill 1995*, which came into effect in 1996

47 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 5, S 15GA, and p. 34, S15XV

2.34 New South Wales, South Australia and Queensland have enacted comprehensive legislation (in fact South Australia's legislation preceded the Commonwealth's) but other jurisdictions (Western Australia, Tasmania and the Northern Territory) continue to rely on judicial and prosecutorial discretion, accompanied in some instances by isolated legislative provisions designed to assist investigations into drug related criminal activities.[48] In some cases (for example in Western Australia) immunity from prosecution under those provisions is also available to civilians.

2.35 Victoria's response is different yet again. Victoria has designed internal administrative procedures for the authorisation and conduct of controlled operations and these are contained in the Victoria Police's *Operating Procedure Manuals.* The Chief Commissioner of Police derives authority to make such orders under the *Police Regulation Act 1958 (Vic).* In addition, section 51 of the *Drugs Poison and Controlled Substances Act 1981 (Vic)* provides immunity to police officers and other persons from prosecution for drug related offences where the requisite written instructions have been issued to the officer or person concerned.

2.36 In New South Wales, controlled operations are governed by the *Law Enforcement (Controlled Operations) Act 1997.* Initially, the Act enabled officers of certain NSW agencies (Police, ICAC and the Police Integrity Commission) to apply to their CEOs for an authority to conduct a controlled operation in relation to the investigation of any criminal or corrupt conduct. If satisfied of certain things, the CEO could issue an authority for a controlled operation. The NSW Act enables civilians to be used in controlled operations but only where it is wholly impracticable for a law enforcement officer to be used. Further, the code of conduct agreed upon between the agencies and provided for by the regulations under the principal Act[49] requires that written undertakings be obtained from civilian participants about the extent of their involvement in a controlled operation. Under the NSW Act, an authority to conduct a controlled operation is valid for up to three months but is also renewable. The NSW Act also provides for the retrospective authorisation of a controlled operation where unlawful activity (excluding murder and certain other offences) is necessary to avert a life-threatening situation. Also, the NSW Act declares certain activities associated with assumed names to be lawful and immunises those engaged in controlled operations from civil liability where activities are undertaken in good faith during the course of an operation.

2.37 In 1999, the NSW Act was reviewed by the Hon Mervyn Findlay QC, Inspector of the Police Integrity Commission. The Findlay Review made 14 recommendations that were described as suggesting 'incremental' changes to the NSW Act.[50] Following the Findlay Review, the NSW Act was amended in 1999 to enact some of those proposed changes. The amendments included:

- enabling the AFP, NCA and ACS to be prescribed as law enforcement agencies;

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48 For example, in Western Australia under section 31 of the *Misuse of Drugs Act 1981* (WA), the Police Commissioner may authorise an officer or civilian to work in an undercover capacity and, in the course of doing so, those persons may acquire certain prohibited substances without committing an offence. See also *Misuse of Drugs Act* (NT), sections 31 and 32.

49 *Law Enforcement (Controlled Operations) Regulation 1998*

50 NSW Inspector of the Police Integrity Commission, Report: *Review of the Law Enforcement (Controlled Operations) Act 1997*, 16 April 1999, p. 12

- including officers of the AFP, NCA, ACS, other State Police Services as law enforcement officers for the purposes of the NSW Act;
- enabling controlled operations to be authorised and varied by telephone;
- enabling CEOs of agencies to delegate their functions under the NSW Act; and
- clarification that the NSW Act does not affect certain judicial/administrative discretions in relation to legal proceedings.

2.38 In South Australia, the *Criminal Law (Undercover Operations) Act 1995* governs controlled operations. Undercover operations may be approved by a police superintendent (or above) to gather evidence in relation to suspected offences against the *Controlled Substances Act 1984* and other specified offences. Approvals for undercover operations are valid for three months and are renewable. The current accountability mechanism is a requirement that the Attorney-General (SA) be provided with a copy of all approvals and a report tabled in Parliament. Under the South Australian legislation, an approved participant in a controlled operation is not criminally liable for action taken within the parameters of the approved operation.

2.39 The *Police Powers and Responsibilities Act 2000* has recently been enacted in Queensland to govern the conduct of controlled operations. Chapter 5 of that Act contains provisions that enable particular officers of the Criminal Justice Commission (CJC), the Queensland Crime Commission (QCC) and the Queensland police service to approve controlled operations that might involve police officers and others (presumably including civilians and informants) engaged in the operation of unlawful activities. The legislation establishes a committee comprising an independent member (a retired Supreme Court or District Court judge), and the CEO of each entity or the CEO's nominee. The Committee's function is to consider and make recommendations about applications to conduct controlled operations. Under the legislation, controlled operations can be approved in relation to the investigation of suspected serious indictable offences or suspected organised crime and for particular officers of the CJC, of a suspected misconduct offence. The provisions provide protection for officers and others engaged in controlled operations from civil and criminal liability.

2.40 The Committee notes that most jurisdictions have only enacted piecemeal legislation in relation to assumed identities. Aspects of assumed identities are found scattered throughout controlled operations legislation reflecting the fact that it is not unusual for a controlled operation to involve the notion of assumed identities. For example, Division 5 of Part 2 of the *Police Powers and Responsibilities Act 2000 (Qld)* contains provisions dealing with various aspects of assumed identities used in the course of a controlled operation. Sections 186 - 189 deal with the issue of documents such as birth certificates to conceal the identity of a covert operative. NSW, however, is the only jurisdiction to date that has enacted legislation specifically directed at the issue.

**Conclusion**

The Committee notes advice that there may be some difficulties with the full operation of the provisions concerning exemption and indemnity in respect of crimes committed in a State if there is no clear relationship between a Commonwealth head of power and the action which is taken.

The community and controlled operations

2.41 The Committee does not consider that there is a need to provide detailed statements about controlled operations to the community in general, given that there is likely to be an understanding of the basic components of the concept. However, it does believe that there is a need for the community to be aware of the implications of controlled operations and assumed identities powers[51] because of the effect these may have on the public perception of crime.

2.42 The issue of indemnity for crimes committed during a controlled operation could provide a perception that some actions are available to law enforcement officials and others which are not available to the community generally. Given that certain of the 'other' persons may have committed various crimes in the past, it may also appear that they are benefiting from their actions, while others have no such advantage.

2.43 The second issue is the possibility of abuse of such power, both by law enforcement officials[52] and others, or community perception of such abuse:

> …I am explaining to you that we are introducing elements that may be corrupting the very force we look to for protection. You have heard of the term 'noble corruption' ….There are some real problems with noble corruption[53]

2.44 The authorisation and accountability mechanisms for both controlled operations and assumed identities are primarily in-house. Although certain matters are not countenanced when the authorisation is given,[54] there is little said about the consequences if such crimes should be committed.[55]

2.45 None of the agencies most involved in the development or potential use of the legislation perceived this to be an issue, with the NCA, for example, suggesting that a greater problem was a continuation of the *status quo* where actions were committed without authorisation.[56] A similar point was also made by the AFP:

> …logically it has been the absence, real or perceived, of effective provisions to counter criminal activity which has led to corruption as a misguided means of exposing crime.[57]

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51 See also below, Chapter 3, Paragraphs 3.23-3.26

52 See *Transcript of evidence*, Senator Cooney, pp. 4-5, 15; see also *Transcript of evidence,* Australian Federal Police, p. 37.

53 *Transcript of evidence*, Senator Cooney, p. 15

54 See above, Paragraph 2.23

55 See below, Paragraphs 2.77-2.82

56 *Transcript of evidence,* Australian Federal Police, p. 37; *Transcript of evidence,* National Crime Authority, p.30: 'the benefit of this legislation is that it regularises those things that happened before, and makes them a lot more transparent, a lot more accountable and a lot more capable of being monitored.' See also *Transcript of evidence*, Attorney-General's Department, p. 56

57 *Transcript of evidence*, Australian Federal Police, p. 37

2.46 However, the Victorian Criminal Bar Association emphasised that the powers required a greater measure of justification and acknowledgment of responsibility precisely because they were so extensive:

> The Association considers that no justification has been proffered, let alone made out, for such wide-ranging changes in the balance between the citizen and the State. The obligation to do so effectively is a powerful one especially where the amendments permit those sworn to uphold the law to be cloaked with immunity from criminal prosecution and civil remedy for offences committed or damage caused respectively. [58]

*Length of controlled operations*

2.47 The issue of the extension of power for controlled operations to other agencies such as Customs[59] is also related to the question of the length of controlled operations. The AFP suggested that its own operations, possibly with the exception of narcotics, were likely to be small in number,[60] but it was not apparent if they would also be short. At one point, it was suggested that some of the operations would be both suddenly established, and also extensive in duration.[61]

2.48 The National Crime Authority (NCA) argued that its investigations were serious ('relevant criminal activity')[62] and long term, lasting twelve months or more. [63] Because of this, its own need for authority for short-term operations was limited. It could not investigate minor matters, although it would have no objections to assisting other agencies in such issues,[64] but it would be unlikely to be involved itself in short term issues.[65]

2.49 The PJCNCA report, *Street Legal*, recommended that controlled operations be extended to 3 months,[66] but the bill extends this time period to six months, for no clear reason. The Attorney-General's Department stated that the six month proposal was a 'compromise or a halfway house':

> …between the New South Wales legislation, which has a six-month period…and the recommendation for a three month period. [67]

2.50 The National Crime Authority itself had previously argued for a 3 month period for controlled operations,[68] but had no objection to the six months period proposed in the bill,

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58 *Submission 4*, Victorian Criminal Bar Association, p. 3

59 See below, Paragraphs 2.53-2.61

60 *Transcript of evidence*, Australian Federal Police, p. 37

61 See *Transcript of evidence*, Australian Federal Police, p. 42

62 *Transcript of evidence*, National Crime Authority, pp. 27, 31

63 *Transcript of evidence*, National Crime Authority, p. 32

64 *Transcript of evidence*, National Crime Authority, p. 32

65 *Transcript of evidence*, National Crime Authority, pp. 32-33

66 Parliamentary Joint Committee on the National Crime Authority, *Street Legal* (1999), p. xv, Recommendation 14

67 *Transcript of evidence*, Attorney-General's Department, p. 12

68 *Transcript of evidence*, National Crime Authority, p. 33

mostly because it appeared to offer greater flexibility for operations. [69] Some aspects of the 'flexibility', however, seemed to be that an operation that might have been considered to be imminent and did not eventuate, could be allowed to rest until revived:

> You might think this controlled operation is about to occur tomorrow or next week, when in fact it is this time next year. This happens because they do not work to a particular schedule on occasions. Having some flexibility operationally would be an advantage.[70]

2.51 It is unlikely that this is the specific intention of the bill, since such delayed operations could be recommenced with a new authority is required.

*Extension of the power to other agencies – the joint operations process*

2.52 Currently, under Part 1AB of the *Crimes Act 1914*, controlled operations can be authorised in relation to the investigation of some narcotics offences.[71] The AFP can extend its powers in this area, including the resulting immunity from criminal liability, to officers from other agencies assisting in the operation. If narcotics are seized by Customs, they are handed to the AFP whereby the AFP will take whatever action it considers appropriate.[72] Further action may include a controlled operation which may or may not require the assistance of Customs officers.

2.53 Under the Bill, power would be extended to other agencies such as Customs, giving it the authorisation to conduct controlled operations and the power to authorise assumed identities for those Customs officers conducting surveillance. Although there do not appear to be any definitive reasons given as to why the specific powers to authorise need to be extended to Customs, the AFP speculated that the extension of these powers to the ACS may have been the result of recommendation 12[73] of the PJCNCA report, *Street Legal*:

> The suggestion in *Street Legal* is that controlled operations be extended to fauna and flora and various things of that nature, and, of course, they tend to be at the border, a Customs issue.[74]

2.54 In addition, the ACS argued that the immunities and indemnities provided by the Bill would provide a guarantee to ACS officers that any evidence collected through investigations of offences against the Customs Act (such as the importation of prohibited

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69 *Transcript of evidence*, National Crime Authority, p. 33

70 *Transcript of evidence*, National Crime Authority, p. 33

71 *Measures to Combat Serious and Organised Crime Bill 2001*, Second Reading speech, p. 1

72 *Submission 3A*, Australian Federal Police, p. 3

73 Recommendation 12 of *Street Legal* stated: 'That the scope of the definition of 'controlled operations' in Part 1AB of the *Crimes Act 1914* should be widened to refer to operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining a financial benefit by vice engaged in by others, extortion, violence, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, dealings or illegal importation or exportation of fauna into or out of Australia, money laundering and people trafficking.'

74 *Transcript of evidence*, Australian Federal Police, p. 38

goods), could not be suspected of having been obtained 'illegally' as a result of breaching State or Territory laws:

> We want to be enabled under the controlled operations provisions to be absolutely certain that, if and when we allow prohibited goods to pass beyond the border in a parcel through the post or in a container, our officers would not in any way be subject to offences under state or territory legislation.
>
> … By enabling us to avail ourselves of the controlled operations legislation, and in particular the immunities and indemnities that that provides, we would have that certainty. This would enable us to be certain that any evidence that we gain by using that method would not be subject to the suggestion that it was improperly or illegally obtained.[75]

2.55 As the Bill would allow for controlled operations on any offence against the Commonwealth (compared with the current provision that allows for controlled operations only for narcotics offences), the ACS also expressed concerns for the 'availability of resources in the AFP' and the priority the AFP might attach to a Customs operation as reasons why the new provisions would be of benefit to the ACS.[76]

2.56 The Committee received no evidence to suggest that the AFP would not specifically have the resources available; however, the ACS might be correct in its concern for the priority the AFP might attach to a Customs operation under the AFP's Case Categorisation and Prioritisation Model (CCPM).

2.57 The AFP stated that the working relationship between it and the ACS in relation to tier 1 and tier 2 offences, is detailed in guidelines agreed by the agencies.[77] Since these guidelines have been in operation, of the tier 1 and tier 2 seizures reported to the AFP by Customs, none have warranted action by the AFP according to the CCPM. Whilst the ACS does not request the AFP to conduct controlled operations[78], prior to the implementation of the guidelines the AFP had provided assistance to the ACS on a number of occasions.[79]

2.58 The NCA gave evidence to the Committee that suggested the proposed increased powers for Customs would not strain the relationship between the NCA and Customs. Rather, agencies such as the AFP, the NCA and Customs would continue to cooperate with each other:

> I have no personal concern with that. There are usually memoranda of understanding between agencies as to how they will conduct the business and no doubt those things will be reviewed in light of this legislation, but I am not aware of any change to the current arrangement.[80]

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75 *Transcript of evidence*, Australian Customs Service, pp. 1-2

76 *Transcript of evidence*, Australian Customs Service, p. 2

77 *Submission 3A*, Australian Federal Police, p. 4

78 *Submission 3A*, Australian Federal Police, p. 3

79 *Submission 3A*, Australian Federal Police, p. 4

80 *Transcript of evidence*, National Crime Authority, p. 29

2.59 Further, the NCA stated that it would be comfortable with the ACS conducting an operation without its involvement, particularly if that operation involved less serious crimes than those the NCA is restricted to under the NCA Act.[81]

2.60 As is discussed above,[82] the NSW legislation was amended in 1999 to provide Customs with similar powers at the State level. Other than the Australian Federal Police Association (AFPA),[83] the Committee did not receive any evidence from government agencies to suggest that these powers should not be extended to Customs at the Commonwealth level. In any case, the ACS is an agency with both regulatory and law enforcement functions and the Committee is confident that whilst Customs may have these powers available, there is no reason to suggest that they will be used improperly or without cause.

2.61 However, the Committee has no evidence to suggest that the risk to the safety of ACS officers has been fully assessed.

**Recommendation 2**

The Committee **recommends** that relevant Australian Customs Service officers, at the direction of the Australian Federal Police, undertake appropriate training to ensure that officers are appropriately qualified to participate in controlled operations.

*Increased monitoring and control - the two-tier approval process*

2.62 In the PJCNCA report, *Street Legal*, a two-tier approval process was recommended for controlled operations, with in-house approval for shorter operations and external approval for longer-term operations.[84] This recommendation was not accepted by Government, which considered that it would place unnecessary restrictions on law enforcement officers.

2.63 The Attorney-General's Department and the AFP both believed that a two-tier process would be cumbersome. The Department compared the telecommunications interception process (where an external authority is required) with controlled operations:

> In the TI context…there is a weighing up of a civil liberty relating to privacy against an operational objective to find out the information. [In controlled operations] there is more a weighing of the agency's resources and the way it will investigate a particular offence: is this the most effective strategy to find the information that will lead to a gathering of evidence?
>
> …because of the time, consideration and knowledge of operational factors needed to decide on an operation of this kind, it has been considered that there would be difficulty in involving a judicial officer in that process and the time and delays that

81 *Transcript of evidence*, National Crime Authority, p. 31

82 See above, Paragraphs 2.36-2.37

83 *Submission 11*, Australian Federal Police Association, p. 2

84 Parliamentary Joint Committee on the National Crime Authority, *Street Legal*, (1999), p.xiii, Recommendation 3

> might be involved in bringing a judicial officer without that experience up to speed on all those kinds of considerations.[85]

2.64 The Committee considers that this argument is not well presented. It ignores the fact that a longer-term operation is unlikely to have been set up overnight, therefore the risk to an individual through any delay[86] is limited.[87] It also suggests that experienced judicial officers would not be able to assess material quickly, although they are required to do so on a daily basis. Although not all 'judicial officers' as defined[88] would have this experience, it would be possible to limit an approval for a longer-term operation to the more senior of 'judicial officers', or ensure that only those persons who currently approve telephone interceptions could approve the longer-term operations.

2.65 The Committee is not necessarily persuaded that there would be 'an extra layer of complexity in the system'[89] by having a two-tier process, or that the more detailed 'after the event' reporting process of operations is a sufficient safeguard.[90] The more serious the issue, the greater should be the protections available to the community generally.

2.66 The AFP also argued in effect that there was no reason that the provisions should not be approved because they would not be used extensively:

> The AFP believes it is important to offer some proportion and perspective to the debate. Controlled operations provisions relating to offences other than narcotics offences would not be frequently used. Long-term assumed identities are considered likely to be used by fewer than half a dozen federal agents in a year. These methodologies are most often associated with significant and resource intensive operations, which simply do not occur on a daily basis. Our present objective is to ensure only that we have access to such options in circumstances where existing tools or methodologies are inadequate.[91]

2.67 This argument suggests that a power which is rarely used can afford to be imprecise, a point which the Committee does not accept. In addition, the Committee had gained the impression that in fact controlled operations were being extended to all Commonwealth offences because it was anticipated that such measures were essential in order to combat crime. The fact that the AFP would rarely use such powers outside of narcotics operations neither means that they would not use them often for narcotics operations nor that the other Commonwealth agencies would not use them extensively. After all, the NCA's main business

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85 *Transcript of evidence*, Attorney-General's Department, p. 11; see also *Transcript of evidence*, Australian Federal Police, p. 37 and below, Paragraph 2.72

86 *Transcript of evidence*, Attorney-General's Department, p. 11

87 A similar argument was put forward by the Australian Federal Police (*Transcript of evidence*, Australian Federal Police, p. 42). However, if an operation is put together so quickly that it must be approved immediately, and in the knowledge that it is likely to be of six months' duration, it can hardly be so complex and detailed that it could not be understood by a more experienced judicial officer

88 See *Measures to Combat Serious and Organised Crime Bill 2001*, p. 51, Item 29

89 *Transcript of evidence*, Attorney-General's Department, p. 11

90 *Transcript of evidence*, Attorney-General's Department, p. 11

91 *Transcript of evidence*, Australian Federal Police, p. 37

is serious and organised crime.[92] The NCA itself indicated that the longer the inquiry, the greater the need for flexibility for an extension of operations approval.[93]

2.68 The AFP also noted in one of its submissions that in 1999-2000:

> the AFP was referred 3,380 cases involving, among other things, illicit drug investigations, economic crime (fraud, money laundering, counterfeit currency, counterfeit goods), corruption, general crime and special references (for example, people smuggling). During the same period the AFP conducted 43 controlled operations (narcotic goods only).[94]

2.69 As the AFP itself notes,[95] the absence of various powers would not of itself be the only factor that would have to be considered in deciding if the matter would be investigated. Nonetheless, there was a suggestion that the absence of powers was a problem in those cases where they were the only appropriate means of obtaining information.[96]

2.70 In addition, it was later clarified that some of the difficulties in respect of pursuing investigations lay in the fact that the more effective means of obtaining evidence could encourage a law enforcement officer to commit a crime. Otherwise, the individual being pursued might only be charged with a lesser offence.[97] Hence, it was the indemnity from prosecution that was relevant, as well as the power to run a controlled operation.

*Ombudsman, judicial or external approval of controlled operations*

2.71 The issue of external scrutiny or approval of controlled operations was raised in the context of recommendations 3 and 10 of *Street Legal* and the current judicial approval required in relation to telecommunications interception and entry warrants.

2.72 Recommendation 3 of *Street Legal* referred to the external approval of controlled operations in relation to longer term, generally more serious crimes in an attempt to ensure that 'operational efficiency is not adversely affected by the approval process'.[98] The AFP stated that such a system in relation to controlled operations would involve an external judgement on whether or not to investigate a matter, a judgement that in general policing, is bestowed upon a constable:

> We would make the point that the judgment being exercised by the judicial officer in relation to telecommunications interception or entry is a judgment about the tools with which an investigation is being pursued. Authorisation of a controlled operation is a qualitatively different issue in that the decision involved is commonly equivalent to the decision whether or not to investigate the matter at all.

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92 See *Transcript of evidence*, National Crime Authority, p. 27

93 See *Transcript of evidence*, National Crime Authority, p. 33

94 *Submission 3A*, Australian Federal Police, p. 5

95 *Submission 3A*, Australian Federal Police, pp. 5-6

96 *Transcript of evidence*, Australian Federal Police, p.41

97 *Transcript of evidence*, Australian Federal Police, p. 44

98 Parliamentary Joint Committee on the National Crime Authority, *Street Legal* (1999), pp. 66-67

> Such decisions have always been independent decisions for the bearer of the office of constable.[99]

2.73 In support, the Victorian Criminal Bar Association stated:

> … I would have thought that a judge is in no better position to make these informed decisions than anyone else.[100]

2.74 Recommendation 10 of *Street Legal* referred to oversight by the Commonwealth Ombudsman based on the terms required of the NSW Ombudsman under the *Law Enforcement (Controlled Operations) Act 1997 (NSW)*. The Committee was advised by the NCA that the involvement of the Commonwealth Ombudsman at this stage may, in fact, be a conflict of interest:

> If the Ombudsman comes into a matter when it is in the developmental stage of an operation, which these things are, then it actually inveigles the Ombudsman into decision making which could later be the subject of another Ombudsman's investigation, for example, as to the conduct of officers in relation to that operation.[101]

2.75 The Committee was also advised that the NSW Ombudsman acquired that particular role under the NSW controlled operations legislation in the context of 'a situation in which the NSW Police did not have any internal guidelines that were thought to govern these sorts of things'.[102] In addition, the NSW Ombudsman's role in this area is as an 'auditor of procedural compliance; it is not to investigate the merits of a particular case'.[103]

2.76 Notwithstanding the Committee's stated concerns about the presentation of arguments in this area, the Committee heard no evidence to suggest that the 'two-tiered system' or any external approval would be preferable to the provisions of the Bill, which allow for the in-house approval of controlled operations. The Committee agrees that the function of decision-making in relation to the investigation or not of a particular matter, should remain an in-house function.

*Control through imposition of penalties*

2.77 One of the points emphasised by those in favour of the legislation was that it offered greater accountability and transparency, compared with previous informal arrangements:

> ...what the public and others have had to rely on previously is the goodwill and intentions of agencies to put in place internally protocols which make it as accountable as it could be. Here we are talking about legislation that clearly regularises and provides penalties for those that step outside the framework, so it has to be an advantage. It has to be more accountable.[104]

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99 *Transcript of evidence*, Australian Federal Police, p.37

100 *Transcript of evidence*, Victorian Criminal Bar Association, p. 23

101 *Transcript of evidence*, National Crime Authority, p. 34

102 *Transcript of evidence*, Australian Federal Police, p.37

103 *Transcript of evidence*, Australian Federal Police, p.37

104 *Transcript of evidence,* National Crime Authority, p. 35

2.78 Various penalties are provided in respect of some abuses of both the controlled operations and assumed identities powers. As noted above,[105] there are limitations imposed on the extent of actions that are permissible under the controlled operations power, but it is not clear what penalties would be imposed if it was stated that 'entrapment' or serious injury or death resulted from an necessary variation to the operation.

2.79 Witnesses raised the issue of the need to provide penalties with respect to the breaching of conditions. The Victorian Criminal Bar Association stated that the penalty for breaching the provisions of the controlled operations procedure should be that the evidence obtained would be inadmissible:

> The Association considers that the best way to ensure strict compliance with the spirit and intent underlying the provisions is to ensure that the penalty for non-compliance is considerable and predictable. That should not be less than a prima facie exclusion of evidence obtained by illegal police conduct subject to an overriding judicial discretion to admit the evidence in exceptional circumstances with the onus being on the Crown to establish the exception.[106]

2.80 According to the Attorney-General's Department, such a penalty *would* apply, both in respect of an *ultra vires* authorisation and in respect of impermissible conduct under an appropriately authorised operation:[107]

> In terms of the conduct under the certificate, if an officer operates outside what they have been authorised to do, there are the AFP internal discipline mechanisms and there is the possibility for the Ombudsman to find wrongdoing. [108]

2.81 The admissibility of all evidence obtained from a general listening device is less clear, especially given that previous restrictions on such use have not always resulted in the evidence itself being deemed inadmissible.

2.82 Nonetheless, most assessment of the appropriateness of action depends on internal assessment. For example, to what extent will internal discipline processes and possible investigations by the Ombudsman, be an adequate means of dealing with the results of an operation that has transgressed its limits, but still retains exemption from prosecution? This may add further weight to the argument that some external oversight is required beyond that offered by the provision of reports to the Minister.

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105 See above, Paragraph 2.23

106 *Submission 4*, Victorian Criminal Bar Association, p. 4

107 *Transcript of evidence*, Attorney-General's Department, p. 13

108 *Transcript of evidence*, Attorney-General's Department, p. 13

# CHAPTER 3

## PROTECTION OF CHILD WITNESSES AND VICTIMS

## ISSUES OF PRIVACY

## LISTENING DEVICE WARRANTS

### Protection of Children in Sexual Assault Proceedings

3.1 Schedule 3 of the Bill provides various protection for persons described as child witnesses and child victims in proceedings for Commonwealth sexual offences. The legislation containing these offences includes the Crimes (*Child Sex Tourism) Amendment Act 1994*,[1] and the Criminal Code - sexual assault of United Nations and associated personnel, and slavery, sexual servitude and deceptive recruiting.[2]

*Background*

3.2 As with other aspects of the bill, there is little information on the development of the provisions concerning the protection of children in sexual assault proceedings. The Attorney-General's Department provided information on reports which had been completed in other jurisdictions concerning the need to assist children in the giving of evidence, although these reports dealt with a wider range of criminal offences.[3] The NSW Commissioner for Children also noted that some states had legislation which provided similar assistance to children who were witnesses or complainants. With respect to sexual matters, however, the age of a 'child' in New South Wales was 15 and under, whereas the Commonwealth legislation provides that a child is 17 and under.[4]

*Provisions*

3.3 The bill is based on the premise that children – often witnesses or 'victims' in respect of assaults taking place in overseas jurisdictions[5] – will be further victimised by the assailant/defendant to the point of being unable to give evidence face to face in court. The intention of the bill is therefore to provide an atmosphere and setting where a child does not have to attend in court and can give evidence in another area, through means of closed circuit television. [6] A child aged 16 or more may make a choice in this matter.[7] Video recordings of

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1 Incorporated as Part IIIA of the Crimes Act

2 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 35, S 15Y

3 *Submission 10*, Attorney-General's Department, pp. 3-4 and Attachment A; *Transcript of evidence*, Attorney-General's Department, p. 55, S*ubmission 1*, New South Wales Commissioner for Children, p. 4

4 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 36, S 15YA

5 *Transcript of evidence*, Attorney-General's Department, p. 64

6 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 39, S 15Y1; where such facilities do not exist, alternative arrangements can be made (note to S 15YI)

7 *Measures to Combat Serious and Organised Crime Bill 2001*, p.39, S 15YI (1) (a)

an interview with a child witness may be admitted, although there must be an opportunity given for cross –examination and re-examination.[8]

3.4 On the basis that direct confrontation or questioning of the complainant or witness is undesirable, there may be no direct questioning of the child by the defendant unless leave is given; [9] unrepresented defendants therefore may need to cross-examine the witness through a third party, and those with counsel must cross-examine through counsel. [10]

3.5 Other provisions include the exclusion – except by leave of the court – of evidence about a child's reputation with respect to sexual activities; [11] limited admission of evidence about a child's sexual activities; [12] and various limitations on judicial discretion.[13]

*'Victim'*

3.6 To a point, there are few objections that can be made to these aspects of the legislation, but there are some issues of concern to the Committee. The first is a technical issue, whereby a 'child victim' is described as such in a case where the objective is to determine if in fact an assault on the child occurred.[14] In such cases, it would be preferable to describe the child as a child 'complainant'. This would not result in confusion, as other children in proceedings are described as 'child witnesses'. [15] The word 'victim', if necessary, could only be used in relation to a person whose claim had been demonstrated. [16]

*The right to a fair trial*

3.7 Both the Victorian Bar and the Victorian Criminal Bar Association expressed some concerns that the legislation might reduce the possibility of a fair trial and decrease the rights of the defendant.

3.8 They saw this as occurring through the limitations imposed on the defendant and counsel, and especially on an unrepresented litigant, by the processes that were intended to assist the child. In particular, there was concern that accuracy and truthfulness could not be properly tested through the closed circuit television process: [17]

> Not only are there obvious practical difficulties, but there is an inevitably **high risk of prejudice and disadvantage** to an unrepresented accused. Clearly an atmosphere is created when an accused is not permitted to have contact with a victim or when he or she is not even permitted to ask questions by themselves.

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8 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 41, S 15YM (1) and (4)

9 *Measures to Combat Serious and Organised Crime Bill 2001*, pp. 38-39, S 15YG,

10 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 39, S 15YH

11 *Measures to Combat Serious and Organised Crime Bill 2001*, p.36, S 15YB

12 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 37, S 15YC

13 See below, Paragraphs 3.13-3.17

14 *Measures to Combat Serious and Organised Crime Bill 2001*, p.36, S 15YA

15 See *Submission 3A*, Australian Federal Police, p. 2

16 See *Submission 9*, Victorian Bar, p 8

17 *Submission 9*, Victorian Bar, pp. 9-10

> There is the risk that a jury will infer that the accused has done something which has resulted in this course – ie threatened or intimidated the witness…It is important to note that many defendants are not unrepresented by choice but simply because they are unable to obtain representation. The system proposed…will clearly result in two different types of justice…[18]

*Need for experienced persons to cross-examine child witnesses/complainants*

3.9 Although the Bill makes provision for another party to cross-examine a child witness or complainant where the defendant is unrepresented,[19] it does not specify the qualifications or experience required of those who may undertake this role:

> We do see real practical problems in the way in which those provisions might operate – how one can provide instructions; when; whether the person is required to ask questions in a manner dictated to by the unrepresented accused or whether that person is at large; the quality of the person; and what occurs in the event that the unrepresented accused determines that the third party questioner is not doing a satisfactory job. It is very difficult to do this in a way which is consistent with providing a fair trial to someone who may be unrepresented through no fault of himself or herself.[20]

3.10 The Committee has considered the arguments put forward in respect of defendants and the possible disadvantages they may face and believes it is important that such matters be addressed. It believes that it is necessary, for all parties, to ensure that appropriately qualified persons be available to defendants at least for the purposes of cross-examination and preferably for the entire trial. An appropriately qualified person would necessarily be a person experienced in cross-examination.

**Recommendation 3**

The Committee **recommends** that all defendants in Commonwealth sexual assault cases be provided with appropriate assistance, especially with respect to cross-examination of child complainants and child witnesses. Guidelines as to the experience and skills of qualified persons should be developed as a matter of urgency.

*Fair trial in assumed identity issues*

3.11 The Victorian Bar[21] and Victorian Criminal Bar Association also commented on the need to ensure that the rights of the defendant were protected in cases in which one or more witnesses had been using an assumed identity:

> The interests of an accused receiving a fair trial must be paramount and in particular cannot be subordinated to the interests of a witness in protecting an assumed identity. [22]

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18 *Submission 9*, Victorian Bar, p. 10

19 *Measures to Combat Serious and Organised Crime Bill 2001*, pp. 38-39, S15YF, S15YG

20 *Transcript of evidence*, Victorian Criminal Bar Association, p. 22

21 *Submission 9*, Victorian Bar, p. 7

22 *Submission 4*, Victorian Criminal Bar Association, p. 5

3.12 The Association considered that, at the very least, 'full disclosure of the fact of the identity [as opposed to details of the identity] would be made to the trial judge and at his or her discretion to the accused.'[23] This would help ensure that relevant issues, such as matters of credit, could be considered in light of such knowledge.[24] The Committee believes that this is a sensible view, and that appropriate provision should be made to accommodate it in the bill.

*Judicial Discretion*

3.13 Both the Victorian Bar and the Victorian Criminal Bar Association expressed some concern about the implications for the judiciary of some directions in sexual offence hearings. These directions concerned the accountability of judges for decisions to admit evidence of a child's sexual experience or sexual reputation;[25] and the fact that a judge is also specifically prevented from making a statement about the nature of evidence given by children.[26]

3.14 Although the AFP did not necessarily agree that this was the intention of the amendments, it noted that the amendments 'may have the effect of restricting the overall exercise of judicial discretion in this area.'[27]

3.15 Both the Victorian Bar and the Victorian Criminal Bar Association suggested that these sections of the Bill impose unnecessary limitations on the exercise of judicial discretion in dictating to the judiciary what evidence may be admissible and when a judge can or cannot make a statement about evidence. According to the Victorian Bar and the Victorian Criminal Bar Association, the effect of these provisions is to suggest that Parliament is better placed to make decisions on such matters:

> The explanatory memorandum clearly expressed the view that Parliament does not trust the judiciary to sufficiently protect the rights of witnesses (see for example the comments at page 103 dealing with admissibility of evidence of child's sexual activities: *"... the proposed section provides means of ensuring that judges are accountable for decisions to admit such evidence and that the restrictions set out in proposed section 15YB and 15YC are fully complied with."*). The Victorian Bar believes that such lack of faith in the judiciary is totally unwarranted.[28]

3.16 The Committee does not believe that these factors place inappropriate limitations on judicial discretion, given that the court has extensive control over the proceedings including in matters such as allowing cross-examination and admissibility of evidence. The limitations with respect to statements about the acceptability of evidence given by children[29] are acceptable given that a jury assessing the evidence must make its own decisions about the

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23 *Submission 4*, Victorian Criminal Bar Association, p. 5

24 *Transcript of evidence*, Victorian Criminal Bar Association, p. 23

25 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 37, S15YD; *Submission 4*, Victorian Criminal Bar Association, pp. 6-7

26 See *Measures to Combat Serious and Organised Crime Bill 2001*, p. 43, S 15YQ

27 *Submission 3A*, Australian Federal Police, p. 1

28 *Submission 9*, The Victorian Bar, p. 8

29 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 43, S 15YQ

reliability of the evidence in a particular case and not make a generalised judgement about the reliability of evidence of all children. [30]

3.17 In making this point the Committee notes the statement of the Victorian Criminal Bar that children, like adults, will vary in their truthfulness and accuracy.[31] It is for this reason that appropriate representation of defendants is required.

*Privacy, Security and the Interests of the Community*

3.18 There are several issues in the Bill which impinge on privacy considerations. The main issues are:

- Invasion of privacy through the use of general purpose listening devices;
- The importance of maintaining the security of an assumed identity as opposed to the need to maintain proper records of such identities;
- The creation of false identities, using government agencies, and the security of such arrangements;
- The extent to which such identities may continue to be used, affecting the confidence of the public;
- Possible distortion of public records registers.

Invasion of privacy through the use of 'general purpose' listening devices

3.19 As the Victorian Bar noted, the current restrictions on warrants limit the invasion of privacy through more specific targeting:

> …the need to particularise the person or the premises is paramount…The requirement of particularity provides an important restraint on the scope of the warrant and, therefore, the level of intrusion that is permitted into the lives of people affected by the warrant.[32]

3.20 On this basis, the Bar was opposed to the amendment at Schedule 5 of the bill,[33] on the grounds that it would be 'a serious invasion of private communications, which both the common law and parliament has steadfastly sought to protect.' [34] In response, the AFP stated that it did not have:

> the time or the resources to waste on…'fishing expeditions', even if we could persuade a judicial officer that they were a good idea…[35]

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30 See also *Transcript of evidence*, New South Wales Commissioner for Children, pp. 52-53

31 See *Transcript of evidence*, Victorian Criminal Bar, p. 24

32 *Submission 9*, Victorian Bar, p 5

33 The amendments are to the *Australian Federal Police Act 1979* and the *Customs Act 1901*

34 *Submission 9*, Victorian Bar, p. 6

35 *Transcript of evidence*, Australian Federal Police, p. 37

3.21 This may be correct, in that if resources are limited, the less precise or less defined operation is likely to be restricted. However, this statement does not deal with the basic question of the extent of invasion of privacy resulting from the capacity to intercept the conversations of other persons.

3.22 The law enforcement view appears to be either that it is unlikely for persons not involved in suspect matters to have any conversation recorded, or that such information would be destroyed (S219G of the *Customs Act 1901* makes provision for the destruction of irrelevant material). However, in order to protect persons with no connection to the specific inquiry or any other prescribed offence, the destruction of statements or other conversation by an innocent party should be specifically addressed in the bill. The reason for this is that a particular person or particular premise warrant may naturally restrict the number and types of persons whose conversation may be recorded; a specific item warrant may broaden the scope to include more uninvolved persons. [36]

The importance of maintaining the security of an assumed identity as opposed to the need to maintain proper records of such identities; continuation of identities

3.23 The power to create a complex false or assumed identity may be essential to both the AFP and the NCA, and to other agencies. However, this power needs to be carefully monitored, both for the sake of the community generally and for the security of the individual using the identity.

3.24 Although the AFP states that it would not expect more than half a dozen agents to use 'long-term' identities each year,[37] the number of agencies granted the power[38] suggest that there could be at least several dozen such identities in use at any one time. Given that one authorisation may cover more than one identity,[39] it may also be difficult to determine how many identities are being used by any one person.

3.25 There appears to be no provision whereby a central body has knowledge of all of these 'persons', how long the identity has operated, and whether it is likely to continue. Nor is there any clear guidance on the termination of any identity, except at the request of the authorising officer.[40] In theory, the identity could continue to exist and be re-activated when required, without a new authorisation. In addition, the provision concerning being 'unaware of variation or revocation' of an identity,[41] may allow too much flexibility for some individuals.

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36 See Submission 7A, *National Crime Authority*, p. 7; the NCA suggests that there is no difference with respect to privacy between the current situation and the proposed item specific warrant. However, this is not invariably the case, as persons coming near a certain premises may be limited to those with some involvement, whereas an item such as a bag, shipping container or crate, may be moved to a number of places often near people with no likely involvement in the suspected crime

37 *Transcript of evidence*, Australian Federal Police, p. 37

38 See *Measures to Combat Serious and Organised Crime Bill 2001*, pp. 22-243, S 15XA.

39 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 29, S15XI(3)

40 *Measures to Combat Serious and Organised Crime Bill 2001*, p.31, S 15XO

41 *Measures to Combat Serious and Organised Crime Bill 2001*, p. 27, S 15XE

3.26 The effect of these factors on the community in general needs to be considered, especially in the context of identities being granted to foreign law enforcement officers and to 'approved persons'. While accepting the importance of using appropriate methods to deal with serious and organised crime, the Committee believes that the community must have confidence in the system that such powers will not be used to the detriment of society. As was noted above, the Committee considers that there is merit in the suggestion that the fact or existence of an assumed identity should be advised to the court and, where necessary, to the defendant in a case.[42]

**Recommendation 4**

The Committee **recommends** that consideration be given to audits of assumed identities by an external agency such as the Privacy Commission.

The creation of false identities, using government agencies, and the security of such arrangements

3.27 The Committee has no objection in principle to the use of government agencies in the creation of assumed identities. However, this use does pose certain risks in respect of security, and access to information would need to be carefully monitored. Where an identity receives a benefit or payment, appropriate provision for the return of such public funds must be made, especially in relation to an identity that may be continued indefinitely. This would help limit possible misuse of funds, and increase public acceptance of such identities.

3.28 The Committee notes the provisions regarding penalties for persons divulging information concerning assumed identities.[43] With respect to non-government agencies, it believes that such agencies should be used as little as possible because of the increased risk of inadvertent disclosure.

Possible distortion of public records registers.

3.29 This issue was raised by the New South Wales Privacy Commissioner,[44] although not in great detail. The main issue is the need to maintain the integrity of official records, including birth, marriage and death records, which may be jeopardised by the creation of additional 'persons':

> …widespread use of assumed identities could run counter to the attempts to strengthen the methods of identifying individuals operated by New South Wales and other states. There are growing concerns over the way new technologies, such as computer printing, email and the Internet, provide opportunities for identity fraud, and there is a concern that the proliferation of assumed identities might complicate this problem. [45]

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42 See above, Paragraph 3.12

43 *Measures to Combat Serious and Organised Crime Bill 2001*, pp. 32-33, S 15XS

44 See *Submission 8*, New South Wales Privacy Commissioner, p. 2

45 *Transcript of evidence*, New South Wales Privacy Commissioner, p. 46

3.30 This issue would also affect other states, and constitute part of the problem currently experienced by law enforcement officers with respect to the creation of a range of false documentation, including passports. Within this context, assumed identities may add to a complex situation. The suggestion concerning possible greater involvement by privacy bodies in the matter of assumed identities is reasonable and should be considered further.

**Listening Device Warrants**

*Background*

3.31 The immediate background to this part of the bill is the Nicholas case,[46] which involved the use of a listening device in a manner not authorised by the warrant. Listening device warrants currently may only be granted in respect of a specific person or specific premises,[47] and not in respect of items such as bags or containers which are not linked to a specific person. In the Nicholas case, devices were used in a number of areas, including a bag,[48] and the 'person' warrants did not specify a particular person.

3.32 The essential issue in Nicholas, in respect of listening devices, was the legality or otherwise of the device[49] and the admissibility of the evidence obtained through its use.[50] As was noted by the Victorian Bar:

> The Association recognises that the decision in *Nicholas v R* [2000] VSCA 49 represents a significant practical impediment to law enforcement authorities in circumstances where illegal materials are detected without a known linkage to a particular person or to particular premises.
>
> It is important however that any remedial legislative action is very carefully balanced and designed to minimise the risk of the law enforcement community utilising the provisions in a such a way as to effectively constitute a general warrant by, for example, releasing an item into the general community with the intention of gathering such criminal intelligence as may be detected thereafter. [51]

3.33 Although the Victorian Bar Association had no objection to certain uses of more general warrants, it was opposed to an opportunistic use when there was no specific investigation underway.[52] According to the AFP, this was an unlikely scenario, given both limited resources and the need for approval for a warrant.[53]

3.34 The evidence provided by the AFP in respect of listening device warrants was somewhat puzzling, in that it was stated that 'AFP use of listening devices in these

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46 *R v Nicholas* 2000 VSCA 49

47 *Submission 9*, Victorian Bar, p. 5

48 See *R v Nicholas* 2000 VSCA 49, Paragraphs 14, 18, 19, 78, 79 and 94

49 The warrant was held to be invalid on the grounds that 'it was in the form of a general warrant which was authorised by S 219B(5) of the Customs Act'*, Submission 9*, Victorian Bar, p. 6

50 The evidence itself was not seen as inadmissible - *R v Nicholas* 2000 VSCA 49, Paragraphs 95-96

51 *Submission 4*, Victorian Criminal Bar Association, p. 4

52 *Submission 4*, Victorian Criminal Bar Association, p. 5

53 *Transcript of evidence*, Australian Federal Police, p. 37

circumstances dropped to zero in April 2000. No particular item warrants have been used since', in response to the decision in *Nicholas*.[54] As particular item warrants are not permitted, it would have been inappropriate if they had been used at all in April 2000, since April 2000, and, indeed, prior to that time. This however does not provide information on the extent to which any other listening device warrant has been used since April 2000, although it appears to be suggested that the Nicholas case reduced *all* use of listening devices. The Committee is concerned that this seems implausible, given its understanding from previous enquiries of the general reliance of the AFP in operational matters on listening device warrants.

3.35 The Committee's main concern with respect to the granting of these warrants is that they can be abused easily, and indeed other warrants may have been so abused for some time prior to April 2000. In these circumstances, the Committee would prefer to see greater accountability with respect to use of such warrants, possibly through a specific time limit being imposed in respect of each individual warrant.

**Recommendation 5**

The Committee **recommends** that the issuing official impose a specific time limit on the operation of all 'particular item' warrants.

54 See *Submission 3*, Australian Federal Police, p. 16

# CHAPTER 4

## PART 1C OF THE CRIMES ACT

4.1 The Committee is concerned that the Principal Act contains a serious internal contradiction which is not addressed by the Bill. The contradiction is that a person can only be 'detained' if lawfully arrested but an investigating official can, without arresting a person, give that person reasonable grounds for believing that he or she 'would not be allowed to leave'. The Committee is unable to distinguish between the two concepts. Perpetuating the contradiction by finetuning the existing provisions is not constructive.

4.2 The Committee considers that the authorities appear to have been able to work around the anomaly since Part 1C was inserted in the Crimes Act a decade ago. The Committee suggests that the best approach would be for the Government to leave Part 1C in its present form while it rethinks the amendments to take account of the anomaly.

**The Principal Act according to the Explanatory Memorandum**

4.3 The Explanatory Memorandum states that most of the amendments in Schedule 4 result from a review of Part 1C of the Crimes Act. Part 1C (sections 23A–23W) was inserted into the Crimes Act by the *Crimes (Investigation of Commonwealth Offences) Act 1991*. Under section 23C, a person who is lawfully arrested for a Commonwealth offence may be detained for a reasonable time, within certain limits. The Explanatory Memorandum indicates that Part 1C confers a range of rights, that apply both in the situation of lawful arrest and detention, and in specified circumstances constituting deemed arrest, and that some of the measures contained in the Schedule are directed to clarifying the distinction between lawful and deemed arrest for the purposes of the Part.

4.4 The Explanatory Memorandum also states that among the rights conferred by Part 1C on those subject to lawful and deemed arrest are:

- To communicate with a friend or relative and legal practitioner (section 23G);
- In the case of an Aboriginal person or Torres Strait Islander – to have an interview friend present during questioning (section 23H).[1]

**The Committee's understanding of the Principal Act**

4.5 The Committee understands that the Part operates in the following way:

- Section 23B provides that a reference in Part 1C to a person who is arrested includes a person in the company of an investigating official for the purpose of being questioned if:

  (a) the official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence on which he or she is to be questioned; or

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1 *Measures to Combat Serious and Organised Crime Bill 2001*, Explanatory Memorandum, p. 40

(b) the official would not let the person leave if he or she wanted to do so; or

(c) the official has given the person reasonable grounds for believing that he or she would not be allowed to leave if he or she wanted to.

- Nevertheless, that arrest ceases if the person under arrest is remanded by a magistrate in respect of the offence or voluntarily takes part in covert investigations by an investigating official to establish if some other person has committed an offence.

4.6 Subsection 23C(1) provides that the 'following provisions' apply if a person is lawfully arrested for a Commonwealth offence. (It is not made clear which of the subsequent provisions in Part 1C are applied although one could assume that provisions relating to the period of arrest (sections 23C-23E) are applied). Subsection 23C(2) says that the person may be detained for the purpose of investigating whether he or she committed the offence for which he or she was arrested or another Commonwealth offence but must not be detained for that purpose after the end of the investigation period. Other provisions say that the person must be released within the investigation period or brought before a magistrate and that the investigation period begins at the time of arrest. If a person is under arrest for a serious offence (punishable by imprisonment for more than 12 months), the investigating official may apply, face to face or by telephone, radio or radio-telephone, to a magistrate or other specified judicial officer for an extension of the investigation period.

4.7 Section 23F requires an investigating official to caution a person under arrest about his or her right to remain silent before starting to question him or her. The caution is to be given in or translated into a language in which the person is able to communicate with reasonable fluency. Section 23G requires an investigating official to allow a person under arrest to inform a friend or relative of his or her whereabouts and to arrange for a legal practitioner to attend the questioning. Subsection 23H(1) provides that, if the person under arrest is an Aboriginal person or Torres Strait Islander, the investigating official must actually notify an Aboriginal legal aid organisation unless that person has arranged for a legal practitioner to attend the questioning. Section 23U provides an investigating official who is required to give a person under arrest certain information (including a caution) must tape-record that giving of the information. To avoid doubt, section 23R declares that Part 1C does not confer any power to arrest a person or to detain a person who has not been lawfully arrested, which is a key point.

4.8 Subsection 23H(2) provides that if an investigating official reasonably believes that a person suspected of, or under arrest for, or able to be implicated in, the commission of a Commonwealth offence is an adult Aboriginal person or Torres Strait Islander, he or she must not question the person in the absence of an interview friend, unless the person has expressly and voluntarily waived that right. Section 23K provides that if an investigating official reasonably believes that a person suspected of, or under arrest for, or able to be implicated in, the commission of a Commonwealth offence is under 18, he or she must not question the person at all in the absence of an interview friend. Section 23V provides that a confession or admission made to an investigating official by a person being interviewed as a suspect (whether under arrest or not) is inadmissible in any proceedings unless the questioning was tape recorded or a written record was made.

**The Bill**

4.9 The Bill proposes various amendments, described by the Attorney-General's Department as 'finetuning amendments'.[2] It would divide the Part into 3 Divisions, the first (sections 23 - 23B) being introductory, the second (sections 23C-23E) dealing with powers of detention of people lawfully arrested for Commonwealth offences and the third (sections 23F-23W) dealing with the obligations of investigating officials towards persons lawfully arrested or taken to be arrested (or, in some cases, suspected). A large number of stylistic changes are to be made without affecting the basic principle that only a person lawfully arrested for a Commonwealth offence may be detained under Part 1C or the circumstances in which a person is to be taken to be arrested. Sections 23C (period of arrest), 23D (extension of investigation period) and 23E (applications by telephone etc) are all amended to make it clear that they specifically apply to persons lawfully arrested. Sections 23G and 23P, which currently refer to 'holding' a person under arrest, would no longer use that concept although they still use the concept of 'being' under arrest.

4.10 The concepts in subsection 23H(2) and 23K of an investigating official's suspicion that a person may have committed, or may be implicated in, a Commonwealth offence is to be replaced by the simpler one of a person being a suspect (whether under arrest or not).

**Consideration of the concept of being taken to be under arrest**

4.11 The logical problem that the Committee sees with the existing legislation (which the Bill would not rectify) arises from the fact that, on the one hand, a person who is not lawfully arrested cannot be detained under Part 1C, but many provisions in Part 1C proceed on the basis that a person, once taken to be under arrest will continue to be taken to be under arrest. For example, questioning of a person taken to be under arrest cannot proceed after caution under section 23F unless that person continues to be taken to be under arrest. Again, the obligation to allow a person taken to be under arrest to communicate with friend or relative and to arrange for a legal practitioner to be present, is only applicable if the person continues to be taken to be under arrest. Similarly with subsection 23H(1), sections 23M, 23N, 23P and 23U.

4.12 The point is that a person who is taken to be under arrest, for example, under paragraph 23(2)(c) in that the investigating official has given him or her reasonable grounds for believing that he or she would not be allowed to leave if he or she wished to do so, is effectively detained. That detention is recognised by the fact that the legislation empowers an investigating official to question a person taken to be under arrest under paragraph 23(2)(c) if the investigating official complies with certain obligations. If the investigating official indicates that the person is free to go, the person is no longer 'under arrest'.

4.13 A similar point could be made, if not as forcefully, about a person taken to be under arrest under paragraph 23(2)(b), ie, where the official would not allow the person to leave if the person wished to do so. Presumably, in such a case, the investigating official's attitude has not been communicated to the person under arrest, or he or she would come under paragraph 23(2)(c). However, it can be argued that the person is effectively being detained without knowing it. If the investigating official changes his or her mind and would allow the

2 *Transcript of evidence*, Attorney-General's Department, p. 16

person to leave if the person wished to do so, that person is no longer 'taken to be under arrest'.

4.14 The difficulties of comprehension in this area may be overcome by the Australian Federal Police practice being more generous than is required by the legislation (although no evidence was given as to the practice of other investigating officials). It appears from evidence that the Australian Federal Police apply the time limits relating to the detention of persons lawfully arrested to the period for which a person will be asked to voluntarily assist them with their inquiries

> . . . from the practical side of things, once the police officer is forming a suspicion about a particular suspect, as soon as he or she starts to engage in conversation with that suspect, then basically the clock starts ticking in terms of that four hours with which you have to deal with that person.[3]

4.12 It appeared from the evidence that there is a great deal of confusion in government circles about the concept of being 'taken to be under arrest'. For example, in one exchange, it was said:

> Australian Federal Police: They are detained but not arrested.
>
> Senator: The detention is voluntary?
>
> Australian Federal Police: Yes, at that point.[4]

4.13 In another exchange it was said:

> Senator: So that 'taken to be arrested' in effect means 'detained'?
>
> Attorney-General's Department: It is not terminology I would use, because 'detained' sounds as though there is a power to hold the person. "Taken to be arrested' means, for example, that the police officer suspects you and has said, 'Come along here to the station' and has created the impression that you cannot leave[5]

4.14 The Committee considers that detention cannot be voluntary and that there is no difference between being detained and being given the impression that you cannot leave.

4.15 So far as the Committee can tell, the problem with the drafting of Part 1C arises because the original *Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990*, as introduced, did not distinguish between actual and deemed arrest. The concept of 'lawful arrest' was brought in by Government amendment and has been interpreted as indicating that detention for questioning is only available where there has been an actual and lawful arrest. However, it seems to the Committee that if this was intended, there should have been a number of consequential amendments. As Part 1C is now and would be, if amended in accordance with the Bill, it has a number of anomalies.

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3 *Transcript of evidence*, Australian Federal Police, p. 42

4 *Transcript of evidence*, Australian Federal Police, p. 43

5 *Transcript of evidence*, Attorney-General's Department, p. 61

4.16 For example, it is not clear what purpose, if any, is served by the application to a person taken to be under arrest, of the provisions in subsections 23(3) and (4) - that a person ceases to be under arrest if he or she is remanded by a magistrate or takes part in covert operations. The legislation says nothing at all about how long an investigating official can have the state of mind in which he or she would not allow the person to leave if the person wished to do so, nor how long the investigating official can leave the person with reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so. One might ask what is the point of providing so many safeguards for a person who is taken to be arrested, unless evidence obtained after all the safeguards have been met is admissible. However, this would be abhorrent if the person was being unlawfully detained. Again, the very use of the concept of 'being under lawful arrest' as opposed to being taken to be under arrest suggests that there is something unlawful about the latter state.

4.17 Although the Committee has not had sufficient time to examine corresponding provisions in all other jurisdictions, it notes that section 464A of the Victorian Crimes Act 1958 provides that people taken into custody (including those who have not actually been arrested) must be released or brought before a bail justice or the Magistrate's Court within a reasonable time. It also notes that the NSW Crimes Act 1900 provides by subsection 355(2), 365C and 365D that a police officer's power to detain for investigation (and the limits on it) extends to people who are described in much the same terms as in paragraphs 23(2)(a)-(c) of the Commonwealth Crimes Act. The Committee does not say that the NSW and Victorian approaches are better. What the Committee does say is that NSW and Victorian provisions are coherent and follow what was originally proposed for the Commonwealth, whereas the Commonwealth's current and proposed provisions are confusing and should be carefully examined. The present proposal does nothing to address the main issues.

**Recommendation 6**

The Committee **recommends** that the Government reconsider the drafting of the proposed amendments to Part 1C in relation to the concept of being taken to be under arrest, and ensure that they are drafted (and redrafted, if necessary) in a clear and lucid manner.

Other Matters

4.18 The Victorian Criminal Bar Association and the Victorian Bar both made the point that that the present method by which the judicial officer dealing with an electronic application for extension of the investigation period communicates the grant of the application is by sending a written form, whereas the Bill simply provides for the investigating official to be informed. They suggest that this change is retrograde and could result in a judicial officer being required to give evidence about the contents of the communication.[6]

4.19 However, the Committee notes that the existing provisions are contradictory. On the one hand, subsection 23E(3) requires the judicial officer to inform the investigating official, whereas subsection 23E(4) refers to the investigating official's receipt of the actual authority. In addition, the rest of the section proceeds on the basis that the investigating official was simply informed of the authority and did not actually receive it. For example, the investigating official is to complete a form of authority and forward it to the judicial officer;

6 *Submission 4*, Victorian Criminal Bar Association, p. 7; *Submission 9*, Victorian Bar, p. 12

that form is to agree with the terms of the authority signed by the judicial officer. The Committee considers it arguable that the amendments simply rectify a drafting error and should not be rejected.

4.20 Both the Victorian Criminal Bar Association and the Victorian Bar discuss proposed changes to the provisions prohibiting an investigating official from questioning an Aboriginal person or a Torres Strait Islander or a person under 18 in the absence of an interview friend if the investigating official suspects that the person may have committed a Commonwealth offence or is of the opinion that information received may implicate that person. The changes proposed in the Bill would mean that the investigating official could not interview the person as a suspect (whether under arrest or not) in the absence of the interview friend. They argue that the changes are ambiguous and could lessen the rights of members of these groups.[7] The point appears to be that if the investigating official has gone beyond suspicion, he or she will not be caught by the prohibition, because he or she will not be interviewing the person as a suspect. However, it should be noted that the amendments would bring the language of the provisions into line with that in section 23V (which deals with tape recording of confessions and admissions). The Committee is not sure that the point is valid. One would have to consider it in the light of the provisions dealing with rights of other persons taken to be under arrest.

4.21 The Australian Institute of Criminology asserted that the change would significantly restrict the range of situations in which an Aboriginal or Torres Strait Islander person who was being questioned must be advised of the right to have an interview friend present. It stated that the interview friend requirement would have no application when such a person was being questioned but was not a suspect, eg, when being questioned by police about a family member, friend or acquaintance. The Committee disagrees with the point made by the AIC, in so far as subsection 23B(6) provides that in the Part, a reference to questioning the person is a reference to questioning the person or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in a Commonwealth offence. Subsection 23H(2), as at present and as it would be if amended by the Bill, provides that the official must not question the person unless the interview friend is present. The current provision makes no reference to an interview friend being present if the person is being questioned about others.

4.22 The second point made by the Australian Institute of Criminology was that the obligation in subsection 23F(2) for the caution by investigating officials to be given in, or translated into, a language in which the person was able to communicate with reasonable fluency, appeared to have been repealed.[8] In fact, the proposed replacement subsection 23F(2) would require the investigating official to inform the person of the caution, and 'inform' is to be defined in section 23B as meaning to notify the person in a language in which the person is able to communicate with reasonable fluency.

4.23 The Human Rights Commissioner and Disability Discrimination Commissioner suggests[9] that subsection 23F(2) in both its current and proposed forms could be taken to imply that a hearing-impaired person (who could be illiterate) need only be given the caution

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7 *Submission 4*, Victorian Criminal Bar Association, p. 8; *Submission 9*, Victorian Bar, p. 13

8 *Submission 2*, Australian Institute of Criminology, p. 2

9 *Submission 5*, Human Rights Commissioner and Disability Discrimination Commissioner, pp. 1-3

in writing. This would be a reverse inference from the statement that the caution need not be given in writing unless the person cannot hear adequately. Such a reverse inference might not be valid in criminal matters but the Commissioner's further suggestion that regard be had to the current application of subsection 23F(2) is wise.

4.24 The Commissioner also points out that simply giving the caution to an intellectually-disabled person will be inadequate if he or she does not understand it and suggests that the investigating official be required to give the caution in a manner which the person is able to understand, having regard to any intellectual disability.

4.25 The Commissioner considers that the proposed subsection 23C(2) would be fairer than the current provision in that it only permits investigation whether the lawfully arrested person has committed the offence for which he or she was arrested and any other of which he is reasonably suspected (instead of any other offence). On the other hand, the Commissioner is concerned about the possibility of arrest on a holding charge while a more serious charge is investigated. However, the Committee is not sure that his concern takes enough account of the requirement that the arrest be lawful.

**Recommendation 7**

The Committee **recommends** that the Government, in reconsidering the drafting of the proposed amendments, take account of the submission of the Human Rights and Disability Discrimination Commissioner, particularly as it relates to the manner of giving the caution.

# CHAPTER 5

## RECOMMENDATIONS

5.1 The Committee has raised a number of issues and made recommendations throughout this report. The recommendations are as follows:

**Recommendation 1, following Paragraph 2.17**

The Committee **recommends** that 'serious and organised crime' be defined for the purposes of this Bill.

**Recommendation 2, following Paragraph 2.61**

The Committee **recommends** that relevant Australian Customs Service officers, at the direction of the Australian Federal Police, undertake appropriate training to ensure that officers are appropriately qualified to participate in controlled operations.

**Recommendation 3, following Paragraph 3.10**

The Committee **recommends** that all defendants in Commonwealth sexual assault cases be provided with appropriate assistance, especially with respect to cross-examination of child complainants and child witnesses. Guidelines as to the experience and skills of qualified persons should be developed as a matter of urgency.

**Recommendation 4, following Paragraph 3.26**

The Committee **recommends** that consideration be given to audits of assumed identities by an external agency such as the Privacy Commission.

**Recommendation 5, following Paragraph 3.35**

The Committee **recommends** that the issuing official impose a specific time limit on the operation of all 'particular item' warrants.

**Recommendation 6, following Paragraph 4.17**

The Committee **recommends** that the Government reconsider the drafting of the proposed amendments to Part 1C in relation to the concept of being taken to be under arrest, and ensure that they are drafted (and redrafted, if necessary) in a clear and lucid manner.

**Recommendation 7, following Paragraph 4.25**

The Committee **recommends** that the Government, in reconsidering the drafting of the proposed amendments, take account of the submission of the Human Rights and Disability Discrimination Commissioner, particularly as it relates to the manner of giving the caution.

5.2 Subject to the above recommendations, the Committee **recommends** that the Bill proceed.

**Senator Marise Payne**

**Chair**

June 2001

# APPENDIX 1

## INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. NSW Commission for Children and Young People
2. Australian Institute of Criminology
3. Australian Federal Police
3A. Australian Federal Police
3B. CONFIDENTIAL
4. Victorian Criminal Bar Association
5. Human Rights and Equal Opportunity Commission
6. Australian Customs Service
6A. Australian Customs Service
7. National Crime Authority
7A. National Crime Authority
8. NSW Office of the Privacy Commissioner
9. The Victorian Bar
10. Commonwealth Attorney-General's Department
10A. Commonwealth Attorney-General's Department
10B. Commonwealth Attorney-General's Department
11. Australian Federal Police Association
12. New South Wales Bar Association

# APPENDIX 2

## INDIVIDUALS AND ORGANISATIONS WHO APPEARED BEFORE THE COMMITTEE TO GIVE EVIDENCE

**Thursday, 7 June 2001 - CANBERRA**

**Australian Customs Service**

Mr Peter Naylor, National Manager, Investigations Branch

Mr Paul Hill, Director, Policy Development

**Commonwealth Attorney-General's Department**

Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch

Mr Karl Alderson, Principal Legal Officer, Criminal Law Branch

Ms Sarah Chidgey, Legal Officer, Criminal Law Branch

Ms Liz Atkins, Deputy Director, Money Laundering Deterrence, AUSTRAC

**Victorian Criminal Bar Association**

Mr Edwin Lorkin, Member of Executive

**Victorian Bar Council**

Ms Jeanette Morrish, QC

**Tuesday, 12 June 2001 – SYDNEY**

**National Crime Authority**

Mr Adrien Whiddett, General Manager Operations

Mr Brain Dargan, Manager Law Reform

Mr James Bennett, Member

**Australian Federal Police**

Mr Graham Ashton, General Manager, Southern Operations

Mr Chris Whyte, General Manager, Policy and Commercial

Ms Annie Davis, Director, Legislation Program

Ms Victoria Linabury, Federal Agent, Principal Legislation Officer

**NSW Office of the Privacy Commissioner**

Dr John Gaudin, Legal and Policy Officer

**NSW Commission for Children and Young People**

Ms Gillian Calvert, Commissioner

**Commonwealth Attorney-General's Department**

Mr Karl Alderson, Principal Legal Officer, Criminal Law Branch

# DISSENTING REPORT BY LABOR SENATORS

1.1 Although this Bill is entitled *Measures to Combat Serious and Organised Crime Bill*, not all of the provisions can be categorised as such. It is unfortunate that the Government chose to include amendments intended to improve protections for child witnesses in sexual assault cases and clarify the rights of people detained for questioning, and technical amendments relating to financial transaction reporting and CRIMTRAC, in the same Bill as amendments which increase law enforcement powers.

1.2 An issue essential to a true assessment of this legislation is: "What is the correct balance to be struck between the public interest in having crime suppressed and the public interest in having a fair and benign society informed by the rule of law?" This is a philosophically and practically difficult question to answer, but one which policy makers and legislators must continue to struggle with. One of the repeated justifications for many of the measures in this Bill is that they are necessary in order to combat crime which has a devastating impact on our social fabric – without these measures, criminals will avoid their just desserts. While that is true, it is essential that Parliament remains wary of creating, in pursuit of criminals, a culture of noble corruption in the community, where law enforcement officers are allowed to become so oppressive and dissimulating in the pursuit of criminals that they range beyond the bounds of what is proper in a democratic society.

1.3 We believe that there are sufficient public policy grounds to give in principle support for the initiatives proposed in this Bill. It is unarguable that the nature of criminal activity has altered – it is more sophisticated, more organised, and more pervasive than ever before. Whilst the measures in this Bill do extend powers to law enforcement agencies they are limited to the circumstances of combating organised and serious crime.

1.4 However, we believe that the Bill does not contain adequate safeguards to ensure that these extended powers are used as intended by the legislation, and in a way that does not go beyond what is proper in a democratic society.

**Controlled Operations**

1.5 The majority report correctly identified a range of concerns regarding the provisions in the Bill that extend the scope of controlled operations. However, we believe that the majority did not give appropriate weight to the need to ensure that special investigatory powers are only given to appropriate agencies, with appropriate oversight.

1.6 During the hearings, both the AFP and the ACS argued that, although the provisions of the Bill seemed to extend broad powers on each agency, in practice, these powers would not be exercised to their fullest extent. This justification for granting broad powers in legislation is not acceptable. When a power is on the legislative books, it is available for use, no matter what the intention of the relevant agency at the time the legislation was introduced.

*Definition of "Serious Crime"*

1.7 Labor Senators believe that the conduct of controlled operations should not be extended to all Commonwealth offences. The extension of controlled operations is justified on the grounds that it is a necessary tool to fight serious and organised crime. Therefore, the legislation should be limited to serious and organised crime. We recommend that the Bill be

amended so as to adopt the definition of organised crime as per the *National Crime Authority Act*.

**Recommendation 1: that the Bill be amended so as to adopt the definition of organised crime as per the *National Crime Authority Act.***

*External Authorisation and Oversight*.

1.8 The issue of external authorisation of long term controlled operations, and increased oversight by the Ombudsman were considered in the NCA Committee report, *Street Legal*. The inquiry process, which took place before the Street Legal report was produced, was longer, with more witnesses and more hearings, than this inquiry into the *Measures to Combat Serious and Organised Crime Bill*. The NCA Committee's inquiry therefore considered the issues associated with increasing the scope of controlled operations in a much more detailed way than this Committee was able to.

1.9 The *Street Legal* report was a unanimous report. We believe that this unanimity gives substantial weight to the recommendations of the *Street Legal* Report, as do the substantial inquiry process and detailed consideration of issues in the Report. Unfortunately, the Government chose to reject a number of the NCA Committee's recommendations in its formal response to the Report and in this Bill. It appears that the recommendations in support of extending the scope of controlled operations were accepted, while the recommendations improving oversight and accountability were not.

1.10 We consider this an unbalanced and unacceptable approach. The controlled operations provisions of this Bill should not go ahead unless they are redrafted to implement ALL of the recommendations of the *Street Legal* Report.

**Recommendation 2: That the controlled operations provisions of this Bill should not go ahead unless they are redrafted to implement ALL of the recommendations of the *Street Legal* Report.**

*ACS and controlled operations*

1.11 Currently, only the AFP and the NCA have the legislative power to authorise and conduct controlled operations, and only for Commonwealth narcotics offences. This Bill not only extends this power to all Commonwealth offences, it also extends this power to the ACS.

1.12 We reject the arguments given by the ACS in support of their inclusion as an agency given the power to authorise and conduct its own controlled operations. While the ACS has both regulatory and facilitating functions, and within that must context must enforce the laws for which it is responsible, it is not a body that has the role of seeking out and suppressing organised crime. It is not a law enforcement agency - it does not have the institutional

structure, the culture, the tradition, the training facilities, or the oversight and accountability mechanisms.

1.13 The Committee heard that the ACS has powers of search and seizure, and the ability to apply for and use listening device warrants. While this is true, it is also true that these powers have been granted so that the ACS can locate and seize either prohibited imports/exports, or documentation that would reveal that Commonwealth excise is being evaded. These powers are necessary to facilitate and regulate people and goods moving across Australia's borders. They have not been given to the ACS so that it can conduct long-term investigations into organised criminal activity. This, properly, is the jurisdiction of the AFP.

1.14 It may be that the ACS is already equipped with more powers than is necessary to carry out its functions. However, this question is beyond the scope of this legislation. What is directly on point for this inquiry is that this Bill purports to give the ACS the power to use one of the more contentious law enforcement tools – controlled operations – without any apt public consultation or consideration as to the appropriateness of this move.

1.15 Labor Senators believe that this is too great a change to the status quo to be supported in the absence of a wider public debate about the proper role of the ACS.

1.16 These arguments also apply to the inclusion of the ACS in the list of agencies covered by the new assumed identity legislative regime. On this point, we note that the ATO is also included in the list. However, there was no discussion as to the appropriateness of this during the inquiry. We request that the Government provide this justification before the Bill is debated.

**Recommendation 3: That the ACS be removed from the provisions in the Bill relating to controlled operations and assumed identities.**

*Commonwealth indemnity for State offences*

1.17 During the public hearings, the Victorian Bar Association suggested that the provisions of the Bill that purport to give relevant persons indemnity from State offences may be open to constitutional challenge. The Attorney General's Department rejected this suggestion. Given the recent High Court decision in *Re Wakim* that, on one view, can be read as narrowly interpreting the incidental power, it may be arguable that these provisions are not constitutionally valid. Whilst this would be an unfortunate Constitutional interpretation, it should not be discounted out of hand.

1.18 It was also made clear during the hearings that there had been no formal consultation with the States. This lack of consultation is unfortunate, as it would seem that it precluded the Government from considering adopting a "belt and braces" approach to the issue of indemnity from State offences, for example, a State reference under s51(xxxvii). It is remarkable that the Commonwealth has not formally and in some depth consulted with the States about legislative matters to do with organised crime that cross jurisdiction boundaries.

1.19 Labor Senators believe that the Government should give a guarantee that, in the event that there is a successful challenge to the indemnity provisions, it will nonetheless indemnify any individual officers who may be exposed to civil or criminal liability.

**Recommendation 4: that the Government should give a guarantee that, in the event that there is a successful challenge to the indemnity provisions, it will nonetheless indemnify any individual officers who may be exposed to civil or criminal liability.**

*Protection of Child Witnesses and Victims*

1.20 We strongly support the intent of Schedule 3 of the Bill. We also concur with the comments of the majority.

1.21 However, with respect to Recommendation 3, it should be noted that the only time that a defendant in a prosecution of the type contemplated by this Bill should ever be unrepresented is if the Defendant chooses not to have counsel. Otherwise, there is a need to see that the Defendant is properly represented by legal counsel.

1.22 We believe that, if a Defendant does choose to defend him or herself, then that Defendant should not be denied due process. The Bill should be amended to provide that, in the event that the defendant is unrepresented, the Court should appoint a lawyer competent in criminal law, to cross examine the child witness.

**Recommendation 5: that the Bill should be amended to provide that, in the event that the defendant is unrepresented, the Court should appoint a lawyer competent in criminal law, to cross examine the child witness.**

*Privacy, Security and the Interests of the Community*

1.23 Labor Senators support the majority report's position in respect to listening devices. We particularly support the comments made in paragraph 3.22, and Recommendation 5.

1.24 In addition, we believe that it is timely for the Parliament to take the opportunity to review the entire issue of privacy, civil rights and surveillance. While privacy issues with respect to telephone interceptions receive ongoing consideration, it appears that the use of listening devices has not received the same level of attention. There would appear to be no logical reason why this should be the case. Further, as technology is changing, there is an increasing range of new tools that law enforcement agencies want to use. The opportunity should be taken now to consider what provision we could or should have in place to account for individuals' civil rights.

1.25 We understand the thrust of the provisions regarding assumed identities. We endorse the concerns expressed in paragraph 3.25 regarding the absence of a central registry of assumed identities, and 3.30 concerning the involvement of privacy bodies. Following from

this, we support the suggestion made in Recommendation 4 that consideration be given to audits of assumed identities by an external agency such as the Privacy Commission.

*Part 1C of the Crimes Act*

1.26 We concur with the comments and recommendations of the majority report relating to Part 1C, and strongly urge the Government redraft the proposed amendments so as to achieve greater clarity.

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| **Senator Jim McKiernan** | **Senator Barney Cooney** | **Senator Joe Ludwig** |
| **Deputy Chair** | **Member** | **Participating Member** |

# ADDITIONAL COMMENTS BY SENATOR BRIAN GREIG ON BEHALF OF THE AUSTRALIAN DEMOCRATS

1.1 The Democrats are in agreement with the dissenting report by Labor Senators. However, we would add some additional comments in relation to accountability mechanisms for law enforcement operations.

**Controlled Operations**

1.2 The Democrats support a two tiered approval process for the authorisation of controlled operation. The in-house approval process for controlled operations proposed by this Bill does not provide for an adequate level of accountability.

1.3 In accordance with recommendation 3 of the Street Legal Report, the Democrats do not oppose the use of appropriate in-house approval processes for minor controlled operations. Minor controlled operations are understood to be short-term investigations (not exceeding one month's duration) involving minimal contact between a covert operative and a suspect or suspects, where law enforcement officers are required to engage in activities involving unlawfulness of a technical nature.

1.4 However, we also support the recommendations of Street Legal in so far as they propose that longer-term or more serious controlled operations should be subject to an external approval process. We believe that authorisation by a judicial officer should be required in such cases.

**Recommendation 1: Long-term or serious controlled operations should be subject to external approval by a judicial officer.**

**A Public Interest Monitor**

1.5 As an additional safeguard, the Democrats support the use of a body akin to the Queensland Public Interest Monitor where possible. This would promote the integrity of the application processes while not compromising the secrecy or effectiveness of law enforcement operations.

1.6 Part 10 of the Queensland *Police Powers and Responsibilities Act 1997* establishes the position and powers of the Public Interest Monitor. The Monitor has a number of functions under the Act. Of particular relevance is the requirement that the Monitor appear at any hearing of an application to a Supreme Court Judge or Magistrate for a covert search warrant or surveillance warrant and to thereby test the validity of the application by various means, including:

- presenting questions for the applicant to answer
- cross-examining any witness who has sworn an affidavit or given oral evidence in support of the application; and

- making submissions on the appropriateness of granting the application.

1.7 The Monitor's primary role is to represent the public interest where law enforcement agencies seek approval to use powers which have the capacity to infringe the rights and civil liberties of citizens. The role recognises the public interest in ensuring that law enforcement agencies meet all the legislative requirements and that their proposed actions do not exceed the limits prescribed by Parliament.

1.8 It is envisaged that the monitor could have a role in the approval of long-term controlled operations and applications for listening device and search warrants.

1.9 The current process by which warrants are approved can be unfair. Decisions are made based solely on representations made and evidence presented by the relevant law enforcement agency. The rights, interests and privacy of citizens are deeply affected by these proceedings in which they are not represented. The nature of these operations usually precludes direct legal representation of subjects, but it does not mean that their rights and interests cannot be represented by an independent party.

1.10 The design of our legal system reflects the view that justice is best served by proceedings in which all interested parties are represented before an independent arbiter. It concerns the Democrats that there is no procedure by which representations can be made on behalf of prospective subjects of warrants as to the lawfulness of issuing warrants or the soundness of the evidence on which warrant applications are based.

1.11 The third annual report of the Public Interest Monitor was tabled in the Queensland Parliament in November last year. It referred to the establishment of the position of Monitor as a 'unique and fundamentally significant step forward in the process of accountability of investigative agencies.' It said that:

> 'the recognition which has been accorded by issuers [that is, judges] to the fundamentally important role of the Monitor reflects the potential which the position has for expansion into other aspects of the criminal investigative process where, necessarily, there will be infringement of the public's personal or proprietary rights as a consequence of the imperative of detecting and prosecuting major crime.'

1.12 The success of the Public Interest Monitor in Queensland confirms that establishing similar accountability mechanisms for Commonwealth law enforcement bodies would be practical, worthwhile and cost-effective. The number of warrants currently issued and the number of controlled operations currently approved are not so great as to require any significant bureaucratic structure. Monitors would normally be barristers appearing as required and remunerated for their services by way of an hourly rate.

1.13 Obviously, where exceptional circumstances require the immediate determination of a warrant application and a Monitor is unavailable to participate in the proceedings, it is appropriate that the application proceed. However, in such cases the Monitor should be required to review the case as soon as possible.

1.14 This proposal is not expensive or resource intensive. It is a simple change to existing procedures that would enhance the integrity of current processes.

**Recommendation 2: Public Interest Monitors should be established to participate in warrant applications and in applications relating to long-term or serious controlled operations.**

**Senator Brian Greig, Member**

**Australian Democrats Senator for Western Australia**