



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2001

27 June 2001

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

- (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 2001

The Committee presents its Eighth Report of 2001 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Family Law Legislation Amendment (Superannuation) Bill 2000

Health Legislation Amendment Bill (No. 2) 2001

Measures to Combat Serious and Organised Crime Bill 2001

Migration Legislation Amendment (Immigration Detainees) Bill 2001

Family Law Legislation Amendment (Superannuation) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2000*, in which it made certain comments in relation to clause 2 of the bill which deals with its commencement.

On 24 May, the bill was amended in the House of Representatives. This amendment extended the period within which the bill's commencement might be delayed from 12 months to 18 months. The Committee noted this amendment in *Alert Digest No. 7 of 2001* and sought advice from the Attorney-General as to the reasons for extending the possible delay in commencement.

The Attorney-General has responded in a letter received on 26 June 2001. A copy of the letter is attached to this report. An extract from *Alert Digest No. 7 of 2001* and relevant parts of the Attorney-General's response are discussed below.

Although this bill has now been passed by both houses of Parliament, the Attorney's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 7 of 2001

Commencement Clause 2

The Committee considered this bill in *Alert Digest No 6 of 2000* in which it made certain comments in relation to clause 2 of the bill which deals with its commencement.

On 24 May, the House of Representatives agreed to amend this bill. The majority of these amendments raised no issues within the Committee's terms of reference. However, the House of Representatives agreed to amend the commencement clause, which originally provided for a 12 month delay in commencement to permit industry bodies and government agencies to adjust their information technology and administrative systems. Under the amendment, the commencement of the bill may now be delayed for up to 18 months after assent.

In introducing the amendment, the Attorney-General noted (at House of Representatives *Hansard* p. P25965) that this amendment, among others, had been introduced in response to a report of the Senate Select Committee on Superannuation and Financial Services. The Committee notes that that Committee received some representations concerning possible delays in the gazettal of regulations to accompany the bill. However, in its Final Report that Committee simply recommended that “the date for commencement of the new regime be clearly stated”.

Given that the bill’s commencement may now be further delayed, the Committee **seeks the Attorney’s advice** as to the reasons for now providing for a possible 18 month delay in the commencement.

Pending the Attorney’s advice, the Committee draws Senators’ attention to this provision, as it may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Relevant extract from the response from the Attorney-General

Thank you for your recent letter regarding the commencement provision of the Family Law Legislation Amendment (Superannuation) Bill 2001 (‘the Bill’), which was passed by the Senate on 18 June 2001.

The commencement provision allows for the Act to commence on Proclamation. Subsection 2(2) of the Bill in effect provides that if the Act hasn’t commenced within 18 months of Royal Assent it will automatically commence thereafter, without the need for a Proclamation.

In the development of the policy underpinning the Bill, the Government gave a clear commitment to the superannuation industry that there would be a 12 month lead time between the finalisation of the legislation and its commencement so that the superannuation industry would have sufficient time to make the necessary changes to its information technology and administrative systems.

The original commencement provision in the Bill provided that the substantive provisions were to commence 12 months after Royal Assent.

The superannuation industry, during the consultation period on the draft Bill and before the Senate Committee, expressed concern that much of the detail that they would need to know in order to make the changes to their systems was to be contained in regulations. The superannuation industry, therefore, suggested that the commencement provision be more clearly tied to the promulgation of regulations.

The commencement provision adopts this suggestion and also gives effect to the recommendation of the Final Report of the Senate Select Committee on Superannuation and Financial Services (‘the Senate Select Committee’) that the

apparent inconsistency about the commencement of the superannuation provisions be clarified.

The Committee thanks the Attorney-General for this response.

Health Legislation Amendment Bill (No. 2) 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2001*, in which it made various comments. The Minister for Health and Aged Care has responded to those comments in a letter dated 21 June 2001. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 2001

This bill was introduced into the House of Representatives on 5 April 2001 by the Minister for Employment Services. [Portfolio responsibility: Health and Aged Care]

Schedule 1 to the bill proposes to amend the *Australian Institute of Health and Welfare Act 1987* to broaden the Minister's capacity to nominate certain persons for appointment to the Australian Institute of Health and Welfare and to extend the scope of the Institute's Ethics Committee to include welfare-related information and statistics. The amendments also include minor changes to maintain the relevance of reference to the National Health and Medical Research Council.

Schedule 2 proposes to amend the *Health Insurance Act 1973* to simplify the process for recognising specialist medical practitioners and to allow the payment of Medicare benefits direct to general practitioners in certain circumstances.

Schedule 3 proposes to amend the *Private Health Insurance Incentives Act 1998* in relation to payment of low or late claims; application and calculation of the premium reduction for the 30 per cent rebate on private health insurance; and to make a technical amendment.

Schedule 4 proposes to amend the *Health Legislation Amendment Act (No. 3) 1999* to repeal a redundant Part concerning the functions of the Health Insurance Commission.

Retrospective commencement

Subclauses 2(2) and (3)

By virtue of subclauses 2(2) and (3), various items in Schedule 3 to this bill are to commence retrospectively. However, the Explanatory Memorandum does not indicate whether this retrospective commencement will act to the disadvantage of any person. The Committee, therefore, **seeks the Minister's advice** as to whether any person will be disadvantaged by the retrospective commencement of these provisions.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

I am able to advise the Standing Committee for the Scrutiny of Bills that no person will be disadvantaged by the retrospective commencement of the provisions contained in the Bill.

Items 7, 8, 9 and 10 of Schedule 3 of the Bill amend the *Private Health Insurance Incentive Act 1998* (the Act) to ensure that the rules relating to the calculation of incentive payments and premium reductions are consistent throughout the Act. At present, slightly different rules apply to the calculation of incentive payments under Part 2, and premium reductions under Part 5 of the Act.

Technically speaking, Items 7-10 of Schedule 3 of the Bill could operate to reduce the amount of the premium reduction to which some contributors are entitled. These Items could also operate to reduce the corresponding refund that health funds are eligible to claim from the Health Insurance Commission.

However, in practice it is extremely unlikely that either reduction would occur. This is because it was always the intention that the same rules would apply to the calculation of incentive payments under Part 2, and premium reductions under Part 5 of the Act. Since the commencement of the Act, the practice of health funds has actually been to apply the rules set out in the Bill to the calculation of premium reductions. Thus, the amendments incorporated in this Bill are unlikely to change any of the calculations that have been made in the past.

In any event, a transitional provision has been included in the Bill, Item 11 of Schedule 3, to ensure that the retrospective operation of these provisions would not affect calculations that have been made in the past. This transitional provision seeks to preserve the validity of premium reduction calculations and payments made before the commencement day, by specifying that the amendments made in the Bill do not affect the amount paid or payable to a fund by the Health Insurance Commission before that day.

Item 12 of Schedule 3 of the Bill is a technical amendment to insert an amendment that was previously proposed in Schedule 3 of the *Health Legislation Amendment Act (No. 3) 1999*. This amendment was not incorporated into the Act at that time because it was misdescribed. The retrospective operation of this amendment has no capacity to disadvantage any person. It simply refers to the existing power of the Health Insurance Commission, set out in subsection 15-20(1) of the Act to refuse to pay a claim made by a fund if it considers the claim to be incorrect.

Item 12 is to commence retrospectively so that it will be taken to have commenced at the same time as the rest of the amendments contained in Schedule 3 of the *Health Legislation Amendment Act (No. 3) 1999*. These amendments included the amendment to subsection 15-20(1) to give the Health Insurance Commission power to refuse to pay claims.

Thank you again for your interest in this matter.

The Committee thanks the Minister for this response.

Measures to Combat Serious and Organised Crime Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2001*, in which it made various comments and sought a briefing on the provisions of the bill. On 21 June, the Committee received a briefing on the bill from representatives of the Attorney-General's Department, and has also received a response from the Minister for Justice and Customs dated 15 June 2001. A copy of the letter and the proof transcript of the briefing is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 6 of 2001

This bill was introduced into the Senate on 4 April 2001 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes a range of measures to facilitate the investigation and prosecution of serious and organised crime by amending the following Acts:

- *Crimes Act 1914*, in relation to the conduct of controlled operations; the use of assumed identities; protection for child victims and witnesses appearing in Commonwealth sex offence proceedings; and the use and disclosure of information concerning pardons, quashed and spent convictions to be now held by the CrimTrac Agency;
- *Crimes Act 1914* and *Customs Act 1901*, to make minor and technical amendments;
- *Australian Federal Police Act 1979* and *Customs Act 1901*, in relation to the issue of listening device warrants; and the
- *Financial Transaction Reports Act 1988*, in relation to the definition of "cash dealer"; access by certain State agencies to financial transaction reports information; and the secrecy and access regime for foreign financial transaction intelligence provided to AUSTRAC.

The authorisation of controlled operations

Proposed new section 15J

Proposed new section 15J provides that a law enforcement officer may apply to an “authorising officer” for a certificate authorising a controlled operation. An “AFP authorising officer” is defined as the Commissioner, Deputy Commissioner or an authorised senior executive AFP member. An “NCA authorising officer” is defined as a member of the National Crime Authority. A “Customs authorising officer” is defined as the CEO of Customs or an authorised senior executive Customs employee.

In each case, the officer wishing to conduct the controlled operation seeks authorisation from within his or her own organisation – the bill makes no provision for any independent oversight of such authorisations. An officer who wishes to enter and search premises, or to intercept telephone conversations, can only do so when authorised by an independent judicial officer. It is unclear why a similar approach should not be applied to controlled operations (which usually involve conduct which would otherwise itself be a Commonwealth offence).

In order to clarify the safeguards applicable under the legislation, the Committee **would appreciate a briefing** on this and various other aspects of the bill.

Pending the briefing, the Committee draws Senators’ attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.

Relevant extract from the response from the Minister

Under proposed new section 15J, a law enforcement officer may apply to an “authorising officer” for a certificate authorising a controlled operation. Authorising officers are the Commissioner, Deputy Commissioner and authorised senior executive employees of the Australian Federal Police (AFP), members of the National Crime Authority (NCA) and the Chief Executive Officer and authorised senior executive employees of the Australian Customs Service (Customs). In determining whether to issue a certificate authorising a controlled operation, an authorising officer is governed by stringent criteria set out in proposed section 15M.

Proposed section 15J maintains the existing internal approval process. The procedure for authorisation by senior law enforcement officers has been in place since 1996, when the controlled operations provisions were enacted with bipartisan support. The approval of controlled operations under the New South Wales *Law Enforcement (Controlled Operations) Act 1997* and the South Australian *Criminal Law*

(Undercover Operations) Act 1995 is also an internal process. The Finlay review of the New South Wales legislation conducted in 1999 did not recommend any changes to the internal approval process.

Senior law enforcement officers who have experience and understanding of operational considerations are better equipped than a third party, such as a judicial officer, to make a judgment as to the appropriateness of conducting a controlled operation. A decision as to whether a controlled operation can be undertaken requires consideration of the manner in which the proposed operation would be conducted, the extent of unlawful activity involved in its conduct, the nature of the criminal activity being investigated and an assessment of whether that criminal activity would have occurred without law enforcement involvement. Senior law enforcement officers have the familiarity with operational detail to enable a fully informed decision to be made on these issues. Indeed, there are serious questions about the appropriateness of involving judges or magistrates in operational decisions that primarily involve considerations of effectiveness and security.

The requirement to include information on decisions to grant or refuse a controlled operations certificate in reports to the Minister and to Parliament ensures that there is independent scrutiny of authorising officers' decisions and public accountability for those decisions. Under proposed amendments to section 15R, the AFP Commissioner, NCA Chairperson and Customs Chief Executive Officer would have to report to the Minister every three months on all decisions to grant or refuse an application for a controlled operations certificate made during those three months together with the reasons for each decision. This information would also be included in the annual report to Parliament under section 15T.

The Bill also enhances other safeguards associated with the authorisation of controlled operations. Additional criteria would apply to the approval process. In particular, an authorising officer would have to be reasonably satisfied that the nature and extent of suspected criminal activity would justify a controlled operation; that unlawful activity would be limited to the maximum extent consistent with an effective operation; that any unlawful activity would not cause death or serious injury, involve a sexual offence or result in serious property damage; and that the operation would be conducted consistently with reporting and accountability requirements. The details required to be set out in the authorisation certificate would also be extended to provide more comprehensive information on the planned operation. Furthermore, proposed section 15IC would ensure that a participant in a controlled operation will not receive immunity from criminal liability for conduct which could have been authorised under any other law relating to criminal investigation including searches of premises and interception of telephone conversations.

I note that the amendments to sections 3E and 3R of the *Crimes Act 1914* in Schedule 4 to the Bill implement recommendations made by the Committee in its *Report on Entry and Search Provisions in Commonwealth Legislation*. The amendments to section 3E would clarify precisely when a search warrant ceases to be in force. The amendment to section 3R would expressly provide that an issuing officer may record an oral application for a search warrant.

I hope that this information is of assistance to the Committee. Officers of the Attorney-General's Department are available to provide you with a briefing on the Bill as requested.

The Committee thanks the Minister for this response and for the briefing from representatives of the Attorney-General's Department. A proof transcript of the briefing is attached to this report.

Issues raised at the briefing concerning controlled operations included:

- the conduct and effectiveness of controlled operations and the need for revised provisions to regulate them;
- the authorisation of controlled operations and the effect of requiring law enforcement officers to seek prior authorisation from a judicial officer or some other independent person;
- the length of time during which law enforcement officers may be authorised to conduct and continue controlled operations;
- the exemption of law enforcement officers who engage in controlled operations from civil and criminal liability and the circumstances in which officers may be indemnified against civil liability;
- 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;
- the effect of the assumed identity provisions on the work of the courts;
- reporting requirements under the new provisions; and
- the possible role of a public interest monitor in ensuring accountability under the new provisions.

Issues raised at the briefing concerning other provisions in the bill included:

- the protection of child witnesses in proceedings for sexual offences and the effect of statutes of limitations;
- the conduct of sexual offence trials involving child witnesses and accused persons who do not have legal representation;
- whether the court will be able to determine the demeanour of child witnesses who give their evidence by closed circuit television;
- the appropriate role of justices of the peace and bail justices in the investigation of Commonwealth offences;
- removing the right to hold suspects on holding charges;

- the grant of a listening device warrants where the name of a suspect is not known; and
- extending the availability of financial transaction reports information.

The Committee would welcome the opportunity to consider these matters in further detail. If no such opportunity arises, the Committee suggests that a number of these matters should be considered in further detail by the Senate.

Pending this consideration, the Committee continues to draw Senators' attention to these provisions, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Migration Legislation Amendment (Immigration Detainees) Bill 2001

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2001*, in which it made various comments and sought a briefing on the provisions of the bill. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 25 June 2001 and, on 25 June, the Committee received a briefing from representatives of the Department of Immigration and Multicultural Affairs.

In *Digest No 6*, the Committee was specifically concerned about proposed new sections 252A, 252B and 252F, which, among other things, authorised officers to conduct strip searches of persons in immigration detention, and which also applied as Commonwealth law those State and Territory laws which conferred a power to search persons being held in prison or on remand.

On 21 June, this bill was amended in the House of Representatives. These amendments have removed the provisions of particular concern to the Committee from the bill. These provisions are to be included in a new bill to be introduced later in the sittings of the Parliament.

The Committee thanks the Minister for the briefing and for his response on the bill. As a result of the amendments moved on 21 June, the Committee has no further concerns with this bill, and proposes to report to the Senate when the Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001 is introduced.

Barney Cooney
Chairman

The Hon Daryl Williams AM QC MP



Attorney-General

RECEIVED

26 JUN 2001

**Senate Standing C'ttee
for the Scrutiny of Bills**

Senator B Cooney
Chairman
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

Thank you for your recent letter regarding the commencement provision of the Family Law Legislation Amendment (Superannuation) Bill 2001 ('the Bill'), which was passed by the Senate on 18 June 2001.

The commencement provision allows for the Act to commence on Proclamation. Subsection 2(2) of the Bill in effect provides that if the Act hasn't commenced within 18 months of Royal Assent it will automatically commence thereafter, without the need for a Proclamation.

In the development of the policy underpinning the Bill, the Government gave a clear commitment to the superannuation industry that there would be a 12 month lead time between the finalisation of the legislation and its commencement so that the superannuation industry would have sufficient time to make the necessary changes to its information technology and administrative systems.

The original commencement provision in the Bill provided that the substantive provisions were to commence 12 months after Royal Assent.

The superannuation industry, during the consultation period on the draft Bill and before the Senate Committee, expressed concern that much of the detail that they would need to know in order to make the changes to their systems was to be contained in regulations. The superannuation industry, therefore, suggested that the commencement provision be more clearly tied to the promulgation of regulations.

The commencement provision adopts this suggestion and also gives effect to the recommendation of the Final Report of the Senate Select Committee on Superannuation and Financial Services ('the Senate Select Committee') that the apparent inconsistency about the commencement of the superannuation provisions be clarified.

Yours sincerely

A handwritten signature in cursive script that reads 'Daryl Williams'.

DARYL WILLIAMS

The Hon Dr Michael Wooldridge
Minister for Health and Aged Care

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21 JUN 2001

Senate Standing Committee
for the Scrutiny of Bills

Senator B. Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

Thank you for your letter of 24 May 2001 concerning the retrospective aspects of Health Legislation Amendment Bill (No.2) 2001 (the Bill).

I am able to advise the Standing Committee for the Scrutiny of Bills that no person will be disadvantaged by the retrospective commencement of the provisions contained in the Bill.

Items 7, 8, 9 and 10 of Schedule 3 of the Bill amend the *Private Health Insurance Incentive Act 1998* (the Act) to ensure that the rules relating to the calculation of incentive payments and premium reductions are consistent throughout the Act. At present, slightly different rules apply to the calculation of incentive payments under Part 2, and premium reductions under Part 5 of the Act.

Technically speaking, Items 7-10 of Schedule 3 of the Bill could operate to reduce the amount of the premium reduction to which some contributors are entitled. These Items could also operate to reduce the corresponding refund that health funds are eligible to claim from the Health Insurance Commission.

However, in practice it is extremely unlikely that either reduction would occur. This is because it was always the intention that the same rules would apply to the calculation of incentive payments under Part 2, and premium reductions under Part 5 of the Act. Since the commencement of the Act, the practice of health funds has actually been to apply the rules set out in the Bill to the calculation of premium reductions. Thus, the amendments incorporated in this Bill are unlikely to change any of the calculations that have been made in the past.

In any event, a transitional provision has been included in the Bill, Item 11 of Schedule 3, to ensure that the retrospective operation of these provisions would not affect calculations that have been made in the past. This transitional provision seeks to preserve the validity of premium reduction calculations and payments made before the commencement day, by specifying that the amendments made in the Bill do not affect the amount paid or payable to a fund by the Health Insurance Commission before that day.

Item 12 of Schedule 3 of the Bill is a technical amendment to insert an amendment that was previously proposed in Schedule 3 of the *Health Legislation Amendment Act (No. 3) 1999*. This amendment was not incorporated into the Act at that time because it was misdescribed. The retrospective operation of this amendment has no capacity to disadvantage any person. It simply refers to the existing power of the Health Insurance Commission, set out in subsection 15-20(1) of the Act to refuse to pay a claim made by a fund if it considers the claim to be incorrect.

Item 12 is to commence retrospectively so that it will be taken to have commenced at the same time as the rest of the amendments contained in Schedule 3 of the *Health Legislation Amendment Act (No. 3) 1999*. These amendments included the amendment to subsection 15-20(1) to give the Health Insurance Commission power to refuse to pay claims.

Thank you again for your interest in this matter.

With kind regards

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Wooldridge', with a stylized flourish at the end.

Dr Michael Wooldridge

21 JUN 2001



SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia

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21 JUN 2001

Senate Standing Committee
for the Scrutiny of Bills

01/2753 CRJ

15 JUN 2001

Senator Barney Cooney
Chairman
Senate Standing Committee
for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Senator Cooney

I refer to the Scrutiny of Bills *Alert Digest No. 6 of 2001* in which your Committee sought my advice as to why the Measures to Combat Serious and Organised Crime Bill 2001 ("the Bill") does not provide for independent oversight of decisions to authorise controlled operations.

Under proposed new section 15J, a law enforcement officer may apply to an "authorising officer" for a certificate authorising a controlled operation. Authorising officers are the Commissioner, Deputy Commissioner and authorised senior executive employees of the Australian Federal Police (AFP), members of the National Crime Authority (NCA) and the Chief Executive Officer and authorised senior executive employees of the Australian Customs Service (Customs). In determining whether to issue a certificate authorising a controlled operation, an authorising officer is governed by stringent criteria set out in proposed section 15M.

Proposed section 15J maintains the existing internal approval process. The procedure for authorisation by senior law enforcement officers has been in place since 1996, when the controlled operations provisions were enacted with bipartisan support. The approval of controlled operations under the New South Wales *Law Enforcement (Controlled Operations) Act 1997* and the South Australian *Criminal Law (Undercover Operations) Act 1995* is also an internal process. The Finlay review of the New South Wales legislation conducted in 1999 did not recommend any changes to the internal approval process.

Senior law enforcement officers who have experience and understanding of operational considerations are better equipped than a third party, such as a judicial officer, to make a judgment as to the appropriateness of conducting a controlled operation. A decision as to whether a controlled operation can be undertaken requires consideration of the manner in which the proposed operation would be conducted, the extent of unlawful activity involved in its conduct, the nature of the criminal activity being investigated and an assessment of whether that criminal activity would have occurred without law enforcement involvement. Senior law enforcement officers have the familiarity with operational detail to enable a fully

informed decision to be made on these issues. Indeed, there are serious questions about the appropriateness of involving judges or magistrates in operational decisions that primarily involve considerations of effectiveness and security.

The requirement to include information on decisions to grant or refuse a controlled operations certificate in reports to the Minister and to Parliament ensures that there is independent scrutiny of authorising officers' decisions and public accountability for those decisions. Under proposed amendments to section 15R, the AFP Commissioner, NCA Chairperson and Customs Chief Executive Officer would have to report to the Minister every three months on all decisions to grant or refuse an application for a controlled operations certificate made during those three months together with the reasons for each decision. This information would also be included in the annual report to Parliament under section 15T.

The Bill also enhances other safeguards associated with the authorisation of controlled operations. Additional criteria would apply to the approval process. In particular, an authorising officer would have to be reasonably satisfied that the nature and extent of suspected criminal activity would justify a controlled operation; that unlawful activity would be limited to the maximum extent consistent with an effective operation; that any unlawful activity would not cause death or serious injury, involve a sexual offence or result in serious property damage; and that the operation would be conducted consistently with reporting and accountability requirements. The details required to be set out in the authorisation certificate would also be extended to provide more comprehensive information on the planned operation. Furthermore, proposed section 15IC would ensure that a participant in a controlled operation will not receive immunity from criminal liability for conduct which could have been authorised under any other law relating to criminal investigation including searches of premises and interception of telephone conversations.

I note that the amendments to sections 3E and 3R of the *Crimes Act 1914* in Schedule 4 to the Bill implement recommendations made by the Committee in its *Report on Entry and Search Provisions in Commonwealth Legislation*. The amendments to section 3E would clarify precisely when a search warrant ceases to be in force. The amendment to section 3R would expressly provide that an issuing officer may record an oral application for a search warrant.

I hope that this information is of assistance to the Committee. Officers of the Attorney-General's Department are available to provide you with a briefing on the Bill as requested.

Yours sincerely



CHRIS ELLISON
Senator for Western Australia



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Reference: Measures to Combat Serious and Organised Crime Bill 2001

THURSDAY, 21 JUNE 2001

CANBERRA

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BY AUTHORITY OF THE SENATE

[PROOF COPY]

SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
Thursday, 21 June 2001

Members: Senator Cooney (Chair), Senators Crane, Crossin, Ferris, Mason and Murray

Senators in attendance: Senators Cooney, Crane and Murray

Terms of reference for the inquiry:

Measures to Combat Serious and Organised Crime Bill 2001.

WITNESSES

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department..... 1

CHIDGEY, Ms Sarah Jane, Legal Officer, Attorney-General's Department 1

Committee met at 11.06 a.m.

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

CHIDGEY, Ms Sarah Jane, Legal Officer, Attorney-General's Department

CHAIR—Let us go to the changes in the bill, under item 12 in schedule 1, Controlled operations, referring to paragraph 15G(1)(a). The act says:

(1) The objects of this Part are:

(a) to exempt from criminal liability law enforcement officers who, in the course of controlled operations—
and so it goes on. This is extended to include indemnification from civil liability—is that right?

Mr Alderson—Yes.

CHAIR—Then, over the page, 15IA reads:

15IA Indemnification of law enforcement officers etc.

(1) The Commonwealth must indemnify a law enforcement officer against any liability

I wonder why we have that in, since we have said we are going to exempt them from both civil and criminal liability.

Mr Alderson—The explanation for that is that 15G, the first provisions you are referring to, are really just designed so that readers of the legislation can quickly see what is contained in this part. It does not actually have any legal effect; it is just a description of what is in the rest of the part. What you then do is turn to the proposed 15I, which explains when you have immunity from criminal liability; then 15IA, which explains when the civil indemnity operates; and then 15IB sets out a series of requirements that apply to both—preconditions to get either of those.

CHAIR—So the Commonwealth is going to indemnify people against both criminal and civil liability, I suppose. I wonder how they can indemnify them against criminal liability.

Mr Alderson—The criminal immunity and civil indemnity do work in slightly different ways. The immunity from criminal liability operates directly by force of this law. The Commonwealth does not stand in place of the police officer for that. Once these preconditions are met, the person who is subject to immunity is simply not criminally liable. The civil immunity operates in a slightly different way in that, although the person who incurs the civil liability is not liable, the third party who would have a right to sue still has a right to sue and to recover for any damage they have suffered because the Commonwealth stands in the shoes of the person who has incurred the liability and therefore indemnifies the police officer or whoever, and itself pays out whatever has to be paid to deal with the civil claim.

Senator CRANE—In that situation, what is there to stop the officer who it impacts being a little bit *laissez faire* about it because they have no responsibility—the Commonwealth has undertaken that responsibility?

Mr Alderson—There are two mechanisms to deal with that. One is to deal with the situation of the officer being lax at the time they are actually engaging in the conduct. That is governed by the provisions, for example, that the conduct must be in the course of duty and within the terms of what the officer has been authorised to do for the operation. The second phase is after it has all happened and perhaps the officer has been told they are going to be sued. There is provision in the bill for regulations to be made, and compliance with those regulations will be a condition of getting the civil indemnity. That was in case, for example, an officer might think, 'Oh, well, I've got indemnity so I will just settle for \$2 million.' To deal with that kind of problem where an officer makes an improper settlement there are existing Commonwealth litigation guidelines. The idea is that they will be brought in under the regulation so that the normal processes, if you are an officer and are being sued—

Senator CRANE—There will be tight guidelines under which they operate and understand that in this?

Mr Alderson—Yes.

Senator CRANE—Could I ask the overarching question. It is one that I think will stretch some of our thinking processes on that. Why is this all necessary?

Mr Alderson—In terms of the controlled operations provisions?

Senator CRANE—Yes. We have operated for a long time under the old ones. Why do we suddenly have a new set that has obviously raised some of our concerns. It is a pity Senator Andrew Murray is not here, because he would probably raise the greatest concerns. If you could just give us an overview as to just why this has been done at this particular time. Why was it not done last year? What has changed to make it necessary?

Mr Alderson—In terms of the operational objectives of the law enforcement agencies, this broader model has been desirable from the beginning. At the time the 1996 provisions were enacted—which are narrow and limited to drug import and export—they were an immediate, quick response to the problems caused by the Ridgeway decision. The context of that decision and the particular priority for undercover operations was interception of drug trafficking. That was what it originated in—in the Ridgeway case. That is probably the most common type or was the most common type of operation, where drugs are coming into the country and you, say, talk to the person carrying them and say, 'Look, you know if you work with us you will get a lighter sentence—or whatever—but we want you to take them on to the person who arranged this so we can get evidence against them.' However, the principle involved of allowing criminal conduct to go forward so you can find out who is organising it extends to types of criminal activity other than drug importation. Some of the major examples would be money laundering, where it is known that there are financial transactions occurring for the purpose of laundering money or, potentially, things like smuggling in other kinds of goods—smuggling in firearms, potentially people-smuggling rackets, or smuggling of exotic flora and fauna, where they are quite serious offences under the environment protection act.

Senator CRANE—Does this go both ways—that is, smuggling out of the country as well as in?

Mr Alderson—Yes. The concern is that, without this kind of legislative framework, in the example of, say, smuggling an endangered species, if law enforcement officers allow that to continue, monitor it or speak to the person carrying them and try to make an arrangement to get evidence against the person who is going to collect it at the other end and who is paying for it, those police officers will be committing criminal offences of participating in the import or the export of the exotic wildlife. Therefore, without this kind of legislative framework, police would be committing criminal offences. The rationale is that that is undesirable from a number of points of view. Firstly, law enforcement officers should operate within the law and, if the view is that this is the kind of operation that should happen, there ought to be a legal framework for that; and the High Court really emphasised that point in the *Ridgeway* decision; that it was not really appropriate or acceptable just to turn a blind eye and say, 'We know this needs to happen but we're not going to have a proper legal framework.'

Secondly, as well as giving it a legal framework, because there are genuine concerns about the way these kinds of activities are undertaken by law enforcement officers, there should be some sort of framework for the way the operations are authorised for reporting on them once they have taken place. Therefore, by broadening this framework, it will allow agencies to use the controlled operation technique for these other types of criminal activities and also ensure that there is this broader legislative framework to govern that and make it accountable.

Senator CRANE—You have used the words endangered species, but it is really broader than that, isn't it? Unless there is a permit, all species are banned from being taken out of Australia.

Mr Alderson—Yes, I was—

Senator CRANE—You are not restricted to endangered; you are using it as an example.

Mr Alderson—Yes. In fact, the whole issue of importing and exporting—

Senator CRANE—You have answered the question; I just wanted to clarify that. That leads me now to ask this question: allowing these law enforcement officers to be part of the process, if you like, really allows them to legally carry out an illegal act. Is that correct?

Mr Alderson—An otherwise illegal act.

Senator CRANE—Yes. Is this just about protecting their position so that it is fair to them that they are not caught up doing something they should not do, even though they are allowed to do it? Or has there been any assessment done by the department or whoever does these assessments, as far as apprehension of criminals and criminal activity, that this will improve the results? I think we all have to face reality in one sense. Unfortunately, the movement of exotic species or animals or drugs in and out of the country or what have you appears to have increased enormously in recent years. I think the evidence points that out fairly clearly. I just want to get some sort of feel as to whether it is just about protecting the personnel or whether there have been assessments done that will increase the hit rate, if you like.

Mr Alderson—There has been. Certainly as part of the development of this legislation, the Australian Federal Police in particular and also the other agencies involved—the National Crime Authority and the Australian Customs Service—did identify examples of the kinds of

cases where they were currently precluded by the law from conducting an operation and where these kinds of powers would allow them to apprehend people guilty of quite serious offences. In terms of the specific kinds of examples, the Australian Federal Police actually provided some detailed examples to the Senate Legal and Constitutional Legislation Committee. If this committee is interested in looking at those specific examples, we might be able to arrange for those to be provided to this committee as well. They would be the kinds of cases where effectiveness will be improved and those agencies will be able to sort of tackle crimes in a way that they cannot at present.

Senator CRANE—They would probably be included in their report, though, wouldn't they? I would certainly like to see some of that information.

Mr Alderson—The situation at present is that the kinds of crimes that cannot be investigated are not detailed in the existing controlled operations reports because at the moment law enforcement agencies cannot investigate those other kinds of activities using this technique. But the examples give cases where the law enforcement agencies have had to stop short and not pursue something they otherwise could have pursued using these kinds of powers.

Senator CRANE—Is there any way in which these amendments or changes impact on the rights or the liberties of any of the police officers engaged in this activity?

Mr Alderson—It impacts in the sense that, if it is accepted that law enforcement agencies should engage in these kinds of operations, having this kind of legislative framework does two things. The first is that it does not push officers out to do something illicit with a wink and a nod; it says, 'The parliament has accepted that you can engage in this kind of conduct.'

Senator CRANE—That is beneficial to them. I am talking about things that impact adversely.

Mr Alderson—I would not say impact adversely. It does lay down a series of preconditions for the immunity from criminal liability to operate. The preconditions in this model proposed in the bill are more detailed than the preconditions in the existing 1996 legislation. So there are restrictions on the capacity of officers to gain those immunities under this legislation. Some of those restrictions are set out in more detail than they are currently.

Senator CRANE—But they do not have them now, so you are not taking anything away from them, are you?

Mr Alderson—Under this legislation, the controlled operations provisions, there are no powers that the agencies have under the 1996 legislation that they would lose under this.

Senator CRANE—How is their identity protected, or is that in other legislation?

Mr Alderson—I guess there are a number of elements to that. Firstly, there are some cases where the officers themselves would maintain their own identity because it would be an informant, a courier or someone who was going forward. But there certainly are cases and proposed cases where a police officer goes under cover. The agencies involved have schemes set up to deal with taking on a false identity. In fact, schedule 2 to this bill is designed to set up a

formal legal framework for that. That sets up a scheme where, say, the Australian Federal Police can go to the tax department or the foreign affairs department and get a tax file number and a passport for a person taking on a false identity so that that person will have a credible false identity for the purpose of an operation. There are secrecy provisions in the legislation which prohibit the disclosure of the truth of a person's identity having taken on a false identity.

Senator CRANE—I will just go to our report when we requested the briefing. That paragraph says:

In each case, the officer wishing to conduct the controlled operation seeks authorisation from within his or her own organisation. The bill makes no provision for an independent oversight of such authorisations. An officer who wishes to enter and search premises or to intercept telephone conversations can only do so when authorised by an independent judicial officer. It is unclear why a similar approach should not be applied to controlled operations which usually involve conduct which would otherwise itself be a Commonwealth offence.

Can you comment on that?

Mr Alderson—Certainly. I guess the first thing I would say is that I do not know whether this has been received by the committee, but Senator Ellison has written in response to the committee's report only on 15 June. I do not know whether that has been received. If not, perhaps the secretariat could talk to the department and make sure a copy is in the hands of the committee as soon as possible.

Senator Ellison comments on this issue and responds to this issue that the committee has raised. There are a couple of key points. One is that this kind of model with internal authorisation is the one that has been preferred not only in the Commonwealth legislation but also in each of the states that have enacted this kind of model—New South Wales, Queensland and South Australia—and it was also supported by the review by Inspector Finlay of the Police Integrity Commission who reviewed the New South Wales provisions in 1999.

There were a couple of key rationales for this internal authorisation process. Firstly, authorising a controlled operation as opposed to, say, issuing a search warrant involved detailed consideration of all sorts of operational matters—for example, who should be selected to be targeted, which officers should be involved, how long should the operation continue, what weight should be put on the sensitive intelligence that has been received and how far do you attempt to go up the chain through infiltration before calling a halt and bringing those people in for prosecution. That kind of detailed weighing of different operational and resourcing considerations has been considered more appropriately addressed by a senior operational officer rather than a judicial officer who would not have the same level of expertise or the time to really go into that level of understanding of the different operational priorities of the agency and its different techniques.

Secondly, and I guess closely related to that, there is a concern about drawing the judiciary too closely into the process of operational decision making. I guess there is a traditional dichotomy between the common law model in countries like Australia and England and the civil law approach in continental Europe. In Europe, there will often be a magistrate directing the investigation, and the judicial process and the investigatory process are wound in together. The view in common law countries has often been that really, once you get into that kind of decision making, it is better to keep the judiciary separate, to not draw them into being

responsible for that kind of detailed decision making. It potentially creates conflicts of interest where you have a judicial officer who has been right in the heart of planning the way an operation will be set out and then, for example, at a later date may be called on to be the independent arbiter of a criminal trial involving either that specific case or that kind of operation. It is therefore better to allow judicial officers to stand well outside that process.

In the legislation itself, I guess what has been put in here in recognition that this does not have that kind of judicial authorisation process that, say, search warrants have is that there is this requirement for detailed reporting to the minister and to parliament both on authorisation decisions and on reports. Whereas a lot of the reporting requirements you see in law enforcement legislation just result in a single page with some statistics that you cannot really discern very much from, the reports that have been made under this legislation have in fact been very detailed. I think there have been four annual reports to the parliament now, and that really gives some real detail about the considerations that went in to authorising an operation and then once the operation has taken place how that operation panned out. So that offers a different accountability avenue to the model of judicial authorisation.

Senator CRANE—I think you are missing our point. You have said that annual reports are good—valid, et cetera—but they are still internal. This actually says in our thing ‘was why it makes no provision for any independent oversight’. An independent oversight does not have to be made by a judicial officer; it could be made by an auditor, for example. Our fundamental question is not about getting the judiciary tied up or relying on internal reporting; our question is why there is no provision for an independent outsider without having to encompass the people who might get involved. It just seems to us, the way we operate, to be an essential—and I underline ‘essential’ and I think the members of the committee agree with me—provision in these types of operations, where on an annual basis or thereabouts there actually is an assessment of what has been done.

Auditor-General’s reports come up with all sorts of things on our operations in the various committees, for example, and that is just at arm’s length from the people doing it. People are not deliberately going out there and breaking the rules or whatever, but things do creep in from time to time that get slightly off the rails. That is our fundamental question: why isn’t that little bit of independent overview there from time to time? They would not interfere with operations—they would not even get near operations.

Mr Alderson—As I understand it, you are raising the idea of an independent oversight not at the point the decision is made but checking on the way the decision has been made.

Senator CRANE—Well that is the way I understood it. I understood there was an overview from time to time which just had a look at how it was operating. If it was going sideways at all, it made recommendations and would probably give it the big tick most of the time.

Mr Alderson—The model through which that was proposed to be done in the 1996 legislation, which continues here, is that the minister receives details of authorisations and operations soon after they take place. That idea of having some process checked is performed under this legislation through the minister. One of the areas of tightening under the model in the bill, as compared to in the existing legislation, is a provision that would allow the minister to require the agency to provide more information if the minister were not satisfied.

Senator CRANE—We do not make recommendations in the sense that we send recommendations to the parliament, but we raise issues of concern. This transcript will be available for people to look at and read if they so choose, but it is handed over to all members of the Senate who then decide whether or not they want to move amendments. We just raise the issue. I could not personally classify the minister as being in an independent position. Ministers are not in independent positions; they cannot be. They might not actually have their finger on the operational side, but they are part of the whole administration and the management of it.

Senator MURRAY—And the chain of command.

Senator CRANE—Yes, the chief. I personally cannot see that the minister is an appropriate answer. You might be able to convince us that it is not necessary, but I think it is from an independent standpoint. When we say ‘independent’, we mean independent in its purest sense.

Senator MURRAY—I will deal with a few issues. The first is just an observation. We have just passed a brand new customs bill which turns everything upside down. I notice that you have lots of references to the Customs Act here, and I hope it will tie in with the new legislation.

Mr Alderson—The amendments to the Customs Act are really to some discrete areas that are different from that industry regulation area. A couple of the amendments to the Customs Act implement recommendations in this committee’s entry powers report.

Senator MURRAY—Let us move on to the main areas I want to discuss, apart from those that Senator Crane has already added. The first question is whether you are familiar with two reports. The first is the fourth report of 2000 of the Scrutiny of Bills Committee, which is called the *Entry and search provisions in Commonwealth legislation*.

Mr Alderson—Yes.

Senator MURRAY—The second is the annual report required by legislation on telecommunications interceptions and how they progress.

Mr Alderson—I am aware of the existence of that report, but I am not closely involved in telecommunications interception matters.

Senator MURRAY—That report—I do not have it before me—shows an extraordinary shift in acceleration in the level of telecommunications interceptions, which coincides with the movement away from judges granting warrants to the AAT granting warrants. If I said statistically that the increase is almost exponential, I do not think I would be exaggerating. That could mean many things. It could simply mean that there is greater use by the various agencies of those sorts of warrants and much more activity in that area. But for a committee like this, which is concerned with civil liberties issues and rights, you have to have a fear that it must also represent an easier granting of warrants. For the purposes of the committee, I have made a couple of adjournment speeches on this matter. We can do very little about the fact that warrants are now granted administratively, but this bill includes listening device warrants. Are you familiar with the Queensland legislation governing warrants in a general sense?

Mr Alderson—For example, the existence of the public interest monitor?

Senator MURRAY—Exactly; I thought you would know where I am going. For the benefit of the chair, who may or may not know this, one of the great concerns we have had—and that is why I referred to our own report—with the granting of warrants is that they are granted *ex parte* without the presence of anyone affected. Obviously, if you are going to listen in to someone's telephone, you will not tell them you are going to do so because it would do away with the entire purpose of it. The public interest monitor and, indeed, the deputy public interest monitor in Queensland legislation—there are a few of them—are on a register and are barristers who appear on behalf of the community. In the pursuit of your bill, did you consider recommending that a public interest monitor on the Queensland model be available for interception warrants that you deal with?

Mr Alderson—Not for these amendments. There are two issues. Firstly, to my knowledge the government has no proposal at this stage to introduce a public interest monitor regime to the listening device provisions. Secondly, these particular amendments are designed to take an existing framework and address a particular problem relating to the situation where the name of the person engaged in criminal activity is not known. Therefore, one of the reasons the amendments are very short is that they take the existing listening device regime in the AFP and in the Customs Act and adjust that. So there was no consideration as part of that proposal of any change to the overall framework for listening device warrants.

Senator MURRAY—I do not want to know the policy advice—I do want to know, but you are not going to tell me—but are you able to tell me whether the government has been formally appraised of the contents of the Queensland legislation concerning the public interest monitor and whether it is alert to its potential?

Mr Alderson—I can certainly say that in the context of controlled operations, there was discussion of the public interest monitor model in the context of the *Street legal* report of the Parliamentary Joint Committee on the National Crime Authority. Therefore as part of the policy development process relating to controlled operations, that was considered and that was known to the government.

Senator MURRAY—To use a marketing strategy phrase which everyone uses—I think that is where it came from—you would see, would you not, that there is a window of opportunity? If you connect the concerns expressed in the entry and search provisions report with the trends apparent in the telecommunications report with what some people would see as a need to make sure that the applications for warrants are objectively tested, you can see that there may be some attraction by some to use the opportunity presented in this bill to put the model down and establish it. If those sets of amendments which effectively are there to provide an additional form of protection were to come before the Senate, for instance, would the department be against them as a matter of policy or have you not considered that? What is your view on the advisability, applicability or desirability of the public interest monitor mechanism?

Mr Alderson—I think I can safely say that to this point the government has not favoured the public interest monitor model, at least in relation to the legislation that I have been involved in. There are a couple of issues depending on the legislation. There is a question as to whether it would add value, depending on the particular provisions in question, and whether there is a demonstrated problem with the way the existing provisions are working in practice. One comment I would make on the controlled operations provisions, as opposed to the situation you

refer to with telecommunications interception, is that the number of controlled operations authorised has fallen somewhat year to year over the last four years under the internal authorisation model, and that relates in part to the operational priorities of the agency. But, particularly because of the significant resources required there, there has not been an issue of proliferation.

It is always more difficult to give the reason why something has not been done than why it has been done. There are any number of reasons why a thing may not be done, but the government has not felt that the public interest monitor would not materially add to the effectiveness or accountability of this kind of legislation.

Senator MURRAY—You have mentioned the words ‘add value’. Add value from what perspective?

Mr Alderson—I guess the objective of the public interest monitor is to ensure that considerations that might not otherwise be taken into account in the warrant issuing process are taken into account. I am not aware that there has yet been demonstrated a problem in that regard with existing Commonwealth provisions. I am not aware that there is evidence that those factors are not being taken into account.

Senator MURRAY—Without being unkind either to you or to those who work in this field, I would have the impression that, if you had a little tick-off set of boxes to tick off when you are reviewing matters, I doubt that civil liberties would be first box. In other words, I would suspect that your approach is to attend to the practical needs relative to these functions before you attend to civil liberties. Without doubt, the public interest monitor idea is a device which is there as a protective device to make sure that in hearings where the person affected is not represented that someone independently puts alternative views if they need to be put. There is no sign that I know of in Queensland that that has worked negatively for authorities. As I understand it, it has just made them be a little more careful with the sort of material they put forward in warrants. My concern, as you would have gathered, is that spreading it from the judiciary into the AAT may in fact result in people taking an administrative perspective rather than a judicial perspective.

Mr Alderson—One of the mechanisms that has been increasingly used in Commonwealth legislation in recent years to deal with this issue of ensuring that the right matters are taken into account and that issues relating to people’s rights, privacy and other interests are taken into account has been inclusion of more detailed authorisation criteria. We have gone from a model where in legislation a number of years ago you would tend to just require that, say, the magistrate be satisfied on balance that it was appropriate. In, say, the forensic procedures provisions and in the internal authorisation procedures in here, there tend now to be quite long lists of matters that the person making the authorisation has to take into account in their decision.

Senator MURRAY—I will leave it there, but you have had a light switch on in your head, I am sure. So be prepared for that one being taken up elsewhere.

The other issue I want to deal with briefly concerns the protection of children in proceedings for sexual offences. I should preface my remarks with a declaration: I sit as a member of the

Senate references inquiry into child migrants, and I myself am a child migrant, so I have possibly a personal interest in these matters. The issues of the sexual abuse of children feature very strongly in the evidence before that committee. It strikes me that the provisions that are here concerning the protection of children in proceedings for sexual offences to a degree exist for the protection of children. That is always to be encouraged. However, one of the things which affects sexual offences to do with children is of course the statute of limitations. The difficulty with child sex offences is in fact them being brought to courts in sufficient time for them to be acted on. Particularly with regards to children and particularly young children it will often be many years before they or others feel able to take up these matters. In issues of amending these bills, did you consider and do you think you should consider at all statute of limitations issues in this area as it may affect the protection of children? One of the protections of children is that the perpetrators are punished. Perpetrators are not punished if they get away with it because the offences do not come to attention in time. As an example, if we use six years under the statute of limitations, a child improperly dealt with at the age of, say, eight, is still a child and out of the loop at the age of, say, 15 when the matter might be pursued.

Ms Chidgey—For Commonwealth offences where a maximum penalty of greater than 12 months imprisonment can be imposed, there is no time limit on prosecution for those offences. In that case, for instance, for the child sex tourism offences in the Commonwealth Crimes Act there would be no limit on prosecuting those offences.

Senator MURRAY—That is in contrast to state legislation, where there are clear limits.

Mr Alderson—Certainly some of the state offences do have those limit period issues, but all of the Commonwealth sex offences have no limit period.

Senator MURRAY—Excellent.

CHAIR—Earlier I asked some questions about civil liability. I gather from what you said that civil liability is still alive but the Commonwealth undertakes to indemnify the police or the investigating authority.

Mr Alderson—That is correct.

CHAIR—Recently there have been a number of cases in Victoria where police have been sued successfully and damages, substantial sums, have been gained. The ability of a person to sue an investigating authority is not being taken away by this?

Mr Alderson—That is correct.

CHAIR—And the indemnity for the police officer is preserved?

Mr Alderson—That is right. If you are a person who believes that a civil wrong has been committed against you, your rights to sue remain unaffected. You will just face different, a very wealthy defendant, namely the Commonwealth.

CHAIR—In New South Wales recently, the state—as is its right—paid out the damages that the person recovered and then sued the police officer. You would have seen that. Do you

remember that? This is the one where the officer dragged the person who was in custody along the floor. Did you see that?

Mr Alderson—I do remember seeing reports of that.

CHAIR—The state sued the policeman to recover what it had paid out to the plaintiff. Does any of this change that law, do you know?

Mr Alderson—What it does change is that it clarifies. In practice there is probably not much change but the legal situation changes. Generally, if a police officer was acting in the course of duty then the Commonwealth would step in, with or without this legislation, to indemnify them. What this legislation does is say up front that that is what the Commonwealth will do. Of course, if you have a situation where a police officer is acting maliciously or inappropriately and just punching into a person, then the Commonwealth does not help them out at all. It may be that the Commonwealth is liable itself, but the Commonwealth does not help out that law enforcement officer who has acted wrongly.

CHAIR—Item 20 deals with the limits within which the controlled operation must stay. Subparagraph (c) says:

(c) conducting the operation would not involve intentionally inducing a person to commit:

a Commonwealth crime. If you induce a person to commit a crime then you do not get protection of these provisions—that is correct, isn't it?

Mr Alderson—That is correct.

CHAIR—What about the situation where you increase the seriousness of an offence. The offence may be importing drugs, say, and you do not induce that but you induce people to import a bigger quantity of the drug so that you can try to get back to the person who is providing it. Although the crime is the same, the seriousness of the breach of that crime has increased. You can imagine a situation where you are the undercover agent. You want to get up the chain a bit, so you come to me—I am a small dealer. So that I can get back up the chain a bit, you say, 'I'd be very happy to buy more from you.' I then start trading in bigger quantities of drugs so that, when you catch me, I am going to get an increased prison sentence. There is nothing to prevent that happening, is there, in item 20?

Mr Alderson—I agree that, in terms of the quantities involved, the provision does not directly deal with that, in part because of the problem of where to draw the line. But one of the safeguards there is that if you then prosecuted the person and a court was deciding what sentence to impose, it would undoubtedly take into account the fact that your culpability—what you were trying to do—was so much, and then these other quantities were brought in and you are not culpable for that to the extent that it was foisted upon you. The other thing is that not only the law of sentencing but the substantive law of entrapment remains in existence in the background behind this legislation. This deals with what law enforcement officers can do but, aside from that, the general principles of criminal law relating to entrapment are still there.

CHAIR—It is in that context that I just want to raise Ngui & Tiong. The president, John Winneke, says on page 582:

The courts, however, have also recognized that heroin importation not infrequently involves the use of schemes in which profit-making principals seek to shield themselves from apprehension by employing and exploiting unsophisticated carriers who are exposed to the major risks for little reward. In this case, we were told, the Malaysian "contacts" have never been apprehended.

That was a controlled operation. It was in that context that I ask you this. What happens there is that you get the carriers. There is no evidence, as I can see it, that they were asked to increase the quantities they were bringing in. Nevertheless, one of the problems with all this is what we are going to do is catch the people down the line rather than the principal perpetrator of the evil.

Mr Alderson—I was very pleased that you had drawn that case to my attention and I have kept a copy, because I think it is a very good model of the appropriate use of a controlled operation. What the judges say is that, yes, at the Malaysian end, the organisers were never caught, but at the Australian end, they talk to the couriers and say, 'What we're really after is the organisers at the Australian end.' Without the controlled operation, the police would have just arrested the couriers, and those couriers would have been the only people prosecuted. But what they did was set up some phone calls and a meeting so that the people who had made the arrangements at the Australian end were caught out under the controlled operation and therefore they were able to prosecute those Australian organisers and subject them to heavier sentences than were appropriate for the couriers.

CHAIR—All sorts of people will be affected by these controlled operations. I was just wondering whether we have enough control over the whole thing. I know you have answered this question at other committees—and you may have just done so to Senator Crane—but could you quickly go through why we should not have judges giving warrants? In here we deal with the case of the issue of warrants for all sorts of other things—such as arrest warrants and search and entry warrants—but we distinguish here. Do you repeat what you said to Senator Crane about that?

Mr Alderson—Certainly. In short, there are two main reasons. Firstly, authorising a controlled operation, unlike issuing a search warrant, is really about assessing the agency's priorities and resources, the kind of information it has at its disposal, how far it wants to try to infiltrate a criminal group and what different officers it wants to involve. A lot of very detailed operational planning has to occur before a controlled operation can be authorised, and this model is designed to place the decision in the hands of those with expertise in assessing all of those operational considerations. Secondly, not only would there be a problem with finding a judicial officer with the expertise or time to go so far into the operational planning process, there would also be a separation of powers problem that, having done that, the judicial officer has really been coopted to the executive.

CHAIR—The next point is that at item 25 you omit the 30 days and substitute six months, and then there is a gloss on that that *prima facie* it should be three months and then six months if that is approved. Isn't that a long time to leave the law enforcing agent with the ability to go around doing the controlled operation?

Mr Alderson—The argument for the longer time frame is that, with the broadening of the legislation, this is really designed to allow law enforcement agencies to infiltrate sophisticated criminal organisations which may be involved in a range of criminal activities. The reality is that, in an operation like that, you have to put undercover officers in for quite some time to get evidence against the people organising the criminal activity and to determine the full extent of their activities. Therefore, after 30 days you really may not have got far into the operation at all, and it is better that what the authorising officer is doing is thinking about what is going to be happening for the next six months and thinking, ‘This is the plan. This is ensuring that it’s going to stay on the rails, if necessary, for this length of time that we have planned ahead as much as we can.’

The six months also equates with the period allowed under the New South Wales legislation, which was recommended by the New South Wales Police Integrity Commission. They had previously had three months. In fact, I think South Australia has six months as well. I would describe the three-month review as more than a gloss in that it is a statutory requirement that there be a thorough review of the operation and the considerations that would lead you to authorise it in the first place. If that does not occur, by force of law the certificate ceases after three months. The idea is that, rather than suggesting that the operation begins anew after three months, it is saying that that kind of high level and thorough consideration that you want out of an authorisation process also has to occur at the three-month mark.

CHAIR—The next issue is item 31, which is the variation of termination of the certificate but the officer authorised is not liable so long as he or she is unaware of the variation. Doesn’t that open too wide a gate for a person to simply go on without the warrant?

Mr Alderson—I guess that is why the bar has been set fairly high in terms of what is the state of mind of the officer. The ‘unaware or is not reckless’ is equivalent to the sort of intentional or reckless threshold that applies to criminal offences generally. The idea is that, if a particular operative is out in the field and is genuinely acting in accordance with a certificate they have every reason to believe is still in force, it is unfair for that officer to become liable for any actions that they carry out. Nonetheless, the onus is on the agency. In the first place, there is the three-month upper cap and, secondly, there are going to be people higher up in the agency who know the certificate has been terminated. In fact, if they allow criminal conduct to continue after they know the certificate has been terminated, they could be guilty of criminal offences. So those who know are really under a strong onus to bring this to a halt as quickly as they can.

CHAIR—I was going to ask you apropos a person’s ability to sue for civil damages and how that is affected. The sections that deal with indemnification and the ability to sue are 15IA, 15XC and 15XD. I just want to put that on the record.

Mr Alderson—The schemes for controlled operations and assumed identities are designed to work the same way for civil indemnity.

CHAIR—An issue that arose in previous hearings was the issue of assumed identities and how that is to be treated by the courts. I am subject to correction on this one, but I think the court is not to allow the identity to be revealed and that must be done in camera, unless there are special circumstances. I think that is right.

Mr Alderson—We are referring to the assumed identity provisions, I assume?

CHAIR—Yes, in the assumed identity provisions. Ms Chidgey, where is that? Can you pick it up for me?

Ms Chidgey—It is on page 33, section 15XT.

CHAIR—Thank you very much for that. Subsection 15XT(2) states:

However, this section does not apply to the extent that the court, tribunal or commission considers that the interests of justice require otherwise.

Have you thought about whether or not that interferes with the way courts go about their business? I think common law public interest says that you do not have to identify an informer. Do you have any comments about the way that may interfere with what the court does? Did you have any discussion when drawing this about the problem that might cause a court?

Ms Chidgey—The provision provides that, generally, when an officer is giving evidence using an assumed identity—and it would appear that it may be disclosed—parts of those proceedings are held in private and the real identity is not disclosed by publishing the evidence. Then subsection (2), as you mentioned, says that the court does not have to proceed with those provisions if it considers that the interests of justice require otherwise. So the provision strikes a balance whereby it protects the real identity of officers, but in situations where the court thinks it is in the interests of justice that that real identity be disclosed—for instance, if you were with proceedings to do with the misuse of an identity—then a real identity could be disclosed.

CHAIR—So you think 15XT(2) saves the day?

Mr Alderson—I should mention that, when a similar question was asked before the other committee, I omitted to mention subsection (2), which Ms Chidgey pointed out to me later, so I was pleased she was able to rectify the error.

CHAIR—I go now to protection of children in proceedings for sexual offences. The main issue here is a bit similar to what is going on now with Pat O'Shane and what have you, in the sense that it talks about how you are to deal with particular witnesses. Subsection 15YB(1) says, for example, that evidence of sexual reputation is inadmissible 'unless the court gives leave'. I suppose that saves that situation too. Is that right?

Ms Chidgey—Yes. The general circumstance would be that evidence with respect to sexual activities of a child witness or child victim would be inadmissible unless the court gives leave. To give leave, the court would have to be satisfied that that evidence was substantially relevant to facts in issue.

CHAIR—Except that it does not allow any attack to be made on the child's credit. The child's credit may be very important. What do we say about that?

Ms Chidgey—That provision draws on similar state and territory provisions. The problem with the admissibility of this type of evidence in the past has been that that very situation has

been misused to blacken someone's reputation or to embarrass or humiliate witnesses. With respect to evidence of a child victim's or child witness's reputation relating to sexual activities, the reputation is more general and is removed from the activities which are actually at issue in the trial. So it is felt that, on balance, it is best to exclude that.

CHAIR—I suppose you would say that about any witness, wouldn't you? For example, in an armed robbery case involving a man aged in his 30s who is attacked as to credit, couldn't the same sort of things be said about him? Why do we make special provisions for children?

Mr Alderson—The government is responding, as have state and territory governments and parliaments, to the fact that, although there is always some give and take in a criminal trial, there is a very well documented, specific problem with the way sexual assault proceedings traditionally took place and there have been a number of reports. The people who have made these reports have included senior lawyers and judges who have felt that the practical situation is that the admissibility of this kind of evidence has proven to be unfair in practice.

CHAIR—Section 15YF presents a real problem. Section 15YF(1) reads:

A defendant in a proceeding who is not represented by counsel is not to cross-examine a child victim.

Section 15YF(2) reads:

A person appointed by the court is to ask the child any questions that the defendant requests the person to ask the child.

So that is the victim, in 15YF. Section 15YG(1) reads:

A defendant who is not represented by counsel is not to examine a child witness (other than a child victim), unless the court gives leave.

Section 15YG(2) reads:

The court must not give leave unless satisfied that the child's ability to testify under cross-examination will not be adversely affected if the defendant conducts the cross-examination.

There are two points about that. Firstly, it stops a person who is facing very serious charges—and these are very serious charges—from cross-examining. Secondly, he or she cannot cross-examine the victim, whether or not the court reckons that he or she should be allowed to cross-examine, but there is a difference made for the witnesses. The accused can, with leave of the court, cross-examine a witness. Why do we take the approach that if he is not represented by counsel, the accused cannot cross-examine the victim but he can, with leave, cross-examine the witness? So there are two things: why have laws about cross-examining in any event and why make a distinction between the victim and the witness?

Ms Chidgey—The reason for having these provisions which prevent unrepresented defendants from personally cross-examining child victims and child witnesses without the leave of the court is that, particularly in sexual offences, child witnesses and child victims can be very vulnerable. Obviously, there is often a proximate relationship between the defendant who seeks to personally cross-examine that victim or witness and the child that they are examining. It is

felt that, to ensure that the child victim or witness is able to give evidence in as free a manner as possible and without intimidation, it is necessary to prevent the defendant in those circumstances from personally cross-examining, but that provision is made for another person appointed by the court to ask questions on the defendant's behalf.

CHAIR—A problem that may lead to, amongst other problems, is that a well-resourced accused person would be able to employ counsel, whereas one who was less well resourced could not. So a well-resourced person is going to be a lot better off than a person not so well resourced. I am getting pretty close to policy there, but have you got any comments on that?

Mr Alderson—It is an unavoidable consequence of our system that, in general terms, well-resourced defendants get better lawyers and do better in the court system. However, because the Commonwealth sex offences carry such heavy penalties—up to 19 years imprisonment for the sex slavery offences and I think up to 15 years for the child sex tourism offences—all else being equal, they are likely to be quite strong candidates for legal aid if the defendant is impecunious. In the case of the child sex tourism offences, the person has also had enough money to go overseas to engage in these activities, which may suggest they will have enough left to fund a defence afterwards. Also, the provisions try to be pragmatic about this. Rather than saying to the person, 'We're setting up some formal scheme and if you can't afford it, tough luck,' it is really letting the judge make a commonsense decision in the case. If there ever were a case where there was an unrepresented defendant with no money, the judge could just make a sensible decision in the circumstance to identify someone who can ask questions on their behalf.

CHAIR—That is set out in 15YG(5), but that would allow the court to appoint anybody whether or not the person is legally qualified to ask questions of the child. Is that right?

Mr Alderson—Again, that is leaving the discretion to the court to come to the best, most sensible solution in the circumstances.

CHAIR—You might not want to comment on this because it does touch on policy, but the great solution to this is to provide adequate legal aid. Section 15YI goes to closed circuit television. What do you say about using the closed circuit television rather than a child being presented in court where a jury could assess not only the evidence but the demeanour of the child and so on? Was any thought given to that?

Ms Chidgey—The idea is that the image of the child would be visible at all times to the jury and other people in the court.

CHAIR—Would that be the whole length of the child and not just the head?

Ms Chidgey—They would be appearing on closed circuit television so the jury would be able to observe the child in those circumstances. Closed circuit television provisions are common in all states and territories except Queensland, where they have been recommended.

CHAIR—Do the video recordings and the closed circuit television show the whole of the child so the jury or a judge for that matter can judge the demeanour of the child?

Ms Chidgey—I am not familiar with that.

CHAIR—Could you find that out for me?

Mr Alderson—We will find that out.

CHAIR—Section 15YQ says that you are not to give warnings. I think that is just a matter of changing the common law. Section 15YS relates to general powers of the court. I thought 'intendment' was a nice word. Who chose the word? Was that the Parliamentary Counsel?

Mr Alderson—Yes, that was our very good drafter from the Office of Parliamentary Counsel.

CHAIR—This next question is on a hobbyhorse of mine. Item 14, section 23B(1) is 'definition of a magistrate' and then you are going to substitute 'judicial officer'. It states:

(9) In this section:

judicial officer means any of the following:

- (a) a magistrate;
- (b) a justice of the peace;
- (c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

You have not included judges and you have not included anybody from the AAT, who all would be much better placed to do this work than a justice of the peace or a person authorised to grant bail. Have you ever tried to run a case before a justice of the peace?

Mr Alderson—I cannot say that I have. I would say that this is a status quo amendment; this is the effect of the existing provisions. The idea is that it was a bit of trickery to look in the legislation and see the word 'magistrate' and think that you were getting a magistrate. It is thought to be more honest and up-front to use the term 'judicial officer', which then people will know must be defined somewhere and will see the way these provisions operate.

CHAIR—Do you know that justices of the peace can do terrible things? Do they teach you that in law school? I bet they do not.

Ms Chidgey—No.

CHAIR—Bail justices? Where are we getting to?

Mr Alderson—I must say again that often the situation faced by the Commonwealth is that it has a much smaller number of cases within the state and territory systems than the states and territories do, and it really has to take those systems as it finds them.

CHAIR—The other thing said is that, if you are way up in the north-west of Western Australia you cannot get a magistrate, the only people you will get are justices of the peace. I would be interested to see how many times they use a justice of the peace. Justices of the peace are not very well qualified, are they, legally? Your knowledge of the law is such that, if people

compared you with justices of the peace, you would be most insulted—and properly so. Do not comment, but that is true. That is a battle that has been waged and lost. Section 23C division 2 is the powers of detention. Does that maintain the status quo? I was trying to work that out before.

Mr Alderson—This is an amendment in the direction of protecting civil liberties, if I am not incorrect. This is the one that clarifies that police cannot hold people on holding charges. What it currently says in the Crimes Act is that, once a law enforcement officer has arrested somebody and they have been detained under part 1C, they can be questioned—

CHAIR—Let us have a look at it. Section 23C states:

(1) If a person is lawfully arrested for a Commonwealth offence, the following provisions apply.

(2) The person may be detained for the purpose of investigating whether the person committed the offence or any other Commonwealth offence, but must not be detained for that purpose, or for purposes that include that purpose, after the end of the investigation period ...

Mr Alderson—The key words there were ‘or any other Commonwealth offence’. That allowed police to ask questions about any offence, whether they had evidence about it or not—and that is being removed. Now they can only question you about an offence if they reasonably suspect that you have committed that offence.

CHAIR—Item 22 says:

(2) The person may be detained for the purpose of investigating either or both of the following:

(a) whether the person committed the offence;

(b) whether the person committed another Commonwealth offence that an investigating official reasonably suspects the person to have committed ...

Mr Alderson—In other words, under the old scheme, in theory—this would not happen in practice—they could have said, ‘No, you’re not going yet because we want to ask you about this offence under section 18 of the wool act,’ even though they had no evidence.

CHAIR—Yes, that is right. That puts in the ‘reasonably suspects’. This bill extends the ability to carry out a controlled operation to Customs, and I think it increases the power of Customs officers a lot.

Mr Alderson—Which pages of the bill are you referring to?

CHAIR—Just generally, I think.

Mr Alderson—There are three things that impact on the Customs Act in this bill. No. 1 is the power for Customs to authorise controlled operations, in schedule 1. No. 2 is in schedule 4, which is ‘Investigation of Commonwealth offences’. These are actually the provisions that implement this committee’s recommendations. At the end of the entry powers report there are some recommendations to amend the search warrant provisions in the Crimes Act, and the same amendment is made here to the Customs Act.

CHAIR—Does the section on listening devices warrants change the law much? I have not looked at that closely, I must confess.

Mr Alderson—It clearly states in the law what the law was thought to be until a Victorian case last year. The situation these amendments are directed to is where police know or have reasonable grounds to believe that a particular person is going to import drugs or commit some other offence. Say the person has a backpack and the police want to put a listening device in the backpack to find out about the crime but they do not know the name of the person. They know the person but they do not know their name. Under the existing provisions, where it said 'name of person', they used to just put X or something like that. The Victorian Supreme Court said: you cannot do that; if you do not know the name of the person you cannot have a listening device warrant. This has caused severe problems for the use of listening device warrants, because often they are used at a stage where you do not know the person's name. This bill puts it back to the situation it was thought to be in—that, yes, you still have to have your suspicion of criminal activity and you still have to go through your process of authorisation by a AAT member but you do not have to actually know the name of the person.

CHAIR—So you cannot go into a backpackers hostel and put a listening device in every backpacker's pack?

Mr Alderson—No, you cannot.

CHAIR—What was that Victorian case?

Mr Alderson—The Nicholas case. We probably have something in our brief on that.

CHAIR—Who was on the full court, do you know?

Mr Alderson—I do not know. I can tell you that it is *R v Nicholas* [2000] VSCA 49.

CHAIR—Have you ever taken an Aspro?

Mr Alderson—I personally have not taken Aspro but I know what you are referring to.

CHAIR—That was the Aspro family.

Mr Alderson—A piece of Australian history.

CHAIR—Yes. It was all a terrible embarrassment, to end up in jail. Families can go wrong, no matter what. On page 61, section 8A says

A person referred to in subsection (4A) may apply to a Judge or nominated AAT member to issue a warrant to a Commonwealth law enforcement agency authorising the use of a listening device in relation to a particular item.

Mr Alderson—Yes, this is the concept: because you do not know the person's name, what you do have to specify is the item.

CHAIR—Last but not least is the amendment of the Financial Transaction Reports Act. What have we done there?

Mr Alderson—These are really just a range of tidying up amendments or things that have become outdated since the last time the FTR Act was amended. For example, there is provision that financial transactions information can be used by, say, the New South Wales Crime Commission and the different police services. Since that list was last updated the anticorruption commission of Western Australia has come into existence, so it is being added to the list of agencies that can use FTR information.

There is also a provision here to close a loophole which I think is referred to as ‘underground bankers’. The financial transactions reports provision has requirements to monitor transactions and file reports of suspicious activity or large transactions. They were designed for the sort of formal banking system—the banks, the building societies and credit unions. But, since then, we have got currency exchanges places. You can actually now launder money because currency exchange places can change such large amounts of money, so they are being brought within the ambit of the banking system that is subject to these provisions.

CHAIR—The last page inserts ‘CrimTrac Agency’ instead of ‘the National Exchange of Police Information’. CrimTrac has taken up the work that the National Exchange of Police Information used to do.

Mr Alderson—Indeed. I was not able to be present, but I believe that there was an excellent launch of the CrimTrac database yesterday by the Prime Minister.

Committee adjourned at 12.37 p.m.