COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

(Subcommittee)

Reference: Involvement of the National Crime Authority in controlled operations

MONDAY, 23 AUGUST 1999

CANBERRA

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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Monday, 23 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 *(Acting Chair)* and Stott Despoja and Mr Edwards, Mr Hardgrave and Mr Somlyay

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

Committee met at 10.46 a.m.

PERRY, Mr Richard Anthony, Public Interest Monitor

ACTING CHAIR—I declare open this third public hearing of the Parliamentary Joint Committee on the National Crime Authority into the involvement of the NCA in controlled operations. The hearing today will be conducted by a subcommittee to which I have been appointed as chair. The committee chair, Mr Peter Nugent, is unfortunately unable to attend this morning.

Our witness today is Mr Richard Perry, the Public Interest Monitor for Queensland. We are very grateful, Mr Perry, that you have made time to come here to speak with us in Canberra today. However, after hearing evidence in Brisbane last Tuesday from Mr Terry O'Gorman, President of the Australian Council for Civil Liberties, in which he recommended the Public Interest Monitor model for application to the NCA's involvement in controlled operations, the committee saw a need to seek your views in this regard.

Mr Perry, the committee does prefer that all evidence 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. I now invite you to make an opening statement before we move to questions.

Mr Perry—The position of Public Interest Monitor came into being in April last year. It is unique, as I understand it, in the common law world. There is some precedent for it in Sweden. It operates under three acts in Queensland: the Police Powers and Responsibilities Act, the Criminal Justice Act and the Crime Commission Act. The Crime Commission Act and the Police Powers Act were essentially proclaimed and drafted together, so they have a consistent approach in terms of the monitor's functions and powers. The Criminal Justice Act was of older standing, so it was amended. However, it was not amended entirely consistently with the provisions in the other two acts. It would be useful, of course, if that consistency were maintained, and that is something which may be addressed in the future.

The monitor's functions are several, and I will summarise them this way: the monitor has the authority and the ability to appear on an application brought by any of the aforementioned law enforcement agencies before a Supreme Court judge or magistrate when those agencies seek a covert search warrant—that is, a search of a person's premises in circumstances where it is intended that the subject of the search not be aware of it—or the installation of surveillance devices either by way of audio devices, video devices or tracking devices.

In order to discharge his obligations, the monitor is provided with all the material that the applicant agency proposes to rely upon. In addition, the monitor may cross-examine the deponent or issue written questions to the agency for further answer before the application is heard. The monitor has the ability under the act to prescribe the time frame within which the application is to be brought. Once the application is made, the monitor then goes to a second function which is the true monitoring role.

The act prescribes that one of the monitor's functions is to monitor the surveillance techniques. That is achieved now by way of conditions which are placed upon the relevant warrants. Those conditions, which are being developed by way of argument before the issuers—that is, Supreme Court judges—and in consultation with the agencies, allow the monitor to have immediate and unfettered access to all of the information obtained under the surveillance system, that is, in simple terms, the transcript and, if it is a video, the film.

The monitoring process provides for the monitor to ensure that the conditions of the warrant are being complied with. If they are not, then the monitor has the ability to report that to the police commissioner. There is also a facility to apply to the court for destruction of material which has been obtained. There is not yet a facility for an application by the monitor to have the warrant cancelled.

The Police Powers Act is currently the subject of legislative review, particularly through a committee established under the act called the Police Powers and Responsibilities Act Reference Group, of which I am a member. One of the proposals which I will be putting to that committee—and, indeed, to the minister—will be to entitle the monitor to make an application to cancel a warrant should the conditions of the warrant not have been complied with or it is otherwise in the public interest to do so.

The third function of the monitor is, of course, reporting. He reports to the parliament every year. The first report covered only the first four months of operation—that is, April until 30 June. The report which will be delivered this year will cover the ensuing 12 months. The importance of the report is to put before parliament the functions and obligations which the monitor discharges and how they are discharged. You are necessarily, of course, somewhat confined in what you can place in a public report because it can impact upon operational secrecy, and that is an important function—only, though, in so far as the reporting aspect is concerned. The monitor has, as I said, unfettered access to all the information obtained under the warrant, and if he or she becomes aware of any misconduct or other matter which ought to be brought to the police commissioner's attention, he or she can do so.

I have read the transcript of the evidence given before you in Brisbane and have had the opportunity this morning to briefly consider the briefing paper and the report of the Inspector of Police Integrity in New South Wales. I am aware of the preference from some of the agencies for what might be described as the New South Wales model. Can I say in respect of the current federal legislation that I agree that there are significant shortcomings in it. But having said that, I want to put on the record, because I think it is important, as a judge observed to me on Friday in an application for a surveillance warrant, that it is far easier to be critical of legislation than for yourself to propose workable amendments to it, particularly with respect to my own profession, when one is a lawyer. We can say, 'This is no good; this doesn't work.' But I can tell you from personal experience that it is a very difficult thing then to substitute something which is not itself open to criticism.

One of the things that I have to do for the reference group in the next short time is draft a series of sections with respect to covert surveillance powers. As I said, it is not an easy task. You prepare a draft that looks good; it addresses problems as you see them. But then, upon review, you see further problems that open up. The original federal legislation, as I

understand it, was drafted, if not necessarily in response to, certainly in the context of, the High Court decision in Ridgeway. From its terms, it addressed particular problems. As such, I think it was valuable and important legislation and, being the first step into this area, legislation which was ground breaking. That itself makes it difficult to draft properly.

My experience of our act in Queensland has shown me that it is only when the act comes into force and operates for a period in law enforcement that you see where areas need to be addressed. So in appreciating that there are defects in the current federal legislation, I do not want that to be said in a critical sense.

As to the New South Wales legislation, it has significant advantages over the federal legislation—no doubt because it had the ability to operate from an existing model and then to improve upon it. There are still aspects of it, though, that I would not support. I refer the committee, in terms of the evidence that was given, to some observations made in Brisbane which I support and which may assist in demonstrating to the committee the attitude that I take in respect of the proposed insertion of a public interest monitor model into the federal legislation. In Mr Carmody's evidence—and I will put on the record the passages that I am referring to—at page 76 he noted:

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 . . .

I agree. It is the case, from my experience of being monitor for 18 months, with respect to the sorts of targets of these operations, namely, organised narcotic importation or trafficking rings, that they are well organised and they are extremely difficult to penetrate.

My perception, in the time that I have been involved in this job, has been that it is a necessary function of law enforcement for there to be a regime of controlled operations. The question for the committee to address now is not whether that step ought to be taken, but how that step should run in parallel with extremely stringent and sensitive accountability and reporting mechanisms.

I am aware, from reading the material before you, that opposition to a controlled operations legislative scheme has been expressed by, amongst others, the New South Wales Law Society and the New South Wales Council for Civil Liberties. Mr O'Gorman, whom I know well, seemed to start from that proposition, but during his evidence perhaps recognised that there has to be some legislative and statutory regime for what will necessarily occur. I note also that Mr Carmody, more importantly, at page 79, went on to say this:

The New South Wales model—subject to the untabled review . . . I think, is the most preferable, from two points of view. It covers a wider range of offences—

but now more importantly, and I emphasise this—

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.

I say to members of the committee that that seems to me to be the starting point for the consideration of amendments to the federal legislation. Often, you will hear from the

agencies, as they expressed to me on more than one occasion, the necessity for operational effectiveness and operational efficiency to be paramount. I cannot, with respect, agree with that proposition. Of course, an important consideration in the drafting of any legislation is the accountability regime and how that legislation ought to operate. But it is not the only consideration, nor, in my submission, is it the paramount consideration.

In considering what recommendations you make ultimately, there is no one factor which I think you can identify as being the most important. There are a series of parallel factors, each of which has to be looked upon in the context of the others, so that if you develop wider powers for law enforcement agencies, it is done only—and I emphasise 'only'—upon the basis of appropriate accountability and reporting methods. It is in respect of that aspect that I think I have some criticism of the New South Wales legislation.

It seemed to me from reading their evidence that both Mr Carmody—and again at page 83—and Mr Butler, the head of the CJC, recognised that it was important that there be put in place sufficient accountability models. To the extent that they do so in their evidence, I, with respect, adopt what they say.

How is that to be done? The way in which I think it can be done is by looking back at the outline I gave of the monitor's functions and obligations. The principal weakness that I see in the New South Wales legislation, as indeed it is in the federal legislation, is the application process. At the moment you have an applicant for a certificate or an authority or an approval, whichever way you want to describe it, being made to the chief executive officer or a relevant officer of the agency undertaking the operation. It seems to me that that course is not a preferable one.

Around Australia, and in the federal sphere, we have a regime, for example, of application for telephone interception warrants or, in the Queensland example, listening device or surveillance warrants. We require, as a matter of course, that those warrants be approved, in the Queensland case by a Supreme Court judge and in the federal case by a senior member of the AAT.

What we are doing under those warrants is listening in on people's at times quite private and sensitive conversations. But without in any way belittling the impact upon privacy that that involves, those warrants are doing no more than that. Yet at the same time we have a regime which authorises conduct which would otherwise be illegal by law enforcement officers and which may necessarily, firstly, have an impact upon members of the public and, secondly, involve other members of the public in such activity. Yet we do not require that the authority or authorisation for that be given the same level as we do for surveillance devices. It seems to me that there is a logical inconsistency in that, and that is one which I think has to be addressed.

Having said that, I know what the response from the agencies will be, because one hears it regularly, and it has some force: if we require applications of this kind to be made to some form of authorising officer, whether it be a judge—and I am against that for reasons that I will explain in a moment—or some other body, that will somehow impact upon operational efficiency. Well, the answer is that it will. It is quite right. It will not be as efficient for an applicant to go before a body such as that, particularly with the intervention of someone

such as the Public Interest Monitor in the application process, as it would be simply to go to one superior officer. But that is not the answer to it. The answer is whether such an application process is an appropriate thing when one is considering the sort of conduct which is being authorised or approved.

To my mind, the resolution of that question really is, with respect to the legislative scheme now in existence, a fairly simple one. I can see no reason why operational efficiency or effectiveness is considered to be so paramount that a regime cannot be implemented in which the appropriateness of conduct to be authorised is reviewed by an appropriate independent person with the intervention of an appropriate ombudsman or public interest monitor or whatever you wish to call them.

One of the criticisms which I am sure was levelled when the position of Public Interest Monitor was first created for surveillance of things was that that would have an impact upon operational efficiency, that is, the opportunity that it presented and which merits surveillance is at times a fleeting one and that, therefore, this system will lose those occasions. During the 18 months that I have done this job, there have been a couple of occasions on which that has happened to an extent, in that, by the time covert search warrants were obtained, the window of opportunity had closed. But they are rare. What we have managed to put in place, certainly in Queensland, is that applications where urgent can be brought on urgently, heard urgently and disposed of urgently.

One of the requirements of my position is that either I or my deputy must be available 24 hours a day, seven days a week to hear these applications. As I said earlier, the monitor has the facility to prescribe the regime within which the applications are brought. We have found it impossible to put any time frame to that because the circumstances vary so greatly from one application to another. What it means in practice is that, as a monitor, I have appeared on applications at night, on public holidays, on weekends and before court if I am involved in a trial or in some other matter. I can say that that sort of flexibility which is required has been greatly facilitated by the attitude taken by the justices of the Supreme Court and judges of district courts in Queensland. For example, on more than one occasion I have been in a trial somewhere and an application has come on urgently. I have had the matter stood down for a while so we can go before a Supreme Court justice and hear the application.

I think it is fair to say that, since the regime has started in Queensland, there has not been an occasion on which the operational efficiency has been, in a detrimental sense, affected by the necessity to go before a Supreme Court justice. What that means in simple terms is that the system can work and does work if it works with the cooperation of all parties to it, and to date that cooperation has been forthcoming. Frankly, I can see no logical reason at all why a similar regime would not operate with equal efficiency in any other state or in the federal sphere. ‘Operational efficiency’ is a term used perhaps too frequently to deny what seems to me an otherwise logical imperative.

The second defect that I see in the New South Wales regime is the monitoring system. As it currently stands, the Ombudsman has the right to monitor records and must do so every 12 months to present her or his annual report. The monitoring system in Queensland is a little different because it starts from the advantageous position of having been involved in

the original application—that is, once you are sufficiently up to speed with what the application involves and are aware of the circumstances upon which it is based, it is far easier in that context to engage in an active monitoring regime. After the period of the warrants has expired, I have access to the warrant information, and I read it. But it takes a lot of time. It takes a lot of time out of a practice and out of ordinary life. If monitoring is to mean anything, if it is to be effective, it must work in the regime of someone consistently monitoring information which is obtained. Equally, in controlled operations, if monitoring is to mean anything, it cannot be something that occurs too far down the track.

Not only is it important from a public interest perspective that the monitoring be ongoing and close; I think it is also important from a law enforcement agency perspective. One of the factors, in my view, as to why the Public Interest Monitor in Queensland works well, and works with the agencies well, is that the agencies do know that this is what you are doing. The agencies do understand that you can make their life particularly awkward and particularly difficult if you become aware that there are any shortcuts being taken or that information which ought not be retained is proposed to be retained.

The third area where I think there is a problem in the New South Wales legislation which is identified is the question of retrospective authorisations or emergency authorisations. Under the Queensland system, we have provisions whereby surveillance warrants can be obtained in true emergency situations without authorisation; then the authorisation is sought ex post facto. That has not happened yet. One of the reasons why it has not happened, as I said, is that we have made ourselves available sufficiently on short notice to obviate the necessity for it to occur. In the controlled operations, it is a little different, because circumstances will arise which are so immediate that no application process, whether to a police officer or to anyone else, will ever be sufficient.

I can see some merit in considering in greater detail the New South Wales provision in that regard, but I do, with respect, agree with the rejection by Mr Finlay in his report of widening this sort of thing to any great extent. I suppose it is either an advantage or a disadvantage that, having practised in Queensland and having been aware, as any lawyer would have been, of the sorts of problems and sorts of issues that have arisen in the Queensland law enforcement agencies over the last 10 or 15 years, I am perhaps sensitive to ensure that those sorts of things do not recur. I think it is also fair to say, and it should be acknowledged, that the agencies themselves are sensitive to it and sensitive that they take steps to ensure that it does not recur.

One of the things which I think has been a positive step in the QPS, for example, is the employment of legal officers in the various sections and, indeed, now a legal adviser to the Commissioner for Police. I think it is important because those people add another perspective to the approval process, and they are people with whom any ombudsman will work in the first instance.

In summary, having read Mr O'Gorman's evidence, it seems to me that a monitoring role such as that undertaken in Queensland under our legislation is not only readily suitable for the controlled operations scenario, but is one which is a necessary element. It is also one which, it seems to me, is not difficult to institute. I could see, for example, within the framework of the New South Wales act, being able to insert amendments which would

maintain the effectiveness of the regime set out there, but at the same time provide the sort of monitoring and the sort of respect for the civil liberties aspects which both Mr Carmody and Mr Butler quite frankly conceded before you were critical. All that it requires is the appreciation as a matter of policy that that is what will happen. If that policy is one which has bipartisan support, as it ought, then it will happen, it will work and the agencies will cooperate in an effective way. That has been my experience.

I have benefited from, as I said, the bipartisan political support in Queensland for the creation of the monitor and the operation of the position. Both the current minister, Mr Barton, and his predecessor, Mr Cooper, were supportive of the role, and strongly so. That is a factor which is necessary to acknowledge publicly, as I did in my previous report, but also one which has to be understood as being absolutely fundamental, because if there is any prospect that the role can in any way be impacted upon by anything other than bipartisan support, then it is immediately weakened. If that is right, if the perception is that it can be weakened, then it will be. That is all that I want to say by way of opening remarks.

ACTING CHAIR—Thanks, Mr Perry. That was very valuable. Could you take us through, in a practical sense, what happens when you go into chambers with a judge and some of the law enforcement agencies are there. Do they put their case and then you question them? Has it been the case that the law enforcement agencies have modified the application that is before the judge? Have any been rejected? I think in your annual report you say that none have been rejected.

Mr Perry—No.

ACTING CHAIR—I am just interested in a practical sense. You have set out for us very clearly the principles under which you operate. Could you take us through a case study, in a broad sense.

Mr Perry—A typical application for a surveillance warrant generally runs this way: the legal officer responsible from the agency will contact you and say that they wish to bring on an application, and describe over the telephone, in broad terms, what it involves. I will respond in terms of the sort of information that I would require to support such an application. Even at that preliminary stage, we will debate the pros and cons of an application, what my views or concerns are, and how they might be addressed.

The material is then supplied in draft form. As I said, I have the ability, if necessary, to provide questions in writing which have to be responded to. That was used in the first few applications but, not surprisingly, as the legal officers, my deputies and I have had more experience with each other, there tends to be a greater understanding of what is required in order to meet any one application. Nonetheless, there have been a number of occasions when I have asked for further material to address particular points.

If I am opposed to a particular application, I will state my position and why. To date, where I have expressed opposition on a factual basis, rather than on a construction of the act basis—and I will come to that in a moment—the applications have not gone ahead. That is why there have been none which have been opposed before court. The position has been that, between myself and the agency, we have addressed the shortcomings, if there are any;

the problems, if there are any. If they cannot be cured by further material, the application to date has not been brought before the court.

At the stage at which it is brought before the court, I have the entitlement to cross-examine the deponent. I have done that once, in the early days. I suspect it had a salutary effect in that applications are now supported by extensive material and are critically examined by the police agencies themselves. One of the advantages of self-regulation in this field is that surveillance resources are fairly scarce. The police services themselves do not want to waste their time, effort and money on matters which are not going to go forward to execution and, hopefully, ultimately, arrest and prosecution. So that is of assistance.

Before the judge, the application will generally run in this sense: the applicant will simply read the affidavit. By 'read the affidavit' I mean 'this is the affidavit of'. The judge will then physically read it. Sometimes the applicant will provide a summary, but generally not. After reading it, the judge will generally ask me if I have any submissions. Generally, I will take the judge to matters which in my view require the exercise of a discretion by him. For example, I might say to him, 'I have some concerns about the strength of the information in respect of this particular statutory criterion. I have some concerns about that.' Then there will be a debate, back and forward.

If I support the application, I will tell him so and the warrant which is issued will record that as a matter of fact. I think it is important that, if a Public Interest Monitor does support an application, or oppose it, the document that comes out of that process should record that as a fact.

That is generally how the operations work. They work, I think, partly because over the last 18 months we have built up a good working relationship with the relevant legal officers. There is no reason that I can see why such a relationship ought not, and cannot, be developed by similar monitors in every state.

ACTING CHAIR—Would you be talking about a process that might take two hours?

Mr Perry—No, not necessarily. To read the affidavit, sometimes they are quite lengthy. The judge may take half an hour or so, or 45 minutes, to do that. Some judges, as you would expect, are quicker than others. Some judges will question the applicant more extensively than others. The average for an application before a judge would be an hour or less. But as I say, the reason for that is that the ground has been prepared before you get there.

In terms of my involvement, by now, it would involve something like two, three or four hours per application—maybe a little more—in terms of contact and preparation. Because I am sensitive to the cost of the insertion of a monitor, I have made it a practice not to charge for talking these things through with officers and so forth. So the recorded time that I put down is for reading the material and appearing in court. I also do not make it a practice to charge for reading the information, because if you did so, as it stands at the moment, it would cost too much, but that is because it is a part-time job. If you made it a full-time position, obviously that would come within the regime. The practice which I generally

follow is that, for about two or three hours a week, I will sit down and read the logs that go through. If you make that a regular practice, that generally enables you to keep up with it.

ACTING CHAIR—We have not had this criticism, but I can imagine that it might come, which is the suggestion that this is putting another layer of bureaucracy onto the process. What do you say to that argument?

Mr Perry—Of course you will hear that criticism. I know when this position was created that the immediate reaction amongst a lot of the agencies was, 'Who is he? What is he doing being involved in our patch? This is just going to make it harder. This just makes it all too difficult.' That criticism is implicit in the Integrity Commissioner's report about time frame. I think there was mention of the difficulty of preparing applications—the work it takes and how much harder that makes it, and of course it does. It is another layer of bureaucracy, but it is a bureaucracy directed towards one particular aspect; that is, ensuring as far as possible that a fairly important public interest—namely, civil liberties and privacy—is to be protected. There is no other way of doing it.

If the agencies want these powers then, in my submission, they have to be prepared to accept, cope and cooperate with the parallel, which is the monitoring system. I can see nothing wrong, as a matter of principle, in the agencies preparing the cases, as they do at the moment in Queensland, for these approvals. The reason is that, apart from anything else, it tends to focus the agency's mind on how strong the factual basis for the application is. That in itself assists not only the investigation but also the agency's determination as to whether they are going to follow it through. So of course you will hear that. You will hear all the time that it is an unwarranted intrusion. From the perspective of the agencies alone, that is right, but it is not their perspective which is the paramount issue. It is an important one but it is not the sole one. Yes, Senator, you will hear that and you will disregard that.

Senator GEORGE CAMPBELL—In your presentation, you made reference to the issue of certificates. I think you made the comment that you did not believe it should be done by judges and that you would come back to explaining why. You did not come back and explain why.

Mr Perry—Yes, I am sorry.

Senator GEORGE CAMPBELL—Would you mind outlining your reasons?

Mr Perry—Yes. The reason I think it cannot be done by judges is because of what it involves. Can I draw a distinction between these sorts of certificates and surveillance devices. The last time Mr O'Gorman and Mr Carmody and so forth met with the committee, there was reference from one of the members, perhaps Mr Kerr, about decisions of High Court judges in respect of this. You are familiar with the Kable case recently and that New South Wales legislation. There is a concern, and I think a justified one, that members of the judiciary should not be seen to be too closely involved in the regulation of the criminal investigation process. When you are okaying a surveillance warrant, you are doing it in fairly confined circumstances: here are the facts; this is why we think it meets the statutory criteria; yes, I will okay the surveillance warrant.

Another example is Queensland, where the requirement initially was for a report back to the judge about what had happened and whether they complied with the conditions. The judges themselves expressed considerable misgivings about that. What happens now, under one of the conditions inserted into the warrants, is that they do all that to me. If I want to bring an application to the court for destruction and if my proposals are accepted, I hope that, after the amendments for cancellation, that can happen. These certificates are a bit different. What you are considering here is the appropriateness of conduct which would otherwise be illegal. That requires some value judgments about the investigative process itself. My concern would be that, if you framed an appropriate approval system which required some degree of involvement from the issuer or approver and that person was a judge, we run smack into the Kable proposition, et cetera.

I would prefer, as a matter of prudence, that judges do do it, because they are the people charged by society with making the sorts of decisions that are akin to these sorts of decisions. My concern is that, if that regime were put in place, preferable though it might be, it would fall over. In the federal sphere, you are aware that they have sent interception warrants down to members of the AAT. As we are talking about the federal sphere only, that would be a preferable course. In a state environment, it would cause some significant problems because we do not necessarily have recourse to a tribunal of similar standing and experience as the AAT in the federal sphere does. We are largely confined to Supreme Court and District Court judges. In a regime such as this, a separate issuing authority may have to be considered. Of course, that is not a concluded view. I would prefer it to be judges, but I do not think it can be, because of the criteria concerned and because of the sort of approval you are talking about. That is, you are sending police out to engage in illegal activity which will on occasions necessarily involve other people in such activity. I do not think the judiciary can get involved in that.

Senator GEORGE CAMPBELL—This leads me to my next question. In the submissions made by the representatives of the Queensland police force, at one stage they made the point that they did not believe it would be effective for the operation of the process to have the Public Interest Monitor—or whoever—involved in the process of issuing the certificates, because that would compromise their involvement in the actual operation—of necessity, it would have to be part of that—their ability to monitor or assess the outcome of those operations and whether the force had acted with due diligence, et cetera. What do you say to that argument?

Mr Perry—That depends on what involvement you are talking about. If the Public Interest Monitor were to be the person who approved or issued the certificate, that, in itself, would be right. I think the issuer should be separate from the person doing the monitoring and the reporting. Apart from anything else, if the regime were to be put in place—which I think is the most effective one—there should be the possibility for the monitor to go back to the issuer and have the authority cancelled. It is a bit difficult to have the one person doing the two tasks. If it were within those limited confines, I would agree. However, I would not agree if the monitor were to act in the same way that I do now within the legislative scheme that I act under. That is, there is a separate issuer and a monitor, who appears on the applications, supports or opposes them or does the same thing that I do now and at the same time monitors.

There is no conflict involved there; there is none in the current legislative regime. That criticism is not one that I have heard expressed about the act that I operate under, and we have looked fairly extensively at amendments to the act. My response to that criticism is that it works under the current act, and there is no reason, in principle, why it would not work in a different context, namely, the controlled operations context.

Senator GEORGE CAMPBELL—On the issue of accountability, one of the arguments for national legislation is the need for uniformity and the fact that different regimes apply in each of the states. Queensland does not have any regime at all for controlled operations, but they have uniformity because of the interface between state systems and the NCA. In the context of achieving that, what sort of monitoring system would you set up? Would you have a monitoring system that looked at each of the separate systems independently, or would you seek to set up a monitoring system that was able to cut across all jurisdictions? How you would achieve that poses political questions.

Mr Perry—I suspect the latter is the case. My view is that there ought to be monitors. I think it is a matter of practice. While we still have separate state law enforcement jurisdictions, the practical way is probably to do it within each state, but to have the person in each state also act where federal agencies are concerned. For example, the NCA already brings a lot of applications under the state legislation under which I work because they have Queensland police officers seconded to them. The NCA itself has an extremely limited investigative arm of its own. It operates through either the AFP or the local state forces, so I already have a considerable involvement with the NCA.

It seems to me that the appropriate way to do it would be to have a uniform federal and state scheme. Uniformity is important because it avoids what is truly an unfortunate system of forum shopping. Any lawyer will tell you of the advantages of picking particular forums to operate in. There are sometimes procedural or substantive advantages in doing so. That is something that ought to be avoided like the plague, frankly, because you cannot have that sort of thing in the law enforcement regime. Therefore, it would have to be consistent. Yes, that is difficult. It has happened in other areas, of course. Corporations Law is one that comes to mind immediately. But, yes, it is difficult.

It is difficult also because police enforcement and police operations are a peculiarly state based function. Therefore, the states will necessarily have their own perceptions as to how they should operate. But, as far as possible, firstly, it ought to be uniform around the country. Secondly, I think that, as a matter of practice, there should be monitors, or whatever you want to call them, in the individual states. That person or persons should operate under the relevant state scheme for their own state forces, like our Police Powers Act, and should also operate under the cooperative scheme in respect of any federal agency operating within that state area.

The only problem that may arise, of course, is that operations of a criminal nature are not neatly confined by state boundaries. I think you would want to have a system where, if there was an application by a federal agency but there were real prospects that it was going to operate interstate, you still had the application in one place. How the agencies did that would probably be operationally a matter for them, depending upon where the investigation was

being run from, where the senior officers were or something of that description. That authority, under the federal act, would extend, of course, Australia wide.

Senator GEORGE CAMPBELL—Could you use a system that applies in some other jurisdictions of dual appointments?

Mr Perry—Yes. One of the things that there is interest in, not surprisingly, in the QPS, is for telephone intercept powers which are under the Commonwealth regime. Without in any way wishing to represent the views of either government or opposition in my state, because that is not my function, I think it is probably fair to say that there is at least a view that those intercept powers are appropriate only if there is a parallel accountability mechanism akin to the Public Interest Monitor proposition. That view seems to have run into some problems in the federal sphere in creating such a position, because there is the Ombudsman position.

In my report you will see that I recommend that the telephone intercept powers should be addressed. As a matter of law enforcement, they are a necessary incident of the system. It can be done—again, all you have to do is set up a regime where you have this dual appointment. I think it is important that, at least within a state boundary, the same person or people do the range of applications because you need consistency in approach. Operations are not in little parcels. The use of covert search warrants, surveillance, telephone intercepts and controlled operations are all parts of the same basket. They ought to be approached in a consistent way, with a consistent application system, involving a consistent approach. Yes, you would need a dual appointment system to cover the field.

Senator GEORGE CAMPBELL—I have one final question. Part of the argument that is put up is whether or not the range of criminal activities that is subject to controlled operations ought to be narrow and specifically codified, or whether it ought to be more general and broad. One of the arguments that we heard in Queensland was that the range of applications in this area is getting broader and more and varied types of criminal activities are being caught in the net in terms of applications. There is a concern about how wide you would make it in terms of the range of activities out there.

Mr Perry—I will address that this way as well: as I said, the Queensland act is under review. One of the problems that we are grappling with in amending it is to identify the range of offences to which surveillance devices should be applicable. Currently it is described under the act as being ‘serious crime’, and then the act goes on to talk about ‘serious theft’. When is something serious theft? Is it a lot of money or is it a small thing which is of intense value to an individual or to the public at large? It is an extremely difficult debate to resolve.

The only way it seems to me that it can work is to specify two classes of circumstances: one in which an application for a controlled operation can be made, and then related back to the statutory criteria, like the New South Wales act does; and a second regime of offences which, at their face value, are less serious, but which in any individual case may, because of particular circumstances, actually have a compelling public interest. In those circumstances, you would add a further layer of, say, an exceptional circumstances clause.

The easy ones, of course, are the murders, rapes, drugs, life imprisonment offences, or offences with sentences of 20 years and above. A break and enter is a classic one—seven years. You would say that, on first blush, there is no way that this sort of intrusion of privacy is warranted by that. Let us say that somebody breaks into Queensland university's biolab and takes a phial of something fairly significant. The offence itself, in legal terms only, is minor. The impact on the public interest by not having it resolved is significant. I think the way that it has to be done is to have these two classes of offences but to never go away from the fundamental proposition that these powers are, by their very nature, so significant and carry within them the seeds of such significant problems that they should be warranted only in the most particular and serious circumstances. You cannot do more than that, because the factual cases that you run into are so varied that it will defeat the skill of any draftsman to preview every possible circumstance.

Senator GEORGE CAMPBELL—It does throw an enormous amount of onus onto the person who is issuing the certificates.

Mr Perry—That is why I think the system of issuing certificates by reference to an independent—and I mean entirely independent—authority, which is created like the judiciary or the AAT for the whole purpose of resolving these things in the public interest, ought to be used. That is why I think the system of applying to CEOs or senior officers has within it real, inherent inconsistencies and tensions. I should hasten to add that that is not to say that the personalities of those people who occupy the positions currently, or indeed in the future, are not such that you would have that confidence. You have to do this exercise, though, and disregard the individuals and look at the systemic problems. It seems to me to be inherently unreliable to provide for a system where the agency conducting the operation is itself the approving agency, and that is not in any way intended to be a criticism of the agencies. It is just simply, in my opinion, a fact.

Senator STOTT DESPOJA—Mr Perry, I understand that you also have an educational role, and I am just wondering what that involves and how that influences your practice.

Mr Perry—Within the QPS, yes. On the initiative of some of the legal officers in the QPS in particular, they are running courses for their surveillance operatives—that is, the people who are the users at the front end. We have, by arrangement, involved in those courses a presentation by me with respect to the public interest—the Public Interest Monitor, what I expect of them and why I expect that of them.

I have also had the opportunity to give a similar presentation to the commissioner, the assistant commissioners and the crimes operations officers. That is a function which I think is an important and ongoing one and one which any person in a similar position in any other state should also engage in. It allows two things: by a greater understanding of the position and by presenting the individual up there—'Here I am and this is what I am going to do'—not only do you enhance cooperation from the agency but also I think you inculcate a greater understanding of why the position is there. As I said, in the first instance—I am sure because I know—the reaction was: 'Who are you, and what are you doing? You just can't come in here and involve yourself in these things.' You can, you must and you do, and the best way to do it is to explain why.

Senator STOTT DESPOJA—There is a question, and one that I have been grappling with over the last week. It is about not only the culture of law enforcement agencies as to whether or not there is that right of someone to come in over the top or in a monitoring role but also the impact of police officers being engaged in criminal activity—that impact on criminality. But, I guess more generally, do you believe we are effectively striking a balance between the protection of privacy and other civil liberties in our society? Are we against this situation where we are seeing requests for expanding police powers? Do you think that the PIM is an example of striking that balance of protecting those liberties but also allowing various law enforcement procedures to go ahead?

Mr Perry—It is an example. It will only be effective if it has three things. Firstly, there must be bipartisan legislative support. There must be no doubt that no change of government, no change of position, no change of policy will weaken the position. Secondly, it must be supported by legislation which is sufficiently strong; that is fundamental. It must be understood that the monitor has these powers, will exercise them and can be a real thorn if there is any divergence from the specific conditions set out in the warrant. Thirdly, there is the selection of the people, the environment in which they work and the control of the monitor. As one person expressed to me recently in terms of the monitor's position, if you give a monitor significant powers they can equally, if they are acting perversely, be a problem. If you do not give a monitor significant powers, then do not bother. There is a point in the position.

In my view, it does strike a balance. It strikes a balance primarily because of the independence of the monitor's position. Yes, you will get opposition in terms of, 'This makes our life too difficult.' As any court is wont to do when you are trying to put an argument before them, taking that to its logical conclusion, if opposition and operational impact is the only criterion, then why do we bother with civil liberties aspects at all? The most effective way of having law enforcement is to go out there and do what you want. Then you will catch a lot of people, that is true. But that is the logical extension of the argument that is being put forward.

It is important, particularly as we turn into a more technological age that, consistent with the increase in police powers, there is a parallel increase in surveillance and monitoring. During the weekend before last in the *Sydney Morning Herald* there was an article about a lady in America who got a letter saying, 'I see that you have divorced your husband and you like eating Weeties in the morning.' This woman was appalled. Where did this come from? It came from a prisoner in a Texas jail. What had happened was that she took part in the American equivalent of a fly buys program and the company that collected all the information used prisoners to collate their information because they are cheaper.

The reality is that we are living in a world where the ability to eavesdrop, surveil and control is getting better. In many respects that is a good thing, because the opposition—namely, the criminals—are doing it themselves. But, as soon as we lose sight of the necessity of having this done in tandem, then the impact on civil liberties is not only significant, but irrecoverable.

Yes, I think the monitor system does work. I think it works effectively. I think the police would concede that we work together professionally and effectively. I know that they would

prefer in many respects not to have that intrusion. You should not expect anything else of a law enforcement agency, because they have a job to do. So it is a natural position. In the relationship I have with the people I work with from the agencies, we disagree on many things, of course, but it still works effectively and efficiently. It can work effectively and efficiently if the monitor is given the appropriate powers, but is also oversighted themselves. The old 'who guards the guards' motto still works fairly well. That may mean in this context having something like the PCJC that we have in Queensland in terms of any monitoring. Let us say we have a federal scheme. What are we going to have? Seven or eight people and their deputies, a dozen to 20? Their role should itself ultimately be reportable to a parliamentary committee like this. I think it is important that they do so, because, if not, you could get a monitor in there who wants to be a nuisance.

Senator STOTT DESPOJA—That is fine. I could pursue that thought as well, but I am curious. If you were in a situation where you have concerns, are you able to speak publicly about those concerns? Are you bound to deal with those concerns through standard reporting procedures, or is it simply that you have not had concerns yet?

Mr Perry—It is twofold. You report to parliament, but that is 12 monthly. I can report to the police commissioner under section 82D about any particular matter on an ad hoc basis. So I can report to the commissioner. I would doubtless have the facility, if I needed, to report to the Chairman of the CJC, if I became aware of any matter that would involve potential misconduct. I hope that subsequently there will be a facility to enable the monitor to apply to cancel warrants, rather than simply just order the destruction of material. I think it is important that it be understood that, if the conditions applicable to an operation, to a warrant, are transgressed, the result is the warrant gets cancelled and everything that has been gathered goes through the shredder.

The agencies often say, 'We'll argue that at trial about admissibility of evidence.' The problem with that is that trials are not the only facet of law enforcement. There is collection of databases as well. If the warrants are transgressed, the stuff should be destroyed. Publicly, no, I do not have any reporting facility beyond that. One of the reasons for that—and it is a fair one—is that your concerns can be generated because of an operational matter and security is important. For example, I make a practice of not having anything in my chambers relating to any operation. I do not have anything at home relating to an operation. There are only two of us who do this, so all the agencies run through you. You tend to be possessed at any one time of an awful lot of knowledge about particular operations and, because of what you are talking about, you do have to be careful about the extent to which you can do it publicly.

That is why I think there are advantages in what we have here. If you set up a regime such as this, one of the things that might be appropriate would be the ability for the monitor to address a committee such as this in camera about particular aspects that caused it concern. There is some analogy with the oversight committees of the US House of Representatives as to how they operate with their security intelligence organisations, that is, the ability for a committee to have a presentation such as this, but in confined circumstances so that operational secrecy is not compromised.

Mr EDWARDS—Do the agencies have any appeal process, and should they have any appeal process? That is the first question.

Mr Perry—From a decision to grant a warrant or not?

Mr EDWARDS—Yes, not to grant a warrant.

Mr Perry—No, they do not. One of the matters that I suggested when I was first appointed was that there be an appeal process on the point of construction of the act. An appeal process on the facts, if I can make that distinction, was fairly vigorously opposed, because I think the services were worried that they would get an order over my opposition. I would then appeal and, effectively, operate a stay. Then the opportunity presented by the circumstances would pass. That was fairly vigorously opposed. I think there ought to be an appeal process, not on a factual basis, but on a legal basis.

Senator Ferris asked me about the opposition to applications. The times in which we have had opposed arguments before justices have arisen out of construction of the act, that is, what does this word or this sentence mean, particularly under the Criminal Justice Act, because there is some tortuous language in some of the sections. I think there should be an appeal process, but probably not in respect of the granting or otherwise of an application, because I think that would lead to things getting just a little bit too complex. You have to have sufficient faith in the issuer. That is why for another reason you want to make sure that the issuers are people whom you do have that faith in—hence, judges—to leave the factual basis at first instance.

Mr EDWARDS—How are you appointed, by whom and how are you discharged and by whom?

Mr Perry—Appointed by Governor-in-Council on the recommendation of the Premier. As for discharge, there is no particular basis other than effluxion of time. I think it is appropriate, and I am going to put into the act, that there be a mechanism for that. Like all positions of independence, though, appointment and dismissal is a matter that should be a last resort, rather than simply saying, 'Look, he is too awkward. Let's just roll him over and try again.' That would cause me some concern if that were the case. Equally, like any position, there should be some mechanism for that. I assume that, having been appointed by the Governor-in-Council for a term, I could equally be removed by the Governor-in-Council, though that is not expressed to be so in the act.

Mr EDWARDS—I asked the question because you seem to have a fairly good relationship with the agencies.

Mr Perry—Yes. You have to have a good working and professional relationship with them. That is not to say that we do not disagree fundamentally on some fundamental issues. In terms of surveillance devices, we do. For example, I have some real concerns about the use to which information obtained under a surveillance device can be used for purposes other than the one which founded the warrant. That is, we put a device into your place because we think you are a major drug trafficker. That is not right, but we find out that you are fencing VCRs down at the local pub on a Saturday night. Can we use that information? The

agencies' attitude is, 'It is a legal warrant and we should be able to use it for these purposes.'

I have a diametrically opposed view. I noted in a recent Home Office paper put out by Jack Straw in June this year about telephone intercepts in England that they have an entirely different system. You get a warrant for a particular purpose. If it is not used for that purpose, all information is destroyed. I do not quite agree with that, either, because there will be sufficiently serious offences that you will find out about over a surveillance device, in respect of which the information should be used. So there is middle ground somewhere. The agencies say that it is all fair; I have a more conservative view, I guess.

Senator STOTT DESPOJA—Can I just pick up that point? To take on board your concerns, how does that manifest itself in terms of people making an application, say, for a warrant? Do you prefer it to be specified and as inflexible as possible—that people make very clear in their application the specific purpose for which it is being used and try to discourage broader interpretation?

Mr Perry—Yes, I do, both as a matter of principle and because it has to be, having regard to the scheme of our act. There is a slight difference between the Crime Commission and the QPS acts. The Crime Commission is an intelligence gathering organisation, so the criteria under which it can apply are somewhat broader than those for the police. The police can apply in respect of specific offences—it is an offence driven section. The warrants specify the purpose for which the warrant is approved; that is, 'in respect of investigation and prosecution for the offences of'—and they are enumerated. That is a matter of principle that I support strongly.

One of the conditions in the warrant is that, without leave of a judge, it can be used only for those purposes, and other purposes which are allowed under the act. That does not close the door on using it for other purposes where it is warranted. Equally, it does not allow it as carte blanche. That is where the agencies and I differ. I think it is important that, as we repose confidence in the judges to approve the authorities, we should also give them the ability to say, 'No, you're not to use it for other purposes' or, 'Yes, you can, because of a particular circumstance.' The same sort of thing ought to happen in controlled ops.

ACTING CHAIR—Have you ever been presented with a conflict of interest as a result of the work that you do now? Is sort of professional work that you are able to take on constrained as a result of doing this job?

Mr Perry—Yes. The contract under which I am appointed requires that you not prosecute or defend criminal matters and not appear for police in the misconduct tribunal. The reason for the latter is that the Criminal Justice Commission, which is primarily directed towards investigation of misconduct, is a body which runs through the Public Interest Monitor. So yes, you are constrained in that. One of the criteria that was placed upon the appointment when this started was that it was desirable that you have someone who has had criminal experience, but it should not be someone who is currently practising in that field, because, necessarily, names and circumstances that you are aware of will arise. I started out at the bar as a prosecutor, but I have not been doing crime for, say, the last 10 years. I have been in a purely civil practise.

ACTING CHAIR—In a professional sense, I am sure you meant!

Mr Perry—I am a lawyer; I suppose I have been engaged in all sorts of senses! That is the sort of background which I think is advantageous. That is, you want someone who is sufficiently familiar with the field but has not been involved in it for a significant period of time. And then you have to be prepared to forgo that part of your practise that might impact upon it. In my case, as I said, I had appeared for the local police union in a number of inquiries. Upon taking up this job, I had to relinquish that part of the practise. It is a financially painful aspect of it, frankly, but that comes with the position.

ACTING CHAIR—If this committee were to recommend something along the lines that you have suggested this morning, what sort of qualifications would you see that a federal public interest monitor would need to have—a similar background to that of yourself?

Mr Perry—Similar, yes, but not necessarily identical. I think it is advantageous that the person have experience in the criminal law field. That can be practical in the sense of appearing or it can be theoretical in the sense of an academic, a Criminal Justice Commission researcher, an ICAC researcher or something like that. But I think it is important that they have had that experience.

I think it is important that they have had other forensic experience—that is, litigation based experience, because it gives the ability to more readily discern what the core facts are in any particular application. Again, that ability can be gained not simply by being a barrister or a solicitor. I do not think you would want to confine it too much. I think you would want to have someone who is not associated with the agencies and has not been for some period of time. As you said, Mr Edwards, I have a good relationship with these people because I have known a lot of them at the bar. Mr Butler was at the bar before he became the chairman; Mr Irwin, similarly, at the NCA. So these are people whom I know. That helps because you can talk frankly and openly with them and still have objective disagreements with them.

Obviously, you do not want someone who is too close to the agencies because that tends to risk their independence and both their ability and their willingness to, at times, cause considerable disappointment by not accepting a particular proposition. The agencies are, in the main, fairly seriously and honestly committed to what they are doing. If you take a contrary view, that is going to cause ructions at times, and it has and it will. You just have to be prepared to do it, I guess. As to conflicts, yes, they can arise. The way to get around that is simply to put the same sorts of confines that I operate under.

ACTING CHAIR—Have you ever thought that you would like to have a research assistant with you? I get the impression that, when you have your meetings with the judges, the agencies are well represented. You are there alone. Has it ever occurred to you that perhaps it would be useful to have an associate to work with you?

Mr Perry—I have a deputy but we do not generally appear together. My deputy appears if I cannot, for example. It certainly would be of advantage to have that sort of backup, not for the purposes of appearing but for the purposes of maintaining the monitoring regime. At the moment, the office of Public Interest Monitor is me. My secretary is the secretary to the

Public Interest Monitor, my computer system is the computer system for the Public Interest Monitor—

ACTING CHAIR—And obviously your telephone.

Mr Perry—and the telephone. And the TV and couch at home is the office of the Public Interest Monitor—and I am reading these transcripts. That is what happens.

ACTING CHAIR—Well resourced in Queensland!

Mr Perry—It is a new office, and I know that in any one law enforcement context, you will have budget arguments. I know that there is concern about why money is being spent on one particular person when it could be spent somewhere else. So you have to be sensitive to that and keep it in mind. If you had the sort of regime that we talked about, you would have to establish it on a more permanent basis. It is getting to be a problem now for me—keeping on top of it. It is not an insurmountable problem yet but I could see it being so.

Mr EDWARDS—Can you and do you put conditions on the degree to which information picked up can be disseminated amongst the agencies?

Mr Perry—Yes, you can. There are some provisions under the act for it, and there are conditions that can be inserted in the warrants as well. Controlled ops are a little different because you are not so much in the information gathering field as you are in telephone intercepts or surveillance devices. I do not know if this committee is going to be involved in considering telephone intercepts in any way. It is certainly something that ought to be done, because I know that they do not have an equivalent monitor position in respect of telephone intercepts—that is, the agencies appear themselves before the AAT. I think that is wrong. That ought to be changed, but that is a different question.

Yes, you can do that. I think it ought to be fairly tightly circumscribed because once it gets out of a fairly narrow band of people, it is impossible to control. All of this information is recorded on a computer. It takes—what?—a couple of seconds or less by email to transfer it to anywhere you like.

One of the concerns I mentioned to Senator Stott Despoja was the build-up of data banks. It is equally important not just that material not be used to prosecute people if it has not been properly obtained, but also that it disappears; that it does not just go out into the ether and 10 or 15 years later come back and bedevil somebody. I think you have been a police minister in Western Australia. One of the examples is in the criminal paedophilia area that the Crime Commission is involved in. There are justifiable reasons why material gathered in respect of that should be maintained for a long time, because often the complainants as children will not become complainants in fact until they are adults. So the material may have to be maintained for a long time.

It is critically important that it be maintained securely and in a narrow confine, because if the material is not in fact used in a prosecution, there is always the potential—as we have seen overseas previously—for things like that to pop up a long time later to be used in inappropriate circumstances. Yes, it ought to be confined, and closely.

ACTING CHAIR—Mr Perry, your evidence has been very valuable to us this morning and we certainly appreciate that you made the effort to come down from Queensland to meet with us face to face.

Mr Perry—Over the weekend I toyed with looking at the sorts of sections you might think about putting in if you were to follow essentially the New South Wales model, but with a different approach. Proceeding upon the basis that an application for a certification was to be made to the AAT—where the telephone intercepts have gone now—it is easy to put forward that sort of framework. If it is of assistance to the committee, I have taken that a little way forward over the weekend. I could complete a draft set of sections to operate that way and supply them to the committee.

ACTING CHAIR—That would be very valuable. Thank you very much.

Senator GEORGE CAMPBELL—While you are doing that, if you have the time, would you apply your mind to how you would operate it in terms of a national type of structure?

Mr Perry—Yes.

ACTING CHAIR—Given the state based jurisdictions.

Senator STOTT DESPOJA—You could write our report, too. We would be very happy about it!

Mr Perry—Yes, I will do that and if possible, if need be, I can have contact with the committee through the secretary to discuss issues on a broader base. Obviously, it needs some sort of a lead from you as to how you think this thing can work, but yes, I can do that.

ACTING CHAIR—It will be very interesting to hear the response of Mr Broome and his colleagues to your propositions on Friday. That concludes our hearing today. We will be holding a final hearing in relation to this inquiry on Friday here in Parliament House, the details of which will be released very shortly. I am sure you will be interested to read the *Hansard* as well in your spare time. I thank you again for your attendance today and declare this hearing closed.

Committee adjourned at 11.57 a.m.