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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CUSTOMS (DETENTION AND SEARCH) BILL 1989

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Industry,
Technology and Commerce, Senator the Honourable John N. Button)

CUSTOMS (DETENTION AND SEARCH) BILL 1989

OUTLINE

This Bill proposes new amendments to the Customs Act 1901 to repeal the current power to detain and search persons suspected of unlawfully carrying prohibited goods, and insert in its place a new Division containing a more comprehensive range of Customs detention and search powers. The Bill gives effect to several major elements of the Government's anti-drug strategy, including;

- . the Government's decision to implement the legislative framework for the detention and, if necessary, search of persons suspected of internally concealing narcotics, settled in consultation with the Commonwealth/States Ministerial Council on Drug Strategy, and
- . the Government's decision announced on 18 July 1989 to allow authorised Customs officers to stop and frisk search persons for prohibited goods within Customs controlled areas at international air and sea ports.

The proposed new Division 1B of the Bill inserts 22 new sections into Part XII of the Customs Act, bringing together the full range of Customs body-search powers, from the least intrusive frisk, through external search, to the most intrusive internal search. By splitting the three types of searches into distinct Subdivisions, the new Division not only highlights the progressive strengthening of the statutory protections and rights afforded persons to be searched as the level of intrusiveness increases, but it also highlights the more rigorous legal requirements on officers of Customs and police as the searches become more invasive.

The principal elements of the three search regimes are as follows:

- i) frisk-search (Subdivision A - new sections 219L to 219P):
 - the search -
 - a) is defined as a quick examination of a person by the rapid running of hands over the person's outer garments and anything voluntarily removed by the person, to determine whether the person is carrying any prohibited goods, and includes the recovery of any such goods (Clause 4);
 - b) is restricted to officers of Customs, who may detain a person in a Customs controlled area of an international air or sea port (Clause 8, new section 219L) where a detention officer (new subsection 219ZA(1)) suspects on reasonable grounds that the person is unlawfully carrying any prohibited goods (defined as prohibited imports or exports under Sections 50 and

112 of the Customs Act, or any other law of the Commonwealth (Clause 4);

- c) must be carried out as soon as practicable after the person is detained, by an officer of Customs of the same sex as the detainee, and in private if so requested (new section 219M); and
- d) includes the right of Customs to require the production of any thing revealed by the search, in order to determine whether it is, or contains, prohibited goods (new section 219N).

Failure to submit to a lawful frisk search, or to produce upon request a thing revealed by the search, shall constitute sufficient grounds for an external search under new Subdivision B (new section 219P).

- ii) external search (Subdivision B - new sections 219Q and 219R):

the search -

- a) replaces the existing Section 196 body-search provision, which is repealed (Clause 7);
- b) is defined as a search of the body of, and of anything worn by, a person, (not including an internal examination of the person's body) to determine whether the person is carrying any prohibited goods, and includes the recovery of any such goods (Clause 4);
- c) is available to officers of Customs or police, who may detain a person (new section 219Q) where a detention officer (new subsection 219ZA (2)) or police officer suspects on reasonable grounds that the person is unlawfully carrying any prohibited goods (defined as per the frisk regime (Clause 4)).

Where a person is detained;

- d) the detainee must be taken as soon as practicable to either a detention place (new subsection 219ZB(1)) or a place that offers the detainee adequate personal privacy (new subsection 219Q(2));
- e) the Customs or police must apply, as soon as practicable, for an order for an external search from a Justice of the Peace, the Comptroller-General or an authorised officer (new subsection 219R(13)), unless the detainee consents to be searched, (new subsection 219R(1));
- f) the person to whom a search application is made must not order the search unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is unlawfully carrying prohibited goods, and where no search order is made, an order for the

immediate release of the detainee must be made (new subsections 219R(3) and (4));

- the person to whom the application is made must also ensure that where the detainee is in need of protection (defined in subclause 4(2) as a person who is a minor (under 17 years of age) or mentally or physically incapable), any search order that may be made is to be carried out in the presence of the detainee's legal guardian or another person capable of representing the detainee's interests, and such person must, so far as practicable, be acceptable to the detainee (new subsections 219R(5) and (6));

- g) the detainee may be allowed to communicate with another person, unless the Customs or police believe on reasonable grounds that such communication would prejudice the processes of law enforcement or the life and safety of other persons (new subsections 219R(7) and (8));
- h) a detention officer or police officer may question the detainee incidental to the search, or in relation to any goods found to have been carried as a result of the search (new subsection 219R(11)), provided an adequate caution is given concerning the result of any answers to questions (new subsection 219R(12)).
- i) Where an external search is to be carried out on a detainee the search must be carried out by a person who is of the same sex as the detainee (new subsection 219R(10)).

iii) internal search (Subdivision C - new sections 219S to 219Z):

the search -

- a) is defined as an examination of the body of a person, (including an internal examination of the person's body), to determine whether the person is internally concealing a substance or thing, and includes the recovery of any substance or thing suspected on reasonable grounds to be so concealed (Clause 4);
- b) is available to officers of Customs or police, who may detain a person (new section 219S) where a detention officer (new subsection 219ZA(3)) or police officer suspects on reasonable grounds that the person is internally concealing a narcotic substance (referred to as a suspicious substance, which by definition is a narcotic substance that would, or would be likely to, assist in the proof of an offence against the Customs Act involving a commercial or trafficable quantity of narcotics).

Where a person is detained;

- The overriding policy is that a search will only be ordered as a last resort. To give effect to the policy, the legislation provides for 2 periods of detention which may be ordered by a Magistrate or Judge to maximise the chances of any suspicious substances being eliminated naturally. This is contained in the following provisions:
- c) the detainee must be taken as soon as practicable to a detention place defined in new subsection 219ZB(2) - (subsection 219S(2));
- d) the Customs or police must apply, as soon as practicable,
 - i) to a Magistrate for an order for detention of 48 hours, unless the detainee consents in writing to be searched (new subsection 219V(2)), or
 - ii) where the detainee is in need of protection (as defined), to a Judge for a similar 48 hour order subsection 219T(1);
- e) the Magistrate or Judge to whom a detention application is made must not order detention unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance, and where no detention order is made, an order for the immediate release of the detainee must be made (new subsections 219T(3) and (4)):
 - Again, similar to the external search regime, the judicial officer to whom a detention application is made must also ensure that where the detainee is in need of protection, as defined, a person capable of representing the detainee's interests must be appointed, and, so far as practicable, that person must be acceptable to the detainee (new subsections 219T(5) and (6));
- f) for the first 48 hour detention period, and where the detainee does not consent to an internal search, and where a detention officer or officer of police still suspects on reasonable grounds that the detainee is internally concealing a suspicious substance, such officers may apply for a further 48 hour detention order, similar to the requirements and conditions in (d) and (e) (new subsection 219U);
- g) at any time during the detention periods;
 - the detainee may communicate with another person, (subject to the similar discretion in the external search regime that such communication may be denied where there are reasonable grounds

) to believe that such communication would prejudice the processes of law enforcement or the life and safety of other persons) or consult a lawyer of his or her choice, which Customs or the police must arrange (new subsections 219W(1), (2) and (3));

- adequate opportunity must be given to the detainee to obtain legal advice and legal representation in relation to applications for detention orders (new section 219Y); and
- a detention officer or police officer may question the detainee insofar as is reasonable to determine whether the detainee is internally concealing a suspicious substance, or concerning any such substance found to have been internally concealed, provided once again an adequate caution is given concerning the result of any answers to questions (new subsections 219W(4) and (5)).

An internal search of detainee may only proceed, where;

- h) the detainee is not in need of protection and has signed a written consent to be internally searched (new subsection 219V(2)); or
- i) where the detainee (not being in need of protection) has been detained for 96 hours pursuant to two detention orders, and has not consented to an internal search, and a Judge on application orders such a search (new subsection 219V(6)); or
- j) where the detainee is in need of protection and a Judge on application orders such a search (new subsections 219V(4) and (6))
 - The Judge to whom an internal search application is made must not order such a search unless he or she is satisfied there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance, and where no such order is made, an order for the immediate release of the detainee must be made (new subsections 219V(7) and (8)).
- k) The detainee must also be given adequate opportunity to obtain legal advice and legal representation in relation to an internal search application (new section 219Y).

Where an internal search is ordered;

- l) it must be carried out by a medical practitioner (new subsection 219Z(1));
- m) at a prescribed institution or facility equipped with the necessary medical amenities and staff (new subsection 219Z(2)); and

- n) where the detainee is in need of protection, the search is to be carried out in the presence of the person appointed to represent the detainee's interests (new subsection 219Z(3)).

Financial Impact Statement

The costs associated with this Bill relate to the provision of medical and judicial personnel for the internal search regime (new subdivision C and E of proposed new Division 1B). It is estimated the costs for medical personnel and facilities to carry out those internal searches which are ordered, and the costs of the States' and Territories judicial officers to service detention and search order applications, will total \$150,000 dollars per annum.

CUSTOMS (DETENTION AND SEARCH) BILL 1989

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Short title

Clause 1 provides for the Act to be cited as the *Customs (Detention and Search) Act 1989*.

Commencement

Clause 2 provides for the Act to commence on a day to be fixed by Proclamation (subclause (1)).

Subclause (2) is the now standard "sunset" provision in Acts which are expressed to commence by Proclamation, to provide that if the Act is not proclaimed within a period of six months after the Bill receives the Royal Assent, then it shall commence on the first day after that period.

PART 2 - AMENDMENTS OF THE CUSTOMS ACT 1901

Principal Act

Clause 3 is a standard machinery provision which provides that the Customs Act 1901 is referred to as the "Principal Act" for the purposes of this Part of the Bill.

Interpretation

Clause 4 amends section 4 of the Principal Act to define various words and phrases used in the amendments.

subclause (1) inserts the following definitions in the Principal Act:

"carry" is defined, for the purposes of Division 1B of Part XII of the Principal Act, as having the meaning assigned by new subsection (19) (inserted by subclause (2));

"Detention officer" is defined for the purposes of the 3 new Subdivisions in which it appears, as being an officer of Customs who is a "detention officer" because of a declaration under section 219ZA;

the three new Subdivisions in which the phrase "detention officer" appears are in

new Division 1B of Part XII, as follows:

Subdivision A, relating to Frisk Search;
Subdivision B, relating to External Search;
Subdivision C, relating to Internal Search;

- . an important feature of the new section 219ZA is the facility to declare different "detention officers" for each level of the new search regime. This is consistent with the general thrust of the legislation which provides increased protection of the rights the individual's rights as the level of intrusiveness of the search increases;

"Detention place" is defined for the purposes of the 2 new Subdivisions in which it appears, as being a place prescribed for the purposes of subsections 2192B(1) or (2).

- . the two new Subdivisions in which the phrase "detention place" appears are in new Division 1B of Part XII, as follows:

Subdivision B, relating to External Search;
Subdivision C, relating to Internal Search,

- . it is intended to prescribe by regulation different "detention places" according to the level of privacy and facilities etc. required by the particular level of search being performed.

"Division 1B Judge" is defined as being any Federal Court Judge or any Judge of the Supreme Court of the Australian Capital Territory, or any Judge of the States or the Northern Territory to whom an appropriate arrangement under subsections 11(1) or (2) applies (as amended by Clause 5);

- . new paragraphs 11(1)(aa) and (2)(aa) provide for the making of an arrangement with the States or the Northern Territory so that State Judges or Northern Territory Judges may exercise the powers under this Act in relation to the internal search regime, proposed new Subdivision C of Division 1B.

"Division 1B Magistrate" is defined as being any Magistrate of the Australian Capital Territory, or any Magistrate of the States or the Northern Territory to whom an appropriate arrangement under subsection 11(1) or (2) applies (as amended by Clause 5);

- . new paragraphs 11(1)(b) and (2)(b) provide for the making of an arrangement with the States or the Northern Territory so that

State Magistrates or Northern Territory Magistrates may exercise powers under this Act in relation to the internal search regime.

"External search" is defined as the search of the body of a person, or anything worn by the person, to determine whether the person is carrying any prohibited goods, and to recover any such goods;

- . the definition specifically excludes the power to conduct an "internal search", which is the subject of a separate definition;
- . the definition applies in relation to "prohibited goods" which is also the subject of a separate definition;
- . the provisions relating to the conduct of an "external search" are contained in new Subdivision B, Division 1B of Part XII - Clause 8 refers;

"Frisk search" is defined as

- (a) a quick search of a person by the rapid and methodical running of hands over the person's outer garments; and
- (b) an examination of anything worn by the person that can be conveniently removed and is voluntarily removed by the person;

to:

- (c) determine whether the person is carrying any "prohibited goods"; and
- (d) to recover any such goods;
- . the definition applies in relation to "prohibited goods" which is also the subject of a separate definition;
- . the provisions relating to the conduct of a "frisk search" are contained in new Subdivision A, Division 1B of Part XII - Clause 8 refers;

"In need of protection" is defined as having the meaning assigned to it by new subsection 4(20); (as to which see subclause (2) below);

"Internal search" is defined as the examination (including the internal examination) of the body of a person, to determine whether the person is internally concealing anything, and to recover

anything so concealed;

- the provisions relating to the conduct of an "internal search" are contained in new Subdivision C, Division 1B of Part XII - Clause 8 refers;

"Lawyer" is defined as a person who has been admitted in a State or Territory to practise as a barrister, or as a solicitor, or both;

- references to lawyer appear in new subsection 219W (concerning the internal search regime).

"Medical practitioner" is defined as any person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners;

- new section 219Z provides that all internal searches must be carried out by a medical practitioner;
- new Subdivision E contains provisions relating to the rights and obligations of medical practitioners who perform internal searches under the Act;

"Prohibited goods" is defined as goods whose importation or exportation is prohibited or is subject to restrictions under the Customs Act 1901 or any law of the Commonwealth, or any goods subject to the control of the Customs;

- this definition is important in drawing a distinction between the various searches which may be carried out under the Act;
 - .. ie an internal search may only be carried out where there is a reasonable suspicion that a person is internally concealing a "suspicious substance" (which is defined to mean a narcotic substance - see below). By contrast, a frisk search or an external search may be carried out where there is a reasonable suspicion that a person is unlawfully carrying "prohibited goods";

"Suspicious substance" is defined as a narcotic substance which would, or would be likely to, assist in the proof of the commission by any person of an offence against the Customs Act 1901 that is punishable by imprisonment for a period of 7 years or more;

- . an internal search may only be carried out where there is a reasonable suspicion that a person is internally concealing a "suspicious substance".
- . the only offences in the Customs Act 1901 which provide for a penalty of imprisonment of a period of 7 years or more are those provided for in sections 231, 233A and 233B of the Customs Act 1901, concerning the importation, exportation and smuggling of narcotic substances;
- . section 235 of the Customs Act 1901 prescribes the penalties in relation to narcotics offences. Paragraph 235(2)(c) provides for penalties of greater than 7 years imprisonment for offences involving narcotic substances in a "commercial quantity" or a "trafficable quantity" (both already defined in section 4 of the Customs Act 1901);

subclause (2) inserts new subsections (19) and (20) into section 4 of the Customs Act 1901 to clarify the following definitional matters:

- . new subsection (19) provides that a reference to a person "carrying" prohibited goods (which appears in both the frisk search regime, new subdivision A of Division 1B, and in the external search regime, new subdivision B of Division 1B) includes a reference to a person having prohibited goods on his or her person;
- . new subsection (20) provides that a person is "in need of protection" if that person is under 17 years of age (eg. a minor), or is in a mental or physical condition (whether temporary or permanent) that renders the person incapable of managing his or her affairs;
- .. new subsections 219R(5) and 219T(5), and new section 219X make special arrangements for a detainee who is "in need of protection";

Arrangements with States and the Northern Territory

Clause 5 amends section 11 of the Customs Act 1901 to provide the formal machinery by which the Commonwealth may enter into an agreement with the States or the Northern Territory for the purpose of securing their consent to the granting of powers under the new provisions in this Bill to Judges and Magistrates in those States or in the

Northern Territory;

- . a central feature of the protection afforded under the Bill to potential detainees is the prominence of Judges and Magistrates in the making of detention orders and search orders in the internal search regime (Subdivision C of Division 1B)

.. see, for example,

s219T - Initial order for detention
s219U - Renewal of order for detention
s219V - Arrangement for internal search

- . participation by Judges and Magistrates of the States and the Northern Territory in the decision-making process is essential for the proper functioning of the internal search regime of the Bill;

.. discussions have taken place over several years with the various State and Northern Territory administrations for the purpose of obtaining each jurisdiction's agreement to access to their respective Judges and Magistrates for the internal search regime orders.

Power to question passengers etc.

Clause 6 effects a technical drafting change to section 195 of the Customs Act 1901, as a result of the proposed new definition of "prohibited goods", which is added by Clause 4;

Repeal

Clause 7 repeals section 196 of the Customs Act 1901.

- . section 196 contains the existing power to detain and search persons suspected of unlawfully carrying any goods subject to the control of Customs. These powers are superseded by the provisions contained in Division 1B of Part XII, inserted by Clause 8;

Insertion of new Division

Clause 8 inserts two new Divisions after existing Division 1A in Part XII of the Customs Act 1901.

New Division 1B of Part XII contains five new Subdivisions, conferring powers on officers of Customs or police to detain persons who are suspected on reasonable grounds of carrying "prohibited goods" or internally concealing a

"suspicious substance" and, depending on the level of search, granting powers to search those persons after an order from the appropriate authority.

The new Division 1B provides for 3 levels of search, as follows:

Subdivision A - Frisk Search

New Subdivision A contains 4 new sections, containing the powers relating to Frisk Search, as follows:

s219L	-	Detention for Frisk Search
s219M	-	Frisk Search
s219N	-	Power to require Production of Goods
s219P	-	Persons to whom s219R applies

Frisk Search is the least intrusive of the 3 levels of search provided by the new provisions.

The main features of the Frisk Search powers are:

- . the term "Frisk search" is defined, as a quick patting down of a person or his or her outer garments;
- . a frisk search may only be performed by an officer of Customs who is of the same sex as the detained person;
- . a frisk search may be performed where a "detention officer" forms a reasonable suspicion that a person is unlawfully carrying "prohibited goods" - s219L;
- . a person detained for the purpose of a frisk may exercise the right to have the search performed in an area which would provide adequate personal privacy s219M(2)(a);
- . if a person fails to submit to a frisk search, that person may render himself or herself liable to "external search" under section 219R - s219P;

Subdivision B - External Search

New Subdivision B contains 2 new sections, containing the powers relating to External Search as follows:

s219Q	-	Detention for External Search
s219R	-	External Search

External Search is the intermediate level of search provided by the new provisions.

The main features of the External Search powers are:

- . the term "External search" is defined as the search of the body of a person, or anything worn by the person, to

determine whether the person is carrying any prohibited goods;

- . this definition expressly excludes the internal search of the body of a person;
- . an external search may only be performed by an officer of Customs or a police officer who is of the same sex as the detained person s219R(10);
- . an external search may be performed where a detention officer (who is an officer of Customs of a specified class) or a police officer forms a reasonable suspicion that a person is unlawfully carrying "prohibited goods" - s219Q;
- . where a detention officer or a police officer entertains such a reasonable suspicion, and the detainee does not consent to a search, an officer of Customs or of police must as soon as practicable apply to an authorised officer, the Comptroller, or a Justice of the Peace, for an order for an external search of the detainee s219R(1)(d);
- . a search must be carried out at a place that affords adequate personal privacy to the person s219Q(2);
- . special arrangements apply in relation to a detainee who is "in need of protection", as defined in section 4 - s219R(5);

Subdivision C - Internal Search

s219S	-	Initial Detention
s219T	-	Initial Order for Detention
s219U	-	Renewal of order for Detention
s219V	-	Arrangement for internal search
s219W	-	Detention under this Subdivision
s219X	-	Detainee becoming in need of protection
s219Y	-	Applications for orders under this Subdivision
s219Z	-	Internal search

Internal Search is the most intrusive level of search contained in the new provisions, and thus more rigorous protections are contained in the provision to safeguard the rights of the individual.

Foremost among these is the policy that an internal search should be conducted only as a last resort, unless a detainee consents in writing to an internal search.

To this end, the new provisions provide for 2 periods of detention which must precede an internal search. The purpose of these periods of detention is to allow any suspicious substances suspected of being internally concealed by a person to be naturally eliminated without the need for internal search - s219T and s219U.

) Both periods of detention must be ordered by a Judge or a Magistrate.

Finally, where 2 periods of detention have been so ordered, and there is still a reasonable suspicion that the detainee has a suspicious substance concealed internally, an application may be made to a Judge for an order for an internal search - s219V.

Only a Judge may grant such an order, and only where he or she is satisfied that there are reasonable grounds for suspecting that the detainee has a suspicious substance concealed internally.

Where an internal search is ordered, it must be conducted by a medical practitioner - s219Z.

Further main features of the Internal Search powers are:

- . the term "Internal search" is defined in section 4;
- . special arrangements apply in relation to a detainee who is "in need of protection", as defined in section 4 - s219T(5) and s219X;

Subdivision D - Detention generally

- | | |
|--------|--|
| S219ZA | - Detention Officers |
| S219ZB | - Detention places |
| S219ZC | - Detention under this Division |
| S219ZD | - Release from, or cessation of, detention |

This subdivision applies generally to all 3 types of search noted in the first 3 subdivisions, and provides the general head of power whereby the Comptroller may appoint classes of Customs officers as the officers to exercise the detention powers in the various search regimes (new section 219ZA), provides the head of power to prescribe detention places where persons detained for external and internal searches are to be detained (new section 219ZB), prescribes the method of identification for persons exercising powers under the Division (new section 219ZC), and prescribes the situations where detention is to be immediately terminated (new section 219ZD).

Subdivision E - Medical practitioners

This subdivision contains 4 new sections which prescribe the rights and obligations of medical practitioners insofar as their involvement in carrying out internal searches under new Subdivision C is concerned.

The new provisions relating to the 2 new Divisions are explained in greater detail below.

Division 1B - Detention and search of suspects

Subdivision A - Detention and frisk search of suspects

Detention for frisk search

- new s219L provides that, where a detention officer forms a reasonable suspicion that a person is unlawfully carrying any prohibited goods, an officer of Customs (not necessarily the same officer who had reasonable suspicion) may detain that person for the purposes of being searched.
- . the search must be conducted at a place identified under s234AA; that is, a Customs disembarkation place for ships and aircraft (subsection (1));
 - . "detention officer" is defined amongst the definitions inserted by Clause 4;
 - . the reasonable suspicion of the detention officer may be based on, but is not limited to, any of the following grounds (subsection (2)):
 - a. the person's travel itinerary, including plans in relation to places that have been visited or are intended to be visited by the person;
 - b. declarations or statements made under a law of the Commonwealth by the person in the course of arriving in or departing from Australia;
 - .. this includes not only Customs declarations, but also declarations made in connection with quarantine, etc.
 - c. documents in the person's possession, including passports, visas or tickets;
 - d. the contents of or appearance of the person's baggage.

Frisk search

- new s219M provides the conditions under which a frisk search is to be carried out;
- . a frisk search must be carried out as soon as practicable after the detainee is detained (paragraph 219M(1)(a));

- . a frisk search may only be performed by an officer of Customs who is of the same sex as the detained person (paragraph 219M(1)(b));
- . before an officer of Customs can perform a frisk search, he or she must advise the detainee of the detainee's right to have the frisk search conducted in an area of the place of detention that in the opinion of the Comptroller would provide adequate personal privacy to the detainee (subsection 219M(2));
- . the term "Frisk search" is defined amongst the definitions inserted by Clause 4.

Power to require production of things

new s219N provides that an officer of Customs may require the production of any things found to be carried by the detainee as a result of the search, in order to determine whether they are, or contain, prohibited goods unlawfully carried by the detainee.

Persons to whom section 219R applies

new s219P provides that if a detainee

- a. refuses to submit to a frisk search; or
- b. refuses to produce a thing that he or she is is required to produce under section 219N

then section 219R applies to the detainee.

- . the purpose of this provision is to provide that the external search provisions will apply to any person who refuses to co-operate with a frisk search, by in effect deeming the precondition of an external search (eg. reasonable cause to suspect a person is unlawfully carrying prohibited goods) to be made out.

Subdivision B - Detention and external search of suspects

Detention for external search

new s219Q provides that, where a "detention officer" or a police officer suspects on reasonable grounds that a person is unlawfully carrying "prohibited goods", an officer of Customs or police (not necessarily the same officer who had the reasonable suspicion) may detain the person for the purposes of an "external search" (subsection (1));

(subsection (2)) provides that a detainee must be taken as soon as practicable to a suitable "detention place", or to a place that, in the opinion of the officer of Customs or the police officer concerned, affords adequate personal privacy to the detainee;

. "Detention place" is defined for the purposes of the 2 new Subdivisions in which it appears, as being a place prescribed for the purposes of subsection 219ZB(1)

.. it is the intention to make regulations which declare "detention places" suitable for the level of privacy and facilities etc. required by this particular level of search.

External search

new s219R

prescribes the conditions under which an external search will be performed, including the rights and obligations of the officer of Customs or the police officer, and the detainee.

subsection (1) provides that, where a detention officer or a police officer suspects on reasonable grounds that a person detained under new section 219Q is unlawfully carrying prohibited goods then:

. - where the detainee consents to be searched, and there are reasonable grounds to believe that the detainee is not "in need of protection" -

an officer of Customs or a police officer must, as soon as practicable, carry out an external search of the detainee (paragraph(c));

- where the detainee does not consent to be searched, or is in need of protection -

the detention officer or police officer must, as soon as practicable, apply to an authorised officer, the Comptroller, or a Justice for an order for the external search of the detainee (paragraph (d));

subsections (2) and (3) provide that an order may not be granted by the authorised officer, the Comptroller or a Justice unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is unlawfully carrying prohibited goods,

- . otherwise, the person to whom the application has been made must order that the detainee be released immediately (subsection (4));
- . an "authorised officer" is an officer of Customs authorised in writing by the Comptroller for the purposes of this provision (subsection (13));

subsection (5) provides that, where a search is ordered and the person making the order is satisfied that the detainee is "in need of protection", the person making the order must also order that the search be carried out in the presence of:

- the detainee's legal guardian (paragraph (a)); or
- a specified person (not being an officer of Customs or a police officer) who is capable of representing the detainee's interests in relation to the search (paragraph (b));
- .. where a person is specified in accordance with subsection (5) to represent the detainee's interests in relation to the search, that person must, so far as is practicable, be acceptable to the detainee (subsection (6));
- . new subsection 4(20) of the Customs Act 1901 (inserted by subclause 4(2)) provides that a person is "in need of protection" if that person is under 17 years of age, or is in a mental or physical condition (whether temporary or permanent) that makes the person incapable of managing his or her affairs;

subsections (7) and (8) set out the conditions under which a detainee may communicate with another person. The detainee is given a right to communicate at any time with another person, but

- . an officer of Customs or a police officer may stop the detainee communicating with another person if the officer believes on reasonable grounds that such communication should be stopped (subsection (8)) in order to:
 - safeguard the processes of law enforcement (paragraph (a)),

- protect the life and safety of any person (paragraph (b));
- .. given the sensitivity of drug related imports in particular, this provision might be used, for example: to prevent accomplices being warned; to prevent potential witnesses being intimidated; to prevent evidence being destroyed or removed; etc

subsection (9) reinforces the policy that a detainee shall be detained only so long as there is a reasonable suspicion that the detainee is carrying prohibited goods. Thus, even where an order has been granted under subsection (2) for the search of the detainee, the search may only be carried out where a detention officer or a police officer still believes on reasonable grounds that the detainee is carrying prohibited goods;

- . new s219ZD specifically sets out the times at which detention under the new Division ceases, and the rights of the detainee to be released;

subsection 219ZD(1) provides the times at which detention must cease under the new Division. Paragraph 219ZD(1)(d) provides that detention must immediately cease if no detention officer suspects on reasonable grounds that the person is unlawfully carrying prohibited goods;

subsection (10) provides that an external search is to be carried out by a person who is of the same sex as the detainee;

subsection (11) provides that, where a person is detained in accordance with this Subdivision, being suspected on reasonable grounds of carrying prohibited goods, then a detention officer or a police officer may question the person for the purposes of:

- carrying out an external search of the person (paragraph (c)); or
- concerning any prohibited goods found to have been unlawfully carried by the person as a result of the external search of the person (paragraph (d));

- this provision also applies to a person who fails to co-operate with a frisk search (paragraph (a));

subsection (12) provides that the detention officer or police officer must not question the detainee unless that officer has "cautioned" or informed the detainee:

- that the detainee is not obliged to answer any question asked of him or her (paragraph (a));
- that anything said by him or her may be used in evidence (paragraph (b)); and
- of his or her right to communicate with another person (paragraph (c));

.. as noted above, an officer of Customs or a police officer may stop the detainee communicating with another person if the officer believes on reasonable grounds that such communication should be stopped (subsection (8)) in order to:

- safeguard the processes of law enforcement (paragraph (8)(a));
- protect the life and safety of any person (paragraph (8)(b));

subsection (13) provides that an "authorised officer" is an officer of Customs authorised in writing by the Comptroller for the purposes of this section (subsection (13));

- subsections (2) and (3) provide for the granting of an order for an external search by an authorised officer, the Comptroller or a Justice.

Subdivision C - Detention and internal search of persons suspected of internally concealing substances etc.

Initial detention

new s219S

provides that where a "detention officer" or a police officer suspects on reasonable grounds that a person is internally concealing a suspicious substance, an officer of Customs or police officer (not necessarily the same officer who had the reasonable suspicion) may detain the person to enable an application for an order for detention to be made, (subsection (1)),

- . "detention officer" is defined amongst the definitions inserted by Clause 4;
- . "suspicious substance" is also defined amongst the definitions inserted by Clause 4;
- . In effect, detention is available where a detention officer or officer of police suspects on reasonable grounds that the person is concealing a narcotic substance that would, or would be likely to, assist in the proof of an offence against the Customs Act involving a commercial or trafficable quantity of narcotics.

subsection (2) provides that a detainee must be taken as soon as practicable to the nearest suitable "detention place" prescribed for the purposes of this Subdivision (new subsection 219ZB(z)), and,

an officer of Customs or police may detain the person at that place to enable a formal order for the detention of that person under new section 219T to be made;

- . it is the intention to make regulations which declare "detention places" suitable for the level of privacy and facilities etc. required by this particular level of detention.

Initial order for detention

new s219T prescribes the mandatory steps which must follow an initial detention under section 219S, as follows:

subsection (1) provides that the Customs (via the Comptroller or his delegate) or a police officer must, as soon as practicable,

- . apply to a Magistrate for an order for detention of 48 hours, unless the detainee consents in writing to be internally searched (new subsection 219V(2)), or
- . where the detainee is "in need of protection" (as defined), apply to a Judge for a similar 48 hour order;
 - .. the 48 hour detention, if ordered, runs from the time the detention began under section 219S or the time at which the detention order is made, whichever the Judge or Magistrate thinks fit (subsection (2)), and is to be

conducted with such medical supervision as may be specified in the order (new paragraph 219W(6)(b));

subsections (3) and (4) provide that the Magistrate or Judge to whom a detention application is made must not order detention unless he or she is satisfied that there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance, and where no detention order is made, an order for the immediate release of the detainee must be made;

- . Similar to the external search regime (new subsections 219R(5 and (6))), the judicial officer to whom a detention application is made must also ensure that where the detainee is in need of protection, as defined, a person capable of representing the detainee's interests must be appointed, and, so far as practicable, that person must be acceptable to the detainee (new subsections (5) and (6));

Renewal of order for detention

new s219U provides the mechanism by which a second 48 hour detention order may be obtained, as follows:

subsection (1) provides that where the detainee has not consented to an internal search, and where the "detention officer" or officer of police still suspects on reasonable grounds that the detainee is internally concealing a suspicious substance, then

the Customs (via the Comptroller or his delegate) or a police officer may apply for a further 48 hour detention order;

- . the application and order, if granted, must be made prior to the expiration of the first detention order, and the second 48 hour detention order runs from the end of the period for which the unexpired order is in force (subsection (2));
- . the application may be made to a Judge or Magistrate, unless the detainee is "in need of protection", in which case the application must be made to a Judge.

subsections (3) and (4) provide (similar to new subsections 219T(3) and (4)), that if the Magistrate or Judge to whom the detention application is made is not satisfied that there are reasonable grounds for suspecting that the

detainee is internally concealing a suspicious substance, that judicial officer must order the release of the detainee from the end of the first 48 hour detention period.

Arrangement for internal search

new s219V

prescribes the conditions by which the internal search phase of this Subdivision is activated. In all cases except where a detainee not "in need of protection" consents to be internally searched, an internal search may only be carried out by order of a Judge. Arrangements for an internal search application proceed as follows:

subsection (1) provides that the reasonable cause test (eg. that a detention officer or Officer of police suspects on reasonable grounds that the detainee is internally concealing a "narcotic" substance) must still exist;

Where such a suspicion exists, an internal search may only proceed

- . where the detainee is not "in need of protection" and has signed a written consent to be internally searched (subsection (2)); or
 - . where the detainee (not being in need of protection) has been detained for 96 hours pursuant to two detention orders, and has not consented to an internal search, and a Judge on application orders such a search (subsection 6); or
 - . where the detainee is in need of protection and a Judge on application orders such a search (subsections (3)(4) and (5)).
- .. The Judge to whom an internal search application is made must not order such a search unless he or she is satisfied there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance, and where no such order is made, an order for the immediate release of the detainee must be made (subsections (7) and (8)).
 - .. The application for an internal search order must be made to a Judge;
- where the detainee is "in need of protection" and the person who has been appointed to represent the detainee's interests (pursuant

either to subsections 219T(5) or 219X(3) consents to the detainee being internally searched - as soon as practicable after the consent is given (paragraph 4(a));

- where the detainee is not in need of protection and the detainee has been detained pursuant to a "renewal" order for detention (eg. pursuant to an order for detention which is for the period 49-96 hours section 219U), - before the end of that period of detention; ie. before the expiration of the 96th hour of ordered detention (paragraph 4(b));

subsection (5) provides that any period of detention, be it the initial detention (section 219S), or the first ordered detention (section 219T - eg. 0-48 hrs), or the renewal order of detention (section 219U - eg. 49-96 hrs), may automatically be extended for the following periods:

- . where the detainee is not in need of protection and he or she has consented , at any time, to be internally searched, - until the internal search is completed, (paragraph (a));
- . where the detainee is "in need of protection" and his or her representative has consented to an internal search, or, where the detainee, not in need of protection, has been detained pursuant to a "renewal" detention order - until an internal search order, or order for release, is made (paragraph (b));

subsection (6) provides that where an internal search order is made, the Judge may order that the search is to start;

- . if consent to the search has been given by a person appointed to represent the detainee's interests (the detainee being in need of protection), - as soon as practicable after the internal search order is made, and no later than a time specified in the order, or
- . in any other case, not sooner than the expiration of the 96th hour of ordered detention, and not later than a time specified in the order (paragraph (a)); and

- . the Judge may further order that the detainee be detained for as long as is reasonably necessary for the internal search to be completed (paragraph (b)).
- .. subsection (10) provides a facility to have the times specified for the commencement or completion of an internal search (subsection (6)) extended, provided such extension is not later than 48 hours after the termination of a period of detention (paragraph 9(a)) or 48 hours after the time when a detention is legally extended pursuant to subsection (5)(paragraph (b)).

Detention under this Subdivision

new s219W

provides several general rights during any of the detention periods relating to the internal search subdivision;

the first relates to the detainee's right, at any time during detention under the Subdivision,

- . to consult a lawyer of his or her choice, which the Customs or police must arrange (subsection (2)); or
- . to communicate with another person, subject to the similar proviso in the external search regime (subsection 219R(8)) that such communication may be denied where there are reasonable grounds to believe that such communication would prejudice the processes of law enforcement or the life and safety of other persons (subsection (3));

the second general right relates to the Customs or police right to question the detainee insofar as is reasonable to determine whether the detainee is internally concealing a suspicious substance, or concerning any such substance found to have been internally concealed, provided an adequate caution is given concerning the result of any answers to questions (subsections (4) and (5));

Detainee becoming in need of protection

new s219X

provides the mechanism to appoint a person to represent the detainee's interests throughout the period of detention under the Subdivision, where it becomes apparent during the detention periods that the detainee has become "in need of protection"

- . new subsection 4(2) (inserted by Clause 4) provides that a person is "in need of protection" if that person is under 17 years of age (eg. a minor), or is in a mental or physical condition (whether temporary or permanent) that makes the person incapable of managing his or her affairs;
- .. new subsections 219R(5) and 219T(5), make special arrangements for a detainee who is "in need of protection", as opposed to one who during the detention period, becomes in need of protection

subsections (1), (2) and (3) provide that where it is believed a detainee has become "in need of protection", the Comptroller or police officer must, as soon as practicable, apply to either a Judge or Magistrate for an order for the appointment of a person to represent the detainee's interests until the detainee is no longer in need of protection.

- . so far as is practicable, the person appointed to represent the detainee's interests must be acceptable to the detainee.

Applications for orders under this Subdivision

new s219Y

prescribes the method by which detention and search orders must be applied for under the internal search regime, and the rights of the detainee to be present at, make submissions to, and be represented before, any such hearings;

subsection (1) provides that a detainee must be given adequate opportunity to obtain both legal advice and legal representation in relation to applications for orders under the Subdivision (in particular, detention and internal search orders).

subsections (2) and (3) provide that applications for orders must be made in person at a hearing before the relevant judicial officer, and the detainee has the right to be present at, to make submissions to, and to be represented before, any such hearings, except

- . the judicial officer may restrict the rights of the detainee to hear or have access to evidence presented by the Customs or police, or cross-examine such evidence, where that judicial officer considers it necessary to do so to safeguard the processes of law

enforcement or protect the life and safety of any person (subsection (4));

- . where it is not practicable to appear in person, an application may be made other than in person, provided,
- .. the detainee is given an opportunity to make submissions in relation to the application by the same mode of communication and
- .. as soon as practicable after the application, a statutory declaration is presented to support the facts and reasons in the application (subsection (5)).

Internal search

new s219Z prescribes the conditions under which an internal search is to be performed;

Where an internal search is ordered;

- . it must be carried out by a medical practitioner (new subsection (1));
- . the search, and the recovery of any goods uncovered by the search, is to be carried out at a prescribed institution or facility equipped with the necessary medical amenities and staff (subsections (3) and (5)); and
- . where the detainee is in need of protection, the search is to be carried out in the presence of the person appointed to represent the detainee's interests (subsection (2)); and

Subdivision D - Detention generally

Detention officers

new s219ZA provides a power for the Comptroller-General of Customs to declare a class of Customs officers to be detention officers for the purposes of the 3 new Subdivisions in Division 1B of Part XII containing search powers:

Subdivision A, relating to Frisk Search;
Subdivision B, relating to External Search;
Subdivision C, relating to Internal Search;

subsection 219ZA(1) provides that the Comptroller may declare a class of Customs officers to be

detention officers for the purposes of
Subdivision A, relating to Frisk Search;

subsection 219ZA(2) provides that the Comptroller
may declare a class of Customs officers to be
detention officers for the purposes of
Subdivision B, relating to External Search;

subsection 219ZA(3) provides that the Comptroller
may declare a class of Customs officers to be
detention officers for the purposes of
Subdivision C, relating to Internal Search;

- . an important feature of the new section 219ZA is the facility to declare different "detention officers" for each level of the new search regime. This is consistent with the general thrust of the legislation to provide increased rights for the individual as the level of intrusiveness of the search increases.

Detention places

new s219ZB provides a power to prescribe a "detention place" for the purposes of the two new Subdivisions in new Division 1B of Part XII in which the phrase appears:

Subdivision B, relating to External Search;
Subdivision C, relating to Internal Search;

subsection 219ZB(1) provides that the regulations may prescribe a place as a "detention place", or prescribe minimum amenities and standards that a place must satisfy to be a "detention place" for the purposes of Subdivision B;

subsection 219ZB(2) provides that the regulations may prescribe a place as a "detention place", or prescribe minimum amenities and standards that a place must satisfy to be a "detention place" for the purposes of Subdivision C;

- . it is the intention that regulations will prescribe different "detention places" according to the level of privacy and facilities etc. required for the particular level of search to be performed.

Detention under this Division

new s219ZC prescribes some general requirements for all 3 types of detention in the new Division.

subsection 219ZC(1) provides that an officer of Customs or a police officer exercising powers under this new Division must produce identification as such an officer when requested by the detainee to do so;

subsection 219ZC(2) provides that an officer of Customs or a police officer exercising powers under this new Division must not use more force, or subject the person to greater indignity, than is reasonable and necessary;

subsection 219ZC(3) provides that the period during which a person is being taken to a particular place is a period during which the person is to be regarded as under detention,

- . the only exception to this is where a person is being taken to a place in accordance with new subsection 219ZD(3);

- .. subsection 219ZD(3) provides that, on the release of the detainee, the detainee may request to be returned, free of charge, to the place where the detainee was first detained;

subsection 219ZC(4) provides that while a person is being detained under this new Division, then depending on whether the person is being detained by an officer of Customs, an officer of the Australian Federal Police, or a State police officer, the person is to be taken to be in the custody of the Comptroller, the Federal Commissioner of Police, or the State Commissioner of Police respectively, as the case may be;

- . this provision is included to provide certainty in any legal proceedings which may occur as a result of a detention under this new Division;

Release from, or cessation of, detention

new s219ZD specifically sets out the times at which detention under the new Division ceases, and the rights of the detainee to be released.

subsection 219ZD(1) provides the situations where detention must cease under the new Division. The subsection provides that, subject to subsection (2), detention must immediately cease if

- . an order is made for the release of the person (paragraph(a));
- . an order for the detention of the person is revoked (paragraph(b));
- . an order for the detention of the person has ended and subsection 219V(5) does not apply (paragraph(c));
 - .. subsection 219V(5) extends the period of the detention for the purposes of conducting an internal search of a detainee, as ordered by a Judge;
- . - where the detainee has been detained for external search under new Subdivision B (suspicion of unlawfully carrying "prohibited goods"):-

no detention officer suspects on reasonable grounds that the person is unlawfully carrying "prohibited goods" (paragraph(d));
- . - where the detainee has been detained for internal search under new Subdivision C (suspicion of internally concealing a "suspicious substance" (ie narcotics)):-

no detention officer suspects on reasonable grounds that the person is internally concealing a "suspicious substance" (paragraph(e));
- . an internal search of the person is completed (paragraph(f));

subsection 219ZD(2) provides that, notwithstanding that a period of detention may have ceased by reason of subsection 219ZD(1), the provisions of the new Division may be used again, or another law might apply, for a period of fresh detention.

- . if a person were to be detained by reason of reapplying the provisions of the new Division, it could only occur because a detention officer or officer of police has the requisite suspicion required by the Subdivision under which it is sought to detain the person and a new detention order is obtained;

subsection 219ZD(3) provides that, where a detainee is released at any place other than the place at which he or she was first detained and the detainee requests to be returned to that original detention place, the detainee must

immediately be returned to the place of the first detention, free of charge.

Subdivision E - Medical Practitioners

This Subdivision outlines the statutory requirements to be observed by medical practitioners (a term defined in the new definitions to be inserted by Clause 4) conducting any internal search under new section 219Z (Subdivision C relating to internal searches). Those requirements are contained in 4 new sections as follows:

Conduct of internal search

new section 219ZE provides that in carrying out an internal search, a medical practitioner may use any medical procedure or apparatus considered reasonably safe in the circumstances, with the exception of surgical incision. The latter may only be used if it is considered that the detainee's life is at risk (new subsections (1) and (2)).

new subsection (3) provides an additional safeguard where a medical practitioner suspects on reasonable grounds during an internal search that the detainee is internally concealing a substance or thing, but the medical practitioner lacks sufficient expertise to recover it. In those circumstances the medical practitioner is required to arrange as soon as practicable for another medical practitioner having the necessary expertise to recover that substance or thing.

Medical practitioner may take action to preserve detainee's life

New section 219ZF provides a medical practitioner with the discretion to do whatever is considered necessary in circumstances where a detainee's life is at risk. This may include surgical incision or exploration or removal of the detainee to another place.

In the case of removal to another place, the detainee may be detained by force of new subsection (2) without time running under an order made under new Subdivision C.

Medical practitioner to answer questions and prepare report

new section 219ZG requires a medical practitioner who is involved in doing anything under the internal search regime in Subdivision C to:

. answer certain questions asked by an

officer of Customs or police officer to the best of his or her ability which relate to:

- .. whether an internal search of the detainee should be carried out;
 - .. the manner in which a search is being carried out; or
 - .. the results of a search (new subsection (1)) and
- . provide a written report to the chief officer as soon as practicable (new subsection (2) and (3)).

The obligations of a medical practitioner to answer questions and prepare a report are not limited by any law relating to privilege or confidentiality and in respect of a report prepared under new subsection (3), such report is prima facie evidence of the facts stated in the report. (new subsections (4) and (5)).

New subsection (6) defines "chief officer" for the purposes of the new section, as the Comptroller-Generall of Customs, or the Commissioner of the relevant Police Force.

Proceedings against medical practitioners

new section 219ZH provides an immunity from suit (with the exception of negligence) to a medical practitioner or any person assisting or providing facilities to a medical practitioner, in respect of anything done by the medical practitioner under new Division 1B (in particular, relating to the conduct of an internal examination).

Division 1C - Judges and Magistrates

This Division outlines the nature of the functions performed by a Judge or Magistrate under Part XII of the Customs Act 1901 (which includes the new Division 1B inserted by Clause 8 of this Bill) and grants those judicial officers certain protections in respect of the exercise of those functions.

Nature of functions of Judge or Magistrate

new section 219ZJ provides that the function of issuing a warrant or giving an order is conferred on the Judge or Magistrate in a personal capacity and not as a court or a member of a court (new subsection (1)). Similarly, any

warrant or order given has effect only be virtue of the Customs Act 1901 and is not to be regarded as issued or given by a Court (new subsection (2)).

- . This provision is intended to make it clear that the judicial officers are being conferred individually with non-judicial power as personae designatae, and the fact such persons are required to act judicially does not alter that status.

Protection of Judge or Magistrate

new section 219ZK provides that a Judge or Magistrate performing the function of issuing a warrant or giving an order under Part XII has the same protection and immunity as if that function were exercised by a court or by a member of a court.

PART 3 - AMENDMENTS OF THE CUSTOMS AMENDMENT ACT 1979

Repeal

Clause 9 repeals unproclaimed sections 5 and 6 of the Customs Amendment Act 1979, which proposed the previous regime relating to detention and internal body-search, and which is now superseded by the present amendments.

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