



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Reference: National Crime Authority Amendment Bill 2000

MONDAY, 5 MARCH 2001

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to: **<http://search.aph.gov.au>**

**SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

Monday, 5 March 2001

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

Senators in attendance: Senators Crane, Cooney, Crossin, Mason and Murray

Terms of reference for the inquiry:

National Crime Authority Legislation Amendment Bill 2000.

WITNESSES

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

**SELLICK, Ms Suesan Maree, Senior Legal Officer, Criminal Law Branch, Commonwealth
Attorney-General's Department..... 1**

Committee met at 4.23 p.m.**ALDERSON, Mr Karl John, Principal Legal Officer, Criminal Law Branch, Commonwealth Attorney-General's Department****SELLICK, Ms Suesan Maree, Senior Legal Officer, Criminal Law Branch, Commonwealth Attorney-General's Department****CHAIR**—Welcome.

Mr Alderson—We welcome the opportunity to appear before the committee and to answer any questions or respond to any comments you may have in relation to the bill. It seems a good opportunity to have a dialogue about the bill and to clarify any questions people may have. There are two themes I want to touch on before we launch into questioning. One is that a number of provisions in this bill are really about standardisation with general approaches in Commonwealth legislation. I have a few examples of that, the first is provision for the Ombudsman to hear complaints against the authority. The general approach for Commonwealth bodies is that there is this scope for Ombudsman review but, until now, that has not been provided for under the National Crime Authority Act for a variety of reasons. So that will be one area coming into line.

A second example, as proposed under the bill, relates to the applications for search warrants and the issuing of them. Under the Crimes Act, any law enforcement officer can apply for a search warrant and an issuing officer, which includes a magistrate or a justice of the peace, can issue one, and under Commonwealth regulatory statutes the general situation is that a magistrate can issue a search warrant. These proposed amendments would do away with the special case in the National Crime Authority where only a member of the authority, one of the very senior people, can apply for a warrant and only a Supreme Court judge can issue one. The committee has raised a question about the role of the Federal Magistrates Service in this, which we can respond to.

Another area of harmonisation is with the criminal code. These amendments, if enacted, will bring the National Crime Authority Act within those principles of the criminal code. There is this process of phasing in the criminal code and bringing legislation gradually within this purview. Some consequences of that are that the fault elements for offences under the act, which were previously implicit and had to be read in, will now be clear-cut under the criminal code. The criminal code generally applicable defences will apply to the offences under this act and, consistent with that process, the reasonable excuse defences that appeared in a number of offences in the act would be removed. The offences in question are the failure of a Commonwealth officer to produce relevant information as directed, failure of a person summonsed to attend and produce documents, and failure of such a person to attend and answer questions.

There has been some discussion about this issue of reasonable excuse in a number of forums. The first point to make is that it is not intended to be and is not presented as a status quo amendment. The specific criminal code defences are different from having the general overarching notion of reasonable excuse, but part of the code process is to, where appropriate, encourage clarification of specific defences and to spell those out rather than to rely on an overarching notion of reasonable excuse. That means that, as the committee has pointed out,

there are contexts where reasonable excuse will remain as a defence to a Commonwealth offence. It is not prohibited by the criminal code but generally in our scrutiny role, where our branch looks at all Commonwealth legislation, assisting the Minister for Justice and Customs, we generally encourage agencies to think about what specific defences should go in rather than putting in a general reasonable excuse defence. That first theme is, I guess, standardisation.

The second theme is hearings and the specific problems that the National Crime Authority has had in relation to the conduct of its hearings and people failing to answer questions. Two principal problems are: one, if someone fails to answer a question or otherwise obstructs the authority, the processes for contesting that person's failure to answer either through the special review mechanisms in the Federal Court or in prosecuting them for not answering, can take a lengthy period of, say, one or two years to resolve, meanwhile to the extent the investigation relies on those answers it cannot continue; and, second, the broad rights under the National Crime Authority Act at present, to refuse to answer questions if an indemnity has not been given and the answers to those questions would be self-incriminatory.

The two measures principally addressing that are, firstly, the increased maximum penalties to give a greater deterrence—I failed to mention that, at the end of those court processes, there has been a number of cases where a person failing to answer a question has received a very small fine of, say, only a few hundred dollars and no other penalty—lining up with the existing penalty for false and misleading statements under this act, and also with the potential penalties for the substantive conduct that somebody may be concealing, such as money laundering or drug trafficking. There is also a proposed contempt mechanism which is designed as a quick and ready way to deal with these matters to avoid the full delays associated with the criminal trial process and to use the process the courts are familiar with in terms of punishing contempt.

One thing to emphasise is that the NCA would not take on judicial robes and be the punisher of the contempt. The matter would have to be proven to the satisfaction of the court where the matter was taken. Related to that is a limitation of self-incrimination immunities to allow greater use to be made of incriminatory material. There is some discussion in the committee's *Alert Digest* comments on the ASIC precedent and the committee's thoughts on that precedent for limiting self-incrimination immunities. This final comment I will make before we go to questions. One point has been made that the limited use immunity that remains. The question has been asked in some contexts, 'What is the value of merely having use immunity. Does that do anything?' One rationale for the use immunity is that, if you are in a hearing before the NCA and you make an admission, that admission itself would not be admissible against the person if it were self-incriminatory. The National Crime Authority would have to obtain verifying evidence and that verifying evidence could be used against the person. What the use immunity does is put a limitation on over-reliance on admissions and confessions and creates a mechanism whereby there is an incentive to verify that with factual material. They were the only comments I had proposed to make. We welcome the opportunity to answer any questions you may have.

Senator CROSSIN—I come from a privileged background of not having a law background when I entered parliament. When I read this I am a bit nervous about my rights as an ordinary citizen in relation to this bill. What is the background for wanting to increase the powers of the National Crime Authority in relation to giving it extended powers over a person's civil rights?

Mr Alderson—There are two initial comments I would make. One concerns the limited and special nature of the NCA's role. The NCA can only exercise these special powers where a reference has been issued to it by the intergovernmental Commonwealth-state committee of ministers. Its functions as devised in the legislation are focused essentially on matters that back in 1984 it was felt that the traditional state and federal police forces were failing to adequately investigate. Therefore it has this special mandate to deal with complex organised crime, not the ordinary crimes like shoplifting.

Senator CROSSIN—I realise that. I realise we are talking about something slightly more complicated than that.

Mr Alderson—The first rationale for those special powers comes from that special role. Secondly, in terms of the amendments that are being made to give greater support to those hearing powers, there are the specific problems that the National Crime Authority has faced with a number of documented cases. Failure to answer questions has led to significant delays in its hearing processes, the end result being that the person who has successfully frustrated its hearings for a long period has then gone on after a couple of years of processes to walk away with a couple of hundred dollars fine.

Senator CROSSIN—I will get on to that in a minute. You are telling me that you have evidence to prove that the powers of the NCA at the moment limit its capacity to do the work it needs to do and that those powers need to be extended for whatever reason in the past.?

Mr Alderson—I think that is a fair statement.

Senator CROSSIN—Is that different to the Australian Federal Police? Do they have a different role?

Mr Alderson—It is. A range of these special powers such as holding hearings and summoning documents are powers not available to the Australian Federal Police. The Australian Federal Police as with the Commonwealth's federal role generally also has a focus on the more serious end of crime. The difference with the National Crime Authority is that there is this overarching Commonwealth-state framework. Whereas the AFP has a very independent role in initiating investigations into things it sees as appropriate, the NCA's special powers are governed by this reference system.

Senator CROSSIN—On the issue of charging someone with contempt, you have cited that them choosing to take up their right to remain silent—which will not be an option now under this bill—has led to delays in cases. I would need a much more convincing argument to give up somebody's right to do that, other than the fact that it is going to take longer to achieve what you want to achieve. I say to you: so it takes longer, as opposed to someone giving up their right to remain silent, to not tender verbal evidence or to not tender documents unless they are entirely sure it is not going to incriminate them. Have you got any other convincing reasons as to why I should accept that provision in the bill?

Mr Alderson—I will see if Suesan has anything to add, but there are two things, again. The first is the consequence of that delay. If an investigation is effectively put on hold for two years because key answers cannot be obtained, by the time you come back to it two years later the

trail may have gone cold—the evidence that had been gathered in the first place may be hard to follow up and use. That may be not just a delay but one that seriously hampers—

Senator CROSSIN—Is it always two years or can it be a matter of only weeks or months? Why do you say two years?

Mr Alderson—That is at the upper end. There are two processes. One, if there is a dispute about whether someone has reasonable excuse, there is a mechanism in the legislation to have the Federal Court arbitrate that. Two, if you prosecute someone for not answering, it then normally goes through a state Magistrates Court or a Supreme Court. Simply because of the delays in the court process in listing matters for hearing, in a defendant being able to say, ‘We’re still gathering our defence case,’ it gets put off for another month. There are cases—say, in a Magistrates Court—where you may get on within two or three months, but there have been key cases where it has taken one to two years.

Ms Sellick—I have two case summaries which might help the committee. The first one is a Federal Court case which is still reported by using the initials of the people, as you would appreciate. There are two key witnesses. I do stress here that these are key witnesses; these are not just people who can assist with the inquiries. The answers to these questions are at the very heart of the National Crime Authority’s investigations, otherwise they would just move on—as any investigatory body would. The first questions were asked in January 1997, and they refused to answer questions on the grounds that the questions might incriminate them. The questions were about a family relationship that some person might have with another person—that was the entire nature of the question. They argued that they had a reasonable excuse.

They ended up in the Federal Court in September 1997. The case was heard in March 1998. The Federal Court found in the National Crime Authority’s favour. That was handed down in a decision—as I said, it is reported in the ALRs. They were again summonsed to appear before the authority in July 1998. They again refused. This time we issued an attempt to prosecute them for failing to answer, having worked out that they did not have a reasonable excuse. In December 1998 the trial kept dragging on in the magistrates courts, with delays there. Finally, in November 2000 the principal witnesses actually came back to the National Crime Authority and gave answers. So that was a three-year delay, by which stage the person that the NCA said that they were after was gone.

Senator MURRAY—So what are you saying? Are you saying that because courts are underresourced and do not have the judges and the time to do these things you should, therefore, take rights away? If the courts were given enough resources, they could fast-track these things and hear the appeals.

Mr Alderson—The argument is that our criminal trial process, as it is currently set up with the various checks and balances to protect the interests of defendants, does provide significant scope for delaying tactics that can hold off for a lengthy period the capacity to pursue a matter.

Senator MURRAY—But you are not addressing that issue. You are accepting that as how it is going to be and you are tending to people’s particular rights. Surely, if there is a fundamental problem with our system of courts and justice and how it is operated, you need to address that rather than address what is regarded as a fundamental right?

Mr Alderson—There is no specific relation to this reform, but the Attorney-General has been pursuing a criminal trial reform project—particularly the complex criminal trials—with the states and territories to try and deal with what I think almost everybody accepts are undesirable delays.

Senator MURRAY—That is a better way to go.

Senator CROSSIN—If I said to you, ‘I don’t want to answer those questions because at some stage I fear for my life,’ what are the implications if the bill were passed as it is now? What does that mean for me? Does it mean that I do not have the right to say that? I have to answer your questions, no matter what?

Ms Sellick—The bill proposes that if you do claim the right to self-incrimination, by claiming that immediately the evidence that you present cannot be used against you.

CHAIR—I think the answer to Senator Crossin’s question is yes. Would she have to answer a question which she thought might end up with her being killed by unsavoury people?

Senator CROSSIN—Or stalked.

CHAIR—She cannot refuse to answer on that basis. The answer to her question is yes.

Senator CROSSIN—I would have to answer, wouldn’t I, under the current proposal?

CHAIR—Under the new amendments, yes.

Senator CROSSIN—Not that it could be used against me. It may well be used against me by anyone who is out there. But under your proposal, even if I feared for my life, I would have to answer those questions—is that correct?

Mr Alderson—The answer is yes. Under the existing legislation, you would have to establish that that fell within the notion of reasonable excuse.

Senator CROSSIN—That is right. And the bill intends to abolish that provision, doesn’t it?

Mr Alderson—The mechanisms that are designed to deal with that are the secrecy provisions for closed NCA hearings and also the Commonwealth’s witness protection legislation.

Senator CROSSIN—So convince me, as someone who will have the responsibility to pass this legislation, why I should do that. If you are telling me that I have to answer your questions despite the fact that I fear for my life, give me a sound and solid reason why I should pass this legislation.

Mr Alderson—Ultimately whether there should be a defence of ‘I’ve been threatened’ or not is a policy question. But let me float a possible argument.

Senator CROSSIN—I do not know if it is policy, I thought it was survival.

Senator MURRAY—It might be ethics.

Mr Alderson—If you could claim, ‘I’ve been threatened, therefore I won’t answer a question,’ that would put a tool in the hands of the bikie gangs or other criminal groups. All they would have to do is issue a threat to anyone attending a hearing and they would be immune from having testimony given against them.

Senator CROSSIN—What if they have not issued that threat? What if I believe that that threat might be issued after I have attended the hearing?

Mr Alderson—That is the situation that arises with other law enforcement investigations; that if testimony is given you may be threatened by those who are protecting their own criminal activities.

Senator CROSSIN—But at the moment I can remain silent, can I not?

Mr Alderson—I am not sure whether there is decided case law on whether having been threatened constitutes a reasonable excuse or not. You could argue to the Federal Court that it fell within the definition of reasonable excuse and have the court decide the matter.

Senator CROSSIN—But you are taking away that option, aren’t you, in this bill? There is no option to argue reasonable excuse—is that right?

Mr Alderson—That is right.

CHAIR—So if you did not answer because you were in fear of your life, you might not—

Senator CROSSIN—I may not have been threatened before I walked into the hearing. I may perceive that that would be a reality after the hearing is over.

CHAIR—He would end up with up to five years jail.

Senator CROSSIN—I still have not heard a sound and solid reason why I should go along with the bill or a convincing reason why I should agree to give up some of these rights. What is the purpose of it?

Ms Sellick—Under the current scheme, if you refuse to answer a question on the grounds that you think you might be threatened or that you have in fact been threatened, you still have to argue that that is a reasonable excuse and you still have to have that reasonable excuse supported or upheld. If it is not upheld and you continue to refuse to answer the question, you can be prosecuted and you no longer have a reasonable excuse. In these circumstances, yes, the legislation does require you to answer the question, and you will get immunity from it. But if you still refuse to answer then you can still be charged, and the defences available in the criminal code will assist you in that prosecution. Ultimately, if you do remain silent and we prosecute you, the criminal code defences—

Senator CROSSIN—Where is the assurance that I get immunity from it?

Ms Sellick—It is in the legislation.

Senator CROSSIN—In what way?

Ms Sellick—It is an automatic use of immunity spelt out in the legislation once you claim that information. No, I am sorry; I am talking about incrimination.

CHAIR—Haven't you also left out a step when you say that under the present circumstances you could claim reasonable excuse? If the person examining you said that it was not reasonable and you had to answer, couldn't you then go to the court? So Senator Crossin could go off to the court, but now that has been cut out. It is a very big step that has been cut out, isn't it?

Mr Alderson—There are two issues. One is whether there ought to be a broad reasonable excuse defence covering perhaps this or perhaps some other things. The second issue is whether there should be a specific defence to deal with threats against a person. The possible problem with that is the invitation that gives to criminal groups to make threats and immunise themselves against people testifying against them. There is also the fact that there are mechanisms in the legislation in terms of the secrecy of hearings and witness protection. Also, if you refuse to answer and there is some reason for sympathy for your reasons, there is, firstly, a discretion as to whether to prosecute that matter and, secondly, the court has a sentencing discretion as to what penalty it thinks is fair and appropriate.

CHAIR—I think you are missing the point of what I am saying and what Senator Crossin is asking. At the moment, the person who is questioning you has no discretion. He or she has to ask all the questions that seem suitable. Under the legislation that was put through, even the person examining you has no discretion. At the present moment, a person can examine you and say that it is not a reasonable excuse but then you go off to an independent judge who is above the fray. When we go to this new legislation, the judge will be gone and there will be nobody to judge whether it is reasonable, because you cannot in fact plead reasonableness. That is what Senator Crossin is putting.

Mr Alderson—Yes, there will not be a process for determining whether something is a reasonable excuse. But I was suggesting that the merits of the issue and the sympathies that may be involved would come in in terms of the NCA's, the DPP's or the sentencing court's assessment of how to proceed. At that first stage, the NCA is going to face a problem convicting people if it goes around allowing its witnesses to be killed. It has a vested interest—

Senator MURRAY—It seems to me that you do not distinguish either in the legislation or in your answers between witnesses who will become the accused or a part of the organised crime group and witnesses who can assist in finding out matters. Let me give you an example. A woman is raped by a gang of bikies in the south-west of Western Australia, and the woman and the woman's family refuse to answer questions about what has happened because of fear.

They are not accused of a crime. The bikies also refuse to answer. Both are using the right to silence—one, you can argue, improperly, if you want, although many would argue not improperly, and that is the bikies, because they are simply failing to answer reasonably, so they would be without reasonable excuse; and the other are in fear for their lives. In some south-west timber towns the police cannot even protect people in protected witness programs, never mind in a

country town. Aren't you going to, with this bill of yours, withdraw the reasonable excuse from both of those categories of people?

Mr Alderson—Yes. In the matters the NCA would be investigating, though, the difference in many cases would be a lot more blurred. Something like a rape would not really come within the NCA's focus.

CHAIR—Yes, it does.

Senator MASON—Because organised crime is involved.

CHAIR—It specifically says here in the list that violence is number 10, roman 'X'. It comes squarely within it.

Mr Alderson—It would only be within the purview of the NCA if investigating that was part of investigating organised criminal activity—

Senator MURRAY—But it would be. That is the point. The organised bikie gang in the south-west of WA, according to all the newspaper reports and the NCA, is into all of this stuff—crimes of property, drugs, assault, criminal assault and rape. There is nothing they do not do, according to that, so of course it would be part of that. Yet, the most basic elemental thing is you do not distinguish in your bill between a person who is being asked questions to assist in establishing facts of a crime and those who are likely to have perpetrated the crime. To me, that is a most fundamental thing. It is back to swabbing the mouths of ordinary citizens and swabbing the mouths of suspects. It is that sort of stuff yet again.

Mr Alderson—There would be cases where those two categories were quite blurred, in terms of speaking to people who you know are—

Senator MURRAY—Yes, but surely you should allow the courts and the persons concerned to have a defence. Surely it is your obligation, as protectors of the citizens of this country, to allow people who have a legitimate defence to be able to express it and for the court to acknowledge it. As far as I understand the argument, there are no grounds whereby our notional rape victim and her family could avoid being pursued under these provisions.

CHAIR—And jailed, if they—

Senator MURRAY—And jailed. If I am wrong please tell me, but it just seems to me you do not distinguish.

Ms Sellick—I might be able to assist. I have not seen a National Crime Authority reference which does, in fact, include any of the offences against the person, because of the definition of relevant offence and the need for there to be an organised crime. Putting that issue to one side, taking the example of the rape, if the family does remain silent and they are prosecuted—which, as Mr Alderson has indicated, is in the discretion of the prosecuting authority anyway—for failing to answer the question or if the NCA even pursued it, which again they might not, the criminal code defences are available to the person. If duress, for example, was a defence, that would be available to the person for failing to answer questions.

Senator MURRAY—It may be no duress whatsoever; it may simply be raw fear that if they tell they will get it. They might not even have had a whisper of a threat from anybody; they might just themselves be afraid.

Ms Sellick—I guess they would just have to fall back on prosecuting discretion.

CHAIR—Exactly. While you are on the reference, they do not have to follow their references very closely.

Ms Sellick—Following Federal Court cases they have tighter and tighter controls over the nature of the references and the need to spell out the relevant defences that are being investigated and the nature of the relevant criminal activity.

CHAIR—There was a recent case where a judge said that the NCA failed to stay within its reference. It did not do too well on appeal.

Senator MURRAY—That is a ‘trust us’ answer. People in parliaments have learnt the hard way that ‘trust us’ does not work.

Senator MASON—I think, too, Senator Murray, one of the issues that you have raised in other contexts is legislative creep. In a sense, Mr Alderson, in relation to Senator Crossin’s questions, you addressed that by saying that the National Crime Authority has different obligations: you need a reference et cetera to, in a sense, revoke these powers et cetera. I understand that—in fact, that was going to be my first question. But Senator Crossin, in a sense, explored the issue as to why the NCA needs different powers from the police forces. Even if you have convinced us on that, and I am not sure you have, the next question which often is raised—and Senator Murray has raised this on many occasions—is the one about legislative creep: if we think these powers are okay for the National Crime Authority, next the Australian Federal Police or other police forces will seek these same powers. They argue in the politics of this, ‘If we had these powers, we could also undertake many of the activities of the National Crime Authority’, don’t they? Every time we seem to give more power—say, to the National Crime Authority or some other body—someone else wants it; indeed, worse: they use it as a precedent. Wire-tapping and so forth—

CHAIR—And this act itself?

Senator MASON—Indeed. There are so many examples before this committee of this. You probably cannot answer this question, but this is what concerns us.

Senator CROSSIN—There are a lot of things about this bill that concern me. The other matter that concerns me is that I see you limiting the rights of an individual before the NCA but wanting to extend the powers to issue warrants down as far as state or territory magistrates, yet I would have thought that surely, if the NCA handles matters that are of national and serious significance, you would leave a warrant in the hands of a federal magistrate to issue as opposed to a state or federal magistrate? I will not make a comment about the magistrates we currently have in the Northern Territory at this point in time—that would be most improper of me. But I would have thought it would have been best left in the hands of the federal magistrates, would it not?

Mr Alderson—To this point, the jurisdiction of the Federal Magistrates Service has been focused on family law and related matters rather than on criminal matters. I guess there is a question of how much expertise the magistrates issuing the warrants would have in that area. That is an open question.

Senator CROSSIN—How much expertise would a state magistrate or even a Northern Territory magistrate have in relation to the powers of the NCA, and why they should issue the warrant? There is the same argument there, isn't there?

Mr Alderson—Given that state and territory magistrates generally have a warrant issuing role under state and territory law, it would be more familiar territory.

Senator CROSSIN—It would be, should be or must be?

Mr Alderson—They would be more familiar with the kinds of issues and considerations in issuing a search warrant.

Senator CROSSIN—Have you encountered problems with the federal magistrates doing it currently?

Mr Alderson—It has not arisen yet, because they have not had that role.

Senator CROSSIN—Who issues the warrants at the moment?

Mr Alderson—In this legislation, Supreme Court judges; under the Crimes Act and various other Commonwealth regulatory statutes, magistrates; and under the Crimes Act also justices of the peace.

Senator CROSSIN—State magistrates, you mean?

Mr Alderson—Yes, sorry: all state and territory magistrates.

Senator CROSSIN—So, currently, state and territory magistrates can issue a warrant under the NCA—

Mr Alderson—Under the Crimes Act. Under the NCA Act it is Supreme Court judges.

Senator MURRAY—I think at heart here, of course, is a clash of direction. I am one of those who does not agree with multiple jurisdictions for the same crime. It seems to me we have four jurisdictions which people can shop between. You can shop between states in certain circumstances for the same crime. You can choose that it be prosecuted in one state or another. Then you can shop between the state police, the Federal Police and, if you can persuade somebody for the reference, the NCA. The rights, powers and the obligations of the various authorities differ. It seems extraordinary to me that, in a country of 19 million people, we have that circumstance. However, that has been accepted; it has been accepted at the NCA as a necessary evil, not a necessary good, in some respects.

You also know of the situation where the law is used as a shortcut means to attack what are essentially process and ideological problems, such as we discussed earlier—the business of how our court system operates, its adversarial nature and the way in which people can manipulate process to avoid justice. Those things need to be addressed and I am glad the Attorney-General, not only here but in some of the states, is addressing it. People like Evan Whitton have written a lot on this. It worries me that we, as parliamentarians, are to be used as a kind of shortcut mechanism, because we too are concerned about organised crime, money laundering, bikies and all the people who do bad things in our society. In the process, very important protections are pulled away—even something that sounds as eminently reasonable as standardisation. Standardised laws are fine unless somebody has an exceptional power to override or ignore them. When you standardise it you are increasing that power or authority.

At the heart of our discourse here, for me personally and perhaps for other members of the committee, is not just the provisions of the law but a worry about an attitude or trend of intent in the bureaucracy and those parts of the state apparatus which have power to increase their powers. Sooner or later some little person gets hurt. I do not hear from you enough of a sense of the precautionary principle and that your role is to help us protect ordinary citizens from the misuse of power or overreaching power. I have the sense that you sit there as a defender of those who always want to ratchet it up. There is a great danger when we are faced with people from the bureaucracy who adopt that role. I do not mean to be personally critical of you, I am talking about a feeling that I get in all this. I am deeply concerned about the kind of attitude which underpins this stuff.

Senator MASON—You get a ratcheting up and never a slackening off.

Senator MURRAY—That is right.

CHAIR—This started off back in time with Frank Costigan and his inquiry. We were in power and had to respond to the political situation at the time. We got this going and away it has gone ever since.

Senator CROSSIN—I probably was not even born then.

CHAIR—You would not remember that.

Mr Alderson—I was going to comment that part of this package is making the NCA subject to the Ombudsman's jurisdiction which, in terms of substantive accountability for misconduct, is a—

CHAIR—Where does it say he can fine them?

Senator MURRAY—There cannot be misconduct if the NCA is acting within its power. That is the point I make to you. If you increase the power and they act within their power, there is no misconduct. The Ombudsman is a terrific institution; who introduced it? Was it Fraser or Hawke?

CHAIR—Fraser.

Senator MURRAY—It is a wonderful institution. However, if the NCA acts within their power it is not a problem. The powers themselves may be a problem.

Mr Alderson—One mechanism that exists for seeing whether the NCA is discharging its proper role is the parliamentary joint committee.

Senator MURRAY—Yes, and that is the purpose of that committee, but that committee does not have, as far as I know, as part of its terms of reference, a watching brief for maintaining the rights and liberties of Australian citizens. This committee does, not in that exact frame, but it does. This derivative, use immunity, needs some exploration. My notes say that the bill creates a new scheme for a witness at an NCA hearing to claim the answer to a question or the production of a document or thing might tend to incriminate them. Later on it says that the precedent of the ASIC legislation is used where the abolition of derivative use immunity in the ASIC legislation had been used. But it indicates in the evidence, which you might not have seen, that Michael Rozenes, QC, said there was a clear difference between its former use in ASIC and the intended use here. Do you have any views on that?

Mr Alderson—As I recall, the point that Mr Rozenes was making was that, essentially, the change to the powers is similar, but he mounted the argument that ASIC has a different role, that ASIC is not about investigating perpetrators of serious crime but rather this sort of negotiational process where they keep the market honest and bring people in and what have you and do not pursue serious crime in the same way as the NCA. He was therefore arguing that, given they have more of an information gathering role, different powers may be appropriate. One of the comments that we made at the time was that ASIC's role does include the investigation of serious offences. There are numerous Corporations Law offences with five years imprisonment and so forth, and it is an important part of ASIC's role to secure the convictions of those people just as it is part of the NCA's role to bring forward prosecutions for serious offences.

Senator MURRAY—The other thing Rozenes discusses is this issue which I was alluding to in my earlier remarks of general concern, and that is simply that, if a jurisdiction is selected, somebody may be punished, or potentially be punished, to a greater extent under one jurisdiction than another. In other words, if you have been referred to the NCA, which has all these additional powers and things for which it can punish you, you might end up with a greater jail sentence for the same offence than you would have had if the state police had prosecuted you.

Mr Alderson—I guess that is the situation we have had since 1901 as a result of our federal system where there are a number of significant areas of overlap between Commonwealth and state responsibilities—I guess drug trafficking being the most notable: you get significant differences between the states in terms of maximum penalties for different quantities of drugs, and again it can be different from the Commonwealth.

Senator MURRAY—It seems that it can even be different between Commonwealth and Commonwealth. In other words, under the Federal Police powers and provisions you might, for the same offence, get a lower jail sentence than under the NCA because the NCA can ratchet up the charges against you. Why is that appropriate?

Mr Alderson—If you are talking about the substantive offence that would be the subject of an investigation, such as money laundering or drug trafficking, the maximum penalty would be the same in each case. The offences that are actually in the NCA Act essentially centre on failing to cooperate with an NCA investigation or obstructing it, and there are no—

Senator MURRAY—Okay. So for a drug offence under the Commonwealth you might get 10 years on both, but for failing to answer the question you get another five years on the one—so, thank you very much, you get 15 years on the one and 10 on the other. At the heart of it, what you were pursuing was the drug offence.

Mr Alderson—At the moment, for a number of these offences, there is a maximum fine of only \$1,000 and a 12-month jail term. But if someone can withhold enough information to avoid conviction for the 10-year penalty offence by failing to answer, and the maximum penalty for that is only 12 months, there is a significant incentive.

CHAIR—Can you see you are doing what Senator Murray has said you are doing? You started off with the proposition that, for refusing to answer a question now, you only get six months or a certain fine. But the proper point to start off with is: before this legislation, if you refused to answer a question that might incriminate you, that was your right, you were entitled to do that. Do you follow? It is exactly what we were talking about: ratcheting up. Thanks for coming along and you are doing tremendously well, so in no way is this a criticism of either you or Ms Sellick, but it is ratcheting up. It has gone from a situation where you had a right to silence, a right not to incriminate yourself, to the stage where you could get up to six months, to the stage where you could now get up to five years. What was inherent in the common law has now been converted from a right to a very serious criminal offence.

Senator MURRAY—There is a further problem, and that is that you are trading off things. On the one hand, you are saying, ‘They should have been got for 10 years on drugs but they got away with it because they did not answer questions, so now we will make them answer questions, but we will also make the penalty for not answering questions so great that they are going to end up with an equivalent jail sentence anyway,’ but, on the other hand, you still might not have got a conviction for drugs. So they will get the massive penalty for not answering questions when you had not enough evidence anyway, even after that, to pin them for drugs. I just think there is the potential, in the wrong hands of the wrong people for the wrong motives, particularly when it is a political act which can result in a reference, that you could end up with the wrong people in jail for the wrong reasons and the wrong term of imprisonment.

CHAIR—I want to add, before you answer, that what this act is doing is taking the administration of justice out of the hands of the courts and putting it into the hands of the executive. I will tell you why. Up till now, the court would say, ‘You have got a right to silence.’ Remember judges rules? I do not know whether there still are judges rules but in my day there were, when the judge would decide whether you had to answer a question—not under this act—and you could go to whether it was reasonable. Now this legislation has eliminated the judiciary—and that might well be what it is all about—and substituted instead executive action: the DPP, which is an action by the executive; the prosecuting constable, whether he goes on or not. So what you have here is a shift in where the administration of the criminal law is deposited. It is taken away from the judges, to a large extent, and put in the hands of the executive. Can you follow that?

Mr Alderson—There is an issue about which issues should go to a court. The proposal here is that a court should not be making the decision whether there is a reasonable excuse for not answering questions. There is a significant role for the court in considering the substantive charges laid and determining an appropriate penalty. Even with the existing low penalties, the courts have not hesitated to go lower still, where they have thought that was appropriate.

CHAIR—Because they obviously do not like it, and who does? I think the fact that the courts are giving low penalties is an indication that they do not like what is happening, that somebody should not be simply required to produce documents and to answer questions at the will of an executor over whom there is really no control. What the ombudsman found is that there are no penalties on an investigator who does the wrong thing, are there?

Mr Alderson—I guess it depends which wrong thing.

CHAIR—The ombudsman cannot invoke a penalty.

Mr Alderson—I guess it would normally go to a disciplinary matter, unless there was an issue of intimidation of a witness or an attempt to suppress or fabricate evidence in which you might have an investigating official coming back under criminal offences.

CHAIR—Can you see what is happening here? The person does not answer the question and the very fact that he or she does not answer a question gets him or her jailed for five years. The person who can be doing all sorts of unfair things has no penalty at all imposed on him or her. The balance of power is just incredible.

Senator MURRAY—A zealous NCA officer as a result of his actions puts somebody to enormous stress and they have to defend themselves, and they might even get a punishment as a result, but he never faces the equivalent circumstances—never.

Mr Alderson—If the conduct of a law enforcement officer came within a criminal offence—

Senator MURRAY—What the chairman is talking about is executive administrative action which the law permits them to take. In the hands of somebody of discretion and judgment and so on, you might well have ameliorating circumstances. But life is not like that and some people are not like that. Some people are zealots and will take it to its limits. The consequences would be drastic for those so affected. Providing they operate right to the edge within the law, the people acting will not have a consequence. People who get dragged through the courts now have to defend themselves and have to pay a fortune in legal fees. They are then found not guilty. They have gone through a couple of years of stress and they have had to cough up after-tax money to protect themselves. The state does not compensate them in one sense, and the police officer concerned, or the authority concerned, never gets punished because they have just pushed the boundary. These provisions you are allowing just allow that boundary to be pushed that much more. It is just not the right attitude for the citizen.

CHAIR—Can you see what is being said? You can trawl through people's business accounts, you can trawl through their documents and people have to produce all those, answer all those, otherwise five years jail. But the person who is doing the trawling has really got no sanction on himself or herself at all. They can just come and do what they want.

Mr Alderson—The mechanisms are the limitations through the reference system, which means that you are acting without proper basis if you go outside that, the ombudsman review that would come in if this legislation were passed, and, on broader policy questions about the role of the NCA, the parliamentary joint committee and the parliament as a whole. I guess this committee hearing is part of that process.

Senator CRANE—Mr Chairman, I am sorry I am late. This question may have been asked. If it has been, I can read the *Hansard*. Can I take you back before I ask the fundamental question I want to ask. On three occasions the chairman asked you to indicate whether or not the ombudsman could impose a penalty. On three occasions you chose not to answer the question. I want to know why.

Mr Alderson—The ombudsman cannot impose a penalty.

Senator CRANE—That was fundamental to the questions that the chair was asking. My question is on the expansion of the powers in what is occurring and on the rights of the people. My understanding—correct me if I am wrong—is that the genesis of the NCA was drugs, drugs and drugs, and if issues flowed out of that, for example tax evasion, then the NCA had the power to pursue that, but as an adjunct to the drugs issue.

As I read it, the power of the NCA is now being expanded. They can ignore drugs and, say, go to a major tax evasion matter of concern, which the executive can refer as an issue in its own right. I use tax as an example—please tell me if I am wrong. I do not think I am. Under taxation law there are provisions under which people may be prosecuted and pursued through the law courts. Why is it necessary to suddenly—or as part of this creeping process—expand the role and activity of the NCA when, in effect, we applauded some changes in dealing with the major issue of drugs? Surely there is enough for the NCA to do without getting themselves involved in other areas of law where there is not, in the primary claim or proposition, any relativity to drugs?

Mr Alderson—That is a question that we are well placed to expand and give some information on.

Ms Sellick—To clarify the point, the list of relevant offences that the National Crime Authority can currently investigate already includes tax evasion. The amendment that we have done is simply a reformatting of the list of relevant offences that are currently included in the definition of ‘relevant offence’, with two additional measures: perverting the course of justice and money laundering. In section 4, as currently drafted in the National Crime Authority Act, the National Crime Authority can already investigate.

Senator CRANE—But isn’t the prime function drugs?

Ms Sellick—It was organised crime which normal police enforcement activity investigations could not cope with.

CHAIR—What were the original offences? Not the ones that are in the act now—what were the original offences in 1984?

Mr Alderson—My understanding of the 1984 list was that the touchstone was organised crime. Then there was a list which has been added to. That list included drug trafficking, but my recollection is that the overarching concept was organised crime, which did extend beyond drug trafficking.

CHAIR—I think you will probably find that Senator Crane is right: it was drug trafficking that the authority concentrated on.

Senator CRANE—If it were not for the concern about drugs at that particular time, there would never have been an NCA. It seems to be a creeping proposition—under the head of the powers of the executive, not through the normal process of the law courts—which is, to me, quite a significant way of trampling on top of common law rights of people. You might think that sounds a bit strong, but I am not the only one who shares that particular view. When you get into this area, where do you begin and where do you stop? Why do we have an AFP, for example, if this is creeping over the top of it all the time?

Mr Alderson—There are two things to say in response. One, as Ms Sellick mentioned, this list has been restructured to make it clearer what is in here. So in future if things are added or what have you it will be very clear as opposed to the other structure in which it was harder to see those changes. Two, discrete things have been added. In terms of the role of the NCA and the AFP, the NCA has a limited mandate. This arose earlier in our discussion. The AFP initiates its own investigations across a whole range of matters. The NCA has access to these special powers only if a matter is referred to it. It is for an overarching special category of cases that cross jurisdictional lines and so forth, and is really a more limited range than the full spectrum of things that the AFP investigates.

CHAIR—What has been put you is this: if you have got murder and rape—people say that is prevalent—and this body gets a reference, which it might well do, particularly if there is a law and order campaign going around the states, no matter what their political colour, and they give a reference, you have then got a body with extraordinary powers investigating crimes that the AFP have to use DNA testing, and so on, for. So you have got this dichotomy. Here you investigate and solve crime by asking questions under obligations, and if questions are not answered you should jail the people. In the other forces—this is what is being put to you—to investigate crimes of the same sort of nature they have got to go through different processes. If you have legislative creep, why not say, ‘Righto, what is good for the NCA is good for everyone.’ That is a policy question, which I probably should not have asked.

Mr Alderson—This system of going the route of having a different kind of agency with the NCA, the New South Wales Crime Commission and the Queensland Crime Commission was embarked upon in the mid-1980s. It has been pursued since that time on the basis that there were certain categories of crime that the traditional policing forces were not investigating effectively. There always is a question about whether agencies should have equivalent powers, and that is beyond our remit, except that there are those special mechanisms here about the references and the parliamentary joint committee that are different to what, say, the Australian Federal Police is governed by.

CHAIR—They are extraordinary powers, though, aren’t they, in every sense of the word? Perhaps you should not answer that.

Senator CRANE—In all fairness, going back to the purpose of it in 1984, when it all came on, the weighting on drugs and the crime that flows from drugs was a specific target of the process. It has just boomed out and out and out. It just makes you ask some questions—well, I am asking questions anyway. I do not like it. Quite frankly, I do not like it one little bit. It is one thing to deal with drugs and associated crimes from drugs but when you start getting into the private lives of people who do not have the wherewithal, either financially or legally, to defend themselves without an overriding situation of the principles of a court behind them I think it is incredibly dangerous. It is dictatorial.

CHAIR—The Australian Securities and Investments Commission, ASIC, were given special powers but a limited range of powers. We were only going to give them these powers in these circumstances. Now those powers are being used to justify these powers, from the material on this that I have read. Is that right, that ASIC's powers have been used to justify these powers?

Mr Alderson—I would not say they had been used to justify these powers. Often a question a parliamentary committee or whatever will be interested in is what are the precedents and the benchmarks for this approach. That was mentioned in the explanatory memorandum, because that is a question that often arises: 'Has this model been dreamed up for this, or is there some basis?' But the argument for having it in the National Crime Authority legislation stands on its own. It is a relevant consideration that ASIC have this legislation. The other committee that has looked at this bill invited a representative of ASIC along to talk about the way in which that power had operated. I might say the ASIC legislation is not the only Commonwealth legislation that has gone to that more limited use only immunity. To go to some of the broader questions and comments that have been made—

CHAIR—Before you do that, why shouldn't the Federal Police come along five years from now, when unfortunately the personnel on this committee have gone and there are new ones, and say, 'Look, the National Crime Authority has got this power. ASIC has got this power. Why shouldn't we have the power?'

Mr Alderson—Ultimately, if an agency puts forward proposals to amend its powers at some future time I guess that will be a matter, in the first instance, for the relevant minister, the relevant government and the parliament. I guess the NCA ethic type of model is quite a different model from the traditional police force model. As you say, there is a process whereby different law enforcement powers issues come before the parliament and I guess each one has to be looked at on its merits.

Senator MURRAY—In the history of government—I mean even in your experience—has there ever been an agency or a force or an authority which has said, 'Hello, Mr Bureaucrat,' or 'Hello, Mr Minister,' or 'Hello, Mr Parliament, I want fewer powers?'

Mr Alderson—There are some agencies that say they do not want certain powers because it may limit their standing in the community.

Senator MURRAY—But when they have got powers, does anyone ever reduce them? I do not think so.

Mr Alderson—I guess there are—

Senator MURRAY—People who take powers away tend to be parliaments and sometimes governments who re-order or re-administer. The point the chairman is making is: when you set a precedent that precedent will be taken up by others and they will seek to make it a norm not an exception.

Mr Alderson—There are processes by which powers are brought within greater regulation—one example, I guess, being that there is already a hearing framework in this legislation now with the ombudsman's review. Another kind of example would be, say, the detention and questioning provisions in the Crimes Act. In practice, police had always pulled people in for questioning, but that 1991 legislation included a whole series of rules about interviews, and so forth, that sort of laid down a regulatory regime as to how those powers would be exercised.

Senator MURRAY—I bet it was not the police who proposed those changes—that is the point I am making.

CHAIR—I suppose you cannot blame law enforcement authorities for asking for more power. I do not think that is their problem. It is proper and right that they should ask for more. But I think as parliamentarians we have got to do something. We just cannot put up the hand every time we are asked.

Senator CRANE—Which committee is it that reviewed and altered this?

Mr Alderson—The parliamentary joint committee on the NCA.

Senator CRANE—In that process, was it ever tested against our terms of reference? They are terms of reference which have been adopted by the parliament as a process we are required to go through before we allow legislation through the Senate. Do you know whether there was any measurement or testing or anything done in terms of picking up what you are putting forward? At least on two, if not three instances, I would say you are in breach of those terms of reference—not you personally—in terms of this legislation before us.

Mr Alderson—No. I guess the parliamentary joint committee has its terms of reference and I am—

Senator CRANE—No, I am not talking about them; I am talking about yourselves. When you are drafting this and putting it together do you take into consideration the various terms of reference that have been established by the parliament in terms of bringing legislation before us?

Mr Alderson—In fact, yes, and more broadly, one role our branch plays in assisting the Minister for Justice and Customs is looking at law enforcement legislation not only in this portfolio but also in others. One of the things that we do is to draw this committee's views in terms of reference and different issues to the attention of policymakers.

Senator MURRAY—Did you draw their attention to the excellent report by this committee on warrants, for instance?

Mr Alderson—We certainly do.

Senator MURRAY—Have the provisions from that report been included in this legislation?

Mr Alderson—They have not, but certainly the entry powers report is one that we frequently draw to agencies' attention.

Senator MURRAY—But you are providing this legislation. You would have had the opportunity to adopt some of those principles that were established in that report if you, as a department or a government, were responsible for them. But those principles we laid down in fact restrain and regularise the use of warrant powers. All you have done here is sought to extend warrant powers to another class of people who can offer them without attending to any of the other recommendations which were made after very considerable evaluation of all the alternative prospects. That is what worries me about this. Behind Senator Crane's question is a feeling that you do not respond to where the parliament wants to go; you merely respond to where the government wants to go.

Mr Alderson—I guess the government, in making its decision, has a number of things to do in relation to the reports of this committee. The thing that initiated this bill and where a number of the recommendations come from is an earlier report of the parliamentary Joint Statutory Committee on the National Crime Authority. I guess those considerations are all part of the context in which the government makes its decision.

CHAIR—There is a matter I would like clarified. There are some provisions in there about people being present and the ability of the person being examined to note the presence of those people but not do anything about it. Can you tell me what that is all about?

Ms Sellick—It implements a recommendation from the third evaluation of the National Crime Authority to simply clarify that, during a hearing process, a person who the National Crime Authority allows to be present during a hearing is noted to the witness who is giving evidence.

CHAIR—It is a pretty formidable business. I do not necessarily expect you to answer this, but say that we suddenly locked you in here, questioned you about everything in your private and business life and things like that and were not going to let you out until you answered all and sundry. Can you understand that that might put you in a fairly invidious position where the balance of power is very much our way and not so much your way? Have you ever been to an estimates committee when some of our fellow senators—not us—were in full flight?

Mr Alderson—I guess that comes down to the fact that with any law enforcement body there will be a range of people who come within its investigations, from those who find the experience intimidating to those who are quite hardened criminals and who are looking for opportunities to manipulate the system.

CHAIR—For the ones that are not hardened criminals—or even for the ones that are hardened criminals, I suppose, because if the law is fair it will respect the rights of the ugly as well as the rights of the beautiful—that is a terrible thing, in a way, yet there is no ability at all for those people to go off to the court.

Mr Alderson—The NCA would say, I think, that it is not in the interests of effective law enforcement to intimidate or harass shy witnesses who come along and are not quite sure how to help out or how to deal with the situation; that they need to get information from those people by, to some extent—

CHAIR—But can you see what you are doing? You are leaving the judgment, just as senators exercise judgment as to how they are going to ask questions and whether they abuse witnesses—not that they do, of course, but if they were tempted to—

Senator MURRAY—Some do.

CHAIR—The senators are in control. Can you follow? What you are saying is, ‘We can trust the questioners. They’re not going to be like the senators; they’re going to be decent people. If they see the witnesses are a bit shy, they’re going to take that into account.’

Mr Alderson—I am not sure that this bill is creating or markedly changing that situation. I think it would be very unlikely that you could argue a reasonable excuse on the basis that you had been questioned aggressively.

CHAIR—You could argue it, but you might not be successful. But you can get out of there by arguing it. Can you follow? You can go to the court.

Senator MURRAY—At present.

CHAIR—Yes, at present. You might not be successful but you can get out of there and you can go to the court. Here you cannot get out; you are locked in.

Mr Alderson—Likewise, under the existing regime, you can get out of there and go to court and hold up the process, if you have information that is relevant to the investigation that you do not want to divulge.

CHAIR—And that is what you are saying, exactly. I think you have made the point. What you are saying and what this legislation is saying is that it is better to have injustice done to the person being questioned than to have people escape the law. It is the exact opposite—and you have put it perfectly—of it being better for 10 people to escape the law than to have one convicted wrongly. You are turning it around the other way—and, when I say ‘you’, I mean the system is turning it around the other way—and saying that it is better to get 10 innocent people than to let one who is guilty escape.

Mr Alderson—I understand the point that you are making, but there is a question of whether being required to answer a question is an injustice. That is a question to be considered. I do not know that it necessarily follows that—

CHAIR—Exactly. This is the point that we are making. There is a sea change in all this. The common law says that it is and now this legislation says that it is not.

Senator MURRAY—It is common law based on centuries.

CHAIR—In listening to you, you have made the point very well. Thank you.

Mr Alderson—Ultimately, your substantive guilt or innocence of misconduct is a matter for the courts.

Senator MURRAY—That is what we say.

CHAIR—That is right, exactly.

Senator MURRAY—We say that you should be able to give a reasonable excuse, and, if it is not reasonable, you get punished.

CHAIR—That is right.

Senator MURRAY—If a bokie says that they will not answer the question, and it is not reasonable, then the judge can say that that it is not reasonable. But if a woman says, ‘I do not want to answer the question because I am scared that they are going to come round and beat me up,’ then that is pretty reasonable. That is all that we are saying. That is why we have courts, and a court is a public process. What you are talking about here is a private process which is not open to any kind of public interpretation. The analogy that the chair gave about Senate estimates is wrong in one respect and that is, if senators behave badly, people watching those transmissions and people reading the transcripts and opposing political parties can raise the issue and, in that sense, there is a test of publicity. The great feature of our judicial system is that it is public and people have that opportunity. You are talking here about private executive action in a cold, dark room where the assumed offence automatically produces the punishment. It is just wrong.

The trouble with Australians is that they have not experienced the kinds of societies where this abuse goes on. You always assume that you can trust the executive and they are going to be right at the end of the day. I have lived in countries where you cannot trust the executive and you cannot trust the agency. You give them these powers and you end up with massive abuse. You cannot foresee the future in Australia, and you cannot foresee the kinds of politicians who will end up in our parliaments or the kinds of people who will run our institutions and authorities—you cannot. If you give unwarranted powers and authorities, and if you change the nature of the common law protection, which has come to us through a long history of oppression of the ordinary person, you are going to end up with a problem. It is an attitudinal thing that we are dealing with here. Excuse the strength of my remarks; they are not directed to the two of you but directed to the nature of the problem we see in the bill. You are defending a policy position, but I think those who have come to the policy position have not properly tested this against a bedrock of principle, and the principle is simply that people have the right to protection when they are faced with the might of the state.

Senator CRANE—I want to follow up on that. I made the point before that there are certain things happening that, as a committee, we do not like. I guess I am the most active government member on this committee, and there are other forums in which I can debate it. We hear what you say and the various debates that go on, but one of the things that really concerns me is that we as a committee, at the request of the parliament and some urging from the government, have brought down two reports—one on the appropriateness of jail sentencing, the other on search

and entry; and I understood you to say that you did look at that and take it into consideration—yet we have not had a government response to either of those reports. I have personally pursued it with the Attorney. Those reports happened because of our concern as a committee and the parliament's concern, in approving the terms of reference, about the expansion of the power of the executive. Funnily enough, the report on the appropriateness of sentencing came out of the productivity bill, of all things, but the principle is exactly the same.

As a member of the government who has put a fair amount of effort, as my colleagues on the committee did, into putting together what we think was a good report that was well received—the search and entry one was very well received when it went to the AFP—I sit here and ask myself why we do not yet have a response from the government saying whether they do or do not support the principles we put down, in both those instances, or that we need to vary this and that. There has not been that form of dialogue. It just seems that the bureaucracy behind the scenes are charging on anyhow, regardless of the fact that we put those two reports down. I want to make that point at this time.

I also want to emphasise—and I think you have already picked this up—that this committee is not exactly happy with where we are at as far as this legislation is concerned. I doubt very much whether the joint committee considered some of the issues that we have considered. That is why I asked you: did you measure this against the terms of reference which we have been commissioned to operate under. I would be very interested, if it can be done, for you to do your own test against the terms of reference under which the Senate and the parliament operate.

Senator MURRAY—For two decades.

Senator CRANE—If you continue not to respond to those two reports and take into consideration what is under our terms of reference when legislation comes before us, you are going to continue to get hostile responses from this committee. I want to put that on the public record.

Mr Alderson—I want to quickly respond on those two reports. On the penalty levels, my understanding is there has been a government response that Senator Vanstone wrote to the committee some time ago.

Senator MURRAY—It is not a tabled report.

Senator CRANE—It is not a tabled response.

Mr Alderson—My understanding was that that constituted the government response to the report.

Senator MURRAY—We have not seen an official—

CHAIR—That is your understanding?

Mr Alderson—Yes, that is my understanding. Also on penalty levels, there is more work being done to try and bring penalty levels into line in Commonwealth legislation in the last 10

or 20 years than ever before, in particular through the Criminal Code process, where something like 163 different offences with different penalties—

Senator CRANE—That is good and fine, and I do not want to interrupt your flow. But in terms of the processes here, so that we know where we are at as a committee and where we have got to go in the future in dealing with these things, it is not likely that any government is going to agree, regardless of who is sitting at this table, with everything that comes out of a committee report. Sure, as the secretary has confirmed, Senator Vanstone did write a letter. But as far as I am aware—and I could be wrong—there has been no official government response that has been tabled in the parliament.

Senator MURRAY—Perhaps you could check for us.

Mr Alderson—That is a point we can check.

CHAIR—I think you will probably find that is right, that there has not been.

Senator CROSSIN—To the search and entry report?

CHAIR—No, there was a penalties one.

Senator MURRAY—Definitely not to the search and entry report.

CHAIR—Certainly not for the search and entry.

Senator CRANE—The one on the appropriateness of jail sentences—I forget the exact name of it. One flowed from the other and they fitted like gloves.

Mr Alderson—In fact, Senator Cooney has written to the Attorney-General in relation to the status of the government response to the entry powers report. Without wishing to foreshadow the Attorney-General's response, because the report took such a comprehensive approach right across government, rather than being a report on a specific piece of legislation, there has been an extensive process of consultation with all Commonwealth agencies with the objective of the government reporting back in a coherent manner right across portfolios.

Senator MURRAY—That is fair enough. I think the point you are making, not unknowingly or unwittingly, is from our perspective this: this committee tries to operate against principles. That is why it is a non-partisan committee. We do not have votes, we do not have minority reports and we do not split, because we operate against principles which the parliament has established for us and which we have developed by precedent, and that is our reaction to this bill. If you look underneath what we are saying, it is we establish certain principles and we think this bill fails the test of those principles which we have established. The proposition put to you by both the chair and the deputy chair is, 'Did you, as a department, in turn know that and test the bill against the principles that we have?' I suspect your answer is no and that you tested it against the NCA committee's report, which is perfectly reasonable.

Mr Alderson—No, it would be fair to say that the principles against which this committee operates are taken into account in formulating this kind of legislation. Ultimately, that is one thing the government will take into consideration; the further evaluations and other issues to do with NCA operations are another as part of the policy development process.

Senator MURRAY—We would probably get into debate, but if I said to any government department, ‘Are you alert to the dangers of retrospectivity?’ they would certainly say yes, because they are. It is front of mind. If I said to them, ‘Are you alert to the rights, liberties and protections our citizens enjoy?’ they would say, ‘Oh yes,’ but it is in the general sense. I will just leave it there I think—you understand where we are coming from.

CHAIR—Thank you very much for coming along, answering the questions and bringing matters out.

Mr Alderson—I would like to thank the committee for the opportunity to appear and have this dialogue.

Committee adjourned at 5.53 p.m.