COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Reference: Involvement of the National Crime Authority in controlled operations

TUESDAY, 17 AUGUST 1999

BRISBANE

BY AUTHORITY OF THE PARLIAMENT

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**

JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Tuesday, 17 August 1999

Members: Mr Nugent *(Chair)*, Senator George Campbell *(Deputy Chair)*, Senators Denman, Ferris, McGauran and Stott Despoja and Mr Edwards, Mr Hardgrave, Mr Kerr and Mr Somlyay

Senators and members in attendance: Senators George Campbell, Ferris and Stott Despoja and Mr Hardgrave and Mr Kerr

Terms of reference for the inquiry:

(a) the extent and manner in which the NCA engages in controlled operations;

(b) the appropriateness of the approvals process for the NCA's involvement in controlled operations;

(c) the civil liberties implications; and

(d) the adequacy of relevant national and state legislation in relation to the conduct of controlled operations by the NCA.

WITNESSES

BAINBRIDGE, Mr Mervyn, General Secretary, Queensland Police Union of Employees 112

BEVAN, Mr David John, Director, Official Misconduct Division, Criminal Justice Commission 89

BUTLER, Mr Brendan John, Chairperson, Criminal Justice Commission 89

CARMODY, Mr Tim Francis, Commissioner, Queensland Crime Commission 76

McCALLUM, Mr Colin Malcolm, Detective Chief Superintendent, State Crime Operation Command, Queensland Police Service 110

McDONALD, Ms Evelyn Anne, Detective Inspector, Covert and Surveillance Operations Group, Queensland Police Service 110

O'GORMAN, Mr Terry, President, Australian Council for Civil Liberties 98

Subcommittee met at 9.38 a.m.

CHAIR—Can I call the meeting to order and declare open the second public hearing of the parliamentary Joint Committee on the National Crime Authority inquiring into the involvement of the NCA in controlled operations.

The hearing today, as was yesterday's in Sydney, is being conducted by a subcommittee to which I have been appointed chair. The committee chair, Mr Peter Nugent MP, is regrettably unable to be with us today because of a pressing commitment elsewhere.

The committee intends to hold three hearings with the third hearing scheduled to be conducted in Canberra on 27 August, at which evidence will be taken from a range of experts on the topic of controlled operations, including from law enforcement agencies, police federations, civil liberties groups and academic commentators. It is hoped that we can present our report to the parliament by the end of October.

We are starting today's hearing with Mr Tim Carmody, Commissioner of the Queensland Crime Commission. I note that this is the first occasion that Mr Carmody has appeared before this committee since the QCC's establishment. I am pleased that we now have this time to meet. Welcome Mr Carmody.

[9.39 a.m.]

CARMODY, Mr Tim Francis, Commissioner, Queensland Crime Commission

CHAIR—Mr Carmody, the committee prefers all evidence to be given in public, but you may at any time request that your evidence, or even part of your evidence, or even the answer to a question be given in camera, and the committee will consider any such request.

We have received your submission and the committee has already agreed to a request that it be kept confidential. If at any stage you form the view that the confidential status is no longer required, we would welcome your advice in this respect. I now invite you to make an opening statement before we move to questions.

Mr Carmody—Good morning. Thank you very much. I would like to take the opportunity of making an opening statement, if I may. First of all, can I say that the Crime Commission welcomes the examination of controlled operations legislation as an integral part of the evolution of law enforcement in Australia. Good law enforcement is essential to a free society. It is also the most basic of all civil liberties because without it society will in time be altered to the point where those individual rights theoretically continue to exist but they are devalued and eroded because of the state of the society in which they are exercised.

Covert investigative techniques are often the most efficient, effective and, in the case of the more virulent strains of criminality such as organised and major drug related crime, the only practical way of obtaining evidence for the purposes of prosecuting and convicting those responsible. Sometimes the only viable investigative stratagem will necessarily involve trickery, deceit, subterfuge and even official instigation and inducement of crime. In those cases, an unrealistically strict requirement of observance of the criminal law hinders the law enforcement effort.

While there are definite limits on the power of law enforcement agencies to manipulate people and events in the discharge of their investigative functions, without unambiguously clear legislative guidelines and well defined boundaries the borderline between what is and is not acceptable in this area is unsatisfactorily uncertain. Controlled operations legislation is needed to balance the competing public interest objectives of detecting and convicting the guilty and protecting the integrity of the criminal justice process.

It is unacceptable that covert operatives, whether they are sworn or unsworn, are expected to risk their safety and often their future careers in the performance of a difficult duty because they do not have the legislative backing needed to protect them against potential prosecution in respect of the investigative action that they take. It is equally unacceptable that evidence obtained by undercover operatives should be at risk of exclusion because of technical though necessary breaches of the criminal law.

One thing is clear. Organised criminal activity cannot be effectively countered or eventually defeated unless law enforcement is given the power, resources and support it needs from government, or until the community as a whole becomes less ambivalent in its attitude towards and more hostile in its stance against the threat of organised crime. Law enforcement has to fight fire with fire, but the law makers have to fireproof the firefighters.

Controlled operation arrangements which are practical, workable, integrated and coherent and—ideally—uniform across the country is the best way to achieve that outcome.

The National Crime Authority plays a pivotal role at the national and international level in the fight against organised crime and drug trafficking. It operates from a national perspective across jurisdictions and coordinates the national effort with state based partner agencies like the Crime Commission in Queensland. It needs to be able to issue its own controlled operations authorities in respect of a broader band of criminality and for a longer period than it can under existing arrangements. The overall law enforcement effort in Australia would be considerably enhanced if uniform legislation based on the New South Wales model was introduced.

Finally, it is important to bear in mind that the Queensland government is currently considering a joint agency proposal led by the Crime Commission advocating the introduction of a controlled operations scheme in this state, and nothing I say here is intended to re-argue the merits of the case made out in that proposal. And I expressly do not want my comments or testimony to be seen as the opportunity being taken to use these proceedings as a forum to advance the Crime Commission's own cause. My testimony is intended only to assist this committee with its consideration of matters relevant to the involvement of the National Crime Authority in controlled operations. Thank you.

CHAIR—Thank you, Mr Carmody. It might be helpful to my colleagues on the committee if you could just explain to us the work that you do with the NCA, how strong the links are with the NCA, and perhaps also if you are able to comment on any lack of efficiency or effectiveness in relation to some of that work that has been brought about by the lack of your legislative framework.

Mr Carmody—Can I just start by telling you a little bit about the role, functions and powers of the Crime Commission?

CHAIR—Please do.

Mr Carmody—The Crime Commission is a hybrid, I guess, of the New South Wales Crime Commission and the National Crime Authority. It is a state based law enforcement agency that specialises in organised crime, major crime and criminal paedophilia, and the criminal paedophilia jurisdiction is an historical one. It was established largely because of the parliamentary perception that the effort in respect of organised crime and criminal paedophilia had been lacking and that a specialist agency was needed. It operates strictly on a referral basis in respect of organised crime. It is managed by a committee of nine, which I chair, which also consists of the chair of the National Crime Authority, the chair of the Criminal Justice Commission, the chair and deputy chair of the Parliamentary Criminal Justice Committee, the Children's Commissioner and two community representatives, and the Police Commissioner.

CHAIR—Can I just stop you there and ask you whether you have a view about television coverage—television footage?

Mr Carmody—I have no objection to it. My wife thinks I have a good face for radio, but I am comfortable.

CHAIR—I am sorry to have interrupted you. Please proceed.

Mr Carmody—That is the constitution of the management committee. Importantly, matters can be referred to the Crime Commission only where they satisfy statutory criteria: firstly, that the powers and methods ordinarily available to the police service are inadequate to deal with the matter and to investigate effectively and, secondly, that it is in the public interest that the matter be referred to the Crime Commission. In assessing whether or not it is in the public interest, there are a subset of statutory criteria that have to be satisfied essentially having regard to the seriousness, continuing nature and likely social consequences of the matter not being referred.

The management committee is by name and nature exactly that. It has the power to limit the use of Crime Commission powers and to oversight its performance generally. It has access to its general operational information and can receive complaints about its performance or other concerns raised by members of the public. We have two fundamental functions. One is to investigate deferred matters. The other is to establish and maintain an intelligence service that is capable of predicting criminal trends and devising strategies of dealing with them.

Organised crime is defined in our legislation to include activity that involves two or more people, a serious indictable offence attracting at least seven years in imprisonment on conviction, an objective or motive of profit making and a sophisticated well-planned approach. Major crime, on the other hand, is any criminal offence attracting 14 years imprisonment on conviction.

The conception that the Crime Commission takes to organised crime and its operational area is that it is a market based activity that has two sides—the demand side and the supply side. There is nothing much that law enforcement can do about the demand side. That is a social and government problem. It can do what it can to restrict the supply side and disrupt the business activity of organised crime. Essentially, the approach we take, together with the National Crime Authority, is one of attacking the profit motive and profitability of organised crime—based on the theory that if it is too hard to do business here profitably, the organised criminals will not operate in this place. They will look for some other place that is not as highly regulated where law enforcement activity is not properly directed and where there are weaknesses in the social structure that allow it to spread.

That brings me to the relationship between the National Crime Authority and the Crime Commission. As I said before, we do not have controlled operations legislation in this state. Where the National Crime Authority is involved in joint or collaborative arrangements with the Crime Commission, that represents a gap in its ability to track offenders from other states across the borders into Queensland.

Mr KERR—That would not be the case in relation to drug activities, would it?

Mr Carmody—No.

Mr KERR—Because the National Crime Authority's legislation extends to deal with state based offences.

Mr Carmody—That is true.

Mr KERR—So, essentially, you are discussing other activities.

Mr Carmody—That is right. It is in the context of broadening the scope of the range of offences that can be the subject of controlled operations beyond simply narcotics related offences. As I said, because it is a market based activity, it operates and reacts to changes in circumstances on the political, social and economic fronts, as any other business does. It looks for a lack of regulation, where there is a law enforcement deficiency or defect.

Money laundering in particular is one of those offences that is symbiotic with any organised criminal activity, whether it is drug related or not. Fraud is a growing and often unrecognised threat in the organised crime context. Then there are activities of loose confederations of criminal organisations that do not adhere to state borders. So the gaps are in respect of non-narcotic based offences in jurisdictions which do not have complementary legislation for the National Crime Authority.

The relationship between the Crime Commission and the authority is close. The chair of the authority is a member of the Crime Commission's management board. This is essential for the exchange of information and dissemination of intelligence that is relevant to matters that the National Crime Authority may be investigating. We are a member of international task forces and, as a result, we get access to nationally held information that impacts on Queensland. We contribute what we can from the state level.

The National Crime Authority really has developed to become the coordinator of the overall law enforcement effort and it cannot do that as effectively as it could if it had different legislative regimes to operate. Some states have a form of controlled operations legislation and other states have none. The states that do have controlled operations legislation are different from other states.

CHAIR—Is there a particular state whose legislation you favour?

Mr Carmody—The New South Wales model—subject to the untabled review of its legislative arrangements—I think, is the most preferable, from two points of view. It covers a wider range of offences. It also has a better accountability regime. That is important if you want to ensure that good law enforcement is not bought at too high a price. You have to be sure that the line is drawn, not only legislatively but operationally, at the right place. That is always difficult. There always has to be an area of discretion. The idea is to make sure that those exercising that discretion know that their discretion has to be transparently examinable and reviewable and that they will be accountable for the decisions they make. The experience is that that has a disciplining effect. If you know that you will be called to account, you will exercise the discretion you are given so that it will withstand scrutiny. That has been the practical experience since the introduction of both the Commonwealth and New South Wales schemes.

CHAIR—Yesterday we were presented with some argument by both the Council for Civil Liberties in New South Wales and also, somewhat surprisingly I thought, the Law Society of New South Wales, both of whom are opposed quite strongly to the New South Wales legislation on the basis of increased police powers. What do you say to the comment that both of those bodies would prefer to go back to the pre-High Court Ridgeway judgment legislation?

Mr Carmody—What will happen there is that you will have operatives who take risks, stick their necks out to enforce the law and be left unprotected by the legislation. That is the real problem. We as a society are really asking those civilians and law enforcement officers who do this difficult and dangerous work to do something that no-one else in society is expected to do, and that is, to act nobly and in the best interest of pursuing law enforcement objectives, without the protection. You do not send firefighters in to fight a fire without fireproofing them. You do not send law enforcement officers into a dangerous situation without bulletproofing them.

This is all this legislation does in a different context. It bulletproofs and fireproofs those operatives who operate in isolation. They have to make discretionary calls. They are trying to present themselves to criminals as a criminal. It is like the dark; if you want to be accepted as a criminal, then you must look like one, talk like one and act like one.

Mr HARDGRAVE—Mr Carmody, can I take that point up. Would it be the case, in your judgment, that the criminals understand the laws perhaps best of all and are literally—to use the well used old phrase—'one step ahead of the law' and the police, law enforcement agencies, support agencies, crime commissions, crime authorities are always playing catch-up?

Mr Carmody—We are playing catch-up at the moment. That is the difference we are trying to make here. We are trying to stop playing catch-up. We are trying to move from a purely reactive approach to a more proactive one. We cannot do that unless we infiltrate the classic secret organisations. We cannot infiltrate unless we can put people, whether they are sworn or unsworn, into the places where we can get out the intelligence we need to devise strategies and directions.

Mr HARDGRAVE—But help us, though, with this legitimate problem that all members of a free society would have concern about and that is the question of an erosion of private individuals' liberties. Help us understand that what you are proposing here in Queensland, based on the New South Wales model, will not erode individual human beings' liberties. Is it down to a simple 'If you are not involved in criminal activity, you have nothing to fear.'?

Mr Carmody—It is partly that. But the coercive and intrusive power of the state is already employed through listening devices, telephone intercepts and such things. They are much more intrusive and coercive than this. It is difficult to see really how this threatens civil liberties. As I said in my opening statement, good law enforcement is the most basic of all civil liberties because, without it, the civil liberties and the individual rights you otherwise have will be diminished to the point of being valueless unless you can have them protected by good law enforcement.

Senator GEORGE CAMPBELL—You do not have any law at the moment in Queensland covering controlled operations. What impact does that have on the current police force in terms of their activities in this area in dealing with organised crime? Is it an impediment to them?

Mr Carmody—Yes.

Senator GEORGE CAMPBELL—Do they take an unnecessary risk in terms of operating in these sorts of shady areas, if I can use that term?

Mr Carmody—There are a number of things that the absence of controlled operations involves and that is that those who operate in the infiltration of criminal organisations do not have immunity against potential prosecutions for being involved, whether it is counsellors or principals, in criminal activity. That makes recruitment difficult. It is hard enough on covert operatives. The work they do is hard enough. If you wanted to put on top of that the risk, and it is a real risk, it is a perceptible risk, that having done all that they can for their state, they still may well be charged with doing their duty because it involved the commission of a criminal offence, whether it is ancillary to the principal offence or not. That makes recruitment difficult.

It also makes the exercise of discretion in difficult situations a very complicated process. You have to decide there and then whether you are going to take one course of action or another. What we need is covert operatives who will take the courageous step that will, in the end, fulfil the objective. There is no point if you are concerned and looking over your shoulder worrying that the very law that you are trying to enforce will turn against you and bite you. You may make the wrong decision and you may defeat the very objective that you go in there for and take the risks for. So they are practical impediments.

The other thing is that in those cases where an offence, or an element of an offence, is committed by the law enforcement agency rather than simply evidence being obtained improperly, that evidence is not only at risk but almost inevitably going to be excluded without this sort of protection. There are the different types. There is the illegally procured offence, which this legislation protects, and there is the illegally procured evidence, which is subject to the common law, public policy discretion, as it always was.

If you leave the illegally procured offence subject to the public policy discretion as it was before Ridgeway, the High Court said in Ridgeway that it will almost always be excluded, as it was in that case. Ridgeway was an extreme case. The High Court set out the criteria as to why it rejected the evidence in that case, and that is because it was a grave contravention. It was an international importation of heroin. Even though they thought that it was legitimate, it involved the highest level of law enforcers; and there were various reasons why that was—and the High Court characterised it as such—an extreme case. Extreme cases are never a good point of reference for making legislative calls. What you have to look at is the routine case. In the end we have to work out whether this law does more social good than harm. If it does, then that answers your civil liberties complaint.

Senator GEORGE CAMPBELL—Do you have practical examples where police activity has been impeded as a result of not having laws covering controlled operations? I

am not asking for specifics of any situation, but are there examples that you are aware of where this has occurred?

Mr Carmody—Yes. I can tell you this in a general way. In making decisions with joint partners as to whether or not we will use an undercover operative in a particular operation, the absence of controlled operations legislation has meant that we have not taken the risk either with the person or with the evidence that is likely to be obtained, and we have had to look at less efficient and riskier ways of obtaining the same evidence. Can I say that sometimes it actually involves more intrusion on ordinary people who might be more remotely connected with the criminality.

What we are trying to achieve here is to go directly to the heart of an organisation through infiltration instead of going around the long way using intrusive devices to find our way through there. If we have inside information, as some of the stockbrokers will tell you, although it can get you into trouble, it is invaluable. Information is power. The closer to the source you are, then the better chance you have of achieving efficient and effective results.

Mr HARDGRAVE—But what sort of evidence are you trying to get? Is it complementing evidence based on something to seal the deal, or are you trying to get almost like an organised entrapment of an offender?

Mr Carmody—Entrapment would not be protected by this legislation. It is specifically excluded. We are trying to understand who the people are, who is operating this business, who is connected with it, who are the lower players and who are the higher players. You cannot do that unless you are in the team. It is like a game of football. Everyone can see what the five-eighth is doing because he is out there on his own. But no-one knows what the second rower is doing in the scrum. What we want to do is get in that scrum so that we can see what is happening, who is doing what and where the networks are, who the personnel are. We can build a picture then, not only of specific criminal activity but of how it works overall across the states and across the country, where they are connected, across borders. It is really unrealistic for people to think that each state has its own independent criminal environment where there is no overlapping with other states. Obviously, most of the heroin that comes into this country comes in through Sydney where it is distributed.

Mr HARDGRAVE—You would be satisfied that disclosure, a paper trail, is a sufficient safeguard?

Mr Carmody—It is certainly part of it, but you need to know whose records you want. Where you come out in a case depends very much on where you go in. If you go into the heart, then you will know whose records you want. If you do not know, then the paper trail does not help you because you are starting at the wrong end of it.

CHAIR—By paper trail, I think Mr Hardgrave might have meant a paper trail of assurances and counterchecking before the operation actually takes place.

Mr Carmody—I am sorry; I thought you meant the money laundering context.

Mr HARDGRAVE—You cannot have well-intentioned mavericks or—what was it called yesterday—entrepreneurs within the law enforcement agencies taking it upon themselves to decide that doing some sort of controlled operation will trap this bloke: 'I have been trying to nick him for this but I will do that and we will get him.' It is a bit like *The Untouchables* treatment in Chicago in years past.

Mr Carmody—Obviously, you have got to guard against that. Those sort of people are as big a danger to law enforcement as they are to society generally.

Mr HARDGRAVE—So disclosure of these controlled operations, keeping an absolute, obvious record—

Mr Carmody—Keeping them out in the open. Anyone with a secret is a danger to himself, the organisation he works for and society generally. What you need to do—and this is really what the controlled operations legislation does more than anything—is control law enforcement action which was previously, before Ridgeway and before the legislation, uncontrolled. The risks were taken unseen and often undiscovered, and the results were achieved.

This is truth legislation. It is saying that we acknowledge that, if you want to get these outcomes, you are going to have to do these things, involving subterfuge, deceit, trickery, infiltration, and sometimes the commission of criminal offence by the state through its agencies. We acknowledge that because, if we do not do that, organised crime is going to spread. The only way we can combat that is to conduct our investigations in this way. But they are not going to be able to be conducted in an uncontrolled way, and that is why the legislation is called Controlled Operations. It has got to be controlled at a level where the control is effective and where accountability can have an impact if something goes wrong.

Given that experience is the best predictor of future performance, the experience in the states that have this legislation is that there has been no adverse comment that I know of by the judiciary of the way it is being used. That has got to say something about its effectiveness not only as a law enforcement weapon but also as an accountability mechanism for how law enforcement is controlled so that it delivers its product without undue—and 'undue' is the important word—intrusion into civil liberties. There will always be intrusion into civil liberties in law enforcement. There is a natural tension between the two. What you have to guard against is unacceptable, intolerable, unnecessary intrusions into civil liberties. There will be a compromise. What you have to achieve is the minimum possible compromise of civil liberties.

CHAIR—How much would your operations change if you were to have the New South Wales legislation operating in Queensland? Would they change substantially, exponentially or what?

Mr Carmody—They would change substantially. The approach we would take would be different. It would be more efficient. We would be able to contribute much more to the national effort than we can currently. We would be more of a partner than a host of somebody else and we would be more involved in what is happening nationally, because we

could offer the same protection and have the same regulatory regime—or, if not exactly the same, at least comparable.

Senator GEORGE CAMPBELL—How far are you down the legislative track in getting this?

Mr Carmody—Here? The government is giving consideration to a proposal we have made to it now. That is as much as I know. That is why I am concerned about what I say being misinterpreted as an attempt by the Crime Commission to push its own barrow. It is not that at all. I want to make sure that I restrict my comments to the National Crime Authority's involvement in controlled operations.

Mr KERR—But you would actually be in an unusual position, in the sense that this state now is the only state which does not have some form of controlled operations legislation. I do not know about the territories.

Mr Carmody—Certainly. The Territory has some protection for operatives, but it does not have control legislation as such. We do not even have protection for operatives, except at the very lower level in the—

Mr KERR—But you would have the experience of working with controlled operations, because you would presumably have joint operations with the National Crime Authority in which your law enforcement personnel become subject to controlled operations.

Mr Carmody—That is true. Where they can go, we can go—if we are a member of their task force. But we cannot go further than they can go; and New South Wales can, if New South Wales wants to give a certificate—and that is the gap at the moment.

Mr KERR—Just testing this issue of where the boundaries of civil liberties lie, the law society put a passionate case yesterday that you could undertake sufficient activities consistent with law enforcement obligations without such legislation. They contested the argument that undercover work would be made so difficult as to damage its effectiveness. You obviously are in a position to see two environments: the effectiveness or ineffectiveness of the different approaches, both operating within the single jurisdiction that you have. Have you any comment in relation to those submissions?

Mr Carmody—It is difficult to be helpful in a practical way without knowing exactly what their counterproposal is and how, in an operational sense, they suggest that we can do it better without needing the protection of this legislation. The reality is stark. It is simple. The reality is that the High Court said that, if you commit an offence in the course of investigative action, for the purposes of prosecuting those who get caught up in that criminal offence, it will be excluded. That is it. That is the bottom line of Ridgeway.

Society, and the parliament as representatives of society, have to make a decision: is this an acceptable outcome? Obviously, at Commonwealth level and in the other states, those parliaments have said, 'No, that is not.' There are occasions, rare as they may be, where you need to commit criminal offences to catch a criminal. The social outcome is better than it would otherwise be. That is all I can say in reply to that without being able to give

operational examples—which I would not want to give in public—or experiences, or without knowing precisely what investigative stratagem the Law Society of New South Wales has been able to devise, that we have not been able to devise, that is a more efficient and effective way of going about our business.

If they could do so, I would be very happy to receive it. If they were right, I would change my mind. I would change my evidence. I would say, 'They knew more about it than I did and I'm happy to say so.' For the moment, from the way I see it from the standpoint that I have, there is no better and more efficient way of doing it.

It is not always just to prosecute a particular individual. Again, this is not investigating an easily definable criminal offence; it is investigating a criminal activity which is ongoing, a course of conduct which, if we want to do anything effectively about it, we have to track, sometimes for a long period of time: sometimes much longer than a month, and sometimes a year. There is just no other way of doing that unless you have somebody in there who can keep you in touch with movements, directions and identities.

Mr KERR—What the National Crime Authority says is essentially that people get tested. Before they are trusted with any serious information in criminal organisations, they are tested in various ways, and some of those tests may involve some minor or less minor participation in criminal activity.

Mr Carmody—It is called 'street cred'. You have got to prove your street credibility because, like any secret organisation or any organisation that has got a lot to lose, these people have got a lot to lose; they have got a very high-yield, low-risk business enterprise here. That is the point. Because they are a market based operation, they see it in terms of business principles. The first business principle is: what are the risks here to my profitability? In respect of organised crime today, and drug trafficking in particular, it must be that they assess that the risk of detection—which is their most important risk—is so low that they can operate quite comfortably in this environment.

We published a report last month that showed that, in the Queensland context, law enforcement recovers about 1.3 per cent of the heroin available annually in our market. That has got to be a low-risk business enterprise to be involved in. So what we have to do is to acknowledge that we still have to keep doing that as best we can with the methodologies that we can devise and the legislative support we can have, and that is where the controlled operations come in. We also have to work smarter rather than harder. We have to attack the profitability motive and we have to make it more difficult for them to make money and keep it. So you need an integrated package. Controlled operations is an essential part of that package and so too is civil based confiscation.

Mr KERR—There are two sides to this. If you say that you must involve yourself in that criminal milieu—I think you used a very colourful expression, 'If you want to be perceived as a criminal, you have to sound like a criminal and act like a criminal'—that immersion could lead to a double agent sort of approach. There are possibilities of people becoming so close to those they are doing business with that they are turned. You would not be the first person, I suspect, to be surprised that there has been experience of crooked cops and corrupt activity, and we should not be surprised that there is a community concern about

that also. What is an appropriate framework for safeguarding the propriety of controlled operations, in your view—particularly if we are being urged to extend their operation, as we presently are?

Mr Carmody—What will happen if you extend is that you will cover offences. We have to bear in mind that pre Ridgeway these investigative strategies were done anyway. They were done without protection and they were often done without getting the evidence excluded by judges. Ridgeway changed that. What it changed was not the methodology but the consequence of the methodology. That is really what it does. The legislation brought in controlling that methodology in a way that said: 'Bring it out into the open and let us put strict accountability mechanisms in place to ensure that the rogue copper—'. It is hard. It is risk management. You can never eliminate it but you can make it harder, just like you can make organised criminal activity harder.

Without controlled operations, there is a gap in the ability of law enforcement to regulate itself from within or through anti-corruption agencies—they do not have it either. They cannot set a trap to catch a crook in a context that is going to work. You need it from an anti-corruption point of view as well as from an anti-crime point of view. Controlled operations legislation actually enhances the anti-corruption armoury rather than diminishes it.

Mr KERR—Sorry, I think you may have missed the point I was making. That is, if we are now in the business of having a publicly verifiable system which requires approvals and the like, what is best practice in terms of that? I suppose to test this proposition, the existing Commonwealth legislation requires reporting of all these matters in a public and open way, save if the National Crime Authority asserts that there are operational reasons—either the safety of some person or the prejudicing of a possible prosecution—which would mean that it was not appropriate to disclose.

The National Crime Authority in its submission argues that that goes too far and that we just need statistical enumeration of approvals. My starting point, hearing what you say—and the importance of these things being open is where I am starting from—is wondering whether there is a best practice outcome. My own instincts are that, if we are authorising these things on the principle that sunlight is the best disinfectant, the greater transparency the better. The onus of suggesting that there is to be some drawing back from those accountability mechanisms that currently exist is on those who assert that. But you have seen the other jurisdictions. The ombudsman scrutinises in New South Wales—

Mr Carmody—That is what I was about to say. The problem there is the publicity aspect rather than the accountability aspect or it. It is not to water down the accountability of the action or the approvals, but the publicity of it. My starting point is: what additional accountability does the publicity give? There are many operations in government that are scrutinised independently without being scrutinised publicly and that everybody is happy to delegate. In Queensland, for instance, we have a Parliamentary Criminal Justice Commissioner who is responsible for the oversight and investigation of complaints against the Criminal Justice Commission at the fiat of the Criminal Justice Committee. So we already have many layers of scrutiny and accountability.

Just like information is power to law enforcement, publicity is also power to our opponent because they are part of the public. They can get access to information and they can devise their strategies and countermeasures on the basis of information we give them. Unless we keep that information confidential, within limits that are safe for accountability but are there to protect the integrity of our ongoing investigations, then that is a compromise that I think is a fair one and a reasonable one. In the end you become self-defeating. If you keep telling people how you are doing things, what your success rates are and where you are being most effective, they will move to some other area. They are very responsive.

Mr KERR—But isn't the whole objective of this to get to them move? I thought that was the whole proposition you were putting forward.

Mr Carmody—Some other place—not to some other method of concealment or something like that. The idea ultimately is to get in front of them, and we cannot do that by just following them. We have to get in front by acting proactively. The best way we can do that is by controlled use of information to get inside what they are doing—not just for a specific criminal investigation but for an investigation of the whole way they operate, the whole approach.

Mr KERR—The problem I have with that assertion is that, essentially, it seems to me to value secrecy above another set of public interests and in a curious way may also be very counterproductive. In the trial process, when somebody is actually arrested, all this comes out anyway—some of it may be suppressed if you seek orders in relation to that. I have not heard instances of that occurring, and I do not believe courts give such suppression orders. There have been many instances where all these kinds of matters have come out and certainly they are litigated on appeal. The whole Ridgeway case was an example exactly of that. But there is no public accountability. It seems to me that you are asking the public to go along with something that many perceive to be something which instinctively sounds wrong. Allowing our police to undertake criminal activities in the investigation of crime, I think, is a very cheap way of expressing it but it is the way it is expressed by those who criticise it.

Mr Carmody—It is tolerating it. The reality is they have to.

Mr KERR—If we are doing that then surely we should draw the public with us by saying, 'Look, these are the sorts of things that are being investigated. These are the circumstances. This is why we are doing it.'

Mr Carmody—We do that. We can do that in a general way through our annual report. The public interest is protected by the parliament and the laws that the parliament make on behalf of the community. They are the line rules. The parliament draws the line. It draws the line in the place where it knows that the society will accept it, because although it is undesirable that law enforcement—

Mr KERR—But in drawing that line, why should not parliament say, 'We have drawn this line. We now want you to report to us'?

Mr Carmody—We do report to parliament through the organs of government but we do not sometimes report publicly. It is parliament that oversees what we do. The Crime Commission in particular has a line minister that I report to.

Mr KERR—I understand what you are saying about your obligation. That isn't the way that it operates.

Mr Carmody—We have a committee in the National Crime Authority.

Mr KERR—I am suggesting to you that the proposal the National Crime Authority has put to us is that it should be simply a statistical report. I am asking you: do you think there is any best practice that you would see as appropriate? If there is going to be a national scheme, some form of accountability will have to be agreed across the board. If ultimately we are seeking a best practice model, it is either going to be a model that follows the existing Commonwealth model, a model that establishes a different accountability system, a model that uses something like the New South Wales accountability system or a model that uses something like the Queensland system. Is there an accountability model which not only satisfies law enforcement interests but also gives the community a high level of confidence that they know what is going on and they are content that that continue to occur? We are their representatives in the end.

Mr Carmody—True.

Mr KERR—Just passing a law and then walking away from it and saying, 'Over to you, mates,' is not really going to be an effective parliamentary response, I suspect.

Mr Carmody—I think the New South Wales model has sufficient oversight and reporting precautions in there. The Ombudsman is independent and performs that role as somebody who knows when information is being withheld or not, exactly what questions to ask and to probe to ensure that information is available. You can give information without actually telling somebody anything. I think the Ombudsman there is that filter. The Ombudsman has the confidence of the public to do on its behalf what it really is not equipped to do itself. The short answer to your question is that, subject to the review and the publishing of its findings, the current New South Wales model is better than any other option that exists in Australia.

CHAIR—Mr Kerr, can I just point out that we are a quarter of an hour over time and we are quite tight this morning in our timetable. So if there are no further questions of you, Mr Carmody, I thank you very much for coming to speak with us this morning and thank you for your submission. We welcome you as a witness for the first time to the oversight committee of the National Crime Authority.

Mr Carmody—Thank you.

[10.28 a.m.]

BEVAN, Mr David John, Director, Official Misconduct Division, Criminal Justice Commission

BUTLER, Mr Brendan John, Chairperson, Criminal Justice Commission

CHAIR—I now welcome Mr Brendan Butler, Chairperson of the Criminal Justice Commission, and his colleague Mr David Bevan. I note that this is the first occasion that Mr Butler has appeared before this committee since his appointment and I am pleased we now have the opportunity to meet. Your predecessor, Mr Clair, was before this committee in Brisbane in 1997 in relation to our comprehensive evaluation of the National Crime Authority. His comments were of considerable value and assistance to the committee.

Mr Butler, the committee prefers that all evidence be given in public, but if any of my colleagues ask you a question to which you would prefer to reply in private—that is, in camera—please ask us and we will consider your request. We have received your submission and that has been published by the committee. Copies can be obtained from the secretariat officer seated at the back of the room. I now invite you, Mr Butler, to make a statement after which we shall have some questions for you.

Mr Butler—Thank you, Senator. Perhaps if I could start by speaking about the Criminal Justice Commission and its responsibilities and why we asked to make a submission to the committee in relation to your present terms of reference. The CJC is an anti-corruption agency. We perform in Queensland, amongst other duties, the sorts of functions that both the Police Integrity Commission and the Independent Commission Against Corruption perform in New South Wales. In that role, we have our own in-house investigative teams that proactively investigate corruption and in-house surveillance teams.

As well as our anti-corruption role, we have a role oversighting the police service in Queensland. Our legislation provides for us to monitor police methods and to report on those matters from time to time. We also have legislative obligations to monitor, research and report in relation to the administration of criminal justice in Queensland. The legislation includes in that the monitoring of the effectiveness of investigative powers. As an anti-corruption agency and with our independent research obligations, of course we are interested in aspects of proposals in respect of controlled operations, both in terms of the effectiveness of law enforcement and also in terms of the effectiveness of the protection of individual rights in the exercise of law enforcement powers.

How that interacts with the NCA is in this way. The CJC in Queensland from time to time finds itself working with the NCA in relation to joint operations. As you would appreciate, particularly in relation to drug offences, there is often an overlap with corrupt activity, attempts to bribe police or public officials. Where, for example, NCA operations raise suspicion of corrupt activity by Queensland public officials, then the CJC might become involved.

We have regular liaison with the NCA. We are a member of the national task forces for liaison purposes. I am—as is the chairperson of the NCA—a member of the management

committee of the Queensland Crime Commission. So I, Mr Carmody and the chairperson of the NCA meet in those meetings. So on the Queensland scene, in our investigative role, there is quite close liaison among the agencies.

The point I wish to make today is that the CJC has joined—and you will see a copy of it there—with the NCA, the Queensland Police Service and the QCC in a joint submission to the Queensland government seeking controlled operations legislation in Queensland. That has arisen following the decision in Ridgeway.

My sense of all this—coming as it does from my background as a criminal lawyer over 25 years, and particularly as a senior prosecutor; I was Deputy Director of Public Prosecutions in Queensland for seven years—comes from an informed base which looks at it this way. Prior to Ridgeway it was common practice for law enforcement agencies to utilise covert operatives. That was done without any legislative basis in Queensland and in most parts of Australia. It was done in a situation where, at least in recent years, it has been apparent to judges and lawyers that those operatives have been technically breaking the law. That is particularly so in Queensland, because we do not come from a position of common law criminal law. We have a criminal code. The criminal code involves no concepts of mens rea. So, if the elements are made out in the particular offence, subject to the criminal responsibilities provisions of chapter 5 of our code, the offence is committed. There is no necessity to prove a criminal mind on the part of the person committing it.

As a result, in Queensland anyone who is not subject to some statutory empowerment and who comes into contact with drugs and possesses drugs, commits a criminal offence. Lawyers have tended to overlook this. There seems to have been a general view that one does not have regard to the fact that drugs are passed around in the courtroom and so on. Over the years there has been a practical attitude to this, both by judges and by the persons who have to determine whether criminal charges are laid. They look to the mind of the person involved to determine whether or not criminal law will be enforced, even where technically criminal offences arise.

Where a person under supervision and under direction comes into possession of drugs—as a covert operative, for example—the authorities, including the directors of public prosecutions, have not prosecuted such a person. Judges have typically not excluded evidence that has been obtained through those methods. Indeed, most drug offences of any serious nature over the last 15 years probably would not have been detected and prosecuted if it were not for the use of undercover agents.

So what we are talking about here is putting in place a legislative scheme to deal with something that has been happening. It has been happening for many years. It has been happening in a context where the courts have accepted that it is appropriate behaviour, because it is recognised that there is no criminal intent or criminal mind on the part of the people who are doing this.

Ridgeway itself was an exceptional case. The High Court excluded the evidence there, on my understanding of the case, because an element of the offence was actually committed by the law enforcement authorities, not simply because there was a technical illegality on the part of an undercover agent. Indeed post Ridgeway, as some of the submissions before you

indicate, courts have regularly admitted evidence even where there has been a technical criminal offence. Of course, that continues to be the case in Queensland. Undercover agents come into possession of drugs in situations where they are technically committing criminal offences. That is not causing the exclusion of evidence of itself.

There has been a much greater recognition of the fact of this technical breach of the law. The illogicality of expecting law enforcement officers and their superiors to make decisions which technically involve determining to break laws is something that is unsatisfactory.

The controlled operations legislation achieves several objectives. On the one hand, it gets rid of that unsatisfactory situation where decisions are made to commit technical offences. It provides certainty for law enforcement officers who are putting themselves in this situation. It ensures that evidence that has been properly obtained according to the scheme is not going to be judicially excluded. Finally—and perhaps most importantly—it ensures that there is a legislative scheme that makes those operations accountable and makes the behaviour of law enforcement officers subject to independent scrutiny.

One can say—as I understood from the submission of the New South Wales Law Society—that perhaps we should go back to the future, we should turn back the page and say, 'Let's leave it to the common law; let's leave it to judge made law, as we did before Ridgeway.' I do not think that is possible now. It is normal in the development of the law that greater awareness develops in relation to particular things. We are now more aware of this issue.

A number of states have moved, and legislation is in place. From a Queensland point of view, dealing across borders will increasingly make it more difficult for law enforcement officers in other states to deal with Queensland. In a situation where they have clear guidelines set out by the parliament and Queensland is operating according to judge made law, there will be a tendency to look for the clearer guidelines. I think the same position exists in relation to the NCA on a national basis. It is really important that we should be aiming ultimately towards a national scheme of mutual recognition where law enforcement agencies can operate across borders with the protection of the law and also be accountable for what they are doing in those situations.

I conclude what I wish to outline to you initially by pointing to the present legislation the NCA is working under and by saying that we would support a broader scope. At present, Part 1AB of the Crimes Act limits the range of offences, as you know. I believe that there are a number of areas where controlled operations are quite important. They are particularly important in those sorts of offences which are typically committed in secret; the sorts of offences that are, in one sense, victimless crimes, although they are not without victims at the end of things. Most police work involves someone reporting that they have been assaulted, the blood-stained body on the floor, and so on. You have a victim. It is easy to identify the offence. It is easy to commence an investigative process.

In the areas where the NCA and the QCC, as organised crime bodies, and the CJC, as an anti-corruption body, operate, we are typically not so fortunate as to have the blood-stained body. We are dealing with offences like drug offences and corruption, where criminals are dealing with criminals. No-one on either side of the transaction is likely to put their hand up.

In order to seek out that sort of criminality it is important to be part of the criminal group, to be able to detect the offences and obtain evidence of their commission. It is in that sort of area that the use of undercover officers, whether police or civilians, is so important.

I believe that it is not limited to drug offences. It is particularly important with corruption offences and some of the fraud and money offences. I urge that the NCA's scope be extended there. It seems inappropriate that there be different sorts of rules—a clear legislative scheme in relation to drugs and then a no-man's land, working with judge made law, in relation to all other offences.

The other thing I would stress is that it is very important to extend the scheme to civilian operatives. Agencies prefer, of course, to use police operatives, who are well trained in these sorts of operations. But, from time to time, one knows that the offence is being committed and one has an appropriately qualified civilian operative who is the only person who really can obtain the evidence. It is important that the scheme cover that sort of situation. I will leave my opening remarks at that and answer questions.

CHAIR—I have one question to start with. I was interested in your comment about your period—I think you said seven years—as a prosecutor. You went on to talk about making an evaluation of the mind of the operative in determining whether or not that person should be charged. Can you expand on those comments from your experience in your previous position as a prosecutor working in a state which had no legislative framework for this sort of operation? How did you make evaluations in relation to charging or not charging individuals?

Mr Butler—It really arises in this way. Law enforcement agencies, as I say, over pretty well all the period that I worked in the criminal law, have used undercover agents, normally police officers. In relation to those persons, no-one has ever suggested they should be charged. Indeed, I think if you went back about 15 years, there was some doubt as to whether or not they were committing criminal offences. I must say that at that time I always thought it was the case that technically they were, and the courts have made it quite clear that that is the case now. Nevertheless, no-one has ever suggested they should be charged and, indeed, they have not been. Directors of public prosecutions have constantly presented prosecutions where these people are the star witnesses. Judges have heard their evidence and, while recognising that there had been technical breaches of the criminal law, have nevertheless ruled that the evidence was admissible and had not been improperly obtained.

Where it often arises for DPPs' consideration is whether or not the person should be given an indemnity. That was not thought necessary in earlier years, but with greater realisation that technical offences were being committed—and Ridgeway was really just a step towards that realisation—there has been an increase in the number of situations where indemnities are granted, particularly to civilian undercover agents. It is normally the case that those indemnities are granted by either DPPs or Attorneys-General, depending upon the particular jurisdiction involved.

Mr KERR—One of the issues you have raised is that of civilian operatives. I must admit, I am not convinced about the argument you are putting forward. Indemnity can currently be given by a DPP. Indemnity is normally expressed in very narrow terms; it

indemnifies against particular conduct in limited circumstances. If you step outside that you may find yourself subject to potential criminal prosecution. The reason for that is unsurprising. Most of these people have been principals in organised crime for a long time and for some reason have been caught, or their life is in jeopardy. They may have turned on one section or another of the criminal world which they have inhabited, but they are not what we would call 'Mr Cleanskins'. The chance of their turning against the law enforcement agency that recruited them is high. There is a whole range of circumstances where they might undertake activity that we would regard as immoral or wrong.

If you are giving a certificate that covers them in relation to an operation, broadly expressed, then presumably they are indemnified against all conduct that is part and parcel of that operation, notwithstanding that their motivation may be to set up some other arrangement with a third party. They may be scheming: whilst they are quite happy in bringing down Mr X, they may be trying to set up a deal with a Mr Y in which they are participating. Their motivation may be quite different from that of a law enforcement officer.

It seems to me that we have here very much a different argument in relation to the so-called civilian. I accept that there is probably a difference between a civilian who is somebody recruited by the police—and who is not a sworn officer—to undertake some step in an investigative role, and what we normally mean by civilian, somebody who is essentially a crook, who has been used as an informant and is recruited to turn against particular sections of the underworld. How bad is the present situation? Can you actually go to the DPP and discuss some form of indemnity and put that to that person?

Mr Butler—There are two aspects of this. One is that in Queensland you cannot get prospective indemnities. Indemnities are retrospective things. There is a decision of our Court of Appeal to that effect. You cannot indemnify people in advance for the commission of criminal offences. There is always that level of uncertainty. It is really not possible for the agency to promise the person indemnity; it can only really be on the basis that the DPP might, if approached at a later stage, provide it in respect of some act that has been committed.

The other aspect is that civilian operatives are not always criminals. You can have non-police operatives who themselves have not been committing criminal offences but, because of their knowledge of the people involved or some other aspect, it makes them appropriate to use in that situation. I think the concerns you have in relation to criminal informants and their use as operatives are real and ones that law enforcement agencies address. They can be addressed by quite tight processes in terms of the use of those operatives. It would be normal, for example, in our agency, if you are utilising an operative like that, to have what they are doing completely controlled. Everything they did would be the subject of monitoring and would be under considerable supervision.

Senator STOTT DESPOJA—I was actually going to pursue a similar theme to Mr Kerr. My question to begin with was going to be a portrait of civilian operatives. I was curious as to how common it is to use civilians in those kinds of circumstances and whether or not Mr Kerr's analysis was not only correct but broadly applied—that is, that most of the civilians would be engaged in some other criminal activity anyway and would need that indemnity. I am also curious if you have cases or examples where CPOs or civilians have

been engaged in covert operations and have been charged, and unjustly so? Have you got examples in Queensland where you believe there has been an injustice served as a consequence of charges being laid against either police officers or civilians engaged in that kind of activity?

Mr Butler—I cannot think of an example. I suppose I should say in relation to that that I do not think the real danger is that they are going to be charged. I think the problem really is that you have this situation, technical though it might be, where people like me have to make a determination whether a person is going to be asked to commit a technical criminal offence. I just find that an unattractive thing for me to have to do.

In Queensland, there would be virtually no effective drug policing if senior officers in the police service were not making those sorts of decisions on a daily basis. As I say, the courts and the law have accepted that that is appropriate. I would much prefer to have it on the table as part of a legislative scheme where the decisions that I am making, as head of an investigative agency, follow a legislative scheme and what I am asking people to do is legal and subject to appropriate checks and balances. The important thing in all of this is that you enhance the accountability of the whole process by putting it on the table rather than putting one's head in the sand and saying, 'Let everyone just go on doing it the way they used to,' and where the whole legal situation is rather clouded.

I think it is much more effective, it protects civil liberties and it provides for independent scrutiny in a much more effective way if you give the power but you also place responsibilities with it. I think that has been the move in the whole law enforcement area. In recent times in Queensland, there is now the Police Powers and Responsibilities Act, which has very much sought to balance the powers that police have with the responsibilities that police have. If you do not grant the powers, you create all sorts of situations where agencies have to determine for themselves where to draw the line, where individual officers might feel that they need to go a step further in the absence of power.

That has been one of the problems in the past with verballing, for example, which was a problem at one time in police services. Because there was no power to detain and question people, you had the situation growing up where police officers used subterfuges to carry out their questioning. It seemed to me much better to have a situation where you say, 'Police are allowed to detain and question people but in a situation where that has to be fully monitored and fully registered and is subject to independent scrutiny.' I think the same is true of the covert operatives.

Mr HARDGRAVE—Technically, you are breaching your own CJC act as it stands, aren't you—

Mr Butler—No, I do not think so.

Mr HARDGRAVE—by not pursuing what could be perceived by some to be a corrupt or illegal activity by a servant of the state. I understood that that is what the CJC is all about.

Mr Butler—There is certainly no corrupt activity. What we are talking about are processes which have always proceeded in terms of the use of undercover operatives in situations where that has, over recent decades, always been accepted by the courts as being appropriate.

Mr HARDGRAVE—But how vulnerable are you? If you are the independent investigative wing of the parliament of the people in pursuing corrupt or illegal activities of people as you do on a daily, weekly and monthly basis, how vulnerable are you then as an organisation under the current lack of guidelines which protect you from what someone else may in fact judge is a wrong call?

Mr Butler—Fortunately, the CJC has very significant accountability processes which include any operations that we carry out being subject to an internal process of procedures, decision making, reporting and so on at the highest levels. The CJC is subject both to a parliamentary committee, which is quite powerful on the Queensland model and receives fairly extensive briefings from our agency, and also to the Parliamentary Criminal Justice Commissioner, who is able to utilise all the powers of a commission of inquiry to investigate any complaints against us.

Mr HARDGRAVE—But you must have some sort of misgivings about the concept of controlled operations, given that it in fact authorises something that in another set of circumstances you are trying to stamp out.

Mr Butler—I do not agree with your last point. As I said at the beginning, one looks to the criminal mind. What we are talking about here is a technical situation where the persons are carrying out acts for the purpose of detecting criminality and not for the purposes of committing it. The effect that it has in relation to agencies like ours is that we are very cautious. We would not be authorising acts which fell outside the range of what the normal investigative behaviour has been over recent decades in terms of the use of undercover agents. I suppose the uncertainty generates, if anything, more caution at the moment.

As I said earlier, people in agencies we work with across state borders who have this legislation in place and who have nice clear guidelines for their behaviour are going to be increasingly unsettled in dealing with people in a place like Queensland where there is no legislative basis, because they will become accustomed to having that legislative scheme in place. Over time, that will decrease the effectiveness of agencies in Queensland—whether they be the police service, the NCA operating in the state sphere, us or the QCC—in our proactive operations in things like drugs and corruption.

Senator STOTT DESPOJA—You have described the urgent need for a legislative framework and the deficiencies in the system that currently operates. As I understand it, there is a preference for the New South Wales legislation. In the joint submission, you describe it as more comprehensive than the rudimentary laws in Victoria, Northern Territory and WA. Do you see any deficiencies in the current New South Wales model? You refer to accountability; do you believe the accountability mechanisms in that legislation are appropriate? Do you believe there is a sufficient and appropriate balance between protecting people's rights and civil liberties and allowing agencies to do the work that you believe they need to do? That legislation is clearly preferable, but is it adequate?

Mr Butler—In the joint submission prepared by the agencies in Queensland, we indicated that the New South Wales model might form an appropriate starting point for a Queensland examination of controlled operations legislation. I would not wish to give an imprimatur to every aspect of that legislation. It is important that there be a comprehensive and effective scheme for both the approval and the reporting of controlled operations.

In that context, I might raise a matter that Mr Kerr raised earlier, that is, how to provide for independent accountability and the degree to which there should be public disclosure. As in all these things, there has to be some balance. From time to time, agencies like ours will use operatives who themselves do not wish to give evidence in court. This is very often true with civilian operatives. You might use the civilian operative to introduce a police undercover agent, and then the civilian operative will fall out of the picture. The police undercover agent will then proceed to gather the evidence which is ultimately utilised in a prosecution in court. That might be done because there is considerable danger to the life of the civilian operative—we are talking about certain sorts of criminal, organised milieus.

There needs to be a certain degree of control in the public reporting of the full scope of investigations and the use of the powers. On the other hand, agencies like us and the NCA have recognised in recent years that public support and understanding of law enforcement agencies are very much dependent upon proper transparency and full communication to the parliament and, through the parliament, to the people of Australia. The NCA annual reports reflect that. There is a lot more information in them now in relation to operations, task forces and so on. I think that is a good thing, and I think that will continue. Agencies will be looking for ways to communicate as fully as they can what they are doing and what they are trying to achieve. But when you come down to individual operations, one has to be cautious.

I would like to suggest that I think there is a place for a proper oversight mechanism for the NCA, similar either to the Parliamentary Criminal Justice Commissioner in Queensland, or perhaps someone like the Inspector of the Police Integrity Commission in New South Wales. I think the NCA themselves have advanced some submissions in relation to such a position. If you had an independent agent like that, with considerable powers to receive all the information about investigations, considerable powers to investigate complaints against the agency, and then to report to the parliament or to the parliamentary committee in a way which could give an assurance to the committee, to the parliament and to the public that the law is being followed, that probably would be the best model.

Mr KERR—This is one area I find most interesting at the moment—the accountability mechanisms. I suppose it is only now, three or four years after I ceased to be Minister for Justice, that I realise the extent to which over time I became infected by the mind-set of the operations or agencies which were reporting to me. I am not meaning any disrespect to them. But you learn of their operations, you value what they are doing, you see the threats that they are countering and you start to see the world through their eyes—inevitably you do—and it leads you, to a certain extent, to become persuaded to make those compromises that we all must make.

I think you have made the case of there being all these balancing considerations. You inevitably tend to start to see the world through the eyes of those agencies. I suspect it must be the same with the Ombudsman in New South Wales, notwithstanding that their broad

responsibility is to hear complaints against administrative misconduct. I am sure that their constant familiarity with the work, the challenges and the responsibilities of law enforcement agencies, lead them, in the long run, to understand the dilemmas that those agencies face and perhaps become inclined to the world view of those agencies. The likelihood is that, over time, any independent accountability person you put into the system, particularly if they are long serving, will become inclined to such views, unless they are particularly resistant to this. I think I came with a degree of resistance, but over time I became perhaps persuaded to the world view that they were advocating.

I suspect that this is not really an accountability mechanism. As with all these vehicles where you put in one or two people to assess, to evaluate and to report, in the long run they simply become part of that loop. There really is a difference in reporting in a public way the nature of the operations that are being undertaken. It does impose another level of discipline: the fact that you know that, at the end of the day, after the prosecutions are over, after any danger to the persons who are subject to threat is gone—all those sort of things—at some stage you are going to report that we did this kind of operation.

CHAIR—Is there a question in there somewhere?

Mr KERR—Yes. How do you deal with these accountability issues? In the long run, do you accept that there is a certain kind of public scepticism about a closed loop system. If you do accept that, how do you get that next step into the process which enables people to make a judgment that these actions that are taken on the community's behalf are legitimate and not going that one bridge too far?

Mr Butler—It all comes back to balance. There are aspects of the scheme that you can put in place that will mitigate the concerns that you have. For example, three-year terms seem like a good idea for people in these inspectorate type positions. That would help somewhat. You can have a situation with this full or near full reporting to the parliamentary committee with confidentiality provisions. Certainly that applies with our parliamentary committee, and I think there should be a high level of reporting on matters.

Some caution needs to be exercised, both in terms of the effect it might have on individuals and the recruiting of individuals to be involved in these sorts of investigations where there is some personal danger, and also on giving away the secrets, if you like, of how law enforcement agencies are going about their business and the actual ambit of their investigative techniques. Both of those aspects might detract significantly - if there were absolute openness - from the effectiveness of the investigative exercise.

CHAIR—Thank you very much, Mr Butler. We have appreciated your evidence and the time you have given us this morning. Thank you also, Mr Bevan, for your attendance.

[11.17 a.m.]

O'GORMAN, Mr Terry, President, Australian Council for Civil Liberties

CHAIR—May I welcome Mr Terry O'Gorman, President of the Australian Council for Civil Liberties. The committee prefers that all of your evidence be given in public, but if at any time you are asked a question and you wish to answer in private, that is in camera, please tell us and we shall consider your request. I understand that you have a document here to which you will speak, and you want that document to be tabled. You will also be giving us extra material as a submission at a later date. Is that correct?

Mr O'Gorman—My written submission will be delivered at 2 o'clock today. I will simply speak to it.

CHAIR—Thank you for your time this morning. Do you wish to make an opening statement?

Mr O'Gorman—Yes. So that my personal background is known, I was admitted as a solicitor in 1976, after starting articles in 1972. I worked for four years for the Aboriginal Legal Service in Queensland; 12 months for the Legal Aid Commission; and since then, I have been in private practice. Since 1976, I have been variously President and Vice-President of the Queensland Council for Civil Liberties; and for the last four years, I have been President of the Australian Council for Civil Liberties. My solicitor work is exclusively in the area of criminal defence.

I want to start at the end, and I want to say that I see the most important aspect of these hearings as addressing the accountability provisions. I will be proposing that the committee look very seriously at the concept of the public interest monitor, which is a creation of Queensland statute in 1997, in the Queensland Police Powers and Responsibilities Act. I have given you the first annual report of the monitor, which I will speak to briefly in due course. While I will make some lead-up comments, the thrust of my submission is that I urge that the mechanism of the public interest monitor can be, and should be, implemented federally in relation to controlled operations. As my submission states, the current, so-called protective mechanisms are, in practice, non-existent and not workable. So I am submitting to the end position of urging you to seriously look at adopting the public interest monitor concept, which I will come to presently.

In this area where we are looking at controlled operations, it is very easy for many of us to be affected by the rhetoric of the war against drugs. The war against drugs, whether we like it or not, is lost. Many of us will not face up to that fact. If we will not face up to it, as a civil libertarian, I am concerned that we at least address the serious impact on longstanding criminal procedures and protections that increasing police powers in relation to drugs, particularly in the federal sphere, has effected. The role of police undercover operations has historically been very controversial, if you go back in policing history. Unfortunately, as I have observed over the last two decades—particularly in my civil liberties capacity—the controversy of undercover operations in Australia is no longer anywhere near as controversial as it used to be, or as it ought to be.

The paper that I have prepared, that you will receive in concluded form at about 2 o'clock, addresses what I refer to as 'function creep'. It is an awkward term, but I cannot think of a better one. It is the police powers equivalent of the economics of bracket creep. It is simply this: when you look at major increases in police powers that have been brought in federally—at state level as well, but I particularly want to address the federal sphere—they have all been brought in, using the spectre of high-level drug trafficking, to make respectable what people would otherwise have significant reservations about.

Look at telephone tapping, introduced federally in 1979: the spectre was the immediate aftermath of the various Stewart, Costigan et cetera royal commissions. Telephone tapping was only going to be used in relation to the most serious of serious federal offences. Of course, 20 years later, we have seen the function creep where telephone tapping is available for most indictable offences.

That function creep—if you have regard to the law enforcement submissions before you—is now argued for in the controlled operations sphere. When the controlled operations amendment was brought in in 1996 after Ridgeway, it was simply to deal with—so we were told—the terrible calamity that law enforcement was going to face because of this awful High Court decision that meant that no-one could wear anything other than a uniform in the police field. Of course, that was wrong, but what we are now seeing is an argument, particularly by the NCA, that the controlled operations legislation should be extended across the field in drugs, and outside the drugs field. The argument is: look at South Australia, look at New South Wales—and the NCA looks longingly at those two pieces of legislation saying, 'I want one of those too, please.' Those pieces of legislation say, 'controlled operations across the field of indictable offences'. No longer are we talking about the most serious offences—function creep is happening again.

AUSTRAC, in its submission, looks at the Financial Action Task Force—a body hitherto unknown, to me anyway—which has argued for controlled operations in legal systems throughout the world. What AUSTRAC fails to address when it refers to the Financial Action Task Force is that that body, while arguing for the use of controlled delivery techniques, argues at the same time for judicial authorisation. I stress that: judicial authorisation. Not this ex post facto, supposed 'analysis' of the legitimacy of a controlled operations certificate. It argues for judicial authorisation. I argue, similarly, that there should be judicial authorisation. Where my submission ends is to argue that, by using the mechanism of the public interest monitor, controlled operations should be judicially authorised and, via the operation of the public interest monitor, should be—at least to some extent—judicially supervised. That was the model for telephone tapping. Of course, we have seen the prostitution of that concept where now the AAT is looking at it.

Mr KERR—To be fair here, the reason that the AAT is looking at it is because the High Court, in another decision, has indicated the purported impropriety of judges giving such consents and operating there.

Mr O'Gorman—That is so, but we still now have a body of people who have no tenure and significantly less legal experience and standing than judges, who are now, twenty years later, supposedly providing the protection that parliament told us in 1979 would be exercised by Federal Court judges.

Mr KERR—I understand your proposition, but arguing for judicial authorisation in a field where the courts will not exercise it seems to me an unfruitful course for us to pursue.

Mr O'Gorman—Maybe it can be done by the AAT—at least at tribunal level—if the difficulties that you allude to for some Federal Court judges remain an obstacle. But certainly my submission is—

Mr KERR—I do not want to distract you from the main thrust which I—

CHAIR—Mr Kerr, in the interests of time, because we only have half an hour with Mr O'Gorman, we will let him continue. Mr O'Gorman, have you got any more to say in your introductory remarks, otherwise we will move to the questioning that Mr Kerr is pursuing.

Mr O'Gorman—The final thing that I want to say about the concept of judicial authorisation is that it should be, desirably, by court. Following on from Mr Kerr's remarks, if it cannot be by court, then it should be by an administrative appeal tribunal. I want to finish in one minute by explaining how the public interest monitor concept works in Queensland.

I have provided you with material but, in a nutshell, it works this way. This is what happens when Queensland law enforcement agencies seek a listening device under the practice subsequent to the police powers legislation passing in 1997—instead of, as occurred before the passage of that act, the law enforcement agency going to the judge's private office, arguing for the issue of a listening device with no-else present except the judge, the law enforcement agency and their lawyer, and with no transcript kept many instances. The conservative government in Queensland agreed, after a submission from the Civil Liberties Council, to interpose a person called the public interest monitor to go into the judge's chambers and, in effect, argue public interest issues when a listening device is sought. On the listening device issue, should they cross-examine the relevant police officer on his 'oh so secret' affidavit and perhaps argue for the imposition of certain conditions as to what parts of a house or other premise should or should not be monitored by the listening device?

That model has worked well in Queensland for the last 18 months. I have had requests from parliamentarians in Western Australia and South Australia to provide them with material because they are interested in it. It is a model which, if the controlled operations concept is to be extended—something which you will not be surprised to hear we are opposed to—makes the current system of annual reporting to parliament a joke. If you look at the 1996 annual report, all you see are pro forma certificates which tell you very little and which often raise more questions than they answer.

The New South Wales model of the Ombudsman, in my submission, is not good enough. The model of the public interest monitor enables a person to go in and argue, in relation to a court application, whether a certificate should issue. I am obviously arguing that the cosy arrangement where senior police issue certificates to slightly less senior police should stop and that controlled operation certificates should be issued by a court with the involvement of a public interest monitor. That is the end of my preliminary remarks.

CHAIR—Thank you, Mr O'Gorman.

Senator GEORGE CAMPBELL—Can I just ask you a threshold question? Are you essentially arguing that there is no role for controlled operations in modern day policing?

Mr O'Gorman—No, I am not. I accept with reluctance that there is a role. The question that has to be asked is: should the role have been extended to the extent it was by the post-Ridgeway legislation to, in effect, enable police to actively import drugs from overseas? I accept with regret—but I nevertheless accept it—that undercover operations have to occur. What I am concerned about is that they are insufficiently controlled at the stage of the issue of a controlled operation certificate and, equally importantly, they are insufficiently controlled as to what the CPOs do on the ground in the course of it.

There is far too little adequate supervision of what CPOs do during an undercover operation. There is far too little requirement for CPOs to tape record when it is quite safe for them to do so. CPOs frequently operate out of unnumbered Spirax notebooks that are bought from newsagents, as opposed to paginated notebooks. So there is a lot of monitoring of the activities of CPOs that I argue is a logical follow-on from putting the controlled operation certificate concept in the hands of the court and out of the hands of senior police.

Senator GEORGE CAMPBELL—Are you arguing that it is possible to perhaps more strictly codify the role of undercover operatives and the way in which they operate in the field? It is, for example, in the New South Wales legislation where I understand it is fairly broad.

Mr O'Gorman—Codified to this extent, that if the certificates are issued by a court rather than by senior police, and if there is a role for the public interest monitor, the public interest monitor would have some role in checking, initially perhaps after the event and maybe in due course contemporaneously, what CPOs are doing to ensure that they are engaging in activity not beyond what they are permitted to do. As the paper addresses, although not in as much length as I would like, to argue that in court you can have the court in a criminal prosecution actually examine, firstly, the legitimacy of the issue of a controlled operation certificate and, secondly, the legitimacy of the operation of CPOs on the ground, is to ignore the reality.

The reality is that every time I try to issue subpoenas as a defence lawyer or try to ask questions of a CPO, I am met constantly with public interest immunity arguments saying, 'That will reveal police methodologies.' So, even in court situations, it is simply wrong to say, as the NCA do in their submission, that courts properly examine the way controlled operation certificates both issue and operate in practice. In reality, they do not. The NCA particularly are notorious for sending QCs along to argue, even at committal level, against any opportunity for the defence to ask questions about controlled operations, either how the certificate was issued or how it operated, by constantly throwing up public interest immunity arguments which magistrates quite readily accede to.

Senator GEORGE CAMPBELL—I raised yesterday in the discussions with the NCA the prospect of having a judicial panel established to issue or oversight the controlled operations that the NCA is involved in. That was met by two reactions and the judiciary does not want anything to do with one of them. The second argument from the NCA was

that it would be too difficult and cumbersome a proposition to operate in practice. Do you see any difficulty with that type of approach?

Mr O'Gorman—I view the cumbersome argument by the NCA with a significant degree of cynicism and you only have to look at the big rearguard action which the NCA have mounted against the Australian Law Reform Commission recommendation for an external oversight body called the national integrity commission. When you have the NCA, after a background of 15 years of operation, still objecting, by putting up what I regard as specious arguments, to having an external oversight body like the CJC or PIC—it was to be called NIIC—you have to ask how serious they are. When you look at their argument, they are even objecting to the scant information contained in the annual report as to certificates. They just want statistics. They want us to go down the track of annual reports to parliament in telephone taps where the reports are simply not worth reading.

CHAIR—I raise a couple of points which I do not believe you raised in your introductory remarks. One was the duration of time limits—the 30 days, 60 days, 90 days issue. The second was the role of civilian operatives. I do not believe you commented on that, although, of course, you may have it in your paper.

Mr O'Gorman—No, it is not in the paper because I did not have time to include it. If one accepts that controlled operations are to continue and they are to continue by way of certificates, I have some sympathy for an argument to extend time limits initially from, say, 30 days to 60 days but only if—and I stress 'only if'—they are taken out of the cosy arrangements of senior police issuing them and are put into court, and only if there is a role for the public interest monitor.

CHAIR—So you are opposed to the Victorian aspect of the legislation which allows police officers to issue those certificates?

Mr O'Gorman—Yes. Senior police officers were once junior police officers. I know some senior police officers who, when they were junior police officers, were regarded as part of the problem rather than part of the solution. Yet, naively, we say that because a police officer gets pips on his shoulder, suddenly he is responsible. If you look at Fitzgerald, if you look at Wood, if you look at the anti-corruption commission in WA and if you look at the broken windows—not crims this time but police breaking windows—in Victoria you see that senior police often carry some of the baggage in terms of misbehaviour that they carried when they were junior police.

CHAIR—Just pursuing this question of civilian operatives, what do you say to the argument that these people deserve some form of protection, some form of immunity?

Mr O'Gorman—I heard the question that Mr Kerr directed to Mr Butler. My view is that that is best dealt with by an indemnity. An indemnity ex post facto is good enough because if the civilian operative is being sufficiently watched, controlled and oversighted, if he or she stays within the parameters of what the law enforcers are directing, he or she is going to get an after the event indemnity. I have very real worries about giving civilian operatives protection under controlled operation certificates. I refer—I think only fleetingly—to the Trident scam in Queensland.

In 1996, the same year as this controlled operations legislation came in, retired Supreme Court judge Bill Carter QC presented a report under the aegis of the CJC where he reported on a number of Queensland police who were standing by in car parks near railway stations while crims stole the cars—mostly of low income people in poor suburbs—so that the police could then monitor the ring of receivers to whom those cars were passed on. You only have to look at that particular report and the activities of a fellow called Riesenweber who was later convicted to see the very worrying consequences of allowing civilians to be covered by these certificates.

CHAIR—What role has your organisation played in the development of this proposal to bring in legislation in Queensland which is similar to the New South Wales legislation?

Mr O'Gorman—None, because we have not been asked and we have not been shown the submission that Tim Carmody said the Crime Commission, the CJC and the QPS put together. It is regrettable, but this submission has been with government now for at least two months and we have not been asked to comment on it.

CHAIR—Have you sought to comment on it?

Mr O'Gorman—We certainly indicated our criticism of the proposal when it was publicised. We have not been given the opportunity to comment on it.

CHAIR—Aside from the aspect of this public interest monitor and thinking about the New South Wales legislation, are there any other fundamental aspects of it that you would be opposed to if it were to be seen as model legislation?

Mr O'Gorman—I am opposed to its extension beyond high level drugs if it remains that one group of police gives certificates to another group of police. It is simply unacceptable that the controlled operation certificate concept be expanded unless it is put in the hands of the court or the AAT with the involvement of PIC.

CHAIR—What do you say to the argument that AUSTRAC advanced that unless you can follow the money trail involving drugs you often will not get to Mr Big?

Mr O'Gorman—My answer to that is that AUSTRAC have impressive computer facilities to follow the money trail. When you look at what AUSTRAC said to the ASIO committee's recent inquiry into amending the ASIO Act in the lead up to the Olympic Games, ASIO said consistently how good they were at passing on not just the raw information their computers pick up as to financial transactions but they are able to do quick analyses and pass them onto law enforcement agencies who want them. I find AUSTRAC's argument a little hard to follow.

When they say on the one hand to the ASIO parliamentary committee, 'We do a whacking good job analysing this financial transaction material and we are excellent at passing it on quickly to other law enforcement agencies,' why then are they now arguing that somehow or other controlled operations should be extended to them so that they can perhaps follow bags of money around the country? My understanding of AUSTRAC is that they do

not need to follow bags of money around the country. They just simply follow it around on their computer screens.

Mr KERR—I think their concern is twofold. One is that there are lots of bags of money that do not go into the formal banking systems. They do not get reported. There is a black banking system.

CHAIR—They made the point yesterday that there is a lot of cash circulating in the market.

Mr KERR—In relation to the monitoring of these things, the accountability issue is the issue that interests me most in this. You have raised accountability concerns, firstly, in terms of the issue of a certificate and then you have raised the compliance issue as you go through these processes. Those who have given evidence already say that there are going to be instances, no matter how you anticipate controlled operational work, where something will change in the course of it which will require a judgement to be made on the ground. I am referring to an unforeseen circumstance or instance such as a controlled operation in the narcotics area and someone putting some form of test to the undercover operative slightly unexpected—outside the usual realm—and you have really got to decide at that point whether you break the underground surveillance or accept the test which may be an illegal act of some severity.

So they say that, whatever the framework is, when you go into an undercover operation there are going to be things that you cannot anticipate when you draw it up, and there is an argument about how you deal with that: whether you have a retrospective process of approval, whether you have no process of approval and you simply have to close the operation, or whether you then say that it goes outside the controlled operation, it goes back to the common law and all the discretionary judge-made rules start to apply. I was just wondering how you would deal with that in terms of thinking through that unanticipated issue.

Mr O'Gorman—I do not think that from a community perspective it is acceptable that the operation fall down dead on the spot because of the unforeseen contingency. I think the question is whether retrospective approval of the type envisaged is a good thing or not. I have a fair bit of reservation about that because retrospective approval I think runs the risk of a judge being a bit awed over what has been got and tending to rubber-stamp it. And I hold the view increasingly, unlike when I was going through law school and I was taught and naively believed that judges were immune from media pressure, that they are quite susceptible to media pressure, and I think there are some judges who would baulk at applying the law as it should be for fear that they might be subject to some media ridicule later on.

I have some major reservations about retrospective approval. Acknowledging that it is not appropriate from the community perspective for the operation to drop down dead on the spot, it is probably better to go back to common law and the discretions, because, despite what I heard Tim Carmody say, you cannot have all these coppers waking up each morning thinking, 'Am I going to start work as a copper today and finish as an accused?', in fact

Brendan Butler said that that never happens. So, if you have a situation where the unforeseen happens, the common law discretion then takes over in reality who is going to prosecute.

Mr KERR—I think the fear that has been expressed by the police associations is not so much the likelihood of perverse prosecutions but rather the possibility of civil actions being taken and the suggestion that criminal activity founds a liability for civil liability. I understand there have been a number of such cases taken. We are becoming a more litigious society.

Mr O'Gorman—I would like to see from the police association the evidence that civil actions have been taken in that scenario. They often put that up as a bogyman spectre, but I very rarely see the evidence that those cases are taken. Who is going to take them? Legal aid is not going to fund them. If it is someone who has been pinched in relation to criminal activity, the state freezes their assets anyway, so they have got no assets to bring it. I would like to see the evidence from the police associations that these cases are in fact being brought, as opposed to them being the product of their pretty good imaginations.

Mr KERR—It was not put in evidence, but at lunch yesterday Mr Alexander gave me two examples where he asserted this. I think we should give him the opportunity to put the response on record.

Mr O'Gorman—If the evidence was there I might change my mind, but I suspect it is not.

Mr KERR—The other point is that you keep referring to judicial approval. I accept that that is your preferred model, but I ask you, as a practising lawyer, this question. My understanding as a practising lawyer is that that is simply not available at the Commonwealth level, that the purported conferral of a jurisdiction of this kind on a Federal Court judge or a High Court judge would be rejected. I think that is an accurate statement of the law as it currently stands.

Mr O'Gorman—What about the AAT, then?

Mr KERR—I think it would be lawfully possible to confer it on the AAT, as we have given that opportunity in terms of the issue of search warrants because of the refusal of increasing numbers of federal judges to carry out that responsibility. But you yourself made some criticisms of the AAT as the appropriate repository.

I suppose from an accountability point of view I am less concerned about the starting point and more concerned with the monitoring, surveillance, supervision and accountability of these operations. If those processes are in place then it seems to me improbable that you have misuse of the starting point. This is why I am very interested in your suggestion that you can have some through the system of monitoring. In Queensland this public interest monitor actually follows the investigation, does it?

Mr O'Gorman—Not fully. We argued for that in our submission but it was not fully accepted. In the first annual report which you have before you there is, on my reading, a de facto monitoring; not in minute detail but at least some spot audit monitoring. This is done

by a public interest monitor who is not a public servant. There is no set-up cost. There is no office, there is no structure, there is no superannuation cost. He or she is simply a barrister who is chosen by a selection panel. He or she does not have a practice in crime, so as to get rid of the potential for conflict. The person who has occupied it for the last 18 months has, on my understanding, commanded respect from the QCC, the CJC, the QPS and the judges.

Mr KERR—Something like that, having a spot monitoring system, on its face seems to be the first original and interesting submission that has come before us for some time. It makes a new suggestion that I had not thought of. That is the weakness in the system at the moment, isn't it?

Mr O'Gorman—Yes. I heard you talk to Mr Butler about the watchdogs becoming part of the loop. I think the advantage of the public interest monitor concept is that federally you can have suitable people appointed in each state, and a suitable person was found without all that much difficulty in Queensland. After some initial, quite rabid, opposition to the concept by law enforcement agencies in Queensland, they have come to the stage of accepting it and admitting that it is working well after 18 months.

CHAIR—Mr Kerr, the witness has got only another 10 minutes, and Senator Stott Despoja has got some questions.

Senator STOTT DESPOJA—Can you tell me what you believe the impact or the effect of police involvement in criminality is on criminality? Does it lead to further encouragement for police to be involved in the commission of crimes, or is that too long a bow to draw?

Mr O'Gorman—I think it contains an unacceptable level of the risk of corruption, particularly as we are dealing with the NCA, that they persistently lobby against an external oversight body. I think it leads to a very real possibility that evidence in court is tainted or, indeed, fabricated. If police are in fact participating in criminal activity in a way where there is in effect no monitoring of what they are doing on the ground day in, day out, if they are not having to tape-record where it is safe to do so, if they are not having to properly record conversations in paginated notebooks, then it is very easy for them to go into court—particularly in drugs, in front of a jury—and lie and get away with it. There is the corruption problem, but there is the re-emergence of the verbal in another form through the antics of the undercover officer that worries me considerably. We have largely dealt with the verbal in the police station by mandatory tape-recording around the country, but I am concerned about the whole issue of controlling the verbal out of the mouth of the undercover operative when there is no-one else present and the jury are so impressed with him—and it is mostly him—because he does such a dangerous job; and he does. He goes in there, or occasionally it is she, with huge credibility. The crim, as the accused is seen by the jury, finds the jury saying, 'He's lying.' There is no contest.

Senator STOTT DESPOJA—Developing that theme, I know that you have probably put this in your submission, but for the record are you prepared to elaborate on some of the competing implications when it comes to civil liberties in relation to enacting legislation for controlled operations? What are the civil liberty implications that we should be wary of in relation to either implementing or extending such legislation?

Mr O'Gorman—Firstly, I think it is a huge step, even three years after bringing in the initial legislation, to move from 'high-level drugs' to where the state based legislation—where it exists—says in effect 'any indictable offence'. Secondly, the major civil liberty concern is that, when you read the annual report—and I have only read the 1996-97 one; I have not read the current one—the information that is in the certificates is meaningless. I have referred to some instances in the submission which you will get. In one case where I think eight kilos—or around about that—of cocaine or heroin was brought in by the Australian Federal Police in conjunction with the USDEA, there was a controlled operation certificate issued and all that the report says is that the controlled operation did not go ahead.

If you look at that annual report, there are probably upwards of 10 instances where it says 'controlled operation certificate issued, controlled operation did not go ahead'. There is almost an equal number of examples of the controlled operation resulting in the delivery and the stuff is never picked up. You have to ask, 'Aren't we entitled to a little bit more information than simply being told "certificate issued, drugs dropped off at address X, no-one picked them up, drugs now in the AFP vault"?' You have to ask, 'If that is happening, why was the certificate needed in the first place?' It intrigued me when I read that annual report as to why there was so little information. Look at the reasons—they are all pro forma.

Mr KERR—You would expect a report to be pro forma, wouldn't you?

Mr O'Gorman—I find that, with respect, a surprising comment. I would not expect it to be pro forma. But, based on what is happening with telephone tapping—where we were promised what were going to be informative reports to parliament and then they became pro forma—then I suppose that it is no surprise that they have become pro forma.

CHAIR—I think it is called function creep.

Mr O'Gorman—It is called function creep.

Senator STOTT DESPOJA—Do you have any sympathy for specifically the Queensland law enforcement agency's argument that the NCA is somewhat hampered because it is subject to different jurisdictions, that it is hampered in terms of issuing its own authorisations? Do you see a need for any changed arrangements in relation to the issuing of authorisations by the NCA?

Mr O'Gorman—I do not have a whole lot of sympathy for that argument when I have a look at what the role of the NCA was supposed to be. It was supposed to be an intelligence driven law enforcement agency. Because it was keen to get its face on television, it has now become an on the ground arrest agency. I think if it went back to what its charter was supposed to be—that is, intelligence driven—its concerns need not be as they are stated.

Mr KERR—I think you may be misapprehending the role that they have largely moved back to, but anyway that is a different point.

Mr O'Gorman—When one reads their submission, they appear to be arguing that there are different state rules in each of the states and territories and they cannot do their job. I am pretty cynical about that in the absence of their putting forward hard case examples. With

this, as in any other area where law enforcers seek extra power, they have to put forward—even if you see some of them in private—hard case examples where they can show that the sky has fallen in and things have not worked out. What they tend to do is operate by the threat of spectre.

CHAIR—Any further questions, Mr Kerr?

Mr KERR—Only to tease out a little further two broad issues that have been raised for our consideration. One is whether to extend the remit of controlled operations over a range of a number of other potential Commonwealth offences. Accepting what you say, for the sake of this argument, that the war on drugs essentially has been lost—accepting that as a proposition—nonetheless, it seems to me there are a lot of very serious matters of Commonwealth law where we would expect law enforcement not to concede the ground to have been lost—white-collar crime, fraud, currency crimes, forgery, computer fraud and computer crimes.

You said that if we did not change the mechanism for accountability you would not extend these provisions to other fields. But let us assume you have a better accountability regime. Do you think there is any principled case for not extending the reach of controlled operations to non-drug offences?

Mr O'Gorman—I think there is a very strong case for restricting controlled operations to high-level drug importation, because controlled operations mean that law enforcement officers commit crime. That concept has been sold to an otherwise sceptical and worried public in the name of the war against drugs. But I find it a little hard to justify why, in white-collar crime, police should be encouraged—under state sponsored legislation like a controlled operation certificate—to commit white-collar crime. White-collar crime is different from drugs because white-collar crime is often—indeed I would say almost invariably—traceable through the inevitable documentation, whereas drugs is a different beast.

I worry considerably about the prospect of saying to police, 'Now that we have sold, by the drug spectre, the idea to the public that police can commit crime in order to catch criminals, we will now put it into organised crime, white-collar crime and currency crime.' I think that is opening a huge Pandora's box.

Mr KERR—You heard the evidence before from the head of the CJC that essentially these operations occur even now in Queensland but without an approval process. In fact, I think the suggestion is that there would be fewer occurring if there were an approval process but that they would be subject to greater regulatory scrutiny. If it is the case that controlled operations operate irrespective of the existence of a framework which is legislatively based, would it not be better to control the beast rather than to allow it to roam wild and untamed?

Mr O'Gorman—Yes, but what I baulk at is the concept of having police commit white-collar crime in order to catch white-collar criminals or having police commit currency crime in order to catch currency criminals where the overwhelming evidence is that, where the resources are devoted to white-collar and currency crime, the computer and the document trail—

Mr KERR—We have been ‘massively successful’, haven’t we, in white-collar crime?

Mr O’Gorman—That is not because of a lack of police powers; it is because of a lack of resources that government is putting into police facilities.

Mr KERR—What?

Mr O’Gorman—That is my very strong view. What has happened in this country is that we have made up for a lack of governmental input of resources by increasing police powers. It does not result in any higher rate of convictions but the rights and protections have gone because the police powers have gone up and the funding still remains low. As I recall, you have made a number of comments about how the current government has significantly underfunded the AFP.

Mr KERR—But ever since Comrade Bosch was chairman of the NCSC, the difficulties in obtaining convictions of wicked white-collar criminals has been manifest.

Mr O’Gorman—That is because of the conflict between him, wanting to pursue civil remedies, and Michael Rozenes, when he was the federal DPP, wanting to pursue criminal remedies.

Mr KERR—And after the triumph of the Rozenes regime we had thousands of these white-collar criminals hurled into jail protesting, didn’t we? We have got the first one after how many years?

Mr O’Gorman—That has nothing to do, with respect, with police powers. It has everything to do with the lack of resources.

CHAIR—Just before we allow you to go, Mr O’Gorman: do you have any objection to the publication of your submission when we receive it at 2 o’clock?

Mr O’Gorman—No.

CHAIR—I thank you very much for making the time for us this morning and for that interesting discussion with Mr Kerr.

Proceedings suspended from 12.01 p.m. to 1.07 p.m.

McCALLUM, Mr Colin Malcolm, Detective Chief Superintendent, State Crime Operation Command, Queensland Police Service

McDONALD, Ms Evelyn Anne, Detective Inspector, Covert and Surveillance Operations Group, Queensland Police Service

CHAIR—Can I call the committee to order and welcome the representatives of the Queensland Police Service, Detective Chief Superintendent McCallum and Detective Inspector McDonald.

The committee prefers all evidence to be given in public but you may at any time request that your evidence, part of your evidence or answers to specific questions be given in camera and the committee will consider any such request. We have already agreed that following a short public statement we will move into camera for a briefing from both of you this afternoon.

We have received a submission from the Hon. Tom Barton MLA, the Minister for Police and Corrective Services, which has been published by the committee. I now invite you to make an opening statement to the committee and then we will move to the in camera briefing.

Det. Chief Supt McCallum—My full name is Colin Malcolm McCallum. I am a Detective Chief Superintendent of Police, and I am the officer in charge of the Crime Operations Branch, State Crime Operations Command of the Queensland Police Service.

The major roles and responsibilities of the Crime Operations Branch are those required for the investigation and suppression of organised and major crime in Queensland. The Crime Operations Branch is responsible for all covert police operations conducted by the Queensland Police Service. The covert operations group of the Crime Operations Branch is responsible for the selection, training, employment, supervision, welfare and re-integration of all covert police operatives utilised by the Queensland Police Service.

All requests for covert operations are submitted through the relevant assistant commissioners or regional crime coordinators to the Queensland Police Service target committee which is chaired by me. This committee comprises me, as superintendent, Crime Operations Branch, and a superintendent of the Queensland Justice Commission. Once an operation has been approved a covert police officer is assigned. The conduct of the operation is then reported on fortnightly to the covert allocation and evaluation committee.

The responsibilities undertaken by the covert operations group are carried out in accordance with the national guidelines for deployment of police undercover personnel, of which the Queensland Police Service is a signatory along with other state and territory police services, including the Australian Federal Police. These guidelines encompass covert policing from selection to interrogation and require each signatory to develop and implement specific policies for each phase of that process. Those guidelines are endorsed by the 1997 crime conference chaired by assistant commissioners throughout Australia, and fully supported out of sessions by the commissioners' conference in early 1998.

The Crime Operations Branch conducts joint covert operations with the National Crime Authority, the Australian Federal Police, the Criminal Justice Commission, the Queensland Crime Commission and interstate police services in which Queensland covert police operatives are deployed.

The Premier of Queensland, the Rt Hon. Mr Peter Beattie, has approved the development of controlled operational legislation in Queensland. It would seem prudent to include the National Crime Authority in such a scheme. However, recent opinion obtained from the Queensland Crown Solicitor expresses the view that the ability of a state parliament to include the National Crime Authority within a legislative scheme appears to be limited by section 55A of the operations of state laws of the National Crime Authority Act 1994. This section seems to prevent a state parliament conferring a power or imposing a safeguard on the National Crime Authority unless it is a power or duties similarly conferred or imposed by the National Crime Authority Act.

Because controlled operations provisions are not currently included under the National Crime Authority Act it is possible that the state parliament may not pass valid legislation that confers a power on the National Crime Authority to improve a controlled operation or impose corresponding recording and reporting requirements.

There are in excess of a dozen former covert police officers who have instigated civil proceedings against the Queensland Police Service claiming damages for personal injuries as a result of their performance as undercover personnel at a period in time prior to the adoption of national guidelines for deployment of police undercover personnel. The ability of the National Crime Authority to effectively investigate organised crime will be severely diminished if they are denied the authority to conduct covert operations.

That is the opening statement that I wish to make. Any other questions in relation to that I ask be held in camera.

CHAIR—Thank you very much, Mr McCallum. By agreement, the committee will now hear the remainder of Mr McCallum and Ms McDonald's evidence in private. *Hansard* will not be required.

Proceedings suspended from 1.12 p.m. to 2.10 p.m.

BAINBRIDGE, Mr Mervyn, General Secretary, Queensland Police Union of Employees

CHAIR—Welcome, Mr Bainbridge. The committee prefers that all evidence is given in public but if any of the committee ask you a question and you would prefer to answer that question in private—that is, in camera—please say so and the committee will consider that.

Mr Bainbridge—No, I have no problems.

CHAIR—I understand you have just given us a submission, for which we thank you. Is it the wish of the committee that this submission be published? There being no objection, we will authorise the publication of that. Do you want to make an opening statement before we move to questions?

Mr Bainbridge—No, not at all.

CHAIR—It might be useful, since we have just got your submission, if you could briefly take us through that.

Mr Bainbridge—Yes. Our position actually is that whilst the NCA has no legislation to cover their actions in the state of Queensland, what we would ask is, if there were some proposed along those lines, that there be covering legislation also for our members that covers them, too, because we have some of our people that are co-opted to the NCA at times to work.

Our concern is probably twofold. No. 1 is that our members do not leave themselves open to civil litigation, et cetera, or actually criminal charges with respect to their undercover activities with respect perhaps to being made parties to an offence by their very nature. No. 2 probably is safeguards, too. Obviously in Queensland when we have our powers with respect to placing listening devices, et cetera, our members have to go before the Supreme Court and ground a warrant and give good reasons before a judge as to what they are doing. So we would like to see, if the legislation applies to the NCA, things along those lines also being introduced with respect to safeguards for all concerned.

CHAIR—We did hear yesterday from the NCA and also from Mr Peter Alexander, your federal representative, about the difficulties that each of them currently has, particularly the NCA in relation to appointing Queensland police officers to particular task forces where New South Wales, Victoria and even South Australian officers are covered under this protective legislation in each of these states and Queensland officers are not.

Mr Bainbridge—That is right.

CHAIR—We also asked Mr Alexander—and I would like you to comment on it also—whether you have ever given any thought to the status of the civilian informant, the civilian operative. Clearly, a lot of police use them.

Mr Bainbridge—Yes, exactly, a lot of police use them. No, to be honest, we have not. Probably our primary concern is for our members that are attached to the NCA with respect to leaving themselves open either for a criminal prosecution, as I said, or civil damages against them because they are not covered by law.

CHAIR—You would be aware that the Queensland government is looking to introduce legislation.

Mr Bainbridge—That is right.

CHAIR—Has your union been consulted in relation to that? Do you have any comments about it?

Mr Bainbridge—No, no comments whatsoever. We do wish, and we have made our feelings known to them, that with respect to actions of our police officers, particularly in the covert section, we would like legislation covering them. We did have trouble up until a few years ago with respect to coverts. As a result, now what has happened is that there are a number of civil cases where the Police Service is being sued by former coverts who were in the reintegration program where they came back into the service. They felt that the Police Service had not diligently carried out safeguards with respect to their things. What you will find now—and evidence probably may have been given by Mr McCallum, et cetera—what happens now is that all coverts in Queensland are regularly drug tested and there is a proper reintegration program in place. In the past, there was not, and there are some rather sad and tragic stories that have come out of it. As a result, a number of former coverts are suing the service.

CHAIR—What about situations where covert officers are involved in an operation and something goes wrong? How often would you have a situation where those people would come to you seeking your assistance as their employee representative in trying to deal with that issue? For example, if there was to be a covert operation and somebody found themselves being put in a position where they had to do something that was technically illegal and they decided in the heat of the moment to do that and subsequently found themselves in difficulties because there is currently no legislation. Has that ever happened?

Mr Bainbridge—No, none of them has ever come to us. One of our former coverts is now serving time in prison. He developed a drug dependency problem. As I said, there are a couple of rather sad stories with respect to former coverts. This person developed a drug dependency problem whilst a covert because of the shadowy world in which he operated. I do not think anyone with any commonsense would honestly think that they simulate smoking the various drugs. What has happened since then is that the police service, to their credit, has put in a number of safeguards. It is a question of what caused those safeguards to be put in. I would suggest that perhaps some of the civil cases that are pending against the police service may have forced their hand.

Senator STOTT DESPOJA—I wanted to pursue some of these similar matters in relation to the reintegration programs that operate now. You sound a lot happier with them and feel that they have improved overall. Are you aware of any concerns that your members may have about the current guidelines or reintegration programs that exist?

Mr Bainbridge—No, they are very happy with the current guidelines that have been laid down. In the past, our coverts were given a phone number and a set of car keys, they were told to grow a beard and have long hair, if they had tattoos that was good, and fit themselves up with a couple of earrings and, basically, 'We will see you in two years time.' I never realised completely until one of them broke down in my office and said he could not form any relationships. Because he was a dirty looking, long-haired character—and that was the part he was playing—no decent woman would look at him. He did attract certain members of the opposite sex, but they were not to his choosing.

For two years this man basically had no, what we would call, social life. Probably the hardest thing he and a number of them in the old days found was that they would be told, 'You finish up Friday and you start at this suburban police station on Monday.' There was no testing, no chance to speak to human resource people, psychologists or anyone like that. The hardest thing for him to do was to get out of bed and be at work at 8 o'clock in the morning because for two or three years he slept in until late, he wandered around at all hours of the late evening and early morning and—in trade union terms—he worked broken shifts.

The only contact he had was contact with his controller occasionally on the phone. Apart from that, there was no discipline and no sequence of things. He dressed as he felt and who cared if he shaved every morning. After a couple of years of this he found it very hard that on Monday morning he started and he had to be in a fresh blue uniform, with a short hair cut, shaved and ready for work. It might sound trite, but he found it a problem adjusting to perhaps getting back into the discipline side of things. I believe that before the SAS people in the armed services finish their term of engagement they are actually brought back into a battalion for quite a few months and slowly brought down. What happened in the past is our coverts were not. Now the situation is a lot better.

Senator STOTT DESPOJA—It sounds as though in Queensland you have some good guidelines and a good reintegration program that operates. Are you aware of any authority that may operate here or in other states that allows the use of non-qualified covert operatives? Are you aware of people who may be involved in such operations without requisite levels of training, guidance or reintegration?

Mr Bainbridge—No, I am not aware of that.

Senator STOTT DESPOJA—Are you kept informed of the members who may or may not be involved in covert operations?

Mr Bainbridge—No, once a person is a covert they would be seen nowhere near a police station, a police club, the police union or anywhere else. If they do then they have broken the system and they would find themselves very quickly out of being a covert.

CHAIR—I want to ask you about your relationship with the public interest monitor. Are you aware of the public interest monitor?

Mr Bainbridge—No I am not, to be honest.

CHAIR—I understand it is a fairly new position and his role was raised with us this morning by Mr Terry O'Gorman. This person has an independent monitoring role on behalf of the wider public in relation to the use of covert operations. If your organisation does not have any connection with them—

Mr Bainbridge—No.

CHAIR—That is fine.

Mr Bainbridge—We are basically supervised by the CJC. I think the actions of our coverts probably have to stand up in court. Prior to that, when we ran operations in Queensland we had to go before a Supreme Court judge to get a warrant to use listening devices, et cetera. They were the checks and balances that look after the public interest.

Senator GEORGE CAMPBELL—How long have you been in the force, Mr Bainbridge?

Mr Bainbridge—I am out of the police service now. I was in for 31 years and went out as a sergeant of police.

Senator GEORGE CAMPBELL—Over that period was there a growth in the use of covert type activities?

Mr Bainbridge—There was and actually it is probably a lot more sophisticated than it was many years ago. I would suggest as the criminal element become more sophisticated and crime becomes more sophisticated so the use of coverts and the various apparatus they use comes to the fore.

Senator GEORGE CAMPBELL—Does that include a range of criminal activities as well as the number of sorts of operations involved?

Mr Bainbridge—That is right, yes. Coverts can be used for any number of criminal activities, not only for drugs, et cetera.

Senator GEORGE CAMPBELL—Is it fair to say it is becoming a more integrated tool of policing?

Mr Bainbridge—It is a very important and very useful tool if it has all the checks and balances. It is a very useful tool for police officers.

Senator GEORGE CAMPBELL—Would the experience in Queensland be repeated around the other states?

Mr Bainbridge—I would think so. I cannot speak for them, but I would think police are using coverts to try to infiltrate various sections of sophisticated criminal elements.

CHAIR—There are no further questions for you, Mr Bainbridge.

Mr Bainbridge—Thank you very much.

CHAIR—Thank you very much for coming along this afternoon. We have appreciated your evidence. This completes the program for today.

Subcommittee adjourned at 2.46 p.m.