

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

*CRIMES AMENDMENT
(CONTROLLED OPERATIONS) BILL 1996*

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General and Minister for Justice,
the Honourable Daryl Williams AM, QC, MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
SENATE TO THE BILL AS INTRODUCED

CRIMES AMENDMENT (CONTROLLED OPERATIONS) BILL 1996

GENERAL OUTLINE

The purpose of this Bill is to amend the *Crimes Act 1914*, by inserting a new Part 1AB, and by adding additional definitions to section 3. The main elements of the Bill are that it:

- allows the Commissioner, Deputy Commissioners and Assistant Commissioners of the Australian Federal Police and members of the National Crime Authority to issue certificates authorising a controlled law enforcement operation involving the import, export and/or possession of narcotic drugs;

- requires that the certificate is to be tendered in evidence in a prosecution for an offence against section 233B of the *Customs Act 1901* or an associated offence;

- provides that certain law enforcement officers acting in good faith and in the course of duty in relation to an authorised controlled operation are not criminally liable for:

 - offences against section 233B of the *Customs Act 1901*;

 - offences against sections 10-14 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (that relate to the possession, importation or exportation of narcotics);

 - associated offences eg conspiracy, aiding and abetting; and

 - (in some cases) State or Territory offences relating to the possession of narcotic substances and associated offences;

- requires the Commissioner of the Australian Federal Police and the Chairperson of the National Crime Authority to report to the Minister on the results of applications for certificates authorising controlled operations, and the reasons for the decision in each case, and requires the Minister to report on these matters to Parliament;

- provides that the protection of a certificate authorising an operation does not extend to conduct involving the inducement of a suspect to commit an offence of a kind which he or she would otherwise have lacked the intent to commit;

- preserves judicial discretions to exclude evidence or stay proceedings, except to the extent that these discretions are expressly restricted by the Bill;

- requires the making of reports to the Minister and to Parliament, detailing the route through which narcotic goods passed in the course of an authorised controlled operation, the persons or agencies who had control of the goods during and after the operations, and the current status and whereabouts of the narcotic goods;

provides that the fact that law enforcement officials took part in, or facilitated, the importation of narcotics prior to the commencement of the Bill, is not to render evidence of that importation inadmissible where the importation was made pursuant to a request from the Australian Federal Police to the Australian Customs Service for an exemption from detailed customs scrutiny; and

includes procedures which will contain the usage of controlled operations to instances involving the investigation or detection of, or the prosecution of persons for, serious criminal activity.

The Bill is a response to the decision of the High Court in *Ridgeway v R* (1995) 129 ALR 41. In *Ridgeway*, the High Court held that where law enforcement officials break the law by committing an element of the offence for which a defendant is being prosecuted, then as a general rule, a court should exercise its discretion to refuse to allow evidence of that element of the offence to be admitted against the defendant.

By exempting law enforcement officers from criminal liability for certain conduct related to importation, exportation or possession of narcotic goods, the Bill will ensure that evidence resulting from such conduct is not excluded from evidence under the principles enunciated in *Ridgeway*. The transitional provisions of the Bill directly reverse the discretionary principles laid down in *Ridgeway* in the case of certain importations carried out under conditions agreed by the Australian Federal Police and Australian Customs Service.

FINANCIAL IMPACT

The Bill will have no real impact on Government expenditure. Minor compliance costs will be absorbed in the budgets of the Australian Federal Police and the National Crime Authority.

NOTES ON CLAUSES

Clause 1 - Short title

This clause is formal and provides for the short title of the Bill.

Clause 2 - Commencement

This clause provides that the Bill will commence on Royal Assent.

Clause 3 - Schedule

This clause explains that the items set out in the Schedule amend the *Crimes Act 1914*.

Schedule 1

Amendments to Subsection 3(1) - Interpretation

The proposed amendments insert definitions, used in Part 1AB, in section 3 of the *Crimes Act 1914*. These definitions are as follows:

Assistant
Commissioner,
Deputy
Commissioner
and
Commissioner

These are defined as references to officers holding these ranks
within the Australian Federal Police

associated offence The purpose of this definition is to describe the range of ancillary offences that may occur in the course of a controlled operation, and in relation to which a certificate acts as a shield from criminal liability.

In the case of offences against section 233B of the *Customs Act 1901*, associated offences are offences against sections 236 (ie, aiding, abetting, counselling or procuring an offence against section 233B) and 237 (ie, attempting an offence against section 233B) of the *Customs Act 1901*, and against section 7A (ie, inciting an offence against section 233B) or subsection 86(1) (ie, conspiring to commit an offence against section 233B), of the *Crimes Act 1914*.

While sections 236 and 237 of the *Customs Act 1901* do not appear to create distinct offences, there is some authority to the contrary (*Beckwith* (1976) 135 CLR 569 at 580 and 583 per Mason and Murphy JJ), and they have accordingly been included in the definition of 'associated offence', out of caution.

In the case of offences against the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act involving the importation, exportation or possession of narcotic drugs, associated offences are offences under sections 5 (ie, aiding and abetting such an offence), 7 (ie, attempting such an offence), 7A (inciting such an offence) and subsection 86(1) (conspiring to commit such an offence) of the *Crimes Act 1914*.

In the case of offences against a State or Territory law, an element of which is possession of narcotic drugs, associated offences are offences equivalent to those found in sections 5 (ie, aiding and abetting a narcotics possession offence), 7 (ie, attempting a narcotics possession offence), 7A (inciting a narcotics possession offence) and subsection 86(1) (conspiring to commit a narcotics possession offence) of the *Crimes Act 1914*.

Australian law
enforcement officer
and
law enforcement
officer

The term 'law enforcement officer' is defined to mean an Australian Federal Police member, staff member or special member, a National Crime Authority staff member, an Australian Customs Service officer, a State or Territory police force member, or a member of a police force or law enforcement agency of a foreign country.

The definition of 'Australian law enforcement officer' is the same, except that it excludes a member of a police force or law enforcement agency of a foreign country.

authorising officer	This is the person to whom an application may be made for a certificate authorising a controlled operation under proposed section 15J, and who may grant that application. These persons are: the Commissioner, Deputy Commissioners and Assistant Commissioners of the Australian Federal Police, and members of the National Crime Authority (including the Chairperson).
controlled operation	The definition contains a cross-reference to the definition of controlled operation in proposed section 15H.
narcotic goods	This is defined as having the same meaning as in the <i>Customs Act 1901</i> (see section 4 of that Act).
narcotic goods offence	<p>A certificate granted under the Bill only provides a shield from criminal liability in relation to a narcotics goods offence, defined as:</p> <ul style="list-style-type: none"> • offences against section 233B of the <i>Customs Act 1901</i>; • offences against sections 10-14 of the <i>Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990</i> (that relate to the possession, importation or exportation of narcotics); • associated offences eg conspiracy, aiding and abetting; and • (in some cases) State or Territory offences relating to the possession of narcotic substances and associated offences.
person targeted	This expression is used in subsection 15I(2) and paragraphs 15I(5)(a) and 15M(b) to identify the person who is the subject of the controlled operation.

PROPOSED PART 1AB - CONTROLLED OPERATIONS FOR OBTAINING EVIDENCE ABOUT CERTAIN OFFENCES RELATING TO NARCOTIC GOODS

Proposed Division 1 - Objects of Part

Proposed Section 15G - Objects of Part

Proposed subsection 15G(1) sets out the objects of Part 1AB.

The first objective relates to law enforcement: to exempt law enforcement officers (as defined) from criminal liability for conduct in the course of a controlled operation authorised under the Part involving or related to the importation, exportation or possession of narcotics goods. Law enforcement officials are not exempt from liability for other kinds of activity that might be carried out in the course of the operation, such as property damage, assault or bribery.

The second objective relates to accountability: to require the Commissioner of the Australian Federal Police and the Chairperson of the National Crime Authority to report to the Attorney-General on controlled operations, and for the Minister to report on these matters to Parliament.

The final object relates to the evidence derived from operations before the commencement of the Bill: to provide that evidence of importation of narcotic goods, obtained through a controlled operation prior to the commencement of the Act, and in which the Australian Federal Police and the Australian Customs Service co-operated to allow the narcotic goods to pass through the customs barrier, is not to be rejected because of the unlawful conduct of law enforcement officers in carrying out or facilitating the operation.

Proposed subsection 15G(2) responds to the recommendation by the Senate Legal and Constitutional Legislation Committee in its report on the 1995 version of the Bill that a provision be inserted in the Bill 'clarifying that it does not in any way remove from a court its inherent and constitutional power and duty to ensure that justice is done in the conduct of the matter before it, including the power to terminate or stay proceedings'.

Proposed subsection 15G(2) provides that, subject to section 15X, nothing in Part 1AB is intended to limit a court's discretion to exclude evidence in criminal proceedings or stay criminal proceedings in the interests of justice. The discretion to stay proceedings includes the discretion to permanently stay (ie, terminate current and bar future) proceedings.

Section 15X removes the discretion of a court to exclude evidence solely on the basis that it was unlawfully obtained or procured, but only in the limited circumstances provided for in Division 3 of Part 1AB.

Proposed Division 2 - General

Proposed section 15H - What is a controlled operation?

This definition plays an important role in a number of areas of the Bill. Firstly, a certificate can only be issued in relation to a 'controlled operation'. Secondly, a law enforcement official is only exempt from criminal liability for certain conduct in the course of an authorised 'controlled operation'. Finally, the transitional provision (proposed section 15X) only relates to the admissibility of evidence gathered in the course of, or as a result of, a 'controlled operation'.

The proposed section defines a controlled operation as having three elements that (i) certain persons (ii) acting for certain purposes (iii) are likely to engage in certain conduct that constitutes an offence against section 233B of the *Customs Act 1901* or an associated offence, or would constitute such an offence but for this Bill.

A controlled operation must involve the participation of law enforcement officers (as defined): officers of the Australian Federal Police, the National Crime Authority, the Australian Customs Service, State or Territory police force, or foreign police and law enforcement agencies.

A controlled operation must be for the purposes of gathering evidence of one or more offences relating to the importation or exportation of narcotic goods, ie, offences

against section 233B of the *Customs Act 1901* or associated offences (aiding and abetting, attempting, inciting and conspiring to commit an offence against section 233B). The ultimate objective of this Bill is to facilitate the investigation and prosecution of such offences. To be a controlled operation, therefore, the investigation must be for this purpose.

Finally, a controlled operation must be one that may involve a law enforcement officer (as defined) engaging in conduct that would, apart from subsection 15I(1) or (3), constitute a narcotic goods offence. If an investigation is not expected to involve any law enforcement officials committing offences in respect of which a certificate would act as a shield from criminal liability, it is not an investigation of the kind to which the Bill relates, and does not fall within the definition of 'controlled operation'.

An operation falling within this definition is a 'controlled operation', whether or not a certificate authorising the operation is issued under the Bill, and whether the operation took place before the commencement of Part 1AB, or takes place subsequently.

Proposed section 15I - Law enforcement officers not liable for certain offences committed for purposes of authorised controlled operation

This section is the key provision of the Bill. The purpose of the section is to define the circumstances in which a law enforcement official will not be criminally liable for otherwise unlawful conduct.

Proposed subsection 15I(1) defines the circumstances in which a law enforcement officer, other than a State or Territory police officer, is not criminally liable for conduct that would otherwise constitute a narcotic goods offence.

Narcotic goods offence is defined in subsection 3(1) as:

- an offence against section 233B of the *Customs Act 1901*;
- an offence against sections 10-14 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (that relate to the possession, importation or exportation of narcotics);

an associated offence eg conspiracy, aiding and abetting; and

(in some cases) a State or Territory offence relating to the possession of narcotic substances and associated offences.

Pursuant to proposed subsection 15I(1) a law enforcement officer, other than a State or Territory police officer, will not be criminally liable for conduct that (i) is carried out in the course of duty; (ii) for the purposes of a controlled operation; (iii) at a time at which a certificate issued under section 15M, authorising the controlled operation, is in force. (Subsection 15I(3) deals with the criminal liability of State or Territory police officers.)

The certificate does not prevent a law enforcement officer from being civilly liable for conduct in the course of a controlled operation. Nor does it prevent a law enforcement officer from being criminally liable for other kinds of conduct eg theft, bribery or assault, even if committed 'in the course of the operation'.

Proposed subsections 15I(2) and 15I(5) impose an additional pre-condition to a law enforcement officer avoiding criminal liability for conduct pursuant to a certificate issued under section 15M. This pre-condition is that the conduct of the officer must not constitute entrapment. These subsections implement the recommendation by the Senate Legal and Constitutional Legislation Committee, in its report in September 1995 on the previous version of this Bill, that a provision be inserted in the Bill 'clarifying that the Bill does not permit entrapment'.

The protection of the certificate will not extend to the intentional inducement of a suspect to commit an offence, where the suspect did not have the intent to commit an offence of that kind prior to the inducement. Conduct constituting such an intentional inducement will be subject to the ordinary criminal law.

For example, take a case in which a suspect intended to buy a quantity of heroin, not being specifically to import heroin. The suspect's intent would be to purchase or possess heroin, not to import heroin. Proposed section 15I will authorise law enforcement officers to take part in an operation to facilitate the possession of the heroin, provided that this is done in the course of duty, pursuant to a certificate issued under section 15M. It will not authorise law enforcement officers to intentionally encourage the suspect to import heroin. The conduct constituting the encouragement will be subject to the ordinary criminal law.

Subsequent conduct in the course of an operation may, however, be protected by the section 15M certificate, if all of the pre-conditions under section 15I are met.

[Note: A further protection is that a certificate may not be issued in a case where it appears that the operation would involve inducing a person to commit an offence which he or she was otherwise not likely to commit: paragraph 15M(b).]

Proposed subsection 15I(3) defines the circumstances in which a State or Territory police officer is not criminally liable for conduct that would otherwise constitute a narcotic goods offence (as defined).

A State or Territory police officer, like a Commonwealth or foreign officer, will not be criminally liable for conduct that (i) is carried out in the course of duty; (ii) for the purposes of a controlled operation; (iii) at a time at which a certificate issued under section 15M, authorising the controlled operation, is in force.

As with proposed subsection (1), which relates to Commonwealth and foreign law enforcement officers, proposed subsection 15I(3) will shield State and Territory police officers from liability for any Commonwealth, State or Territory narcotics offences. Similarly, the protection will not apply if the officer's conduct amounted to entrapment: proposed subsection 15I(5).

Proposed subsection 15I(6) provides that the fact that a law enforcement official is not criminally liable for importing or exporting narcotic goods does not alter the fact that the goods were imported or exported in contravention of paragraph 233B(1)(b) of the *Customs Act 1901*. This is to ensure that the importation or exportation of narcotic goods by a law enforcement official who is exempt from criminal liability for that conduct does not render that importation or exportation lawful, thereby preventing the prosecution of offences depending on that unlawful importation or exportation.

Proposed subsection 15I(7) clarifies the notion of 'in the course of duty', used in proposed subsection 15I(1), in relation to foreign police and law enforcement officers.

As a matter of law, there must be uncertainty as to the scope of a foreign police or law enforcement officer's duty in investigating a Commonwealth offence. For that reason, the proposed subsection provides that a foreign police officer or law enforcement officer is to be taken to be acting in the course of duty in relation to a controlled operation to the extent that he or she takes part in the controlled operation in accordance with the instructions given by the Australian law enforcement officer in charge of the operation.

Proposed section 15J - Application for certificate authorising a controlled operation - by whom and to whom made

The proposed section provides that the Australian law enforcement officer - from the Australian Federal Police, National Crime Authority or Australian Customs Service - in charge of a controlled operation, may apply for a certificate authorising the controlled operation. In practice, this will almost always be an officer of the Australian Federal Police or National Crime Authority.

The application may be made to a member of the National Crime Authority (including the Chairperson), or a Commissioner, Deputy Commissioner or Assistant Commissioner of the Australian Federal Police. These are the 'authorising officers' who may grant a certificate authorising a controlled operation.

There may be cases in which an officer of a foreign law enforcement operation has some degree of control over a controlled operation. Whether or not this is the case, it is the most senior Australian law enforcement officer responsible for the Australian involvement in the operation who is to make the application.

Proposed section 15K - Form and contents of application

The proposed section lays down a number of prerequisites for the form and content of applications for certificates. The rules for urgent applications are dealt with in section 15L.

The first requirement of proposed section 15K is that the application must be in writing, signed by the applicant. This is to ensure that any later dispute as to the content and authenticity of the application can be easily resolved.

The second is that the application must identify whether there has been any previous application in relation to the operation, and if so whether it was granted or refused. In a case where a certificate has previously been denied, the authorising officer will be alerted to the possibility that the applicant may be 'shopping round' for a certificate. In a case where a certificate has previously been granted, the authorising officer will be alerted to the fact that the time allowed by the previous certificate was not, or is not expected to be, sufficient, and can decide whether it is appropriate to grant another certificate.

Nothing in the Bill prevents the making of further application for a certificate, regardless of whether an earlier application was refused, a certificate is in force, or a certificate has terminated. For example, circumstances may have changed following a previously unsuccessful application, or unexpected delays in the trafficker's timetable

for the transit of narcotic drugs may render the time allowed by the original certificate insufficient.

Finally, the application must contain, or be accompanied by, sufficient written information to allow the authorising officer to decide whether to grant the application. Charts, pictures and diagrams are all forms of writing (*Acts Interpretation Act 1901*, section 25), and could therefore be included with the application.

Proposed section 15L - Urgent applications

The purpose of proposed section 15L, which allows for urgent applications, is to allow a certificate to be granted in circumstances where, if a certificate is to be given, it must be given quickly to have any law enforcement value.

Proposed subsection 15L(1) limits the availability of the urgent application procedure to circumstances where the applicant has reason to believe that the delay caused by making the application in writing, in accordance with proposed section 15K, may affect the success of the operation. This would be the case, for example, where a delay would alert the intended recipient of narcotic drugs of law enforcement involvement, causing him or her to refuse to take delivery of the drugs.

Proposed subsection 15L(2) provides that an urgent application may be made by any means of communication, including orally in person or by telephone.

Proposed subsection 15L(3) requires the applicant to give the authorised officer such information as the authorising officer requires to decide whether or not to grant the application. This is the same requirement as for non-urgent applications, except that the information need not be provided in written form.

Under proposed subsection 15L(4), the applicant is required to inform the authorising officer whether any previous application has been made in relation to the operation, and whether any such application was granted or refused. This mirrors the obligation under paragraphs 15K(b) and (c) relating to non-urgent applications.

Under proposed subsection 15L(5), the authorising officer must immediately inform the applicant if he or she decides to grant the application, and must, as soon as practicable, furnish the applicant with the certificate authorising the operation. This ensures that law enforcement officers know whether they can proceed with an authorised operation as soon as possible.

Proposed subsection 15L(6) requires an applicant, as soon as practicable, to prepare a written application that complies with section 15K, and to provide that application to the authorising officer. This ensures a written record of the contents of the application is produced while the oral application is still fresh in the applicant's memory.

Proposed section 15M - On what grounds may a certificate authorising a controlled operation be given?

Proposed section 15M requires an authorising officer, ie, Australian Federal Police Commissioner, Deputy Commissioner or Assistant Commissioner, or National Crime Authority member, to grant a certificate authorising a controlled operation if he or she is satisfied of four things. This is so whether an ordinary application has been made under section 15K, or an urgent application under section 15L.

First, the authorising officer must be satisfied that the applicant has provided as much information as he or she possesses, about the nature and quantity of narcotic goods to which the operation relates. This is so that, to the degree of specificity possible, the certificate can describe the narcotic goods to which the proposed controlled operation relates.

Secondly, the authorising officer must be satisfied that the 'person targeted' (as defined) by the operation is likely to commit an offence against section 233B of the *Customs Act 1901* (or an associated offence) whether or not the operation takes place. This is to ensure that certificates are not issued to allow law enforcement officials to 'manufacture' crime - to entrap citizens who otherwise would not have been involved in the commission of offences involving narcotic goods.

Thirdly, the authorising officer must be satisfied that the operation has a genuine law enforcement purpose - that it will make it much easier to obtain evidence that may lead to the prosecution of an offence against section 233B of the *Customs Act 1901*, or an associated offence (aiding and abetting, attempting, inciting and conspiring to commit an offence against section 233B).

The fourth matter of which the authorising officer must be satisfied is that any narcotic goods to which the controlled operation relates, and that will be in Australia at the end of the operation, will be under the control of an Australian law enforcement officer.

In the course of some controlled operations, law enforcement officers must allow the narcotic goods to be conveyed by couriers and others. It is essential, however, that the controlled operation be set up so that law enforcement officers can be confident that the narcotic goods will be under their control at the *end* of the operation, so that the drugs do not go astray and be disseminated into the community.

Proposed section 15N - Form and contents of certificate

The purpose of this section is to regulate the form and content of certificates authorising controlled operations. These prescriptions have been set down with the objectives of minimising the prospect of later dispute as to the terms of the authorisation, providing the information law enforcement officers need to effectively perform their duties, and requiring the proposed operation to be described in as much detail as possible.

Proposed subsection (1) regulates the form of certificates authorising controlled operations: they must be in writing, signed by the authorising officer.

Proposed subsection (2) regulates the content of certificates authorising controlled operations. A certificate must state the name of the applicant for the certificate, and whether the certificate was made under section 15K (standard application) or section 15L (urgent application).

Proposed paragraph (2)(c) requires the certificate to contain a description of the operation. The purpose of this requirement is to ensure that a certificate relates only to a specific, describable operation, and is not issued as a blanket authorisation to import or export narcotic goods.

The amount that law enforcement officers will know about an operation and the type of information relevant to describing the operation, will vary widely from case to case. For that reason, proposed paragraph 15N(2)(c) only requires the following details to be described to the extent that they are known and relevant: (i) the name of any person being, or to be, investigated; (ii) the nature and quantity of the narcotic goods to which the operation relates; (iii) the foreign countries through which the goods have passed, or are likely to pass, in the course of the operation; (iv) the place(s) where the narcotic goods have been or will be dealt with by Customs or (v) the place(s) where the narcotic goods have otherwise entered, or are likely to enter, Australia.

Proposed paragraphs (2)(d) and (e) require the certificate to state that the authorising officer has authorised the operation to be carried out, and the date and time on which the certificate was given.

Proposed subsection (3) requires a certificate given following an urgent application under section 15L to specify the date and time at which the applicant was informed of the decision to give the certificate.

The time and date required to be stated by proposed paragraph (2)(e) and proposed subsection (3) are important, because this is the time from which law enforcement officers may engage in certain otherwise unlawful conduct in the course of a controlled operation without incurring criminal liability.

Proposed subsection (4) allows the authorising officer to specify a day prior to the normal termination date 30 days after issue, on which a certificate is to cease to be in force. This might be done for example, where it is known that the narcotic drugs must be delivered to the intended recipient within one or two days, so that the operation will certainly be complete within a week.

Proposed subsection (5) provides that the a certificate is not invalidated by a failure to comply with section 15N. This is so that law enforcement officers can rely on the terms of a certificate. It would be unjust for an officer who had acted in accordance with an apparently valid certificate to find himself or herself criminally liable because, for example, the certificate misdescribed the place at which narcotic drugs had passed through Customs.

Proposed section 15O - Surrender of certificate

Proposed subsection 15O(1) allows the law enforcement officer in charge of a controlled operation to surrender a certificate by notifying the authorising officer who issued the certificate of the surrender. The notification must be in writing, specify the time it is to have effect, and be signed by the officer in charge of the controlled operation. A certificate might be surrendered, for example, where an operation has been completed or aborted, so the certificate has no further application or use.

Proposed section 15P - Period for which certificate is in force

Proposed subsections 15P(1) and (2) regulate the time at which a certificate comes into force.

Under subsection 15P(1), a certificate given in response to an urgent application under section 15L comes into force when the authorising officer notifies the applicant of his or her decision to give the certificate. Under subsection 15P(2), a certificate given in

response to a standard application under section 15K comes into force when the certificate is given.

In each case, the relevant time must be noted on the certificate (see section 15N).

Subsection 15P(3) regulates the time at which a certificate ceases to be in force. A certificate that ceases to be in force does not exempt a law enforcement officer from criminal liability for conduct that occurs after it ceases to be in force, but continues to exempt law enforcement officials from criminal liability for the conduct described in proposed section 15I that occurred while the certificate was in force.

A certificate ceases to be in force on the 30th day after it is granted, unless an earlier date for expiry has been specified in the certificate, or in a surrender notice under section 15O.

The Bill does not preclude an application for a further certificate where a certificate has previously been granted in respect of the controlled operation in question, either while the certificate is in force, or after it ceases to be in force. This might occur, for example, where the conveyance of the narcotic goods to the intended recipient is unexpectedly delayed.

Proposed section 15Q - Chief Executive Officer of Customs to be notified of certain certificates

The purpose of this section is to ensure that the Australian Customs Service is notified of any authorised controlled operation that will involve narcotics passing through the customs barrier.

Proposed subsection (1) provides that the notification requirement in the proposed section applies where a certificate authorising a controlled operation is given under proposed section 15M, and the applicant believes that in the course of the authorised controlled operation, the narcotics to which it relates may pass through customs control.

Proposed subsection (2) requires the applicant for the certificate, in the circumstances described in subsection (1), to notify the Chief Executive Officer of the Australian Customs Service of certain things. These are: (i) the applicant's name; (ii) the date on which the certificate was given; (iii) to the extent that this is known - the place(s) at which the narcotics are expected to pass into the control of the Australian Customs Service; and (iv) to the extent that this is known - the time(s) and date(s) at which the narcotics are expected to pass into the control of the Australian Customs Service.

Proposed subsection (2) also provides that this notification must be made in writing.

Proposed subsection (3) provides that failure to comply with this notification requirement does not affect the validity of a certificate authorising a controlled operation.

Proposed section 15R - Minister to be notified of applications for certificate

Proposed sections 15R and 15S lay down the mechanism by which the seeking and granting of certificates under the Bill will be accountable.

Proposed subsection 15R(1) requires the Commissioner of the Australian Federal Police to inform the Minister of any decision to grant or refuse to grant a certificate, and the reasons for that decision, as soon as possible after an Australian Federal Police Assistant Commissioner, Deputy Commissioner or the Commissioner has made such a decision.

Proposed subsection 15R(2) places the same obligation on the Chairperson of the National Crime Authority in relation to decisions made by members of the Authority.

Proposed subsection 15R(3) requires that the report to the Minister under this section must include an indication of the extent to which the authorising officer, in making the decision, took into account the seriousness of the criminal activity of the person targeted by the operation or of any other person associated with that person. This will ensure that controlled operations are employed only in relation to matters involving suspected serious criminal activity.

However it may be that the activity of the particular person targeted may be comparatively low level, but the controlled operation is still warranted because of his/her involvement with a major conspiracy. This eventuality is achieved by the extension contained in proposed paragraph 15R(3)(b).

The 'serious criminal activity' test may be satisfied by a narcotics offence against either Commonwealth law, State or Territory law, or the law of a foreign country. The definition of 'criminal activity' in proposed subsection 15R(4) ensures that this is the case. It is, of course, necessary that the controlled operation involve the gathering of evidence related to an offence against section 233B of the Customs Act (or an associated offence) by the person targeted (see proposed paragraph 15H(b)). However, the 'seriousness' of the criminal activity involved may be demonstrated by the fact that the Commonwealth offence is part of a wider criminal design involving breaches of either State law or the law of a foreign country involving the possession, importation or exportation of narcotics.

Proposed section 15S - Authorising officer to report to Minister about action taken under certificate

Proposed section 15S introduces a requirement for the Australian Federal Police Commissioner and National Crime Authority Chairperson to make a post-operation report to the Minister, setting out information about the control of the narcotic goods involved in an operation, both during and after the operation.

The provision implements the third recommendation by the Senate Legal and Constitutional Legislation Committee in its September 1995 report on the previous version of the Bill. Proposed subsection 15S(1) requires this post-operation report to be provided to the Minister within 3 months after the certificate ceases to be in force. This hiatus of up to three months will allow:

the provision of details about the long term storage of the narcotic goods, and whether they have been destroyed;

the gathering of information in the possession of other agencies; and

the central collation and checking of reports by the Australian Federal Police and National Crime Authority, to ensure the quality and accuracy of reports, before information is passed on to the Minister.

The information that must be reported will allow the Minister, and ultimately Members of Parliament and the general public, to evaluate the extent to which law enforcement officers ensured the security of narcotic drugs during the course of an operation.

Under proposed subsection 15S(1) the report must state whether a controlled operation was carried out pursuant to the certificate. If so, then under proposed subsection 15S(2), the report must set out the following details about the operation: the nature and quantity of narcotic goods involved; the route through which the narcotic goods passed; the law enforcement agencies whose officers had possession of the narcotic drugs; and the persons from outside law enforcement who had possession of the narcotic goods in the course of the operation. The report must also identify the person or agency with possession of the narcotic goods at the time of the report, whether this is unknown, or whether the narcotic goods have been destroyed.

Proposed subsection 15S(3) requires that where the narcotics have not been destroyed and the identity of the person who has possession of them is known, the report must identify either the law enforcement agency to which the person belongs, or the person from outside law enforcement who has possession of the narcotic goods.

Under proposed subsection 15S(4), where an operation was authorised by an authorising officer from within the Australian Federal Police, the post-operation report must be provided to the Minister by its Commissioner. Where an operation was authorised by an authorising officer from within the National Crime Authority, the post-operation report must be provided to the Minister by its Chairperson.

Under proposed subsection (5) it will be permissible for the report to omit the name of a person from the report if the inclusion of the person's name might endanger his or her safety or prejudice an investigation or prosecution. It will be necessary to use a code name for the person and to state the reason for omitting the person's name.

Proposed section 15T - Minister to table report before Parliament

Proposed subsection 15T(1) requires the Minister to lay a report about controlled operations before each House of Parliament. The report must be laid before each House by the first sitting day after 1 October in each year. The report must include the information required by proposed subsection 15T(2).

Proposed subsection 15T(2) requires the report to include (but is not limited to) the date on which each application for a controlled operation was made during the year, the decision taken, and the reasons for that decision. The report must also include the information given to the Minister in post-operation reports under proposed section 15S.

The reporting requirement is subject to provisos in subsections 15T(3) and (4). Proposed subsection 15T(3) prohibits the report from mentioning anything about a named person that has not already been published.

Subsection 15T(4) requires the Minister, based on the advice of the Australian Federal Police Commissioner or National Crime Authority Chairperson, to exclude from the report information that may endanger the safety of a person or prejudice an investigation. The information must then be included in the first report after these risks no longer exist.

Proposed section 15U - Evidentiary certificates

Proposed subsection 15U(1) provides that a document purporting to be a certificate issued under proposed section 15M authorising a controlled operation is to be tendered in evidence in a prosecution for an offence against section 233B of the *Customs Act 1901* or for an associated offence. The certificate will be prima facie evidence of the facts stated in the document. The required contents of the certificate are specified at proposed section 15N. The tendering of the certificate will place the defendant on notice that evidence gathered through the use of a controlled operation will be adduced at the trial. This will ensure that the defendant has an opportunity during the trial to examine the process for the authorisation of the controlled operation.

On some occasions it may occur that the prosecution will seek that some of the contents of the certificate not be made public. This might be done, for example, because the publication of the information may prejudice another operation that is still in progress, or might endanger the life of a person (such as a confidential informant). If this occurs it will be possible for the prosecution to make an application for the suppression of that material on the basis of a claim of public interest immunity.

Proposed subsection 15U(2) provides that a copy of the certificate, certified as such by the AFP Commissioner or the Chairperson of the NCA as the case may be, shall be treated as if it were the original certificate. This is a necessary requirement because there will be only one original of the certificate, but it may be necessary to tender the document in a number of proceedings (eg where the controlled operation targeted a number of individuals and a number of prosecutions result).

Proposed Division 3 - Controlled operations started before commencement of this Part

The purpose of this Division is to prevent evidence being rendered inadmissible in proceedings *after* the commencement of the Bill, because of the unlawful importation of narcotic goods *before* the commencement of the Bill, where certain conditions are met.

Proposed section 15V - Interpretation

Proposed subsection 15V(1) provides that proposed Division 3 only applies to controlled operations started before the commencement of the Bill.

Proposed subsection 15V(2) contains two definitions for the purposes of proposed Division 3 only.

The 'Ministerial Agreement' referred to in the Division is that dated 3 June 1987 between the then Minister for Industry, Technology and Commerce, and the then Special Minister of State, concerning the relationship between the Australian Customs

Service, Australian Federal Police and National Crime Authority in relation to narcotic goods law enforcement.

'Regional Director for a State or Territory' is given the same meaning as in the *Customs Act 1901*, which is the principal officer of Customs for that State or Territory (*Customs Act 1901*, subsection 8(1)). Prior to 1 July 1995 these officers were known as Collectors of Customs. The proposed definition will include references to those officers prior to their change in designation, which was effected by the *Customs, Excise and Bounty Legislation Amendment Act 1995* (Act No 85/1995).

Proposed section 15W - Minister may give certificate about controlled operation that involved unlawful importation of narcotic goods by law enforcement officer

The purpose of proposed section 15W is to lay down a method by which the prosecution may prove the matters relevant to establishing that evidence should not, under section 15X, be excluded from evidence. This does not prevent these matters being proved by other means, and nor does it preclude the defence from bringing evidence suggesting the non-existence of these matters.

Proposed subsection 15W(1) allows the Minister to give a certificate in writing stating that for the purposes of a controlled operation leading to the prosecution of a person, an Australian Federal Police member named in the certificate made a written request which purported to be in accordance with the 1987 Ministerial agreement, to a customs official that the narcotic goods be exempted from detailed customs scrutiny by Customs officers, and that this request was accepted.

The Minister may give such a certificate where three things have occurred. First, evidence leading to the prosecution of a person for an offence against section 233B of the *Customs Act 1901* or an associated offence (aiding and abetting, attempting, inciting and conspiring to commit an offence against section 233B) must have been obtained through a controlled operation.

Secondly, a law enforcement officer, acting in the course of duty for the purposes of the operation must have contravened paragraphs 233B(1)(b) or (d) of the *Customs Act 1901*, ie, imported narcotic goods or aided, abetted, counselled, procured or been knowingly concerned in the importation of narcotic goods.

Finally, for the purposes the controlled operation, an Australian Federal Police member must have made a written request which purported to be in accordance with the 1987 Ministerial agreement, to a customs official that the narcotic goods be exempted from detailed customs scrutiny by Customs officers, and that this request was granted.

The request need only 'purport' to have been made in accordance with the agreement, because while prior to the decision in *Ridgeway v R* (1995) 129 ALR 41, the Australian Federal Police, National Crime Authority and Australian Customs Service believed controlled operations were being carried out in accordance with that agreement, the legal status of the agreement is now in doubt.

Proposed subsection 15W(2) describes the effect of the Ministerial certificate. In a prosecution for an offence against section 233B of the *Customs Act 1901* or an associated offence (aiding and abetting, attempting, inciting and conspiring to commit an offence against section 233B) a document purporting to be a certificate given under

subsection (1) is admissible as prima facie (non-conclusive) evidence of the facts that it states.

Proposed section 15X - Evidence of illegal importation etc. of narcotic goods not to be rejected on ground of unlawful conduct by law enforcement officer

The purpose of proposed section 15X is to alter the rule of evidence laid down in *Ridgeway v R* (1995) 129 ALR 41, where certain circumstances relating to the involvement of law enforcement officers in the importation of narcotic goods in the course of a controlled operation can be shown to have existed.

The proposed section provides that in a prosecution for an offence against section 233B of the *Customs Act 1901* or an associated offence (aiding and abetting, attempting, inciting and conspiring to commit an offence against section 233B), evidence that narcotic goods were imported into Australia in contravention of the *Customs Act 1901* is not inadmissible on the ground that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, their importation, if three things can be shown.

The first is that the law enforcement officer was acting in the course of duty for the purposes of the controlled operation when he or she committed the offence.

Secondly, a purpose of the operation must have been to obtain evidence leading to the prosecution of a person for a narcotic goods offence.

Finally, for the purposes of the controlled operation, an Australian Federal Police member must have made a written request which purported to be made in accordance with the 1987 Ministerial agreement, to a customs official, that the narcotic goods be exempted from detailed customs scrutiny, and that request must have been granted.

A certificate granted under proposed section 15W will facilitate proof of this final matter.

