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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Friday, 9 February 2001

Members: Mr Nugent *(Chair)*, Senators George Campbell, Denman, Ferris, Greig and McGauran and Mr Edwards, Mr Hardgrave, Mr Kerr and Mr Schultz

Senators and members in attendance: Senators Denman, Ferris and McGauran and Mr Kerr and Mr Nugent

Terms of reference for the inquiry:

National Crime Authority Legislation Amendment Bill 2000.

PARTICIPANTS

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

McDONALD, Mr Geoffrey Angus, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

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

LONGO, Mr Joseph Paul, National Director, Enforcement, Australian Securities and Investments Commission

GILLESPIE, Ms Margaret, Community and Public Sector Union

TWIGG, Ms Vanessa, Community and Public Sector Union

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

GREENTREE-WHITE, Mr James, Legal Officer, Law Council of Australia

HARVEY, Ms Christine Susan, Deputy Secretary-General, Law Council of Australia

ROZENES, Mr Michael, Law Council of Australia; Victorian Bar Council

BOULTON, Mr William McLean (Mac), General Counsel, National Crime Authority

CROOKE, Mr Gary, Chairperson, National Crime Authority

IRWIN, Mr Marshall Philip, Member, National Crime Authority

KENNEDY, Mr Michael Hartley, Committee Member, New South Wales Council for Civil Liberties

MURPHY, Mr Cameron Lionel, Secretary, Australian Council for Civil Liberties; President, New South Wales Council for Civil Liberties

OVERTON, Mr Allan, Director (Legal), Office of the Commonwealth Ombudsman

MOSS, Mr Philip, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman

BROOME, Mr John Harold, private capacity; former Chairperson, National Crime Authority

Committee met at 9.05 a.m.

CHAIR—I declare open this public hearing of the Parliamentary Joint Committee on the National Crime Authority inquiry into the National Crime Authority Legislation Amendment Bill 2000. The Senate referred the bill to the committee on 7 December 2000 and requires it to report back on 1 March 2001. We have now received 23 submissions in relation to the bill, and today's hearing is an opportunity for us to have a detailed discussion about the main issues of contention raised in those submissions. Copies of the submissions, as published by the committee, can be obtained by observers and anybody else, if you have not already got them, from the secretariat staff.

I would like to welcome all of our witnesses today and thank you for making yourself available, especially those who have come from interstate. Thanks also to the committee members who have not gone home interstate.

We are conducting this hearing as a series of panel discussions, which will hopefully generate a free and frank exchange of views about the provisions of the bill. I should emphasise that witnesses are encouraged to comment on the evidence of other witnesses. The committee will happily sit back and listen to exchanges, if that leads us to a better understanding of the issues. At the conclusion of the hearing, it falls to the committee to determine the appropriateness of each of the bill's provisions, having had the benefit of listening to your views and exchanges.

I propose to invite either Mr Crooke or Mr McDonald, as they consider more appropriate for each of the subjects, to be the triggers to the discussion process by giving the committee a brief critique of the intention of each of the bill's provisions and perhaps some of the history that has prompted its inclusion. Then, depending on the wish of committee members to immediately take up an issue of concern to them, I will invite other witnesses to provide comment. I should point out that the timetable is reasonably flexible but there is an end time which we need to achieve. That is just the reality of aeroplanes and other commitments.

I am required to say to witnesses that the committee prefers all evidence to be given in public but that 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. Hopefully, there will not be any need, but the provision is there. Committee members are also reminded that those witnesses who are public servants are here to help us to understand the provisions of the bill and that they should not be asked for an opinion on matters of policy. Similarly, the officers of ASIC and the CJC are here to give us the benefit of their advice about the operations of provisions in their own organisations' legislation which are comparable to those in this bill, not to defend their statutes. We will start with panel 1.

Schedule 1—Part 1 (Reasonable excuse, self-incrimination, penalties)

CHAIR—We will move to the first issue for discussion, which is reasonable excuse. In addressing this issue I would like to invite either Mr Crooke or Mr McDonald to discuss the argument of the Hon. Trevor Griffin, the Attorney-General for South Australia, that the scope of reasonable excuse is wider than the chapter 2 Criminal Code defences and that it is therefore a 'mistake' to replace reliance on the code. You might also perhaps explain how the concept of lawful excuse enters the equation.

Mr McDONALD—I have already agreed with the NCA that the department will commence, and on some of the specific topics I would like to have my colleagues here address them. In relation to reasonable excuse, the Criminal Code is one of my favourite topics and obviously I want to talk about that.

I will begin by saying that the department would like to thank the Parliamentary Joint Committee on the National Crime Authority for the opportunity to comment here. You would be well aware that the parliament has always had a very keen interest in the powers and functions of the National Crime Authority since its inception in 1984—such a keen interest, in our view, that we agree with the PJC report that a lot of the limitations on the NCA have affected its capacity to do its work. We have seen over the years what an incredible job the NCA has been able to do. This is all about making the NCA a more effective body and at the same time providing for the necessary accountability.

Amendments have often had sources from all over the place: ministers, the authority itself, consultation with states, decisions of the High Court. These are amendments that are substantially derived from the hearings of this committee, and that is a very good thing. We as a department have been very pleased to provide assistance in trying to get a bill that works well. No doubt the committee will, however, direct questions to the NCA in relation to the operational need for the amendments because, at the end of the day, they can give you much more detail about that.

In relation to reasonable excuse, the South Australian Attorney-General's position is correct in the sense that it is possible to have any defence in the code and it is possible, of course, to insert the defence of the reasonable excuse in the code. The code does not stop you from having a defence of reasonable excuse. However, from a policy perspective, it is a very vague defence, and I think this is recognised by the PJC and in some of the cases that have come over the years. With the arrival of the code, there are some very specific defences which at the starting point with any new legislation should be looked at before you even consider reasonable excuse. The code itself outlines defences in relation to emergency, mistake, duress—a range of defences like that. So, consistent with the approach that would be taken by the Model Criminal Code Committee or the Commonwealth, who are religiously trying to implement the model criminal code, you do not splatter 'reasonable excuse' all around the place or you will end up with the sort of vagueness that the PJC has recognised here.

I think the South Australian Attorney-General has come at it from the point of view that we might be suggesting that there is no role for reasonable excuse under the model criminal code. We have never asserted that that was the case. What we have said, though, is that where you have defences they should be as specific as possible. You have to look at each defence on its own basis. In this case, we think that the defences that are in the code are sufficient.

Mr KERR—If we were to accept the proposition that we should eliminate the privilege against self-incrimination, presumably there are some instances that most of us would accept as still meaning that people might claim a basis for refusing to answer a question. For example, it may be that they have a reasonable fear that they would be killed were they to do so.

Mr McDONALD—That would be where the general defence of duress comes into it.

Mr KERR—Can you take us, briefly, to the actual defences that would exist under the general operation of the Criminal Code?

Mr McDONALD—First of all, where a person has a reasonable mistake of fact—they have not complied with a notice or something because there was some crazy mistake about the timing of the appearance. Another one, as you mentioned, is duress—if someone is being threatened. There could be an emergency—their house was on fire and they had to put the flames out, or they had a car accident on the way. It is that sort of thing. Those are the ones that immediately come to mind. There is also lawful excuse. I mention the last set of amendments which the parliament unanimously passed where someone has lawful authority or excuse which means that they just cannot do it. Those are the basic ones. It is not meant to include someone just not feeling well on the day or something like that. That is a basic summary of those defences.

Mr KERR—I am trying to clarify this. If you say that you are just not feeling well—

Mr McDONALD—That would not be reasonable.

Mr KERR—Presumably if you are ill, I cannot imagine that we would intend that somebody who was—

Mr McDONALD—Completely and thoroughly incapacitated—

Mr KERR—I did not wish to say this, but I suffer migraine headaches. It is possible that that incapacitates you to a degree where, on a particular occasion, it would be difficult to sustain that process. How would that operate?

Mr McDONALD—It depends a lot on how severe it is, but of course those defences are there in case there is some sort of emergency. Obviously, if that was the case, it could be raised. I do not think, with the prospect of something like that, that anyone would want to risk prosecuting anyone in those circumstances.

Mr IRWIN—As somebody who presides over authority hearings, I might say that it is not unusual now for us to get applications, for all sorts of reasons, to adjourn the hearing to another day, perhaps to suit the convenience of a legal representative or because somebody has another commitment. I would see those sorts of issues as really coming under the normal request for an adjournment. The people who constitute the authority are all experienced lawyers who, as you know, have appeared on both sides of the bar table. Those matters are going to be treated in the same way as they would be in a court. That has been the case historically, and nothing in these changes would in any way alter that situation.

If somebody contacted me or, I am sure, any other member of the authority and said, ‘I’m unwell today. I’ve got a migraine headache. I’ve got a medical certificate,’ just as would normally be produced in a court, and we are satisfied that that is a genuine excuse, we would not be insisting that they come in on that day. We might insist they come in if we have reason to believe from other material that they are simply making it up to avoid their obligations. But the committee can feel assured that the authority would continue to deal with it in the way that it does now. In doing that, it does not look at the issue of reasonable excuses; it is normal questions of fairness.

Mr KERR—We are all aware that it might be thought by some that some people dying in Majorca might have laboured a little on their health excuses. I have a broad sympathy with the need to improve these provisions and to make them more workable and more effective, but I also accept the Council of Civil Liberties position that you start with a presumption that no encroachment should be made into people's existing rights unless a substantial case is demonstrated. There is a perception that, because of the secrecy and the way in which these hearings operate, sometimes the authority is not subject to the scrutiny that a court would be in determining such matters. I need to be assured that the scope of what would be still left as a proper basis for avoidance of prosecution remains. Perhaps others have some views on that.

Mr McDONALD—One thing I did not mention was that you have to prove the fault under the offence as well.

Mr KERR—In some element.

Mr McDONALD—Yes, that is right. I use the code terminology.

Mr ALDERSON—I will make a couple of points along those lines to further add to that mix in the issue you are raising. The first is that, by bringing this act within the Criminal Code, one of the things it does is to make clear that that culpability must be proved. Just say you had a heart attack just before you were to testify, even if that was not covered by a defence because of your lack of culpability for your subsequent actions, as a matter of law you have not committed the offence. Secondly, across the Commonwealth statute book there are many offences on all sorts of topics. Very few of those, comparatively speaking, contain the reasonable excuse defence. The general situation for a criminal offence is that you prove the offence, you prove culpability and any specific defences. That is the normal situation that operates.

Mr ROZENES—I do not know much about the code, I have to be honest. I am concerned that if the only defences to failing to answer questions are those to be found in the code, the duress offence is a long way short of being established by a fear of death. The NCA will concede, I imagine, that a lot of people they investigate have genuine concerns about their safety—they would not have a witness protection program if it was not the case. The idea that you have to show duress as a defence to a refusal to answer when you have a fear of being killed is nonsense. Duress defence is limited, as I understand it, and will remain so limited under the code, to a present, imminent risk of death. The gun has to be pointed at your head.

The idea that you say, 'I belong to a society that you well know about, and that society has a reputation for killing informers. If I give this evidence, I will be killed,' that will not get you home on a duress defence, I should not think. You really do need to leave something in there for people who have genuine concerns about giving evidence that are understood in the milieu of the criminal scene in which the NCA operates but which will fall short of statutory defences that are currently available under the law.

Mr KERR—Would you see that that would be appropriate by crafting a specific NCA related type of defence? I have some sympathy with removing what is a very broad and nebulous basis for refusal, which then forces perhaps a review in a court of a person who is simply seeking to avoid the proper scrutiny that the NCA can bring to bear.

Mr ROZENES—I think you will have some difficulty in drafting specific narrow provisions to cover those sorts of situations. What will be a fear for some people might not be a fear for others. What will be a risk for some might not be a risk for others. Reasonable grounds is a nice, fluid, loose, relatively ambiguous phrase that encompasses a number of events that are case specific.

Mr MURPHY—I just want to make a couple of points that Mr Kerr has already outlined. The first thing is that the burden of proof should really be on the NCA to show in a public sense that they need these powers to do their job properly. It may have been shown in a private sense to this committee, but I do not think there is a public recognition that they require these powers to do their job. The second point is that I am very concerned that the right to silence will be breached through clever questioning. This is a derivative power, meaning that I think you can obtain the evidence that you require to prosecute a person through that clever questioning process. I do not think the protections are in place for people at all against self-incrimination.

Mr KENNEDY—I am probably the only person here who is not a lawyer—

CHAIR—I am not a lawyer either.

Mr KERR—You are appealing to vile prejudice.

Mr KENNEDY—I am not good on my feet; that is what I mean.

CHAIR—We are under time pressures, so let's get to the point.

Mr KENNEDY—I am doing a PhD at the present moment. I have spent three months in Paris with the Police Judiciaire. I was also 20 years in New South Wales police as a detective, and I worked in their crime commission, and in the early days I assisted with the National Crime Authority. What concerns me is that, in relation to this reasonable excuse, we have a whole group of people that are used to dealing within the criminal justice system from one side of the table who have no understanding whatsoever of what it is like to be in that little square box, regardless of what the circumstances are. When you talk about, for example, being in fear, I was a detective for 20 years, and I do not remember a single instance when I got into the witness box that I was not sweating under the armpits and in fear about what was going to be raised and how I was going to explain things. I was not that confident. It is not just a matter of telling the truth; it is about people's perceptions in an adversarial system. It is at about things that can be said one way or the other to discredit you that you simply cannot address on the spot because you are not equipped and you are not educated to the level that you need to be. If you want to don the cape of Bernardo Gui, then you cannot expect support from a lot of individuals or a lot of professional organisations, because traditionally and historically that sort of inquisitorial practice without the foundation of the republican values of liberty, equality and fraternity, which we do not have, tends to become a crusade. There is historical evidence to support that.

In relation to the National Crime Authority's application for these powers, my understanding from when I worked there, way back when Justice Stewart was the chairperson, was that these powers would only be used when traditional investigative techniques had been exhausted. The simple fact is that there has been a civil war for the past 20 years between the state and federal

police about who is the most evil and who is the most corrupt. And to defend the police and say that they are not corrupt is just ridiculous, so I am not going to go down that path. But, by the same token, it has debilitated these organisations in relation to the quality of the investigators that they have there, because no experienced investigators want to go to places like the NCA where they are treated like—

Senator McGAURAN—Given time pressures, I think we are off the point.

CHAIR—I think we do need to focus on the issue.

Mr KENNEDY—What I am saying is that these powers should not be implemented simply because you cannot do what was originally intend to be done, and that is to do traditional investigations, because the organisation has a poor capacity to be able recruit good investigators and the majority of people who are there are just out of their probation and are unable to provide the chairman with a good foundation of information that he can use to conduct these types of hearings in the first place.

Senator McGAURAN—In your response, can you give us an example of where reasonable excuse has being successfully abused.

Mr CROOKE—Successfully abused?

Senator McGAURAN—Can you give an example of where it has been used by someone and they have got away with it.

Mr CROOKE—As Mr Irwin said, if somebody is not in a position to attend a hearing or has got some sort of difficulty about being present, fairness is the keynote. If we endeavoured to prosecute them in a situation that was manifestly unfair, natural justice considerations would be very much taken into account by the court. I do not think, Senator, that there is a specific example that I can bring to mind about this question of somebody abusing the concept of reasonable excuse.

Mr BOULTON—I can do that for you, Senator. There was a case of F, G, H and J—

Mr KERR—It sounds like the Crimes Act!

Mr BOULTON—Yes. I will just give you a very quick summary of the facts. In January 1997, two of these persons were summonsed to appear. Counsel appeared on their behalf and argued that the summonses were faulty. In March 1997, fresh summonses required them to appear in April 1997. They then, along with H and J, appeared and refused to answer questions, claiming that they had a reasonable excuse. In July 1997, the member presiding ruled that they had no reasonable excuse and published his reasons for doing so. The hearing was then listed to recommence in September 1997. They then used the provisions in our act to apply to the Federal Court to challenge that ruling that there was no reasonable excuse. In March 1998, the case ended up in the Federal Court. In April 1998, the Federal Court found in our favour—that there was no reasonable excuse. They were then summonsed again to appear in August 1998. They turned up in August 1998 and refused to answer the same questions again, claiming reasonable excuse. We then asked the Commonwealth DPP to prosecute. They were summonsed

to appear in the Perth Magistrates Court in December of 1998. They managed to get successive adjournments of their case. We negotiated with them. Finally, in November last year, the principal witness of those four came in and voluntarily answered all the questions in respect of which this charade had gone on for almost four years.

Senator McGAURAN—How big were these characters in the scheme of things?

Mr BOULTON—They were important in the scheme of a significant investigation but, by the time we had the answers to the questions, the trail had gone cold.

Mr IRWIN—I was in fact involved in that to an extent. It was a case that is in the public record to some extent because it is reported in the *Australian Law Reports*, at least up to the stage that the judge gave his decision in April 1998. In the scheme of things in South Australia and the sort of criminal conduct that consistently concerns South Australia, they were important players. But, by the time the matter was resolved, the matters that we initially wanted to question them about were ancient history; events had moved on. In fact, the argument that is put forward by the South Australian Attorney-General in a sense is going to weaken, if it is accepted, the National Crime Authority's ability to investigate people of this sort, who, as I say, are of significant concern in South Australia. That case took 3½ years.

We have another case, again with people of the same background as the people who were involved in 're F', in Western Australia. In that particular case, on 30 September 1999 and 1 October 1999 two witnesses appeared before me—this ended up in the Federal Court, so I can talk to some extent about what is on the public record. One witness refused to answer a question. They claimed privilege against self-incrimination, so there was a reasonable excuse there. That was ruled against. It was immediately indicated that the matter would be taken to the Federal Court. The next day, an associated person came in and was asked something like 51 questions, and in 47 of them they claimed a reasonable excuse on the same basis. Again, that was ruled against and the matter went to the Federal Court. By 17 February, five months later, the application of the first witness was dismissed and costs were awarded in favour of the NCA. The other witness continued with his application, and ultimately it was resolved by the authority agreeing not to ask seven of the questions that were in issue. He was brought back to the authority, as was the other applicant. Both of them answered the questions, and in fact many more questions, when they were brought back to the authority. But that took us until the end of May 2000. So that was eight months, and it was another case where, by the time we actually got around to asking the questions, the trail was cold as far as the investigation we were trying to conduct was concerned. Consequently, by using reasonable excuse where it did not apply properly, our investigation was effectively thwarted.

While I am speaking, can I also say that I think the reason for making the change as illustrated by those two examples is well put by the Attorney-General's Department not only in what they have said today but also at page 48 of the booklet that I have been provided with where they talk, as you have, Mr Kerr, about the uncertainty of the reasonable excuse defence. May I say that, if there needs to be an illustration of how uncertain and unclear that defence is, one only has to look at page 38 of the booklet, which is the submission from the Attorney-General of South Australia, where a large passage from the case of the Bank of Valetta, which, as I am sure Mr Broome will recall, is another case where the excuse was successfully abused to delay our investigation for a long period of time before the ruling was made in our favour. One

only has to read those two paragraphs to see how uncertain and unclear that defence is and how easy it is to abuse.

Senator McGAURAN—Can we have those paragraphs submitted?

CHAIR—It is all in the evidence.

Mr IRWIN—The latter one is on page 38 of the booklet of submissions that I have been provided with.

Mr KERR—Mr Irwin, if you work from an assumption at this stage that the committee were to be persuaded that we should at least say that in relation to reasonable excuse the defence of self-incrimination is removed, that leaves the question of whether or not a residual defence should remain or whether we should just simply rely on the code provisions. How do you deal with the point that was raised by Mr Rozenes about somebody who might genuinely hold a fear for their life? Law enforcement is not always a kind and gentle craft, and it would place a person between a rock and a hard place were they to genuinely fear or were they to suspect that it was known that they had been summonsed. This is not always capable of being held entirely secure, and there are some people who we know would be willing to kill or hurt a witness. It seems to me that maybe we are going one bridge too far, if the defence of duress is as limited as Mr Rozenes says, if you could not then say—they do not need to be good guys; they could be really bad guys—

CHAIR—I think that from what you have said already Mr Broome is bursting his boiler to respond.

Mr IRWIN—Can I say first that that is why witness protection schemes exist. Even under the current scheme, given that the current section 34 of the National Crime Authority Act enables a member of the authority to make arrangements for the safety of a witness, there is every reason for concluding that it would not be a reasonable excuse, against that background, for a person to refuse to answer the question. Furthermore, I would have thought that, if there were genuine safety concerns that causes the person ultimately, notwithstanding all that, to not answer questions, that would probably be reflected in the DPP exercising the discretion not to prosecute. It would also be reflected in any penalty that would be imposed, which I would have thought would be almost nonexistent in that case.

Mr CROOKE—This is not a problem confined to NCA hearings; the same thing could arise in relation to any witness summoned before a court. A judge has to determine in the circumstances of that case how he deals with the person, because prima facie the law as to duress is fairly tight, as Mr Rozenes pointed out. Nevertheless, it is for the judge to determine whether it is really duress in those circumstances and whether the threat is immediate enough. This is something that the courts have to determine every day of the week, more or less. It is in the public interest to get the answers to questions that are at issue before the court, not only in criminal courts but also civil courts, and also the NCA hearings, which have the added difference of being held in secret.

Mr BROOME—I was going to make that same point. This debate seems to be a little off the point, because the questions would have to be answered in public court, without these

reasonable excuse provisions, in the course of a trial. It is possible to treat separately the circumstances of a witness who wishes to refuse to answer questions because they may incriminate the witness, dealing with that as one issue, and the circumstances of all the witnesses whose evidence might be material to deciding whether or not another person has committed an offence. First of all we have to decide on that dichotomy. So we put the whole issue of self-incrimination to one side and deal with the other witnesses. There is no doubt that other witnesses consistently have used reasonable excuse as a means of not answering questions which they undoubtedly have a legal obligation to answer, which undoubtedly their legal representatives know they have an obligation to answer and which those same representatives will continually assert is a question in respect of which the claim can be made—often on the most spurious grounds. The reality is that they know that you need to end up going through a prosecutorial process which will take months, if not years, and therefore it achieves its purpose.

The question of how you use the evidence is another issue altogether. This provision is essentially about ensuring that the authority can gain material in ways which many other organisations can gather material, and there is no body of evidence which suggests the provisions have been abused, which I think is also relevant. The bottom line is that the present provisions are simply unworkable. I have had witnesses appear before me and refuse to confirm a familial relationship on the grounds that to do so would be self incriminating. That is quite clearly a ridiculous proposition, but it is made, it is asserted, it is asserted by the lawyers and then you end up on the track of going down to the Federal Court, the Magistrate's Court or wherever, to have the issue tested. That is why this provision needs to be changed. Then we need to look separately at the question of self incriminating, derivative use and so on. For general witnesses, it is self-evident.

Mr MURPHY—I want to make a few short points in response to what the NCA has asserted. Firstly, other law enforcement agencies are dealing with similar types of criminals and similar types of problems. They can do their job and successfully prosecute without these powers. So I am not sure that they are necessary. The burden of proof should be on the NCA to show that. We have already had one person—I think it may have been one or more—in the witness protection program who was killed. I am not sure that that is a satisfactory solution from that point of view.

The other thing is that we have seen two examples today raised by the NCA of how they have been frustrated in the process. So we have several examples—one in our submission was about costs being awarded against the NCA at the end of a court process—that have shown that they are not always correct and that it is not always someone frustrating the process. I do not think that the information that they talk about is in the public domain and it is very hard for the NCA to show that they require these powers when it is not transparent.

CHAIR—Could I ask ASIC and CJC to comment on what powers they have and how things might work? I think you should feel free to move into the area of self-incrimination as well, because I think similar issues will apply.

Mr LONGO—These are all big subjects. As far as ASIC is concerned, all of these issues have been resolved in a way that I think is consistent with what the bill before the committee is designed to achieve. I have been in my current role for just over five years. I was in private practice before doing what I am doing now and I have been on both sides. There are some key distinctions to make. The first point to be made is about the information gathering stage. It is

true that privilege and self-incrimination will be modified as a result of these amendments. I am not very familiar with the current act, but I gather that it is already modified under the current act as well. What this bill does is to put in place a regime that will enable that to happen more efficiently. It is probably more in line with what ASIC has. Essentially, if you are a person who has been asked to answer a question under oath that you think is going to incriminate you, at an ASIC inquiry you are required to say 'privilege'; you can answer the question and both the question and the answer cannot be used against you subsequently in criminal proceedings or proceedings for the recovery of a civil penalty. To that extent, the privilege has been modified. In its classical form you would not be required to answer that question at all, but in its modified form you are required to answer the question but the material cannot be used against you. The investigating authority has the benefit of that information and is then required lawfully to obtain evidence that establishes the elements of the offence without having to rely on your evidence. So there is obviously a balance achieved in that process.

Regarding the sort of work that ASIC does, it is a very complex and sophisticated environment and there is a long history behind the current provisions. As late as the late fifties and early sixties, company inspectors were being frustrated by officers and directors of companies in refusing to answer questions. Whether an answer to a question incriminates you or not can be very complicated and it is a very time consuming process to establish whether it will or will not. In the meantime, the efficiency of the administration of justice is greatly undermined. It is true that our inquiries are conducted in secret, but I can assure you that everyone who appears before us would prefer it that way. Most people who assist investigations are quite happy for that process to be conducted in that manner because there are other considerations which need to be weighed up—privacy and reputational considerations. Although I would like to think that ASIC, like the NCA, has a reasonable track record in enforcement, many of our investigations do not conclude in any proceedings being commenced, so those people assisting the inquiry usually like to maintain some degree of anonymity during the process of assisting.

We have covered a wide area this morning. I think the work of ASIC would come to a halt if our current set of powers was not there. They do achieve a balance. There are all sorts of accountability mechanisms. After hearing the exchange of this morning, there is one respect that I will mention that is different under our act. If someone refuses to answer a question at a section 19 examination, which is the counterpart to an NCA examination, our usual remedy is either to not bother with that question or withdraw it and ask some other question, and that is a forensic investigative judgment. But if it is important enough to us, our remedy is to bring an application before a Federal Court judge. He or she will decide whether the question needs to be answered. That happens occasionally. I do not think that we have ever prosecuted someone for failing to answer a question. We do occasionally prosecute people for telling lies at section 19 examinations, which, in my view, is a much more serious matter.

In broad terms, that is where ASIC comes from. The derivative use, immunity and self-incrimination issues have long been dealt with under our act and have been subject of several inquiries and hearings—

Mr KERR—And I am old enough to have sat on them all.

CHAIR—We will not get into questions of age! Mr Bevan, do you have any comments?

Mr BEVAN—The CJC has operated since 1990 with a provision which abrogates the right to refuse to answer questions. Until 1998, the CJC's jurisdiction included the investigation of organised crime. Since that time, the Queensland Crime Commission has had that jurisdiction; our jurisdiction is limited to the investigation of official misconduct. However, the Queensland Crime Commission has the same power as the CJC has in respect of the conduct of its hearings. The provision in the CJC Act allows the commission to require a witness to answer a question. If the witness then answers the question, the answer or disclosure cannot be used against the witness in any criminal proceedings or in any disciplinary proceedings, should any apply. The only exceptions to that are a contempt of the commission or an offence of perjury.

We heard a little while ago about the problems which are posed in the NCA Act by not having a provision like this. In a situation which the commission confronted, two police officers who were being investigated for drug related activity refused to answer any questions. They were directed to do so. Their contempt was then certified to the Supreme Court and the matter was mentioned before a judge of the Supreme Court, who remanded the matter until the next day. The officers were held overnight in custody. The next day they came before the commission and answered all questions, so the matter was able to be resolved in the space of 24 hours.

There is another point to make about this, and that is that it soon becomes well known that witnesses are obliged to answer questions in such circumstances. Legal practitioners are aware of that. Therefore, when we approach a potential witness, quite often the legal practitioner representing that witness says to us, 'Our client can help you, but would like to do so by way of giving evidence in a closed hearing.' In using this power of refusing to answer and being directed to do so, they are protected. That has been used in quite frequent circumstances and, as I said, is often suggested by the legal practitioner. The CJC certainly could not have operated effectively without such a provision and without the corresponding contempt provision. A provision in the same terms as the NCA Act I believe would have meant that we had a weapon which took so long to load that the target was out of sight before you could load and fire it.

CHAIR—I am keen to move on to the subject of penalties. There are two questions I want to put on the table initially. Under the proposed amendments, penalties for failure to cooperate with the NCA are significantly increased. Mr Broome, I think you have expressed concern that the level of the proposed penalties is still too low, so I would be interested in some of your views on that. I would also like to ask Mr Longo and Mr Bevan to comment on the level of penalties under your legislation for equivalent sorts of offences.

Mr LONGO—It is not an area that we have been too concerned about. Our penalty provisions are currently under review as part of the Criminal Code Act exercise. The level of penalties for the sort of work that we do is not a principal source of encouragement to get people to cooperate with our inquiries. The most serious cases, in my view, are those involving matters akin to perjury. In those circumstances the maximum penalty is, I think, two years—it is section 63 and 64 of our act. Those penalties are likely to be reviewed as part of the Criminal Code Act exercise, but I will defer to the Attorney-General's Department about that.

From our point of view, the principal remedy for failure to cooperate with ASIC is generally a civil remedy. That normally involves making an application to the court immediately and getting the issue resolved quickly. There is an overwhelming public interest in the efficient conduct of investigations. The days are long gone, in my view—certainly for ASIC

investigations—where they can just go on and on for years. That simply cannot be allowed to happen in most market type and investment related type matters, which is the area that we operate in. So what we want is the information. We are looking for an appropriate and efficient way of getting information and we use the criminal justice system only in the most serious cases. In my view, they normally relate to perjury related matters. Several times a year, with the assistance of the DPP, we will bring charges. So the penalty is not the main consideration. I do not come to the committee with any particular knowledge as to whether two years is too low. I think it is a very serious thing whenever someone is prosecuted for a matter of that kind, and that in itself acts as a disincentive, I think, to treating the regulator in a way that is unlawful.

Mr Bevan—Conduct such as obstructing the processes of the commission, disrupting a hearing, failing to answer questions, failing to attend a hearing when summoned or failing to continue to attend and breaches of non-publication orders are punishable as contempt. Certain of these are also punishable under the act. Persons obstructing or delaying commission procedures in relation to fabricating records or destroying records are guilty of misdemeanours and liable, upon conviction on indictment, to imprisonment for three years. There are other general provisions relating to obstruction of the commission, punishable by two years.

Mr Broome—Just a few quick points. First, I think the distinction that is drawn between a refusal to answer questions and answering that question falsely is itself a false distinction. If you lie when you give an answer to a question, you achieve the same result as not answering the question at all. If you can in fact achieve a lower possible penalty for not answering at all, then you will get a very clear dose of the 'I can't recalls' and the questions will never be answered or they will just be refused or whatever. So I think that distinction is one without difference, and I have never understood why we persisted with that distinction. Indeed, there was a great deal of debate about the changes which are in the bill now on that very point.

The second point is that the level of penalties now proposed still seems to me to be absolutely ridiculous. For a start, I do not understand the equation of a year's imprisonment with a $2,000 fine. I suppose if you take Bond as an example, a day's imprisonment is worth about $340,000, according to Paul Barry, if you work out the rate in that case. So I think we need to do something very substantial to increase the level of monetary penalties, even in the Magistrates Court. I make the point that, on the established precedents to date, it is unlikely that, unless the parliament signifies very clearly that it regards these matters as serious offences, the courts will not even contemplate terms of imprisonment in these cases. They have refused to do so in the past. I think I am right in saying that it was the NCA during my term that first brought prosecutions for failure to answer questions. We had long delays in getting the matters to court and when they did get the court we found that there were small monetary penalties imposed. It basically said to those witnesses, 'You played it very cleverly. You've made the right decision—you avoided answering questions.'

CHAIR—When you say that small penalties were imposed, you are saying less than the minimum that exists?

Mr Broome—Certainly less than the maximum that exists.

CHAIR—So why would increasing the penalties encourage the judge to actually give a stiffer sentence?

Mr Broome—If you work on the assumption that the level of penalty imposed by the parliament is some indication of its concern about the seriousness of the offence, even most Australian judges would recognise that if you increase the level of penalties there is some signal that higher than minimum penalties should be imposed. At the moment, the signals which are being sent, both in terms of judicial decisions and the present statutory arrangements, send exactly the opposite signal. Most witnesses, when you threaten them with a prosecution for failure to answer, wryly smile and know that that is a completely empty gesture on behalf of the presiding member.

Mr MURPHY—I want to pick up on a couple of points. Mr Longo made the point that it was an efficient way to gather information. That is concerning if we are going to approach this on the basis of efficiency and not on the basis of what is in the public good or the interests of justice. That is the first point. If we are going to bring these powers in, there are much more efficient ways to do it than to remove the right to silence or the protection from self-incrimination. I do not think that should be the starting point for why we do this.

On penalties, if we are really dealing with the sorts of tough, hardened criminals who have resources that need these sorts of powers to be able to compel them to answer, I am not sure that increasing the penalties will have any effect. These are the sorts of people who will do another year or two years standing on their heads. Once they have been to jail once, or when they are involved in this type of crime, I do not think threatening them with any more of a penalty will make any difference at all.

Mr BOULTON—We are happy that we have the increases that are now in the bill. We want to make it clear to all of the members that they should not think for a moment that the NCA is not happy, because our position is improved.

Mr McDONALD—From the Attorney-General's Department perspective, this penalty is at the upper level for this sort of offence. The matters which the NCA deals with are very serious matters. I do not want to go into that in great detail. Five years is the beginning of the recognised serious offence level. It is a tenfold increase in the penalty. If that does not give the courts a signal that imprisonment might be an option under this, then what would not. The current penalty is six months imprisonment. Everyone knows, of course, that with six months imprisonment as a maximum penalty it would be very unlikely that a person would suffer imprisonment for breaching this offence. With five years it is much more likely. So it is a very significant increase in the penalty. From a policy perspective, my colleague here is always looking at the penalties and the comparative side of it. It would be inappropriate for the penalty to be any higher than this, but I think it is very balanced and fair to have it at five years. I do not agree that it would not dissuade some people to cooperate. You cannot generalise about people who might be breaching this offence; it will affect different people differently. At the hardest end, there might be someone who is used to being in jail and does not mind if he gets a couple of years under this, but it is better than a $200 fine as an incentive to answer questions.

Senator McGAURAN—Mr Murphy, you mentioned that hardened criminals would not be put off by the increase in the penalties. Who would be hurt by them? Basically who are you protecting?

Mr Kennedy, as an ex-policeman, do you accept that, that the penalties are of no effect?

Mr MURPHY—I will start off quickly and then let Mr Kennedy talk. First of all, people have a number of reasons why they will not answer. They could be in fear of their lives or there could be some other motivation. Giving people an increased penalty is not going to affect that motivation. I do not think it will make any difference in those sorts of case. The people it will hurt are the people who are brought through the system who should not be there. Mr Kennedy can go into that.

Mr KENNEDY—I will be brief this time. The issue of maximum penalty is almost totally irrelevant because penalty is not what the statute says; it is what the precedent is. The people who are not going to answer questions are going to be aware of that. If the precedent is six months, it does not matter what the maximum is. If they can appeal their way out and just get six months and they know it—it is like any of these serious offences. Armed robbery is 15 years imprisonment, but no-one gets it because there is a precedent. The other issue is that, amongst the hardened criminals that I know, the only disadvantage of going to jail is the food, and that is it. My view is that the most successful way of concluding these things is, as Mr Longo says, in private, where people cannot be publicly humiliated, which this type of legislation seems to be aligned with on many occasions. If you publicly humiliate people, if you embarrass them through press releases, et cetera, people—especially hardened criminals who have been down hard paths—are just going to fold their arms and say, 'Do your best; I don't care.'

Mr KERR—It seems to me that there is a bit of a misapprehension, from what I understand of the way in which the NCA operates, that in these investigatory processes the witnesses are principally drawn from the hardened criminals. Frequently they are the fringe people, the people who look after the money—the lawyers and the accountants—and the processes are private and in camera. It is only if there is a refusal that there would be a potential issue of penalty. It is certainly true that from time to time some of the extraordinarily heavy characters that infest crime scenes in Australia would potentially be called as witnesses. But I do not think it is true, from my understanding, to suggest that that is the principal type of person who is called before the NCA. For an accountant or somebody to realise that it is not a $200 fine but potentially a prison term that they are facing makes a significant difference. It would to me if I were caught.

Mr LONGO—I just want to correct a misconception that Mr Murphy may have had earlier. My starting point is not efficiency. I said earlier that this is a big subject. The history of privilege and self-incrimination goes back many hundreds of years and it grew up in an environment that I think we can all concede is very different from the one we live in today. We live in a time with rapid electronic funds transfers and globalisation of corporations. The corporate form did not really exist until the 19th century. We live in a time when, in spite of the electronification of communications, I still cannot walk into my office without bumping into paper. We live in a time when there is a proliferation of advisers in all forms—corporate, legal, accounting, technical—and they are the front-line troops for getting your case up in court. I am not so worried about the hardened criminals, because I know that ASIC's duty is to obtain evidence in a lawful manner from people who in the end will give it voluntarily, who are not going to be prosecuted, and for that evidence to be used against those who are to be prosecuted. No-one is ever going to get up thinking they are going to get evidence from the people they are going to prosecute. This is a most misconceived approach.

All I was trying to say was that there are a number of competing public interest considerations that underlie these fundamental documents, and I think one needs to be a little

realistic about what result you want to get. If you want an investigation conducted within a reasonable time frame, where the lives of people, most of them innocent, are not going to be unduly disrupted, where the duties of confidence to third parties that lawyers and accountants owe can be respected and where people's privacy can be acknowledged, this mix of powers that is presently before the committee in this bill is, I think, as experience shows, overwhelmingly sensible. It has certainly been ASIC's experience. So efficiency is not the sole consideration, but I think most sensible, thinking people would think that it is certainly a consideration that bears weight.

Mr IRWIN—At the moment, the balance is all the other way. We conduct hearings in private, subject to claims of privilege against self-incrimination, which it is difficult to controvert and ends you up in legal proceedings, wider claims of reasonable excuse that have the same result, low penalties or no contempt power. But, as Mr Bevan said before, we really do not have the bullets to fire to balance the public interest.

Mr CROOKE—We are some years into the life of the NCA now and this bill has been the product of very detailed discussion and inquiry, not least through this committee but also public debate. Effectively, what we are doing is to see whether the NCA needs to be brought up to date in the exercise of its powers. The debate has already been had as to whether there should be an NCA—as to whether there should be an inquisitorial body as an adjunct to law enforcement. There are issues in that where there has to be a balance of public interest. These issues have been determined by the parliament. It is against that background that we are sitting here for this committee to review whether the suggestions that find expression in this bill are reasonable as a review of the NCA and as to whether it can properly operate. If we look at it in that context, a lot of the expressions that have been uttered today in certain quarters do not take us very much further. We have to look very much at the situation as to what is needed today and what is fair and reasonable for the NCA to properly accomplish its task.

CHAIR—Quite apart from penalties, when we talk about self-incrimination there is an issue, as I understand it, concerning derivative use. Can you comment on that?

Mr CROOKE—Again, this is a balancing exercise. What is suggested in the bill is departing from a previous procedure which has proved unworkable—namely, if there were to be an abrogation of the privilege against self-incrimination, a journey had to be made to all appropriate DPPs or Attorneys-General to get an appropriate undertaking. This proved very difficult because it was before the witness gave evidence and one was never certain as to what they were going to say and as to what the breadth of the undertaking would have to be. There is a deep-seated principle that says that one should not give an indemnity or an undertaking in advance of what is likely to fall from a witness.

Leave it at that, that it is not working properly. What is suggested is no more and no less than what is on foot in relation to other investigatory bodies. The question then arises as to whether this derivative use immunity is one that should be taken away and it be left with only use immunity. As I said, the use immunity is the common situation in relation to investigatory bodies in Australia—and, let me suggest, for good reason: because derivative use immunity proves very difficult to unfathom, for the reasons that we have set out in our submission to the committee.

Effectively, the danger is that the minute somebody comes before an inquiry where there is use and derivative use immunity, there is a very real danger, for practical purposes, that they will be immunised against prosecution, because it is always open to suggest that what has been found against them was the result of or a derivation of what they said under compulsion. It is very difficult to prove a negative and, for practical purposes, it often leads investigatory bodies not to even question the person because of catapulting themselves into this area of dispute—that everything that is brought up against them can be suggested to have been derived from what they said in the witness box under compulsion.

If we look back to Justice Mason, he has affirmed this in a passage that appears in our submission to the committee—that the essential ingredient of the privilege against self-incrimination is what falls from a person's own mouth and is not in relation to matters that have been, or are able to be, established otherwise than from what the person said. It is for these reasons that the practicality of making the system work tips the balance against the inclusion of the derivative use immunity.

Mr ROZENES—The history of the abrogation of the privilege against self-incrimination is long. Up until 10 years ago or so, the only instrumentalities that got the benefit of such an abrogation were agencies that had as their principal functions or duties the regulation of some conduct, the collection of revenue or the administrative determination of various issues. The last thing that most of those agencies saw as being their prime function was investigation with a view to prosecuting serious crime. In fact, until a few years ago, many of the agencies that I just referred to eschewed the idea that they were law enforcement agencies. They saw themselves as informers of the public, as revenue collectors or as regulators of corporate conduct. The last thing that they wanted to be was investigators with a view to prosecuting in the criminal justice system. On the other side of the coin, every criminal justice agency had no capacity to override a privilege against self-incrimination. No police force in this country—or, for that matter, anywhere else in the world—has the ability to sweep aside a person's claim for privilege against self-incrimination. Every parliamentary inquiry that has been conducted, both at state and Commonwealth level, has ensured that the privilege against self-incrimination at the investigative stage remains sacrosanct. The failure to cooperate with investigative agencies cannot be commented on even at trial in Australia, although that situation has changed in England.

The NCA debate has been had—there is no question about that. I do not imagine that this committee or this government is going to reinvigorate that issue. But when the bill was initially passed and the act proclaimed, what became immediately apparent was that the coercive powers of the NCA could not in fact be used against a target because the target had the common law right to refuse to answer questions on the grounds that they may tend to incriminate him. Before that person could be compelled to assist in the investigation, he effectively had to be immunised by a director of public prosecutions. I do not think that there was a case over the period of time that I was about, and even before, where any person who had been so immunised was prosecuted. The reasons have been explained here. It was difficult—almost impossible—to demonstrate that the material that you had obtained outside had not somehow derived from the statements of the witness. We are moving from a position where the target—the person who the agency wants to prosecute—could previously not be compelled to answer questions to now being in a position where not only can he or she be compelled to answer questions but can be asked questions about every process that that person may rely upon ultimately in their defence

in a criminal trial. Where were you? What is your defence? What are you going to say about this? What can you say about that? Where is the evidence? Where did you hide this? Where did you hide that? It really is starting the investigation at the wrong end.

The NCA relies upon, as did ASIC rely upon, this unfortunate problem that emerges when you retain derivative use indemnity. The problem is that the investigator, instead of going immediately to the person who knows most about the conduct that you are concerned about, has to go about picking up all the bits and pieces on the outside of the circle and establish their existence, so that when the person in the centre says, 'Yes, I did this, this and this, and I did it with that document, this document over here, with that person, that bank account, that witness, that accountant and that lawyer,' the agency can say, 'We know all that and we are going to rely upon that.' They are not shut out from relying upon it because of the derivative use protection.

But there really is an expediency about that. The expediency is that it is cheaper, quicker and perhaps more certain if you can go straight to the villain before you make the case against him. ASIC has a good argument for that, and their argument was one that I supported at the time when they were arguing it. The argument was that, because ASIC had a concern about keeping the market informed and because ASIC had a concern to ensure that creditors of companies were not disadvantaged by dissipation of assets while lengthy investigations went on, it was important not to beat around the bush but to go straight to the person who best knew and get the evidence quickly so that civil remedies and other steps could be taken.

The second concern they had was that the smart customer would come into the hearing, make the admission, produce all the bits of paper, point ASIC in all the right directions and forever be immunised against prosecution. There are probably good arguments—arguments that I imagine were held 100 years ago—as to why agencies like ASIC, Customs and the tax office were given the ability to get to the bottom of things at the cost of compelling a person who may have a genuine concern about incrimination from giving evidence, with the protection that it cannot be used against you, just like a royal commission, because the duty is to inform the public and to get to the bottom of the exercise.

But the NCA, make no mistake about it, is a police agency. It is not interested in getting to the bottom of things. It has no duty to inform the public about anything. Its job is to detect, to investigate and to prepare for prosecution trials in criminal courts. Are we going to have a situation where people who happen to fall within the criteria of the NCA's concern—the money launderer and the fancy drug dealer—will be dealt with in one system of criminal justice where that person can be interrogated on the penalty of a five-year prison sentence if he refuses to answer questions, where the very matters that will be the subject of his prosecution will be canvassed with him, where the very evidence that he may be relying upon will be explored and investigated and may be used against him, whereas every other Joe Blow gets picked up by the ordinary plod for murder or for drug trafficking, which carries life imprisonment in some state systems? That person will have a completely different criminal justice system to play in.

I think that is an enormous step forward. I know that agencies like ASIC and the tax office do not resort to their coercive powers against the very person whom they understand will be the target. At least once they have ascertained that that person will be the target, they leave him alone. There will be no such concerns for the NCA. They will go for the target right to the end. And why shouldn't they? Their job is to convict the criminal—to get admissible evidence

against the person whom they have reason to believe is guilty, and usually on good grounds. I am not critical of the NCA for the targets they pick or the way they go about doing it. But it is creating a very separate and different criminal justice system for the people who fall within the purview of the NCA's powers.

Senator McGAURAN—You would take that privilege from the New South Wales Crime Commission, the Queensland Crime Commission and all royal commissions? The same principle?

Mr ROZENES—Yes, I would. I understand why the royal commissions have the powers they have. The royal commissions are not set up to investigate crime. Royal commissions are set up because there has been something that so affronted the public situation that someone needs to get to the bottom of it. There may be prosecutions arising out of it, but their principal purpose is not to do that. I do not think that if you take privilege in front of the Queensland CJC you lose derivative support. I think you retain derivative protection. I am not sure about that.

Mr BEVAN—The act is silent on it, so we would regard ourselves as being able to use such evidence.

Mr ROZENES—My argument is a simple one. I do not think that we should lose derivative protection for people who are compelled to answer questions. The admissibility of that evidence will itself be the subject of great debate because our criminal justice system does not accept evidence against an accused person that has been compelled. It does not matter whether some statute enables an investigator to compel the evidence; the question whether it is admissible will be another question. There is great debate about that and no-one quite knows what that answer is. But at the moment our criminal justice system has no such capacity: in the court, in the public arena, with the protection of the judge—not the investigator, the judge—there is no power to compel a person to answer questions when their privilege against self-incrimination is properly taken. Why would we give that away to an investigator? That we have given that away I have no doubt, and we probably will live with it; but why that should be emasculated by removing the derivative protection I do not understand. This bill itself recognises the need to retain the privilege against self-incrimination to a person being interviewed by an investigator at the NCA, otherwise they would not have this section. Why then take away the derivative protection you get from it? Are they really saying, 'We won't use the words against you, but, if we manage to get you to tell us where you have hidden the body or the money and we go and find it independently of what you have told us, then, bad luck'?

Mr MURPHY—In every other jurisdiction overseas where you have an inquisitorial system—and that is what the NCA is asking for here—you have got clear protections where a right to silence is guaranteed; whether it is guaranteed legislatively or through constitutional amendment, it is there. What the NCA is asking for here is unique for an investigative body—no other investigative body has the power to do this. With respect to the other examples that have been used, royal commissions and other organisations have a role to expose something or to provide information to the public, as has been raised. Their primary role is not to convict a target through a process of investigation. That is what the NCA's job is. What you are doing if you support this change is incongruent, because you are saying to someone, 'You have got a right to silence. We're asking you to come along to tell us information that will help us get to the bottom of an investigation,' and then you are saying, 'If we actually find something we're

going to use it against you.' I think it will be borne out that, through clever questioning, it is quite simple to find the evidence that you need to convict someone. So it is incongruent, and it is different to the way that justice is handled in every other area.

Senator McGAURAN—Someone can correct me on this, but I would challenge Mr Murphy's comment that no bodies overseas have this power.

Mr MURPHY—Law enforcement bodies.

Senator McGAURAN—Yes. Law enforcement bodies in the United States under the RICO laws, I should imagine, let alone the Italian laws—I have forgotten the name; someone might be able to help me there. They have far more sweeping powers. I am not looking for those sorts of powers, but they certainly have these powers. Is that correct? Remember what we are getting at here: investigating organised crime.

Mr ALDERSON—I can offer two examples. One is within the Commonwealth's own sphere. Part of the role of the Australian Securities and Investments Commission is to investigate some quite serious criminal offences that carry heavy penalties. This broad issue of the right to silence, as you point out, has been under review in a number of countries and has been looked at. But in Britain, for example, for ordinary police investigations there has been a move that people can be compelled to answer questions under investigation, at the risk of having adverse comment made about that at trial.

Mr BOULTON—I will answer Senator McGauran and also the matter that Mr Kerr is interested in. It is established—we pointed to it at the page 58 of the record—that 'the bulk of use immunity provisions only afford protection in relation to incrimination of a direct rather than of a derivative kind'. That is the current position in this country. Further, in a case that we quote there, the then Chief Justice of the High Court reinforced that position, that the principal matter to which the privilege is directed is someone convicting themselves out of their own mouth and not in respect of evidence derived derivatively. So really the current state of the law in this country, as endorsed by the High Court, is for what we contend.

Mr KERR—It is a hard call. I understand what Michael Rozenes is putting. I think you put that as well and as eloquently as I have ever heard it put, but I sat through the ASIC inquiries well over a decade ago and exactly the same arguments were advanced. On that occasion, notwithstanding those very concerns about giving it to what is a regulatory and also an investigative agency, the balanced outcome—I think there were some minority reports in that respect—was that the derivative use should be allowed. I think these are serious issues and I am not trying to squib them, but I suppose what ultimately persuaded me was that, if one has the power given to an organisation with a specific remit to deal with something that is important in the public interest—and I take the example that was given, that you do ask a question about where the body is buried—it seems to me to be a bit bizarre that you can dig the body up, do the forensics, have everything that connects the hair, the tissue, the blood samples and the like, and have no doubt whatsoever that that would sustain a proper prosecution, but, because of the way you found out about where the body actually was located, it might be precluded from going to trial. I think that is difficult. It is an awkward set of balances. But, once you facilitate and concede that you abrogate the privilege for proper and public purposes, which I think is where

we have got to, you have the subsidiary question of how you deal with the evidential issue. I find myself very troubled with the idea.

I also agree with you that the ideal way for the NCA to operate is not to go to the target and place itself in that position. Notwithstanding that, if in the course of calling somebody in, who may not be the target at all, it asks a question which it does not know the answer to—this is not like the court where the barrister never asks the questions they do not know the answers to: this is an investigative situation—it puts it in an awkward position. Is it to operate on the basis that they only ask questions that they know the answers to? The truth is that you may find yourself in a position where you are asking a question you do not know the answer to, the witness volunteers some hideously incriminating matter of which you had no knowledge, and therefore, accidentally or on purpose, immunises himself from the potential consequences of the criminal law. I find myself caught in this dilemma but, in the end, constrained by the same sorts of considerations that led a majority of the committee on that other issue to that outcome. I just wonder how you deal with that in terms of the ethics and the public policy dimensions.

Mr ROZENES—First of all, referring to the history of ASIC and before it the ASC, the NCSC and the Corporate Affairs Commissioners, the Corporate Affairs Commissioners had the coercive power, protected only by use indemnity. I think that remained so when the NCSC was created. Then the Commonwealth invented the perfect indemnity, which was the use derivative use indemnity. It suddenly found itself in the DPP Act, the ASIC Act and wherever else it went. It was perceived to be a better view than what was previously the tool—namely, the transactional immunity that was being offered by various Attorneys and directors of public prosecution. They created the statutory animal of the use derivative use immunity which was consistent with the immunities that were available in the United States and places like that. When ASIC suddenly found that this new component severely thwarted its conduct, it was capable of persuading the relevant body to go back to where it had come from—namely, the use indemnity.

The NCA has not had an abrogation of the privilege against self-incrimination. The NCA Act maintained that privilege. Now not only does it seek to set it aside and protect it merely with the use indemnity, but to set it aside without giving derivative protection. It is a very substantial jump.

Mr KERR—I understand that, but I would like you to address the point I was raising: were we persuaded as a threshold issue that we should facilitate the NCA being able to ask questions which might otherwise be responded to by a claim of privilege? Firstly, how do you handle the practical questions about an investigator not knowing what an answer might be and how a wise person subject to investigation would find a way of answering a question which would practically immunise them—certainly one who had good legal advice on it, and I am certain that you could provide that.

Secondly, how do you deal with the ethical and moral consequences of the very situation that I have described, given that we are dealing with very serious matters? We are dealing with people who are, by any description, the kinds of people against whom you would wish to exercise strong and effective law enforcement. How do you deal with a situation where, for example, you know where a body is or the forensics are there but you cannot proceed? I find

this an ethical dilemma which I do not think you have responded to. You have identified a problem and explained it extraordinarily well, but you have not responded to that point.

Mr ROZENES—It is difficult. I suppose that once you have let the cat out of the bag it is hard to make it walk on two feet alone. That is the issue. I aim my concerns at the first question. You cannot make it work and you should not let the cat out of the bag because you will create a situation where there will be a very separate and different legal system brought to bear against persons who by accident—and it is only accident—fall into the NCA criteria. They do the same criminal work as the state police forces. They investigate drug importation, as does the AFP; it does not have the power. They do drug trafficking investigations, as does the Victorian police force; it does not have the power. One person will be compelled to divulge all and another will not. It will create a ridiculous situation in the criminal justice system.

If you are determined to achieve that result by giving them this power, then, in my view, you have to take every step you can to make sure that you contain it. The ethical dilemma and the moral dilemma should not be capable of sweeping aside the basic fundamental right of citizens not to be compelled to assist in their conviction before the courts. The fact is that if a witness is called before any trial division in any court, that person is prevented from giving evidence unless he or she receives use and derivative use indemnity. No director of public prosecutions would give a simple use indemnity and say, 'Off you go into the courts,' because the witness would say, 'I'm not saying anything in there; I don't know what you are going to do against me.' Either they are immunised completely, by way of derivative and use indemnity, or they are given transactional immunity. The courts cannot compel them to give evidence unless those facts are present. Why would you want the investigator to have greater powers than the courts have?

Mr LONGO—I would ask the committee to continue to use the word 'balance'. With so many different considerations here of a historic kind, the law simply cannot stand still in the criminal justice system relying on a principle as if we all know what it is. The concept of the right against self-incrimination is itself a bundle of related strands built up over 400 or 500 years in different jurisdictions. It is a very complicated subject, and it grew up at a time when there was not an organised bar, when we did not have the complexity of the society that we have now, and it remains a profound value that law enforcement agencies and authorities respect enormously. But there does need to be a balancing public interest in being able, in this complex world we now live in, which is quite different from the world of 400 years ago, to get access to information so that proper decisions can be made about whether people should be prosecuted. So it is that balancing exercise that is paramount. It would be quite wrong to overvalue one value over the others.

The only other point I would make is that this issue cannot be looked at in isolation. We keep mentioning the courts. They are a key feature in the system of accountability in which these powers are exercised. There are police integrity commissions, parliaments, an ombudsman and a privacy commissioner—I do not think I have left anyone out. All these features of accountability with whom we work did not exist 400 years ago when this privilege, or right, first came into existence. So I think it is very important to acknowledge the complexity of the environment in which we operate and, if we make this change, to see whether it will be for the best or whether it will cause harm.

Mr IRWIN—Let me say, in relation to a couple of the comments that have been made, that this debate seems to equate the authority and similar bodies with police services. If regard is had to the National Crime Authority Act—and I am sure the committee knows it from the comments it has made today, but I think it is worth stating—the purpose of the NCA, as it was set up, was to investigate when ordinary police methods of investigation were not likely to be effective. That is the only circumstance under which we can be given references by the IGC under section 9(2) of the Commonwealth act. So I do not think it is just accidentally that people come within our purview. The people who come within our purview are people who are deliberately committing the most serious criminality in an age where, as Mr Longo has said, we are now dealing with new technologies and people can hide money in cyberspace. I ask the question: why in those circumstances should there be a derivative use immunity? Why shouldn't we be able to find out where in the World Wide Web these people are hiding their ill-gotten gains?

At the end of the day, as the submission the NCA has put before the committee demonstrates, all we are trying to do is catch up. We are about nine years behind the ASIC that was given these powers. The matter was debated out there and the explanatory memoranda and the second reading speech, where relevant, are cited in our submission. All we are trying to do is catch up and bring ourselves into line with a lot of other bodies where a lot of other cats have been let out of bags.

Mr BROOME—We ought to remember that we are not only dealing with oral evidence; we are also dealing with documents. One of the curious arrangements at present is that claims about self-incrimination can be made in respect of documents held by a witness who is not even the author of those documents. We have to work out what we are actually dealing with here. We are not dealing with this sacred protection of oral testimony. It is a much broader protection that is afforded in the NCA Act. One has to go back to the debates in 1983 and 1984 about why it is there in the way that it is now. The world has changed a great deal since then. The protection has changed in a range of other circumstances.

It is not correct to say, with great respect to Mr Rozenes, that you would create something, as far as the criminal justice system is concerned, if the bill goes through with these provisions. The dam has broken already. In Queensland and New South Wales those powers can be and are used in criminal investigations. Yes, it is a matter of chance whether the crime commission in Queensland or the crime commission in New South Wales investigates a criminal rather than the NCA—better off for the criminal if it is the NCA. The very dilemma that you talk about already exists. The fact is that it is now a matter of the great roulette wheel of law enforcement as to who does the investigation as to what powers they have.

I also find it a rather curious proposition put forward on behalf of the Law Council—notwithstanding Michael's eloquence—that it is reasonable enough to use the ASIC powers to protect the market by early disclosure but it is not reasonable, in terms of the balance that Mr Longo talks about, to use those powers to protect the community from some of the criminal activity which is investigated by the NCA. I know where my vote goes in terms of the balance being struck. A debate was had nine years ago and it was seen as absolutely critical to ensure that corporate behaviour was as it was supposed to be that these rights would be changed. Most of the states have legislated in a way which is now being sought for the NCA without, one has to say, almost a whimper in terms of public debate. I think it has to be said that this debate seems to gather much more heat because the NCA is involved rather than because of the underlying issues. I do not understand why that is the case, although I will live with its

issues. I do not understand why that is the case, although I will live with its consequences. But that is one of the points that have to be made. The committee has to ask itself why things are so incredibly different for the NCA.

As to royal commissions, it seems to have become modern folklore that royal commissions were never set up for the purpose of investigating activity with an intention to prosecute. Royal commissions have often done just that. They have done it with these powers, and the Commonwealth Royal Commissions Act is dated 1902. All of the royal commissions have had the power to require the giving of evidence without any protection flowing from that. It is not a new concept at all. As Mr Longo said very eloquently, it is about balance.

Mr KERR—I would like to say two things. Firstly, sensitivity is greater at a Commonwealth level than at a state level because we are not so infected by the bloody stupidity of passionate and quite irresponsible law and order campaigns that happen at state jurisdictional levels. We actually do operate with a greater degree of understanding of the balances to be struck.

Secondly, as the chair quite rightly said, these powers were intended to operate where normal policing is unlikely to be available and were intended to be extraordinary. I am very comforted by the evidence that Mr Crooke has given us in relation to the direction and manner in which you intend to have the NCA operate. But there has to be continual re-emphasis of those things if there is going to be any public confidence in the vesting of these kinds of powers because, in truth, when you look at what can be done, it does range down to a lot of things where, if you use that language, the great roulette wheel would come into operation. I do not want to be political, and it is not political, but with the Theophanous prosecution my gut feeling instinctively was: how does this come into organised crime; how does this raise itself to a level where you might say these are equivalent to the sorts of people you would expect the NCA to be targeting? There are a number of other instances where we have seen the organisation perhaps go for the minnows rather than the sharks.

As soon as the organisation is seen to descend to the minnows, I think it will lose public confidence, because these powers should be reserved for those instances where normal policing is not likely to operate and where the public interest is transparent. If I see it going after the Mr Bigs in the drug industry and the sharks who are operating organised crime, I do not have much difficulty in resolving the Rozenes dilemma. But if I see it starting to go after minnows, I start seeing some weight in what Mr Rozenes is saying. So the two things are interconnected.

CHAIR—We could probably talk about this all day, but I think we have given the matter a good hearing from all perspectives and obviously the committee will give it due consideration. I have one question before we need to move on. I understand the ASIC legislation had to be reviewed after five years or something of that sort. Is that right?

Mr LONGO—The derivative use immunity provisions that Mr Rozenes was talking about were passed in 1992. Part of that package was a review that took place five years later, in 1997. The result is *Review of the derivative use immunity reforms*, by John Kluver, who is Executive Director of the Companies and Securities Advisory Committee. That was the report referred to in the package. Mr Kluver concluded that the law should remain as amended, and gave a very useful and comprehensive summary of the issues and the provenance.

CHAIR—I would like to move on to the area of contempt.

Schedule 1—Part 15 (Contempt)

CHAIR—Would the NCA like to make some opening comments?

Mr CROOKE—What we want to put forward we have essentially said in our written submission. It is very much a question of practicality. We have had some discussion already today, in the context of penalties, about what is effective. Forgive me if I rely upon personal experience but, having been somewhat involved in a couple of long-running royal commissions, I can say it is effective. The ability to do that to get an immediate result, to make a person think carefully of the decision not to answer a question, has got much greater practical effect than any other procedure that might be available which takes some considerable time.

There is also another factor not often mentioned: in the nature of punishment for contempt there is always the ability to purge that contempt. A person who considers his position in another place can put his hand up and come back—the remedy is up to that person. The same is not the case if he is convicted of a particular offence or if it is dealt with solely by way of offence and there is some locus poenitentiae where a mind is changed. If the proceedings have gone forward and he has been convicted and the appeal time has expired—and it probably would not even help much in relation to mounting an appeal in any event—there is nothing that can be done to recognise the different attitude; nor, indeed, is there any incentive for a person to change his or her mind once the penalty has been delivered. But the biggest factor is the practicality, that something can happen in a hearing room this morning and that same afternoon they are before a court and the judge can make a decision as to whether the conduct is meriting of punishment and can impose the punishment there and then.

There have been some submissions written about the constitutionality of it, and members of the committee may well be aware that this was discussed at great length on the way through in relation to the bill. We have opinions at the highest level that the constitutionality is not a problem, and it is instructive to note the opinion of Chief Justice Phillips in his submission; and, indeed, the support of many of the people who have made submissions here.

Mr KERR—I will raise a threshold question. I think we have a quite unnecessary degree of provocation in the choice of the language by calling it 'contempt'. We could call it obstruction of the National Crime Authority, or something of that nature, and identify the elements. 'Contempt' conflates what is happening before the authority with what happens before a court. It quite correctly draws flak, and it takes us away from the issues and the subheadings of what should or should not be dealt with and how fast to a quite unnecessary debate about the legal relationship of the organisation to courts. Frankly, I think you put a hot potato unnecessarily on the table.

Mr CROOKE—There is no magic in calling it contempt; it is only the process that is of concern. Indeed, the authority, like ICAC or other bodies like royal commissions, cannot be equated with a court.

Mr ALDERSON—In terms of the substance having the desired effect, there are other names that could be given. The rationale for the title 'contempt' comes from two places. One is that there is an existing obstruction offence in the National Crime Authority that is similar to

obstruction offences in other legislation. Generally those offences have the title 'contempt', reflecting the traditional word to describe a variety of hindrance and obstruction and so forth. Secondly, these provisions go for only 2½ pages. One of the objectives is to plug in as cleanly as possible to the court's own contempt procedures, once these initial mechanisms have gone through, so that it is a familiar process for the courts. Therefore, that is one reason the label has been applied—because of that connection to the kinds of rules the courts themselves operate in the contempt context.

CHAIR—Are there any other contributions?

Mr BEVAN—I will give you the CJC's experience with a similar provision. As I said before, there is various conduct that amounts to a contempt of the commission, including refusing to answer questions. In such circumstances the chairperson of the commission certifies a contempt to the Supreme Court. I mentioned the case of the two officers who refused to answer and the action that we took in that case, successfully. To my knowledge, that is the only occasion on which we have had to use that provision. It is not as though we have not used the hearing power; we have. We have held in the vicinity of 230 private hearings in the 10 or 11 years that we have been operating. We have summonsed some 920 witnesses. It may be the case that Queenslanders are naturally more law-abiding than the rest of Australia.

CHAIR—Don't provoke me!

Mr BEVAN—Nonetheless, during that time we have called to those hearings—as I said before, halfway through 1998 we had the jurisdiction over organised crime as well—almost every member of some outlawed motorcycle gangs. We have called people involved in Italian organised crime and involved in Chinese organised crime. For whatever reason, those people have been given advice that they should attend the hearings and should answer the questions. Whether they answered truthfully or not is another matter and, of course, we have to set out to prove that they have not on some occasions.

CHAIR—Mr Broome, I think you have some reservations about practicalities.

Mr BROOME—I have two basic reservations. One is that the problem in the past with witnesses answering questions has been, firstly, the reasonable excuse issue, which we have discussed already. Assuming that matter is resolved—and indeed that the self-incrimination issue is resolved as the bill proposes—it seems to me you take away a great deal of the problem that the authority has faced in relation to these matters. That is why the CJC does not have the problem—because it does not have the cause of the problem. And then you deal with the refusal to answer in the appropriate way.

The second reservation that I have, and one hesitates to say this too publicly, is that I do not think a lot of the Supreme Courts around Australia would take very kindly to being given this jurisdiction. There have been utterances from various individual judges which have shown a decided antagonism towards the NCA. I think that what this bill does is purport to equate the authority with a court, both in terms of the language that it uses—

CHAIR—The bill or this provision?

Mr BROOME—I am sorry; I meant this provision of the bill. What the bill does in this provision is equate the NCA with a court, which I think is the wrong model to be using as a matter of general principle.

The second issue that has always worried us in relation to the effectiveness of the penalty provisions and so on in the act is the simple delay in getting the DPP to prepare the case, take it before the courts and have a court resolve the matter, and so on. If, as I assume is the case—and I hope it is the case—the government has been successful in negotiating with not only the governments of the states and territories but also, presumably, their chief justices that they will accommodate these provisions if they are passed and give these matters the urgency which will be required, surely they have gone a long way towards dealing with the underlying problem: that is, the prosecution for a failure to answer should be dealt with with the same alacrity.

While I agree with all the other things that Mr Crooke said this morning, the one thing I do have a problem with is the notion that somebody can be in the NCA in the morning and in the Supreme Court in the afternoon. I think that will create the kind of criticism that the NCA can well do without. It will seem to be draconian; all those epithets will come out again. I really think we need to think a little more about whether this is the way to go. If it works, yes, that would be fine. But I have my reservations and I wonder whether we will have in fact solved most of the problem anyway if we enact the other provisions in the bill. I realise that in that sense I am a fairly lone voice.

Mr BOULTON—First, in answer to Mr Kerr, there is a bit more to it than just calling it contempt and applying that convenient label, because contempt is a concept well-known to our state Supreme Courts. That was done advisedly because, contrary to Mr Broome's reservations, we can get somebody in the court in a day because the Supreme Courts are familiar with the process. We will not brief it out. We do not have to involve any of the directors of prosecution. For instance, a lawyer from our office will certify the contempt and take that person to the Supreme Court on the same day. The Supreme Court with which I am mostly familiar—that is, the Queensland one—will put the matter in its chamber list and the matter will be dealt with very expeditiously.

It is that ability to concentrate the mind of the witness on the fact that they may be going to spend some time in jail while they are thinking about the matter that is the boon of the proposal. First, it needs to be known as contempt because that is the gravamen of what the Supreme Courts are familiar with and will deal with. Secondly, there are no problems, in terms of administration, in having the courts take the role on. One thing Mr Broome put in his submission was the constitutionality. Supreme Courts exercising federal jurisdiction every day will take on a matter like this without any problem.

Mr IRWIN—I think the CJC submission and what Mr Bevan said before about the case with the two police officers who refused to give evidence indicate how quickly these matters can be dealt with by courts. The fact that under the CJC act the concept is also called contempt does not seem to have created any problems in Queensland. The matters are simply being dealt with in the normal course of events in the courts' chambers lists. Recently under one of our provisions a warrant was issued to a witness who refused to attend. That was handled by one of our lawyers—in that case in the Federal Court—and the matter was dealt with within an afternoon at the Federal Court when the matter came before it.

There is the point that courts might be somewhat reluctant to take on matters such as this but, again, speaking from the Queensland experience, with which I am more familiar, there has been introduced in the last couple of years the concept of the police powers responsibilities legislation and a public interest monitor, which the committee would be aware of. That has meant that a number of applications for surveillance warrants are conducted in the Supreme Court, with a public interest monitor being present to represent the interests of the community. Those applications are made at all times of the day and night. Often they have to be made extremely expeditiously. The experience has been that the Queensland Supreme Court has gone out of its way to hear these applications on weekends and in the early hours of the morning. Judges at their homes will hear these applications. Certainly from the experience that I have had—and I am sure the CJC would concur on this, specifically in relation to contempt—there really have not been any practical problems getting these matters on, getting the courts to understand them and getting them dealt with quickly. The NCA would simply see contempt—I take the force of what Mr Broome says—as part of the package of measures that the authority needs to create the appropriate balance.

Mr CROOKE—Turning to Mr Kerr's point, I think it would be a mistake to do anything that had the NCA perceived as seeing itself as having anything like the status of a court. That is a very fundamental proposition. If things can be done to avoid that, so much the better. The real issue is that the Supreme Court, when it comes before it, deals with it as if it were a contempt of court—that is, it considers the matter and it punishes it or fails to punish it against that background. That is the way the statute deals with it in New South Wales and it is the way all royal commission statutes deal with it. It is the preservation of the concept in the body of law that relates to contempt of court and the way that it is dealing with it. How it is initially called is not necessarily vital or fundamental to anything.

Mr KERR—I go back to the starting assumption that I think is common to a number of members of this committee, which is essentially that we start with goodwill towards the National Crime Authority but with a presumption that any incremental addition to its armoury has to be justified. Were we persuaded to accept all the other elements that we have discussed this morning, is it not likely that most of these issues would go away? If somebody refuses to answer a question, high penalties apply. Certainly there would be a greater delay than putting them into the court in the afternoon, but the same kind of administrative arrangements that presumably need to be crafted at all sorts of levels can be crafted.

I have not heard this argument of the necessity for a contempt procedure advanced previously by any member or chair of the National Crime Authority. It has not been advanced; it is not an historical claim. I have heard over a long period of time difficulties with the questions of privilege and with the way in which people refuse to answer questions, but I have not heard that there is a long history of people obstructing or hindering a member. I think that was to be picked up under the general code provisions, anyway, in relation to offences against Commonwealth officers and the like. I think all of those issues are there, and that anyone who disrupts a hearing would be picked up, again, by the general provisions of the code. We should not pretend that there is not a significant group in the community who are still sceptical of the validity and role of the National Crime Authority. I mean, some are sitting around this table.

Mr CROOKE—I can answer that. The issue is what can be done to have people answer a question, not necessarily to punish them, effectively. But if you get a person who decides to try

it on, to say, 'Well, do your worst; I'm not going to answer a question,' the most effective way that experience has shown to deal with them is to give them an opportunity to reflect in the confines of a prison cell. It is a salutary experience and, in my experience, in most cases it works. That comes from many days in royal commissions and exercising those parameters. That is the issue. What we are on about here is conducting an investigation and needing an answer. We were expecting a particular situation not long ago in Western Australia and, as expected, the person refused to answer a question. We had a kit prepared. Within two days the matter was with the state DPP. It took 12 months to get to hearing, notwithstanding our earnest entreaties to hurry up et cetera, and then there was an adjournment because at the last minute the person sacked his lawyer.

Mr KERR—Why didn't you get the Commonwealth DPP to do the job?

Mr CROOKE—Because we were under the state act.

Mr KENNEDY—The first issue I want to canvass is the issue of public perception. The uneducated public that does not understand this complicated issue should never perceive the National Crime Authority as an organisation that can arrest people, try people and send them to jail, because it cannot. That is what a lot of people out there think the NCA can do. They think that it is a court, and they think that because of the publicity that comes with it. That contempt issue aligns it with a court. Mr Crooke, people perceive you as Justice Crooke at the National Crime Authority. People do think that. The problem is that when you are part of a small—

CHAIR—Have you got any evidence to demonstrate that?

Mr KENNEDY—I can only give you evidence of the fact that the people I deal with are not from the inner circle of the National Crime Authority; they are just ordinary people. I was in the police, and even some police were of the view that the person at the National Crime Authority and at the state crime commission was a judge. They are referred to as 'the judge', colloquially speaking. People out in the western suburbs, people out in the broader public—the people we rely upon for support—are the ones who perceive this. In the royal commission, they heard Justice Wood continually referred to as Justice Wood, yet whilst he was at the royal commission he was Commissioner Wood. Everyone thought he was running a court. I would say to you that the issue of contempt puts the National Crime Authority, for the average person who does not understand these things, in a framework of a court. And it is daunting for those people if they have to go there to think they are going into a court when they are not; they are going into an inquiry.

Mr MURPHY—On the evidence that has been put forward already, I think we need to get back to the basic principle, which is that I think the National Crime Authority should first show us conclusively that they need these powers. They have already asserted that they need to remove the right to silence. If you accept their argument and say that it is in the public interest and that it is necessary to have a removal of the right to silence, surely you would determine on the basis of that whether it is then necessary to have a contempt provision.

CHAIR—So you would agree with the proposition that Mr Kerr was—I am not saying advancing but putting on the table for consideration, that if the other measures we were talking about earlier on were approved—which you actually disagreed with—

Mr MURPHY—I do not think any of it should be approved.

CHAIR—You were saying that if those measures were agreed to ultimately, there would be no need for this?

Mr MURPHY—Let me put it in this sense: I think what you are doing here is going the whole hog, where they are asking not for one provision to get around their perceived problem of witnesses failing to answer but for all possible measures that they can think of. In the view of anybody in the public, I think it is sensible to first look at them one at a time and what their effect is. It may be absolutely unnecessary to have a contempt provision if the first one works. I do not think you should have either of them; I think they are both unnecessary. I think the National Crime Authority can adequately do their job—prosecute people in the same way that other law enforcement bodies do—without either of these powers.

CHAIR—I do not want to be difficult, but we have had in the submission from the National Crime Authority fairly substantial reasons advanced as to why they have the view they have. I am putting to you: what evidence, other than your feeling, have you got to rebut the evidence they have given us? For the committee to make a decision, we need to have some substantive evidence from all sides of the argument.

Mr MURPHY—Let me put it this way: I think the first principle should be that the burden is on the NCA to prove it. I do not think they have done that in the evidence they have provided.

CHAIR—Have you read the evidence they have provided?

Mr MURPHY—Yes, I have looked at it. I think the problem is that a lot of this is speculative, and it is not open in a transparent sense. The NCA conducts itself in an air of secrecy. Their information is not publicly available. Their committee hearings are held in private. People in the public cannot look at exactly what they do and make a judgment about whether this is necessary. I do not think it is all in the public domain.

CHAIR—I am sorry, what committee meetings are held in private?

Mr MURPHY—The monitoring of the NCA, the process for the way the NCA operates in terms of this committee's work—

CHAIR—But this hearing is public.

Mr MURPHY—Yes, I understand that. But I think a number of hearings that oversight the NCA are not public, and I do not think the public can see the full operation of the NCA. In our submission, which has been deleted from the public version, we have given one example—there are a number of others we could provide, but we gave one of the best—to show the way in which the NCA can take on people who are at the small level of crime, as they would see it, go through the system, be treated extraordinarily badly by the way the NCA has conducted itself and have costs awarded against the NCA at the end of the process. It can say that it needs it because people obstruct justice and that the NCA is often successful in compelling people to answer but it has to go through a procedure to do so, but there is also the other side of the coin,

where people are brought through this process and at the end of it it is found that they do have a right and that the NCA was incorrect.

CHAIR—All right. I think you wanted to say something, Mr McDonald.

Mr McDONALD—Maybe I could add two further things to this discussion. Firstly, it seems remarkable that someone would prefer that the person be taken through the full prosecution process and get a conviction when in fact use of contempt might avoid that sort of process and resolve the issue more quickly. Secondly, again drawing on my model criminal code experience, the word 'contempt' is not only of meaning to the courts but also to members of the public and the community. That is one more argument in favour of using the word 'contempt' in the way that in the model criminal code we have retained a lot of these old words because people hear them on television and things like that and they have a concept of what contempt means and so that is another argument for keeping that language.

Mr KERR—It just seems to me that there are some really significant perceptual issues that are not being confronted here. Parliament, for example, has generally tried to deal with its powers of contempt under the Parliamentary Privileges Act by saying, 'It does not look good to have us doing a Browne and Fitzpatrick anymore. If we are going to do it, we will do it by summons and we will have it heard and determined before a court and someone will get a conviction.' I think the courts themselves are dealing with it in the same way. There are a number of judges who have been chastised by the High Court for dealing with contempts that are not immediate and in the face of the court. The High Court is saying that they should be dealt with on summons and by way of prosecution. I think that the reason is that there is something wrong in the feel of an organisation, particularly of this nature, saying, 'We have this reservoir of powers. You are here. If you don't do what we want at this stage, you are off to jail this afternoon.' I have got to say that, if it is proved to be necessary in order to deal with large and organised crime, I will buy it. I am on that side. But at this point I have a hesitation in saying that we need to bite off all those issues if we deal with the other issues. I am just saying that you have got some more work to do to persuade me on that.

Mr Crooke—I could only take you to the inquisitorial nature of the proceedings. If you bring in the ordinary litigation process et cetera, you have got different considerations—save to say that, if somebody was in a civil case in the court and decided, for no good reason, that he did not want to answer questions, he would finish up in the same boat as what we are talking about here. It really gets back to something as simple as this: it is the most effective way—as royal commission experience has demonstrated—to get people who are reluctant to answer questions to answer a question. The prosecution process renders nugatory the investigation process because it takes too long and once the person has been prosecuted there is no pressure on him to answer the question.

CHAIR—I think we have had a fairly good airing of this particular topic. It is now up to the committee in its deliberations to decide what it thinks. Are you still with us for a while, Mr Longo, or are you leaving? The next item on the agenda is the non-APS employees.

Mr LONGO—I am happy to remain for that item.

CHAIR—That is good. We will adjourn for a few minutes.

Proceedings suspended from 11.19 a.m. to 11.31 a.m.

Schedule 1—Part 18 (Non-APS employees)

CHAIR—I welcome the members of the Community and Public Sector Union, Ms Vanessa Twigg and Ms Margaret Gillespie, who have just joined us at the table. 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. Hopefully, that will not arise, but the provision is there. I would like to start this particular segment, which deals with employment of non-APS employees, by asking Mr Crooke to outline what this amendment will achieve. Then we will take comment and have a discussion.

Mr CROOKE—In a word, this is all about flexibility. I find that the constraints imposed by the present legislation do restrict flexibility. I note the submission that has been put forward by the union, and I wonder whether it is the same body that made this submission that writes to me every time an appointment is made to say, 'You can't do it because the act doesn't let you.' There are very specific criteria that have to be fulfilled under the present legislation before appointments, other than ongoing service—that is, long-term Public Service appointments—are made. The detail of this is set out in the material before the committee.

The issue is flexibility. We do have an ongoing discussion with our friends from the union about whether, when a person is brought on board as an employee at the NCA, they must be an ongoing employee. The union contends that this is the case because of the present state of the legislation. We need the ability, in an organisation such as the NCA, to be flexible. I keep using the word 'flexible' because this is what it is all about. We need this because part of our funding is for short term, for example, under the National Illicit Drug Strategy, or in relation to fraud against the Commonwealth with the Swordfish money that comes. Having regard to our new direction in the undertaking of national operations and the restructuring of the organisation to be a national one, it becomes necessary to go with the flow in relation to the complex operations that we undertake.

It may be that the focus and spread of resources will become different as an operation proceeds. One needs to have the flexibility to employ or deploy people to be able to be available at a particular area or, alternatively, suddenly to engage people who have particular expertise in certain fields that can be a demand of a particular operation which may not be ongoing. Essentially, that is the issue: it is because that flexibility is not there at the present time or, if it is there, it is the subject of great dispute, and the dispute needs to be put beyond all doubt.

Ms GILLESPIE—The first comment I would make is that I am quite intrigued at the position that Mr Crooke is taking before the committee. I could perhaps understand him taking that position before the current Public Service Act, which was passed by parliament in 1999, had been passed. There has been a lot claimed for the Public Service Act and its flexibility. I note that a number of submissions to the committee from other agencies talk about some additional powers similar to the ones that are sought under this legislation, which we, of course, oppose. All of those agencies acquired those powers before the current Public Service Act.

Secondly, I do not think it would be unusual for any chairman or CEO to at times find that there is tension and a difference of opinion between the CPSU and what they actually want to do, but what it comes down to here is whether the employment powers that are being sought are

actually appropriate. It is not about what personally the current chairman might chafe at. Rather, it is a position of: what impact will these changes have on the actual operation of the authority? I would contend that the current Public Service Act has the flexibility to employ ongoing staff—some people here might think that that means permanent, but it no longer means permanent, it means ongoing—and also to employ a range of staff who are non-ongoing under a range of different circumstances. Those circumstances can include the possibility, where there is funding for specific programs, that a person can be employed for the length of that program, that you can specify the time that you would employ somebody, and that actual time is not specified in the legislation or the regulations.

One of the things we tried to make very clear in our submission is that we believe that, by actually broadening the employment powers, firstly, you create confusion about when they are going to be applied and, secondly, you backdoor the Public Service Act. I do not think that there can be any mistake about that—you backdoor it. It means that you remove merit selection from the processes that are now mandatory for any chairman to use. We think the committee should look at that very seriously because, in effect, that is what you would be agreeing to if you said, and if the parliament said, that this amendment should go forward. It is actually saying there is a possibility that you would remove the transparency for selection within the agency. I understand in relation to agencies such as the NCA that people are very wary about nepotism and criminal behaviour, and what you would not want to do at any stage is to compromise how the authority actually operates.

In some of the submissions to this committee it has also been claimed that, because of the similar powers that are included—I think DPP and ASIC were two of those agencies—since the Public Service Act has come in the broader employment power is not used as much but is used occasionally. I would point out that at least a third of the employees in the NCA at any given time are seconded police officers. You must be aware of the fact that you have to have your corporate memory placed somewhere where it will not be eroded. You do not have that situation in those other organisations, so there are actual differences—they are not apples and apples. We are talking apples and pears, and there are some similarities. I will leave my comments at that, but Vanessa might want to make some additional comments.

Ms Twigg—My comments come from the position that I am a staff member of the National Crime Authority and a CPSU member. I have been an employee of the authority since 1985. I have worked from the level of APS 3 to Executive Level 2, at which level I currently act as a solicitor in the Melbourne office of the authority.

The explanation for the amendment seems to indicate that it relates directly to the operational workings of the authority. We are not talking about the corporate side of the work, we are talking about our core operational work. The authority's submission, and our submission, talk about the function of the NCA being to investigate organised crime. Organised crime is complex, national and organised, and to investigate such crimes requires a number of years perhaps on one investigation. On top of that, you have a number of years of prosecution ensuing from that. This means that in order to successfully conduct such operations there is a requirement for a continuing corporate memory, a continuing investigative knowledge by the organisation throughout the whole process of that investigation.

The current situation with the authority is that not only are a third of the staff seconded police officers but the majority of the management of the authority, from the chairperson down to the team leaders of investigative teams, are people employed on fixed term contract or people who are seconded from police agencies. The repository of corporate knowledge and investigative knowledge of the authority exists in the specialist staff employed within the authority. They consist of lawyers, intelligence analysts and financial investigators. They have the responsibility to ensure the corporate knowledge continues on. They are responsible for briefing new chairmen and members when they come in, to preserve this knowledge. But also the nature of organised crime is such that one investigation does not arise out of nothing; it arises out of previous investigations into the same or similar groups of people. It might arise in relation to other people who have come to the authority's attention. There is a requirement for the investigative knowledge to be maintained over a long period of time in order to ensure that the investigations are done fully and completely and that a full picture of the organised crime scene is obtained.

We feel that the impact of these amendments may be that the employment of staff for specific terms and specific tasks may erode the corporate knowledge, and have an impact on our investigative capacity to conduct long and time-consuming investigations. From my point of view, I find that I work with police officers on an investigative team who are often here for a period of two years, or three years at the most. By the time a matter has been investigated and is at the stage of being prosecuted in court, the majority of those staff have returned to their own agency. The responsibility then rests upon people who remain in the authority to ensure that the knowledge required to help the prosecution to a successful conclusion is required to be given by those existing people. We cannot rely upon those people who have returned to their own agency. That is a problem that I face every day in the work that I am doing. I feel strongly that this may be a result of the appointment of people.

The other thing is that the specialist staff in the authority consider that the work they do is unique to not only the authority but also a range of similar law enforcement agencies in Australia. A number of NCA staff have been instrumental in going to the other agencies, which were all formed after the authority, in order to assist them with setting up their investigative capacity. We see that our skills are unique. They are not things that can be bought off the shelf and provided easily on a temporary basis. We see that if people are brought in there is a requirement for training for them and also assistance by existing staff to ensure that they have gained the knowledge of the procedures and policies of the authority, a knowledge of Commonwealth and state legislation and an understanding of a complex national organised crime. That is our other reason for objecting to it. We do think it may have some adverse effect on our current staff. If people can be brought in from outside, why is there any reason to train us and continue to enhance our skills while we are there?

CHAIR—Mr Longo, you are, as Ms Gillespie said, in a related but not necessarily totally similar situation. Perhaps your experience may be of some use to us here.

Mr LONGO—I will try to be even more frank than I was this morning. In my experience, a lot of investigators think what they do is totally unique. It is a very complex world we are operating in; it is rapidly changing, and the investigations are getting harder and more complex. There is no doubt that experienced people with investigative backgrounds, with a corporate memory, are a vital part of any successful agency. I have a great respect for them. Many of them

have been serving the NCA, ASIC and other agencies for many years. That is not really the issue here, though. The issue here is the capacity of ASIC, in my case, to be able to retain the services of individuals who bring special skills or experience for a limited period of time or for periods of times that, in view of the commission or the chairperson, are needed to discharge the functions of the agency. I do not think anyone would think that these provisions are intended to be a key plank in retaining corporate memory, for example. That is not the purpose. As the chairman said, he had in mind flexibility.

The way ASIC uses provisions of this kind is that the vast majority of our staff are employed under the Public Service Act but there are some staff who bring special skills or experience who are employed in this manner. I should say to the committee that I am not in charge of this function at ASIC but I have got some briefing on it for the purposes of today. I am also told that there are some individuals who do not want to be employed under the Public Service Act, who would prefer to be employed under an arrangement that is more akin to a common law contract of employment. So the starting point, certainly in ASIC's experience, is that the vast majority of staff are still employed under the Public Service Act; where that is not the case, they bring special skills or experience to the agency and are seen to add value. In my experience, that has not raised issues about merit or transparency. I know these are considerations and issues that have been raised, but ASIC's experience has been that these provisions have been properly used. The principal point is that they are very often used in circumstances where people are brought in for fixed or short periods of time and bring special experience. Particularly in the work we do, we have rapidly changing market conditions. A lot of work we do is in regulation of the financial services sector of economic activity. I do not need to tell the committee how much change is occurring in that area. So it is important to maintain refreshment of our intellectual and human resources, consistent with wanting to retain corporate memory and other strategies designed to ensure good knowledge management within the organisation. So I see provisions like this as being quite sensible and beyond reproach. The vast majority of people at ASIC still are employed under the Public Service Act.

Ms GILLESPIE—I would like to respond to one point made by Mr Longo. He said that some people do not want to be employed under the Public Service Act. It is a specific provision of the new Public Service Act that that can occur. That is not relevant point in relation to the request for the broadened employment powers; that is an example that does not actually count for what we are talking about.

Mr KERR—If somebody says, 'I don't want to be employed under the Public Service Act,' are you saying they do not need to be?

Ms GILLESPIE—It is a specific part of it. They cannot be pressured into it. I can provide to the committee a copy of the relevant PSMPC guideline. It is not something that is required under this provision that is being requested; it already exists under the current Public Service act.

CHAIR—That specific point can already be dealt with?

Ms GILLESPIE—That is right.

Mr BOULTON—I would like to make some remarks that should not be forgotten. The authority is Australia's premier law enforcement agency. The Australian Federal Police do not have the strictures of hiring under the Public Service Act. The DPP has a hybrid scheme. Mr Longo's organisation has a hybrid scheme. Even the Australian Prudential Regulation Authority does not have these strictures. Why, we ask, should the authority? It is gratuitous for the union to suggest that the chairman would, in some two-headed way, throw out merit selection. In fact, it is indicative of the tenor of the union submission that it suggests that in some way the chairman might even reduce the security clearances required if he were empowered to hire outside the Public Service Act. That just has no basis in fact. If anything, you would think he would have a strong vested interest to ensure that any persons hired, under the Public Service Act or otherwise, would have appropriate security clearances. We also pose the question: why would any responsible authority throw out its reservoir of corporate knowledge? It just will not happen—we rely too much on our skilled, experienced people. But we need flexibility.

I want to go to the detail of the Public Service Regulations. It is said that, since the new Public Service Act, the garden is rosy and the flexibility is there. That is not the case. The devil is in the detail of the Public Service Regulations. I am indebted to the union for providing the committee with the relevant regulations, which appear at page 75 of the record. It is not so simple for the chairman to engage people for specified tasks or tasks of a specified duration. He has to comply with what the regulations require. One of those requirements is that, at the outset of engaging someone for a non-ongoing position, he has to be able to reasonably consider that the person's services are unlikely to be required after completion of that task. That is a limitation, because we are getting into the areas of funding and crystal ball gazing: will he always be able to satisfy regulation 3.5.3 in that regard? He also has to give other persons in the agency with comparable skills first bite of the cherry. He has to be able to reasonably estimate the duration of the task at the time of the engagement. We deal in a practical sense with these matters; the authority and I have had to consider the impact of these regulations. So it is facile to suggest that there is a new panacea since the Public Service Act. There are constraints there, they are ones we deal with in a practical way, and we need the flexibility that the amendment seeks.

Mr KERR—Why not the power to engage people under contract? There is an existing provision that enables consultants to be appointed. I am wondering why that power does not suffice for those occasions when some greater flexibility is required.

Mr BOULTON—Consultants do not always fit the bill. That provision is there advisedly; it is not really directed to engaging employees, in the strict sense of the word, on a non-ongoing basis. You might bring a consultant in for a specific task—someone with recognised accountancy or other qualifications, for instance—but we are talking about the general range of staff. We are also mindful that in this house there is a lot of scrutiny, as you know better than I, about what is said to be the overuse of consultants. We do not like the idea that you have to disguise something as a consultancy when you are really talking about a proper employment relationship; someone who is an employee. Never mind that the act says that they are all members of the staff of the authority—we are still talking about a proper employment relationship and not a consultant coming on board who does not have those same incidents of employment.

Mr KERR—You said it is your understanding that the AFP is not similarly constrained. It is certainly true that the Public Service Act does not apply to the AFP in the same way, but I have to tell you, having been the minister and having been deeply engaged over recent times in the discussion about the new award arrangements, that their conditions of employment are significantly more restrictive. The terms on which they are appointed, the disciplinary arrangements and the like are all dealt with by an agreement which is much more constraining than anything you have in your act. The Commissioner of the Australian Federal Police deals with that every day, and also deals with the fact that he has to deal with arrangements for outside agencies.

The other fundamental point is that, if the task is to be able to put on groups of people to deal with short-term tasks, I do not think it requires a great deal of complex assessment by the chair or the body to determine whether or not an engagement for a particular purpose is required. It does not seem to me that that is asking a heck of a lot. If this is just to be another employment strand, yes, I would see that there could be a case made; it is one I would disagree with, but I could see a case being made. But if the argument is that we need this because we want to be able to put people on for short-term periods, I am not certain that you have made a case why you want a different set of conditions to apply to those staff other than those which apply generally. That is the real question: you have got the power to do it—why do you want different conditions to apply to the employment terms that would relate to this group, large or small, that the chair would appoint under these mechanisms?

Mr BOULTON—I think the market would dictate that. It is not a case of our applying different conditions. We have problems, as you know, with our funding. We have tied funding—

Mr KERR—Are you anticipating employing these people on lesser conditions, then?

Mr BOULTON—No, because we will not get those sorts of people. If anything, we would probably have to employ them on better conditions.

Mr KERR—So how is funding relevant?

Mr BOULTON—Funding is relevant if we cannot anticipate that we are going to have the funds available in the future.

Mr KERR—Then you make short-term appointments under the regulations.

Mr BOULTON—Provided the chair can in truth put himself on paper to say in each case that he can comply with the regulations.

CHAIR—Mr Broome, you have had some experience presumably of these matters over an extended period of time. Could you give us the benefit of your wisdom?

Mr BROOME—I did not have the benefit of the new Public Service Act.

CHAIR—Knowing what is in it, would that have helped or hindered?

Mr BROOME—It is fair to say, even if one believes only some of the rhetoric about it, that it is certainly an improvement in terms of flexibility on the old provisions. The authority living with funding for specified purposes for specified times is not a new phenomenon, and I do not think it will be something which will go away either. I think it is going to be a feature of the way governments fund not just the NCA but other bodies.

CHAIR—I think that is a fairly definitive statement, actually.

Mr BROOME—Bearing in mind that we were able to engage a variety of classifications of staff on term contracts under the old Public Service Act, I ask the question, perhaps rhetorically, and I have read regulation 3.5: what is it that cannot be done that could not be done previously? I think the answer is certainly nothing. They were the similar kinds of issues to which, as I recall, I had to turn my mind to. I did not feel that they unduly constrained us.

The biggest problem was that when the funding was due to come to an end, and you were awaiting the vagaries of the budget process, staff who had the expertise and experience we wanted to retain but whose contract was about to expire were potentially lost to you. It is a matter of public record in the authority's annual report that, in relation to the so-called Swordfish funding, there was that problem arising. It was taken up towards the end of my term with the government; it was certainly taken up by Mr Crooke as my successor. And I note from a press release issued by the recent Minister for Justice and Customs—I think about the time that she tabled the last annual report—that the government had in fact, outside the budget process, agreed to extend that funding for a further three years. That was in direct response to the issues that were put forward to the government, certainly during my term, as to why there needed to be some continuity.

I accept that the funding issues create real uncertainty. What I am not sure about is why giving a power to engage on terms and conditions which are to have no apparent relevance to the terms and conditions of other staff is a demonstrated need. The biggest single problem we faced at the authority in relation to staffing issues during my term was the problem amongst seconded police who operated on very different terms and conditions but who worked side by side and had to operate as part of a common team. It was a cause of some disquiet; it caused people to complain. They were faced with a situation where they had different pay packets for doing the same job. I think that is always a problem. I therefore start from the proposition that you would want your staff to be engaged on essentially similar terms and conditions. Whether their length of engagement was fixed by some contractual term is fine by me—I did that quite frequently. But I am not persuaded, from what I have read in the explanatory memorandum and in the submissions that have been put forward, as to what the precise nature of the problem is. Is it the need to advertise jobs? Is it the need to have selection processes? Is it the need to make staff redundant? We had enough experience of making staff redundant during my term as well: we sacked them and we hired them with great regularity as the budget came and went, in the space of very short periods of time. It was not desirable, but we were able to do it. So I am just not quite sure what the flexibility is that is required over and above what currently exists.

I am with Mr Longo in that I accept that there are vast areas of investigative work where flexibility is important. Certainly in the past we have engaged consultants at the authority who have a range of skills, some of whom might be regarded as on a normal employment relationship, others were not. I think the power is there under the act for the chairperson to use

to have that degree of flexibility if there is a case for particular expertise over and above that provided by the Public Service act.

CHAIR—Mr Crooke, in addition to asking you to perhaps respond to some of those points, I want to refer to you a problem raised by AUSTRAC, that people employed by you under these proposed provisions might not be regarded as staff for the purposes of the FTR Act and hence not eligible to access AUSTRAC information. Can you respond to that, or could Mr Boulton?

Mr BOULTON—Yes, that is a lacuna. We are proposing, with Attorney-General's, to amend our definition of member of the staff of the authority in section 4 of our act—if the section 47 amendment gets up—to include any persons who are engaged under subsection 47(3) as members of the staff of the authority.

CHAIR—Are there any other comments? We are not going to come to a decision today, we are just listening to the arguments.

Ms GILLESPIE—I would like to make a comment in relation to Mr Boulton's statement that any responsible authority would not want to lose its corporate memory. That presupposes that it is management that has total control over how it can retain its corporate memory. I would suggest that there is a problem in that belief in that, if you have a proposal, as we have heard here today, that you would have different conditions being applied to people who are doing the same work, then your corporate memory is going to go down the drain because people will leave.

What will happen is that there will be an artificial ceiling put on positions which are always filled by people from outside the organisation who are given perhaps better pay and conditions. Therefore, the perception is there for people to hold that, 'We are being told that we are now substandard; we are not considered the same. If you are from outside, you are the ones that get the starters, you are the ones that get the reward.' What is the reward for somebody who stays in the organisation, and when is their use-by date up? Does it mean that, if you are an ongoing employee in the NCA, you are going nowhere? Is that really what is proposed by the use of the powers? Another person may use those powers very rarely, and the staff may not have a problem; but, if it is being used because there is an ongoing dialogue with the CPSU at the moment about how people are being employed, I would suggest, first, that we would never come here and ask parliament to solve that problem. I think that we need to actually sort it out within the authority and not seek additional powers to try to get around a dialogue that one would have in a workplace with a union representing the staff in that workplace.

Mr CROOKE—First of all, I would attempt to emphasise that in fact the restrictions under the Public Service Act on a day-to-day basis, in particular the regulations to comply with the requirements there, are inhibiting us in putting people into temporary positions. There is a great management gap between employing somebody on a finite contract and employing somebody on an ongoing basis under the Public Service Act, which has an indefinite period of operation. This is where flexibility is found wanting. The gap is too vast between the narrow confines of the regulations under the Public Service Act for short-term employment and the alternative, which is this indefinite ongoing employment under the Public Service Act.

CHAIR—Thank you very much indeed. I thank Ms Gillespie and Ms Twigg for coming to talk to us this morning. We very much appreciate your input. Mr Longo, thank you for your contribution throughout the morning. I understand that you are leaving your present appointment pretty soon. Is that right?

Mr LONGO—The legal arrangements have come to an end.

CHAIR—We wish you well in whatever it is you are now going to do.

Mr LONGO—Thank you very much. I will be returning to the private sector.

Mr KERR—Did you enjoy the post?

Mr LONGO—I enjoyed very much my time with the Commonwealth, and I learned a lot.

CHAIR—It is good experience. Now you can double your fee because you have that extra experience!

Mr LONGO—Who knows what might happen.

CHAIR—Thank you very much. I suggest we have a short break.

[12.15 p.m.]

CHAIR—I welcome the representatives of the Office of the Commonwealth Ombudsman: Mr Philip Moss and Mr Allan Overton. As you would know, Mr Moss, from appearing before the committee last year in conjunction with our witness protection inquiry, I am obliged to say that the committee prefers 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 give consideration to any such request. We hope that does not happen, but it is there.

I suggest that we have a cognate debate about parts 12 and 16 and schedule 3, not only because, in general terms, the topic is the NCA's accountability but also because the future functioning of the committee and the intended role of the ombudsman's office as the NCA's complaints agency are fairly closely linked. This committee has, I think, been trying to put itself out of business for some years, because it does not believe it has been given the tools to do the job. I hope the attorneys-general have got the message, but we will not pursue that too much. Who would like to make a start?

Mr CROOKE—We have really got nothing to say. The bill incorporates what seems to be an appropriate balance, and a good regime would be, as the NCA has always requested, some accountability mechanism.

Mr BROOME—I agree that there should be jurisdiction of the Ombudsman; I have argued it for years. It will help to dispel a lot of the unsubstantiated allegations which are made, because there will be an independent body to which people can turn and it is a reform that is long overdue. I do not agree with the provisions in the bill in relation to access to information. The test which has been laid down for disclosure seems to me to be inappropriate. In relation to disclosing information, the whole question of what would happen if material were made public of a disclosure to the committee seems to me to be inappropriate. I have argued previously to the committee that its function should be extended, and that is for the primary reason that when assertions are made about the way the authority has behaved it has been the failure of the committee's procedures to enable it to publicly deal with those issues which has tended to make the allegations gather a life which they have never properly justified. So anything which enables the committee to be able to deal with those issues is, in my view, a move in the right direction—and I would go further than the bill goes.

I did mention in the submission the bill which the honourable member for Denison did table, which I thought was an appropriate process—a view that was not entirely shared by some of the other Commonwealth agency heads at the time. I will say no more.

CHAIR—Mr Moss or Mr Overton, would you like to make any comments?

Mr MOSS—Just briefly, we support the bill and we feel we have been fully consulted about it to this point. We have some roles in relation to law enforcement and complaints about those agencies, mainly the AFP and the Australian Customs Service, to name two, and we have some practical experience in that field. We already have a role in relation to the NCA, as we do for the

AFP in relation to inspections we conduct twice yearly concerning their records of telecommunications interception.

We do see that there may be some issues in terms of the federal-state nature of the NCA, particularly over the sensitivities with which state police services regard their own members, even on secondment in a Commonwealth role. But we feel confident that we can negotiate to come to a working arrangement with the relevant agencies in the state that look after such matters for state police services as it concerns the NCA and its staff. So, frankly, we have no issues or problems at this point.

CHAIR—Mr Rozenes.

Mr ROZENES—I have no comment.

Mr KENNEDY—In 1994 it was recommended that an inspector-general should be appointed to investigate complaints against the National Crime Authority. Only last year, when a citizen requested assistance from the Commonwealth Ombudsman's office to investigate a complaint against an employee of the National Crime Authority, it was revealed that the Ombudsman had no charter to proceed. Even worse, a citizen was referred to an NCA liaison officer who was the subject of the complaint. There is a history of the Ombudsman's office being dependent upon the Federal Police to do its investigations and yet there are a number of issues in relation to that. There is the fact that, after the Harrison inquiry, the Ombudsman's office assisted a number of police to resign from the Australian Federal Police with dignity, et cetera. Had their service registers been adequately updated to include why they had to resign? What government organisations are they working in under the capacity of investigators? Will the Ombudsman have to call upon any of these organisations to assist it in complaints against the National Crime Authority and use a network of federal police who are probably in and now out of the Federal Police but still part of the same network?

The National Crime Authority in Sydney is about to move into the Australian Federal Police headquarters. They are not going to because of something about their lease agreements, but they want to do so, as far as we have been informed. I am wondering how the Ombudsman can employ the Australian Federal Police in its capacity to investigate complaints independently against the National Crime Authority, which has a high component of Australian Federal Police, when the Sydney office will be in the AFP building. It has been long recognised in New South Wales that, in a service of 15,000 people, the New South Wales police cannot adequately investigate its own people. The AFP has 4,000 police nationally. I wonder how they are going to manage to independently investigate complaints against themselves through the Ombudsman's office in relation to the National Crime Authority when the National Crime Authority is within the AFP headquarters in Sydney.

Mr MOSS—At the present time we have the capacity to investigate AFP members, wherever they are, because we do so under particular regimes set up by the Complaints (Australian Federal Police) Act. That is a fact as it stands now. The regime for our dealing with complaints about the AFP is under that particular legislation. It will be different from the way we will deal with matters about the NCA under the proposed bill we have here. The other comment to make is that there are, at present, no AFP members, former or presently seconded, in the

Ombudsman's office who work on AFP complaint matters except for one secondee who works in another area quite independently of our police work.

CHAIR—Are there any further comments other than what you have already said?

Mr KENNEDY—I think I have already put what I have had to say. There may be different legislation, but the pool of people you are using to investigate the complaints are from the same network of people with histories that go back forever with each other. They have vested interests in covering each other's backsides.

Mr MURPHY—We welcome the fact that there is someone—an ombudsman—oversighting the process. I think that is an important step, and it is probably better for that role to be away from this committee structure. The only thing I would say is that it always worries me that you use a process like the ombudsman at the end of giving extraordinary powers and other things to a commission in a sense in a laundering exercise, where you are using that to oversight and to fix up what you know is going to go wrong at the other end of it. So I think it is important to have someone there, but I am a bit concerned about the capacity for the Ombudsman's office to do their job properly. I would hope that that role does not end up as one where they are just put in place to allay the fears and concerns of another source.

CHAIR—Who else would you appoint who would have the capacity?

Mr MURPHY—Having an independent director or an inspector-general who could oversight police forces in particular could be a better role—not necessarily, but I think it is something that would have to be thrown open for discussion. At the moment the Ombudsman has to look after everything in the Commonwealth, and I am not sure whether the Ombudsman's office has the capacity to deal with the NCA as well.

CHAIR—This committee recommended having an inspector-general.

Mr ROZENES—The Law Council have left, but they also made that recommendation, as did the ALRC.

Mr KERR—In a perfect world that might be a wise course, but we live in an imperfect world and this is a substantial improvement on any scrutiny that has hitherto existed and fills a very important vacuum. I do not propose to curtail the proposal, but I do want to ask a couple of questions about the adequacy of it. I would ask you to excuse me because I have not put the amendments together with the underlying act. Paragraph 8 of schedule 3 on its face looks as if certain matters are to be excluded from the capacity of investigation of the Ombudsman. Am I correct in that understanding? I am not quite certain. What is 9(3)(d)? It is presumably some exclusion of your jurisdiction.

Ms SELLICK—I do not have it in front of me, but section 9 deals with the current situation where the Attorney-General was able to give a certificate to prevent certain material being given to the Ombudsman. Proposed paragraph 9(3)(e) simply expands that so that certain information with the National Crime Authority can, with an Attorney-General's certificate, not be given to the Ombudsman.

Mr KERR—I might query that. I can well understand why 35B exists—that is, the Attorney giving a certificate to prevent the publication of any information—but, to be frank, if we are seeking to have public confidence in a transparent capacity for inquiry and the authority can essentially prevent that, albeit with the political consent of the Attorney, it does seem to me to look like the Lord giveth with one hand and taketh away with the other.

Mr BROOME—I think it is crazy. If you look at the list it is going to be appended to, we are talking about security, defence and international relations. We are talking about the standard provisions which relate to public interest immunity. I just do not understand why, if we are going to have an investigative capacity—unless I am misreading it—the Attorney could then come along and issue a certificate saying, 'This relates to an investigation.' The information in the authority's possession in relation to investigations will very often, if published, prejudice their safety if it were released, et cetera. I do not quite understand how it is going to work. Maybe I am just misreading the provision.

The second issue then is that when you look at the other provision which is being put in in relation to the committee, where the test is publication but it is to go to the committee, even in private, I am not sure how these things will work. I would not have added it to the list, in the sense that other provisions already exist to protect generally confidential information.

Mr ALDERSON—In terms of a consistent theme across the PJC provision and the Ombudsman provision, the objective is to open out the accountability mechanisms, but there is a need—and this has been recognised in other legislation, such as the reporting under the controlled operations provisions—to have some mechanism that deals with operationally sensitive material which can have quite dire consequences.

Mr KERR—Everyone accepts that. The controlled operations legislation precludes reporting to the parliament under certain circumstances and for certain periods, until the currency of those operations go, and it is fully covered by 35B. Why in God's name would you say that you are establishing a transparent and open process whereby any person who believes their interest has been adversely and improperly affected by the NCA can complain to the Ombudsman, and then have such an open provision which allows the exclusion of that investigation? It seems a most unsatisfactory and unexplained circumstance. Any complaint which might cause embarrassment could be excluded. There is not a single possible circumstance where you could not find a heading under (e) (i), (ii), (iii) or (iv) where you could not, should you so desire, exclude the possibility of accountability.

Mr CROOKE—What we are talking about is when the Ombudsman publicly discloses information—

Mr KERR—No, this is where they cannot conduct the inquiry.

CHAIR—We are not talking about public disclosure.

Mr KERR—Is he right?

Mr BROOME—I think the chairman is right.

Mr KERR—This is why I am asking. I do not have the benefit of putting the two acts together.

Mr BROOME—This is the provision of the act which enables the Attorney to certify that the Ombudsman should not release that information in a report.

Mr KERR—No; that is 35B.

Mr OVERTON—We are still talking about section 9, which is the power to obtain information and documents. It is a provision that operates to prevent the Ombudsman obtaining that information.

Mr BROOME—My original comment.

Mr MOSS—It is a policy question.

CHAIR—I think that is called a fast death call!

Ms SELLICK—In the development of the bill we were seen as simply trying to fit the National Crime Authority into the existing provision of the Ombudsman Act and make the necessary amendments so that the scheme was continued.

Mr KERR—No other provision in relation to Commonwealth agencies allows the agency to determine whether or not a matter of complaint will be pursued.

Ms SELLICK—We thought the Attorney-General, as the independent arbiter, was the person who issues the certificate. It is not the National Crime Authority itself which would be determining what is or is not given to the Ombudsman.

Mr KERR—Yes, but look at the terms. Everything is potentially excluded.

CHAIR—Can I draw this to a close by asking: does anybody dispute the interpretation that Mr Kerr has given us? If nobody disputes the factual interpretation he has given us, I think the committee has sufficient substance on which to deliberate. Is that a fair statement?

Mr KENNEDY—It seems to me practically a little bizarre that a data input person—the National Crime Authority—can have access to all of this information, yet the Ombudsman's officer—if he is not trusted, why is he there in the first place?—cannot have access to the information. That is the reality of it.

CHAIR—Are there any other issues in this accountability section that anybody wants to comment on?

Mr KERR—Only the large issue that Mr Broome adverted to—the substance of the bill which I proposed to the parliament some time ago, which would open a larger window on the operation of Commonwealth law enforcement. I would hope to persuade the committee in its

private sessions that a similar course should be recommended to the government, but I do not think I should take the time of this committee to do so now.

CHAIR—I think that is for another day.

Mr KERR—Unless somebody wants to support my wise and foresightful bill.

CHAIR—You are not campaigning now! That will be about November. We will draw this section to a close. I thank Mr Moss and Mr Overton for joining us—a short but valuable contribution, as ever. Thank you very much indeed.

Schedule 1—Parts 2 to 14 and Part 17; Schedules 2 and 4 (Remainder of the bill, omissions)

CHAIR—This is the final section, which is loosely entitled 'Remainder of the bill and omissions'. In other words, we are talking about schedule 1, parts 2 to 14 and part 17, and schedules 2 and 4. I will run through these numerically and, if anybody has any comments, please feel free to draw them to my attention. I will start with part 2 of schedule 1, which is 'Relevant criminal activity'. NCA, Law Council—any particular views? No.

Part 3, 'Terms of appointment'. Mr Broome, I think you had some comment on terms of appointment. Do you think your successor has been treated overly generously or has been poorly done by?

Mr BROOME—Let me say in response to that that if I knew then what I know now I certainly would not have wanted the term to be extended. That is, I am enjoying life immensely, which is not a state of mind I enjoyed for four years.

CHAIR—A lot of former politicians tell me that, as well.

Mr KERR—Again, this is going to be on the fringe and I do not think anyone is going to die in a ditch in relation to this proposal. But is it correct that the NCA committee recommended at one stage an eight-year term renewable? Let us not get into this business of whether it is policy or not. It is really a practical question. Given the sort of evidence we have that you need this continuity, I still feel that we will have rapid and too frequent shifts in key leadership, which gives rise to lack of public confidence and a whole range of other things. Was that previous position canvassed? How did we end up with six years? Do we split a difference? Is there a serious policy issue?

Mr BOULTON—I think I can answer it. It went up to cabinet with your committee's recommendation, and it came back with, 'No—six'.

CHAIR—I do not think that is news to any of us, with great respect.

Mr McDONALD—May I make a comment here? A consideration could be that you have to get people with the right skills to accept these terms. It is often very difficult to get a good person like Mr Crooke to head an organisation like this. Perhaps if the term were longer than what has been proposed, it might be harder to get people to make that kind of commitment.

CHAIR—I think the proposal was eight years, but renewable at the four-year point, so people would not necessarily be locked in for eight years.

Mr BROOME—And the act at present only allows a term of up to four years. I think it is the case that Mr Crooke's term is less than four, in any event. It is a question of what the maximum available term is.

Mr BOULTON—Might I just add for the record that the recommendation that went up was that the term be four, with the option for renewal for a maximum of another four subject to satisfactory performance. The response that came back was, 'The government proposes to seek amendments to extend the potential maximum term to a total period of six years. This will provide some greater flexibility'—there is that word again—'balanced against a safeguard of terms being capped.'

Mr KERR—At the end of the day I guess that is a matter that we will have to argue about—

CHAIR—I think it is a matter of opinion.

'Definitions.' Minor technical amendments not queried in any submission. Is there any witness who might wish to add anything about new definitions, beyond money laundering and perverting the course of justice?

Mr KERR—I do not want to be thought to be raising spurious concerns, but I think that there is some weight in the linkage between the seriousness of the matters that are being pursued and the kinds of powers that we see fit to invest in the National Crime Authority. The difficulty is that, when you add to the list—as we are doing here—and include a range of offences, some of which can have weighty components and some of which have quite trivial components, it then becomes, to a certain degree, a matter of administrative choice in the selection of matters within the authority and within those who are politically responsible for it. But the legislation puts it all at large. I wonder whether we can have some mechanism that will give me greater security of mind in broadening out the number of matters that are remitted to the authority for potential examination. I think that money laundering obviously is something that is related to most criminal activity, and following the money trail is an appropriate course. Perverting the course of justice can have a whole range of different scales—that can also have some very trivial dimensions. We need to have some mechanism of assurance that is coming through. We do not have it through this committee's reporting processes, because we cannot at the present stage. We do not get a sufficiently comprehensive oversight of the matters that are referred to the committee, the nature of those matters and what is being pursued. My experience during my time as chair of the IGC was that there was not, shall we say, a huge disposition to lay out those matters in much more detail to that committee. It may have changed.

But I do think that there are some concerns—I certainly hold some concerns—about menu selection. As we broaden the palette out, those concerns become greater to me. If you have a narrow palette and you are closely focused, you do not really have this debate so much. The legislation is so open-ended in relation to this, and I do not know whether anyone has any solutions, but I think the absence of transparency, the absence of publication of criteria in relation to investigation selection and the absence of reporting to this parliamentary committee in relation to the matters—all those things really do set a scene where those who would wish the

NCA ill can paint a picture of an organisation a bit out of control. I hesitate to take it further, but we are being asked to add two new matters to a list which is already extensive. I do not know how best to deal with this, but all I can say is that it does concern me. It goes back to that original point that I think Mr Broome, Mr Crooke and everyone else have agreed about—that this was an organisation established to do the kinds of investigations not suitable for ordinary policing and to focus on organised crime and cross-jurisdictional matters. I have to say that making sure that there is transparency about those objectives and how they are being pursued is going to be a matter of considerable delicacy as the palette gets wider.

Mr ALDERSON—Could we make some comment on the context in which that definition operates?

Ms SELLICK—The elements before a relevant offence can be actually referred to the committee do require that it has things other than just that list. If you look at the list as it is currently written, theft, for example, is anything from minor theft to major theft. Before it can be referred to the authority, before they can use their special powers, it does need to involve two or more offenders, substantial planning, the ordinary use of sophisticated methods, et cetera. Before the IGC, which you mentioned, is able to actually even approve a reference, it must be satisfied that ordinary police methods of investigation would be ineffective.

The nature of the references which are now being used by the National Crime Authority is that they do extensively set out a lot of the background as to why these particular offences are matters that are appropriate to be referred to the authority. That is following the court cases which did basically say that they seemed to be operating wider than the legislation necessarily allowed. We see those as being controlling factors. So, adding these two issues to the list, yes, it extends the primary offence which they can investigate; however, they could have already investigated them should they have fitted within the incidental definition.

Mr KERR—I guess the ones that go to the IGC at least have that public scrutiny that Attorneys have them and have the documentation. But in terms of the ones that the commission initiates on its own motion—to be blunt, if you wished to investigate some piece of triviality you could easily fit it within those matters. If you wish to abuse the powers that are there, it is not difficult to do, because you can always find two or more people who may be engaged in some matter. Most crimes do involve a conversation between at least one or two folk, or at least the allegation that that may have occurred. All I am seeking is a mechanism of assurance. I think our committee's role will be alleviated to some extent with the greater confidence that will happen with the Ombudsman. But having something more significant by way of a running reporting arrangement that deals with what is not being done as much as with what is being done is very important.

Mr BROOME—You cannot use the NCA's so-called special powers unless there is a reference. You cannot get a reference without going to the IGC. So, even if you want to go off and investigate somebody on a frolic, the best you can use is 'ordinary police powers'; you do not have the other armoury. That is the practical constraint in terms of the use of the powers inappropriately: because it has to fall within a reference.

CHAIR—I think Mr Rozenes may disagree with you.

Mr ROZENES—It does not stop the NCA from picking up the investigation; it just stops it from using the special powers.

Mr BROOME—Precisely.

Mr KERR—And it can draw down on an intercept and on all those other sorts of things.

Mr BROOME—Only if it meets the qualifications in the T(I) Act.

Mr KERR—It is this effort to strike the balance; that, if we are conferring these extraordinary powers, I think there needs to be some mechanism of increasing public confidence. I have no reason to not have public confidence, given what the chair has told us in private session regarding his focus in relation to the organisation, and all members. Indeed, predecessors have told us about the focus, intention and direction of the work of the organisation. But I do think there needs to be some thought given to greater transparency here by way of a legislative mechanism—perhaps not—or by way of undertakings into this committee process or into some other process, that there is greater transparency. I accept what you are saying, John. I am not saying that there is malice or anything of that kind.

CHAIR—I think there are two areas of concern in what Duncan is saying. The first is that, yes, this committee may get some very meaningful private briefings and so on, but that does not actually deal with the problem of public confidence. The other thing is that, certainly in the time that I have been associated with this committee, with the two chairs who have been in place in my time there has been a very sensible and cooperative arrangement in terms of coming and talking to us and answering questions pretty frankly. But I understand that the history of this committee is such that that has not always been the case. In fact, from some of the descriptions I have heard, it is probably an understatement to say that there has been war between predecessors in this chair and predecessors in Gary's chair. When that sort of communication breaks down, the process of oversight becomes a problem. I would agree with Duncan's concerns in that sense. Having flagged that, I am keen to move on because I am conscious of the time. If you have a real pearl of wisdom, Mr McDonald, please give it to us.

Mr McDONALD—I have one final comment. I would like to put on the record that our department would certainly see perverting the course of justice as being a very serious offence and the sort of offence where you would not have many instances which we would not regard as serious. Some of the other examples might be better than that one.

CHAIR—Part 5, 'Police power to interview': I understand that no submission queried that. Unless there are any late comments, we will move on.

Part 6, 'People who may apply for, or issue, search warrants': I think only Mr Broome raised questions about these issues.

Mr MURPHY—I have a question as well. My reading of it says that all magistrates, including state magistrates, will be entitled to issue warrants. Is that correct?

Mr ALDERSON—That is right. The situation that all state magistrates can issue warrants is the equivalent situation that exists under the Crimes Act and other Commonwealth legislation that has warrant provisions.

CHAIR—Mr Broome, do you have a comment, other than what you have said in your submission?

Mr BROOME—What is said in my submission is that I thought this was a job half done, that the problem with section 22 in relation to search warrants is that this is the provision which operates where a member of the authority is satisfied that evidence will be destroyed if the normal notice to produce documents is used. It has its equivalent in other legislation: the tax act, the Trade Practices Act, the proceeds act and so on. The problem here is that at present the authority has to get a judicial warrant which enables it to seize documents on the spot. Yet, if it issues a normal notice to produce, returnable immediately, it can achieve the same result. There are issues then as to why section 22 is not used—that is one of them. This seems to be solving part of the problem, which is the need to physically have a member available to seek the application by changing the class of people who can seek it and also changing the class of people who can grant it. My preference would have been to follow some existing law and precedent—that is, the Trade Practices Act—and give members of the authority the power to issue notices in these special sets of circumstances. But it is pretty silly to have a process where you are entitled to ask for documents, they are required to be delivered, but, because you set the date some days down the track, the documents can be destroyed, and to prevent that you are left with this fairly messy process. It also leaves open a range of issues about search warrants in relation to computers and so on. What I have said in the submission is that we ought to address some of those issues as well. Perhaps that is for another day. It is a lost opportunity to make section 22 work efficiently.

Mr KERR—I would like to raise one objection. I have been made very aware that there is a strong strand of opinion among some of my colleagues that giving powers to state magistrates is inappropriate because, whilst notionally they should exercise their minds in relation to these matters with the diligence that is required of a magistrate doing this, there is a view that sometimes these things are procedurally ignored, or rubber stamped. There would be greater comfort, from those colleagues' point of view, if the definition of 'magistrate' were restricted to a federal magistrate. I raise that simply because at some stage this bill is going to have to pass through the parliament and, irrespective of the views that might be here, those issues will be canvassed outside—and that is one of the most touchy ones. Whether or not it is one of great substance is not material. I wonder whether there would be any practical objection if we were to suggest that this be restricted at this stage to federal magistrates, because they now exist across Australia and there would be greater confidence, as they are essentially chapter 3 judges, that you could say that you have a process where people would be less antagonistic. I just see that as easing the task of dealing with that particular issue. I understand why it has to be there.

Mr BOULTON—Without detracting at all from your colleagues' concern about state magistrates, I foresee a problem with that suggestion, and that is that federal magistrates do not have any jurisdiction at present to issue any process of this sort, so it would involve as well a policy decision, presumably by the government, to allow them to have that jurisdiction before it could be given.

Mr KERR—Yes, but state ones cannot do it as judicial officers either—there have to be people designated. There is no legal or policy impediment to doing it. I am just asking the practical question. I understand what needs to happen and I do not want to make the processes too cumbersome, but I have already had more than a few fairly strong representations on a point which might be seen otherwise to be at the edge of the legislation but which will certainly coming to its centre at some point.

CHAIR—Mr McDonald, I think you need to take that on board for the Attorney in what might well become the inevitable negotiations when it goes through the Senate.

Mr McDONALD—Yes, we were taking note of that. I have been around so long I can remember people objecting to JPs in this way, and restricting it to magistrates was seen as a great reform.

Mr BOULTON—Can I just say that it is not something that the authority will go into the trenches about.

Mr McDONALD—This is a matter for the government.

CHAIR—Yes, absolutely. We will now move to part 7, 'Non-disclosure of information about summonses and notices', et cetera. Mr Broome raised the point that, in practice, non-compliance with section 29A was common and he called for a policy review of the whole issue. Are there any other comments? No.

We will move on to part 8, 'Delegation of chairperson's powers'. There have been no comments from anybody who has made a submission. Does Mr Crooke, AG's or anybody want to make a comment?

Mr CROOKE—No.

CHAIR—Mr Kerr, since you have to go, you might move a motion that the committee form a subcommittee, of you, Senator McGauran, Senator Denman and me, to proceed with the public hearing.

Resolved (on motion by **Mr Kerr**, seconded by **Senator McGauran**):

That the committee form a subcommittee to proceed with the public hearing.

CHAIR—We can now proceed with a quorum of two rather than three.

As there are no comments on delegation of chairman's powers, we will move on to the matter of hearings. There is a minor amendment which requires the NCA at a hearing to identify any non-NCA personnel in the room. My understanding is that this fully implements what this committee actually recommended in its findings, so I do not think we have any concerns, unless anybody else has any comments.

We will move to part 10, 'Disclosure of information by legal practitioners'. Whilst this was meant, as I understand it, to be a correction of a minor drafting error, I understand the Law

Council is 'deeply concerned' at this proposed amendment. Mr Greentree-White, would you like to make a comment?

Mr GREENTREE-WHITE—I just want to briefly draw attention to our submission. As has been remarked today, balance is central to these provisions. We believe that the balance in the act as it presently stands is correct. If this provision is enacted, it will interfere with the role that legal practitioners perform. Legal practitioners are in a particular position in the community. There are policy reasons for lawyers to be treated differently from certain other professions, and those reasons are set out there. We acknowledge that there are provisions that are designed to facilitate the giving and receiving of legal advice, but we believe that making this provision will move the balance inappropriately and prevent lawyers from doing their jobs in the legal system.

Mr BOULTON—Could I just point the committee to subsection 30(9), which says that there is no alteration in the law relating to legal professional privilege. That is what we are bound by. We are removing something that is uncertain and vague in respect of which no other person in a fiduciary relationship has the same so-called right, but we go on expressly to state in 30(9) that the law relating to legal professional privilege is not affected.

Mr IRWIN—Obviously, it is a provision that no-one on any side of this legislation has ever seemed to have understood. During the time that I have been with the authority, it does not seem to have been a provision that is used or relied upon in practice. In the 2½ years I have been with the authority, I have never experienced an argument based on that section.

CHAIR—Have you been there for 2½ years? It seems only a couple of months ago that you were the new man.

Mr IRWIN—It seems like yesterday, and I was less grey.

CHAIR—Are there any further points that you would like to make?

Mr BOULTON—No.

CHAIR—In relation to part 11, 'The use of reasonable force to execute warrants', I understand that this is a minor amendment and is not queried in any of the submissions.

As there are no comments, we will move on to part 13, which relates to the dissemination of information overseas. I think that Mr Broome felt we had not gone far enough in this area.

Mr BROOME—I just queried whether this actually overcomes an issue in relation to the capacity of the authority to involve overseas agencies, including the disclosure of information to them as part of operations where they are going on on a joint basis. It certainly solves one problem in fixing the definition of a law enforcement agency, but I think it could have gone further to address the issues in section 17, I think it is from memory. It is just a minor suggestion, but I think there has always been some doubt amongst some of the players in this law enforcement game as to the authority's powers and role in relation to overseas matters. This might be an opportunity to remove that doubt rather than to leave it not dealt with and therefore leading to continuing complaints from some quarters that the NCA does not have a role which can extend to overseas related investigations, and so on.

Ms SELLICK—I would like to make the comment that there is no reason now why overseas law enforcement agencies cannot be a part of the Commonwealth task force that can be established under the act, provided that they are investigating relevant criminal activity, which is the charter of the National Crime Authority. There is no limitation in law on that. There may in fact be a practical limitation as to what material those agencies can access under other legislation, such as the FTR material which is a matter for the FTR legislation at this stage. As far as engaging in operations with overseas agencies is concerned, they can at this stage already do so.

Mr BOULTON—Might I say that the authority endorses Mr Broome's contribution. We would like to see this whole area of cooperation with overseas agencies and of dissemination cleared up, but the fact is that what we have in the bill is an improvement. We would like to keep it. We do not want to lose it. We will come back to you in the future asking for more.

CHAIR—I think the committee has taken on board that, whilst you may not regard many aspects of the bill as perfect, you would regard them as improvements. We have got that message loud and clear. We may not always agree with you, but we have got your message. That is not to say that we disagree with you either.

Mr BOULTON—Thank you.

CHAIR—As there are no further comments on part 13, we will move to part 14, 'Application of the criminal code'. I think we dealt with that fairly comprehensively under part 1, 'Reasonable excuse'. Unless somebody has something additional to say, I propose to move on.

Part 17, 'Hearing officers': this seems to have been generally supported as a means to increase the NCA's operational capability without the administrative cost of additional full-time members. Mr Broome, I understand you are again the only one to object on the grounds that hearing officers would have less standing than members and thus it would be difficult to attract suitable candidates. Would you like to expand on that?

Mr BROOME—I think it is well known that the authority has not exactly had an easy row to hoe in obtaining members over its life. Certainly the proposal which had been previously advanced was that of part-time members who would be available as and when required. I do not object, if that is the solution everybody agrees will meet the problem of being able to have a greater number of appropriately qualified persons to conduct hearings. My concern is whether, if you cannot get people to take on a position now as members, you will get them to take on the position of hearing officers. At the end of the day, making them part-time members of the authority at least maintains what has long been said to be a fundamental principle of the NCA Act—that the special powers would only ever be exercised by members of the authority. What this provision now does is to enable those who are not members of the authority to exercise some of those powers. I just wonder whether that is going to provide ammunition for those who will, quite wrongly, assert that these powers are being misused. I think there would have been some greater protection if only members of the authority—albeit some in a part-time capacity—exercised those powers.

CHAIR—Mr Bevan, do you have an experience in your organisation in this respect?

Mr BEVAN—Yes. We have a provision which allows the chairperson or a legally qualified commissioner, of which there is one at any particular time, myself as the Director of the Official Misconduct Division or any legally qualified employee to preside at hearings. I have never heard the argument as a result of that that in some way the position of chairperson or commissioner is diminished. It also has not resulted in a spate of applications for judicial review to the Supreme Court on the basis that the legally qualified employees of the commission have exercised their powers wrongly under the act.

It also helps us operationally in that the chairperson and the legally qualified commissioner, who is in private practice as a solicitor, are not always available. It allows us, for a particular investigation, to hold two hearings at once. So you have two presiding officers who examine two witnesses at the same time, obviously for tactical operational reasons. But it has not posed a problem, nor has it been the subject of any criticism of which I am aware.

Mr IRWIN—It is important to remember that the role of the hearing officer will be under the oversight of a member. It will be the member who has to issue the summons in the first place. Effectively, all the hearing officer will be doing will be collecting the evidence and, at the end of that, being required to hand it over to the member. Also, what we will effectively have is a panel of appropriately qualified people—a bit like people who are on the crown prosecutor's brief out-list, if you like, or the legal aid brief out-list, except these people will be ultimately approved at a much higher level and appointed by the Governor-General. I believe it would be easier to get people off that list to come to do a matter that might take them one or two days, just like they are getting a brief to appear in court, than it is at present to get a member or even a part-time member who might have to give up years or even months in private practice.

CHAIR—We now move to schedule 2, Privacy Act amendments. That has not been queried in any submission.

As there are no comments, we will turn to schedule 4, the Administrative Decisions (Judicial Review) Act amendments. I understand the Law Council believes that the NCA conduct should not be insulated from judicial review. It states that such a move would be pointless as litigants would sue in the Federal Court at common law based on a recent refugee case. Are there any thoughts, comments or expansions?

Mr GREENTREE-WHITE—No expansions upon the submission, no.

Mr ROZENES—It is correct.

Mr GREENTREE-WHITE—That was implicit in the submission!

Mr ROZENES—But what good is it in any case when 39B of the Judiciary Act exposes all the decisions to challenge in the Federal Court, whether you have got the AD(JR) Act or not?

Mr GREENTREE-WHITE—The recent refugee case is, with respect, about the High Court. What we are saying in our submission is that, if you exclude judicial review, you can use section 39B of the Judiciary Act to seek judicial review in the Federal Court. Parliament has the power to preclude the operation of section 39B. But, even if you were to do that, because of this recent case, the Aala case, the litigant could go to the High Court. We think it is inappropriate

for such matters to end up in the High Court. Given that judicial review will be available at some point, we do not see it as appropriate to restrict Administrative Decisions (Judicial Review) Act review.

Mr ALDERSON—There is a minimal judicial review power embedded in the Constitution. But you can see from this being paragraph ZB that there have been numerous exclusions from the AD(JR) Act, and the High Court has not been flooded with litigation as a result.

CHAIR—In relation to refugees, I must just say that, as chair of another committee, I spent all of last week touring all the detention centres around Australia, and if you think you have got some challenges in this area, well—it is just unbelievable. But we will not go into that.

There are some other matters I want to raise briefly. The South Australian Attorney-General raised some concerns about the bill. Being a simple person and a non-lawyer, I thought all of these amendments had been agreed by the various state governments and the federal government before they were introduced to the parliament. So, if they are signed off by all the states, how come the South Australian Attorney-General is now raising objections? And what does that tell us about where we are going to go in the operation of federal-state cooperation in future in this field?

Ms SELLICK—There was consultation with the states on this issue, as there always has been, through the IGC and through the state's Attorney-General, where it is relevant. While it is not desirable for one of the states or a territory not to amend their state underpinning legislation, it is not fatal to the operation of the national scheme. As a matter of fact, not all states had state underpinning legislation before the NCA was up and running under its Commonwealth act. If one particular state does not amend their legislation, it will simply become a question of fact, on a reference, which legislation they are acting under.

Following the amendments from the High Court decision in Hughes, the authority will now be able to operate under the Commonwealth legislation in a much wider set of circumstances. It will only be if there is a single state reference that there will be a need to rely on that single state legislation, in which case the NCA will simply operate under that single state legislation. So, whereas it is not desirable and for certainty it would be better if the NCA knew that its powers were the same regardless of where it was operating, it will simply be a matter of decision on each individual case.

CHAIR—So it is whichever rulebook you decide to apply in a particular circumstance.

Mr McDONALD—The other thing is that the South Australian letter does not say anything about being opposed to the legislation. What they are doing is raising some issues which they would like the group to consider. I do not think there is any suggestion of South Australian not being with the bill.

Mr IRWIN—The reality about these things is that it often does take some time for the underpinning state legislation to catch up with what happens at a federal level. We have seen that with recent amendments to the act arising out of Wakim and, more recently, Hughes. There always is time when new Commonwealth legislation is passed when there is a gap between the Commonwealth legislation and state legislation. We just have to do the best we can, depending

on which reference is properly available in a particular case and therefore what piece of legislation we actually have to use.

CHAIR— John, I come back to you again. You commented adversely on the failure to amend the annual reporting provisions. Would you like to expand on that? Would you have made the same comments when you were in the chair?

Mr BROOME—Yes, I would. I think the annual reporting provisions are a complete and utter mess. We go through this nonsense every year, or we certainly did in my experience. That was not just when I was the chair of the authority but when I was in other capacities as well. We go through this nonsense of the committee getting upset because the annual report is not tabled in the time frame it thinks it should be. The government takes a view in certain circumstances as to whether or not the relevant minister has seen the report or not.

There is the proposal that states have to be consulted about the content of the report when the report is never changed as a result of the state consultation. In my experience—and I am sure it is the experience of the current members of the authority in relation to the last annual report—you may get a one-liner from a state government that says, 'We support the report', or you may get some observation about some matter that the act then requires to be incorporated. You then get this delay about when you can incorporate those comments. The whole thing is an unnecessary mess. The report should be required to be given to the federal minister by a certain date. He or she should have an obligation to table within a certain number of sitting days. The states are provided with copies which they table in their parliaments as they see fit—end of section. There are some interesting legal fictions going on at the moment as to the way the provisions are dealt with anyway.

CHAIR—I think the Attorney-General's representatives have taken note of what you have said and will report to the Attorney-General. They indicate that that is a fair comment.

Senator McGAURAN—I think the last point you raised is more for the committee to be interested in. It is so trivial when we have discussed such items of moment. I appeal to you: let's all go home. We are trying to catch the Mr Bigs.

CHAIR—I think I understand what you are talking about. My next question, which will be my last, is again directed toward Mr Broome. Somewhere in your submission, you either said specifically or implied that you felt that these amendments were a missed opportunity, that there should be a complete rewrite of the act and that this, while not tinkering at the edges—it was certainly better than nothing—was a lost opportunity. Would you like to expand on that?

Mr BROOME—I will be as brief as I can. It is a bit like a Chinese meal. You have had one for 20 minutes and you still feel hungry.

CHAIR—That is a matter of opinion.

Mr BROOME—It has been a long time coming. It is 10 years since the act was substantively amended. In my view, both sides of politics have to bear responsibility for that long delay in achieving some of these changes. That said, there are a number of options that seem to me have been lost in the 2½ years that this bill has taken to come forth. One of the

committee's recommendations was that the act be rewritten. That was rejected by the department in its submission to the committee before the matter even went to government. While I note that the minister's response was that the matter had been considered, it appeared that nothing was found which could have been simplified or improved. I would start with section 55A. I understand why it is as complicated as it is, but that is just one example. There is an issue there about simple comprehensibility of the legislation.

The second thing is in relation to issues like search warrants. The problems in relation to search warrant powers generally are now, I think, fairly well known. We are getting report after report, including those of the parliament, in which these issues are addressed, and we are still waiting for solutions. It is well known that people have substantial doubts about the capacity of the existing search warrant law to cope with issues like computers. It keeps being referred to. It was referred to again recently by the police commissioners in their discussion paper released last year. I think those problems could have been addressed in this legislation if this is about the government's response to give the NCA the capacity to do the job that it is set up to do. I have only to mention expressions like 'proceeds of crime'. We have had a three-year-old ALRC report, and there is still no response. We have inadequate laws in relation to computer crime, which the NCA needs to get into and deal with. We have problems in relation to controlled delivery legislation. The present legislation does not work. The committee has looked at that and has reported and there is still no response. The list goes on. It just seems to me that if this is the last chance that the NCA is going to have for the foreseeable future to have its legislation addressed—and, unfortunately, I suspect it is—it is a shame that, after 2½ years, something a little better could not have been produced.

Mr McDONALD—Computer offences and the whole computer area are of great interest to the government at the moment, and I expect there will be a model criminal code report on that very soon.

CHAIR—I hope it can take into account the findings of this committee's current inquiry into new technology.

Mr McDONALD—I think it will be very pleasing for many of the people here. While I cannot go into further detail, I can say that all the matters that Mr Broome has mentioned are actively being considered.

CHAIR—I am conscious that we have covered a lot of ground this morning. While I have on occasion encouraged people to try to be as succinct as possible, I certainly do not want anyone to feel that they may have been denied an opportunity to say something that they felt needed to be said. I am not looking for closing speeches or addresses, but if anyone feels that there is something critical that they wanted to say on any of this morning's topics and they have not had an opportunity to comment, now is that moment.

As no-one has indicated that they would like to speak, that concludes today's hearing. It has been a long session. I thank all the witnesses for coming, particularly those who came from interstate. I thank the staff, who have clearly had a fair amount of work to do associated with today, and I thank Hansard for their admirable work. If I could have a copy of the transcript tomorrow morning to read on my flight to East Timor on Sunday, I would be most grateful!

Committee adjourned at 1.23 p.m.