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Reference: Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 22 January 2007

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Brandis, Kirk, Ludwig, Scullion and Trood

Participating members: Senators Allison, Barnett, Bernardi, Bob Brown, George Campbell, Carr, Chapman, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Fifield, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, Mason, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Watson and Webber

Senators in attendance: Senators Kirk, Ludwig, Mason, Payne and Trood

Terms of reference for the inquiry:

Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006

WITNESSES

ALDERSON, Dr Karl, Assistant Secretary, Criminal Law Branch, Attorney-General's Department 22

BROWN, Ms Vicki, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman 14

COCKSHUTT, Ms Melinda, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department 22

DONOVAN, Ms Helen, Policy Lawyer, Law Council of Australia 2

GOODRICK, Mr Robert, Director, Inspections Team, Office of the Commonwealth Ombudsman 14

LAWLER, Federal Agent John, Deputy Commissioner, Australian Federal Police 22

PRENDERGAST, Federal Agent Frank, National Manager, Counter Terrorism, Australian Federal Police 22

THOM, Dr Vivienne, Acting Commonwealth Ombudsman, Office of the Commonwealth Ombudsman 14

WEBB, Mr Peter, Secretary-General, Law Council of Australia 2

WHOWELL, Mr Peter, Manager, Legislation Program, Australian Federal Police 22

Committee met at 9.44 am

CHAIR (Senator Payne)—Good morning. This is the hearing for the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the provisions of the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006. The inquiry was referred to the committee by the Senate on 7 December 2006 for report by 7 February 2007. The bill proposes a number of amendments in relation to controlled operations, assumed identities and the protection of witnesses. The bill also provides for delayed notification search warrants. The committee has received eight submissions for this inquiry, and these will be available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground on which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

[9.45 am]

DONOVAN, Ms Helen, Policy Lawyer, Law Council of Australia

WEBB, Mr Peter, Secretary-General, Law Council of Australia

CHAIR—Welcome to the first inquiry of the year for this committee. The Law Council has lodged a submission with the committee which we have numbered 6. Do you need to make any amendments or alterations to that submission?

Mr Webb—We have in fact provided a fresh version of that submission this morning—a better-proofread version—so we have no amendments at this stage.

CHAIR—Thank you very much. As is normally the case, I will ask you to make an opening statement, and we will then go to questions.

Mr Webb—I think our preamble, the point that we want to make with some force, is that the Senate as a house of this parliament—and this committee as a committee of the Senate—would be entitled to feel as though it has not been provided with nearly enough justifying information to enable it to seriously consider the provisions in this bill. This lack of justification is brought about by the executive's submission of insufficient facts, insufficient analysis and insufficient argument. The minister's second reading speech of two pages deals with a 156-page bill accompanied by a 118-page explanatory memorandum.

Regrettably, the Law Council find we have to say that we feel that that is treating the Senate with something bordering on contempt. Bland, simplistic and astonishingly incomplete assurances are provided or claims made. Many serious matters are not referred to at all. So a threshold question for the Senate, and for this committee, is really whether it is prepared to be treated in this fashion. We do not believe that it is good enough for the government to say that this committee can call witnesses for evidence; it is not the role of witnesses to fill in the gaps, as it were. The responsibility lies with the executive to make its case to the parliament, and we submit it has not done so in relation to almost any aspect of this bill.

There is certainly not enough time for us as commentators on the bill to come to grips with it. We have done our best and our submission is there for you to look at, but we could have done a better job with more time and done a more complete analysis. In fact, there are one or two matters where we make it clear that time has beaten us and it has not been possible for us to get to them.

We think the executive carries an onus in relation to this matter in that it cannot delegate or avoid providing to the parliament the necessary information for it to make serious decisions about what will become part of the law of the land.

These preliminary observations are necessary, in our view, because our underlying concern is that extraordinary measures such as those introducing delayed notification search warrants might be introduced without transparent, properly informed and detailed analysis of the threat or social evil which is sought to be addressed; without exhaustive consideration of all the methods available for addressing that threat; without the time to properly review and consider any consequences and ramifications, both intended and unintended, of these proposed

changes; and without any time frame being set for the expiration of extraordinary powers if and when they cease to be necessary.

The Law Council has identified a round dozen or so matters that involve an erosion of the rights of citizens, the removal of protections or accountabilities or the extension of unduly intrusive law enforcement powers. No reference at all to most of these matters is made in the minister's second reading speech. The collective force of the provisions in this bill amount to a powerful assault on the rights of the individual.

Let me refer briefly to some illustrative examples. The law on controlled operations—which are, as I am sure we all know, covert police investigations in which law enforcement officers and civilians can be authorised to engage in unlawful conduct—is to be significantly changed. This bill will result in the expansion of the range of offences in relation to which a controlled operation may be carried out; the expansion of the type of people who may receive exemption for criminal liability; the dilution of an already unsatisfactory authorisation process; the removal of the need for external authorisation to extend a controlled operation; and the relaxation of reporting arrangements.

If one looks at the first of those matters, the range of offences for which controlled operations may be authorised, one can see that there is a history here, in that when the original framework for controlled operations was introduced in 1996 the operations were limited in their application to certain drug importation offences. In 2001 an amendment was sought to extend their operation to any Commonwealth offence. That proposal met with considerable opposition. On the basis of a recommendation from this committee, the provision was reframed. When the bill was finally passed, it provided something less than that which had been sought at the time. What we have now is a regeneration of that request by the executive to effectively allow virtually any Commonwealth offence to be the subject of a controlled operation.

If you couple this proposal to extend controlled operations to any Commonwealth offence with the additional proposal to strip authorising officers—that is, officers within law enforcement agencies who are senior officers of those agencies and a step or more removed from operational activities of the operations—of their current power to authorise such operations, you have a result that should be seriously disturbing to this committee. An officer in charge of an operation—not an authorising officer—can empower specific persons, including law enforcement officers and civilian informants, to engage in unlawful conduct, no matter how insignificant a Commonwealth offence is involved. We say that the current authorisation regime is inadequate as it is, and that a judge should authorise controlled operations, which should be limited to serious offences. Our submission has a great deal more to say about controlled operations, and about the introduction of provisions relating to them on which your agreement is being sought.

The bill deals with a number of other serious matters as well. The proposed provisions about assumed identities, delayed notification search warrants and the extension of the coercive powers of the ACC, the Crime Commission, all deserve your very close consideration and all should be supported by far greater justifying material and analysis than the bill, the second reading speech and the explanatory memorandum provide.

The assumed identity provisions will deny courts any role in evaluating whether there is a need to protect the true identity of witnesses and in balancing that need against other competing interests, like the interests of justice. The law enforcement agencies are to be granted extraordinary and unsupervised powers on the assumption that superficial, periodic reporting requirements offer sufficient safeguard against corruption and misuse.

The notification to a person that a search warrant is to be executed on their premises and personal property is to be overtaken by provisions in this bill for such notification to be delayed by up to six months, and this power will be available in relation to a greatly expanded range of offences and for an extended time. The information or arguments that might justify such provisions are nowhere to be found.

In our submission, no parliament should accept this sort of treatment at the hands of the executive. The executive is under an obligation to take the parliament into its confidence about matters such as this. We urge the committee to consider our submission, and no doubt the submissions of others, with an eye to seeing whether in fact you can truly and fully be satisfied that you have sufficient information before you to come to a balanced and considered decision about these matters. Thank you.

CHAIR—Thank you, Mr Webb. Ms Donovan, did you wish to add anything?

Ms Donovan—No, thank you.

CHAIR—Mr Webb, thank you for the submission of the Law Council and for the matters that you have discussed in your opening remarks. I will go to my colleagues in a moment but I did want to say that a number of the issues that you have raised are matters of concern to the committee as well, and I appreciate you enunciating those this morning. One point which I do not think you referred to in your remarks and which is one of the arguments advanced for the bill is in relation to harmonisation and the efforts to pursue the model provisions and bring some coordination around these activities in Australia. What comment does the Law Council have on that aspect?

Mr Webb—Harmonisation of criminal law can be a very desirable thing to try to achieve; there is no doubt about that. But harmonisation should not, in our submission, be the sole objective for providing the Australian nation with appropriate laws that deal with criminal matters, law enforcement matters and the administration of justice generally. Harmonisation alone, without more, is not a sufficient justification. There is a price to be paid if harmonisation involves derogation from the traditional freedoms of the individual that we cherish in our parliamentary democracy. Notwithstanding that ministers might from time to time agree in ministerial meetings that they would like to introduce a harmonised system of laws into the parliaments of Australia, that does not place those proposals above proper examination and criticism.

CHAIR—Indeed, and I was not suggesting that it should place them above examination or criticism, but in terms of an aim I was interested in your view on that.

Senator LUDWIG—It also, in respect of controlled operations, in schedule 1 includes foreign law enforcement and security intelligence personnel for the first time. Do you have a particular view about that, as to whether you agree or disagree with the inclusion of foreign

law enforcement and security intelligence personnel, notwithstanding your current objections to the provisions?

Mr Webb—Do you mean whether in fact that might make it a more desirable matter to legislate for?

Senator LUDWIG—More generally than that.

Mr Webb—For the purposes of international cooperation—law enforcement cooperation?

Senator LUDWIG—Yes.

Mr Webb—Again, that is an important matter. Sometimes the framework for those sorts of matters is incomplete and could usefully be provided by a parliament, just as it was no doubt very useful for the parliament to provide a framework for controlled operations in 1996. No doubt controlled operations were ongoing long before 1996, but they were done without the protection of a framework. Certainly those things are desirable, but then it always goes to the extent and the terms on which they are provided.

We have no particular objection in principle to providing a framework that extends to and assists international law enforcement cooperation, but it has to be the right sort of offence. Controlled operations are and should be seen as extraordinary exercises of legal power, not just as ordinary, run-of-the-mill operational matters for law enforcement agencies to adopt as and when they see fit. These are serious exceptions to the general rules that relate to all of us, and they should not be lightly entertained.

Senator LUDWIG—The Australian Customs Service is now included as a law enforcement agency, as designated by this bill, which means that under this regime it will continue to use and/or participate in controlled operations. But unlike the Australian Federal Police and the ACC it does not have an oversight body, which is yet to start: the Australian Commission for Law Enforcement Integrity. Does the council have a view about whether the Australian Customs Service should also be subject to that oversight body in controlled operations, notwithstanding your objections to some of the provisions within controlled operations?

Mr Webb—We would like to see that happen. What this bill proposes, and what will occur if the parliament passes it, is a dilution of the oversight responsibilities of the courts, the AAT and, I believe, the Ombudsman. Anything that extends oversight accountabilities in the context of controlled operations would be a very good thing.

Senator LUDWIG—I want to turn to some of the specific objections. In determining what is a serious Commonwealth offence, if the regulation-making power you object to were defined within the legislation—I will not suggest what that could be defined as—would that allay your concerns?

Mr Webb—The act specifies a minimum standard for Commonwealth offences—punishable by three years—but the regulations are not limited in that way at all. The regulations allow any other Commonwealth offence to be promulgated as a complying Commonwealth offence for the purpose of controlled operations. That really means that any Commonwealth offence is potentially available for a controlled operation. We think that the

regulation-making power has to be at least limited in the same way as the act purports to limit those matters prescribed by the act.

Senator LUDWIG—Do you think there should be a threshold higher than three years?

Mr Webb—We are not sure, frankly, why there needs to be a regulation-making power to extend the scope of those matters.

Senator LUDWIG—No. If we put that issue aside for a moment and say that that is not a matter and we instead focus on what the legislation currently provides—that is, three years—is that sufficient for controlled operations for serious offences, or do you think that threshold should be higher?

Mr Webb—We think the statutory threshold should be higher. We do not see why it is necessary to reduce it from the current 10-year mark to three. I am sorry; I have just been told it is three, but there is a list of other matters that are punishable and have a—

Ms Donovan—It is currently three years but there is a list of matters—the nature of the crime—which the crime also has to relate to in addition to having a maximum penalty of over three years, and it is now proposed to take away that list of limiting matters and introduce the—

Senator LUDWIG—I understand that. I was using three years as a generic example but it does include a list because there are many offences where there is a penalty of three years or more, which, by and large, may not be categorised as so serious.

Ms Donovan—Certainly.

Mr Webb—To answer the question, parliament could easily take the view that if the accumulated wisdom of the executive and relevant law enforcement agencies has not been able to particularise that list and simply wants an entitlement to make regulations to extend that list as and when a further proposition to include a different offence comes along, there is no reason why that should not be a very high standard in the regulation-making power.

Senator MASON—Following up Senator Ludwig's questions—and they are very pertinent—can you give the committee an example of a Commonwealth offence that is punishable by more than three years in prison where you agree it would be totally inappropriate to use powers relating to controlled operations? When I used to practise, a long time ago, three years was not a high mark. Many quite minor offences might have a maximum penalty of three years, and that is what the legislation says. Can you give us any examples from the Crimes Act that would illustrate your point that three years is far too low a standard?

Mr Webb—We have not reviewed the Crimes Act to see if we can come up with—

Senator MASON—I just thought I would ask. You can see my point: under state legislation, three years is nothing.

Mr Webb—Yes.

Senator LUDWIG—Perhaps three years is a long time but—

Senator MASON—I did not mean it that way.

Senator LUDWIG—No, it was just that the record did not show that.

Senator MASON—Assault, for example, was punishable by a penalty of more than three years.

Mr Webb—It certainly does not seem to us to be a proper threshold for the allowance of controlled operations. Controlled operations are really law-breaking operations.

Senator MASON—It used to be drug importation, and so forth.

Mr Webb—Of course, and that is where it began. It began in 1996 with drug importation and it has been added to over the years but, as I mentioned in my opening remarks, this committee objected in 2001 to an extension, that it thought went too far, to all Commonwealth offences. We are saying that, with this regulation-making power that is not qualified in any way, shape or form, it opens the door to provide for very low-level offences. And what are we talking about for controlled operations and low-level offences? These are inappropriate matters in which we should be permitting law enforcement officers and civilians to break the law.

Senator LUDWIG—It no longer simply applies to drug offences, as it was originally designed for back in 1996. It does not seem to be limited in that way. It seems broad enough to cover a range of operations—including drugs, but others as well.

Mr Webb—An amendment to include a number of child pornography offences has been made, all attracting a maximum term of imprisonment of at least 10 years. A 2004 amendment extended the power to authorise a controlled operation to the investigation of a serious state offence with a federal aspect, which was characterised or defined as a state offence which has a federal aspect and that has the characteristics of a serious Commonwealth offence. Three years in prison is a long period of time if you happen to be the person who is doing it but I do not think we would normally regard that level of offence as a serious Commonwealth offence.

Senator LUDWIG—The practicalities are that the term that is usually given is not for a first offence in any event, and it is a maximum, as I think Senator Mason pointed out.

Mr Webb—The explanatory memorandum says about the regulation-making power that it:

... will enable the Australian Government and law enforcement agencies the flexibility to deal with emerging categories of serious crime.

In other words, it does not seem that it is needed to deal with anything that has emerged and can be identified. It is a device which the parliament is being invited to enact so that, as and when something indeterminate and inchoate—we cannot yet work out what—arises, that power will be available to spring to life.

Senator LUDWIG—Yes. In a roundabout sort of way that is the point I was trying to get to—that the controlled operations are not limited. They seem to be limited in part to drug offences and the set offences, but there does not seem to be an end to the regulation-making power. It seems to be a ball of string with no end in terms of what you can add by regulation down the track and the type of offences that might come under a controlled operation. I guess drugs, child pornography and those types of issues are obvious. But it seems that you could then broaden it to include a whole range of offences where the term is three years, which I do not think is normally contemplated.

Mr Webb—Or less.

Senator LUDWIG—Or less, as the case may be. Has the council seen delayed notification warrants in other statutes in Australia or in state law?

Mr Webb—Yes. They do exist, and it is possibly as a consequence of this harmonised arrangement in some state laws, we understand.

Senator LUDWIG—In New South Wales or Victoria or—

Mr Webb—In New South Wales and Western Australia, I understand.

Senator LUDWIG—I have the ability to ask the A-G this as well but any information that you can provide might be helpful. In terms of your objection to the broad use of the power, did you object to its use in New South Wales and other states as well?

Mr Webb—No, and the reason for that is that the Law Council as a national body deals with national matters. Harmonised Commonwealth-state cooperative matters provide a hazier line than used to exist between what the states did and what the Commonwealth does. But the Law Council's resources are almost exclusively applied to what happens in the federal arena—that is, the Commonwealth government's arena—and we do not try, because it is materially beyond us, to identify what is going on in every state and territory parliament around the country about these matters. We leave those matters, as part of the arrangement between ourselves as the Law Council and our member organisations, to those member organisations. We would be reliant on the local law society and bar association to monitor what is happening in state and territory parliaments.

Senator LUDWIG—Is it within your ability to check with any of your state counterparts about their view of the use of the state power for the delayed notification search warrants and whether or not they have had any adverse experience with those?

Mr Webb—Yes.

Ms Donovan—While I am sure that the Attorney-General's Department will be able to shed more light on the matter, I understand that in the state legislation the delayed notification search warrants are only available in relation to terrorist offences as opposed to, as is proposed under the current bill, serious Commonwealth offences which carry a maximum penalty of over 10 years, if I am not mistaken.

Senator LUDWIG—Thank you, that is helpful. I will seek to check with the A-G about that matter.

Senator TROOD—Mr Webb, the Law Council has launched a fairly considerable broadside against the legislation here. There are obviously lots of issues we can usefully take up, but I want to ask you a couple of questions about the control orders. As I understand it, your objection is that more offences are going to be covered by this and that at precisely the same time as that is occurring the restrictions or the controls of the monitoring on the use of these powers are also being substantially weakened or removed—and I see that point. If the committee were disposed to say, 'Yes, there is a justification for the Commonwealth's powers being extended to these other offences,' what in your view would be an adequate protection regime that might cover the extension of this power?

Mr Webb—There would be a number of facets to it. One of the things the bill also proposes—which I touched on but not in any great detail—is the authorisation process within

the law enforcement agency. This bill will allow an officer in charge of a law enforcement operation, not someone several steps removed and much more senior, to decide to whom the controlled operation can extend and who will receive, for example, the benefits of immunity, in effect. That is a serious dilution, we think, of the checks and balances that I am sure the parliament wanted to have for this extraordinary type of operation. So there is a matter about which we think no attempt has really been made to justify other than that it is convenient. We think it is wrong in principle and this committee should reject it.

The role of the AAT in extending the period of controlled operations is really being done away with and, in effect, that is being done away with on the basis—and I cannot just pick it up here, but there was an implied reference to the fact that, apart from being operationally easier, which no doubt it is—that it is also more secure. That implies that you cannot trust anyone in the AAT if you have to take the matters to the AAT, as you do now to obtain an extension of time for their operation. It seems to be suggested that this produces an insecure operation. We think that is offensive to the AAT and, again, the AAT should not be deprived of its current role in relation to those matters.

The Ombudsman has the power to look at these things, but in retrospect. So a number of the gatekeeping type accountabilities are simply being done away with here, and the checks and balances are going. The system is being extended. You mentioned the word 'broadside', and that is fair enough, but these are very serious matters in our view.

Senator TROOD—No, I do not disagree with that. Do I accurately reflect your position if I say that, if the parliament were to extend these powers to these new offences, your position would be that you would not like that occurring but at the very least the existing, as you call it, 'gatekeeping' arrangements must remain in place?

Mr Webb—Absolutely.

Senator TROOD—In view of the fact that there is an extension of the powers to other offences, more minor offences potentially, would you wish to see further checks and balances introduced or would you be satisfied with existing arrangements?

Mr Webb—We could well be. We simply have not had a chance to frame what they might possibly be, but we probably could turn our minds to it. Of course we would prefer that it did not happen at all.

Senator TROOD—No, I understand that.

Mr Webb—Helen might be able to offer something here.

Ms Donovan—When the model legislation was considered, the proposal that the Law Council put forward was that a retired judge might be an appropriate person to fulfil the role of an external independent party who could provide authorisation. Our problem essentially with the existing and the proposed authorisation mechanisms is that they are entirely internal to the law enforcement agencies. I should add that it is not just a question of the controlled operations extending to a broader range of offences. Currently there is a limit on how long a controlled operation can run, which is six months. To run over three months, the involvement of the AAT is required. Under the bill, a controlled operation could continue indefinitely and the extension of that by way of variation of the original authorisation is, again, an entirely

internal process. Whilst the Ombudsman has some role in both receiving regular reports and auditing the records of law enforcement agencies that have the ability to authorise controlled operations, as Mr Webb pointed out, this all happens after the event.

Our concern also is that the degree of information which is provided to the Ombudsman before a controlled operation is completed is not sufficient because it does not detail what actual unlawful conduct has taken place. Looking at the Ombudsman's reports of controlled operations—because the Ombudsman does currently have the power to review controlled operations—the Ombudsman does not look into controlled operations which are continuing at the moment because that is deemed inappropriate. That is all right when a controlled operation can only be extended for six months but if it can be extended indefinitely that creates a different problem.

Senator TROOD—Is it your proposition that there should not be indefinite controlled operations or is it that there is probably an occasion when that is justifiable but that there need to be checks and balances for those operations?

Ms Donovan—Certainly. I would reiterate the point that, at the moment, controlled operations are limited and if that is problematic for law enforcement agencies and has frustrated their attempts to penetrate drug rings, for example, that case could have been made. But it has not been. In the absence of a case being made, we see no cause for extending the maximum duration of a controlled operation beyond six months.

The other point we would make is that controlled operations and delayed notification search warrants are both introduced as powers which are available to prevent an offence from occurring or to investigate the commission of an offence. They are not intended to operate as security mechanisms or as intelligence gathering mechanisms as such. So we believe that the indefinite extension of a controlled operation introduces a greater possibility that they will be misused—not so much for the investigation of a specific offence but just to have a continual flow of information or intelligence.

Senator KIRK—Thank you very much for your submission; it is very comprehensive, especially given the limited time you had. I want to go to an issue that has not been covered—that is, the extension of protection from criminal responsibility and indemnity from civil liability for participants in controlled operations, particularly for informants. In reading your submission I see that you have concerns about the extension of protection for informants, particularly, as you say, in light of the absence of any external independent authorisation process for controlled operations, which is what we have just been discussing. Could you elaborate some more on this aspect of the bill and where you see there are concerns.

Mr Webb—We think the most significant change introduced by the bill is that it extends this protection from criminal responsibility and indemnity from civil liability to all participants in a controlled operation, whether they are civilian participants or law enforcement officers. Under the existing provisions of the Crimes Act, informants are not granted protection from criminal or civil liability, but under the provisions of the bill informants will get both those protections.

We think that is cause for great concern, particularly in the absence, as we mentioned, of an external independent authorisation process for controlled operations. Remember that, if the

bill passes, the officer in charge of a police operation will be statutorily authorised to nominate the people to whom the controlled operation applies or extends. In making that decision, those people will be granted the indemnities and the immunities that only law enforcement officers are able to get at the moment.

You would have to think that this has significant potential for abuse, simply because no other person needs to be involved in this process, except the officer in charge of it who has a vested interest, of course, in either bringing it to a successful conclusion or, if one were to take a more sanguine view about objectives of law enforcement officers from time to time, perhaps producing a result that is really good for them but not necessarily in the interests of justice.

That should not be allowed to happen. We have worked very hard over many years to introduce checks and balances in the law enforcement field and in the administration of justice generally to make sure that people are not put in a position of such power that any abuse of that power is possible and may go undetected. If you do not have an external authorisation or some other form of supervision or accountability you have a recipe for mischief.

Senator KIRK—Again it comes back to this lack of external independent authorisation process, doesn't it, rather than the extension of indemnity or immunity to informants as such?

Mr Webb—That is certainly a very important part of what we are saying but, again, I think this committee and the Senate would like to have a lot of material before them which justifies the extension. Why is it necessary to provide the extension at the present time? Not very much is offered, for example, by the explanatory memorandum. We ought to bear in mind that the explanatory memorandum is not the vehicle for the executive to provide a justifying argument. An explanatory memorandum explains, as its name suggests, the terms in a bill. It does not provide the analysis, the argument, the background information, the context and so on. You cannot expect that of an explanatory memorandum. We are not overly critical of the explanatory memorandum in that sense, but it should not be taken as an adequate substitute for discharging the onus that rests on the executive.

Senator KIRK—Is this matter mentioned in the Attorney-General's second reading speech? I have not looked at it, I have to say.

Mr Webb—It should not take long to check.

Senator KIRK—It is two pages.

Mr Webb—I do not think it is mentioned.

Senator MASON—On the sixty-four dollar question about justification for the new proposals, the chair, I think in her first question to you this morning, spoke about harmonisation. I think you agreed that as a general principle that is a good idea, but in a sense you are asking for other policy or operational justification for the change.

Mr Webb—Yes.

Senator MASON—We will ask questions of the AFP about that shortly. I am sure they will have given that some thought. Perhaps you can do my homework for me. Are there any published justifications for the change in policy—for example in 'Cross-Border Investigative

Powers for Law Enforcement' of November 2003, by the Standing Committee of Attorneys-General and the Australasian Police Ministers Council Joint Working Group on National Investigation Powers? Is there any mention there of why this is necessary, other than for harmonisation?

Mr Webb—The short answer is that I do not know. One would have expected the minister to refer to supporting reports of that kind if there were supportive information and data in those reports. That is where you would like to be steered by a minister properly informing the parliament.

Senator MASON—By lunchtime we will know if there are any justifying arguments, Mr Webb.

Mr Webb—As I mentioned before, people from the AFP will come before your committee, and that is fine. They will put their point of view to you, but nothing relieves the executive of the responsibility to provide this sort of justifying argument to the parliament. You can call all the witnesses. It is not your job, in a sense, to run around and chase up the justifying arguments from people other than the executive.

Senator MASON—We all forget at times that constitutionally you are dead right. The executive has to justify to the parliament and not the other way around. How we forget that, Mr Webb!

CHAIR—The police association have raised one interesting issue in their submission about the process for execution of warrants. You may want to take this on notice and come back to us. Under the bill's arrangements, they raise this concern:

> ... whilst the person first named in the warrant must be a police officer, the Bill proposes to authorize the person named in the warrant to sign the warrant over to another person.

That can occur in a range of circumstances. The concern that they raise is that the explanatory memorandum identifies:

> ... this person may or may not be a police officer due to the ACC consisting of a number of contract or in-house investigators.

It may end up in a position where a search warrant is being executed by someone who is not a police officer but who would have potentially been sworn in as a special member of the AFP and is therefore entitled to use reasonable force and to carry a firearm in the process of the execution of the search warrant. Does the Law Council have any comment on that particular concern raised by the police federation?

Mr Webb—Our submission actually objects to granting persons powers that are ordinarily reserved to police officers. We do that in the context of a proposal to extend the grant of powers to civilian members of the ACC. I do not know whether that is what the police are talking about—

CHAIR—Yes, it is.

Mr Webb—The justification provided seems to be that there is turnover in the police staff working for the ACC, which is apparently difficult to manage, so this is the proposed solution. We do not think that is a sufficiently good enough argument to warrant that arrangement.

CHAIR—Indeed, the committee has raised concerns about persons entitled to execute search warrants in different contexts and previous legislation. I am sure we will pursue that as well. Thank you, Mr Webb and Ms Donovan. Thank you for preparing your comprehensive submission. We understand the time available was limited—both for you and for us—in this process. We appreciate the Law Council's submission.

Mr Webb—We acknowledge those shortages of time for committees too.

CHAIR—I know you do.

Mr Webb—It must be very, very difficult for you to deal with these matters.

CHAIR—We have a busy 10 days ahead of us. Thank you very much.

[10.34 am]

BROWN, Ms Vicki, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman

GOODRICK, Mr Robert, Director, Inspections Team, Office of the Commonwealth Ombudsman

THOM, Dr Vivienne, Acting Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

CHAIR—Welcome. The Commonwealth Ombudsman has lodged a submission with the committee, which we have numbered 5. Do you need to make any amendments or alterations to that?

Dr Thom—No.

CHAIR—Thank you very much for appearing today. I now invite you to make an opening statement, at the end of which we will have questions.

Dr Thom—Thank you for the opportunity to address the committee. We have a few brief comments to make as an opening statement. The Ombudsman's office was closely involved in the preparation of this legislation, particularly in the replacement of part 1AB of the Crimes Act and the new provisions on delayed notification search warrants. We share the interest of other agencies in achieving a more efficient approval process for authorisations and warrants and believe that the new part 1AB improves on its predecessor in this respect.

Our input into the legislation has been considerable, and we are pleased to say that the Attorney-General's Department was most cooperative in dealing with our suggestions for change. Many of the suggestions were of a textual nature, and the result is legislation that will, in our view, be easier to understand and administer. The role of the Ombudsman as inspector has also been clarified.

We are also conscious that the responsibility for ensuring public accountability rests more heavily on the Ombudsman's shoulders than previously through the regime of inspection and reporting. The scope of reporting is an important issue which will require careful attention over the coming months. One issue that the preparation of this bill has thrown up is the value of having a package of inspection powers automatically applicable in all inspection regimes. We have more detail on this in the submission.

CHAIR—Thank you, Dr Thom. I will not say it is unique but it is certainly interesting for the committee to have an agency come forward and say that they are very pleased to have been consulted in the process and what a constructive arrangement that has been. It is always nice to start the new year on a positive note. I note the comments you make in your submission about the desirability of a coordinated set of powers for the inspection role of the Ombudsman, and the committee will give some thought to that and how we might pursue it. You have made comments in relation to the lack of definition of 'public interest'. Would you make further comment on that for the committee and whether you think we should go so far as to suggest that 'public interest' be defined.

Dr Thom—We are merely commenting that in other legislation there usually is a definition of 'public interest', whereas here it has been left quite broad. I do not think we are really suggesting a way forward on this but rather to draw it to your attention.

CHAIR—You have done that; thank you very much.

Senator LUDWIG—When you say that you are satisfied with the consultative process and the legislation, I take it that that is with respect to the Ombudsman's role in oversight.

Dr Thom—We look more generally than just at our role in oversight. We look at the other oversight and accountability mechanisms. Overall, we believe there is an appropriate balance between the powers, the efficiency of the process and the oversight and accountability mechanisms.

Senator LUDWIG—One of those oversight and accountability mechanisms for controlled operations is the Australian Commission for Law Enforcement Integrity.

Dr Thom—That is right.

Senator LUDWIG—In terms of controlled operations, do you have a view about whether all the law enforcement agencies, including Customs, should be included under, and have the ability to be oversighted by, the Australian Commission for Law Enforcement Integrity, or are you now saying that you are satisfied that Customs should not have that oversight?

Dr Thom—That is a bit outside the scope of this bill.

Senator LUDWIG—That is not what you said. You said that you have looked at the accountability mechanisms within the bill. You say that, from your perspective, the oversight arrangements are sufficient. In terms of controlled operations, this bill ensures that the Australian Crime Commission and the Australian Federal Police have an oversight body—that is, notwithstanding your role, they also have the Australian Commission for Law Enforcement Integrity, which, although not on line yet, is expected to be up and running soon. In terms of controlled operations, the AFP is a law enforcement agency and, in terms of this bill, so is Customs. Customs, however, will not be oversighted by the Australian Commission for Law Enforcement Integrity. Are you satisfied that Customs does not need to be oversighted by the Australian Commission for Law Enforcement Integrity?

Mr Goodrick—When we were talking about oversight we were thinking more in terms of oversight by us.

Senator LUDWIG—But Customs went broader than that.

Dr Thom—Yes. I should have spoken about oversight by us.

Senator LUDWIG—Would you like to correct the record?

Dr Thom—Yes, I correct the record.

Senator LUDWIG—In terms of the legislation, what do you say about your oversight role and how does it satisfy you?

Dr Thom—We currently carry out inspection on these records. We are aware that the inspections of these records will change somewhat and, I suppose, we are satisfied that that inspection will in fact be adequate oversight.

Mr Goodrick—I think that one of the major changes that the bill has brought about is the removal of real-time oversight by the AAT. When discussions first began on this, some enhanced role for the Ombudsman was seen as somehow replacing that. I am not sure we saw it quite like that, because real-time oversight is always different from oversight after the event. Nevertheless, with a proper set of powers and a fair bit of flexibility concerning the reports that we might want to see, we do have the power to ask for further information to be included in the reports. From our point of view, that is pretty effective oversight. In fact, in the end it may be more effective oversight than an AAT member ticking an application.

Senator LUDWIG—In your annual report you provide statistical figures on what you do in terms of controlled operations and/or oversight arrangements. I do not have your annual report in front of me at the moment but I am trying to understand the types of information you provide publicly about your work.

Mr Goodrick—The annual report referred to here is not the Ombudsman's annual report for the Ombudsman's operations as a whole.

Senator LUDWIG—I am aware of that. The AFP and the ACC provide witness protection information and reporting—and there is a separate piece of legislation which provides for that. I am looking more at the Ombudsman's annual report and what information you provide as to the type of work you undertake, how many inspections you undertake and the extent of those inspections.

Mr Goodrick—I think it also includes some evaluative material about whether there would be compliance—and that is pretty important. But there is the very fact that inspections take place. Some of that material, as you will have noticed from the bill, may be deleted from the final report if it is particularly sensitive but it is, nevertheless, on the record, even if it is not on the public record at that time. Judging from the way that law enforcement agencies go out of their way to cooperate with us, in our experience that is an effective form of oversight.

Senator LUDWIG—Give us a sense of the nature of your work in terms of the Australian Federal Police or the Australian Crime Commission. How many times do you visit them and have a look at their records in controlled operations—for example, in the witness protection program?

Mr Goodrick—We normally have two sessions a year and two reports. We let them know what records we want to see and we would decide whether or not to take a sample of the records or look at the full set of records—depending on the volume of records. We basically go through all the records they have and determine whether they have followed the procedures set out in the legislation. We also provide further comments on matters which we think may affect their compliance in the future, because some of the practices could be improved. These are 'best practice' comments. But, as I say, we do that only because we see a risk of problems with compliance in the future if certain practices continue to be followed.

Senator TROOD—When you say you were consulted was it in relation to those aspects of the bill that relate to the Ombudsman's powers or was it in relation to all of the matters that are included in the bill?

Mr Goodrick—We were consulted on pretty well the whole lot. As I think we have pointed out in the submission, our concern is obviously with the Ombudsman's powers, to make sure we have proper powers.

Senator TROOD—Sure.

Mr Goodrick—But we are also concerned with making the act manageable. It is very frustrating for both the agency being inspected and for us to come across parts of the act which neither of us can understand. We have to make stabs in the dark and say, 'This is our view.'

CHAIR—You think you are frustrated, Mr Goodrick. You want to be sitting over here one day!

Mr Goodrick—I am sure it is not unique to us. It was quite useful to have the opportunity to go in there and say: 'Look, this is just not going to work' or 'These words just do not make sense.' There was a fair bit of that sort of work.

Senator TROOD—I think we are all prepared to nail our colours to the mast in relation to a comprehensive understanding and the comprehensibility of bills. I think that is a virtue. But there are also some principles here. You have heard the Law Council this morning give its view in relation to the extension of these powers. Did you express a view on that matter in your consultations or wasn't that part of the discussions?

Mr Goodrick—Could you be more precise? Do you mean about the informers?

Senator TROOD—No, in relation to the extension of these powers to a whole range of offences to which they do not currently apply. I think you were here when the Law Council gave their evidence. They were basically saying that this is almost unprecedented—I do not think they used those words, but they were basically saying that the Law Council are concerned about the extension of these powers from what is at the moment a relatively narrow group of serious offences to a wide range of offences. In the council's view, that is not justified and, as yet, there has not been any public justification which is compelling. So my question to you is: was the extension of the powers to this wide range of offences something that you discussed and, if so, did you express a view on that matter?

Mr Goodrick—I have not had the advantage of reading their submission, because it has not been on the website, but I think I know the issue you are referring to. At the moment there is a definition of serious offences which defines the offence by the term of imprisonment and also by reference to a long list of various areas of criminal activity. This has always been a bit of a problem in application. There has been a tendency to interpret the areas of criminal activity to include things which some of us may disagree should be included. The list is so long and has omitted so little—I think it omitted homicides and that sort of thing—that, looking at the purpose of the legislation, I am not sure that removing the list was a backward step. It will certainly make the act easier to apply.

We did make a point in our submission that, if the scope of serious crime is extended, we hoped that there would not be a whittling away of the number of years penalty. If you look at the definition of serious crime at the moment there is a general reference to offences which are punishable by 10 years imprisonment. Then there are other specific references, and some

of them are offences which are not punishable by 10 years imprisonment; they are punishable by somewhat less. There is a diversity of offences there which may be a cause for concern in the future. It is a list that now looks as if it has been added to piecemeal. One might be a bit apprehensive that that might happen again in the future, for all sorts of reasons which may not have everything to do with law enforcement.

Senator TROOD—On the general principle of the extension of these powers, you have made some submissions about the delayed notification of search warrants. For the purposes of the committee, can you put on the record your views on that?

Mr Goodrick—We were not so involved with this and we respected what government policy wanted it to be. We are also conscious that the Commonwealth has chosen a path which is not as draconian as some of the states, which have not wanted this—in fact, I think Victoria does not have any notification at all. From that point of view, from a general civil liberties point of view, the Commonwealth position seemed to be pretty defensible—not that it is our job to comment on Commonwealth policy.

Senator TROOD—Of course not, but you do take the view, which I gather is the Law Council's view, that these kinds of powers should only be reserved for particularly serious offences. Is that true?

Dr Thom—Absolutely, and the list currently is for serious offences.

Senator TROOD—Yes, but there is a sentence in your submission, in paragraph 23, which reads:

Other offences may in time—

I think there is a 'be' missing there—

added to the list and it is hoped that any additions will be limited only to the most serious criminal conduct.

I assume that reiterates the view, but does it also reflect an anxiety perhaps that this might be unduly extended?

Dr Thom—No, it is a comment really, just drawing attention to the fact that we believe it should only be for serious criminal conduct.

Mr Goodrick—And it would of course be parliament which would be adding to the list, not officials. There is no scope for regulations to be made adding to the list. It would be parliament which would do it, and hopefully parliament will be cautious about that.

Senator TROOD—Presumably it would exercise its usual wisdom on the matter.

Mr Goodrick—Exactly, Senator.

Senator LUDWIG—What about the regulation-making power? The Law Council of Australia mentioned there was the ability to add by regulation and, therefore, reduce the three years penalty. That is not in this area; it is in other areas in the controlled operation. Do you have a view about that? Anecdotally, controlled operations were started to try to protect our borders from the influx of drugs. Customs was involved in that with the Australian Federal Police. It now seems that controlled operations have expanded to include other matters as

well, and some of them seem quite sensible when you talk about child pornography, but there does seem to then be a regulation-making power that can include other offences as well.

The committee had a discussion with the Law Council, and the Law Council's view about this seems to be that that regulation-making power is open-ended and should not be there—I might be taking liberties with their view, but I think I would be right about that—and that it should be in the statute as to what the period should be. We might gabble over whether it is three years or more as to whether it is an offence or not.

But in saying in your opening statement that you have had a look at the oversight arrangements and you are satisfied with them, are you also satisfied with that type of power being included where you can include, by regulation, matters that can be in the controlled operation area of offences, where they might in fact be less than three years?

Mr Goodrick—It is not something that we would normally have to consider in inspections work. I am not sure whether there is such a power under the present legislation. If so, I do not think it has ever been used. It is really a matter for the parliament to deal with, I am afraid.

Senator LUDWIG—I am trying to get the gist of your role more broadly so as to ensure that, in terms of the legislation, the i's are dotted and t's are crossed when you do the inspections to make sure that they—that is, the Australian Federal Police or the ACC or Customs—undertake to do it according to the legislation.

Dr Thom—It is a compliance audit. We do make other recommendations in terms of best practice, but it is really a compliance audit with the legislation.

Mr Goodrick—The Ombudsman's overall responsibility, of course, is looking at the quality of administration, and that is what we are talking about when we talk about an act that works better, is more efficient and that sort of thing.

Senator LUDWIG—Do you keep statistics on the number of complaints the Ombudsman receives about the witness protection program or the controlled operations and the like?

Dr Thom—I do not have those figures here.

Senator LUDWIG—I do not know how you disaggregate your statistics and I am open to you taking it on notice. It is a question of how you compile your statistics and then categorise or break them down.

Dr Thom—We will take it on notice, because it is always quite hard to try to disaggregate statistics and find out particular matters. But we can at least provide you with anecdotal information when we come back.

Senator LUDWIG—It just might be helpful to understanding the level of issues that are currently out there, those raised by the public more generally in this area. Thank you.

CHAIR—I am just trying to find in the Law Council's submission an observation that Ms Donovan was making towards the end of her evidence, and I think that you were in the room. She was talking about the extension of operations and the fact that the Ombudsman has a capacity to inspect at the conclusion but not during—I assume because of operational sensibilities and sensitivities. The Law Council were concerned that, with rolling extensions, it might get to the point where there is no capacity for the inspection to be particularly useful.

I wonder if you could comment on that. I cannot find the exact words in their submission right now.

Dr Thom—I know what you are talking about.

Mr Goodrick—It is only a matter of policy that we do not inspect real-time operations, for all sorts of reasons which I do not need to go into. But, if we suspected that there was an unnecessary extension or repeated unnecessary extensions of an authorisation, we would feel free to inspect it—which would basically be a real-time inspection.

Senator TROOD—But it is very difficult to imagine that would come to your notice, isn't it, given the covert nature of these things?

Mr Goodrick—We would know about the issue of the authorisation in the first place, and we would be looking at all our records periodically, so we would—

Senator TROOD—So you would be alerted to the initial use; is that what you are saying?

Mr Goodrick—Yes.

Senator TROOD—And that would be sufficient to alert your antennae to the activity?

Mr Goodrick—We would say: 'Well, what's happened to this authorisation? The operation doesn't seem to have been completed. It hasn't come up in the records that you've presented to us for inspection.' We would find out that way.

Senator TROOD—Does that happen on a regular basis? Do you trawl through the activities of departments or agencies and then ask, 'What's happening in relation to this particular issue'?

Mr Goodrick—We do with inspections in the sense that we see all the records of the authorisation, or the certificates, as they are at the moment, and we can track what happens to them then. It is important that we be able to track them. Sometimes there are problems in doing that simply because of the way that records are kept, and we would then advise the agency on how to better keep the records from our point of view, so we could more effectively inspect.

Senator MASON—To take up where my colleagues left off, in paragraph 19 of your submission you say:

> We have no difficulty with a definition of 'serious Commonwealth offence' that does not require identifying the nature of the criminal activity, provided that the offence is genuinely serious. The requirement that the offence be punishable by at least three years imprisonment is sufficient protection against possible abuse.

I asked the secretariat to give me some examples of offences that are punishable by terms of imprisonment of three years or more, to see how serious they are. Dr Thom, in the past, the reason why protections for the accused or indeed investigative procedures were made easier was not that the offence per se was serious but that it was difficult to prove—for example, drug offences and often taxation offences. But now the language has moved, not so much from what is difficult to prove by virtue of the nature of the crime; it is now about anything more than three years.

Murder, for example, is a very serious offence, but no-one is suggesting that the police should have all these powers in relation to the investigation of murder. Do you see the problem? It is a conceptual problem and it has not been addressed here. The issue in the past has always been that certain offences are difficult to prove. Therefore we need more powers to investigate or to prove them, not by virtue of the length of the penalty but by virtue of the difficulty to prove; hence, these powers are not given for the investigation of murder. Dr Thom, how do we resolve this conundrum?

Dr Thom—I can see the issue you raise.

Senator MASON—Yes, and it is a big issue.

Dr Thom—I can see that it is a big issue, and it is certainly one that I do not want to answer off the cuff here. We can take the issue on notice and give it some more thought. I would be particularly interested to see what sorts of offences are punishable by more than three years. I think that would probably be the best way to give you our more considered thoughts.

Senator MASON—Thank you.

CHAIR—Dr Thom, Ms Brown and Mr Goodrick, there are no further questions from the committee. Thank you again for your submission and for appearing today. That last matter you have taken on notice, and there may perhaps be other matters that you wish to follow up, so it would be helpful if you could assist the committee by coming back to us as soon as possible.

Proceedings suspended from 11.01 am to 11.17 am

LAWLER, Federal Agent John, Deputy Commissioner, Australian Federal Police

PRENDERGAST, Federal Agent Frank, National Manager, Counter Terrorism, Australian Federal Police

WHOWELL, Mr Peter, Manager, Legislation Program, Australian Federal Police

ALDERSON, Dr Karl, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

COCKSHUTT, Ms Melinda, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

CHAIR—I welcome witnesses from the Australian Federal Police and the Attorney-General's Department. Neither the AFP nor the department has lodged a specific submission with the committee, so what I would like you to do is to make opening statements and then we will go to questions. Deputy Commissioner, perhaps you can start.

Federal Agent Lawler—We thank you, Chair, and the committee for the opportunity to make an opening statement. This is an important bill which proposes a number of enhancements to existing legislation. I would like to highlight for the committee the most important enhancements from an AFP perspective. In terms of the existing investigative powers, the bill proposes amendments to the current provisions in the Crimes Act 1914 for the undertaking of controlled operations, the use of assumed identities and the protection of witness identity during court proceedings. These amendments are based on model cross-border investigative powers contained in the report published by the national joint working group in 2003. The joint working group was established by the Standing Committee of Attorneys-General and the Australasian Police Ministers Council to progress the agreement between the Prime Minister and state and territory leaders in April 2002 to develop a national approach to controlled operations, assumed identities, electronic surveillance devices and the protection of witness identity.

The key operational benefits for the AFP from these proposed amendments are: in the case of controlled operations, the inclusion of police informants as participants in controlled operations who can be protected from criminal responsibility and civil liability for conduct undertaken during the course of a controlled operation—an issue which you may recall was proposed in the Measures to Combat Serious and Organised Crime Bill 2001 but was not supported when parliament considered that bill; in the case of assumed identities, improving the arrangements between Australian jurisdictions for accessing evidence of identity to establish assumed identities and clearly including members of the Australian Federal Police National Witness Protection Program within the scheme so that there is no doubt that they can use an assumed identity to perform their functions; and, in the case of protection of witness identity, the enhancement of the current approach to protect the identity of an undercover operative who was or is using an assumed identity.

Importantly, the enhancements to law enforcement powers proposed by these parts of the bill are matched by enhancements to the reporting, recording and inspecting requirements that make up the inbuilt accountability framework for each power. In terms of investigative

powers, the bill also proposes the establishment of an additional power for police operating under the Commonwealth legislative framework: the use of delayed notification search warrants for Commonwealth terrorism offences and a limited number of other serious Commonwealth offences. The proposed delayed notification search warrant scheme is an important proposal for federal law enforcement and is, in our view, overdue. Similar schemes are already in operation in New South Wales, Victoria, Queensland, Western Australia and the Northern Territory. Only the number of other high priority legislative issues affecting law enforcement has prevented this requirement from progressing sooner.

The ability for police to enter and search premises without notifying the occupants of the target premises is an important investigative tool. Searches of this nature—such as controlled operations, telecommunications interception and the use of electronic surveillance devices and stored communication warrants—complement the existing investigative tools available to law enforcement because they allow the examination of physical evidence such as computers, diaries and correspondence that enable police to identify the full range of people involved in suspected serious criminal activity and to obtain evidence of that activity. It is particularly important in being able to operate to prevent criminal activity. The rationale for seeking this power and the context in which it would be used is that there are investigations where keeping the existence of the investigation confidential, in particular from targets of the investigation and their associates, is often critical to the success of that investigation.

A limitation with the existing search warrant regime is that the execution of a search warrant involves notifying the occupant of the premises. This immediately notifies known suspects, and subsequently their associates, of law enforcement interest in their activities. It then allows associates unknown to the police to destroy or relocate evidence or activities to other premises not known to police. It often prevents the full criminality of all those involved being known. I would be happy to provide examples to you of such instances. Delayed notification search warrants could complement these tools in a number of ways, including by offering an alternative investigative strategy. Examples of which might be, where it is difficult to establish the principals of a syndicate or their associates in recorded telecommunications interceptions or to overcome the use of coded conversations or telephone silence by suspects, a delayed notification search warrant would enable the covert examination of physical evidence, such as a suspect's telephone, computers, diaries or correspondence, which may enable police to identify associates and evidence of the activities being undertaken by the suspect. And where suspects are utilising encryption or other techniques to protect electronic evidence, a delayed notification search warrant will enable police the opportunity to identify, analyse and overcome these techniques without the knowledge of the suspect, thereby preserving evidence.

The bill proposes strong accountability requirements for the proposed delayed notification search warrant scheme, covering the application, authorisation, use and reporting of these warrants. It is proposed that the Ombudsman will have an oversight role to ensure agency compliance with the legislation. In summary, the AFP believes that delayed notification search warrants are not applicable to all investigations and only appropriate where keeping the existence of an investigation confidential could be critical to its success, and where the discreet collection of specific evidence is not possible through other means such as controlled

operations, telecommunications interception, use of surveillance devices or other investigative techniques.

The proposed witness protection amendments are necessary to address issues which have arisen in the operation of the National Witness Protection Program. The amendments clarify the basis on which the AFP can provide protection and assistance to former participants and their associates as well as to witnesses in state or territory matters. And, finally, the bill contains amendments that will provide a clear legal basis for accessing data held on electronic equipment seized under section 3E search warrants after the search warrant has expired, and to access data not held but accessible from electronic equipment seized upon arrest, such as voicemail.

My colleagues and I are available to answer any questions you have in relation to the bill. I should point out that, although we will endeavour to answer as much as possible in the public forum, given the nature of the powers covered and the examples that may be spoken of, there may be issues that may be better dealt with in camera or through a more confidential approach.

CHAIR—I wonder whether, given the detail in that statement, you can table it for the committee.

Federal Agent Lawler—Certainly.

CHAIR—Thank you very much. We might have copies made for committee members so that we can refer to them in the ensuing discussion.

Dr Alderson—Because the deputy commissioner has already given a very good summary of key aspects of the bill I will keep my opening statement to just a minute or so. There are a couple of points that I want to make. The first is that this bill contains two groups of amendments. One group is to give effect to the cross-border investigative powers model, where the objective is to try to align Commonwealth, state and territory enforcement powers so that where investigations cross jurisdictional lines you would have similar rules in force, and as close as possible, so that the material that is put together—for example, to seek a controlled operation under Commonwealth legislation—would also be applicable to the state legislation and would allow you to seamlessly investigate across those jurisdictions and also to apply for some reciprocal mechanisms, which is particularly important when the states are dealing with each other. And those areas are: the controlled operations, assumed identities and witness identity protection.

In addition, this bill contains a group of other amendments that are not about the national investigatory powers but have been included in this bill because it is a bill about investigatory powers. They include the delayed notification search warrants and witness protection amendments and the seized electronic equipment amendments.

There is one point of clarification I can provide regarding the hearing earlier this morning. The Law Council had raised a concern that the Australian Customs Service had been given the capacity to authorise controlled operations. That is not the case. Although Customs appears within certain definitions of ‘law enforcement officer’ and ‘agency’ the provision on authorisation is for the AFP, the Crime Commission and the new Law Enforcement Integrity

Commissioner. As far as Customs goes, their officers can participate in operations and can get immunity, but the CEO of Customs cannot authorise operations.

One of the main points of questioning and discussion in the hearings so far this morning has been about the changing of the threshold for the authorisation of a controlled operation to remove the list of categories of offence in relation to which an operation can be authorised and to include the capacity to prescribe by regulation additional offences. No doubt the committee will want to ask us some questions about that very shortly. I just draw attention to the fact that what is in this bill closely follows the model in this joint working group report. There are a number of pages of discussion of both the issue of the threshold of three years without listing subject types and the issue of including additional categories of offence by regulation, or the capacity to be able to do that.

I will close my opening statement by mentioning that we are close to finalising some tables that compare this model to what the Commonwealth has put in the bill and, where we are amending existing suites of provisions for controlled operations and assumed identities, comparing what we have in the Crimes Act now with what is in this bill. I expect we will be able to provide those tables to the committee today.

CHAIR—The point that you referred to at the end was raised earlier in discussion, as you say. The committee acknowledges that you were here for the proceedings of the committee this morning, and we are grateful for that because it makes it much easier to pursue issues which may arise. I understand the point you make in relation to the discussion that you refer to in the report. There was a concern which the Law Council raised and which some members of the committee may share. In the extension process, it is important, from my perspective and from other members' perspectives too possibly, to ensure that the oversight process, the control, the checks and balances—whatever terminology we may wish to use—is not diminished, so that as we extend powers and capacity we do not diminish oversight capacity, for example.

The Law Council made a number of comments on that. I could turn to virtually any page of their quite comprehensive submission to pick up some of those, but let us go with one issue: the fact that we will end up without a limit on the maximum length of a controlled operation and, because of the way the inspection process is structured, until we get to the end of the controlled operation, there is no inspection—although, as the Ombudsman's office said today, they could take it upon themselves to do that. But that seems a clumsy and potentially quite inefficient way to go about ensuring there is an inspection possible. I cannot really see in the bill, the explanatory memorandum or the second reading speech any justification for why we should have endless controlled operations.

Dr Alderson—I might make some comments on that from a policy perspective and then see if any of my colleagues, including from the AFP, want to add to them. The first point is that this process of devising the national powers involved Commonwealth, state and territory officers sitting down together talking about the experiences of the different regimes, what seemed to work and what accountability safeguards were adding value. I think the net result of that was a view that the mechanisms that involve oversight of the Ombudsman, and the reporting mechanisms to the minister and to the parliament, provide a strong framework to provide external assurance that the way in which the AFP and the other agencies are

exercising these powers is appropriate. There was also a view that it is undesirable to impose an artificial limitation against the possibility that, in a very small number of cases where you might have an operation perhaps involving very complex organised crime and the need to really penetrate within an organised criminal group, you should not have an arbitrary limitation on the extent to which an operation can be extended. Nonetheless, what the Ombudsman's powers and the reporting mechanisms mean is that if there is something questionable about that, if there is no apparent rationale or it seems strange that an operation is continuing, then there is the ability to have that intervention and to have close questioning of what the agencies are doing.

The other thing is that, because you do require a renewal every three months within the senior level of the agency, it makes sure that you do not have a very enthusiastic group of investigators going off and not thinking about the bigger picture, in a sense. Things are brought to the attention of the senior level of the AFP at regular intervals. I will pause there for any of my colleagues who might have something they would like to address.

CHAIR—I would say, Dr Alderson, that at the same time it removes the involvement of the AAT in the process, so you are actually removing another layer of external engagement.

Dr Alderson—The reasoning came out of the pooling of ideas. I might say that, broadly, this report follows Commonwealth law more than the law of any of the other jurisdictions. So in large part we are keeping what we have now, but it was considered that members of the AAT are not best placed to form judgements about the appropriateness of the continuation of an operation, that it was not adding value to the stronger accountability mechanisms that exist through the Ombudsman and reporting; therefore, rather than complicate the scheme with that additional element that was not substantively adding to the accountability value in the mechanism, it is not there.

CHAIR—I am sure you can see where some external commentators might think the engagement of an external body or individual might add some value, Dr Alderson. I am not surprised at all that the police and the Attorney-General's Department think it a very good idea to have it entirely contained within, but I am sure it would not surprise you that external bodies might think that is not the best plan.

Dr Alderson—It does not surprise me that some people would hold a different view. The rationale for this approach is that the mechanisms where you have a high degree of expertise within the agencies, at senior levels of the agencies and on the part of the Ombudsman, with the Ombudsman's continuing role—which for many years was not a feature of these controlled operations provisions—give you the appropriate level of accountability and protection.

CHAIR—But there is no mechanism. Once you keep extending the controlled operation, unless the Ombudsman happens to pick up in the process that it is an operation that has not come to an end, there is no mechanism for that particular agency to become involved. It is all completely internalised. It is extendable to the nth degree, with no end date and no mechanism for oversight, except internally within the AFP.

Senator LUDWIG—And, even if the Ombudsman's office recognise it, they cannot bring it to task either. Twelve months later they might simply do a report to say that it is of concern, but that means the operation will have continued for a further 12 months.

Dr Alderson—But the Ombudsman's inspection powers are not limited to papers relating to operations that have been completed. The Ombudsman has a general power to inspect records and is not confined to waiting 12 months to report. The Ombudsman has the capacity to raise things immediately.

Senator LUDWIG—But the Ombudsman's office might see that there is a controlled operation afoot. They might look at it at the six-month interval and say that six months is not unusual, and then they come around again 12 months later and see that it is ongoing. They are not going to pick it up in the first three months and say, 'Gee, it's unusual that you haven't done anything about it.' So it may take something in the order of 12 months before it actually catches their eye. Then it is a question of whether they come back to the organisation to ask, 'Why is this operation still going after 12 months?' So it is more likely that a controlled operation will have got to the 12-month point. A controlled operation is not simply an ordinary operation that the Australian Federal Police conducts. I think we have to recognise what it is and that it requires sufficient oversight.

Dr Alderson—I think the occasions when an operation would extend beyond six months are not common. Therefore, I think the Ombudsman would in fact be raising questions and taking a closer interest before it got to 12 months.

CHAIR—Why do you say that, Dr Alderson? How would we know?

Dr Alderson—One of things that would draw it to the Ombudsman's attention is the register. It is not as though the Ombudsman is sent into a room with a whole lot of files and has to try to discover whether there is a nine- or 12-month operation afoot. It is designed to draw this information to the surface to allow the Ombudsman to quickly detect any anomalies or things that require further questions.

CHAIR—I do not want to spend an inordinate amount of time on this. It is just one example of the oversight issues which have been raised with the committee, and I wanted to give you, Deputy Commissioner, or any of your officers an opportunity to make a comment on this aspect.

Federal Agent Lawler—I would make just one point: extending the duration of a controlled operation under the current scheme in the Crimes Act—it is sections 15OB and 15OC—is the responsibility of a nominated member of the AAT. It was important to note that this particular process was not a merits review function. Rather, the AAT member could only extend the duration of the authorisation if they were reasonably satisfied that all of the criteria required for the granting of an authority remained in existence—and, indeed, not to the actual content and fact that supported the controlled operation in the first instance. There are some who may argue that having it as an internal process—actually reviewing whether the facts that make up the application in the first instance still exist, which is best done by the issuing officer, the chief officer—presents more accountability than what the current process has in play. That was one of the reasons that underpinned that particular change around the AAT officer.

CHAIR—But where does the bill say that the officer providing the authorisation to extend the controlled operation has to be provided with a detailed report on the operation, on the 'facts and activity', as I think you put it—I have forgotten the other word you used after 'facts'—of that? The bill, as I understand it, requires the authorising officer just to be satisfied on reasonable grounds of all of the matters that they were required to be satisfied with in the first place, which does not differ greatly from the point that you have just made. Where does the bill require that the officer be satisfied in relation to the facts of the controlled operation in granting the potentially endless extensions?

Mr Whowell—My understanding of that point is that a duration is like other variation processes, and a variation process for the authority for the controlled operation is set out in the bill. I am looking at 15GO and 15GP. My understanding of that was that it was like making a fresh application. I might be corrected by my colleagues from the Attorney-General's Department if I have got the intent of that wrong, but that was my understanding as we were looking at the model from the joint working group.

CHAIR—I do not think that answers my question, though. Does that tell me that—

Mr Whowell—Chair, you were asking the question, after the deputy just made some comments, of whether, when we wanted to extend a controlled operation in that scenario, somebody needed to present more information, more facts for that internal issuing officer to agree to that extension. The way I read that section, given that one of the grounds for a formal authority is that it can only run for three months, so if you want to extend past three months you need to put in for a variation. To me, the phrase—I think it is in 15GP(1)—about 'on application' would mean that you would have to put an application or at least some information to that issuing authority that addressed the grounds as to why you needed a longer time.

CHAIR—I am pleased that is what you think, but that is not what the bill says.

Mr Whowell—I am sorry, but that is the way I read the bill.

Dr Alderson—It is true that the bill, in terms of variation, puts the focus on the impact of that variation rather than going back to scratch. Therefore, if an operation was assumed to be finite—it would last two months; it would deal with these things—and then you sought a variation to go for another three months, that would significantly alter the variation and that would have to be fully justified.

CHAIR—But the bill does not say that, Dr Alderson.

Dr Alderson—What the bill does say is that—

Mr Whowell—If I may, section 15GP(4) says that 'the authorising officer can require such information as is necessary'.

CHAIR—I see that. We could be talking about the eighth extension, potentially, because you have chosen to put forward a piece of legislation that does not have an end time. That is fine. That is the policy choice that was made. Such information as is necessary for proper consideration in an internal police environment does not necessarily respond to the concerns that have been raised with the committee.

Dr Alderson—Apologies, Senator. It has taken a long time to draw this particular provision to attention.

CHAIR—I am feeling like a dentist right now—

Dr Alderson—I think the answer is 15GQ(2). 15GQ(2) says that 15GH(2)—which is all of the criteria for authorising an operation in the first place—applies in the same way to a variation as it applies to an initial application. That is what requires you to bring all of the facts and the full justification to the table.

CHAIR—I think you have just made my point, Dr Alderson. If it requires you to do the same thing as you had to do to determine the application in the first place, then you do not have to bring forward anything new, do you?

Dr Alderson—Firstly, those three months having elapsed, you have to meet those criteria. That is, can those criteria now—today, after three months—be met to justify it? In addition, there is a provision in here that if it is materially varying the nature of the operation, the authorising officer has to turn their mind to that question as well—

CHAIR—Which clause do you mean?

Dr Alderson—and conclude that it is justified. The one I was referring to is 15GO(5), which is that it is not to be varied if it involves 'a significant alteration of the nature of the controlled operation'.

CHAIR—You think that if you wrap up all of those, starting with 15GH, and then combine GO and GQ—and potentially I suppose GR—then that is some sort of efficient process of ensuring that we have a good check and balance operating here?

Dr Alderson—It does two things. Firstly, it is not just a tick and flick 'yes, you can continue'. It is saying you have to look at all of the considerations afresh. Secondly, it is saying that if really you are talking about a new operation—if it is quite different to what was initially envisaged—then it is not properly treated as a variation. That operation should be terminated and you should be looking at starting a new one afresh.

CHAIR—We will reflect on that and I will have a look at it in the light of the discussion as the *Hansard* reproduces it. I think this goes to one of the concerns that the Law Council raised in their opening remarks. The committee finds itself in quite a difficult position here, with a fairly perfunctory second reading speech. The EM is the EM, and there is not a lot of meat around what it is we are actually trying to look at and, more particularly, why. In particular, why should we be accepting what could be perceived as a diminution of oversight and checks and balances? I will not take any more time, because that took a very long time.

Senator LUDWIG—I will not try to go over that again.

CHAIR—Don't do that again, please!

Senator LUDWIG—I have just a couple of quick questions first. I will jump all over the place, so bear with me. Perhaps the best way to look at it is to have a look at page 86 of the EM. We do not have the Australian Crime Commission with us, but I take it, Dr Alderson, that you are going to do your best. The term 'constable' is defined, but if you look about halfway down that paragraph, it starts:

Therefore, the person named in a warrant, must be a police officer however, item 4 amends the ACC Act to authorise the person named in the warrant to sign the warrant over to another person. This person may, or may not, be a police officer due to the ACC consisting of a number of contract or in-house investigators, as well as seconded police officers.

It says the justification for that is:

It is necessary for the ACC to retain a number of these investigators due to the regular rotation of seconded police and the need to have continuity and corporate knowledge in long term investigations.

A couple of things emerge from that. If you are using contractors, how do you justify or explain in terms of the EM that that will then promote continuity and corporate knowledge? It seems to me to be at cross-purposes, at least with the explanation in the EM. You would have that with public servants within the ACC who are long-term employees. I cannot see how you would have it with contractors in that sense.

The second thing, the more serious part, I think, goes to whether that now authorises the ACC to sign over to outside contractors the ability to get search warrants and to use force when executing those search warrants. Am I reading the EM badly? That is what it seems to say. If you go down to the next paragraph, it says:

The ACC uses search warrants in its investigative and intelligence operation functions. Whilst executing a search warrant, the executing officer (who may not be a police officer) may be called on to exercise powers normally given to police officers, and there will often be the need to carry a firearm.

So are we now saying that people who are not police officers—they will not be constables either—will be carrying firearms and using force? They will be contractors as well. Is that what it is saying, or have I got that wrong?

Dr Alderson—I will answer in three parts. First, as to the use of force, in looking at this this morning I think this needs further investigation, but there may be some correction needed to this part of the bill, because our policy intention was that you could have certain roles in the execution of warrants being exercised by ACC employees who were not sworn police, but that they would not extend to the use of force or, for example, to the carrying of firearms. There is a question about whether the current provision in the bill has that effect, so that is something we will need to raise with the minister and look at further. So I acknowledge that there is a discrepancy between the EM and the bill on that point. Second—

Senator LUDWIG—Just on that point, the bill seems clearer than the EM, in fact. The bill seems to suggest that a contractor who is not a constable can use force and carry a firearm. It seems a lot clearer than the EM. It does not have the limiting words that the EM has.

Dr Alderson—And it may be that the limitation was intended to be included in the bill. This is something that we need to look at as a matter of priority. So, as far as the use of force goes—

Senator LUDWIG—And let me make plain my position on that: I would not agree with the use of contractors or people other than police using force or carrying firearms in effecting search warrants. I am going to ask Mr Lawler his view on that as well.

Dr Alderson—I have to confirm this and talk to the minister, but I do not think we are taking issue with the policy position you are putting, Senator. We are acknowledging there may be an anomaly with the bill on the use of force. On the firearms point, the reassurance I

can give is that, even if there is an anomaly, what the bill does is allow reasonable force. There are no actual provisions on the use of firearms and therefore the existing rules that restrict who can use firearms, and the existing guidelines, would still be in place. So, to the extent that there is an anomaly, it is about the use of force, not firearms. Although firearms are mentioned in the EM, there is nothing in the bill that alters the existing laws or guidelines on who may use firearms.

The third point is about contractors. I suppose the EM is trying to canvass two different points, but, as you say, they perhaps point in different directions. I think the essential idea is that, because you might have changes in the sworn police involved in an investigation, one way in which you can provide further continuity is through a greater capacity to involve the staff of the Crime Commission who are not sworn police. But you are quite correct in saying you would not achieve that by involving somebody whose contract was ending in two weeks time.

Senator LUDWIG—No. Even if they were on a short-term contract that ended at a reasonable point, they are usually fixed and the contractor wants to move on. And the corporate knowledge would move with them, notwithstanding the climate, I suspect, of keeping those matters secret.

Dr Alderson—Yes. I think the underlying idea—and I agree that this is not precisely what it says—was that, because there is a degree of turnover and sometimes you might have turnover among the sworn police but capacity for greater continuity among the other staff, in those situations there ought to be that capacity.

Senator LUDWIG—You might want to take this on notice—the ACC are not before us—but is there a need for the ACC to use contractors for search warrants? There does not seem to be any justification for it. The ACC have directed employees; they have seconded constables who can then undertake that role.

Dr Alderson—As a general proposition, in this day and age it is more common for employment contracts to be used in all forms of employment. In our own department people often perform substantive line roles in a contract position. As to the specific position with the ACC—unless one of my colleagues can add further to that—that is something we will have to confer with them on and get back to you.

Senator LUDWIG—In conferring with the ACC, can you also ask—this is what I was seeking—how many contractors they use more generally in these types of roles, how long the employment might typically be for, the range of the contract and where they are sourced from? Can you provide a rough guide as to the type of expertise they might have, the training and the accreditation they might have? Are there mechanisms in place to ensure that they use their powers appropriately and is there an oversight arrangement? I was going to come back to the Australian Federal Police on the use of contractors more generally to execute search warrants, but I am happy for you to defer to Dr Alderson's position that that may change.

Federal Agent Lawler—I am happy to make some general observations. Rather than talk specifically about the ACC, it might be useful to provide some insight to the committee on how the AFP handles such matters, particularly in relation to the use of force. The use of force and the ultimate carriage of firearms—and by that very nature the application of lethal

force—is something the Federal Police takes very seriously indeed. As such, the principal issue that underlies that is to ensure that if members of the Australian Federal Police are to apply the use of force in the performance of their duties they do so being properly qualified, trained and instructed in the applications of use of force. That would be our base premise. We have a strong position that people who are not so use-of-force qualified are not permitted to carry firearms.

It is also true, as Dr Alderson has mentioned, that in the changing nature of the workforce of the Australian Federal Police progressively specialist skills are required to perform a variety of activities. Often these skills are required in the execution of search warrants, particularly technical skills, to assist that execution process. We would see it as a standard position that the execution of search warrants would normally be done by sworn officers, often with the assistance of specialists—depending on the nature of the specialists, whether that person was on contract to the AFP or through some other employment mechanism. As we move further into the technological application I could see there being an increasing need to call upon such specialists more and more.

Senator LUDWIG—When will you be able to come back to the committee with clarification of this?

Dr Alderson—I would hope very quickly. I suppose it depends, when we dig into this, whether there is simply an error to be corrected or whether there is some underlying policy issue. It is difficult for me to give a definitive answer as to how quickly it can be resolved.

Senator LUDWIG—The reason I ask is that, if it is a mistake and there is no intention to undertake that role, it can be clarified quite easily. But if there is an intention to actually provide to ACC employed contractors, if I can use that term, the use of force and the carriage of firearms, it is a significantly different matter that I would want to question the ACC and perhaps you further on.

Dr Alderson—What we will endeavour to do is get back to the committee very quickly to say either 'It is straightforward and this is what is proposed' or 'It is a more complicated issue.' So that you know which way you want to pursue it, we will get back to you in one of those ways.

Senator LUDWIG—Thank you. That is why I thought I should give you the opportunity of getting back to us as soon as you can.

CHAIR—The committee is here in Canberra for hearings today and tomorrow and then it reconvenes in Sydney next Tuesday and Wednesday for other legislation in our panoply of opportunities for the new year. So, if we do need to do what Senator Ludwig has suggested, it would be very helpful to have a response by COB this afternoon as to whether it is simple or complicated.

Senator LUDWIG—I think you reflected in your opening address in respect of Customs. Is it the position that you do not see that Customs require an oversight, such as the Australian Commission for Law Enforcement Integrity, in controlled operations because they do not have the power to start them?

Dr Alderson—In essence the answer is that the oversight is not of the agencies; the oversight is of the way in which these controlled operations provisions are used. Any Customs participation in an operation will ultimately be the responsibility of whoever authorises the operation—that in practice is likely to be the AFP or potentially the Crime Commission. Therefore, to the extent that Customs are involved, all of the mechanisms in here for the Ombudsman's role and reporting encompass Customs as they do everybody else. But because Customs do not have the role of authorising operations, there is no role for a mechanism that, say, the AFP and the Crime Commission have for reporting or dealing with the Ombudsman on operations that have been authorised.

Senator LUDWIG—But, in terms of controlled operations, Customs officials can be authorised to carry firearms. Is that right?

Dr Alderson—Customs officials can be authorised to participate in an operation, which means they are not liable for a criminal offence under those laws, and the reporting on that is the same as it is for the other agencies.

Senator LUDWIG—I will go to another matter. Page 1 of the EM states that the bill will align the ACC search warrant provisions more closely to Crimes Act search warrant provisions. Could you broadly outline how that would be achieved? In other words, what are the key differences between the two sets of search warrant provisions that are being eliminated? Are there substantial differences between the two sets of search warrant provisions that will remain or will be created by this legislation? You said that you were going to align them. What I want to test with you is what they will look like post this legislation and how close and similar they will be. I am happy for you to take that on notice. I would like to hear your view on how close and similar they will be and how dissimilar they will remain.

Dr Alderson—I can answer on two levels. Firstly, I can give you a range of information. Secondly, it would be helpful for us to then provide that in written form if we can. Broadly speaking, the Crimes Act search warrant provisions have for a long time been treated as the benchmark for any other search warrant provisions in terms of the limitations and safeguards that need to be imposed and the range of powers that are necessary in a given situation.

Some of the discrepancies are big and some of them are really just minor wording. I will run through the principal ones. Currently, the ACC provisions, unlike the Crimes Act provisions, do not extend to searching a conveyance such as an aircraft, vehicle or vessel, so that wording has been aligned with the Crimes Act to allow that capacity. Secondly, the Crimes Act search warrant provisions allow a frisk or ordinary search of a person in appropriate circumstances while on the premises, so it aligns with that. There are the provisions allowing reassigning of a warrant. There is an aspect of that that we have flagged and we will be looking at further. It allows the reassigning of the warrant, as can happen with the Crimes Act.

There is an explicit provision. It is a matter of common law that if you are exercising coercive powers, you can use reasonable and necessary force. But these amendments make that explicit in the provision. I think the ACC provisions which came from the National Crime Authority act provisions had not previously fully taken into account changes in technology. So there are provisions about how you can use equipment to examine things—for example,

computer equipment: to look at a disk or CD. Also, if there is electronic equipment at the premises, such as a computer, you can use it. There is an explicit provision for compensation for damage that is caused to the premises which was in the Crimes Act but not in these provisions.

There is a requirement covering if you are going to seize things. For example, copies are to be provided of documents that a business might be using as a standard rule. There is a provision making it clear that the occupier can be present during the search, which was not clear in the ACC provisions. Finally, there is an explicit requirement to make an announcement before entering the premises, which is a feature of the Crimes Act, so that, in a sense, the occupier is not startled or does not not know why people are barging in. You can see from that that the alignment is about fifty-fifty. Some are incremental additions to powers. Some are incremental additions to safeguards and limitations.

Senator LUDWIG—Going back to the broader question I asked about the use of force, and to make it clearer about some other areas as well, items 3 and 4 of the bill provide a definition of eligible persons and executing officers. Are they one and the same?

Dr Alderson—No. In fact, it may be that if there is an error or anomaly, it might be that the role of 'eligible person' should be more predominant in the substantive provisions. I think the existence in these two definitions is intended to draw a distinction between an executing officer, who does not need to be a sworn police officer and therefore can play an essentially administrative role without using coercive powers, and an eligible person, who is from a narrow category of actual police officers. That is the distinction to which the two definitions are directed. The way those definitions operate on the substantive provisions is the question we need to look at first.

Senator LUDWIG—What I want to test is whether 'eligible person' could be someone other than a police officer or constable, as defined, or whether an 'executing officer' could be someone other than a police officer.

Dr Alderson—An eligible person can only be a police officer on this definition. An executing officer, as I understand it and as currently drafted, is not confined to being an eligible person—in other words, not confined to being a police officer. So 'eligible person' is a police officer and 'executing officer' is broader.

Senator LUDWIG—The EM, in item 4, ensures that the person named in the warrant must be a police officer. How does it enable a warrant to be signed over to a person who is not necessarily a police officer? You seem to have to achieve an end result of a person who is a police officer signing the warrant and then signing it over to someone who is not. It does not seem reasonable to me. I am not suggesting that the Australian Federal Police would do that, but let us not provide for it in the legislation if we do not have to. What would be the need for that? Why would you see the need for that?

Dr Alderson—Obviously, the fuller answer to this will be rolled into the response to your earlier question; but, broadly, as I understand it, the policy intent is that, although use of force and, potentially, carrying a firearm is something that only a police officer should do, there are certain administrative aspects to the execution of a warrant and it is appropriate to be able to involve other officers in that process. For example, the entire process may operate in a

consensual and cooperative manner—and the intention was to be able to involve those additional officers in that process. A fuller answer to that will be included in our response.

Senator LUDWIG—It also touches on section 23A, 'Availability of assistance and use of force in executing a warrant issued under section 22', which states:

In executing a warrant issued under section 22:

(a) the executing officer may obtain such assistance; and

(b) the executing officer, or a person who is a constable and who is assisting in executing the warrant, may use such force against persons and things; and

(c) a person who is not a constable and who is assisting in executing the warrant may use such force against things;

as is necessary and reasonable in the circumstances.

Is it the case, too, that a person who is not a constable can use force against things as is necessary and reasonable in the circumstances?

Dr Alderson—Yes, and I do not think there is any question of an anomaly in that part in that it is the standard approach in both the Crimes Act and in other search warrant provisions that only a constable can use reasonable force against persons but that other persons assisting can use reasonable force against things. An illustration of that is that you commonly now have the situation where a computer is something you are interested in. You may have an expert in the use of computer systems who becomes involved. Having prised the disk out of the computer, you do not want to have the argument, in essence, that that is an unreasonable action. You want to make it clear that reasonable force can be used in relation to the things—and 'reasonable' is no more than is necessary to give effect to the power; it does not mean you can go in with a sledgehammer and attack the computer. You want to make it clear that the standard approach is that an assisting officer who is not a police officer should have the capacity to be able to use force against things.

Senator LUDWIG—It does seem unclear as to whether the executing officer needs to be a constable. Section 23A says, 'In executing a warrant issued under section 22: (a) the executing officer may obtain such assistance …' but, if you couple that with previous conversations we have had, it is unclear to me whether the executing officer 'must' be a constable.

Dr Alderson—As currently drafted, the executing officer, as I see it, does not have to be a constable. Therefore, I am hoping that there will be a single solution to all of this category of matters.

Senator LUDWIG—You can see the position we could end up with. We could have an executing officer who is not a police officer asking for assistance from a person who is not a constable, and who is assisting the execution of a warrant, to also use such force—whereas the executing officer, not being a constable, may not be able to use such force.

Dr Alderson—I would make a distinction between persons and things. The standard policy approach is that any use of force against persons must be by a police officer. Use of force against things can be by another person—who might be, for example, the expert you have brought in to access the computer. But we keep coming back to the question of—

Senator LUDWIG—Yes. In that instance, the executing officer, who may not be a constable, cannot use force against the thing, but the person assisting can.

Dr Alderson—As currently drafted, the executing officer can, as I understand it, use force against persons and things. We would say that it would be consistent with the standard approach that they could use force against things even if they are not a police officer. We need to look at this question about 'persons'.

Senator LUDWIG—The other issue goes to the test more generally. The second paragraph on page 51 of the EM states:

The application of these provisions will mean a departure from the common law approach, where courts 'balance' the competing interests.

Does that mean that you will abrogate the common law approach, where courts balance the competing interests, and instead have a situation where this issue will be looked at separately? Is the policy intention to have only the law enforcement agency look at the first part, with the courts locked out of looking at that part and only able to consider the necessity for disclosure of identity to ensure a fair trial?

Dr Alderson—The way I would characterise it in terms of what this sentence is directed at is that, until now, where an officer is operating under an assumed identity, they get to court and there is a question of whether their true identity has to be disclosed, there has been a reliance on the general rules of evidence and of court procedure to decide that question. New part 1ACA inserts a suite of provisions specifically tailored to this provision. So, instead of trying to answer these difficult questions by applying the general rules of evidence and procedure, you now have provisions that are specifically tailored to this situation for the court to apply.

Senator LUDWIG—What test will the law enforcement agency use? We understand the test that the courts use in balancing competing interests, because it will generally be a trial with a prosecutor, a defendant and a defence counsel. The court or the judge will provide some explanation of how they have balanced those competing interests. How will we know how the law enforcement agency has come to its conclusion in dealing with the first part?

Dr Alderson—The first step in terms of the first part of your question—'what test will the agency apply?'—is contained in proposed section I5KI on page 69 of the bill, which is that the chief officer of the enforcement or intelligence agency is satisfied on reasonable grounds that disclosure of the identity is likely to endanger the safety of the person, prejudice an investigation or prejudice activity relating to security.

Senator LUDWIG—The chief officer does not publish their result, how they arrived at it or how they considered all of those matters. It is not made known to the defence counsel how they arrived at that view.

Dr Alderson—I believe that is correct. There is a requirement that the court be informed of the operative's true identity.

Senator LUDWIG—That is right. It is a discretion that the court has, but the court is locked out of the first part. The court can determine only in accordance with the second part. In this instance, you are constraining the court from looking at the whole issue and requiring

it to look at only the second part, which will consider the necessity of disclosure to ensure a fair trial. It seems to me that you are proposing to implement a lesser test overall and fewer protections for all concerned, other than the chief officer.

Dr Alderson—Yes, it is true that the court is called on to make a different decision. I believe the relevant provision is on page 75 at 15KQ(4), which allows the court to make a determination that, notwithstanding a certificate, questions should be able to be asked which might reveal an operative's true identity. The test that the court applies is at the top of page 76, the last element of which is that it is in the interests of justice for the operative's credibility to be able to be tested. It is true that the court is not called upon to review the decision-making process by which the certificate was issued; however, to my knowledge there is no exclusion of the rules of judicial review. So, subject to the court having appropriate mechanisms to hear things in camera and so forth, I believe it would be possible to—

Senator LUDWIG—Could you check on that to see whether or not ADJR is available?

Dr Alderson—I believe it is, but we will check that.

Senator LUDWIG—I will use the generic title 'delayed search warrants'. Is that now harmonising with the use of that power in other states and territories? In other words, were states and territories consulted about this federal power, do states and territories have similar powers and is there any state or territory that does not have this power?

Dr Alderson—There are. I might make some remarks from a policy point of view and then see if the AFP would like to add something from their experience. It is true that the drafting of these provisions has taken close account of some precedents that exist in state and territory law. For example, New South Wales has a delayed notification search warrant mechanism, and a number of other states, which I could mention in a moment, either have or have legislation before their parliaments for either delayed notification or no notification search warrant provisions in relation to counter-terrorism offences. However, this is not part of the national investigatory powers package. The purpose of these provision is not to fit into a framework of identical laws; rather, this has been framed taking into account those precedents but to devise a model that in policy terms seems an appropriate one for the Commonwealth to have even though in a number of respects it is different from any of the precedents that exist.

Senator LUDWIG—I will not dwell on that, but there are some questions that I might put on notice in respect of that. The other area, of course, is the use of—

Dr Alderson—I apologise, Senator: another pertinent fact has been drawn to my attention. The Australian Police Ministers Council, in the course of discussions about the national legislative framework for investigating criminal offences, including counter-terrorism offences, did in fact ask the Commonwealth to consider introducing a scheme of this kind. The other states and territories that either have or have in train legislation of this kind are Western Australia, Victoria, Queensland and the Northern Territory—in addition to New South Wales.

Senator LUDWIG—Is there anything you wanted to add, Mr Lawler?

Federal Agent Lawler—No.

Senator LUDWIG—The provision where the ACC can exclude a lawyer—I am sure you are familiar with that provision—seems to say that item 31 will give a new power to examiners to exclude legal practitioners from proceedings where the examiner believes on reasonable grounds that to do so would reasonably be expected to prejudice the effectiveness of the special ACC operation/investigation to which the examination relates.

There is that power in other parts of the legislation for exclusion of legal practitioners, but it does not seem to suggest that there should be a break at that point or a cessation of questioning if a legal representative is informed or advised that they cannot continue and that reasonable opportunity should given for the person being questioned to seek another legal practitioner. It seems to me that, in the way it is written, it could continue questioning notwithstanding that they have excluded the legal practitioner. Is that the policy intent?

Dr Alderson—Item 31 of the bill—in subsection (2) of section 25B on page 132—provides that, a legal practitioner having been excluded under subsection (1), 'the examiner may adjourn the examination'—

Senator LUDWIG—Yes, but it says 'may adjourn'. If they choose not to adjourn, the questioning continues without legal representation.

Dr Alderson—That is correct.

Senator LUDWIG—Why would you allow that to happen? Wouldn't it be fundamental that the person being questioned should have legal representation? You have granted that the examiner at that point can continue. You have said that they can exclude them if they do not want that particular representation and you have then said that questions can continue. It seems inconsistent with the overall scheme of how the examiners are supposed to work.

Dr Alderson—I believe that the purpose of the provision in framing it as a discretion is to prevent a person from frustrating an examination through either the delay in the appearance of another legal practitioner or perhaps having a number of practitioners whose presence might in fact undermine the ability to conduct the examination. That is the reason that it has been framed as a discretion.

Senator LUDWIG—So that takes precedence over the right of a person to have legal representation whilst being examined, in your view?

Dr Alderson—My view is not the issue, Senator.

Senator LUDWIG—I am sorry; in the Attorney-General's view?

Dr Alderson—That is the premise on which the provision has been framed—that it is necessary, in order to prevent the possibility of frustration of an examination, to allow for that possibility for continuation without the presence of a legal practitioner.

Senator LUDWIG—Surely you can think of another way around it? You could adjourn and ensure that the person can find a legal representative or, if not, you could appoint one on their behalf. Other legislation I think alludes to those types of solutions. Why haven't you included those rather than simply just leaving a discretion which might leave the person without legal representation, in quite critical areas where they are being examined on the evidence they might provide—especially given the nature of this, where they cannot refuse to answer a question without suffering a severe penalty? Once you have excluded the legal

representative right at the start, the questions might continue and the person might rightly or wrongly exercise their right to silence but find that that has tipped them into another world of hurt and they have not had the opportunity of a legal adviser to advise them of the position they are in. You have then secured a prosecution, I would say, a bit unfairly.

Dr Alderson—Firstly, the premise of the provision is that there are some practical circumstances where the only way in which to allow the effectiveness of the examination is to be able to do that, although I think the existence of subsection (2) gives a clear signal to the ACC as to the normal course of events. Secondly, in terms of the concern you raise about what might follow from that, to the extent that a person being questioned without the presence of a legal representative that they wanted to have present raises some question about the probity of the evidence that was provided, that could ultimately be taken—

Senator LUDWIG—They might just refuse to answer a question until they do get a legal representative. However, the questioning continues and the next question is put and, if they do not answer it, they then are clearly in breach. It happens as quickly as that. In terms of the A-G, you say that use of the special power is a sufficient protection for that person.

Dr Alderson—The other protection is that, if there is some question about the probity of the resulting evidence given in the absence of a legal practitioner, that question could be tested when it comes to the evidence in an ultimate criminal proceeding.

Senator LUDWIG—That seems highly unsatisfactory to me.

Senator TROOD—I want to ask about the search warrants. I am grateful to you, Deputy Commissioner, for your remarks about the search warrants because I think they have provided us with some clearer understanding as to why these search warrants are necessary. I assume that the Australian Federal Police often or largely are expected to be the executing agency. Is that right?

Federal Agent Lawler—In relation to these powers, I think that would certainly be the case. It is important to note, as I indicated in my opening remarks, the other jurisdictions that have access to such authority. However, these powers are not just restricted to Australia; the UK also has similar legislative provisions and, in fact, in very recent times has been putting them to very worthwhile effect.

Senator TROOD—You have not had powers of this kind. Is that the situation?

Federal Agent Lawler—That is true and it continues to be a debilitating factor. There have been cases where we have been able to achieve the same operational outcome by use of the state powers, but it is not always guaranteed. Sometimes there are cases where both Commonwealth and state law will be breached, particularly with investigating drug matters. I know of at least two or three such instances where the state police powers have been employed. One such case involved the importation of cocaine. There we put a significant amount of cocaine—into the many hundreds of kilograms—into a particular warehouse or storage facility. If that were just investigating Commonwealth offences, we would have been prevented from doing anything except notifying the owner of the storage shed. As it turned out, we were able to go into the storage shed and substitute the cocaine so that, with minimal risk to the community, we then could watch the progress of those drugs and to whom they were subsequently supplied. If it were strictly Commonwealth offences involved, that would

mean we would need to bring the operation to a conclusion earlier than we might otherwise like to.

Senator TROOD—This may be a difficult question to answer, but have there been many other occasions when you think this power would have been useful to the conduct of an operation?

Federal Agent Lawler—My experience is, yes, there would have been. As I indicated in my opening remarks, the further we go with technology—the use of encryption and passwords—such matters will become more and more important, particularly so in the counterterrorism context. I have given evidence about this previously before the committee. We are required there to work in the prevention space. In the context of the recent foiled aviation plot in the UK, covert warrants and covert activity were used. Such warrants and activity enable police to get a much greater understanding of where particular criminal plots and activity might be up to; therefore, they are able to intervene at the appropriate time while still having been able to gather the required evidence to present before a court. In answer to your question, yes, there have been quite a significant number of investigations where this additional capacity of law enforcement could have been put into effect if the powers had been available.

Senator TROOD—Have there been occasions when prosecutions have failed, or have been in danger of failing, because you have not been able to make use of these kinds of powers?

Federal Agent Lawler—This is a very difficult question for me to answer because it is a hypothetical question. The reality is that we have not had the powers, so it is a matter of judgement as to whether the powers could have been applied and, if they were applied, whether they would have been successful and to what extent. My professional judgement from investigating matters of this nature is that this is a very important capacity for Commonwealth law enforcement. It is a capacity that would not have escaped the committee's notice as being very intrusive. In my professional opinion, the issues of privacy are about balancing those needs against the needs more broadly of the community. I think that the reporting and oversight mechanisms in the bill appropriately meet that balance.

Senator TROOD—Dr Alderson, I will ask about a couple of matters in relation to the bill. You said that this was not part of the agreement between the states—that this is a separate activity. Perhaps you could illuminate for us where the various timings came from in relation to six months, for example, for a warrant and in relation to the 30 days. Do they relate to some kind of international standards you have been looking at or do they bounce creatively from a civil servant's view of what is needed?

Dr Alderson—They come, principally, from our consultations with the AFP and, in some cases, other agencies about the minimum necessary to meet the need. This is not an area where we have a particular model to draw upon. To my knowledge, those time frames were devised from a process of trying to hypothesise or draw on the practical experience of the AFP of what might be needed and also out of our discussions with New South Wales and other states. I understand that there was a concern on the part of the state and territory police ministers that, particularly in the investigation of counterterrorism offences, there needed to

be a capacity for delayed notification of search warrants, so they had impressed upon the Commonwealth the importance of bringing these into effect. I think their practical experience is factored in as well. To my knowledge, unlike some of the other areas of this bill, there is no external or published benchmark to refer to.

Senator TROOD—I thought you said that New South Wales had these kinds of provisions already. Are they similar in relation to the timings used—30 days, 66 months, for example?

Ms Cockshutt—We could probably provide the committee with a list of the legislation for each of the states of Western Australia, Northern Territory, New South Wales and Victoria. We looked at all that legislation when we devised this scheme and we consulted the states and the AFP when we determined the time frames. I am not entirely clear about which acts and time frames we followed, so I will take that on notice and get back to you on that.

Dr Alderson—Some jurisdictions have just gone for no notification, so there is no time limit. For delayed notification I believe we have gone for a longer time limit than the other jurisdictions, but we will confirm that.

Senator TROOD—I was looking at the provisions in relation to remote application. I can see the need for that. These are the provisions at 3SF. They refer to the circumstances in which a remote application might be needed. I would like you to clarify for me the situation regarding an affidavit which has material information in it for the issuing of a certificate. It is not clear from these provisions that, in the end, an affidavit is actually required for a remote application. Perhaps another provision of the bill actually makes that clear. While 3SF(2) says that, if an affidavit has been prepared, the applicant must transmit a copy of the affidavit, it does not actually make it clear that an affidavit is required in relation to a remote application. Since there are material pieces of information that are required in the affidavit, it seems to me rather important that that affidavit should eventually be sworn and be provided. If you can address that question now, that would be helpful, but if you can to take it on notice I would be grateful.

Dr Alderson—I think the answer to your question is provided in section 3SCE(5)(b) of the bill. It is possible to proceed to have the decision to issue the warrant made without the affidavit being in front of the eligible officer, but it must be sent, after the event, to the issuing officer within 72 hours if the decision has had to be made without the affidavit being in front of the eligible issuing officer. So, if there were some irregularity, the eligible officer could pick that up. So, if it is not possible before the event, there is a requirement to provide it after the event. These provisions, I think, are substantively identical to the rules that apply on remote application for search warrants generally under the existing Crimes Act provisions.

Senator TROOD—I see. The longest period for which a warrant may be extended is 18 months. Is that right, Dr Alderson? This provision is at section 3SS(5), as I understand it.

Dr Alderson—I think the way that works is that 18 months is the limit unless two prerequisites are met: the minister in writing approves it and exceptional circumstances are present.

Senator TROOD—What would the exceptional circumstances be?

Dr Alderson—I will offer a hypothesis and then see if the AFP, from their experience, can offer a more concrete example. On a conceptual level, it would be a circumstance in which perhaps there has been some investigation into, say, a terrorist group but in fact the terrorist activity at the end of six months is still continuing—that is, the action to shut it down is continuing or it has not been possible to bring to justice all of those involved and there is concern that, when you get to the six-month mark, if the fact of the executing on the warrant is revealed, it might have the effect of tipping off a terrorist organisation and bringing about a terrorist attack. I will see if the AFP want to add to that.

Federal Agent Lawler—I do not think there is much to add to that. That could be a likely scenario. Just what the exceptional circumstances might be would vary, but I think one of the key ingredients would be that the particular group of either organised criminals or terrorists posed a serious threat to the country and that the investigation of those persons was ongoing—there was an ongoing interest.

Senator TROOD—I agree that it would have to be a serious threat. I would be a bit troubled if the threat was so profound that it was going to take 18 months to investigate the matter—that you could afford to delay it as long as 18 months before there was a need for action.

Federal Agent Lawler—We do have cases where we have serious concerns about such matters that sometimes go for longer than 18 months—sometimes considerably longer. There are examples and circumstances where that occurs.

Senator TROOD—What kind of criminal activity would that involve?

Federal Agent Lawler—It could involve serious money laundering and/or narcotics importations. Sometimes these syndicates work on large scale importations; in actual fact, they might do one importation every few years. It is a matter of gathering intelligence, gathering evidence, in relation to these syndicates. I would need to further examine the specific circumstances. There are many examples of investigation that has gone on within the AFP for years. Counter-terrorism would be another area where we have ongoing interest in particular persons.

Federal Agent Prendergast—In terms of counter-terrorism investigations, and indeed other serious criminal investigations, there is a risk in acting prematurely to disrupt activity. What this power gives us is the ability to continue to identify associations and elements of criminal syndicates, particularly terrorist cells, which may pose an ongoing threat if we were to act hastily in disrupting them.

Senator TROOD—Intuitively I can see the case for this. In fact, I am rather surprised that the power does not already exist in relation to some of these matters. What I am concerned about is the time delay and the period of time before which, as the deputy commissioner said, a substantial intrusion into someone's privacy is notified. It is not so much the principle; again, it is a matter of the checks and balances and making sure we have the balance between the interests of prosecuting an offence and ensuring that people's rights, so far as they deserve to be respected, are respected by the legislation.

Federal Agent Lawler—I endorse your comments. What we are looking at here are the very small number of cases where it would not, in my professional opinion, be prudent to

have a definitive period but to allow flexibility, with appropriate oversight, in cases where such notification within an earlier time frame would either frustrate or disrupt ongoing police investigations. Going to the minister with such exceptional circumstances is one way of effecting that oversight.

Dr Alderson—The other thing we can add is that these situations often create a dilemma. On the one hand there is the operational effect but, in some exceptional circumstances, notification within six months might cause a problem. On the other hand, there is the concern that you do not want that power to be abused or used in inappropriate circumstances and for people's liberties and privacy to be unduly affected. One of the mechanisms that seeks to reconcile those and arrive at a solution that is satisfactory on both fronts is the significant role the Ombudsman is given. The premise of this legislation is not merely that because of exceptional circumstances the AFP needs this power, so trust the AFP; it is, in addition, creating a strong mechanism for oversight by the Ombudsman so that if there are any anomalies or weaknesses in the way this is being handled they can come to light.

Senator TROOD—I think I will leave it there.

CHAIR—Okay. We will go to Senator Kirk, then Senator Mason to conclude.

Senator KIRK—I want to go to the question of the threshold for offences to which this legislation is going to apply. As I understand it, this bill will repeal the whole list of offences that currently constitute a serious crime which will then be replaced by a list that will be proposed by regulation.

Dr Alderson—Not quite, Senator. At the moment it replaces two current tiers with two different tiers. The current tiers are a penalty of three or more years and where it is an offence of the kind that is in that list. The new mechanism will be three years regardless of the subject matter of the offence, plus, as an additional option, the capacity to list other offences—that is, those with penalties of less than three years—by regulation.

Senator KIRK—Thank you. Given that this change is coming about, one can assume from that that there are currently some offences that are not covered by either of those two lists, the way you described it, and the view is that they ought to be covered. Could you outline for us those categories of offences that are regarded as not currently being covered by the existing legislation and that this legislation will take in.

Dr Alderson—The issue is not principally that there are identified items lacking from the list; rather, it is two things. Firstly, the existence of the list leaves open the possibility for debate in court about whether or not a particular offence falls within the description of that list. Instead of going to the heart of criminality and prosecuting somebody for a crime, it provides the potential to get a debate about, for example, 'Was this really a pornography offence?' or 'Does it fall within this definition?' So there is a concern that, while you have that listing approach, you are opening up the scope for collateral challenge by a person who has in truth committed the offence.

The second consideration was that it is desirable. The Crime Commission is sometimes in a situation where it has a single operation that involves Commonwealth, state and territory offences. There was a concern that, under the law as it stands, the ACC in investigating matters, in pursuing operations, had to prepare totally different material depending on what

jurisdiction it was in, or that their officers might become confused about what their powers were across different borders or with different offences. So, if Australia really is one country, we should be able to have one investigation into a serious crime. The idea was to iron out the differences between the jurisdictions.

When we looked at what the parliaments of the states had chosen to do, we saw that they had in fact generally gone for much lower thresholds. In New South Wales, I think, a controlled operation can be used to investigate any offence, full stop; there is no limitation at all. So, in trying to find common ground, keeping the threshold—subject to the regulations—at three years and removing the list of categories was desirable.

The final, general point I would make about removing the list is that, if one thing has kind of marked the development of criminal law in the last five years, it is how rapidly the world is changing and how commonly we need new categories of offence to deal with things like computer crime, terrorism and money laundering that simply did not exist before. In a sense, we do not want law enforcement to end up being stuck if a new form of crime emerges and the legislature has not had an opportunity to respond to it, leaving the investigators with no capacity to deal with that newly emerging crime. So they are all the reasons, quite aside from any specific problem. I will just see if the AFP have any experience vis-a-vis that list that they want to draw attention to.

Federal Agent Lawler—The only point I would make is to take us back in history a little. The very example that Dr Alderson gave about how things change was relevant in 2004 in the context of the new telecommunications offences in the Criminal Code in relation to child pornography. That is one such example where, I understand, there had to be some specific amendments to ensure that controlled operations could be used by law enforcement in those circumstances.

Senator KIRK—You said that in New South Wales this kind of operation can occur for virtually all offences. Effectively, that is what we will have here. If proposed regulations are put in place such that any offence punishable by under three years imprisonment could be the subject of a controlled operation, then the parliament is effectively authorising for that to occur?

Dr Alderson—I would predict not. Firstly, there is a very large number of Commonwealth offences in lots of regulatory legislation which are punishable only by fines, for example. There is no prison term at all, and all of those are excluded. There are quite a lot of offences with only one- or two-year penalty terms, even in the Criminal Code.

One option would have been to say that, really, law enforcement agencies need to be able to form judgements themselves about when they need to use this power and to remove the limit. The idea of the proposed regulations is to make that a transparent process so that the Senate and everybody else will know when offences are being added, and they will be able to question the rationale and to test whether it seems to make sense. I think a three-year threshold plus capacity by regulation is very different from any offence model, because of the transparency it gives to the process of adding additional offences and the opportunity it creates to ask what the rationale is.

In the future it may well be that regulations will be made to deal with changing circumstances, but one of the reasons I think there will not be a lot of regulations or regulations being made every month is that embarking upon one of these operations is a major undertaking for a law enforcement agency. There just is not the incentive to engage in these operations for minor criminal offences.

Senator KIRK—How many of these controlled operations would take place per year and to what sort of offences do they normally relate? As you say, if the maximum penalty is three years imprisonment, I would have thought it unlikely you would undertake a huge number of controlled operations for those types of offences.

Federal Agent Lawler—I had better take that question on notice and find out just how many there were last financial year. That information is available and can be provided to the committee.

Senator KIRK—And would you also include the offences to which the operations relate so that we can get some kind of idea as to whether the majority were for offences that attracted a 10-year imprisonment penalty or a three-year penalty?

Dr Alderson—I believe we can very readily provide that to you. I think that information is in the publicly provided report, so we can provide the link for that to the committee secretariat. I believe that, as a general proposition, the largest use of these operations remains in relation to narcotics trafficking.

Senator LUDWIG—Would the proposed regulation be subject to disallowance?

Dr Alderson—As a legislative instrument yes it would.

Senator MASON—I would like to cover again some of the issues of principle that my colleagues have raised. Dr Alderson, if I get this wrong I am sure you will correct me. What we are talking about here is legislation that will allow controlled operations, and they are covert or overt activities that would normally be unlawful but for which immunity, usually to the police, is given for the purpose of securing evidence of serious criminal offences. Serious criminal offences are all Commonwealth offences punishable by imprisonment for three years or more. We have not really touched on it in the hearing this morning but there are also serious state offences that have a federal aspect. That is right, isn't it?

Dr Alderson—That is correct.

Senator MASON—How many potential offences do you think that would cover, Dr Alderson?

Dr Alderson—If you include state offences with a federal aspect, it would be a very large number.

Senator MASON—Yes, and how many would that be?

Dr Alderson—Across all the states and territories of Australia I would think that, undoubtedly, hundreds would be a low estimate.

Senator MASON—'A low estimate'—I think that is right.

Dr Alderson—In terms of what that means, there need to be a lot of different offences tailored to different forms of criminal conduct.

Senator MASON—Let me get to that. My colleague Senator Ludwig touched on justification in principle before. In the explanatory memorandum, the minister says, on page 1, I think:

The intent of this model legislation is to harmonise, as closely as possible, the controlled operations, assumed identities and protection of witness identity regimes across Australia.

So, harmonisation is a justification. I think the committee accepts that—or it has been posited as that. But usually with the extension of police powers—and I mentioned this to previous witnesses—you have to justify the extent in relation to particular categories of offences. Are you still with me? Let me go backwards.

Over the last, say, 20 years, the Commonwealth has gathered increased powers in various areas, such as—I wrote these down before—organised crime, drugs, tax, telecommunications and terrorism. In relation to every one of those areas, justification was made on the basis that there might be some operational difficulties. We have heard that, Madam Chair, over the years, particularly in recent years with regard to terrorism, and the committee accepts that. There are operational difficulties that necessitate certain additional police powers. When I was prosecuting a long time ago—you may remember this, Mr Lawler—the Commonwealth brought in powers in relation to prosecuting drugs offenders. Again, it was necessary, and the police and the executive justified it—either, as I said, because of difficulties of proof or, secondly, operational necessity.

Nowhere in the explanatory memoranda—and, with the greatest respect, Deputy Commissioner, even in your opening statement you barely touched on this—is the justification there. Let me give an example, going through the Crimes Act. How do you justify this huge increase in powers—or the extension of offences relating to it? For example, section 29 of the Commonwealth Crimes Act deals with destroying or damaging Commonwealth property. It states:

... Any person who intentionally destroys or damages any property, whether real or personal, belonging to the Commonwealth or to any public authority under the Commonwealth, shall be guilty of an offence.

Penalty: Imprisonment for 10 years.

So, if I turn around and graffiti the wall behind me, Dr Alderson, I would fall under the umbrella of this act, wouldn't I?

Dr Alderson—I believe the example you have given would fall within the existing provisions.

Senator MASON—That is not a defence, Dr Alderson—that is because it is 10 years, but let us say it was less. I will just pick one out quickly. How do you justify those police powers in relation to that sort of offence?

Dr Alderson—The answer is—

Senator MASON—Defences of incrementalism will not save you, Dr Alderson. How do you justify?

Dr Alderson—There are two parts to the answer. Firstly, I do not think I would agree with the proposition, in terms of controlled operations, that this is a massive extension of powers.

We are going from a three-year penalty plus a list to a three-year penalty plus any regulations to be justified case by case. Secondly, it generally has not been the case that enforcement powers are advanced in relation to particular categories of offence. If you look at search warrants, for instance—

Senator MASON—Dr Alderson, I am older than you. Mr Lawler will remember. I have been around for 20 years in this field. I was a bureaucrat in those days. Twenty years ago, every time the Commonwealth wanted greater powers in particular areas it had to justify why in relation to a certain offence—let us say drugs, tax or whatever—it needed those powers. Why shouldn't that test apply today?

Dr Alderson—Firstly, I think the controlled operations provisions—

Senator MASON—Why shouldn't that test apply today—

CHAIR—Senator Mason, could you let Dr Alderson finish, please.

Dr Alderson—I think the controlled operations provisions are possibly the most heavily justified set of provisions in the history of Commonwealth legislation. They have been before this parliament in different forms on five occasions. In terms of the justification—

Senator MASON—You have not justified it to me, Dr Alderson. Let me ask you again: why shouldn't that test apply to these provisions?

Dr Alderson—The justification I would offer for the change is the one that I provided to Senator Kirk. We could sit down with the AFP and think about what particular offences you would use this for and we could attempt in some way to list them all, either by categories or by listing the particular offences. The weakness with that approach would be, firstly, that there might be situations where, in attempting to do policy by imagining and hypothesising, you miss practical situations that will emerge. Secondly—

Senator MASON—So you cover everything because it is convenient? Is that right?

Dr Alderson—Because the other safeguards are there. Secondly, as soon as you start going down the listing approach, what you are inviting is debate in court about whether or not this is within this definition of child pornography or damage to property. Thirdly, it allows for change in circumstances. You could find offences with penalties of more than three years and you would say, 'Why would you do an operation for this particular kind of offence,' and that would be a valid question. But in practical terms the premise is that a better safeguard is to have the mechanisms for reporting to the Ombudsman, the minister and parliament so they can look at whether this power is being used appropriately within the threshold that exists of three years. That is a better safeguard of civil liberties and due process than attempting to exhaustively list all of the offences.

Senator MASON—I am not saying that Mr Lawler or the AFP would, for example, use those powers if I were to graffiti the wall. Of course I am not suggesting that. The point is that the powers apply. When you argue, 'We cannot think of all practical situations where we might need the power', what you are arguing is that there is no limit to the ambit of Commonwealth power in this context because you can never foresee all of the areas. When will the Commonwealth's desire to grab more and more law enforcement power ever cease? It will not, according to your argument.

Dr Alderson—I do not believe the issue is one of desire to grab power; it is one of attempting to ensure that the AFP and other agencies have the powers they need to investigate offences. It is not that there is an unlimited number of—

Senator MASON—That is not actually the test, is it? The test is not what they need. It has to be balanced against civil liberties, doesn't it?

Dr Alderson—Indeed, but the opening premise for any extension to powers—

Senator MASON—Hold on—the executive has to justify it to this committee. The onus is on you or on the executive to justify why you need the powers. It is not for the committee or the citizen to show you why you don't need them, because you may. The onus is on you. You have to show me why the AFP needs those powers in relation to a graffiti offence that I commit on the wall here. That is your duty, not mine. Now do it.

Dr Alderson—But, Senator, that is what I have attempted to discharge. You may or may not agree with the reasoning that is being offered. I have attempted to provide the reasoning behind the framing of the offences in this way. It is not that there is an unlimited number of offences that may require controlled operations as an appropriate form of investigation; it is that any attempt to create a specific list is likely to be fraught with the problems that I have mentioned, especially as Australia is one country and crime does not respect jurisdictional boundaries. This legislation does empower the AFP and other federal agencies to investigate state offences with a federal aspect—a point that you made.

Senator MASON—I understand that.

Dr Alderson—Therefore, an attempt to list all of the offences in each of eight states' and territories' laws would be fraught with further difficulties. In theory one could make a pretty good list, but the attempt to go down the route of a list rather than saying that three years plus safeguards is the right approach would face the difficulties that I have mentioned.

Senator MASON—So it is administrative convenience which is the driving force here?

Dr Alderson—It is not about convenience. Even if you had a large group of public servants working night and day, you would run into the problem that you cannot rule out the possibility that the changing patterns of crime and new criminal threats will give rise to a situation that a list does not catch.

Senator MASON—But, Dr Alderson, this is the problem. On the basis of that prognosis and your argument—and, indeed, Mr Lawler touched on this in his opening statement and comments before—there is no conceptual limit to police powers, and there is no way we as a parliamentary committee can question that. You can simply say: 'Well, we need the powers. It's too difficult to list. Trust us.' You see, Dr Alderson, the problem is that Mr Lawler can sit there and say, 'Look, we need to deter crime,' and I agree with you. But, Mr Lawler, there is no conceptual or intellectual limit to the powers that you need to deter crime, is there? You could have all the powers in the world and still say, 'We need a little bit more to deter crime.' You have not come up with a limit, a point at which we can be satisfied that this field is covered. You keep saying it changes—and I accept that the field does change—but we have to trust you, Dr Alderson: is that enough?

Dr Alderson—I have argued that it is not a question of the Senate or this committee trusting anybody, because of the other safeguards. In addition, I would like to make this point. You disputed my proposition on categories of offence. I would draw your attention to the fact that none of the categories of powers—arrest powers, search warrant powers, telecommunications interception powers, forensic procedures powers—are listed by type of offence. They are all delimited by the penalty applicable to the offence. This follows that same approach.

Senator MASON—I understand that, but it comes down to this: controlled operations, those covert or overt activities that would normally be unlawful—but for which immunity, usually given to the police, is provided for the purpose of securing evidence of serious criminal offences—now include potentially thousands of offences, including graffitiing that wall over there. That is right, isn't it? Isn't it?

Dr Alderson—The example you give is one that is already covered under the existing provisions—

Senator MASON—Sure, but it is now even more extensive. Correct?

Dr Alderson—The provisions give the potential to investigate an array of offences carrying a penalty of three years or more—in which there would be a large number of individual offences—because of the possibility that it might be an appropriate investigative technique, and subject to the accountability mechanisms with the Ombudsman, the minister and the parliament.

Senator MASON—Yes, but what I said is correct, isn't it?

Dr Alderson—There are—

Senator MASON—Thousands of offences are now potentially captured by the provisions. You suggested before there would be hundreds and that was conservative—you said that—including graffitiing that wall. That is right, isn't it?

Dr Alderson—As a matter of law—

Senator MASON—As a matter of principle, yes or no?

Dr Alderson—there are a large number of offences already covered and that are covered under the—

Senator MASON—Answer the question yes or no.

CHAIR—You cannot instruct the officer as to how to answer the question, Senator Mason; neither can I.

Senator MASON—I think I have made that point, Dr Alderson. This is the problem, all right? As long as you understand that.

CHAIR—I think the point has been made, Senator Mason. There are a number of issues that have been taken as questions on notice, particularly by the department. I know that I fulfil the role of a broken record in this regard, but the committee is examining five pieces of legislation in the next 10 days, so we would be very grateful for the department's assistance in returning those responses as soon as possible—most particularly, Dr Alderson, the one in relation to the delegations for the Australian Crime Commission—

Dr Alderson—Indeed.

CHAIR—in case we need to pursue that further. I would like to thank you, Deputy Commissioner, and your officers, as well as Dr Alderson and Ms Cockshutt, for appearing today, and all other witnesses who have given evidence to the committee today. I declare this meeting of the Standing Committee on Legal and Constitutional Affairs adjourned.

Committee adjourned at 1.13 pm