

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Inquiry into Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006

AUSTRALIAN FEDERAL POLICE

Senator Ludwig asked the following question on notice on 1 February 2007:

1. If AFP are running a controlled operation at the moment, and they discovered a cache of explosives or drugs etc, presumably they don't allow them to sit in place (ie they substitute them)? Under what power do you do that currently, and could that power not be used to partially achieve the objectives of a delayed notification warrant?

The answer to the honourable senator's questions is as follows:

AFP controlled operations are usually undertaken in the border environment and the AFP attempts to substitute illicit goods wherever possible. There will be cases where it is not possible to do this. For example, where the illicit goods cannot be removed without damaging the wrappings or container to an extent that would alert the targets that the goods had been tampered with. In those cases, an authorising officer might issue a certificate allowing the illicit goods to remain in place. Where the goods are inherently hazardous goods (explosive, radio-active etc), it is less likely that an authorising officer would issue a certificate allowing those goods to remain in place. This is due to the risks the goods posed to people and property.

Controlled operations could not be used to achieve the objectives of a delayed notification search warrant. The controlled operations regime exempts from criminal and civil liability law enforcement officers and others involved in the commission of criminal offences and to ensure any evidence collected as a result of a narcotics importation is not rejected because of any such unlawful conduct. The substitution powers proposed within the delayed notification regime are intended to enable law enforcement to search and seize material where it is suspected that the material in question is evidential in nature. Any substitution would be for the purposes of covertly seizing material for further examination and analysis to determine whether such material constitutes evidence of an offence.

Senator Ludwig asked the following question on notice on 1 February 2007:

2. Does the AFP would require a warrant (whether delayed notification or ordinary) to seize material during a controlled operation?

The answer to the honourable senator's questions is as follows:

Section 151C of the *Crimes Act 1914* explicitly excludes from a controlled operation certificate, authorisation of the exercise of a range of investigation powers including arrest, search, inspection, and seizure if they are available. This provision is replicated in the Bill at proposed section 15GY. Within this context the power to seize goods during a controlled operation depends on the type of goods, and what time and where goods are to be seized. If the goods are narcotic goods, s203B and 203C of the *Customs Act 1901* could apply to some circumstances. That is, the AFP could seize the narcotic goods under 203B or 203C, fully

substitute them, and then run a controlled delivery without a controlled operations certificate. Alternatively, investigators might be able to rely on these provisions to seize narcotic goods in the course of a controlled operation – particularly, if the discovery of the narcotic goods was unexpected.

There will be other cases where it might be necessary to specify in a controlled operations certificate that law enforcement officers can take possession of illicit goods. Generally, these are cases where it is anticipated that an undercover operative will take possession of a particular kind of illicit good and a traditional seizure is not feasible as it could not be undertaken at the appropriate time to facilitate a substitution without alerting the targets of the operation.

There may be instances where to substitute the goods during a controlled operation, the investigators would need to seek a variation of the controlled operations certificate. Alternatively if it were operationally appropriate in the circumstances, a section 3E warrant could be sought to seize a substance such as explosives.

In relation to delayed notification search warrants, proposed section 3SI(2)(b) in the Bill requires an issuing officer to consider whether there are alternative means of obtaining the evidence or information sought to be obtained under a delayed notification search warrant. Therefore, if evidence is able to be sought using a controlled operation or a section 3E search warrant rather than a delayed notification search warrant, the issuing officer would not authorise the delayed notification search warrant.

Senator Ludwig asked the following question on notice on 1 February 2007:

3. How does proposed paragraph 3SL(1)(b) interact with the assumed identities powers? In other words, what is an executing officer permitted to do by way of impersonating another person (eg can he or she present a false identity card, wear the uniform of company or charity, etc)?

The answer to the honourable senator's question is as follows:

Proposed section 3SL in the Bill outlines what is authorised by a delayed notification search warrant much the same as section 3F *Crimes Act 1914* outlines what is authorised by a section 3E search warrant. This therefore clearly sets out what powers executing officers and constables assisting are authorised to exercise.

The provision at section 3SL(1)(b) makes it clear that an executing officer and constables assisting can lawfully impersonate another person and therefore avoid having to identify themselves as police (as required for example by section 40YC of the *Australian Federal Police Act 1979*) to assist in ensuring that the execution of the warrant can occur without notifying the occupant of the target premises. This authorisation would enable an executing officer or constables assisting to impersonate another person in the following ways:

- By using a cover story that did not amount to the use of a false identity established by identity documents that have been acquired under an authority per Part 1AC of the *Crimes Act 1914*, for example use of a company uniform or verbally identifying themselves as another person if queried; and

- By using an assumed identity established by identity documents that have been acquired under an authority per Part 1AC of the *Crimes Act 1914*.