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Measures to Combat Serious and Organised Crime Bill
2001

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Law and Bills Digest Group
13 August 2001

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Measures to Combat Serious and Organised Crime Bill 2001

Date Introduced: 4 April 2001

House: Senate

Portfolio: Justice and Customs

Commencement: Amendments relating to controlled operations and assumed identities (Schedules 1 and 2) commence on proclamation or 6 months after Royal Assent (whichever is earlier). Item 10 of Schedule 4 commences on proclamation.¹ The remainder of the Act's substantive provisions commence on the 28th day after Royal Assent.

Purpose

The Bill's major purposes include:

- expanding the offences in respect of which a Commonwealth controlled operation can be authorised from an offence against section 233B of the *Customs Act 1901* or an associated offence to any Commonwealth offence
- enabling persons other than law enforcement officers to take part in Commonwealth controlled operations and to extend to them the same immunities and indemnities available to law enforcement officers
- adding the Australian Customs Service (Customs) to the list of Commonwealth agencies whose senior officers can authorise a Commonwealth controlled operation. At present, these agencies are the Australian Federal Police (AFP) and the National Crime Authority (NCA).
- increasing the duration of a controlled operations certificate from 30 days to a maximum of six months
- establishing a statutory regime for the acquisition and use of assumed (false) identities by law enforcement officers, intelligence officers and others
- reforming the law relating to the evidence of child victims and witnesses in Commonwealth sexual offence proceedings
- amending the law in relation to the obligations of Commonwealth investigating officials

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- providing for a new class of listening device warrant—a warrant relating to an ‘item’, and
- amending the *Financial Transaction Reports Act 1988*.

Background

There are linkages between the controlled operations and assumed identities provisions in the Bill. For the most part, however, the Bill covers a number of disparate areas. For this reason, background information about each topic can be found under the relevant heading in the Main Provisions section.

The Bill’s assumed identity provisions apply to a number of Commonwealth agencies including the Australian Secret Intelligence Service (ASIS) and the Defence Signals Directorate (DSD). The Intelligence Services Bill 2001 which is currently before the Parliament provides a legislative basis for these organisations and, among other things defines their functions. It is relevant to the assumed identities provisions in the Measures to Combat Serious and Organised Crime Bill 2001. Readers wanting background information about ASIS and DSD and a discussion of the Intelligence Services Bill should consult *Bills Digests Nos. 11 & 12, 2001-02*.²

Main Provisions

Schedule 1—Controlled operations

Background—Commonwealth controlled operations legislation

Commonwealth controlled operations legislation had its genesis in the High Court’s decision in *Ridgeway v. Queen*.³ On his release from prison, a person with drug trafficking convictions—Ridgeway—contacted a former associate in order to obtain some heroin. However, the former associate had turned police informer. The police and the former associate arranged to buy and import heroin into Australia and sell it to Ridgeway who was then arrested, charged and convicted of offences under the Customs Act. The High Court quashed Ridgeway’s conviction. In their joint judgment, Mason CJ, Deane and Dawson JJ said:

In these circumstances ... grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; absence of any real indication of official disapproval or retribution; the achievement of an objective of the criminal conduct if evidence be admitted—combine to make the case an extreme one in which the considerations favouring rejection of evidence on public policy grounds are extremely strong.⁴

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Their Honours also remarked:

... in the context of the fact that deceit and infiltration are of particular importance to the effective investigation and punishment of trafficking in illegal drugs such as heroin, it is arguable that a strict requirement of observance of the criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the Legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some of the provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements.⁵

Following the decision, controlled operations legislation was enacted in South Australia⁶, New South Wales⁷ and by the Commonwealth Parliament. More recently, controlled operations legislation has been enacted in Queensland.⁸

The *Crimes Amendment (Controlled Operations) Act 1996* inserted Part 1AB into the *Crimes Act 1914* (Cwlth). Part 1AB creates a statutory regime governing Commonwealth controlled operations. It:

- exempts law enforcement officers⁹ from criminal liability when they are involved in an authorised controlled operation relating to an offence against section 233B of the Customs Act (a section 233B offence) or an associated offence, and commit what would otherwise be narcotics offences. Section 233B creates offences relating to the importation and exportation of narcotic goods.
- empowers the AFP Commissioner and the Chairperson of the National Crime Authority to authorise controlled operations
- stipulates when a controlled operations certificate can be granted, and its form, content and duration
- requires the AFP Commissioner and the Chairperson of the NCA to report to the Minister about controlled operations, and
- obliges the Minister to report to Parliament about controlled operations.

In 1998, the Commonwealth Attorney-General's Department reviewed Part 1AB of the Crimes Act. In its submission to a 1999 inquiry conducted by the Parliamentary Joint Committee on the National Crime Authority (PJC) it noted a number of proposals for reform made during the consultations accompanying the review. These included:

- expanding the categories of offences for which controlled operations certificates could be issued
- enabling persons other than law enforcement officers to have the same immunities as law enforcement officers when engaged in authorised controlled operations, and
- extending the duration of controlled operations certificates.¹⁰

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In 1999, the PJC resolved to report on the NCA and controlled operations legislation. Among the recommendations made by the PJC were that:

1. the Government recommend to the Standing Committee of Attorneys-General that uniform controlled operations legislation be enacted by all jurisdictions based on the *Law Enforcement (Controlled Operations) Act 1997* (NSW)—subject to amendments foreshadowed both by a review of that Act and the recommendations made by the PJC.
2. a two-tier system for authorising controlled operations be established—with minor controlled operations being approved internally and major operations being subject to an external approval process.
3. when considering an application for a controlled operations certificate, the authorising officer should be ‘reasonably satisfied’ or ‘satisfied on reasonable grounds’ of the matters set out in the legislation rather than being ‘satisfied’ (the present requirement).
4. the ‘no entrapment’ requirement in paragraph 15M(b) should be clarified.¹¹
5. the Commonwealth Ombudsman should have oversight of controlled operations.
6. the definition of ‘controlled operations’ should be extended to refer to operations carried out to obtain evidence that could lead to a prosecution 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 by or of a Commonwealth, State or Territory officer, bankruptcy and company violations, illegal importation or exportation of fauna, money laundering and people trafficking.
7. immunity from criminal and civil liability should be available to all persons authorised to participate in controlled operations.
8. the duration of a controlled operations certificate be extended from 30 days to three months.

The Government responded to the PJC’s recommendations on 29 March 2001. Among other things it:

- agreed with points 3, 4 & 7
- agreed in part with point 6. That is, it agreed that controlled operations should be available for a greater number of Commonwealth offences but concluded that the range of Commonwealth criminal activity for which a controlled operations certificate could be sought should not be limited.
- agreed in part with point 8. The Government agreed that the existing 30 day time frame for a controlled operations certificate was inadequate but considered three months also to be inadequate.
- disagreed with points 2 & 5.

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The Bill

Title, purposes and definitions

Item 11 of Schedule 1 repeals the existing heading for Part 1AB of the Crimes Act ('Controlled operations for obtaining evidence about certain offences relating to narcotic goods') and replaces it with a new heading ('Controlled operations for obtaining evidence about Commonwealth offences'). Although the title of the Bill refers to 'serious and organised crime' the new title for Part 1AB reflects the fact that the amendments enable controlled operations to be conducted—subject to the terms of the legislation—in relation to any Commonwealth offence.

Section 15G of the Crimes Act sets out the objects of Part 1AB. **Item 12** amends section 15G in a number of ways. First, it reflects the expansion of the controlled operations regime from narcotics offences to any Commonwealth offence. Second, it states that another object of Part 1AB is to exempt from criminal liability and indemnify from civil liability persons other than law enforcement officers who take part in an authorised controlled operation. Third, it states that law enforcement officers and others will be protected when they are involved in what would otherwise be an offence against Commonwealth, State or Territory law.¹² Fourth, another object of the legislation will be to indemnify from civil liability law enforcement officers who participate in authorised controlled operations (at present these officers are only protected from criminal liability). Fourth, another new object of the legislation will be to require the Chief Executive Officer of Customs to report to the Minister on controlled operations (**item 13**).

Item 17 repeals and replaces sections 15H, 15I and 15J of the Crimes Act. Existing section 15H defines a controlled operation as involving law enforcement officers engaging conduct that would otherwise constitute a narcotics offence in order to obtain evidence for the prosecution of a section 233B offence or an associated offence. **New section 15H** expands the definition of 'controlled operation' in a number of ways. It will include an operation to obtain evidence for the prosecution of a 'Commonwealth offence' and may involve a law enforcement officer or other person engaging in otherwise illegal conduct.

Immunities and indemnities

New subsection 15I(1) immunises a law enforcement officer who engages in conduct that would otherwise be an offence against Commonwealth, State or Territory law from criminal liability if the conduct:

- occurs in the course of duty during a controlled operation, and
- meets the requirements of subsection 15IB(1) and any requirements prescribed by regulation.

New subsection 15I(2) provides the same immunity to a non-law enforcement officer whose conduct:

- occurs during the course of a controlled operation

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- is authorised by a law enforcement officer, and
- meets the requirements of subsection 15IB(2) and any requirements prescribed by regulation.

New subsection 15IA(1) indemnifies law enforcement officers who take part in a controlled operation when they engage in conduct in the course of duty and their conduct meets the requirements of:

- subsection 15IB(1), and
- any regulations.

New subsection 15IB(1) specifies that there must be a section 15M certificate in force authorising the operation, the conduct must be covered by the certificate and not breach any conditions contained in the certificate, the conduct must not involve intentionally inducing a person to commit an offence they would otherwise not have committed, and the conduct must not involve the commission of a sexual offence or an offence involving death or serious injury.

Indemnities apply in a similar fashion to persons other than law enforcement officers who are involved in controlled operations [**new subsection 15IA(2)**].

The immunities and indemnities provided by **new sections 15I and 15IA** do not apply if a person's conduct could be authorised under certain other criminal investigation laws (**new section 15IC**). The Explanatory Memorandum explains that the purpose of new section 15IC 'is to make clear that the proposed new controlled operations provisions do not override or oust specific laws governing the conduct of criminal investigations on specific topics'.¹³ Examples of those laws include laws governing arrest, listening devices and telecommunications interception.

Applying for a controlled operations certificate and authorising a controlled operation

Under the law as it stands, an application for a controlled operations certificate is made to the AFP Commissioner, a Deputy Commissioner or an Assistant Commissioner, or to a member of the NCA (section 15J). Only a law enforcement officer who is in charge of a controlled operation can apply for a certificate authorising a controlled operation (section 15J). **New section 15J** amends the law in a number of ways. For example, it:

- enables any 'Australian law enforcement officer' to apply for a controlled operations certificate
- adds the CEO of Customs and other senior, authorised Customs officers to the list of persons empowered to authorise a controlled operation.

Items 19 and 20 amend section 15M which sets out the grounds on which a controlled operations certificate can be issued. At present, an authorising officer can issue a certificate if 'he or she is satisfied' about the criteria in paragraphs 15M(a)-(d). As a result of **item 19** the

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authorising officer will only need to be ‘reasonably satisfied’ about the criteria in **new paragraphs 15M(a)-(h)**.

The matters set out in existing paragraphs 15M(a)-(d) about which the authorising officer must be satisfied are:

- that he or she has been provided with ‘as much information as is available to the applicant about the nature and quantity of narcotic goods to which the operation relates’
- the likelihood that the target of the operation will commit a section 233B offence irrespective of whether the operation occurs
- the operation will make it ‘much easier’ to obtain evidence leading to the prosecution of the target, and
- any narcotic goods to which the operation relates that are in Australia at the end of the operation will be under the control of an Australian law enforcement officer.

New paragraphs 15M(a)-(h) require the authorising officer to be ‘reasonably satisfied’ that:

- it is likely a Commonwealth offence has been, is being or will be committed
- the offence and any related criminal activity justifies a controlled operation
- conducting the operation will not involve intentionally inducing a person to commit an offence they would not have otherwise committed
- any unlawful activity associated with the controlled operation will be restricted
- the operation will be conducted to ensure, ‘to the maximum extent possible’, that any ‘illicit goods’¹⁴ involved in the operation will be under the control of an Australian law enforcement officer at the end of the operation. The present requirement is satisfaction that any narcotic goods in Australia at the end of the operation will be under the control of an Australian law enforcement officer. Foreshadowing the amendment in its response to the Parliamentary Joint Committee, the Government said that ‘The proposed formulation will promote improved operational planning but does not require certainty as to operational outcomes’.¹⁵
- any unlawful activity during the controlled operation will not cause death or serious injury, involve a sexual offence or loss/damage to property, and
- if a non-law enforcement officer is involved in the operation, the role assigned to that person could not be adequately performed by a law enforcement officer.

Controlled operations certificates

Existing section 15N of the Crimes Act stipulates the form and content of a controlled operations certificate. For example, it must be in writing and signed, state the name of the applicant and give a brief description of the controlled operation—including the name of the

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target, the nature and quantity of the narcotics involved and the foreign countries through which they are expected to pass [subsections 15N(1) and (2)]. At present, a controlled operations certificate expires after 30 days [subsection 15N(4)].

The existing terms of subsections 15N(1) and (2) are largely unchanged—except by the substitution of the expression ‘any illicit goods’ for ‘narcotic goods’. This amendment is in keeping with the expanded range of controlled operations contemplated by the Bill. However, **items 23-25** add to section 15N in a number of ways. For example, **new paragraphs 15N(2)(ca)-(cd)** provide that a certificate must state the nature of the activities it covers and the nature of the activities assigned to particular operational personnel, identify any non-law enforcement officers who are involved in the operation, and any conditions to which the operation is subject. **New subsection 15N(2A)** provides that a person who is not a law enforcement officer may be identified by a false name if the AFP Commissioner, NCA Chairperson or CEO of Customs has a document enabling the person’s true identity to be ascertained. **New subsection 15N(4)** increases the length of time a controlled operations certificate can be in force from 30 days to 6 months. However, in order for a certificate to be in place for more than 3 months it must be reviewed.¹⁶

Varying a controlled operations certificate

While the current legislative regime enables controlled operations certificates to be surrendered, it does not allow for their variation.

Item 27 inserts **new section 15NA** which enables an authorising officer to vary a controlled operations certificate. A certificate can be varied if:

- the certificate, as varied, could have been issued under section 15M, and
- it is necessary for the success of the operation, the health or safety of any person, the protection of property or to ensure that anyone involved in the operation has the appropriate immunities and indemnities.

If the authorising officer agrees to vary the certificate, each variation must be stated in writing [**new subsection 15NA(4)**].

Terminating a controlled operations certificate

New section 15OA enables an authorising officer to terminate a controlled operations certificate by providing written notification to the officer in charge of the operation. The notification must specify the time when the notification takes effect (**item 28**).

The duration of a controlled operations certificate

At present, a controlled operations certificate expires after 30 days. As a result of **new section 15OB**, a controlled operations certificate expires 3 months after the date on which it was issued, unless it has been reviewed and the authorising officer concludes that it should be in force for 6 months or some earlier time [see existing **paragraph 15P(3)(a)**].

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What happens if a person is unaware that a controlled operations certificate has expired or been varied, surrendered or terminated?

Item 31 inserts **new section 15PA** which provides that if a controlled operations certificate has expired (after 3 months), been varied, surrendered or terminated, a person will still be covered by the immunities and indemnities contained in sections 15I and 15IA so long as:

- he or she is unaware of the expiry, variation, surrender or termination, and
- is not reckless about the existence of the expiry, variation, surrender or termination.

Reports to the Minister

Item 34 repeals and replaces section 15R of the Crimes Act. The present reporting requirements oblige the AFP Commissioner or the NCA Chairperson to advise the Minister ‘as soon as practicable’ after making a decision about an application for a controlled operations certificate of the decision and the reasons for it. These reasons must include an indication of the extent to which the seriousness of criminal activities were taken into account.

New section 15R requires the AFP Commissioner, NCA Chairperson and CEO of Customs to report to the Minister within 2 weeks from the end of each quarter about each decision to grant or refuse a controlled operations certificate, each variation, review, surrender or termination of a certificate and each certificate that is still in force. A ‘quarter’ is defined as ‘a period of 3 months ending on 31 January, 30 April, 31 July or 31 October’ (**item 9**).

Item 35 amends section 15S of the Crimes Act. In particular, it repeals and replaces subsections 15S(1) and (2). The amendments provide that a report made under section 15R must include the reasons why decisions were made to grant or refuse an application or vary or review a certificate. If a controlled operation has been finalised during the relevant quarter, the report must identify each person targeted by the operation and each person involved in the operation, indicate which people were not law enforcement officers, and what activities were engaged in. If the operation involved illicit goods, the report must state the nature and quantity of those goods and the route through which the goods passed. If the operation involved illicit goods that are narcotic goods, the reporting requirements generally re-produce those in existing subsection 15S(2).¹⁷

Transitional provisions

Item 41 provides that if Schedule 1 does not commence at the beginning of a quarter, then the new reporting requirements will not apply to decisions made or certificates given before the commencement. The old reporting requirements will continue to apply to those decisions and certificates.

Item 48 provides that amendments will not apply to a controlled operations certificate in force immediately before the commencement of the amendments. The old provisions will apply to such certificates.

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Schedule 2—Assumed identities

Background

If the Bill is passed, intelligence and law enforcement officers and others (including those involved in controlled operations) will have access to a statutory regime for assumed (false) identities. At present, there is no Commonwealth legislation governing assumed identities. The Minister's Second Reading Speech explains the assumed identities provisions in the following way:

Assumed identities are false identities adopted to facilitate intelligence and investigative functions, or infiltration of a criminal, hostile or insecure environment with a view to collecting information and investigating offences. Law enforcement and intelligence agencies require assumed identities to protect officers and others in the course of performing their functions. Criminals increasingly seek to verify commonly carried identification, such as Medicare cards. It is proposed to amend the Crimes Act to permit law enforcement and intelligence officers, and other approved persons, to obtain and use assumed identities to support their activities.

The Bill

Who can obtain an assumed identity?

As a result of **new sections 15XA and 15XB**, 'approved officers' and 'approved persons' can acquire evidence of and use an assumed identity.

'Approved officers' include officers of the AFP, Customs, ASIO¹⁸, ASIS, DSD, DIO¹⁹, and the Australian Taxation Office (ATO). Also included are officers of certain State and Territory agencies such as police forces, the ICAC²⁰, CJC²¹, Western Australian Anti-Corruption Commission and similar bodies. Further, officers of Commonwealth, State and Territory agencies prescribed by regulation may be 'approved officers'. Officers of foreign law enforcement, intelligence or security agencies may also be 'approved officers'.

The expression, 'approved person', is merely defined as any person who is authorised to use an assumed identity under subparagraph 15XI(2)(d)(i).

What does 'using an assumed identity' mean?

Using an assumed identity means representing, expressly, impliedly or by words, conduct or omission, a false identity as a real identity or acting in a way that is consistent with a false identity [**new subsection 15XA(2)**]. The Explanatory Memorandum gives an example of the use of an assumed identity:

... if a person acquires a passport as evidence of an assumed identity, it is intended that the person will be able to use that passport to travel outside Australia as if it were the person['s] real identity and not just hold the passport as a means of identification.²²

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What does 'acquiring evidence of an assumed identity' mean?

'Acquiring evidence of an assumed identity' includes obtaining documents or other things purporting to show the person's identity when it is not the person's real identity [**new subsection 15XA(3)**].

Who can authorise the acquisition and use of an assumed identity?

Assumed identities can be authorised by the head of a participating agency or by an authorised person who belongs to a class of persons prescribed by regulation (**new section 15XA**). 'Participating agencies' are the Commonwealth, State and Territory participating agencies mentioned above.

Effect of an assumed identity

New subsection 15XB(1) enables an 'approved officer' to acquire and use an assumed identity in the course of duty and subject to any conditions that are imposed. **New subsection 15XB(2)** enables an 'approved person' to acquire and use an assumed identity in accordance with directions from a supervising officer and any authorisation conditions. A 'supervising officer' is the person in the authorising officer's participating agency who is responsible for supervising the acquisition and use of an 'approved person's' assumed identity [**new section 15XA and new subparagraph 15XI(2)(d)(ii)**].

New section 15XC protects an 'approved officer' or 'approved person' from criminal liability in certain circumstances. For instance, an 'approved officer' is not criminally liable for conduct that would otherwise constitute an offence against Commonwealth, State or Territory law if:

- the officer engages in the conduct in the course of duty when acquiring or using an assumed identity, and
- the conduct accords with any authorisation conditions, and
- the conduct would not be an offence if the assumed identity were the officer's real identity [**new subsection 15XC(1)**].

An example is given of an officer who makes a misrepresentation that he or she is unemployed but the representation would be true if the officer's assumed identity were his or her real identity.

New subsection 15XC(2) protects an 'approved person' from liability for what would otherwise be criminal conduct if:

- the person engages in the conduct when acquiring or using the assumed identity
- the conduct accords with directions given to the person and any authorisation conditions, and

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- the conduct would not be an offence if the assumed identity were the person's real identity.

New section 15XD requires 'Commonwealth participating agencies' to indemnify 'approved officers' and 'approved persons' against any liability incurred subject to conditions that are similar to the requirements of **new section 15XC**.

Irrespective of any documentary evidence obtained as part of an assumed identity, **new sections 15XC and 15XD** do not protect an 'approved officer' or 'approved person' engaging in conduct that requires a particular skill or qualification if he or she does not in fact possess that skill or qualification (**new section 15XF**).

New section 15XE provides that if an approved officer's or approved person's authorisation is varied or revoked, the officer or person continues to be protected from criminal liability and indemnified against civil liability so long as he or she is:

- unaware of the variation or revocation, and
- not reckless about the existence of the revocation or variation.

New section 15XE sits uneasily with **new section 15XK** (see below) which provides that a person must be given written notice when an assumed identity is varied or revoked. In other words, if a person must be given written notice of a variation or revocation, how can he or she be unaware of it?

In what circumstances can the acquisition or use of an assumed identity be authorised?

New subsection 15XG(1) enables an authorising person from a 'Commonwealth participating agency' to authorise a person to acquire evidence of and/or use an assumed identity—if it is 'appropriate to do so'. An assumed identity can only be used in a foreign country if it is 'reasonably necessary to do so'. Evidence of an assumed identity can be obtained from a Commonwealth agency or a non-government body.

A 'foreign officer' can also be authorised by the Commonwealth to acquire evidence of and/or use an assumed identity [**new subsection 15XG(3)**—if the authorising officer considers that it is 'reasonably necessary to do so'. A 'foreign officer' is defined as an officer of a law enforcement, intelligence or security agency from a foreign country (**new section 15XA**).

A 'State or Territory participating agency' can authorise a person (other than a foreign officer) to acquire evidence of an assumed identity from a Commonwealth agency and/or use that identity (**new section 15XH**). The prerequisites for a State or Territory authorisation for a person to use an assumed identity in a foreign country are the same as those for a Commonwealth authorisation.

The contents of an assumed identity authorisation

New section 15XI deals with the contents of an authorisation. The authorisation must be in writing. It must include the name of the authorising person, the date of the authorisation, the

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name of the officer or person who has been given the assumed identity, the name of the supervising officer (if the person is an ‘approved person’), details of the assumed identity, all Commonwealth and non-government bodies who will be requested to issue evidence of the assumed identity, the reasons for authorising the assumed identity, whether the assumed identity can be used in a foreign country, and any conditions to which the authorisation is subject.

Revoking and varying assumed identities

An assumed identity authorisation remains in force until it is revoked (**new section 15XJ**).

New section 15XK provides that an authorisation may be revoked or varied at any time. Written notice of the revocation or authorisation must be given to the person who is covered by the authorisation. The notice must state the date the variation or revocation takes effect, the nature of any variation, and the reasons for the revocation or variation.

Issuing and cancelling evidence of assumed identities

The expression ‘issuing agency’ means a Commonwealth agency or a non-government body (**new section 15XA**). In other words, State and Territory agencies—for example, those responsible for issuing birth certificates or drivers licences—do not appear to be covered by the legislation.

A Commonwealth agency that receives a request to issue evidence of an assumed identity:

- must comply—if the request is made by a Commonwealth participating agency [**new subsection 15XM(1)**].
- may comply but is not required to comply—if the request is made by a State or Territory participating agency [**new subsection 15XM(2)**]

Where a Commonwealth agency asks a non-government body to issue evidence of an assumed identity, the non-government body may comply with the request but is not required to do so (**new section 15XN**).

New section 15XO provides that where a Commonwealth agency has issued evidence of an assumed identity it must cancel the evidence on the written request of an authorising person.

New sections 15XP and 15XQ immunise and indemnify Commonwealth employees in issuing agencies from criminal or other liability when they comply with request to supply evidence of an assumed identity.

Offences relating to assumed identities

New section 15XR creates a number of offences relating to assumed identities:

- it is an offence for an approved officer to acquire evidence of or use an assumed identity if the acquisition or use is not in the course of duty [**new subsection 15XR(1)**]

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- it is an offence for an approved person to acquire evidence of or use an assumed identity if the acquisition or use is not in accordance with the directions of a supervising officer [**new subsection 15XR(2)**]
- it is an offence for an approved officer or an approved person to acquire evidence of or use an assumed identity and engage in conduct that contravenes an authorisation condition [**new subsection 15XR(3)**].

In each case the maximum penalty is imprisonment for 12 months.

New section 15XS criminalises the disclosure of information revealing that:

- a person has an assumed identity—if the disclosure endangers a person or prejudices the conduct of an operation carried out by a participating agency. The maximum penalty is imprisonment for 10 years.
- a person has an assumed identity—if the assumed identity is or was covered by an authorisation. The maximum penalty is imprisonment for 2 years.

Miscellaneous provisions relating to assumed identities

If the real identity of a person who has an authorised assumed identity might be revealed in court or tribunal proceedings, then relevant parts of those proceedings must be held in private and appropriate suppression orders must be made—unless the court or tribunal considers that the interests of justice require otherwise (**new section 15XT**).

‘Appropriate records’ of authorised assumed identities must be kept by the head of a Commonwealth participating agency while the authorisation is in force and for at least 12 months after it has been revoked (**new section 15XU**). The expression ‘appropriate records’ includes authorisations, variations and revocations.

Schedule 3—Protection of children in proceedings for sexual offences

Background—Children’s evidence

Children will mostly appear as witnesses in State and Territory sexual offence proceedings. However, they do appear as witnesses in federal proceedings—including criminal proceedings. While the States and Territories have laws protecting child witnesses they do not apply to proceedings for Commonwealth offences. The issue of children’s evidence has been examined by the Australian Law Reform Commission (ALRC).²³ In a 1989 discussion paper, the ALRC remarked:

Child witnesses may have special needs in adapting to an adult court-room environment. With cognitive, emotional, physical and communicative abilities differing from adults, they may require additional consideration and different treatment from that given to adults. Failure to recognise and address these special needs can result in both trauma to the child and a breakdown in the fact-finding

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process essential to the court's role. ... Although empirical data is scarce, over recent years a number of studies of criminal cases have shown that the children involved, especially young children, are emotionally and mentally traumatised due to the experience of giving evidence in court.²⁴

Amongst the many recommendations relating to children's evidence made by the ALRC in 1997 were:

- legislation should permit all of a child's evidence, including evidence in chief and under cross-examination, to be taken prior to trial and video-taped for presentation at trial whenever the interests of justice require it²⁵
- instead of giving live evidence at committal hearings, the evidence of child witnesses should be presented in writing, or as audio or video tapes²⁶
- corroboration of a child witness' evidence should not be required. Judges should be prohibited from warning a jury that children are unreliable witnesses and that their evidence is suspect. Warnings should be able to be given but only in exceptional circumstances that relate to the unreliability of a particular child witness.²⁷
- children should be allowed to choose at least one person to accompany them into the courtroom and sit with them while they give evidence²⁸
- there should be a presumption in favour of the use of closed-circuit television in all matters involving child witnesses. A child should be able to decide not to use close-circuit television. However, a judge should ensure that the child's decision is an informed one.²⁹
- advocacy and professional conduct rules incorporated in barristers' and solicitors' rules should forbid intimidating and harassing questioning of children³⁰
- a court should have a discretion to permit unconventional means of giving evidence when child witnesses come from different cultural backgrounds³¹ and or have disabilities.³²

The Government has stated that the amendments are consistent with recommendations made by the Model Criminal Code Sexual Offences Against the Person Report.³³

The Bill

Application and definitions

Item 1 of Schedule 3 inserts **new Part 1AD**—'Protection of children in proceedings for sexual offences'—into the Crimes Act. **New Part 1AD** applies to those proceedings specified in **new section 15Y**, including child sex tourism proceedings, proceedings relating to sexual assault of United Nations personnel, proceedings relating to slavery, sexual servitude and deceptive recruiting, and proceedings for associated secondary offences and committals.

New section 15YA is a definitions section. In general, a 'child' is defined as a person under the age of 18. The expression, 'child witness' includes a child who is alleged to have been a

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victim of one of the offences to which **new Part 1AD** applies. A ‘child witness’ includes a child victim.

Admissibility of evidence

New section 15YB deals with the admissibility of evidence of a child’s sexual reputation in proceedings to which **new Part 1AD** applies. Unless a child is a defendant in the proceedings, evidence of his or her sexual reputation is not admissible without the leave of the court. A court must not give leave unless it is satisfied that the evidence is substantially relevant to the proceedings. Further, if admitted the evidence cannot be treated as relevant to the child’s credibility.

New section 15YC deals with the admissibility of evidence of a child’s sexual experience. Unless a child is a defendant in the proceedings, evidence of their sexual experience cannot be admitted unless the court gives leave or the evidence relates to sexual activities with the defendant. A court cannot give leave unless satisfied that the evidence is substantially relevant to facts at issue or relates to credibility and has substantial probative value.

New section 15YD provides that an application for leave to admit evidence of a child’s sexual reputation or sexual experience must be in writing and made in the absence of the jury (if the trial is a jury trial). A court granting an application must state its reasons in writing and record those reasons.

Cross-examination

New sections 15YE-15YH contain rules about the cross-examination of child witnesses and victims:

- questioning of a child witness may be disallowed by a court if it is inappropriate or unnecessarily aggressive (**new section 15YE**)
- an unrepresented defendant cannot cross-examine a child victim. Instead, questions the defendant wants asked must be put by a person appointed by the court (**new section 15YF**)
- an unrepresented defendant cannot cross-examine a child witness (other than a child victim) unless the court gives leave. If the court does not give leave, a third person appointed by the court must ask questions that the defendant wants put to the child (**new section 15YG**), and
- a represented defendant cannot cross-examine a child witness or victim except through their legal representative (**new section 15YH**).

Use of closed-circuit television

In general, a child witness must give evidence via closed circuit television. Exceptions to this general rule are that the child is at least 16 years of age and chooses not to give evidence by

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closed-circuit television, the court orders otherwise or the court is not equipped for closed-circuit television (**new section 15YI**).

If a child witness gives evidence via closed-circuit television from a place outside the courtroom, then that place is taken to be part of the courtroom and the court can order a court officer or other person to be present (**new section 15YJ**). If evidence is given by closed-circuit television, arrangements must be made so that those with an interest in the proceeding can see the child and anyone present with the child (**new section 15YK**). If a child witness' evidence is not given by closed-circuit television, then the court must make arrangements that will minimise the contact between the child and the defendant (**new section 15YL**).

Use of video recordings

A court may give leave for a video recording of a child witness' interview to be admitted as evidence in chief (**new section 15YM**). However, such evidence is not admissible if a court is satisfied that the defendant or their lawyer has not had an opportunity listen to and see the recording (**new section 15YN**).

If a court allows a child witness' interview to be admitted as evidence in chief, the child must be available for cross-examination and re-examination [**new subsection 15YM(4)**].

Other provisions relating to child witnesses

The Bill enables child witnesses to choose an adult or adults to accompany them while they give evidence. However, an accompanying adult is prohibited from prompting the child or influencing or disrupting their answers (**new section 15YO**).

New section 15YQ prohibits a court from warning a jury that the law regards children as unreliable witnesses, or that evidence given by closed circuit television, video recording or when a child is accompanied by an adult should be given greater or lesser weight.

New section 15YR creates an offence of publishing information identifying a child witness or child victim. The maximum penalty is imprisonment for 12 months or 60 penalty units (\$6600), or both. However, no offence is committed if the publication is an official publication or the court has given a person leave to publish the information.

Schedule 4—Investigation of Commonwealth offences

Obligations of investigating officials

The Bill inserts a note under the new heading, 'Division 3—Obligations of investigating officials'—that the Division applies both to people lawfully arrested and those taken to be arrested.

A number of the amendments deal with Indigenous people and interview friends. An interview friend is a relative, lawyer or other person chosen by or provided to a person under suspicion or arrest so that they can be present during questioning by investigating officials.³⁴ As the law stands, an 'investigating official',³⁵ who:

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- suspects that a person may have committed a Commonwealth offence or, due to information received, considers that the person may be implicated in the commission of a Commonwealth offence, and
- believes that the person is an Indigenous person

cannot question the person unless an interview friend is present or the person has expressly and voluntarily waived their right to have such a person present [existing paragraph 23H(2)(a)].

Item 44 amends paragraph 23H(2)(a). Instead of the present provision, amended paragraph 23H(2)(a) will only require an interview friend to be present when a person is interviewed ‘as a suspect (whether under arrest or not) for a Commonwealth offence’.

The effect of **item 48** is essentially the same as **item 44**. **Item 48** amends paragraph 23K(1)(a) of the Crimes Act so that a person under the age of 18 years cannot be interviewed as a suspect by an investigating official unless an interview friend is present. At present, such persons cannot be interviewed in the absence of an interview friend if an investigating official ‘suspects’ they have committed a Commonwealth offence or considers, on the basis of information received, that they may be implicated in a Commonwealth offence. Further commentary on these provisions can be found in the Concluding Comments for this Digest.

While the amendments proposed by **items 44 and 48** appear to reduce existing rights of Indigenous people who are suspected of committing a Commonwealth offence, those effected by **item 45** enhance and clarify some provisions relating to interview friends:

- an Indigenous suspect or arrested person may choose their own interview friend—unless he or she expressly waives the right, fails to exercise it or the interview friend fails to arrive.
- if a person does not choose their own interview friend, the investigating official must choose either a representative of an Aboriginal legal aid organisation or a person whose name is on a list of interview friends maintained under section 23J of the Crimes Act.

Item 52 repeals and replaces section 23P of the Crimes Act. Existing section 23P provides that if an arrested person is not an Australian citizen, the investigating official must inform the person that he or she may communicate with the consular office of the country of which the person is a citizen and must not commence questioning the person for a reasonable time so that the person can communicate with their consular office.

New section 23P makes a number of changes. The arrested foreign national must be informed that he or she can communicate either with the consular office of the country of which they are a citizen or the country to which they claim a special connection. This amendment is designed to cater for the needs of stateless persons. If the foreign national requests it, the investigating official must notify the consular office and also forward any written communication from the person to the consular office. Any information that must be passed on to the arrested foreign national must be passed on ‘as soon as practicable’.

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Schedule 5—Listening device warrants

Background—Listening device warrants and Commonwealth laws

Three Commonwealth laws govern the issuing and use of listening device warrants. They are the *Customs Act 1901*, the *Australian Federal Police Act 1979* and the *Australian Security and Intelligence Organisation Act 1979*. Schedule 5 amends the first two statutes.

Under the Customs Act, listening device warrants can be obtained for the investigation of narcotics offences. Under the Australian Federal Police Act, listening device warrants can be obtained for the investigation of non-narcotics offences categorised as either class 1 general offences or class 2 general offences. Class 1 offences include murder and kidnapping. Class 2 offences include offences carrying a penalty of 7 years or more imprisonment which involve a risk of loss of life, serious personal injury or serious damage to property, drug trafficking etc.

Under the Customs Act and the Australian Federal Police Act, two types of listening device warrant are available:

- a particular person warrant³⁶, or
- a particular premises warrant.³⁷

The meaning of a ‘particular person’ warrant was considered in the Victorian Court of Appeal case of *R v. Nicholas*.³⁸ The amendments in Schedule 5 are a response to that case.

Background to the amendments

R v. Nicholas involved a controlled operation carried out by the AFP, the Thai police and the Australian Customs Service. As a result of the controlled operation, the accused was convicted of being in possession of trafficable quantity of heroin and of attempting to obtain a commercial quantity of heroin. He was sentenced to 15 years imprisonment. During the controlled operation, the AFP obtained a listening device warrant from the Federal Court under section 219B(5) of the Customs Act. The warrant enabled listening devices to be placed in the bag carrying the heroin and³⁹ on the Thai agent who delivered the heroin to the accused. Conversations between the accused and his co-accused were recorded by the listening device and admitted into evidence at the accused’s trial.

The accused appealed against his convictions on a number of grounds—including the invalidity of the listening device warrant. The warrant issued by a Federal Court Judge referred to a ‘particular person, namely a person who obtains or seeks to obtain possession of a bag described as an “ELITE” brand, soft-sided, carry bag on casters, black in colour with brown trimming, containing 24 blocks of compressed white powder ...’. The appellant argued that this warrant did not fall within the terms of section 219B(5) because it was not issued in relation to a ‘particular person’.

The Victorian Court of Appeal concluded that the warrant did not identify any individual and that it could have included, during its 28 day period of operation, innocent possessors of the bag such as porters and taxi drivers. It re-iterated the common law principle that the legal

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system does not recognise general warrants in the absence of specific statutory authorisation. General warrants have long been regarded as invasive and unsusceptible to proper controls. However, the Court did not agree that the evidence obtained from the warrant should be excluded. It rejected any suggestion that the officers obtaining the warrant acted dishonestly and drew attention to the fact that a Federal Court judge had issued the warrant.

The Bill

Listening device warrants in relation to items

New subsection 12G(5A) of the Australian Federal Police Act enables a Judge or nominated AAT member to issue a listening device warrant in relation to an ‘item’ if satisfied about the matters listed in **new paragraph 12G(5A)(b)**. These matters include: that the item has been or is likely to be used in relation to the commission of a class 1 or class 2 general offence, information recorded in the vicinity of that item might assist in inquiries about the use of the item in the commission of the offence, and that some or all of the information cannot be obtained by other means or by a particular person or particular place listening device warrant.

Similar amendments are made to listening device provisions in the Customs Act relating to the commission of narcotics offences [**new subsections 219B(8A)-(8C)**].

Schedule 6—Amendment of the *Financial Transaction Reports Act 1988*

Background

The *Financial Transactions Reports Act 1988* (the FTR Act) establishes AUSTRAC⁴⁰, which is an anti-money laundering and financial intelligence agency.⁴¹ AUSTRAC says this about its work:

We work to ensure that financial service providers and other specified groups (our cash dealers) identify their customers and so reduce the occurrence of false name bank and other accounts. Through our compilation and analysis functions, we monitor and identify money laundering related to serious crime and major tax evasion. We provide this financial intelligence to the Australian Taxation Office (ATO) and Commonwealth, State and Territory law enforcement, security and revenue agencies.⁴²

Some of the amendments contained in **Schedule 6** relate to cash dealers. Under the FTR Act, cash dealers are required to report certain transactions to AUSTRAC and ensure that all account signatories are identified. The transactions that cash dealers must report are:

- significant cash transactions—more than \$10,000 in Australian currency or its equivalent in a foreign currency
- international funds transfer instructions
- suspicious transactions that may be connected with criminal activity.

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Items 1 and 2 of Schedule 6 amend the definition of ‘cash dealer’ in subsection 3(1) of the FTR Act by:

- excluding real estate agents acting in the ordinary course of business from the definition
- including in the definition persons exchanging currency on behalf of others
- including persons carrying on a business of remitting or transferring currency or prescribed commercial instruments into or out of Australia.

Item 4 inserts **new section 17J** into the FTR Act. **New section 17J** provides that information about a specific financial transaction received by AUSTRAC as a result of a request to a foreign country or agency will be covered by the FTR Act. As a result the FTR Act’s secrecy and access provisions will apply to that information.

Paragraph 27(1)(b) of the FTR Act enables the Director to authorise a law enforcement agency to access FTR information for the purposes of performing its functions. **Item 5** inserts **new subsection 27(1B)** which states that the Queensland Crime Commission and the Western Australian Anti-Corruption Commission can only be given access to FTR information if they undertake to comply with the Commonwealth’s information privacy principles.

Items 6 and 7 amend subsections 27(16) and (17) of the FTR Act so that officers of the Queensland Crime Commission and the Western Australian Anti-Corruption Commission can access FTR information.

Schedule 7—Pardons, quashed convictions and spent convictions

Part VIIC of the Crimes Act applies to free and absolute pardons, quashed convictions and spent convictions. It provides that individuals who have been pardoned or had their convictions quashed are not required to disclose them. Individuals who have minor convictions are not required to disclose them after a specified period. Part VIIC also prohibits organisations and individuals taking those convictions into account or disclosing them without the consent of the person. However, a person with a spent conviction must disclose that conviction to a ‘law enforcement agency’ in a number of circumstances. Additionally, spent convictions can be taken into account by law enforcement agencies for certain purposes. These circumstances and purposes include—decision making about sentencing or prosecution, and assessing prospective employees.⁴³

Section 85ZL of the Crimes Act defines the expression ‘law enforcement agency’ to include the AFP, State and Territory police forces, Customs, the NCA, and the National Exchange of Police Information (NEPI). NEPI was established in 1990 by Australian police ministers to promote the exchange of operational policing information between jurisdictions. NEPI has been replaced by the CrimTrac Agency which was established on 1 July 2000.

Item 1 of Schedule 7 removes the reference to NEPI in section 85ZL and replaces it with a reference to the CrimTrac Agency.

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Concluding Comments

General

Two Senate Committees have examined the Measures to Combat Serious and Organised Crime Bill 2001. Comments made by the Senate Standing Committee for the Scrutiny of Bills can be found in:

- *Alert Digest No.6 of 2001*, 23 May 2001
- *Eighth Report of 2001*, 27 June 2001.

The Senate Legal and Constitutional Legislation Committee reported on the Bill in June 2001.⁴⁴ It is not possible to traverse all the comments made in the reports or in submissions and oral evidence given to the Senate Legal and Constitutional Legislation Committee. However, some of matters raised by or with the Senate Committees are mentioned briefly below.

The Senate Legal and Constitutional Legislation Committee expressed its concern that:

... very little explanation or reason for the amendments [was provided], and almost no detail on who is affected by them or to whom they may apply.⁴⁵

On the other hand, the Government recorded its commitment 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 procedural law are in need of updating and reform ...

The Bill contains a wide-ranging package of measures to facilitate the investigation and prosecution of serious and organised crime.⁴⁶

As a general matter, the Committee recommended that 'serious and organised crime' should be defined for the purposes of the Bill. Such a definition would limit the Commonwealth offences that could be the target of a controlled operation. It is not clear whether the Committee also wanted the assumed identity provisions in the Bill to be limited to 'serious and organised crime' investigations.

Controlled operations

The Bill enables the Australian Customs Service to authorise controlled operations. Questions about these amendments were raised by and in evidence to the Senate Legal and Constitutional Legislation Committee. The Committee's majority report supported the extension of Customs' powers. It made the point that Customs is a law enforcement and regulatory agency and commented that government agencies had not opposed the amendments. However, it recommended that Customs officers undertake training at the direction of the AFP.⁴⁷ The

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minority report of the Committee's Labor Senators recommended that Customs should not have the power to authorise controlled operations. Labor Senators took the view that Customs is neither focused on organised crime nor a law enforcement agency with appropriate institutional structures, culture, training or accountability mechanisms.⁴⁸

Different views were taken by Committee members about who should authorise controlled operations. The majority report concluded that authorisation should be an 'in-house' process.⁴⁹ Labor Senators recommended that the controlled operations provisions should not proceed unless they are redrafted to implement all the recommendations made by the Parliamentary Joint Committee on the National Crime Authority report, *Street Legal*. This would include a two-tier approval process with minor controlled operations being authorised internally and major operations subject to external approval.⁵⁰ The Australian Democrats minority report recommended that long-term or serious controlled operations should be subject to external approval by a judicial officer.⁵¹

The Bill contains a re-worded 'no entrapment' provision.⁵² Before issuing a controlled operations certificate, an authorising officer must be 'reasonably satisfied' that conducting the operation will not involve intentionally inducing a person to commit a Commonwealth, State or Territory offence they would not otherwise have intended to commit. In its *Eighth Report*, the Senate Standing Committee for the Scrutiny of Bills asked whether 'inducing a person to commit a more serious offence (eg, importing much larger quantities of drugs) would constitute "inducing" a person to commit an offence under the bill'.⁵³ Another question that could be asked is how an authorising officer can be reasonably satisfied that the conduct of the controlled operation will not intentionally induce a person to commit an offence that he or she would not have otherwise committed—given the very large number of Australian statutory and common law offences.

Assumed identities

Amendments relating to assumed identities were generally supported by law enforcement agencies who appeared before the Senate Legal and Constitutional Legislation Committee. However, concerns were expressed in some submissions—for instance, those from the Victorian Bar and the Criminal Bar Association.

Among the issues raised about the assumed identity amendments were the absence of provisions for a central register of assumed identities. The Committee remarked:

there appears to be no provision whereby a central body has knowledge of all those 'persons' [with assumed identities], 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. 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 the variation or revocation' of an identity, may allow too much flexibility for some individuals.⁵⁴

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The majority of Committee members recommended that consideration be given to audits of assumed identities by an external agency such as the Privacy Commissioner.⁵⁵ This view was supported in the minority report.⁵⁶

Other questions raised in various quarters about the assumed identity provisions include:

- the appropriateness of and necessity of some Commonwealth agencies being able to obtain assumed identities. For example, assumed identities can be obtained by Customs, ATO⁵⁷, DSD and DIO officers. For a discussion of the history and functions of DSD, see *Bills Digest No. 11, 2001-02*.⁵⁸
- the implications for public funds if persons with assumed identities receive public benefits as a result of their false identity⁵⁹
- the threat to the integrity of public records that assumed identities may entail.⁶⁰ A related issue is that while the Bill provides for recorded evidence of assumed identities to be cancelled on the request of an authorising person, there is no requirement to ‘physically retrieve the evidence of the identity’.⁶¹ The Explanatory Memorandum gives an example of a passport which cannot be used for travel into or out of Australia, although it may still be in the possession of the person who had an assumed identity. The Explanatory Memorandum states that physical retrieval will not be required for ‘logistical’ reasons.⁶² There are offence provisions in the Bill and the Crimes Act that would cover misuse of cancelled assumed identity documents. However, a further question is whether there should also be an obligation to surrender or retrieve such documents.
- difficulties for defendants in securing a fair trial when they may be prevented from knowing anything about the identity, character or antecedents of an accused who has an assumed identity. Such matters may be relevant to issues of credibility.⁶³

The evidence of child witnesses and victims in sexual offence proceedings

Many submissions to the Senate Legal and Constitutional Legislation Committee supported the amendments relating to child witnesses and victims. Both the majority and minority Committee reports also commended **Schedule 5**. Some issues raised about the amendments were:

- whether the amendments favoured child witnesses and victims above the rights of an accused person to a fair trial⁶⁴
- whether the amendments should be further enhanced to increase the protections available to child witnesses and extend those protections to proceedings for all Commonwealth criminal offences⁶⁵
- how appropriate arrangements can be made for an unrepresented accused to question a child through a third party. For example, the Committee recommended that ‘Guidelines as to the experience and skills of qualified person should be developed as a matter of urgency’.⁶⁶

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- the need for unrepresented defendants to be provided with legal representation.⁶⁷

Investigation of Commonwealth offences

Schedule 4 of the Bill amends provisions in the Crimes Act that stipulate when investigating officials must question Indigenous people and minors in the presence of interview friends. Essentially, the existing requirement is that questioning cannot occur in the absence of an interview friend if the investigating official suspects that an Indigenous person or a juvenile has committed a Commonwealth offence or has information that the person may be implicated in such an offence. The amendments will only require an interview friend to be present if the Indigenous person or juvenile is being ‘interviewed as a suspect’.

Referring to the amendments relating to Indigenous people, the Explanatory Memorandum states that:

The proposed amendment will make the application of interview friend provisions consistent with the requirements of the tape recording [of confessions and admissions] provisions [which apply where the person is being ‘interviewed as a suspect (whether under arrest or not)’]. This will mean that the requirement to cease questioning a person, unless they have access to an interview friend, will apply where an investigating official interviews a person as a suspect ... rather than in the current wider circumstances.⁶⁸

The current provisions in the Crimes Act appear to be based on the recommendations of the Gibbs’ Review of Commonwealth Criminal Law, the draft bill which accompanied its interim report, *Detention Before Charge*⁶⁹, and an earlier draft bill prepared by the ALRC.⁷⁰ Special protections for Indigenous people in the criminal justice system have been supported as a special measure under Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination. When introduced in 1990, the amendments were said to respond to the Interim Report of the Royal Commission into Aboriginal Deaths in Custody which identified the risks associated with the initial period in custody.⁷¹ They are also in keeping with the Royal Commission’s Final Report.⁷²

In relation to children and interview friends, the ALRC stated in 1997 that, ‘The presence of the interview friend is an important means of compensating for the disadvantage experienced by young people when being interviewed’.⁷³ It referred to those disadvantages as being ‘... vulnerability to pressure, socialisation to agree with adult authority figures, lack of verbal fluency and a tendency to make false confessions under expert or hostile questioning’.⁷⁴

Listening device warrants for ‘items’

The majority report of the Senate Committee recommended that a time limit be placed on the operation of particular item warrants.⁷⁵ Submissions to the Committee by the Victorian Bar and the Criminal Bar Association expressed concerns about warrants for ‘items’. The Victorian Bar objected to the provisions as amounting to a general warrant and a serious invasion of privacy. The Criminal Bar Association acknowledged the difficulties faced by law

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enforcement agencies as a result of the decision in *R v. Nicholas* but rejected any use of the provisions that would effectively result in the grant of a general warrant—for example, ‘releasing an item into the general community with the intention of gathering such criminal intelligence as may be detected thereafter’.⁷⁶

Endnotes

- 1 **Item 10 of Schedule 4** repeals subsection 23A(6) of the Crimes Act. Subsection 23A(6) provides that Part 1C of the Crimes Act—‘Investigation of Commonwealth offences’—applies to ACT offences punishable by more than 12 months imprisonment where the investigating official is an AFP officer. The ACT may legislate to enact its own statutory regime for the investigation of ACT offences. However, it is not known when this will occur. The repeal of subsection 23A(6) is thus contingent on the enactment of an ACT law and will occur by proclamation once the ACT’s law has commenced.
- 2 Nathan Hancock, Intelligence Services Bill 2001, *Bills Digest No. 11, 2001-02* & Intelligence Services (Consequential Provisions) Bill 2001, *Bills Digest No. 12, 2001-02*.
- 3 (1995) 184 CLR 19.
- 4 (1995) 184 CLR 19 at 42-3.
- 5 (1995) 184 CLR 19 at 43-4.
- 6 *Criminal Law (Undercover Operations) Act 1995* (SA).
- 7 *Law Enforcement (Controlled Operations) Act 1997* (NSW).
- 8 *Police Powers and Responsibilities Act 2000* (Qld).
- 9 For the purposes of Part 1AB, law enforcement officers include AFP members, State or Territory police officers, a member of the staff of the NCA, a Customs officer or a member of a foreign police force.
- 10 Parliamentary Joint Committee on the National Crime Authority, *Street Legal. The Involvement of the National Crime Authority in Controlled Operations*, December 1999.
- 11 Paragraph 15M(b) is one of the matters about which an authorising officer must be satisfied before granting a controlled operations certificate—that ‘the person targeted by the operation is likely to commit an offence against section 233B of the *Customs Act 1901* or an associated offence whether or not the operation takes place’.
- 12 At present, protection from criminal liability is available, only for law enforcement officers and only in respect of certain Commonwealth, State and Territory narcotics offences.
- 13 Explanatory Memorandum, p. 9.
- 14 The expression ‘illicit goods’ is defined as goods whose possession is prohibited by Commonwealth, State or Territory law (**item 6**).

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- 15 Government Response to the Parliamentary Joint Committee on the National Crime Authority Report “Street Legal: The Involvement of the National Crime Authority in Controlled Operations”, p. 4.
- 16 See the note to **new subsection 15N(4)** and **new section 15OB**.
- 17 These requirements are to identify the nature and quantity of the goods, the route through which they passed, the name of any law enforcement agency whose officers had possession of the goods, the name of any person other than a law enforcement officer who had possession of the goods during the course of the operation. Further, the report must state whether or not the narcotic goods have been destroyed and if they have not been destroyed who has possession of them.
- 18 Australian Security Intelligence Organisation.
- 19 Defence Intelligence Organisation.
- 20 Independent Commission Against Corruption.
- 21 Criminal Justice Commission, Queensland.
- 22 Explanatory Memorandum, p. 22.
- 23 For example, Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process, Report No.84*, 1997.
- 24 Quoted in Michael Chaaya, ‘Children’s evidence in sexual abuse cases: the need for a radical reappraisal’, *Current Issues in Criminal Justice*, 9(3), March 1998, pp. 262-78 at p. 269.
- 25 ALRC No. 84, op.cit., recommendation 94.
- 26 *ibid*, recommendation 95.
- 27 *ibid*, recommendation 100.
- 28 *ibid*, recommendation 107.
- 29 *ibid*, recommendations 108 & 109.
- 30 *ibid*, recommendation 112.
- 31 *ibid*, recommendation 116.
- 32 *ibid*, recommendation 118.
- 33 Explanatory Memorandum, p. 31.
- 34 See, for example, subsections 23H(9) and 23K(3), Crimes Act.
- 35 The expression, ‘investigating official’ is defined in section 23B of the Crimes Act as a member of the AFP, a State or Territory police force or a person whose functions include investigating Commonwealth offences and whose powers include the power of arrest.
- 36 Subsection 219B(5), Customs Act and subsection 12G(2), Australian Federal Police Act.
- 37 Subsection 219B(7), Customs Act and subsection 12G(4), Australian Federal Police Act.
- 38 (2000) 1 VR 356.

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- 39 (2000) 1 VR 356 at 380.
- 40 AUSTRAC is the Australian Transaction Reports and Analysis Centre.
- 41 <http://www.austrac.gov.au/about/index.htm> current at 30 July 2001.
- 42 *ibid.*
- 43 Section 85ZZH, Crimes Act.
- 44 *Inquiry into the Provisions of the Measures to Combat Serious and Organised Crime Bill 2001.*
- 45 *ibid.*, p. 7.
- 46 Senator the Hon. Ian Campbell, Second Reading Speech, Measures to Combat Serious and Organised Crime Bill 2001, Senate, *Parliamentary Debates (Hansard)*, 4 April 2001, p. 23411.
- 47 Senate Legal and Constitutional Legislation Committee, *op. cit.*, p. 21.
- 48 *ibid.*, pp. 52-3.
- 49 *ibid.*, p. 24.
- 50 *ibid.*, p. 52.
- 51 *ibid.*, p. 58. The Senate Standing Committee for the Scrutiny of Bills sought a briefing from the Minister about why controlled operations should not be approved by a judicial officer—see *Eighth Report*, 27 June 2001. Note, however, that may be a number of obstacles to federal (and perhaps state) judicial officers performing this role. First, there are potential separation of powers problems [see *Grollo v. Palmer* (1995) 184 CLR 348, *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, *Kable v. DPP (NSW)* (1996) 198 CLR 51]. Second, in recent years only a few Federal Court and Family Court judges have been willing to issue telecommunications interception warrants (see Peter Ford, *Telecommunications Interception Policy Review*, May 1999). While judges of the Federal and Family Courts (and federal magistrates) may agree to approve controlled operations, it is conceivable that, as in the case of telecommunications interception warrants, they will generally refuse to do so. An alternative is for certain members of the Administrative Appeals Tribunal to be given this function.
- 52 **New paragraph 15M(c).**
- 53 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report*, p. 325.
- 54 Senate Legal and Constitutional Legislation Committee, *op. cit.*, p. 32.
- 55 *ibid.*, p. 33.
- 56 *ibid.*, pp. 54–5.
- 57 For example, the minority report of Labor Senators on the Senate Legal and Constitutional Legislation Committee.
- 58 Hancock, *op. cit.*

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- 59 Senate Legal and Constitutional Legislation Committee, op. cit., p. 33. In this regard, see the example given in **new subsection 15XC(1)**.
- 60 NSW, Office of the Privacy Commissioner, Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into Measures to Combat Serious and Organised Crime Bill 2001, p. 2.
- 61 Explanatory Memorandum, p. 28.
- 62 *ibid.*
- 63 Victorian Bar, Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into Measures to Combat Serious and Organised Crime Bill 2001, p. 8. See also Criminal Bar Association, Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into Measures to Combat Serious and Organised Crime Bill 2001, pp. 5-6 and Senate Legal and Constitutional Legislation Committee, op. cit., p. 30.
- 64 Victorian Bar, op.cit., Criminal Bar Association, op.cit.
- 65 NSW Commission for Children & Young People, Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into Measures to Combat Serious and Organised Crime Bill 2001.
- 66 Senate Legal and Constitutional Legislation Committee, op. cit., p. 29.
- 67 *ibid.*, p. 54.
- 68 Explanatory Memorandum, p. 51.
- 69 March 1989.
- 70 Criminal Investigation Bill 1981.
- 71 Hon. Michael Duffy MP, Second Reading Speech, Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990, *Parliamentary Debates (Hansard)*, 15 November 1990, p. 4217.
- 72 Recommendations 243-245 of the Final Report relating to police interrogation of Aboriginal juveniles are especially relevant. See Royal Commission into Aboriginal Deaths in Custody, *National Report*, Volume 5, AGPS, Canberra, 1991.
- 73 ALRC, p. 500.
- 74 *ibid.*
- 75 Senate Legal and Constitutional Legislation Committee, op. cit, p. 35.
- 76 Criminal Bar Association, op. cit., p. 4.

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