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Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Criminal Code Amendment Bill (Theft, Fraud, Bribery and Related Offences) Bill 1999

MONDAY, 15 MAY 2000

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 15 May 2000

Members: Mr Andrews *(Chair)*, Mr Billson, Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Murphy, Ms Roxon, Mr St Clair and Mrs Vale

Members in attendance: Mr Andrews, Mr Cadman and Mr Kerr

Terms of reference for the inquiry:

Inquiry into the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999.

WITNESSES

ANDERSON, Miss Jane Elizabeth, Legal Officer, Criminal Law Division, Attorney-General's Department 2

McDONALD, Mr Geoffrey Angus, Senior Advisor, Criminal Law Reform Branch, Attorney-General's Department 2

DELANEY, Mr Grahame, Principal Adviser (Corporate Prosecutions and Policy), Director of Public Prosecutions 22

McCARTHY, Mr Justin William, Senior Assistant Director (Policy), Director of Public Prosecutions 22

Committee met at 9.35 a.m.

CHAIR—I declare open this first public hearing of the committee's inquiry into the provisions of the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999. On behalf of the House of Representatives Standing Committee on Legal and Constitutional Affairs, I welcome all the witnesses and any members of the public who may attend today. This bill was introduced into parliament on 24 November 1999. It was subsequently referred to the committee for inquiry by the Minister for Justice and Customs. She has asked that the committee present its report on this bill to parliament by 26 June of this year. The purpose of the bill is to amend the Criminal Code Act 1995 and its introduction as part of the progressive implementation of the Model Criminal Code by the Commonwealth. I now call Mr McDonald and Miss Anderson to give their evidence.

ANDERSON, Miss Jane Elizabeth, Legal Officer, Criminal Law Division, Attorney-General's Department

McDONALD, Mr Geoffrey Angus, Senior Advisor, Criminal Law Reform Branch, Attorney-General's Department

CHAIR—I advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have your submission, which has been authorised by the committee for publication. I know you have already spoken to us informally, Mr McDonald, prior to today, but do you have some opening remarks you would like to make on this occasion?

Mr McDonald—I begin by saying that there is much about this bill that has already been said in the second reading speech, the explanatory memorandum and our written submission to the standing committee. I will therefore endeavour not to repeat what has been said in these documents. However, there is a little more that I would like to put on the record in this public hearing which may assist those examining the bill. The bill is based on the Model Criminal Code and can play an important role in leading Australia towards improved and more consistent laws. As you will no doubt know, the Model Criminal Code has been developed on a cooperative basis with state and territory criminal law advisers and after extensive nationwide consultation. That of course is all very well, but we have to ask what it does in its own right to improve the Commonwealth criminal law. I very much hope you will conclude that it does a lot and that it will represent a very significant and worthwhile advance on the existing offences.

Those improvements can be summarised as follows: provide a clearer terminology than the existing Crimes Act defences, many of which rely on obscure common law terms which are often argued about and varied by the courts; provide a full range of offences, not a patchwork of state and Commonwealth offences. At present we rely on the Commonwealth act for theft and a state offence for robbery, as an example. Existing corruption offences have very low penalties—for example, the maximum penalty of two years imprisonment for bribing a Commonwealth official—and do not provide for a full range of offences such is proposed in this bill.

It sets the scene for clarity in relation to geographic breach offences. It provides for precise definitions of the terms 'Commonwealth public official' and 'Commonwealth entity', both of which at the moment are not as precise. It modernises the fraud related offences to meet advances in technology. It will rationalise Commonwealth offences. Over 250 offences spread through Commonwealth statutes will be repealed. Instead there will be more reliance on the central offences and more chance of having a standard approach to each type of offence. In this way the bill is a result of a stocktake of existing offences, which has led to an overdue pruning away of duplication, which has produced variations in relation to offences that should be the same. This is a plank of government policy.

It provides protection to those who serve the Commonwealth by providing for stiff penalties where those people are attacked. It correctly allows the Commonwealth to assume responsibility for ensuring perpetrators of such attacks are dealt with appropriately. In recent times—and this is in addition to the submission—quite a deal has been said about the term 'identity fraud' in the media. You have received a submission about it from Mr Hawker MP, Chair of the Standing Committee on Economics, Finance and Public Administration. The submission mentions the wide variations of penalties between the relevant offences, and you will appreciate that concerns about those variations are addressed in this bill. That is why the offences have been centralised, and that is why we can repeal a lot of these offences which provide for variation. The standing committee will note that, apart from the central fraud and general dishonesty offences, which provide for significant penalties where a person dishonestly obtains an advantage by deceiving someone with a false identity—whether achieved by causing a computer, a machine or an electronic device to make an unauthorised response or by other means; you see that in clause 133.1—these are backed up with a number of lesser false or misleading statement and information offences, sections 136.1 and 137.2.

In our view, there is no need for more offences. The submission from Mr Hawker MP refers to some US legislation called the Identity Theft and Assumption Deterrence Act 1988. It is quite a fancy name; however, it covers much the same ground as the proposed fraud and general dishonesty offences that you will find at pages 30 and 33 of the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill and the false information offences at page 42. Of particular interest are the forgery and false document offences, which start at page 50 of the bill. At page 50 of the bill, particular regard should be given to the clause 143.1, which provides for a broad definition of 'document' that includes material capable of being responded to by a computer or another electronic device. In addition to this, we have made it clear that it covers all manner of cards, and we have defined that very broadly to cover what is new, such as smart cards and things like that. Clause 143.2 defines a false document, and there is no doubt that would include false identification documents such as those described in the US provision, which is section 1028, which I hand to the committee now.

I turn now to the American provision. For the committee's convenience, I have written on the copy I hand you the provisions in the code that match up with the provisions in the US provision. When you look at the offences, you will see that, even though it is produced in the United States, we have better proposals here. Examples are US sections 1028(a)1 and 1028(a)2, which are covered by our 'Using a forged document', 'Possession of a forged document' and 'Giving information from false or misleading documents' offences, which are clauses 145.1, 145.2 and 145.5. US sections 1028(a)3 and 1028(a)4 are covered by our 'Giving information

derived from false or misleading documents' offences—clause 145.5—and also our ancillary offences in relation to other offences, such as attempted conspiracy complicity. The same goes for their section 1028(a)5, which is covered by our 'Possession, making and adaptation of devices etc. for making forgeries' offence, which is clause 145.3. US section 1028(a)6 is covered by the receiving offence and also the possession of a forgery offence. Finally, US section 1028(a)7 is dealt with by our receiving offences.

The remainder of the American provision is even worse. They have very complicated penalty provisions, while we have a simple maximum penalty. The definitions that I mentioned that were in our bill, in 143.1 and 143.2, are in my view much less frozen by technology than the American provisions. The American provisions are probably a bit too specific.

Of course it is important to recognise that merely possessing someone else's identity details without anything else would cast the net too wide. There are plenty of situations you can think of. People might be on a computer chat room using someone else's identity just for fun or something like that. A person might simply be conveying a passport for their spouse or might even be wishing to fob off a nosy neighbour or something like that. The American offences recognise that you do have to have knowledge that what you are doing is intended to defraud or intended to mislead.

The model criminal code committee is currently looking at unauthorised use of computer offences. A discussion paper was released by Senator Vanstone on 12 February. It is expected that there will be some updating of offences arising out of that which will deal with people who are found interfering with people's computers, which could be relevant to a situation where you actually catch the person much earlier in the process that we are talking about here.

So I tend to feel that the US provision, 1028 or something like it, would simply add to the complication of the code, that if there is something extra required which we have not thought of then our better approach is to look at seeing how we can improve the general offences that we have already have in this bill. I tend to think that those offences get us there.

New South Wales criminal law would probably be one of the prime examples of a jurisdiction that has just added offences every time something has become topical. As a result, New South Wales now has 150 offences dealing with theft, fraud and related offences-a remarkable achievement over 90 years. If you go through some of those offences it is quite amazing: theft from railways, theft of cattle, the whole works. At the Commonwealth level in a sense we have topped that because we can repeal 250 offences with this bill. So I am not being totally unfair to New South Wales. But it is important that we make the general offences suit the times rather than add new ones.

I would like to finalise my opening statement by noting that you may well be disappointed that there are not a lot more submissions on this bill. I am a little surprised there are not a few more myself. However, I guess there was very substantial contribution to the development of this bill in the model criminal code process. You will see in the back of that an appendix which lists quite a number of submissions. In a sense this standing committee has the advantage of being able to draw on the analysis of those submissions which you will find in this report. One thing the model criminal code committee is good at is putting the arguments for and against

whatever they are proposing. So do not become disenchanted. This report will provide you with the additional consultation. That consultation was genuinely national and there were seminars in capital cities as well to encourage the procession.

Mr KERR—Since that report, what has been the direction in the various state jurisdictions? Is the direction you are proposing now consistent with any of, or all of, the changes that have occurred? Our hope in the long run with the whole review process is to develop a common thread of criminal law, but I am anxious to identify whether or not in the time that has elapsed since that report the states have been moving in a direction which is consistent with that which you are proposing to us. Perhaps you could also give us a quick overview of any significant changes that have occurred at a state level.

Mr McDonald—The situation is that not much has happened at the state level since 1995. There are two jurisdictions which are preparing legislation based on the model criminal code—they are South Australia and Tasmania—but progress has been slower than I would have expected with that. Naturally, it has to compete with other legislation. It has not got to the stage where they have released a bill. However, my expectation is that South Australia, for example, would be unlikely to have a general dishonesty offence. It is quite clear from this report that state criminal law advisers are not terribly enamoured with the idea of a general dishonesty offence. However, Western Australia does have one, and the offence was considered in Queensland at one stage. That is really the main difference.

The other offence we have in here which you will not find at state level is the organised fraud offence, which is based on section 83 of the Proceeds of Crime Act. Finally, states have summary offences acts, which are separate from their serious offence criminal code or crimes act. What we have done here is centralise the lesser offences with the more serious offences. That is something you will not see at the state level. However, that is not really a question of there being inconsistency with the states so much as having additional offences in the criminal code. I cannot really say much more than that. The passage of this bill will, I believe, provide some impetus for change towards reforming laws at the state level. There is certainly plenty of scope for it. I mentioned New South Wales. There would certainly be a need for reform of the theft and fraud offences there, and I would say that that would be the case elsewhere. Very little has happened to date.

Mr CADMAN—Mr Chairman, I wonder whether I could ask a question of you and Mr Kerr. It seems to me that I would be assisted, but you may not think it necessary, by understanding what measures in the new proposals are currently within state and Commonwealth laws, what measures are currently in a state law or Commonwealth laws and what is proposed which is not in the Commonwealth law. That would help me to understand where new ground is being broken and where consolidation is taking place of existing law. Is that not necessary for a professional?

Mr McDonald—I can do two things: I can go away and prepare a detailed table which outlines all that and give that to you and I can give you a quick verbal overview now. You can have both of course.

Mr CADMAN—I would like the table to study privately. I would need to do that to comprehend the scale and scope of what you are doing. However, my colleagues may not need that—a verbal overview may be all that is necessary.

Mr KERR—It would still be helpful.

Mr McDonald—I would be more than happy to do that. In a sense, all the raw material is there but it takes a fair bit to digest that. As a brief summary, at the moment we rely on state law for, say, robbery and burglary. We rely on state robbery and burglary offences law but we have Commonwealth theft offences. This bill says, 'It's ridiculous to have a different system for theft and robbery and burglary; let's have a Commonwealth theft, robbery and burglary offence,' and we have got that. I mentioned the general dishonesty offence. Only Western Australia and the Commonwealth currently have that type of offence. The other states do not have a general dishonesty offence, though you will find offences which are similar to it in relation to specific areas. Sometimes in corporate regulation you might find it and there is a director's duty provision in the Corporations Law which is similar to it and has a similar penalty—five years imprisonment. In relation to blackmail—what we call unwarranted demands in this bill—there has for a long time been state blackmail offences. This bill would bring in a new offence for the Commonwealth—an unwarranted demands offence. The smaller offences that we have, such as the false and misleading statement offences—those sorts of offences—exist in Commonwealth law all over the place and I think you would find similar offences would exist in most states—but, again, all over the place rather than centralised as proposed here. That is a very brief overview of the basic differences.

Mr CADMAN—Do I take it then that customs law and tax law—to use examples—have imposed different penalties for the same offence?

Mr McDonald—There are examples within the Commonwealth where there have been variations. For example, with those misleading statement type offences, there are variations between six months, 12 months and you will get the occasional one with two years imprisonment. In the Health Insurance Act there is an offence which is not exactly the same but it has as high as five years imprisonment. So there is quite a bit of variation. What we have here tries to assimilate and was consulted upon with the departments where we had repeals.

Mr CADMAN—Are there definitional differences as well, or are the definitions consistent?

Mr McDonald—It is true that there are definitional differences. In fact, the point of this exercise was to try to have a standard approach. It is pretty astounding, actually. I have a folder back at the office, and if you go through the offences the differences are quite amazing.

CHAIR—Mr McDonald, I want to take up some discussion with you about the dishonesty offence in two parts: firstly, the rational for it, given the background of what you have said, particularly the lack of desire for it on the part of the states, and I think you point out in your submission that the Model Criminal Code Officers Committee recommended there be no general dishonesty offence; and, secondly, the definition itself. The criticism is that this is a rather vague offence and relies, in effect, on the state of mind of the person who is accused and

therefore it is possibly uncertain and even draconian. They are fairly serious charges, if they can be made out, against an element of criminal law.

Mr McDonald—I think the main thrust of the department's submission is that while the states are saying that, through the model criminal code committee report, in relation to the individual general dishonesty offence they do not seem to have any problem with the conspiracy general dishonesty offence. That is, they are in favour of a conspiracy to defraud offence, which they have mentioned in this little report, which covers the same ground. The only difference between that offence—

Mr KERR—Can you just identify that report?

Mr McDonald—This is the May 1997 *Conspiracy to defraud* I have always assumed you have had it. I will make available. So they say, 'Yes, the elements which we have in this offence are fine for where there is a conspiracy but it is not fine where it is an individual that has managed to pull it off.' That is inconsistent. Conspiracy to defraud has been around for a long, long time. It exists in every state, and the elements are quite similar in each state. It is one of the few areas where there is some uniformity. In fact, they used the dishonesty definition that we have in this bill for a long period.

Mr Gyles QC, whom I mentioned in the submission, hit on this point. He is a man of few words, it would seem, but he does hit on this point. His concern—and many people's concern over the years—is that it is just terrible that people would have to go to the trouble of developing a conspiracy case, which is usually a complicated case, when in fact an individual offence of this nature would suffice. You would all know that there have been some great difficulties with conspiracy cases.

I have here a few more cases. I think I have made the point that it is not easy to find examples of cases where this offence would not be caught by the more serious offences—the property fraud and financial advantage fraud offences—however, I have here the case involving Brian Jones Maher in 1986, which was the classic bottom of the harbour type case. I think a reading of this case really shows—it is a bit thick—that people can devise very complex schemes where it would be very difficult to show the sort of active deception that we talk about here. However, the offence of conspiracy to defraud has existed for just ages, and in England as well. So there is Brian James Maher. I would like to table that. Brian James Maher concerned a tax scheme.

I have another one here concerning Wayne Leslie Condon, a 1995 case. It is quite an interesting one. It concerned an employment scheme to train people with skills to learn to work, to do different sorts of work. Essentially there was a reporting mechanism to the administering department. That reporting mechanism was not the sort of report that you would provide to an auditor—it was sort of a general report—and there was some criticism of the administrative arrangements for this scheme. However, putting that to one side, there was a real argument as to whether, even though he had been putting the funds to buying expensive cars and this sort of thing, he really deceived the Commonwealth. I put that one in—I think it is worth looking at. So there are cases from time to time where this happens.

Mr KERR—I want to draw you up on a fundamental point you make. You say it is inconsistent that we would have a conspiracy offence which operates where two or more people undertake an act which is not criminal if one does it. But isn't that the whole nature of conspiracy, because many acts which are criminalised by the law of conspiracy are not criminal when conducted by a single person; not ones involving dishonesty, but a whole range of tortious conduct, a whole range of things, which if carried out by a single individual would not be criminal?

Mr McDonald—In the criminal law, the movement is totally in the opposite direction to that. In fact, in the whole philosophy of this code, without being critical of my colleagues on where model criminal code commences, there is a little bit of inconsistency because, as you know, in chapter 2 of the code—which is general principles of criminal responsibility—you find conspiracy there and it applies to every offence. The trend is not to have conspiracy unless you have a principal offence. Historically, conspiracy to defraud has been an exception to that, but there is no reason for it.

Mr CADMAN—I am sorry, I do not quite understand. What is the point here?

Mr KERR—Conspiracy has always been one of these odd criminal offences at common law where you actually do not need to allege that the conspiracy is to break a law; it can be a conspiracy to do something which is a civil wrong, and I think that is still the case in most state jurisdictions, although it may be that we have eliminated it as part of the general principles of criminal responsibility in the chapters we have already adopted. But I just wanted to identify this as an issue because you made that point as a strong one that the conspiracy to defraud had that inconsistency, and yet I suppose the response from the states might be, 'Well, that's an inherent one which we're not seeking to abolish across the board in relation to the whole conspiracy offence.'

Mr McDonald—Certainly in every other area in terms of where the criminal law is going and what it is now we always attach the conspiracy to a principal offence. So those that are in favour of having conspiracy to defraud but not the individual offence are being quite inconsistent. It is gives immense weight to the fact that there were two people rather than one, and it really is very hard to justify.

Mr CADMAN—But surely conspiracy means you have got an intention. The establishing of intent for an individual: surely that is equivalent to establishing a conspiracy?

Mr McDonald—With conspiracy you do have to have some overt act, some activity, which begins the process, which shows that the people are going to carry it out. So it is not just intent on its own.

Mr CADMAN—So there has to be a plan behind the intent?

Mr McDonald—No, what I was referring to is that you have to indulge in some conduct towards or some act towards the commission.

Mr KERR—You have to have gone past the plan. You have to have done something to prove a conspiracy.

Mr McDonald—Yes.

Mr CADMAN—Yes, but for an individual to establish intent you must have an action, surely.

Mr KERR—No, but it would be hard to prove without it.

Mr CADMAN—I would have thought so.

Mr McDonald—It depends very much on the facts. It is possible to prove lots of things, things that you would never imagine at times.

CHAIR—What concerns me about this is that we are starting from the difficulty of proving conspiracy to defraud, and starting with Mr Gyles's comments about 20 years ago. You provide us with a list of leading cases—Scott v. the Metropolitan Commissioner of Police, Adams, Eade, et cetera—on conspiracy to defraud and then indicate that you could vary the circumstances so that one person involved might escape conviction for it. But, equally, it seems that in many of the cases there would not have been any financial gain, so in the end we are left with a situation of bringing in a general offence to cover cases where there is no financial gain involved as far as the individual is concerned. Isn't this a fairly heavy-handed approach to some perceived difficulties in prosecution?

Mr McDonald—This sort of offence has been around since the early 1980s, and it had a much higher penalty—in fact, it had a maximum penalty of 10 years imprisonment. Really, it is very difficult to come up with an example of where it has been abused or where anyone has been able to claim it has brought about injustice. In fact, it is in the area of massive government programs such as we have at the Commonwealth level. I notice the DPP will give evidence later. It has actually been able to be used to simplify cases and to make them easier to deal with, not only for the prosecution but for the defence as well. I do not think there is anything to suggest that this has caused problems. If we were to wind it back, then we would be essentially taking the risk of helping the most cunning, devious criminals that are about—the ones who are smart enough to be able to cover their tracks in the way that is mentioned in this Maher case.

Mr CADMAN—With regard to Batten v. Lindsay, you mentioned it was difficult to gain a conviction under any other provision except general dishonesty.

Mr McDonald—I think I found there one which would have well and truly been of that nature. But these other ones that I have come up with—the Condon case and the Maher case—are cases of more substance which demonstrate the same point. The reality is that it is in only a very small proportion of the cases where this offence would be absolutely necessary. Now that we are proposing to change the penalty to five years imprisonment, the emphasis will be on dishonestly obtaining financial advantage by deception as the main fraud offences because they carry a maximum penalty of 10 years. The focus is on the traditional fraud offence in this bill

anyway. This is just to ensure that, where we do have some of these situations, the person does not go completely free.

CHAIR—Doesn't that undermine your argument a little, Mr McDonald, by saying, 'We are going to reduce the penalty'? That seems to me to lessen the importance of the offence. The aim of this offence may be to capture or to convict the likes of those that were identified by Mr Gyles originally, the modern day equivalent of the bottom of the harbour scheme; yet we are now saying that this is an offence with a maximum five-year penalty. Even with the case you cite of Batten v. Lindsay, whilst I do not wish to justify the activities of the defendant involved, it is hardly a matter that is going to make the law reports, is it?

Mr McDonald—Well, you never know. Sometimes all sorts of little things can.

CHAIR—That was not the best way to phrase it. Dishonestly using frequent flier points other than for their intention was heard in the ACT Magistrates Court.

Mr McDonald—The situation is that where you can show deception that is a great indication of culpability. At the end of the day, regardless of what the person has done—whether it is a large fraud or not—you have to look at the state of mind. With the general dishonesty offence, there is absolutely no doubt that the prosecution does not have to prove as much as they prove in the fraud offence. So it is appropriate that it should have a lower penalty. What I am saying is that, if we get rid of it, it is possible that some of these people would not be convicted at all. That would be unfortunate. The court will, within that five-year penalty, take into account the full circumstances of the case. In Batten v. Lindsay, the person is going to get a much lower penalty than some of these other people.

Mr KERR—What about the organised fraud? Why are we batting on with that? Surely we could address the forfeiture and all the other sorts of consequences more directly, without the need for a particular offence of this nature.

Mr McDonald—The organised fraud offence was put in place at the time of the proceeds of crime regime—a general beefing-up of the whole apparatus to deal with organised crime.

Mr KERR—I understand that. I am putting to you whether this is no more than one of the 150 New South Wales offences which come about to respond to a particular circumstance at a particular time and which, when you are cleaning the barnacles off the hull, you say, 'Why the hell do we need this?' If we want to have a forfeiture regime, let us link it to, say, a penalty. If an offence carries 10 years or more or five years or more, let us have an approach which is consistent.

Mr McDonald—It is not there just to enable forfeiture under proceeds of crime. That was an issue at the time. However, really what it is about is ensuring that there are significant penalties from people that commit a number of frauds, a series of them. The offence is put in there and has a high maximum penalty designed to achieve that. That is what it is all about. It is all about penalty. If you reduce that penalty—

Mr KERR—I am not talking about reducing it. Why do you need that offence at all? Isn't the sort of action that is occurring a series of frauds perpetrated? Wouldn't that be caught with a whole range of measures under this legislation without the need for a specific provision?

Mr McDonald—The individual fraud offences have a maximum penalty of 10 years imprisonment and the organised fraud offence has a maximum penalty of 25 years imprisonment.

Mr KERR—But judges are smart enough to be able to do these cumulative legal things and God knows what else, plus there are the conspiracy offences and a whole range of other things. I cannot understand why—

Mr McDonald—The view at the time was that judges required a bit of persuasion through the enactment of this type of offence to provide the appropriate penalty—and I think that is the fear now.

Mr KERR—But if you are cleaning the whole show up, why keep one that stands out as essentially inconsistent with an overall scheme? I can see both sides of the argument on the other point that you are making and probably in the end we will put them down. I am not yet convinced, but I can see the argument that you making about general dishonesty—I can see that argument, but I can see the other side of it also—but I really cannot see the argument for maintaining an offence which really just sums up a whole series of things. It is just another exercise in telling judges to exercise their discretion in a particular way. You can do that much more straightforwardly.

Mr McDonald—What it does is give the judges a clear direction from the parliament that where it is organised fraud the parliament wants the judges to consider higher penalties. There is still discretion. The judges have a discretion in relation to these serious offences.

Mr KERR—But why not make a provision that says that where a person has been convicted of three or four offences the penalty may be higher? Why do you need a special offence?

Mr McDonald—Essentially the repeal of this offence would, in the government's view, send a message to organised crime or send just the general message that there is a softer attitude to this sort of crime—I think that is of concern—and possibly that would relay through to the courts. You are saying that from a drafting perspective you could put something in the penalty provisions, but the only problem—

Mr KERR—You have cleaned up a whole bunch of redundant offences now. You have kept one offence which no state has, which means that any intent to get us closer to consistency is lessened. That offence has no logical rationale—it does not include a new element—and you really only defend it on the basis that you want to encourage judges to impose higher penalties for structuring offences; that is, for putting a whole series of frauds together. You could deal with that very simply through a penalty provision, if you still wanted to send that message—if you think judges are too stupid to exercise discretion according to the weight of the offences that are being conducted, a view that I do not share, by the way.

Mr McDonald—It tags together not just the fraud offences but also some taxation offences—it tags together a range of offences. So if you were to redraft it in the way that you are proposing, there would probably be very little gain in terms of the size of the statute book. Indeed you would be repeating the same sorts of provisions in various places. Having it where it is represents a very neat way of expressing it, as applying to these various offences. Of course it can be applied to new offences as well. It has just been brought to my attention that the new organised people smuggling offences is another area that has been added to it, and this is being looked at as well. So for that sort of reason there is some advantage in putting it in one place.

Another point I should make is that it does not affect the consistency of the code itself. It flows off the fraud offences, which are the model for consistency right around the country. So it does not really involve a clash with the principles that go into those sorts of offences. That is about the sum of the argument for this offence. My friends from the DPP may be able to add to it. I have an example that I have brought along for you, and I will table it. It is an example of a case where it was used. It does not get used that often, either. But here is a case, Campbell, Barker and Harper, which is a reported case where people were channelling money overseas and committed a whole range of offences, and it was used to pull them together.

Mr KERR—I would have thought that, if you are really looking to a structuring offence, you would go for something like the United States Reko provisions, where your participation in an organisation which exercises a larger criminal objective is criminalised. That would be a substantive way of dealing with some of these issues that I do not actually see that this provision addresses. I can see that on a rhetorical level you can wave a piece of paper around and say that judges have a wider range of discretion, but in truth they do not—because, if there is a series of offences, they could choose to address penalty by way of cumulative sentences. So in truth this provision does nothing to really extend the range of penalties available under the law. It is a rhetorical device. Perhaps I can raise with you in this area that we are looking at theft, fraud, bribery and related offences. Obviously no-one here has addressed the Reko type offence, and I do not think that was even taken into account in the—

Mr McDonald—Just with the Reko offence, there was careful consideration given to the Reko provisions at the time this offence was enacted by Attorney-General Bowen. You will recall that, like the Reko range, there was a whole package in the same way we had a package here: over a few years they dealt with proceeds of crime, money laundering and then, as they now call it, the financial transactions package. That all to varying degrees had its inspiration in the US legislation. However, the US legislation is very complex, and that was one of the reasons it was not pursued. Much of the categorisation of the groups was related to American jurisdiction considerations. Essentially, the government of the day came to the conclusion that it was going to be far too complex an offence.

My impression from speaking to state criminal law advisers is that they have a very similar view about that. I will check: I cannot recall whether there is mention of Reko in this report or perhaps one of our other reports. I will take that on notice. I think there may be something there, possibly in our drugs report, which would elaborate a little more on what the states feel about it. Essentially, apart from it sounding nice—a little like that other offence—when you actually look at the ingredients of the offence it is quite nightmarish in its complexity. That case makes it very

difficult to achieve the policy objective, because it makes it difficult to prosecute. You have to take into account that, in the US, there are very complex jurisdictional devices as well.

Mr KERR—Which we, of course, do not have in Australia.

Mr McDonald—We have different ones.

Mr KERR—I am sorry; I suppose that distracts from the prime focus of looking at this bill. But it does seem to me that we have this sort of hangover offence in that particular area. My own interest would be to get some more information on the general dishonesty provision. I know you have struggled to provide a whole heap of information to date. I guess that my underlying concern is that, as the penalty for it is reduced and as we, I suppose, treat it as a more commonplace element of the law, it may in fact become more significant in practice than it has hitherto. It has probably been seen in the past as something we would only charge where, in other circumstances, you would charge conspiracy but you have some difficulty in an element of conspiracy, which really puts it up there in those higher instances where it is a rarely proceeded with offence.

Mr McDonald—Unfortunately, because it is the only fraud offence that we rely on, it is one of our most commonly prosecuted dishonesty offences. The current one is—

Mr KERR—The general dishonesty.

Mr McDonald—Yes. If you have a look at the annual report for the DPP, which I have here, you may find it quite useful because it lists the offences and the regularity of the offences. With respect to 29D, which is our current general dishonesty offence, there were 184 charges under that provision in 1998-99. The reality is that the vast majority of those charges could have been brought under our new fraud offence. However, the general dishonesty offence is used all the time. The actual effect of lowering the penalty to five years will be the opposite: it will be used less often. People will charge the more serious offence when they can.

Mr KERR—I accept that is your submission, but it seems to run counter to my experience, limited as it was, as a prosecutor and as justice minister. The normal prosecution of the Commonwealth is that you charge at the level at which your offence is appropriate.

Mr McDonald—Yes.

Mr KERR—For example, if there is an offence that is set out in a particular statute, you do not charge it under the Crimes Act provision unless it is appropriate to do so. If you have provisions which are reduced in penalty but address general dishonesty, I would have thought that they would be the things that are reached for first—that it would be charged more frequently rather than less frequently and that the range of circumstances in which proceedings would be brought is likely to broaden rather than to narrow.

Mr McDonald—I suppose what I am driving at is that at present the serious and the less serious ones are all dealt with by this one offence, so you are still going to have 180 offences during the year. In the vast majority of those cases, there will be quite an overt deception within

the offence and it will be appropriate to use the offence that has the maximum penalty of 10 years. The number of offences where there is no deception and where it is appropriate to charge the five-year penalty will probably be quite a lot less. I certainly expect that it will be a lot less. You may ask the DPP whether they agree with my opinion on this. The other thing, of course, is that the DPP will have to rewrite their prosecution guidelines in relation to this offence. Consistent with the approach in those guidelines is that, if there were a significant deception involved, the appropriate offence, which would be the more serious offence, would be used. When you add to that scenario the fact that we also have these false information offences at 12 months imprisonment, you can see that this offence covers a fairly narrow area. My guess is that when this comes into place, of the 180 in the annual report, something like 160 or a large proportion will be the more serious offences.

Mr KERR—Maybe one way of dealing with this would be to have the Attorney prepare a draft prosecution policy change. I understand the point you are making about general dishonesty offences—they have been in the law—but I must say I am sceptical about what might be a larger use of them as the penalty gets reduced and as they are seen as a more routine part of Commonwealth law enforcement. I appreciate that you are saying that they are not intended to do that. I do have great regard for the professional integrity of the DPP and its office. You say that the guidelines will have to be changed, and I accept that that is true also. Maybe one way through this which we might reflect on and which might assist us is that, if you are able to work with the DPP towards preparing a draft set of modifications to those guidelines, which would show us what the Commonwealth intended by way of practice in this area—these are not changed very often and I do not think they have been changed since 1983, so we can rely on them; they are not issues that are going to be disposed of and changed for trivial reasons—that might give us greater confidence in accepting the thrust of your submission.

Mr McDonald—I will have to confer with the DPP, but I doubt that there would be too many problems with doing what you are suggesting.

CHAIR—I share some of Mr Kerr's concerns about this. It seems to me that there are a whole range of social security matters where there are overpayments, for example, to individuals who become aware of it and do not pay it back then or within time. It seems to me that this would be quite an easy offence to charge a person with. I cannot see why this will not become the standard, run-of-the-mill charge that is used in many circumstances.

Mr McDonald—I suppose my answer to that is that it could be now and it is not.

Mr KERR—Yes, but the response to that is to say that you have actually treated it as being amongst the most serious of matters, and usually in circumstances where, for example, you would bring another offence but that element is absent. I am just challenging the assumption that you make that it will continue to be used infrequently. I think that your solution might be saying, 'Let's not leave this on the basis of what each of us thinks are likely scenarios. Let's address it by consulting with the Attorney and the DPP and seeing whether we can come up with a set of guidelines.'

Mr McDonald—I know the DPP will need to review their guidelines as a result of this bill, and I know that they are very conscious of the development of this bill. That is something that I will have a talk to them about.

CHAIR—Mr McDonald, can I take up the definition of 'dishonesty' in the bill?

Mr McDonald—Yes.

CHAIR—I am drawing upon the article by Mr Steele in the *Criminal Law Journal* in which he discusses the various approaches and the exchange between Justice Kirby and Mr Priestly. In the Peters case about what a jury would regard as the standards of ordinary people, if Robin Hood appeared before a jury of bishops, then they may have a different outlook on events than if he had appeared before some who had received the Earl of Locksley's largesse. To pick that up, Mr Steele sets out at some length the comments of Justice Kirby about not being too worried by hordes of modern Robin Hoods galloping into courtrooms of the nation and says, in effect, that the High Court should not go so far as to be so prescriptive in terms of its definition but that might be a matter for parliament. Given that we are the parliament, I suppose we can consider it. I am interested in your response to the formulation by Justice McGarvie in Bonnollo's case, which is different from the Ghosh test, and different from the test of Chief Justice King in the South Australian case. It does seem to direct itself to this concern about the fact that there is not this uniform notion of what a jury's approach might be, and also picks up this example of where something is done but it would not be seen as being detrimental in any significant way—the trivial example that Mr Justice McGarvie, as he then was, illustrated.

Mr McDonald—The first thing I would like to say about the critics of the definition is that most of the criticism is that they do not like juries. They do not really like them. They have some sort of problem with the concept of juries. When this is an area where the standards of a community—particularly given the fact that a conviction for theft or fraud has immense impact, not just in terms of imprisonment but in terms of whether a person would be employed in a position of trust, and those sorts of considerations—

CHAIR—Can I stop you there for a moment? Will this offence always be heard before a jury?

Mr McDonald—There will be cases where it is dealt with summarily—in which case you then have the magistrate making this sort of assessment. As you know, dishonesty is used in relation to many offences in this bill. I personally think that, if there was such a problem as they suggest, then surely over the many years in which we have used this test in Australia, there would have been lots of problems and lots of outcries about use of dishonesty in the conspiracy to defraud offences. It has been used with this definition for many years in relation to quite serious cases, conspiracy to defraud. The definition of dishonesty has also been used in Queensland for a long time and in most states in relation to fraud offences—because the word 'fraudulent' is interpreted to mean dishonesty. The McGarvie provision is interesting. However, it would be very experimental. The only place where it has been tried is in the ACT. The consultation that we had, if you read our report about that, in the ACT is that most of the ACT practitioners preferred the Ghosh test and also could not recall situations where the McGarvie test had actually been used in practice.

So the approach of using Ghosh is much more likely to be acceptable around the country. We know the Standing Committee of Attorneys-General meeting took the view that it was a better approach and we put it specifically to them after the Peters case. I think the problem in this area of the criminal law is that many hours of court time can be wasted arguing about new terms. What is good about this is that we are talking about a familiar test and one which has worked well with the vast majority of cases. If you look at the submission we got, which is referred to in the report by Judge Boyce from the Queensland district court, you could not get a more long-term, experienced practitioner dealing with juries on a regular basis. He considers that it works well with juries. He specifically said it works well with juries.

There is the article of Alex Steel. There is also the article of Professor Williams, who is a very experienced commentator. I gave you those two articles because it really does reflect the level of academic pleasure there is with this particular concept. In the UK they have been arguing about it as well. But at the end of the day what we are doing here is trying to get something that is going to be reasonably certain in the courts and will work in the courts. The model criminal code process was about getting some sort of consistent approach and this certainly is quite strongly the case with this.

CHAIR—What do you say to the comments of the judges in the High Court in Peters case which were critical of Ghosh?

Mr McDonald—I suppose what I can do with them is quote many cases where it was preferred. Some of the response is similar to what I have given with Mr Steele's article, and that is that this is something that is appropriate for a jury to consider. These are the sorts of offences that go to community standards. For someone to be completely stigmatised and almost excluded from the community, even after they get out of prison or whatever, you need this sort of input from the jury. There were some suggestions in the Peters case from the High Court which caused us to make adjustments to the way we drafted the offence. The High Court practitioners would be able to tell you better, but Peters case has caused quite a bit of confusion, as well as a bit of confusion about exactly what the High Court was driving at. Justice Kirby at one stage was going for a completely subjective test. Then Gaudron and Gummow were talking about an objective test. I suppose what I am driving at is that there was not a clear view right across the High Court in this case. I will leave it at that. It is probably not a good idea to examine the motives of the High Court justices.

Mr KERR—It is a courageous decision for a senior member of the Attorney's department, anyway.

CHAIR—We will not lead you down that track.

Mr CADMAN—To what extent does our current system, without uniformity, allow for regional differences?

Mr McDonald—The model criminal code committee is actually quite conscious of this point that you make. We had an interesting discussion about our making off with vehicle offence. Some states wanted it to include boats; others wanted it to include different things. Because I live in the ACT, I suggested that perhaps it should include bicycles, because we use bicycles a

lot here. In the end that was of the sort of thing that people thought may well warrant a regional difference consideration. However, generally speaking, in the area of theft and fraud and these sorts of related offences it is very difficult to isolate a difference which you could truly say is a regional difference, and I think we found that with most of the serious offences. But there is the occasional issue where you can see there might be a regional difference of importance. Another one was with the damage offences, which we are working on at the moment. In Western Australia there is this crayfish called marron, and there were some quite interesting habits of the marron which caused some difficulty with our damage offences, and at the end of the day we had to deal with that.

Mr KERR—What are the interesting habits of the marron?

Mr CADMAN—What if there is a marron you do not know about?

Mr McDonald—The problem with the marrons is that they can walk from dam to dam. I cannot remember the details of the issue, but it did cause some difficulty.

Mr CADMAN—That is very interesting because, unless somebody had been there from Western Australia and knew about the marron—and I cannot imagine why anybody would—

Mr McDonald—There is a Western Australian on our committee, and she was able to give quite a—

Mr CADMAN—Say there was a Northern Territorian or a Queenslander that does not know about a type of marron in their district. What catch-all provisions have you got?

Mr McDonald—That is the wonderful thing about the—in the context of theft and fraud—concept of dishonesty. There would be situations where—is very bad to think of examples on the spot—considerations of that nature would come into it.

Mr CADMAN—I am not wishing to appear punitive, however it would seem to me that the codification does run the risk that something is forgotten, inadvertently omitted. The common law development allows for that process.

Mr McDonald—This code has drawn upon several hundred years of common law development, and—

Mr CADMAN—And we have reached a peak of knowledge?

Mr McDonald—If I said yes you would say I had contradicted myself earlier on with the general dishonesty offence. There is a recognition that this can never be set in concrete. But the advantage of certainty involved in these provisions is a strong one. States like Western Australia, Queensland and Tasmania, and the Northern Territory have had codes for long periods, as has Canada, India, I think South Africa, and the United States. The idea of codification in the law in this way is not new, actually. If there are new developments, then probably the appropriate way to deal with those new developments is for the elected representatives, like you—

Mr CADMAN—That is a very slow process normally. The Attorney-General normally has a line of cases that are brought to his attention. Then you have the processes and the problems of grafting and getting it on the legislative agenda. Then you have the problem of a bicameral system on top of that. So you are looking at many years before changes can be made, whereas with allowing a natural process the progression could almost be made on the spot.

Mr McDonald—It is very rare for the court to invent a new offence.

Mr CADMAN—What about refinement of an existing one, which tends to be what we are doing here?

Mr McDonald—The position with this is that even with the code there will be some refinement of some of the language which would take that into account. But if there is to be a significant change in the law, then certainly the philosophy of the code is that it should come to the parliament and that the parliament should deliberate. With regard to codification, Victoria, which is one of the great homes of the common law, has had codified theft and fraud provisions for quite some time. You are getting the same sort of thing happening everywhere in relation to sexual offences and quite a few other offences. Even in states which have had a common law tradition, the tendency is towards codification. It is a discussion that could go on for hours.

Mr CADMAN—It is an interesting comment by Parker that, at the end of the day, it is for the jury to decide. That leaves a scope of judgment that allows redefinition and refinement, does it not?

Mr McDonald—The jury is looking at the particular facts of the case, so it does not really leave much scope for redefinition of the offence. It does get the jury to focus on the particular circumstances of the case, and that is a very important thing to have occur.

Mr CADMAN—The other comment I would like to hear you speak about is the Commonwealth's interest compared with the states' interests.

Mr McDonald—In what sense?

Mr CADMAN—In the sense of codification and the bringing together of these areas; consolidation, if you wish.

Mr McDonald—The bill you are looking at today focuses on Commonwealth law. Of course, the Commonwealth law offences are the same right across Australia at the moment.

Mr CADMAN—Yes, but to what degree are we meant to give weight to state practice?

Mr McDonald—In relation to the elements of the offences, we have the same offences right across the country. Where state practice is sometimes different—and even that is getting codified more and more often—is in relation to some of the procedural rules. One example of procedural rules is police investigative rules. The federal parliament codified those in the early 1990s. Even in that area there is quite a lot changing as well.

But to think about a more general issue, getting the states to have more consistent laws with what has been proposed here, the states agreed that this was an area where there should be potential to get more consistency—and in fact it was the first substantive offence project which was given to the model criminal code committee—and the attorneys-general of the day said that they wanted something like the Victorian-UK theft act model. So there was a recognition, particularly with these offences, that there was some advantage in it, particularly with the mobility of people.

For regional differences, this code is not a Stalinist document; it is a model criminal code. It has always been understood that, if there is a legitimate regional difference or whatever, that can stand on its own feet and be dealt with in the particular jurisdiction. I came up with some reasonably silly examples. The first one probably was not that silly: in a jurisdiction which does not have a lot of valuable boats or something like that, then perhaps the making of an offence should be restricted to motor vehicles. It is just very difficult to think of many issues where consistency should not be the aim. But, of course, being a federal bureaucrat, obviously I am very interested in having consistency in our laws. I think there are a lot of efficiencies in that. It has to be done in a cooperative and careful way, and I think this project has done that. In a lot of ways everyone has had input into the offences. There has been public consultation, there has been political input with the standing committee of attorneys-general, and it has not been rushed—it has been carefully worked out—and here we are.

CHAIR—Mr McDonald, I want to ask about the receiving offences. As a point of clarification first: clause 132.1(3)(b) refers to stolen property, 'if and only if (b) is tainted property', which is then defined further on. I understand that tainted property is where the stolen property has been exchanged for other property before that is tainted.

Mr McDonald—Yes.

CHAIR—Do these provisions go beyond what is in the Commonwealth law at the present time?

Mr McDonald—I might take that one on notice. The Commonwealth provision is very complicated. I think the answer is probably no, but I would like to take that one on notice, if you do not mind.

CHAIR—That is good.

Mr CADMAN—One of the words led me to ask you for that chart originally because I could not follow where 'tainted' came from. That chart of three categories would help me identify things like that.

Mr McDonald—Yes. The question was whether it is covered under Commonwealth law. There is no doubt about it that it is covered under the theft act type legislation at the state level. The Commonwealth offences rely a lot on case law are such. If it were a code I would probably be able to give you an answer straight away but it is not, so I will give you a full answer on that.

CHAIR—My second question relates to the penultimate sentence of paragraph 10 of your submission of 28 April. I will read the entire paragraph to you:

> The approach taken in the Bill recognises that in most cases where there is a series of receivers the first receiver will be a thief. This is because in most cases the person would have simply assumed the rights of the owner and not tricked the person into passing ownership of the property. Recognising this the Bill relies on subsequent receivers being charged as receivers on the basis that the previous receiver is also a thief. It is an attempt to save the prosecutor from having to prove a trail of receiving.

My query is: I can understand that in the first instance of a receiving or possibly in the second, but what if we are talking about a trail that goes on five or six or 10 instances?

Mr McDonald—There has to be some sort of knowledge of what has gone on before and, providing the person knows that they are assuming the rights of the owner, then you do get it running through that trail. The problem with the offence which we have sort of mentioned here is that that does not work as easily with the property fraud offence, so there is a deficiency in the provision because of that. It is nightmarish when we work this offence out with the draft. You put up a big sort of flow diagram of how it all works. But, essentially, the approach taken to the bill was very much focused on the theft connection, and while what was said there is we will work with a series providing there is the right knowledge, it will not work with fraud.

CHAIR—But if I go back to receiving, a person is guilty of an offence—this is 132.1—if the person dishonestly receives stolen property knowing or believing the property to be stolen. If that is the essence of the offence of receiving, then I do not quite follow your comment that the bill relies on subsequent receivers being charged as receivers on the basis that the previous receiver is also a thief. Am I missing something?

Mr McDonald—In the vast majority of situations you should not have too many difficulties.

CHAIR—But can't you have someone in the chain who does not know or believe the property to be stolen and therefore is not guilty of the offence? Subsequently somebody else might receive that property, knowing or believing the property be stolen, because he is on the grapevine at the pub—to take the sort of cliched example that this is the case. My query is about your sentence on the basis that the previous receiver is also a thief. That does not seem to be borne out by the words of the bill itself.

Mr McDonald—Possibly. I will take that one on notice too.

CHAIR—Thank you. I would appreciate that.

Mr CADMAN—I am pleased that the chair has picked up those couple of points. I felt I might have been naive in raising them.

Mr McDonald—No. On that, it is reasonably complex and I will give a full written response.

Mr CADMAN—It just seems that everybody in the chain is knowledgeable about some circumstances concerning the goods that are passing through their hands or documents or whatever.

Mr McDonald—Yes. I just need to think that one through.

CHAIR—Mr McDonald, the only other thing is that we do have a question—but it is detailed—about the nature of the provisions being repealed. Rather than take you through it now, I indicate that we will give you the question on notice because it is not the sort of question that I would expect you to be able to simply answer at this stage. But it would be useful for us to have the answer so the secretariat will provide you with it. It is just that we are trying to set out or establish what is going on and where there are criminal code offences replacing them.

Mr McDonald—Would you like me to prepare something that actually shows you the provisions themselves in the table?

CHAIR—In a sense, to an extent, that follows up on what Mr Cadman asked you at the outset, and that would be useful as well.

Mr McDonald—Yes.

Mr CADMAN—Thank you.

CHAIR—Mr McDonald and Miss Anderson, as there are no further questions from my colleagues, I thank you for your submission and for coming along and discussing it with us this morning. We appreciate it.

Mr McDonald—It is a pleasure.

Proceedings suspended from 11.10 a.m. to 11.33 a.m.

DELANEY, Mr Grahame, Principal Adviser (Corporate Prosecutions and Policy), Director of Public Prosecutions

McCARTHY, Mr Justin William, Senior Assistant Director (Policy), Director of Public Prosecutions

CHAIR—Welcome, Mr McCarthy and Mr Delaney. I advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I thank you for coming along and being willing to share your expertise with us on this inquiry. I note that you have been present for much of the discussion that we had with the officers of the Attorney-General's Department. No doubt there are matters that we have taken up with them that we would like to take up with you. I invite you, if you wish, to make some opening comments.

Mr Delaney—The opening comments we make are quite brief. I should say that Mr McCarthy has been involved in reasonably extensive consultation, with Mr McDonald in particular, over the development of this proposed legislation. From the DPP's perspective, that consultation has focused on practice issues rather than criminal law principles more strictly.

In terms of the impact of the legislation, our view would be that there will be an initial educative process necessary for those involved in investigating and preparing briefs for the DPP. Ultimately, we see the legislation as being of advantage to law enforcement, in particular to have a restricted number of generic offences which can cover a range of conduct applicable to various categories of dishonesty and irrespective of the department involved. There will be some need to revise our working guidelines with law enforcement to reflect the legislative changes, but the general philosophy underpinning those guidelines will not alter.

In relation to the general dishonesty offence, we strongly support its inclusion. We do that broadly on the basis that it is pretty well impossible to predict the variety of conduct which can lead to the extraction of money from the Commonwealth or the deprivation of money owed to the Commonwealth. Because those gaps are so difficult to identify, they really can, in our view, only be properly addressed by having a general fraud offence or general dishonesty offence.

The only other matter I would advert to is that in relation to general dishonesty—and this is something that I think was referred to in brief by the department but we would probably put more stock in it—there is a substantial procedural advantage in a general dishonesty offence, inasmuch as a scheme or course of conduct can be addressed where it might not otherwise be addressed as well, that is, where you have a course of conduct with small amounts of money deprived over a long period of time. The New South Wales case of Moussad has ruled, in effect, that a course of conduct can be treated as a single count without being either duplicitous or uncertain in its effect. With those few remarks, Mr Chairman, we would be happy to take questions.

CHAIR—Thank you, Mr Delaney. Can I take up the question of the dishonesty offence. You said—and I am paraphrasing what you have just said—that we cannot tell what range of circumstances might arise where an individual derives money or funds dishonestly from the Commonwealth or fails to repay them. When I look, though, at this case of Batten and Lindsay in the ACT Magistrates Court, which involved the dishonest use of frequent flier points, the Attorney-General's Department submission stated:

> It is hard to point out how the financial advantage/property was obtained by deception as the airlines are not concerned with what the points were used for and they can be claimed without any reference to the Department (eliminating any need to deceive the Commonwealth). The defendant was dishonest, obtained a financial advantage and caused a loss to the Commonwealth, or risked it, by taking away its capacity to use the frequent flier points for official business.

That seems to me to be stretching the general parameters which you indicated. My concern is that, yes, one can accept what you are saying on the basis that there might be some offence where there is this sort of dishonesty involving loss to the Commonwealth, but here we have a case where it is hard to say what loss there was to the Commonwealth, if any. As is pointed out, the airlines do not really care how these points are used. Once they are allocated I suspect that, from the airline's point of view, that is the end of the matter. From their point of view they are allocated and they can be taken up. It seems that this case illustrates, if you like, the concerns that I have, because such an offence will not be confined to these circumstances where there is a direct loss to the Commonwealth for a failure to repay the Commonwealth where funds have been obtained in circumstances that they should not have been paid in in the first place. I would be interested in your response to that.

Mr Delaney—I would make the point first of all that that case was prosecuted under the existing legislation, which does have general fraud offences in it. The second point is that it is important to keep in mind that cases have to be judged on their own particular facts. My understanding of that case—and I put it no higher than that—is that the defendant was under a direction from his department that frequent flyer points accumulated by him in the course of his duty were only to be used for trips pursuant to further duties that he was obliged to undertake. In those circumstances, Scott v. the Metropolitan Commissioner of Police is authority that if the Commonwealth is precluded from the benefit that it would derive from the use of those points—that is, it would be a saving to the Commonwealth for future trips by this particular person—that is the economic deprivation that satisfies one limb of Scott's case.

Mr KERR—What is the difference? This is a total absurdity. If the Commonwealth gave a direction that someone was not to apply their salary save in some circumstance, it was to the Commonwealth's benefit.

Mr McCarthy—It is the Commonwealth's money that is paying for the fare.

Mr KERR—No, in this case they were his frequent flyer points. The Commonwealth can assert no proprietary interest in that.

CHAIR—Let us take a slight variation on it. Say the defendant has these frequent flyer points allocated to his account personally, even though there is the direction we are talking about. Let us take, for example, the situation where he leaves the employ of the Commonwealth

and still has these frequent flyer points credited to his account. What would be the situation then if he used them personally? Would the Commonwealth have some recourse?

Mr Delaney—I do not know that that has ever been ruled upon, but my personal view would be probably not. He is no longer an employee and the Commonwealth cannot then have the benefit of those frequent flyer points—that is, the benefit that would derive from their use for the employee to fly on official business.

CHAIR—I suppose what we are expressing is a concern that what on the face of it may seem reasonable in the circumstances that you outline has the potential to be used in other circumstances which expand the circumstances of the offence beyond what might normally be contemplated. That is the essence of my concern.

Mr KERR—Let me ask a simple question here: is there an assertion that, by the Commonwealth giving a direction in relation to somebody's private property which might be applied to the benefit of the Commonwealth, if that person, as an employee of the Commonwealth, were to say 'Get stuffed', they are committing a criminal offence?

Mr Delaney—I think that is a different factual situation. When you say it is their private property—

Mr KERR—It is certainly not the Commonwealth's.

Mr Delaney—No, but in the circumstances in which they were earned in this particular case—

Mr KERR—It does not matter. Any property that an employee of the Commonwealth earns is presumably earned through their service to the Commonwealth.

CHAIR—Did the defendant in this case raise the defence that this was not the Commonwealth's property?

Mr Delaney—I am not aware whether that was argued or not. My understanding of Scott's case is that it was argued on the basis of general principles; that is, that the Commonwealth was wrongly deprived of a benefit to which it was entitled.

Mr KERR—What is a benefit to which it was entitled?

Mr Delaney—The use by an employee of frequent flyer points to defray what would otherwise be taxpayers' money.

Mr KERR—Why do they have that entitlement? What is the assertion of the entitlement?

Mr Delaney—Because it is a condition of employment.

Mr KERR—What is?

Mr Delaney—We have the same in our certified agreement. If I can give this example, we are required to use our frequent flyer points for the purpose of official trips only.

Mr KERR—Yes, I understand. You have agreed to that. If you have not, it is your property.

Mr Delaney—Yes, quite.

Mr KERR—I could agree to apply my property to the benefit of the Commonwealth and then, if I acted inconsistently with that, there is presumably some obligation if I do that dishonestly.

Mr Delaney—Yes.

Mr KERR—But, absent an agreement to that effect—

CHAIR—Why is this a criminal offence rather than a breach of contract, to take your example?

Mr Delaney—I suppose because of Scott's case and because of the common law which makes it a criminal offence.

Mr KERR—Isn't the whole point that the chair is making that essentially you are going to criminalise breach of contractual arrangements in any circumstances where you see fit to apply a test that you would say that this is in some way dishonest? In this case, you say that there was a deception. What of the person who just said, 'I'm sorry. I don't believe you have any proprietary interest in this. I am using them. Get stuffed'?

Mr McCarthy—If such a person were charged, it might very well be that a court would hold that there was no loss of property that the Commonwealth had an interest in and therefore the offence is not made out.

Mr KERR—I find it perverse that somebody who does something openly in an assertion of right, contrary to that of the Commonwealth, can get away with it and yet somebody who does it covertly is suddenly guilty of a criminal offence. If I am a tax evader and I overtly say, 'I am conducting this course of conduct; I think it is lawful,' and I am wrong, fine—but what is the difference if I do that covertly or overtly?

Mr Delaney—Concealment and indicia of dishonesty have always been at the heart of fraud. In other words, when you look at conduct and you find that there has been concealment or there has been deception or there have been some other indicia of dishonesty, that is a patent difference from conduct that is open. It is far harder to establish, I suppose, dishonesty according to the usual standards, where there has been an open declaration of the person's conduct.

CHAIR—I suppose for me, if I can come to the philosophical or jurisprudential nub of this, what I am having some difficulty with is making illegal that which in these circumstances we

might have regarded as immoral, but it seems to be going a lot further now. We are saying what might have been regarded as unethical or immoral before—

Mr KERR—Only at a stretch, at that. All these people in private companies are presumably using these things all the time. The Commissioner of Taxation has said there is no tax liability. We hardly even regard it as immoral. In fact, we do not.

Mr Delaney—Perhaps I can take the committee back to, say, the 1980s when the bottom of the harbour schemes were around. The same things were said about them—that, really, it was the climate of the times, that everyone was doing it, that by those standards it was okay and that it was unfair to prosecute people who had engaged in them. I guess the courts in accordance with the general principles ultimately decide the boundaries. That is what happened in the bottom of the harbour matters. Some people in those cases said that they had obtained legal advice, for example. Where that was genuine, that made the difference between prosecution and no prosecution. So I guess it is difficult in the abstract to address the sort of issue that you are raising.

CHAIR—We may not be able to take that much further, although my colleagues might wish to ask some other questions. Can I take up a couple of matters that were taken up with the Attorney-General's Department? One is the matter that Mr Kerr raised about the guidelines; I think we would be interested in any comments you have in relation to that. So perhaps you can start with that.

Mr Delaney—That is in terms of the—

CHAIR—If Mr Kerr wants to put it differently, he might correct me or even put it himself. But, in essence, I think there is a concern that this offence—in codifying it and reducing the penalty and taking into account the circumstances in which it may be used as a charge, without any other considerations—will become more commonplace than it is at the present time. Now, because of the penalty, it is regarded as a most serious or very serious offence one can be charged with; whereas it seems that, with reducing the penalty and having a general offence, there would be a temptation to use this as the catch-all in a whole range of situations.

Mr Delaney—There could be some force in that comment, I must say, with respect. The DPP was content for this offence to carry the same maximum penalty as the general offence does now—and that is 10 years. But we were—we had to be, I suppose—prepared to accept five years on the basis that that was really the quid pro quo for the offence staying. Whilst we would prefer a higher penalty, realistically we would rather have the offence with a five-year penalty than not at all.

Mr KERR—The chair has put my point fairly elegantly. But I suppose the point I wish to make is that, under this scheme, the threshold question will be one for prosecution authorities as to which measure to proceed under. There will be the possibility of bringing a proceeding for a false statement in most instances, which will carry a 12-month imprisonment; the possibility of the general dishonesty offence, which will carry a five-year imprisonment; the fraud provision, which will carry a 10-year imprisonment; and in some instances the multiple fraud events,

which will carry a 25-year imprisonment. I do not think we need to waste much time on that latter one.

But, essentially, prosecution authorities will decide the framework where you come in. I think we would find it useful to have some appreciation of how the DPP will address those issues. You have mentioned that the prosecution guidelines of the Commonwealth would need to be reviewed. But, given the concern of a number of us that this offence might be used too frequently and freely, it would be useful to see how the Attorney-General and the DPP would propose addressing those discretionary questions, given that, in a sense, much of the way in which a case will be disposed of will be determined by executive rather than judicial determination.

Mr Delaney—Yes, at least in terms of the charges preferred.

Mr KERR—And the range of penalties that a person will be subjected to.

Mr Delaney—Yes. I think I can really only answer that in general terms at this stage because you will appreciate that we have not really given thought to precisely how the guidelines will be amended. But the general underlying philosophy would remain, and that is that we would be looking to use the most specific charge relative to the evidence and use charges having a greater penalty where there are circumstances of aggravation, where there is systematic fraud, for example, where a particular proposed defendant has previous convictions, if it is an internal fraud by a public servant. So matters of that nature would tend to steer us towards the more serious charge, the one carrying the 10 years. As for the other offences, we would be looking at those carrying the lesser penalties. But, beyond saying those things, it is a bit difficult for me to be more specific at this time. I do not know whether Mr McCarthy can shed any more light than I have on that issue.

Mr McCarthy—One should, I think, make the point that in cases of fraud we do have this sort of graduated series of responses: a false statement offence carrying 12 months; a general dishonesty offence punishable by five years; and obtaining property or financial advantage by deception carrying 10 years. In a sense, that gives us much more flexibility than the case of someone who steals a Commonwealth pencil, where the only option we have is charging theft carrying 10 years. I think that is a point that should be made.

CHAIR—Mr Delaney, you have said that the quid pro quo for keeping the offence was to accept a lower penalty.

Mr Delaney—Yes.

CHAIR—Can you explain the background to that?

Mr Delaney—At present we have section 29D, which is expressed in terms of defrauding the Commonwealth, and that carries 10 years. That can be used for any set of facts that falls through the gaps. So, for example, you may not be able to find deception. I think there are some examples given in Mr McDonald's paper, for example, about barristers who have evaded very large amounts of tax—in the millions of dollars. In my view, 29D would be an appropriate

response to that sort of conduct. There would be no deception because the Commonwealth does not even know that it has been defrauded. Under the proposed general dishonesty offence, five years would be the maximum penalty available in the same sorts of circumstances where there is no identifiable deception provable. However, in our view, it is better still to have the general dishonesty offence with that penalty than not having one at all.

CHAIR—I am taking it from your remarks that it was being suggested that, unless the penalty was five years, there was a body of opinion that we should not have the offence.

Mr McCarthy—Certainly you have the recommendations by the Model Criminal Code Officers Committee that there should not be a general dishonesty offence. I think it was also part of the reasoning of the department that, in this instance, in terms of the elements of the offence, you did not have to prove a deception. A fortiori, they considered that, if you did not have to prove deception, the maximum penalty should be less. We did not agree with that reasoning, but certainly that was part of their reasoning for coming down and saying that, in their view, there should be only a maximum penalty of five years.

Mr KERR—If I go back to your example of the pencil, though, there are not that many Commonwealth public servants who are actually charged with theft for stealing pencils, yet many Commonwealth public servants take pencils, if I might make that point. The only people who actually go to jail for taking pencils are young blacks in the Northern Territory. Most people would say, 'Why the hell were they prosecuted under those regimes anyway?' The point is essentially that, because people make prosecutorial decisions and understand that people do take pencils home, they do not prosecute for theft, and yet public servants every day routinely do it. I imagine that perhaps once upon a time in your long experience with the Commonwealth even you may have abstracted a biro, used it for private use and not regarded yourselves as liable to be prosecuted.

Mr McCarthy—If I did, I had no intention to permanently deprive—

Mr KERR—The problem is that, when you actually create a lesser offence, the temptation to use it may be more frequent. In other words, you would think, 'Why would I charge somebody with stealing a pencil?' Maybe we have some sort of reprimand or informal administrative process that says, 'Look, watch yourself. This is stupid behaviour,' if people start commenting. But if you have a general dishonesty offence that comes down in seriousness and tends to be used more routinely, then the sorts of instances that the chair has raised—where you get very doubtful decisions, like the frequent flyer issue, which I think is pretty much on the edge of where you would expect the criminal law to intervene, if at all—will become much more common. We have to find some mechanism of guarding against that. I think the Attorney's department is quite wise to say, 'Yes, it has a lesser degree. Bring it down and make the penalty less.' But then if the consequence is that you use it more frequently for circumstances that would not normally have brought charges under an offence which was regarded at the higher end then we may have actually created a monster.

Mr McCarthy—I would like to look at the facts of that case. It might very well be that you could charge either on obtaining property or a financial advantage by deception. That might be possible. If that were so, then that might militate against the argument that it would be

inappropriate to charge such conduct as general dishonesty. The person may in fact have received the frequent flyer points in a sense as the agent of the Commonwealth, given that it was the Commonwealth that incurred the expenditure for travel in the first place.

Mr KERR—I would like to see that argument put—

Mr McCarthy—There might be no legal ownership, but there might very well be a situation where there was some equitable interest in the frequent flyer points.

Mr KERR—I would like to see that put by the public sector and private sector in tax arrangements. I think it is a view that it would be courageous to advance at the present time. The GST might have some impact in relation to that particular proposition.

Mr McCarthy—But these are also issues that I think are relevant in what you can do. I do not know anything about the particular circumstances of this case, whether it was defended and if it was defended what arguments were run—

Mr KERR—But it is being put forward as a proposition of why we should do this. I think the chair is drawing attention to the fact that it might be a damn good argument why we should not be too adventurous in these areas.

Mr Delaney—But, against that, I would say that the law is already there. It is on the statute book now and has been for many years. If the frequent flyer case is on the cusp, so be it. But there are not many other examples, as far as I am aware, where the use of the present 29D, for example, has been criticised. If there is just one, it does not seem to me to be a very compelling case not to legislate in the same way.

Mr CADMAN—What about the guidelines? Would you have to change the guidelines?

Mr Delaney—There will have to be some refinement of the guidelines, yes.

Mr CADMAN—Wouldn't that influence the sort of thing that Mr Kerr is talking about? Let us speculate a little about the change in the guidelines. That is the widening provision. What is the impact of that widening provision?

Mr Delaney—Certainly, in terms of the guidelines provision, we would be trying to give the sort of guidance that Mr McCarthy has referred to—that is, looking for circumstances of aggravation before you charge the more serious offences; where there are more routine offences, using the present, for example, social security offences which carry a maximum of 12 months imprisonment; and only going beyond that where you have reason to go beyond that. That would be the general philosophy underlying the guidelines, which is the present general philosophy. But they have not been drafted in detail, so I really cannot be more specific than that.

CHAIR—Just to take up that point, the provision about choice under the Crimes Act of the social security provisions, if this offence with a penalty of five years rather than the 10 years at

the present time becomes law, do you think that the guidelines as to the amount involved being $40,000 or more would possibly change?

Mr Delaney—Yes, it could. That amount has been in the guidelines for some years now, hasn't it, Justin?

Mr McCarthy—Yes, I think so; some two or three years.

CHAIR—Would it go up, or down?

Mr Delaney—If it is going to be revised, it would revised upwards, I would expect.

Mr CADMAN—Paragraph 2.23 of the guidelines indicates that charges should not be laid under the Crimes Act solely to avoid a time limit. There seems to be the injunction to avoid the Crimes Act. Do you think that sort of provision will stay?

Mr McCarthy—That is more theoretical than real, nowadays. There are very few offences in this particular area that are subject to a time limit on the institution of a prosecution. I think there was one stage when social security offences might have been punishable by six months. At that stage it was a valid consideration. I cannot think of any false statement type offences that are presently punishable by six months imprisonment—not ones that we prosecute.

Mr CADMAN—I guess from a Commonwealth legal officer's perspective in a particular department, a familiarity with their own act rather than the Crimes Act is more likely to be expected.

Mr Delaney—At present, I think that is right.

Mr CADMAN—I am just looking at the implementation process of that and the demand on knowledge and understanding from legal officers within various departments. It is a fair jump for them to become familiar, to the extent that they need to be, with the consolidated Crimes Act. Isn't that right?

Mr Delaney—Yes, there will be an educative process. I think it is probably more directed at the investigators than at the legal officers within the Commonwealth. There will need to be that process.

Mr McCarthy—And they are required to be familiar with that at the moment, because of the overlap between specific offences and the general provisions of the Crimes Act.

Mr CADMAN—I understand your point. I think that would be the attitude of responsible officers. Nevertheless, the workings of your own act, as it were, are something that you are much more likely to be familiar with.

Mr McCarthy—And also the investigators, whilst they investigate the offence and presumably investigate the offence with a particular offence in mind, once they have completed their investigation, refer a brief of evidence to us. They do not lay charges without reference to

us. It is we who look at the brief and decide what is the most appropriate charge. That is the one that we recommend to the investigating department.

Mr CADMAN—All they do is satisfy themselves that they think there is good cause to believe there has been a breach.

Mr Delaney—Yes, that there is sufficient evidence to that effect.

Mr McCarthy—Even in the rare instance where charges are laid without prior reference to us—and that will almost invariably be in arrest matters—our guidelines state that, once the matter is referred to us, we have to look critically at the charges laid and, if we consider they are inappropriate, then we should substitute fresh and different charges.

Mr CADMAN—Okay.

CHAIR—Excuse my ignorance about this, but is it the practice of the Commonwealth DPP to lay a range of charges? For example, say that there is a possibility of some social security fraud for which there are specific offences under the social security provisions and that there was also the general dishonesty charge: would the common practice be to charge a person with both charges or not?

Mr Delaney—No, the contrary would be the general position. You would look to specific charges which covered conduct. One of the main aims is to choose charges that reflect the seriousness of the conduct and to cover the extent of the alleged criminality.

Mr KERR—There is a provision in the code which avows that if you have not made out all the proof of every element, a jury can convict on an alternative verdict.

Mr McCarthy—That would not be available here because we are talking about an offence of general application in the code. So with a specific offence in some other act, that is only available in specified instances.

Mr KERR—I have not looked at where the alternative verdict provisions come in—and we would have to look at this—but, frequently, where there are serious offences alleged by a prosecutor but the jury is satisfied with proof of most of those elements but not all, then there is a lesser offence and an alternative conviction can be brought in relation to that lesser offence.

Mr McCarthy—That is if the alternative is specified. With regard to aggravated burglary, if you are not satisfied of the circumstances of aggravation, you can return an alternative verdict of burglary. But the alternative verdict has to be specified and in the sort of situation we are discussing there is no alternative available. You could not have an alternative verdict of making a false statement in support of an application when the jury was not satisfied that the elements of the general dishonesty offence had been made out. You could do it, I suppose, but you would have to specify it, and it is not specified at the moment.

Mr Delaney—You would have to plead it in the indictment as an alternative.

Mr McCarthy—The alternative way of doing it would be to have an alternative count in the indictment.

Mr KERR—Yes, you can do that. That goes back to the chair's point, that you can put forward an indictment which asserts alternative counts.

CHAIR—Would it not happen the other way around, that if you did not make out the specific charge under whatever the statutory provision was, you would rely upon the general charge?

Mr McCarthy—There would be a technical problem in that the false statement offences are summary and you therefore could not charge an alternative count of a summary offence.

Mr CADMAN—Coming in from a slightly different angle, say you are avoiding conspiracy charges wherever possible. That seems to imply that, where you have a prospect of conspiracy and you are applying it to a group of people, you have to if possible keep away from that area because of the difficulty in obtaining a conviction. What the department seems to be saying is that this is a substitute for the conspiracy framework when you apply the same circumstances to an individual. If there is the need for restraint in laying conspiracy charges, you would nearly have to say in one of the guidelines that you would have to use restraint in laying charges in this general area.

Mr McCarthy—We do not accept Geoff McDonald's assertion that conspiracy charges are notoriously difficult and complex.

Mr Delaney—Certainly in the drugs area we routinely charge conspiracy and routinely obtain convictions. The injunction against conspiracy is really where you have identifiable, substantive offences that can cover the conduct involved. It is only where you do not have identifiable, substantive offences that you would be looking to conspiracy in this area.

CHAIR—But that argument for that offence is not so much that, is it; it is where there is one individual involved rather than quite a number? In the A-G's submission, they went through the cases and said that there could be circumstances where, rather than being a conspiracy, one person could have been involved and brought about the same result for which the conspiracy charge would not succeed and that is why we need the general dishonesty offence.

Mr Delaney—We would agree with that completely.

CHAIR—I now want to take up with you the discussion we had about the definition of dishonesty, the consequence of the decision in the Peters case and the alternative formulations that have been suggested, including that by Mr Justice McGarvie.

Mr Delaney—The fact that the proposed legislation would legislate for the Ghosh test to generally be the test by which liability would be determined gives certainty and confirms what most prosecutors and judges are familiar with. There are arguments as to whether the Ghosh test is the best way to go, but the fact is that lawyers and prosecutors are used to its application and the DPP accepts that it would give that consistency were it to be legislated.

CHAIR—Do I take it from that that there has been some difficulty in applying the Peters test—whatever that may be?

Mr Delaney—I suppose with any new decision there are always some adjustments to be made by judges, prosecutors and defence lawyers. The Peters decision introduced some elements that were a little difficult to interpret in a practical sense, whereas the Ghosh has been around a lot longer and people have become much more used to it. As for the other tests you mentioned, I think there are sound, philosophical and theoretical reasons why they have some support, but in the end the decision was taken to go with Ghosh and the DPP generally does not have a problem with that.

CHAIR—I suppose I should not be asking you this question because they could come along and tell us themselves, but the fact that we have not had any submissions from those who could be said to be representing defence counsel, such as the law societies, suggests—you do not have to answer this if you do not wish to; it is a comment—that there is acceptance that the proposed way of dealing with this in the bill is appropriate.

Mr Delaney—There has been extensive consultation over the years leading to this bill, and it has been a long-term project of the federal and state governments. To that extent, I think there has been a fairly comprehensive exposure of the principles. Perhaps that is a reason why there have not been more submissions made to the committee.

CHAIR—Are there any further questions?

Mr KERR—The point I asked you to follow up with the Attorney's department may be assisted if you were able to pass on to the director the sense that the committee would appreciate a draft and getting that process started at an earlier stage. Whilst it may not be a fair concern for us as members, nonetheless I think it is a real one that these changes might over time see a tendency towards a wider use of the general dishonesty offence than has hitherto been the case. But I do not think we would want to have that happening. I think that is the general sense of it. It should be regarded as things which the larger community would regard as serious matters of wrongful conduct. Perhaps the easiest way to deal with that would be to have a look at the draft changes to the prosecution policy of the Commonwealth.

Mr Delaney—Thanks. We will certainly pass those remarks on to the director and, in any event, would be looking to revise the guidelines in the way we have discussed.

CHAIR—If the bill is introduced and passes in the form that it is in, do you think there would be any change in enforcement, or is it largely a technical argument amongst lawyers that is not going to make much difference in terms of the way in which you go about your role and the nature of enforcement itself?

Mr Delaney—I do not think there would be any fundamental changes in the approach to investigation and prosecution because of the bill. It is our expectation, though, that overall it is an improvement and in due course it ought to be a better vehicle for effective investigation and prosecution.

CHAIR—Given that prosecutions are referred to you from other agencies, do you think there is any need to educate these agencies on the changes contained in this?

Mr Delaney—I think there will be, yes.

CHAIR—Do you think that can be successfully undertaken?

Mr Delaney—The answer is of course, we would certainly anticipate it could. For our part we will be certainly putting measures in place to do that, assuming that the bill is made law.

Mr KERR—Could I just raise two other points. One is that in the submissions coming from the Parliamentary Library there is a reference to alternative verdicts, which I had not noted before, suggesting that the bill provides alternative verdicts in relation to all these matters. I am not certain about whether that is an accurate statement; it is at page 41 of our briefing papers, which is page 16 of the *Bills Digest*. You might like to come back to us in relation to the way alternative verdicts would operate.

Mr Delaney—We will have a look at that. I am not equipped to deal with that immediately.

Mr KERR—The other point was the issue of the organised fraud provision. Do you still hold to the view that the courts cannot deal with organised fraud simply by dealing with it as within the ordinary range of discretions available to the court?

Mr Delaney—I did hear the discussion you had earlier with Mr McDonald on that topic. I suppose from our perspective the organised fraud offence is not all that frequently prosecuted, but it does act as a trigger to automatic forfeiture in very serious cases. I suppose we would see the major benefit being that trigger and the effect that you get with automatic forfeiture and the fact that the onus is then reversed on the convicted, organised fraudster, if I can so describe it, to exclude the property which would otherwise be forfeited—that is, to demonstrate that it did not come from the provable organised fraud activities.

Mr KERR—But that is something that goes to what is, I think, a relatively inadequate framework of confiscation of assets legislation generally. It seems a very odd basis to keep in a criminal law provision to which you have attached a forfeiture regime which only operates in those very limited circumstances. It might be more advantageous to apply that regime more generically.

Mr Delaney—I would rather not give a definitive answer at this stage, except to say that we would not like to see that trigger go without there being thought as to what would replace it and what affect that would have on the proceeds regime itself.

Mr CADMAN—I understand that in your last annual report you recommended that provisions along the lines of section 15D, 'General terms', cast on the defendant the burden of proving that something was done with lawful authority—the reverse onus, it appears to me—lawful excuse or permission. Is it your recommendation that something similar should be established in these provisions?

Mr McCarthy—That has, by and large, been adopted in proposed section 10.5, 'Defence of lawful authority'. Certainly there are differences. Section 15D at the moment casts a legal burden on the accused person—it is at the top of page 5 of the bill—to establish that something was done with lawful authority or excuse, or with permission. Section 10.5 creates a defence, and the defence is the defendant has to discharge an evidential burden only.

Mr CADMAN—It does not go quite to the extent of establishing beyond reasonable doubt that the act in question was done without authority; it moves strongly in that direction.

Mr McCarthy—The departments sees 10.5 as the replacement for section 15D, and we are, by and large, content with that.

Mr KERR—Mr Chairman, I note that in front of each of these chairs was a pad and pencil neatly lined up before we came here, and there will be a check before we leave.

Mr McCarthy—I will place mine at the front.

CHAIR—I would assume that they were provided for our use.

Mr McCarthy—I will just change my intentions. In providing you with that further information on the point that Mr Kerr raised about the alternative verdict, I was just wondering if we could have perhaps only the relevant extract from your briefing dealing with this aspect.

CHAIR—It is from the Parliamentary Library's briefing paper. We can provide you with that, certainly. Mr Delaney and Mr McCarthy, can I thank you for coming along this morning and discussing the provisions of the bill with us. It has been most helpful. We appreciate that and any further material you are able to provide to us pursuant to questions this morning. I thank all of those in attendance.

Resolved (on motion by **Mr Cadman**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.29 p.m.