

**Senate Legal and Constitutional Legislation Committee**

**Consideration of legislation referred  
to the committee**

**Inquiry into the Provisions of the  
Customs Legislation Amendment (Criminal Sanctions  
and Other Measures) Bill 1999**

**February 2000**

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# Members of the Legislation Committee

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Senator J McKiernan, Western Australia, *Deputy Chair*  
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Senator B Cooney, Victoria  
Senator B Mason, Queensland  
Senator B Greig, Western Australia

For the consideration of the provisions of the Customs Legislation Amendment (Criminal Sanctions and other Measures) Bill 1999: Senator the Hon C Schacht to replace Senator J McKiernan.

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## SUMMARY OF REPORT

The Committee **recommends** that, subject to account being taken of the suggestions of the Australian Radiation Protection and Nuclear Safety Agency which are outlined in Chapter 2, the Bill proceed.

Senator Marise Payne

Chair

Legislation Committee

February 2000

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# CHAPTER 1

## Background

1.1 The *Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 1999* was introduced into the House of Representatives on 24 November 1999. On 8 December 1999 the Senate referred the provisions of the Bill to the Legal and Constitutional Legislation Committee for inquiry and report by 16 February 2000.

1.2 In recommending the provisions of the Bill for inquiry, an Appendix to the report of the Selection of Bills Committee<sup>1</sup> stated that if the Bill went through the Senate in that sitting period there would be no opportunity for public debate or parliamentary scrutiny. As the bill introduced an external search procedure which might have potential civil liberties ramifications, Parliament should have the opportunity of ensuring that the appropriate safeguards were incorporated in the Bill.

## The Bill

1.3 The Bill deals with a number of aspects of the enforcement of customs legislation in Australia. It:

- increases penalties for a range of import and export offences;
- removes the Commonwealth statutory limit on the jurisdiction of lower-level (State and Territory) courts when dealing with prosecutions.
- permits Customs officers to use technology in external personal searches.
- allows Customs officers to open international mail articles instead of relying on Australia Post officers
- authorises Customs to retain evidential material and seized goods for up to 180 days, instead of the current 60 days.

1.4 The Bill also deals with a number of minor matters such as the term for which the Chief Executive Officer can be appointed and the disposal of abandoned goods.

### *Penalties for a range of import and export offences*

1.5 The punishment for some offences under the Customs Act is currently a monetary penalty *or* imprisonment whereas, for others, it is only a monetary penalty. The Bill proposes to widen the range of offences which can be punished with imprisonment and to increase the monetary penalties applicable to many offences. The submission from the Australian Customs Service<sup>2</sup> indicated that monetary penalties for smuggling or import or export

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1 Selection of Bills Report No.21 of 1999.

2 *Submission No. 1*, Australian Customs Service.

offences, including those relating to prohibited goods, had not been increased for many years<sup>3</sup> and that they had no relativity with corresponding offences in other Commonwealth legislation<sup>4</sup>. The current maximum punishment for exporting or importing prohibited goods (other than narcotics) is a monetary penalty equal to the greater of \$50,000 and three times the value of the goods. The Bill proposes a maximum penalty of \$100,000 and/or 5 years imprisonment for importing or exporting Tier 1 prohibited goods (which will include performance enhancing drugs and narcotic and psychotropic precursors). It proposes a maximum penalty of \$250,000 and/or imprisonment for 10 years for exporting or importing Tier 2 prohibited goods (including military goods, human body tissue, and child pornography). It also proposes that the monetary penalties for narcotics offences, which are already punishable by imprisonment, be significantly increased.

### *Jurisdiction of lower-level courts*

1.6 The Customs Act currently provides that although customs prosecutions can be instituted in State or Territory County, District or Local courts or courts of summary jurisdiction, the applicable pecuniary penalty above a certain level (\$20,000 in the case of a County, District or Local court and \$5,000 in the case of a court of summary jurisdiction) is to be taken to have been abandoned. The provisions providing for these jurisdictional limits are to be repealed, so that only State or Territory limits (if any) will apply.

### *Powers of Customs Officers*

#### External searches of persons using imaging technology and other methods

1.7 The Act currently empowers officers to conduct frisk searches (the rapid and methodical running of hands over a person's outer garments and the examination of anything worn and voluntarily removed by the person) and external searches (search of the body of, and of anything worn or possessed by, the person) for prohibited goods. It also provides for a medical practitioner to conduct an internal search of a person for narcotics. A frisk search or an external search can only be carried by a person of the same sex as the person being searched. An external search can only be carried out with the person's consent or by order of the CEO, an authorised person or a Justice of the Peace. An internal search can only be carried out with the person's consent or by order of certain judges or magistrates<sup>5</sup>.

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3 The submission said that the monetary penalties for offences not involving narcotics had not been increased since 1982 (page 5) while the monetary penalties for offences involving narcotics had not been changed since 1977 (page 9).

4 The submission mentions the following penalties at page 7:

- 12 years imprisonment for import/export of counterfeit currency or securities (Crimes (Currency) Act
- 10 years for theft/receiving of stolen property under proposed Criminal Code
- 10 years for interfering with data in a Commonwealth computer.

5 Section 219RA of the Customs Act provides that a Judge of the Federal Court of Australia, of the Supreme Court of the Australian Capital Territory or of the Family Court of Australia may consent to be nominated by the minister to perform this function. Section 11 provides that the Governor-General may arrange with a State Governor or the Northern Territory Administrator for the performance by Supreme Court Judges or Magistrates of the function.

1.8 As an alternative to the removal of clothing, the Bill provides for an external search to be conducted by use of prescribed equipment. Equipment can only be prescribed:

- if it has the capacity to indicate that a person is or may be carrying prohibited goods on his or her body; and
- after the CEO has consulted any relevant Commonwealth authorities and established that the equipment can safely be used and poses no risk, or only minimal risk, to the person to be searched.

Some of the existing equipment being evaluated by Customs includes bodyscan X-rays and thermal imaging. The Customs submission reports<sup>6</sup> that the Ombudsman, in a comprehensive review of Customs search procedures between 1993 and 1996,<sup>7</sup> endorsed the view that such equipment must have a role in the searching of suspect persons.

1.9 The Bill also provides that, in inviting a person to consent to an external search, the customs officer must also tell the person that the external search may be recorded by videotape or other electronic means at the discretion of Customs, that any such record could be used in evidence, that a copy of such any record will be provided to the person and that the invitation and the person's response is being recorded.

1.10 The videotape or other electronic record of the external search can only be taken by a person of the same sex as the person being searched. Any videotape or other electronic record and any samples, etc, must be destroyed if no proceedings are brought within 12 months or have not resulted in a conviction. The function of the recording is to protect the rights and dignity of the person searched and the transparency and accountability of the search process.<sup>8</sup>

#### Opening of mail by Customs officers

1.11 The *Australian Postal Corporation Act 1989* provides that an employee of Australia Post who is authorised as an examiner by it may, on his or her own initiative or on that of a Customs officer, open an article in the course of international post to see if it contains prohibited goods.

1.12 The Bill provides that a Customs officer may personally open an article which is in the course of international post and is reasonably believed to contain prohibited goods that are drugs or other chemical compounds. The justification for the amendment<sup>9</sup> is that if Customs officers themselves open the suspect postal articles, security is tightened and it is easier to maintain continuity of evidence.

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6 *Submission No. 1*, Australian Customs Service, p. 12.

7 Australian Customs Service Search and Detention: Own motion investigation of issues relating to the detention and search of suspects by the Australian Customs Service under the Customs Act (April 1996) – pages 17 and 27.

8 *Submission No. 1*, Australian Customs Service, p. 10.

9 *Submission No. 1*, Australian Customs Service, p. 4.



*Retention of evidential material*

1.13 The Customs Act currently provides for the retention for 60 days of evidential material seized by Customs under a search warrant or by an authorised person during a search for prohibited goods at a Customs place or for prohibited goods that are narcotics unless proceedings are taken or a magistrate authorises its further retention. The Bill will allow seized goods to be retained for 180 days.

1.14 The extension of the period for which seized goods can be retained from 60 to 180 days reflects the time that it takes Customs to finalise an investigation and for the Commonwealth legal advisers to determine if a case should be pursued.<sup>10</sup> It is argued that even the smallest fraud cases are unlikely to be completed within 6 months, and that the requirement to get an extension of time from a magistrate every 60 days is counterproductive in that it hinders investigations by diverting the attention of Customs officers. It also adds to the workload of the court system.

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10 *Submission No. 1*, Australian Customs Service, p. 14.

## CHAPTER 2

### THE COMMITTEE'S INQUIRY

2.1 The Committee wrote to a number of organisations and individuals inviting submissions on the provisions of the Bill. The closing date for submissions was set at 24 January 2000, but submissions received after that date were accepted. The Committee received 10 Submissions, one of which was confidential. The others have been listed at Appendix 1. The Committee also received a simple expression of views against the Bill. This is specified at Appendix 3. The Committee held a public hearing into the provisions of the Bill in Canberra on 7 February 2000. Witnesses who appeared before the Committee are listed at Appendix 2.

2.2 The Committee is grateful to all individuals and organisations who expressed their views, made submissions and presented evidence before the Committee.

2.3 Most of the evidence, written and oral, supported the Bill. Particularly strong support was given to the provision for increased penalties for the export and import of performance enhancing drugs by the Australian Sports Commission,<sup>1</sup> the Department of Industry, Science and Resources,<sup>2</sup> the Australian Sports Drug Agency,<sup>3</sup> the Sydney Organising Committee for the Olympic Games,<sup>4</sup> and two members of the Australian Olympic Committee's Athletes Commission, Mr Michael McKay (Chairman)<sup>5</sup> and Ms Nicole Stevenson.<sup>6</sup>

2.4 Oral evidence was given by the Australian Sports Drug Agency,<sup>7</sup> Mr McKay and Ms Stevenson.<sup>8</sup> This evidence supported the urgent passage of the Bill and its provision of heavier penalties for the unlawful importation of performance enhancing drugs as factors being very important for the success of the Olympic games in Sydney. The Committee was grateful for the personal perspective these witnesses were able to give and appreciated their open exchange on these issues.

2.5 The Law Society of Western Australia found nothing objectionable in the Bill. It wrote that the amendments authorising the use of electronic equipment for personal searches would make them less invasive and put safeguards in place, requiring a caution and video recording. The amendments increasing the monetary penalties for the narcotic importation offences were not of great concern and had no real relevance in the criminal area. The Law Society of Western Australia referred to what it called 'new' offences of importation and

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1 *Submission No 2*, Australian Sports Commission, p. 1

2 *Submission No. 5*, Department of Industry, Science and Resources, pp. 1-2

3 *Submission No. 3*, Australian Sports Drug Agency, pp. 1-2

4 *Submission No. 10*, Sydney Organising Committee for the Olympic Games, p.1

5 *Submission No. 9*, Mr Michael McKay, pp. 1-3

6 *Submission No. 8*, Ms Nicole Stevenson, pp. 1-3

7 *Transcript of Evidence*, Proof Hansard, pp. L&C 1-7

8 *Transcript of Evidence*, Proof Hansard, pp. L&C 7-15

exportation of non-narcotic prohibited goods and said that, in effect, they were a tidying up of present offences and a classification of levels of seriousness.<sup>9</sup>

2.6 Various technical drafting and minor housekeeping suggestions were made by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA), which made a written submission<sup>10</sup> and gave oral evidence.<sup>11</sup> It suggested that:

- there be specific provision to ensure the privacy of the technological records of external searches;
- the Customs officer notify the person invited to consent to the use of prescribed equipment in an external search of any ‘possible’ as opposed to a ‘known’ risk;
- the Health portfolio – either Minister or department - be more directly involved in the approval of equipment for use in such searches;
- the external search might be continued without the use of the prescribed equipment even if the equipment has not been able to give any positive indication that the detainee was, or might be, carrying prohibited goods; and
- the use of the expressions ‘authorised person’ and ‘particular person’ be clarified.

2.7 The Australian Customs Service also gave evidence in relation to these suggestions, stressing its desire for the maximum in privacy and consultation.<sup>12</sup> It would ensure that any information about the known or foreseeable risks or concerns about the safety of equipment would be passed on to detainees being searched.<sup>13</sup> It also said that it was happy to consider any other ways to strengthen that assurance.<sup>14</sup> It undertook to look at the possibility of the consultative process being dealt with in detail by regulation, prior to the acquisition of equipment.<sup>15</sup>

2.8 The Committee **recommends** that, subject to account being taken of the suggestions of the Australian Radiation Protection and Nuclear Safety Agency, the Bill proceed.

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9 *Submission No. 7*, Law Society of Western Australia, p. 1

10 *Submission No. 6*, Australian Radiation Protection and Nuclear Safety Agency, pp. 1-5

11 *Transcript of Proceedings*, Proof Hansard, pp. 16-21

12 *Transcript of Proceedings*, Proof Hansard, p. 23

13 *Transcript of Proceedings*, Proof Hansard, p. 23

14 *Transcript of Proceedings*, Proof Hansard, p. 24

15 *Transcript of Proceedings*, Proof Hansard, pp. 22-32

## MINORITY REPORT

1. The Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 1999 purports to introduce a wide range of amendments to the existing Customs legislation. While it is acknowledged that it is important to have a strong and effective Customs regime, it is imperative that such a regime contains appropriate safeguards for the rights and civil liberties of individuals.
2. The Bill contains provisions which substantially increase the penalties for the illegal importation and exportation of specified performance enhancing drugs. The Committee heard persuasive evidence that there is a need to increase the penalties for the importation of performance enhancing drugs, particularly in light of the upcoming Olympic Games to be held in Sydney.

**It is recommended that the provisions of the Bill which introduce tougher penalties for specified performance enhancing drugs be supported, and that the appropriateness and effectiveness of these provisions be reviewed after the Olympics Games.**

3. While the principle of introducing tougher penalties for the importation of performance enhancing drugs is supported, it must be noted that these penalties form an element of a much broader criminal and civil regime. It is important that the legislative approach to the importation of illicit drugs is consistent and appropriate. The Committee heard that under the Bill, a person found at the border with a trafficable amount of anabolic steroids or precursor chemicals used to manufacture narcotics can receive a penalty of five years jail and/or a fine of \$100,000, whereas a person found with a trafficable amount of cannabis can receive ten years jail and/or a fine of \$250,000. Further, under the Bill, the penalty for a first offence of the importation of a trafficable amount of a narcotic other than cannabis (for which a commercial quantity has not been specified) increases from 25 years and/or \$100,000, to life imprisonment and/or \$750,000.

4. The application of serious penalties for serious offences are supported. However, the increase in penalties contained in this Bill appear to reflect a willingness to reject common sense in the pursuit of the impossible. The proposition that bringing into Australia non-commercial amounts of some narcotics should attract a sentence of life rather than 25 years is both unnecessary and absurd. This amendment would effectively mean that a person could receive life imprisonment for the importation of ten grams of codeine or two grams of methadone.

**It is recommended that closer scrutiny is given to the appropriateness of the increase of penalties and categorisation of offences into tier 1 and tier 2 offences, as provided by the Bill.**

**It is recommended that the Bill be amended to align penalty provisions more realistically with community expectations without pandering to the desire to impose draconian but essentially irrelevant and ineffectual penalties.**

5. The Bill gives powers to Customs officials to use certain prescribed equipment to undertake searches of detained people. A threshold point is that the Bill is asking the Parliament to pass measures of uncertain scope, as neither the ACS nor other witnesses to the Committee inquiry could identify the equipment likely to be used in the immediate future or in the longer term. For this reason, it is a difficult task for this Committee or the Parliament to determine whether the regime for the use of prescribed equipment, as set out by the Bill, is desirable and appropriate.
6. Under the current legislation, if a detainee refuses to consent to an internal search, an order for this search must be made by a judge. Arguably, the use of equipment (the scope of which is not known) may give rise to a situation where an external search gives information similar to, or involves processes similar to, an internal search. The Bill allows for an ‘authorised officer’ from the ACS to give an order for the search to be

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carried out, and for it to be video taped. This means that the decision to carry out the search remains with the ACS, removing an element of independent review. Even if the use of the equipment does not give rise to procedures or information similar to an internal search, requiring that the courts rule upon a detainees refusal to consent to a search ensures a necessary level of review of procedures which have the potential to impede upon civil liberties.

**It is recommended that the Bill be amended so as to ensure that any order to submit to an external search using equipment or the video taping of that search, must be made by a judicial officer.**

7. The Committee heard from the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA), which raised a number of concerns about the use of equipment which may have possible health risks. ARPANSA suggested that the Bill should be amended so as to prescribe that the CEO of Customs must consult ARPANSA regarding the health and safety aspects of any prescribed equipment, and must take into account any advise given by ARPANSA.

**It is recommended that the Bill provide that the CEO of Customs must consult with relevant agencies regarding the use of prescribed equipment and the training of officers who will be using that equipment, and must table in the Parliament any advise received by these agencies and given by the CEO to the Minister.**

8. The use of prescribed equipment gives rise to possible privacy issues. Such equipment as may be prescribed in the future, may have the capacity to reveal information beyond whether or not the detainee is carrying a prohibited import. As the Bill provides for the retention of any such information for a period of 12 months, it is imperative that there are adequate procedures in place to ensure that the information is stored safely and only used appropriately.

**It is recommended that the Bill be amended so as to address privacy concerns.**

9. It would appear that the assertion by ARPANSA, that under the current definition of 'radioactive substance' every single import into Australia requires a permit and is not receiving one, needs to be addressed with particular urgency. In addition, ARPANSA informed the Committee that it felt that the requirement to inform detainees of the 'known' health risks associated with the use of prescribed assistance was inappropriate, as for most equipment, the health risks are 'possible', rather than conclusively 'known'. A detainee may not be adequately informed of the risks involved if the duty to inform is of 'known' rather than 'possible' risk.

**It is recommended, in concurrence with the Majority Report, that the drafting issues identified in the public hearing by ARPANSA be addressed in legislation as soon as possible.**

10. The Bill extends the period for the retention of evidential materials from 60 to 180 days. This is a threefold extension. The Committee heard that in many cases, the seized evidence is documentary, and the originals have been returned to the owner. The ACS submitted that the extension of time is necessary, as it removes the need for the ACS to undergo lengthy preparations in order to seek judicial approval for an extension. The Committee was not given evidence as to what happens in situations where the seized goods are not documentary, but are goods which have a short or immediate market life, and the retention of these goods for 6 months may severely impact upon that market life.

**It is recommended that the retention period is either retained, or extended by a lesser amount.**

11. The Bill gives ACS officers the power to open Australia Post items without an Australia Post officer present. The evidence given to the Committee was that this amendment was necessary to increase security of controlled operations conducted by the ACS. However, Australia Post is under statutory obligations with respect to the way in which private

postal items are dealt with. The evidence given to the Committee was that the ACS fears that there may be instances where it could be possible that an Australia Post officer could in some way be involved in the importation of prohibited substances. However, Australia Post has a statutory role to ensure that all private postal items are dealt with appropriately at all times. This rightly includes when mail items are opened by an ACS officer.

**It is recommended that the current provisions which require the presence of an Australia Post officer when a postal item is opened be replaced with a provision that whenever the ACS open mail without the presence of an Australia Post officer, the incident be recorded and the number of such incidents be reported in the annual report of ACS.**

Senator The Hon C C Schacht





# APPENDIX 1

## Organisations that provided the Committee with Submissions

<b>Organisation</b>	<b>Submission No</b>
Australian Customs Service	1
Australian Radiation Protection and Nuclear Safety Agency	6
Australian Sports Commission	2
Australian Sports Drug Agency	3
<b>Confidential</b>	4
Department of Industry, Science and Resources	5
Law Society of Western Australia	7
Mr Michael McKay	9
Ms Nicole Stevenson	8
Sydney Organising Committee for the Olympic Games	10



## **APPENDIX 2**

### **Witnesses who appeared before the Committee**

**Monday, 7 February 2000**

#### **Australian Customs Service**

Mr Phil Burns  
Acting National Director (Commercial)  
Ms Gail Batman  
National Manager, Passenger Processing  
Ms Philomena Bisshop  
Executive Director, Illicit Drugs  
Ms Marion Grant  
National Manager, Border Operations

#### **Australian Olympic Committee**

Ms Nicole Stevenson  
Mr Michael McKay

#### **Australian Radiation Protection and Nuclear Safety Agency**

Ms Anne McManus  
Corporate Counsel  
Mr Daniel Westall  
Manager Coordinator Policy Section  
Mr David Tredinnick  
Legal and Policy Officer  
**Sydney**  
Mr John Baldas  
Director Medical Radiation Branch  
Dr Julian Thompson  
Medical Radiation Branch  
**Melbourne**

#### **Australian Sports Drug Agency**

Ms Natalie Howson  
Chief Executive Officer  
Mr Anthony Ives



## **APPENDIX 3**

### **Organisations or Persons that expressed views for or Against the Bill**

Mr Robert Spanswick