Parliament of the Commonwealth of Australia

STREET LEGAL

THE INVOLVEMENT OF THE NATIONAL CRIME AUTHORITY IN CONTROLLED OPERATIONS

A report by the Parliamentary Joint Committee on the National Crime Authority

DECEMBER 1999

ISBN 0 642 71038 4

This document was produced from camera ready copy and printed by the Department of the Senate Printing Unit, Parliament House, Canberra.

MEMBERSHIP OF COMMITTEE

Mr Peter Nugent MP, Chairman

Senator George Campbell, Deputy Chairman

Senator Kay Denman

Hon Graham Edwards, MP

Senator Jeannie Ferris

Mr Gary Hardgrave, MP

Hon Duncan Kerr, MP

Senator Julian McGauran

Hon Alexander Somlyay, MP

Senator Natasha Stott Despoja

Secretariat:

Mr Michael McLean, Committee Secretary
Ms Yvonne Marsh, Inquiry Secretary
Ms Debbie McMahon, Executive Assistant

Parliament House
CANBERRA ACT 2600

DUTIES OF THE COMMITTEE

The *National Crime Authority Act 1984* provides:

55. (1) The duties of the Committee are:

(a) to monitor and to review the performance by the Authority of its functions;

(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(c) to examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of any such annual report;

(d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority; and

(e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

(2) Nothing in this Part authorises the Committee:

(a) to investigate a matter relating to a relevant criminal activity; or

(b) to reconsider the findings of the Authority in relation to a particular investigation.

TABLE OF CONTENTS

RECOMMENDATIONS

Recommendation 1: That the Government recommend to the Standing Committee of Attorneys-General that uniform controlled operations legislation be enacted by the Commonwealth, States and Territories in terms similar to the *Law Enforcement (Controlled Operations) Act 1997 (NSW)* subject to the foreshadowed amendments in the Finlay Review Report and the further recommendations in this report. (Paragraph 3.43)

Recommendation 2: That, if uniform controlled operations legislation cannot be secured then:

(a) the Government call for those States and Territories that do not have controlled operations legislation, to enact such legislation as is necessary for the NCA to authorise and conduct controlled operations in each jurisdiction;

(b) the Government call for those States and Territories that allow officers of a State or Territory agency (eg police service) to authorise controlled operations to amend their legislation to allow NCA members to authorise their own controlled operations. (Paragraph 3.43)

Recommendation 3: That a two tiered approval process be established for the authorisation of controlled operations under Part 1AB of the *Crimes Act 1914*:

(i) Applications for minor controlled operations should be subject to an in-house approval regime. That is, a law enforcement officer in charge of a controlled operation may apply to the Commissioner, a Deputy Commissioner or an Assistant Commissioner of the AFP or to a member of the NCA for a certificate authorising a controlled operation. Minor controlled operations are to be defined as short-term investigations (not exceeding one month's duration) involving minimal contact between a covert operative and a suspect or suspects, where law enforcement officers are required to engage in activities involving unlawfulness of a technical nature. If a minor controlled operation exceeds one month's duration, it should be re-classified as a longer-term operation and subject to the external approval process set out in paragraph (ii).

(ii) Applications for longer-term controlled operations should be subject to an external approval process. The function of determining applications for longer-term controlled operations should be transferred to the office of the Inspector-General of the NCA as described in recommendation 19 of the Committee's 1998 report *Third Evaluation of the National Crime Authority*. Should the Government not accede to the establishment of an Inspector-General for the NCA, then the power to approve longer-term controlled operations should be conferred on such other independent authority as the Government sees fit, such as the AAT.

Nothing in this recommendation should affect the ability of law enforcement agencies to make urgent applications for a certificate authorising a controlled operation in accordance with section 15L of Part 1AB of the *Crimes Act 1914*. Urgent applications should be able to be made in-house either in person, by telephone or by any other means of communication in respect of both minor and longer-term controlled operations. In particular, the requirements in sections 15L(5) and (6) for the follow-up provision of a written application and certificate in relation to urgent applications should be retained. These written records will be subject to the stringent accountability processes outlined in Recommendation 10. (Paragraph 4.74)

Recommendation 4: That law enforcement agencies devise appropriate training and education courses in relation to the operations of the controlled operations legislative regime. (Paragraph 4.74)

Recommendation 5: That those States and Territories that have enacted specific controlled operations legislation should make appropriate amendments to allow the NCA Chairperson and Members to authorise controlled operations certificates. (Paragraph 4.77)

Recommendation 6: That the standard of satisfaction required by the authorising officer in relation to the preconditions in section 15M of Part 1AB of the *Crimes Act 1914* should be expressed in such terms as 'reasonably satisfied' or 'satisfied on reasonable grounds'. (Paragraph 4.83)

Recommendation 7: That the 'no entrapment' test in section 15M(b) of Part 1AB of the *Crimes Act 1914* be enunciated with greater clarity. (Paragraph 4.86)

Recommendation 8: That in relation to the precondition in section 15M(d) of Part 1AB of the *Crimes Act 1914* the paragraph be reworded to better reflect the need for operational flexibility by relevant law enforcement agencies. (Paragraph 4.88)

Recommendation 9: That section 15M of Part 1AB of the *Crimes Act 1914* be amended to adopt similar conditions to those contained in paragraphs 6(3)(b) and (c) of the *Law Enforcement (Controlled Operations) Act 1997 (NSW)* that the nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation and the proposed controlled activities. (Paragraph 4.91)

Recommendation 10: That there be an appropriate system of accountability provided within the legislative regime of controlled operations involving oversight by the Commonwealth Ombudsman. The oversight should be in identical terms to that required of the NSW Ombudsman under the *Law Enforcement (Controlled Operations) Act 1997 (NSW)*. (Paragraph 5.53)

Recommendation 11: In order that the Parliament be appropriately involved in discharging its responsibility for scrutiny under the legislation there should be a requirement placed on the Ombudsman to annually brief the Parliamentary Joint Committee on the National Crime Authority on a confidential basis in relation to the Authority's involvement in controlled operations. (Paragraph 5.53)

Recommendation 12: That the scope of the definition of 'controlled operations' in Part 1AB of the *Crimes Act 1914* should be widened to refer to operations carried out for the

purpose of obtaining evidence that may lead to the prosecution of a person for theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining a financial benefit by vice engaged in by others, extortion, violence, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, dealings or illegal importation or exportation of fauna into or out of Australia, money laundering and people trafficking. (Paragraph 6.50)

Recommendation 13: (i) That the immunity conferred on covert operatives should be widened commensurately with the scope of controlled operations to confer immunity from criminal liability on any person authorised to participate in a controlled operation in terms of sections 16 of the *Law Enforcement (Controlled Operations) Act 1997 (NSW).* As prescribed in section 16 of that Act, immunity should only be available where the unlawful activity engaged in has been authorised by and is engaged in in accordance with the Authority for the operation. (Paragraph 6.50)

(ii) The Commonwealth Act should be amended to include a provision in terms of section 19 of the NSW Act to immune covert operatives from civil liability. As prescribed in section 19 of that Act, immunity from civil liability should only be available where the conduct engaged in was in good faith and for the purpose of executing the provisions of the Act regulating controlled operations. (Paragraph 6.50)

(iii) The Commonwealth Act should also be amended to include a provision expressly acknowledging that where an individual suffers loss or injury as a result of a controlled operation an action can be maintained against the State for compensation in respect of that loss or injury. (Paragraph 6.50)

Recommendation 14: That the timeframe for which an authority to conduct a controlled operation may remain in force be extended to three months. If an investigation exceeds that timeframe, law enforcement agencies must apply for a new certificate in respect of the same investigation. (Paragraph 6.63)

Recommendation 15: That Part 1AB of the *Crimes Act 1914* be amended to include a provision to allow for the retrospective authorisation of controlled operations only where the life or safety of a covert operative is at risk, in terms of section 14 of the *Law Enforcement (Controlled Operations) Act 1997.* In particular, the amendment should include the conditions that the relevant unlawful conduct was engaged in only for the purpose of protecting an operative or other person from death or serious injury and that the application must be made within 24 hours of the unlawful conduct having been engaged in. (Paragraph 6.85)

Recommendation 16: That Part 1AB of the *Crimes Act 1914* be amended to include a provision to authorise the participation of civilians in controlled operations. The term 'civilians' should be defined so as to exclude those persons who are police informants or who become involved in a controlled operation by reason of their having knowledge, position or influence as a consequence of their own involvement in criminal activities. The position of that class of civilians should remain subject to the current system of retrospective indemnities and assistance at the time of sentencing that operates according to the discretion of the Director of Public Prosecutions. (Paragraph 6.140)

ACRONYMS

AAT	Administrative Appeals Tribunal
ACCL	Australian Council for Civil Liberties
ACS	Australian Customs Service
AFP	Australian Federal Police
AFPA	Australian Federal Police Association
AUSTRAC	Australian Transaction Reports and Analysis Centre
CJC	Criminal Justice Commission (Queensland)
DPP	Director of Public Prosecutions
FATF	Financial Action Task Force
ICAC	Independent Commission Against Corruption (NSW)
NCA	National Crime Authority
NCA Act	*National Crime Authority Act 1984*
NSWCCL	New South Wales Council for Civil Liberties
NSWCC	New South Wales Crime Commission
PIM	Public Interest Monitor (Queensland)
PFA	Police Federation of Australia
QCC	Queensland Crime Commission
TI Act	*Telecommunications (Interception) Act 1979*

PREFACE

Terms of reference

On 25 March 1999 the Committee resolved to conduct an inquiry into the involvement of the National Crime Authority (NCA) in controlled operations with particular reference to:

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

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

(c) the civil liberties implications; and

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

The inquiry is being conducted under paragraph 55(1)(d) of the *National Crime Authority Act 1984* which provides the Committee with authority to examine the environment in which the NCA operates with a view to reporting to both Houses of the Parliament any reforms it believes should be made to the NCA's functions, structure, powers and procedures.

The inquiry

On 3 April 1999 the Committee advertised in the national media to invite submissions from interested persons or organisations. The Committee also wrote direct to each Commonwealth, State and Territory minister with responsibility for policing matters and to the chief executive officers of all Commonwealth, State and Territory law enforcement agencies to draw the inquiry to their attention and to invite their input.

The Committee received some 17 submissions, details of which are shown in Appendix 1.

The Committee held four public hearings: in Brisbane on 17 August 1999, in Sydney on 18 August 1999 and in Canberra on 23 and 27 August 1999. Details of the witnesses who appeared at these hearings are shown in Appendix 2. Supplementary documentary material was also tabled during the hearings, details of which are given in Appendix 3. Valuable information was also provided to the Committee by several witnesses at *in camera* hearings, in order to fully brief the Committee while ensuring that matters of operational sensitivity were not publicly disclosed.

In the course of its inquiry the Committee's attention was drawn to the National Guidelines for Deployment of Police Undercover Personnel, which have been adopted by every police service in Australia. As the Committee understands them, the guidelines deal with the public interest considerations in relation to the deployment of undercover personnel, as well as addressing the issues of the suitability, training, safety and well-being of officers deployed as

covert operatives. Acting on advice that the National Guidelines would be beneficial to its inquiry, the Committee formally requested a copy from the Australasia and South West Pacific Region Police Commissioners Conference, which had endorsed the Guidelines in early 1998. Because the Police Commissioners failed to unanimously agree to the Committee's access to the document, the request was denied. At a late stage in its inquiry the Australian Federal Police provided the Committee with the Commissioners' consent with a brief overview of the guidelines, but on a confidential basis only.

The matter of the use of the coercive powers of a committee of the Commonwealth Parliament in such circumstances has been the subject of longstanding debate but without clear resolution. The Committee has no wish to engage in confrontation with the States and Territories based on arguments about the federal nature of the Australian Constitution. Indeed the Committee acknowledges the significant contribution made voluntarily to its inquiry by representatives of several State Government agencies. The Committee would, however, expect that access to the full National Guidelines would have been of benefit to its inquiry, even if that access had been on a confidential basis if that was a required condition of the Commissioners. The Committee records its disappointment that it has had to proceed to report on this important inquiry without access to the Guidelines.

The report

This report is in 6 chapters. In Chapter 1 the Committee examines the historical development of controlled operations procedures in Australian law enforcement. It also describes the content of the controlled operations legislation which has been introduced in various Australian jurisdictions and summarises the extent and manner of the NCA's involvement in such activity.

It was the Committee's original intention to examine the NCA's involvement in controlled operations only. It had not been the Committee's expectation to revisit the concept of controlled operations legislation from first principles, that debate having been extensively undertaken in the 1995 to 1997 period. Nonetheless, several witnesses raised their fundamental concerns about the merits of controlled operations legislation. Therefore, the Committee has included details of that discussion in Chapter 2.

In Chapter 3 the Committee summarises the impact of the current legislative regime on the operations of the NCA. In its deliberations, the Committee came to the conclusion that the NCA is adversely affected by current arrangements for the conduct of controlled operations and has made appropriate recommendations in this respect. Therefore in the final three chapters the Committee discusses the specific measures it believes are necessary for the proper future involvement of the NCA in controlled operations.

Acknowledgments

The Committee wishes to express its appreciation to witnesses to its inquiry. Their frankness in most cases in an area of some sensitivity has made a considerable contribution to the Committee's understanding of the issues and has enabled the Committee to bring forward a set of recommendations which, in its view, will implement a normative model for the conduct and regulation of controlled operations in the future.

The Committee does wish to express its concern, however, that the representatives of the Commonwealth Attorney-General's Department who appeared before it were unable to be of any assistance on questions of particular importance to the inquiry. While the Committee

notes that their reticence may have been due to their view that the Department did not have a fully developed opinion which they could confidently express in public, the Committee would nonetheless have appreciated it if they had made some attempt to outline the relevant legal and practical considerations or to discuss the relative merits of alternative options for reform. Advice to the effect that they were 'looking at the matter' does not help the Committee to progress its inquiry process.

The Committee also records its appreciation of the efforts of the officers of the secretariat who assisted it with the conduct of the inquiry and with the drafting of this report.

Peter Nugent MP
Chair

CHAPTER 1

THE DEVELOPMENT OF CONTROLLED OPERATIONS PROCEDURES IN AUSTRALIAN LAW ENFORCEMENT

What is a controlled operation?

1.1 The NCA describes a controlled operation as 'an investigative method in which a law enforcement agency becomes involved in specific illegal activity, involving the participation of an informant, agent or an undercover police officer'. The objectives of controlled operations are usually to enable offenders and their associates to be identified, evidence to be obtained, prosecutions subsequently brought and the criminal activity to be frustrated.[1] Controlled operations are a well used tool in law enforcement:

> Everyone is aware that undercover agents (also known as covert police operatives) frequently make "controlled" purchases of drugs from persons engaged in unlawful drug-related activity. Law enforcement agencies the world over have long used such investigative techniques as a means of obtaining evidence of criminal offences.[2]

1.2 In legislative terms, various definitions have been adopted in those jurisdictions in Australia that have introduced controlled operations legislation. The significance of those definitions is that they limit to differing degrees the scope for the authorisation of controlled operations. The broadest definition is that contained in New South Wales legislation where the relevant definitions combine to provide that a controlled operation is:

> ... an operation conducted for the purpose of obtaining evidence of criminal activity or corrupt conduct, arresting any persons involved in such activity or conduct or frustrating such activity or conduct, which involves or may involve that which, but for the instant Act, would be unlawful.[3]

South Australia also has a broad-based definition, linking controlled operations to the investigation of serious criminal activity.[4]

1.3 Unlike its NSW and SA counterparts, the definition in the relevant Commonwealth legislation is narrow. The definition is contained in section 15H of the *Crimes Amendment (Controlled Operations) Act 1996* which inserted a new part 1AB into the *Crimes Act 1914*. Under section 15H, the concept of a controlled operation is tied to the commission of

---

1 National Crime Authority, Submission volume, p. 88

2 Criminal Justice Commission, Submission volume, p. 43

3 *Law Enforcement (Controlled Operations) Act 1995 (NSW)*, section 3, definitions of "controlled operation" and "controlled activity"

4 *Criminal Law (Undercover Operations) Act 1995 (SA)*, section 2

offences against section 233B of the *Customs Act 1901*. This means that controlled operations can only be authorised in relation to the investigation of offences involving the importation of narcotics. The other two elements of the definition are that the operation must involve law enforcement officers and may involve a law enforcement officer engaging in conduct that would, but for the Act, constitute a narcotic goods offence.[5]

1.4 Covert operations have been a legitimate and common policing method in relation to the investigation of a wide range of offences. Historically, however, such operations were conducted in the absence of any legislative approval. Two important consequences flowed from that. Firstly, the evidence obtained as a result of those operations was subject to the legal concept of the exercise of judicial discretion to exclude evidence on the grounds of public interest at any subsequent trial.[6] Secondly, the operatives themselves had to rely on the favourable exercise of prosecutorial discretion so that they were not charged with any criminal offences arising from their work.

1.5 The development of controlled operations legislation marked a new era for law enforcement. It introduced a system of legislative recognition and approval for such work. The regime in Part 1AB of the *Crimes Act 1914*, however, only gives legislative recognition to a specific portion of this undercover work. One of the critical tasks for the Committee was to examine the extent to which this limited legislative recognition is still appropriate.

The significance of controlled operations in law enforcement

The investigation of organised crime

1.6 Organised crime is becoming increasingly sophisticated, globalised and well resourced. Consequently, law enforcement has to move from its traditionally reactive approach to investigating crime to a more proactive one. The view is widely held by law enforcement agencies that controlled operations are integral to the effective investigation of major criminal activity. The Queensland Crime Commissioner, Mr Tim Carmody told the Committee that:

> Covert investigative techniques are often the most efficient, effective and, in the case of the more virulent strains of criminality such as organised and major drug related crime, the only practical way of obtaining evidence for the purposes of prosecuting and convicting those responsible. Sometimes the only viable investigative stratagem will necessarily involve trickery, deceit, subterfuge and even official instigation and inducement of crime. In those cases, an unrealistically strict requirement of observance of the criminal law hinders the law enforcement effort.[7]

---

5 See *Crimes Amendment (Controlled Operations) Act* 1996, section 15H

6 The question in such cases being whether the public interest in obtaining a conviction and enforcing the law is so outweighed by unfairness to the accused in the manner in which the evidence came into existence or into the hands of the Crown, that, notwithstanding its admissibility and cogency, the evidence should be rejected: *Bunning v Cross (1977-1978) 141 C.L.R 64* per Barwick CJ

7 Mr Carmody, QCC, Evidence, p. 76. See also, for example, Criminal Justice Commission, Submission volume, p. 76

1.7 In terms of uncovering drug related crime and collecting evidence, it is necessary for law enforcement agencies to infiltrate the 'classic secret organisations'[8] behind the criminality in order to gather the necessary intelligence about their activities. Infiltration can only be achieved by putting covert operatives into situations where they can obtain the intelligence that will enable the investigating agencies to devise appropriate strategems and directions. Consequently, the agencies involved argue strongly that controlled operations regimes are a necessary function of contemporary law enforcement.[9] Without in any sense derogating from the seriousness of the matter, Mr Carmody likened it to a game of rugby:

> We are trying to understand who the people are, who is operating this business, who is connected with it, who are the lower players and who are the higher players. You cannot do that unless you are in the team. It is like a game of football. Everyone can see what the five-eighth is doing because he is out there on his own. But no-one knows what the second rower is doing in the scrum. What we want to do is get in that scrum so that we can see what is happening, who is doing what and where the networks are, who the personnel are. We can build a picture then, not only of specific criminal activity but of how it works overall across the states and across the country, where they are connected, across borders.[10]

1.8 It was the collective view of all the law enforcement agencies participating in the inquiry that law enforcement cannot have a significant impact on organised crime unless it becomes immersed in what the criminal organisations are doing.[11]

1.9 Organised criminal groups, such as those involved in the importation and trafficking of narcotics, are, however, extremely difficult to penetrate.[12] The investigation of this type of consensual crime differs from other crime in that there are no victims in the usual sense who are available to make a complaint and give evidence of the criminal activity.[13] Law enforcement is at a disadvantage because the 'victims' of drug crime are usually unwilling to assist authorities for fear of prosecution themselves. In addition, many 'victims' of drug crimes do not recognise that they are victims.[14] In the second reading speech for the *Crimes Amendment (Controlled Operations) Bill 1995,* drug crime was described as a 'clandestine criminal activity involving complicity, or participants who will remain silent for fear of retribution'. The rationale behind the Bill was that, properly regulated, 'controlled operations may lead to the detection of principals whose activities might otherwise never be discovered, let alone prosecuted.'[15]

---

8 Mr Carmody, QCC, Evidence, p. 80

9 ibid.

10 ibid., p. 82

11 See for example, Mr Bradley, NSWCC, Evidence, p. 30. Amongst the list of law enforcement agencies participating in the inquiry were: NCA, AFP, NSWCC, CJC, AUSTRAC, Queensland Police Service and affiliated organisations and associations representing those police services.

12 Mr Richard Perry, PIM, Evidence, p. 119

13 Mr Bradley, NSWCC, Evidence, p. 30

14 Messrs Bronitt and Roche, Submission volume, p. 137

15 Second Reading Speech: *House of Representatives Hansard*, 22 August 1995, per the Hon Duncan Kerr MP, Minister for Justice

1.10 The Committee acknowledges the efforts of law enforcement agencies to detect and prosecute those responsible for organised crime, particularly drug trafficking, and believes that there is also widespread community acceptance that covert operations are crucial to combat such criminal activity.

International acceptance

1.11 There is a high level of international acceptance of the use of controlled operations to combat the growing drug trade. As recently as June 1998, the United Nations Twentieth Special Session on the World Drug Problem recommended:

> ... that States, if permitted by the basic principles of their respective domestic legal systems, ensure that their legislation, procedures and practices allow for the use of the technique of controlled delivery at both the domestic and international levels, subject to agreements, arrangements and understandings mutually consented to between States.[16]

1.12 The use of such techniques is similarly reflected in article 11(1) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances that came into effect in Australia in 1993. It reads:

> 1. If permitted by the basic principles of their respective domestic legal systems, the parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled deliveries at the international level, on the *basis of agreements or arrangements mutually consented to, with a view to* identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.[17]

Judicial approval

1.13 In *Ridgeway v The Queen*, the case that prompted the Commonwealth to introduce the *Crimes Amendment (Controlled Operations) Act 1996*, the High Court acknowledged that police methodology sometimes necessarily involves law enforcement officers in deception:

> The effective investigation by police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of the opportunity for the commission by a suspect of a criminal offence.[18]

1.14 This case is discussed in detail below at paragraphs 1.28-1.32. Suffice it to say that although the High Court acknowledged that these types of investigative methods are required in relation to certain criminal activities, on the matter before it the High Court exercised its discretion to exclude the evidence on public policy grounds in favour of the defence.[19]

---

16 Article V, Clause 5a

17 See Schedule 1 to the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth)

18 *Ridgeway v The Queen* (1995) CLR 19 at 37

19 The *Bunning v Cross* discretion: See footnote 6

Investigation of other crime: money laundering and the financial environment

1.15 Although this method of law enforcement is usually associated with the investigation of narcotic offences, there is widespread support for the use of covert operations to investigate other crime. AUSTRAC referred to the Financial Action Task Force on Money Laundering[20] which recommended that:

> 36. Co-operative investigations among countries' appropriate competent authorities should be encouraged. One valid and effective investigative technique in this respect is controlled delivery related to assets known or suspected to be the proceeds of crime. Countries are encouraged to support this technique, where possible.[21]

1.16 The relevant interpretative note encourages the use of the controlled delivery technique to assist particular criminal investigations, including money laundering. It asserts that appropriate steps should be taken to ensure no obstacles exist in legal systems to prevent controlled deliveries, subject to any legal requisites, including judicial authorisation for the conduct of such operations.[22]

1.17 Ms Elizabeth Montano, Director of AUSTRAC, told the Committee that in the international money laundering community, controlled deliveries are considered a very useful tool and that there are a number of scenarios in which the controlled delivery technique could be used in the financial environment.[23]

The extent and the manner of the NCA's involvement in controlled operations

1.18 On both national and international levels, the NCA plays a pivotal role in the investigation of organised crime and drug trafficking. It operates from a national perspective across jurisdictions and coordinates the national effort with state based partner agencies like the Queensland Crime Commission, the NSW Crime Commission, State based Police Services throughout Australia and the Australian Federal Police.[24] The NCA's work is typically 'multi-jurisdictional and international'.[25] An investigation may involve an exchange of intelligence or the coordination of an investigation between the NCA and a Hong Kong agency, the AFP, the ACS and various police services in Australia at any one time.[26]

1.19 The NCA relies heavily on its ability to conduct controlled operations as a means of infiltrating major organisers of tightly knit criminal syndicates. The NCA's investigative work over recent years has resulted in the infiltration of the higher echelons of some

---

20 The FATF is an international body established for the purpose of combating money laundering. Australia is a founding member of the FATF. There are currently 26 member countries and two member international organisations.

21 Australian Transaction Reports and Analysis Centre, Submission No. 5, Attachment B, *The Forty Recommendations of the Financial Action Task Force on Money Laundering*, Recommendation 36

22 Australian Transaction Reports and Analysis Centre, Submission volume, p. 80

23 ibid.

24 Mr Carmody, QCC, Evidence, p. 77

25 National Crime Authority, Submission volume, p. 98

26 ibid.

significant organisations. The intelligence gained in controlled operations has enabled the NCA to frustrate criminal activity at the planning stage and so reduce the level of narcotics that reach the street.[27]

1.20 The Third Annual Report on the operation of Part 1AB of the *Crimes Act 1914* was tabled on 12 October 1999. Four certificates were issued by the NCA for the year 1998-99, and three of those operations were carried out.[28]

1.21 During 1997-98, 21 certificates for controlled operations were issued by the Chairperson or a Member of the NCA.[29] This contrasts to the preceding year when only nine certificates were issued by the NCA.[30] The 21 certificates in 1997-98 related to six separate investigations; multiple certificates were issued in respect of four of those investigations. The Annual Report indicates that in four cases, the controlled operation was not carried out but persons were nonetheless arrested and charged with criminal offences. In the fifth case, the operation was not carried out and the certificate was surrendered. In the sixth case, the controlled operation did proceed. It involved an importation of heroin in a compressed powder form with a total bulk weight of 298.91 grams and with a heroin content of about 228.4 grams. The following description of the operation, detailing the route through which the narcotic goods passed, appears in the Annual Report:

> The parcel containing the mah-jong set was delivered to the Australian Federal Police (AFP) in Sydney by the ACS. The AFP then handed it to a member of the South Australia Police (who was also a member of the National Crime Authority) who brought it to Adelaide by plane. Upon arrival in Adelaide, that officer gave the parcel to another member of the South Australia police. That officer delivered it to 20 Arthur Street Pennington, where Mr Duc Ngoc Nguyen took delivery of the parcel. The police searched the premises a short time later and seized the parcel which was unopened. Mr Duc Ngoc Nguyen was then arrested and charged with possessing a prohibited import, contrary to section 233B of the *Customs Act 1901*.[31]

1.22 The NCA's involvement in joint operations under the controlled operations legislation in the states is also recorded:

> *Law Enforcement (Controlled Operations) Act 1997(NSW)*: 26 certificates (and one variation) issued for joint operations between the NCA and the NSWCC in period 1998 to May 1999;
>
> *Criminal Law (Undercover Operations) Act 1995 (SA)*: 7 approvals issued for NCA operations from commencement of Act until May 1999;

---

27 National Crime Authority, Submission volume, p. 92

28 *Crimes Act 1914* Part 1AB Controlled Operations, Third Annual Report under Section 15T 1998-1999, pp. 131-137

29 *Crimes Act 1914* Part 1AB Controlled Operations, Second Annual Report under Section 15T 1997-1998, pp. 186-208

30 *Crimes Act 1914* Part 1AB Controlled Operations, First Annual Report under Section 15T 1996-1997, pp. 124-132

31 *Crimes Act 1914* Part 1AB Controlled Operations, Second Annual Report under Section 15T 1997-1998, pp. 208

Drugs, Poisons and Controlled Operations Act 1981 (Vic): 56 authorities issued for NCA operations between November 1997 and April 1999.

In addition, the NCA is party to many controlled operations that are the responsibility of other agencies.[32]

1.23 The NCA's involvement in controlled operations under the legislation is typically of three kinds:

- controlled deliveries, that is, forbearing during the importation or delivery of narcotics;[33]
- controlled purchases, that is purchasing/sampling drugs to infiltrate drug syndicates; and
- possessing narcotics during a controlled operation or controlled purchase.

1.24 In addition, controlled operations are often used in conjunction with other surveillance tools such as listening devices and telephone interception:

> Information gathered during a controlled operation permits the strategic deployment of listening devices and the use of telephone interception at critical stages in the planning and execution of criminal activity. The combination of controlled operations and the strategic use of surveillance devices has resulted in significant arrests. The weight and cogency of prosecution evidence encourages guilty pleas.[34]

1.25 In assessing the importance of controlled operations to the NCA's investigative capability, it was claimed such operations are an essential weapon if the NCA is to cooperate in the international response to organised crime and to fulfil its functions as provided under the *National Crime Authority Act 1984*. The Committee was warned that the ability of the NCA to effectively investigate organised crime would be severely diminished if it were denied the authority to conduct covert operations.[35]

The development of controlled operations legislation

1.26 Although covert or controlled operations are a longstanding method of law enforcement, legislation specifically addressing their use was not introduced until 1996. Until that point, law enforcement agencies conducted covert operations knowing they had to rely on the favourable exercise of prosecutorial discretion to save them from the possible legal consequences of their technically unlawful activities. Although covert police operatives could have been charged with criminal offences in respect of their work this rarely, if ever, happened. In addition, the admissibility of evidence gathered during the course of such an

---

32 National Crime Authority, Submission volume, p. 92

33 That is, although law enforcement agencies are aware that narcotic goods have passed or are passing through the barrier, the agency refrains from taking action at that point with the objective of following the goods to their intended recipient or for the purpose of gathering further intelligence about the persons/organisations involved in the importation.

34 National Crime Authority, Submission volume, p. 93

35 Hon Tom Barton MLA, Queensland Minister of Police and Corrective Services, Submission volume, p. 86

operation was always in question, the prosecution having to rely on judicial discretion in the event that the evidence was challenged.

1.27 This was the state of affairs until the *Ridgeway* case which prompted the development of controlled operations legislation.

Case history: Ridgeway v The Queen

The facts

1.28 The facts in the Ridgeway case are important because they demonstrate the rationale behind the Bill[36] that inserted Part 1AB into the *Crimes Act 1914*. Ridgeway and Lee served sentences at the same time for drug related offences in a South Australian Prison during 1985 to 1987. Following his release, Lee became a registered informer for the Royal Malaysian Police. In 1989 Ridgeway contacted Lee and arranged a purchase of heroin for importation into and sale within Australia. The AFP and the Malaysian Police arranged a controlled importation and delivery of heroin to Australia using Lee, for the purpose of apprehending Ridgeway. In the course of the operation, the AFP sought and received an exemption from detailed Customs scrutiny under the relevant Ministerial Agreement. Subsequently, Ridgeway was apprehended by the AFP with 203 grams of pure heroin in his possession. Ridgeway was convicted in the South Australian District Court. His appeal to the Full Court of the Supreme Court was dismissed. Ridgeway obtained special leave to appeal to the High Court of Australia on three grounds: a defence of entrapment; abuse of process; and the public policy discretion to exclude evidence that has been obtained illegally.

1.29 It was common ground throughout the proceedings that the AFP had imported heroin contrary to section 233B(1)(b) of the *Customs Act 1904* which, as stated above, essentially provides that any person who imports into Australia any prohibited exports shall be guilty of an offence.

The decision

1.30 The High Court, by majority, allowed the appeal and granted a permanent stay of proceedings in favour of Ridgeway in relation to any proceedings under section 233B of the *Customs Act*. The majority decision was that the importation of the heroin by law enforcement officers was illegal and therefore the evidence of that importation of heroin should have been excluded on the grounds of public policy. Had it been properly excluded during the trial, the prosecution would have been unable to prove a necessary element of the offence and Ridgeway would not have been convicted. Mason CJ, Deane and Dawson JJ were of the view that:

> In these circumstances, the above-mentioned factors – ie grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; absence of any real indication of official disapproval or retribution; the achievement of an objective of the criminal conduct if evidence be admitted – combine to make the case an extreme one in which the considerations favouring rejection of evidence on public policy grounds are extremely strong.

---

36 *Crimes Amendment (Controlled Operations) Bill 1995*

> Against those considerations, one must weigh the legitimate public interest in the conviction and punishment of the appellant for the criminal offence of which he is guilty. The weight of that consideration in the present case is reduced by the fact that the appellant's possession of the heroin at the time he was apprehended constituted any one of a variety of offences against the law of South Australia of which illegal importation was not an element ... .[37]

1.31 The court concluded that the considerations of public policy favouring the exclusion of evidence of the illegal importation of the heroin clearly outweighed the considerations of public policy favouring the conviction of the appellant of an offence under section 233B(1) of the *Customs Act 1904*.

1.32 In the course of their judgement, however, the justices said that the problems relating to the conduct of controlled operations should be addressed by the Legislature not the courts:

> ... in the context of the fact that deceit and infiltration are of particular importance to the effective investigation and punishment of trafficking in illegal drugs such as heroin, it is arguable that a strict requirement of observance of the criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the Legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements.[38]

The Commonwealth's legislative response to the Ridgeway case

1.33 In response to the Ridgeway case, the Parliament enacted the *Crimes Amendment (Controlled Operations) Act 1996,* inserting Part 1AB in the *Crimes Act 1914*. That amending Act introduced a legislative scheme to provide for the conduct of controlled operations by Australian law enforcement agencies. The legislation is narrow in scope, only regulating controlled operations in the course of investigating offences under section 233 of the *Customs Act 1901* or an associated offence. The legislation has no effect in cases where, for example, the NCA or other Federal law enforcement agency is investigating narcotic offences where importation is not an element of the offence.

Legislative scheme of Part 1AB of the Crimes Act 1914

1.34 A controlled operation is defined as an operation involving law enforcement officers that is carried out to obtain evidence in relation to possible prosecutions under section 233B of the *Customs Act 1901* or an associated offence and may involve a law enforcement officer engaging in conduct that would, apart from subsection 15I(1) or (3), constitute a narcotic goods offence.

1.35 The authorisation process is as follows: An officer of the AFP, NCA, ACS or of a State or Territory police force in charge of a controlled operation may apply to either the Commissioner, Deputy Commissioner or Assistant Commissioner of the AFP or a member of

---

37 *Ridgeway v The Queen* 184 CLR 19 at 43

38 ibid., p. 44

the NCA (including the Chairperson) for a certificate authorising a controlled operation. If issued, the certificate has the effect of exempting the law enforcement officers from criminal liability in respect of any narcotic goods offences for which they might otherwise be liable. The exemption may extend to a member of a foreign police force but not to any civilians. The exemption from criminal liability does not apply if the conduct of the law enforcement officer involves entrapment (ie where the person was intentionally incited by the law enforcement officer to commit the offence, rather than voluntarily and with the necessary intent).

1.36 Section 15I(6) states that the exemption from criminal liability does not affect the criminality of the importation of narcotic goods under section 233B and does not exonerate the targets of the operation who may have conspired to import the narcotics.

1.37 Section 15M sets out the preconditions to the issuance of a certificate. The authorising officer must be satisfied that all available information about the nature and quantity of the narcotic goods has been provided; that, irrespective of the operation, the target is likely to commit an offence against section 233B (or an associated offence); that the operation will make it easier to obtain evidence of the offence; and that, after the operation, any narcotic goods in Australia will be in the control of an Australian law enforcement officer.

1.38 A certificate has effect for a maximum of thirty days only. Urgent applications may be made in person or by telephone or any other available means of communication but certificates cannot be issued retrospectively. The only retrospective operation of the scheme was to initially validate those controlled operations involving the importation of narcotic goods into Australia prior to the commencement of the Act for which prosecutions were still pending. In such cases, when determining the admissibility of evidence, the judge is to disregard the fact that law enforcement officers committed an offence relating to the importation if the officer was involved in a controlled operation for which there were administrative arrangements in place between the AFP and the ACS.

1.39 The scheme incorporates specific accountability mechanisms. The Attorney-General must be informed as soon as practicable after any decision in relation to an application and the reasons for the decision. A further report must be made to the Attorney-General detailing certain matters three months after the conclusion of the operation. The Attorney-General must table an annual report relating to the controlled operations conducted the previous year.[39]

Some preliminary observations

1.40 Compared to the legislative regime in New South Wales (discussed in detail below), the scheme in Part 1AB of the *Crimes Act 1914* has been described as unnecessarily narrow and prescriptive by law enforcement agencies. Some of the views expressed include that the legislation is of limited application because the definition of controlled operation is so narrow that it does not assist the investigations of Federal law enforcement agencies into other narcotic offences not involving the importation of narcotics or their non-drug related work generally. Further, it has been pointed out that the legislation offers no protection to civilians/informers who assist law enforcement officers or participate in controlled

39 There have been three such reports tabled.

operations. There is no provision for the retrospective authorisation of controlled operations and no provision for the renewal of certificates where operations exceed the thirty day period.

Review of Part 1AB of the *Crimes Act*

1.41 In 1998, the Attorney-General's Department conducted a review of the operation of Part 1AB of the *Crimes Act 1914*. The review was undertaken as part of a series of proposals aimed at enhancing Commonwealth drug law enforcement in the National Illicit Drugs Strategy. Although a large number of agencies, organisations and individuals were consulted, the Department only received ten submissions that contained substantive proposals for reform with law enforcement agencies arguing that their powers are too narrowly confined under the Act. Although a report is not publicly available in respect of that review, the Attorney-General's Department has advised the Committee that:

> The Government has decided, as a matter of high priority, that improved controlled operations provisions should be developed. The amendments will form part of the Government's strategy to enhance the effectiveness of drug law enforcement. The Government has also decided to pursue increased consistency in law enforcement legislation and practice as between the Commonwealth, States and Territories.[40]

1.42 The Attorney-General's Department identified cross-jurisdictional operational problems arising from the lack of uniformity in legislation governing controlled operations throughout Australian jurisdictions. The Department submitted that these could be alleviated either by the introduction of nationally, uniform legislation or a combination of legislative initiatives. First, those States and Territories without controlled operations legislation could enact provisions to permit the authorisation and conduct of NCA controlled operations in each jurisdiction. Secondly, State and Territory legislation could be amended so that the NCA can authorise its own operations in each jurisdiction. Thirdly, Part 1AB could be amended so that controlled operations are not confined to the investigation of specified narcotics offences.

1.43 The Attorney-General's Department noted some of the proposals for reform. These included:

- Expanding the categories of offences the investigation of which could attract the immunity available under an authorised controlled operation;
- Enabling private persons engaged in controlled operations to have the same immunity enjoyed by law enforcement officers;
- Extending the time for which a controlled operation certificate can remain in force;
- Ensuring that all amendments preserve consistency between the AFP and the NCA and take account of the context in which the AFP operates.[41]

---

40 Attorney-General's Department, Submission volume, p. 115

41 ibid., pp. 121-122

States and Territories legislation

1.44 Like the Commonwealth, NSW and SA have enacted controlled operations legislation in recognition of, amongst other things, the problems associated with controlled operations highlighted in the Ridgeway case. Those States and Territories that have not introduced specific controlled operations legislation continue to rely on judicial and prosecutorial discretion which, as demonstrated in *Ridgeway,* contains an element of uncertainty.

New South Wales

1.45 The *Law Enforcement (Controlled Operations) Act 1997* (NSW) is considered the most comprehensive legislative regime in Australia and has been held up as the model for uniform legislation.[42] The salient points of the regime are:

- An officer of the NSW Police Service, the Independent Commission Against Corruption (ICAC), NSW Crime Commission or the Police Integrity Commission may apply to their Chief Executive Officer for authority to conduct a controlled operation.[43] A 'controlled operation' is broadly defined as an operation conducted for the purpose of obtaining evidence of criminal activity or corrupt conduct, arresting any persons involved in such activity or conduct or frustrating such activity or conduct, which involves or may involve activity that, but for the instant Act, would be unlawful. Authorities may not be issued unless a code of conduct has been prescribed by regulation for that agency;

- To justify issuing an authority, the chief executive officer must be satisfied, amongst other things, that there are reasonable grounds to suspect criminal or corrupt conduct within the administrative responsibility of the agency. In addition, the nature and extent of the criminal or corrupt conduct must justify the controlled operation and the nature and extent of the controlled activities must be appropriate to the suspected conduct and can be accounted for in detail under the reporting requirements of the Act. The CEO must also have regard to the reliability of information, the nature and extent of the suspected criminal activity or corrupt conduct and the duration and likely success of the proposed controlled operation;

- An authority may not be issued where a participant would be induced to engage in criminal activity or conduct that the participant would not otherwise engage in or where the health or safety of a person would be endangered or cause serious loss or damage to property. Civilians can only be used in certain controlled operations, for example, where it is wholly impracticable for a law enforcement officer to do so;

- An authority must bear certain particulars including the persons so engaged, the nature of controlled activities that civilians and officers may engage in and the period for which the authority is to remain in force. Authorities may also be renewed;

---

42 The NCA stated that 'it is the NCA's view that there should be uniform legislation based on the NSW model, but taking into account the results of the recent review of the legislation': National Crime Authority Submission volume, p. 89. See paragraphs 1.47-1.50 for details of the review.

43 There is no provision for the NCA Chairperson or Members to issue authorities in respect of NCA operations in NSW.

- the Act provides that an authorised activity undertaken in accordance with the authority is not unlawful and does not constitute an offence or corrupt conduct. The Act makes provision for retrospective authorisation of unlawful activity undertaken in life threatening situations but no retrospective authority is available in respect of an offence of murder or any offence for which the common law defence of duress would not be available;

- an authority may remain in force for up to three months;

- the Act declares certain activities with respect to assumed names to be lawful and excludes any civil liability on the part of those involved in an authorised operation in respect of conduct engaged in for the purposes of an authorised operation and undertaken in good faith;

- the Act confers a reviewing function on the NSW ombudsman so that the ombudsman is notified of the grant, variation or renewal of authorities and must inspect the records at least annually and furnish a report to Parliament; and

- the Act provides that where the identity of a participant in a controlled operation is in issue before, for example, a court or Royal Commission, unless justice requires otherwise, the relevant part of the proceedings must be held in private and the identity of the participant suppressed.

1.46 The NSW Police, ICAC, the NSW Crime Commission and the Police Integrity Commission agreed on a code of conduct for which provision was made in the NSW *Law Enforcement (Controlled Operations) Regulation 1998*. The significant provisions include that the applicant for an authority must act in good faith and make full disclosure and that participants in controlled operations must act in good faith. Further, the officer responsible for the controlled operation must ensure that all participants have a full understanding of the operation and obtain written undertakings from any civilian participants about the extent of their involvement.

Review of the NSW Act

1.47 Earlier this year, the Hon Mervyn Finlay QC, Inspector of the Police Integrity Commission, reviewed the *Law Enforcement (Controlled Operations) Act 1997 (NSW)*. The report states that the parties with an apparent interest were involved in the process throughout the review. Those parties were listed as the NSW Police Service, ICAC, the NSW Crime Commission, the Police Integrity Commission, the Ombudsman, the AFP, the NCA and the NSW Attorney-General's Department. Although it had been expected that 500 controlled operations would be conducted in the first year of the Act's operation, in fact the number was far less. The distribution of controlled operations authorities granted to law enforcement agencies was as follows: the NSW Police Service, 123; the NSW Crime Commission, 23; ICAC, 2; and the Police Integrity Commission, 11. Reasons advanced for the low use of the Act included that:

- the paperwork required to obtain an approval is 'daunting';

- the time taken to obtain an approval is too long;

- an inability to nominate undercover staff as required due to lack of staff;

- the high level of senior officer authority required to authorise an operation;
- concerns about the legality of such operations and authorisations; and
- an unnecessarily restrictive interpretation of the Act.[44]

1.48 The review concluded that there is a need to amend the Act to enable the objectives of the Act to be achieved and to enable law enforcement agencies to use its provisions more effectively. Radical amendment was rejected in favour of an incremental approach, recommending amendment of the existing terms of the Act. Recommendations included:

- amendment of the Act to include the capacity to prescribe by regulation the NCA, the AFP and the ACS as law enforcement agencies thereby enabling those agencies to use the Act;
- amendment of the Act to permit delegation of the CEO's function of approving applications for a controlled operation to another high ranking officer, and, in the case of the NSW Police Service, to permit delegation to four other officers;[45]
- extending the time frame for which an authority to conduct a controlled operation may remain in force to 6 months;[46]
- permit CEO's to authorise controlled operations by telephone[47] or other means where an urgent response to information or circumstances is required and that the authorisation will be valid for 48 hours during which time, a full written application must be submitted;[48]
- amendment to the Act to prevent authorities from being invalidated by reason of a technical fault in the original, varied or renewed authority not being a defect that affects the substance of the authority in a material particular;[49]
- amendment to the Act to ensure that evidentiary certificates are conclusive evidence that the CEO was satisfied as to the matters listed to avoid CEOs being called to give evidence as to their satisfaction;[50]
- amendment to require that inspection by the Ombudsman of records relating to any particular controlled operation take place within 12 months of its commencement (rather than in every 12 month period). This will avoid the Ombudsman inspecting records of operations that have just commenced;[51]

---

44 NSW Inspector of the Police Integrity Commission, *Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act)*, 16 April 1999, p. 10-11

45 ibid., pp. 17-18

46 *ibid., p. 19*

47 Note: This is already available under section 15L of Part 1AB of the *Crimes Act 1914* (Cth)

48 NSW Inspector of the Police Integrity Commission, Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act), 16 April 1999, p. 27

49 ibid., p. 31

50 ibid., p. 32

51 ibid., p. 33

- amendment to repeal the section relating to the renewal of authorities (because the section is little used and requires as much work as an original application) and instead to enable the section on variation of authorities to be used to extend the maximum duration of the original authority;[52]

- amendment to extend the period for reporting by the principal law enforcement officer engaged in a controlled operation to the CEO from 28 days to two months;[53]

- amendment to the Regulations so that non-urgent applications for variations may be made by means other than in writing[54] and that certain forms (application, variation and renewal forms) be prescribed by Regulation;[55]

- amendment to include a statement of intention in the Act to clarify Parliament's intention. This would help address concerns by law enforcement officers about their position in relation to possible prosecution for activities in controlled operations;[56]

- amendment for another review of the Act, after a further two year period.[57]

1.49 It is significant that suggested amendments that would extend the provision for the retrospective authorisation of unforseen controlled activities were rejected by Mr Finlay. Retrospective authorisation can be obtained in life threatening situations. The rejected proposal was that unforeseen (and unauthorised) activities undertaken either before or during a controlled operation should be authorised retrospectively where certain conditions are met. First, failure to undertake those activities would have jeopardised either the operatives involved or the operation. Secondly, the activities were of such a nature that they would reasonably have been approved under ordinary circumstances. Thirdly, the application is submitted within 24 hours of the activity having been undertaken.

1.50 Also rejected was a proposal to permit the CEO certifying that a matter is of such a sensitive nature that inspection by the Ombudsman be deferred for a period not exceeding 12 months.[58]

South Australia

1.51 The *Criminal Law (Undercover Operations) Act 1995* (SA) provides that police superintendents (or above rank) may approve an undercover operation for the purpose of gathering evidence of 'serious criminal behaviour' being behaviour involving the commission of an indictable offence against the *Controlled Substances Act 1984* or other specified statutory offences.

---

52 NSW Inspector of the Police Integrity Commission, Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act), 16 April 1999, p. 37

53 ibid., p. 38

54 ibid., p. 40

55 ibid., p. 41, noting that if the renewal is repealed then the form recommended for renewals will not be required.

56 ibid., p. 45

57 ibid., p. 46

58 ibid., p. 34

1.52 To give approval, the authorising officer must reasonably suspect that persons are engaging in or about to engage in serious criminal behaviour. The officer must also be satisfied that the undercover operation is proportionate to the suspected criminal behaviour, that the means are proportionate to the end and that there is no undue risk that persons without a predisposition to serious criminal behaviour will be encouraged to commit an offence. Approvals may be given for a period of three months and are renewable. The Attorney-General must be provided with a copy of approvals and table an Annual Report.

1.53 The effect of an approval is that, despite any other law, an authorised participant in an approved undercover operation incurs no criminal liability by taking part in the operation in accordance with the approval. The Act also seeks to have limited retrospective operation to cover participants in undercover operations approved prior to the commencement of the Act.

Other States and Territories

1.54 Victoria, Western Australia and the Northern Territory do not have legislative schemes in relation to the authorisation of controlled operations. In those jurisdictions, there are only piecemeal legislative provisions, generally targeted at police investigations into drug related crime. Although these provisions go some way towards addressing the evidential difficulties highlighted in the *Ridgeway* case, they do not constitute a comprehensive regime such as exists in NSW.

1.55 Although Victoria does not have any legislation specifically directed at regulating controlled operations, there is a legislative base upon which administrative and operational procedures for authorising and conducting such operations have been developed. For the purposes of the Victorian Police, controlled operations involve the controlled delivery or purchase of narcotics using either undercover police operatives or police informers. The Chief Commissioner of Police derives his authority to supervise and control the Victoria police under the *Police Regulation Act 1958 (Vic).*[59] In so doing, the Chief Commissioner may also make and amend orders for the administration of the police force and make and amend orders relating to the conduct of the force's operations. The procedures contained in the Victoria Police's *Operating Procedure Manuals,* which also contain the procedures for the conduct of controlled operations, is derived under that power.

1.56 The approval process in Victoria is both internal and tiered. The method for obtaining approval differs depending on the level of seriousness of the investigation proposed. All controlled operations conducted in investigations other than of a minor nature must be approved by either the Covert Investigation Target Committee or Deputy Commissioner (Operations). The Target Committee is comprised of a chairperson, being an officer in charge of State Crime Squads, and three other members, being another officer in charge of State Crime Squads, the Regional Crime Coordinator of the General Policing Department and the officer in charge of the Covert Investigation Unit. Approval at this level is not required, however, in relation to minor covert investigations that can be authorised by the officer in charge of the Covert Investigation Unit after consultation with the chairperson

59 *Police Regulation Act 1958* (Vic), section 5

of the Committee.[60] Also, where a covert operation is needed in relation to the investigation of the summary offences of licensing, gaming or other offences of a vice nature, approval must be obtained from the District Commander.[61]

1.57 In Victoria, immunity from criminal prosecution for police officers and other persons for drug-related offences is contained in section 51 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*. To qualify, the police officer or person must be acting under written instructions by a police officer not below the rank of senior sergeant. Section 51 states:

> No member of the police force or person if the member or person is acting under instructions given in writing in relation to a particular case by a member of the police force not below the rank of senior sergeant shall be deemed to be an offender or accomplice in the commission of an offence against this Act although that first mentioned member or person might but for this section have been deemed to be such an offender or accomplice.[62]

1.58 In Western Australia, section 31 of the *Misuse of Drugs Act 1981* provides limited protection for police officers and civilian participants in undercover drug investigations. The Commissioner of Police may authorise an officer or civilian to act as an undercover officer. In the course of detecting the commission of an offence that person may acquire a plant or drug without committing an offence or being declared an accomplice. Authorised civilians must deliver the plant or drug to a police officer as soon as reasonably practicable. Failure to do so will constitute an offence. The Northern Territory has similar provisions.[63]

1.59 The Tasmanian Minister for Police has foreshadowed the introduction of a Police Undercover Operations Bill in the near future. Queensland, however, apart from one minor exception[64], has no legislation governing controlled operations although it is understood to be under active consideration.

---

60 Victorian Government, Submission volume, pp. 186-187 (Attachment A; Operating Procedures, Victoria Police Manual, Chapter 5, paragraph 5.1.15)

61 ibid., pp. 187-188

62 In *Papoulias v R* (1987) 31 Crim R 322, the Victorian Court of Appeal held that in cases involving the sale of dangerous drugs to undercover police officers where the requirements in section 51 were satisfied, the officers did not commit an offence against the Act and the evidence of those officers could not be rendered inadmissible by reason of the evidence having been illegally obtained.

63 See *Misuse of Drugs Act* (NT), sections 31 and 32

64 See *Vagrants Gaming and Other Offences Act,* section 41 which provides that police officers acting in the discharge of their duty and persons acting under their instructions shall not be deemed to be offenders or accomplices in the commission of any offence under that Act. Section 41 does not apply, however, to the commission of offences against the *Queensland Criminal Code* or the *Drugs Misuse Act.*

CHAPTER 2

THE MERITS OF CONTROLLED OPERATIONS LEGISLATION

2.1 Discussion took place during the Committee's inquiry on the merits of a legislative regime to govern controlled operations. The respective arguments are set out in this chapter.

The case for controlled operations legislation

2.2 Law enforcement representatives generally advocated the expansion of the ambit and reach of current controlled operations legislation. In doing so, witnesses argued that the benefits of having such legislation substantially outweighed the arguments against it. Some of the principal arguments in favour of controlled operations legislation are that the legislation:

- balances competing interests;[1]
- provides protection and certainty for law enforcement officers in relation to their own actions (and avoids the unsatisfactory situation where decisions are made to commit technical offences);[2]
- ensures that evidence that has been properly obtained according to the legislative scheme is not going to be judicially excluded;[3]
- imposes internal discipline on police;[4] and
- ensures that there is a scheme of accountability in relation to such operations and makes the behaviour of law enforcement officers subject to independent scrutiny.[5]

2.3 In addition, the regulatory framework itself can be subject to review so that new areas requiring legislative initiatives can be identified. It could, for example, be determined that a mechanism is needed to compensate members of the community who suffer loss as a result of a controlled operation.[6]

---

1 Mr Carmody, QCC, Evidence, p. 76

2 Mr Butler, CJC, Evidence, p. 91

3 ibid.

4 National Crime Authority, Submission volume, p. 91

5 Mr Butler, CJC, Evidence, p. 91

6 Hon Tom Barton MLA, Minister of Police and Corrective Services (QLD), Submission volume, p. 85

Balances competing interests

2.4 The overwhelming view put to the Committee was that controlled operations legislation provides the appropriate balance and protection for the community when agencies conduct covert operations.[7]

2.5 Mr Karl Alderson from the Attorney-General's Department pointed out that the rationale behind such legislation is that if law enforcement officers are to be authorised to engage in unlawful conduct, then that authorisation should be matched by an appropriate accountability framework and statutory limitations and controls on that authority.[8] While there is a public interest in the convicting of wrong doers, there is another public interest in ensuring that those entrusted with law enforcement do not impeach the integrity of the system they seek to uphold by their own actions. It was the view of most witnesses that controlled operations legislation is necessary to balance these competing interests and that it is the business of the Parliament to decide what is and what is not acceptable conduct in covert operations.[9]

2.6 The Queensland Crime Commissioner, Mr Tim Carmody, asserted that while there are definite limits on the power of law enforcement agencies to manipulate people and events in the discharge of their investigative functions, controlled operations legislation is needed to provide clear and unambiguous guidelines as to what is and what is not acceptable in this area:

> Controlled operations legislation is needed to balance the competing public interest objectives of detecting and convicting the guilty and protecting the integrity of the criminal justice process.[10]

2.7 Mr Carmody added that the enactment of controlled operations legislation is indicative of the community's determination to combat major crime that undermines other significant freedoms in our society:

> One thing is clear. Organised criminal activity cannot be effectively countered or eventually defeated unless law enforcement is given the power, resources and support it needs from government, or until the community as a whole becomes less ambivalent in its attitude towards and more hostile in its stance against the threat of organised crime.[11]

Protection for Covert Police Operatives

2.8 Controlled operations legislation exempts law enforcement officers (and occasionally civilians) from prosecution in respect of certain unlawful activities committed by them in the course of a controlled operation. In the absence of such legislation, covert

---

7 See for example: Hon Tom Barton MLA, Queensland Minister of Police and Corrective Services Submission volume, p. 86; Mr Broome, National Crime Authority, Evidence, p. 14

8 Mr Alderson, Attorney-General's Department, Evidence, p. 188

9 See for example: Mr Bradley, NSWCC, Evidence, p. 34

10 Mr Carmody, QCC, Evidence, p. 76

11 ibid.

operatives have had to work without the assurance that they would not be prosecuted at some later time. They relied on the favourable exercise of prosecutorial discretion.

2.9 One of the most persuasive arguments in favour of controlled operations legislation was the view expressed to the Committee that if we, as a society, are going to ask operatives and/or civilians to participate in this type of dangerous work which no-one else in society is prepared to do, then we should provide them with adequate protection to do that work:

> You do not send the firefighters in to fight a fire without fireproofing them. You do not send law enforcement officers into a dangerous situation without bulletproofing them.
>
> This is all this legislation does in a different context. It bulletproofs and fireproofs those operatives who operate in isolation. They have to make discretionary calls. They are trying to present themselves to criminals as a criminal. It is like the dark; if you want to be accepted as a criminal, then you must look like one, talk like one and act like one.[12]

2.10 Law enforcement agencies agreed that it was imperative that law enforcement officers should have certainty in respect of the activities they undertake during undercover work.[13] Mr Carmody asserted that:

> It is unacceptable that covert operatives, whether they are sworn or unsworn, are expected to risk their safety and often their future careers in the performance of a difficult duty because they do not have the legislative backing needed to protect them against potential prosecution in respect of the investigative action that they take.[14]

2.11 Undercover operatives are sometimes required to work in what are described as 'deep cover' situations where the objective of the operative is to gain the trust of those connected with organised criminal syndicates. In those situations, it is common for undercover operatives to be 'tested' by the criminals they are associating with. This is a common technique used by criminals to check the 'street cred' of new associates.[15] Such testing is usually in the form of jobs that will involve an escalating degree of seriousness and criminality. In the absence of controlled operations legislation, the exercise of discretion by covert operatives in difficult situations is a very complicated process. Mr Carmody said:

> You have to decide there and then whether you are going to take one course of action or another. What we need is covert operatives who will take the courageous step that will, in the end, fulfil the objective. There is no point if you are concerned and looking over your shoulder worrying that the very law that you are trying to enforce will turn against you and bite you. You may make the wrong decision and you may defeat the very objective that you go in there for and take the risks for.[16]

---

12 Mr Carmody, QCC, Evidence, p. 80

13 Mr Butler, CJC, Evidence, p. 91

14 Mr Carmody, QCC, Evidence, p. 76

15 ibid., p. 85

16 Mr Carmody, QCC, Evidence, p. 81

2.12 Similarly, in the course of undercover work, operatives sometimes witness criminal activities which, were they in a position to act responsibly, they would attempt to prevent. In these situations, however, when an officer is undercover, attempting to stop such unlawful activity may well involve the operative risking his or her life.[17]

2.13 The view of Mr Peter Alexander, President of the Police Federation of Australia is that police operatives should not do anything that is not prescribed by legislative authority. Mr Alexander described controlled operations as 'fluid'. That is, it is not always foreseeable what activities an officer may be called upon to participate in during an operation:

> We have a real concern about our members doing anything that has not got the support of legislation. Whilst we admire the entrepreneur, we worry for them ... . At the end of the day, they are people who then find themselves coming to us with their problems. What they do on behalf of the Commonwealth government or the state government or their jurisdiction might be extremely noble, but we do not want them being exposed.[18]

2.14 Controlled operations legislation addresses some of these problems. The Committee was told that without such legislation, recruitment for undercover work would be more difficult because fewer police officers were willing to take risks that could have a negative impact upon their future career prospects:

> That makes recruitment difficult. It is hard enough on covert operatives. The work they do is hard enough. If you wanted to put on top of that the risk, and it is a real risk, it is a perceptible risk, that having done all that they can for their state, they still may well be charged with doing their duty because it involved the commission of a criminal offence, whether it is ancillary to the principal offence or not. That makes recruitment difficult.[19]

2.15 These issues are discussed further under the heading 'Retrospective authorisation' in paragraphs 6.64 - 6.85.

Admissibility of evidence

2.16 Controlled operations legislation ensures the admissibility of evidence gathered during a controlled operation. As mentioned above, the *Ridgeway* decision was that, on the facts before it, the court should exercise its discretion in favour of the defence and exclude certain evidence of the prosecution. That evidence was obtained during a covert operation without the protection of a statutory approval basis and the unlawful activities of the officers constituted one of the elements of the offence with which the accused was charged.

2.17 There are divergent opinions as to the implications of the judgement. One view is that it was a warning that the judicial discretion to exclude evidence on public policy grounds may well be exercised against the prosecution when evidence is obtained in a covert operation involving the police officer in unlawful activities:

---

17 Mr Bradley, NSWCC, Evidence, pp. 33-34

18 Mr Alexander, PFA, Evidence, p. 47

19 Mr Carmody, QCC, Evidence, p. 81

> From a practical perspective, the decision places in jeopardy the utility of any police investigation which in some way demands that the police participate in the conduct under investigation.[20]

Another school argues that the judgement did no more than exercise the discretion along the lines of clearly established judicial principles and that it was confined to those cases where the unlawful activities of the police officer actually constitutes an element of the offence with which an accused is charged.[21]

2.18 Following that decision, the Commonwealth regime was enacted. The legislation put the admissibility of evidence obtained during the course of authorised controlled operations beyond doubt where police officers act within the terms of the certificate authorising the operation.

2.19 Mr Carmody described the *Ridgeway* case as an 'extreme' case. The evidence was rejected because the unlawfulness in which the police officers were involved was "a grave contravention" - an international importation of heroin. He argued that extreme cases are never a good point of reference for framing legislation:

> What you have to look at is the routine case. In the end we have to work out whether this law does more social good than harm. If it does, then that answers your civil liberties complaint.[22]

2.20 The NCA described the *Ridgeway* case in similar terms:

> *Ridgeway* is a bad case making bad law. The circumstances there were unusual. The High Court's decision in relation to particular facts is perhaps not surprising. The difficulty with *Ridgeway* was that some of the observations the court made raised questions about activities that would not go as far as occurred in *Ridgeway*.[23]

2.21 In the NCA's view what is needed is 'a sense of balance' and for Parliaments to decide which activities should be controlled and circumscribed and which activities should be left within the discretion of those involved in law enforcement. In the latter case, the agency will have to convince the court at trial that the evidence should be admitted if indeed there was some unlawful activity involved.[24]

2.22 Mr Simon Bronitt and Mr Declan Roche, the authors of substantial papers in the area, recognised a 'definite need' for controlled operations legislation but questioned whether the High Court's decision in *Ridgeway* had, in fact, made it too difficult for law enforcement agencies to conduct controlled operations. They also described the case as an 'extreme' one involving an extreme form of controlled operation where the police themselves had committed an element of the offence. It was the extreme nature of the police operation

---

20 Senate Legal and Constitutional Legislation Committee, *Crimes Amendment (Controlled Operations) Bill 1995*, September 1995, p. 5

21 See for example Messrs Bronitt and Roche, Submission volume, pp. 125-126

22 Mr Carmody, QCC, Evidence, p. 81

23 Mr Broome, NCA, Evidence, p. 14

24 ibid.

involved that resulted in the evidence being inadmissible. In their view, legislation is necessary not to facilitate cases like *Ridgeway* but to prevent them[25]:

> After *Ridgeway*, Australian law enforcement agencies claimed that the High Court had unreasonably restricted the ability of law enforcement agencies to detect and break up drug rings. This claim overlooks the fact that the High Court confined the scope of the discretion to those entrapment cases where the illegality was an integral part of the offence charged. In routine entrapment cases, Mason CJ, Deane and Dawson JJ held that "the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations except in what we would hope to be the rare and exceptional case where the illegality or impropriety of the police conduct is grave and either so calculated or so entrenched that it is clear that considerations of public policy relating to the administration of criminal justice require exclusion of the evidence" ... .[26]

2.23 In the absence of controlled operations legislation, evidence gathered during the course of a covert operation involving unlawful activity on the part of law enforcement officers would remain subject to the judicial discretion to exclude it. NCA Chairperson Mr John Broome warned the Committee that there are dangers in leaving the issue of the admissibility of such evidence to judges. He alluded to two recent cases which have, in his opinion, clearly demonstrated that judicial opinion can vary significantly:

> The difficulty is that, absent a controlled operations environment, there is always the risk that some courts in some places might take a different view of what the police officers' conduct amounts to and exclude the evidence in ways which effectively leave the prosecution with no room to appeal in the event that they are wrong. So we need to be very careful about the analysis. But, having said that, I think experience tells us that it is better to be sure rather than sorry and it is better for the parliament to specifically address these issues and decide what it thinks is appropriate and to legislate accordingly.[27]

Controls the police

2.24 The Queensland Crime Commission argued that controlled operations legislation controls a field of law enforcement endeavour which was, prior to *Ridgeway* and before the legislation, uncontrolled. Law enforcement officers took risks which were undocumented and largely undiscovered, removed from public scrutiny. According to Mr Carmody:

---

25 Messrs Bronitt and Roche, Evidence, pp. 137-138

26 Messrs Bronitt and Roche, Submission volume, pp. 125-126

27 Mr Broome, NCA, Evidence, p. 4. The cases he alluded to were Mr Justice Vincent in the John Elliott case and Mr Justice Merkel in the matter of A1 and A2. In these cases the trial judges took the view that the NCA's actions were unlawful but for ostensibly contradictory reasons. They then considered whether evidence obtained through that unlawful activity was admissible. Mr Justice Vincent ruled that the evidence was inadmissible because the reference under which it was collected was invalid. The Court of Appeal later found the trial judge had erred but for technical reasons could not be reheard. In the second case, the judge decided that a reference was invalid and therefore an NCA hearing could not proceed. This was overturned unanimously by the Full Court of the Federal Court. Mr Broome speculated that in this second case, had it been a trial, Mr Justice Merkel would have similarly ruled that the evidence was inadmissible.

> Anyone with a secret is a danger to himself, the organisation he works for and society generally.[28]

2.25 Mr Broome told the Committee that one of the apparent but unstated objectives of Part 1AB was to control the police. He referred to the disapproval of the police conduct expressed by the High Court in *Ridgeway*. A consequence of Part 1AB is that, rather than providing a *carte blanche* to police as some may have feared, it has, in fact, imposed a form of internal discipline and control on law enforcement agencies:

> The stringent approval process and reporting requirements have been strictly observed. Approvals for controlled operations are not easily obtained or lightly given. The legislation has imposed an internal discipline on law enforcement agencies. The question arises whether there are too many controls in Part 1AB that make it too unwieldy from an operational perspective. While the answer to that question must be 'no' there are difficulties with the overall limitations and requirements of Part 1AB ... .[29]

Proper accountability

2.26 In terms of accountability, legislatively regulating controlled operations ensures that an appropriate approvals process is in force to review the need for particular operations and that the operation is adequately monitored and periodically reviewed. This kind of accountability minimises the risks associated with covert operations, to both police officers and the community.[30]

2.27 As a result of the accountability procedures provided under the Commonwealth Act, information is recorded for public scrutiny whereas previously it was scattered throughout the transcripts of relevant cases in the judicial process. The Annual Reports on the operation of Part 1AB of the *Crimes Act 1914* contain statistical and other data that can be used to assess, though not critically, the impact of controlled operations on the law enforcement effort. The AFP, for example, asserted that controlled operations legislation has contributed significantly to the AFP objective of dismantling and disrupting major syndicates involved in drug trafficking. Considerable seizures of drugs have occurred, particularly of heroin and cocaine. There is now information available as to the number of controlled operations, the kinds of controlled operations and the results of those operations.[31]

The case against controlled operations legislation

Law enforcement officers engaging in unlawful activities

2.28 Representing the NSW Law Society, Professor Trevor Nyman described controlled operations legislation as 'dangerous law' because it legitimates crimes committed by those who are charged with the responsibility of upholding the law.[32] The effect of this sort of

---

28 Mr Carmody, QCC, Evidence, p. 83

29 National Crime Authority, Submission volume, p. 91

30 Hon Tom Barton MLA, Queensland Minister of Police and Corrective Services, Submission volume, p. 84

31 See for example: Mr Keelty, AFP, Evidence, p. 155

32 Professor Trevor Nyman, NSW Law Society, Evidence, p. 66

legislation is that it causes damage to the fabric of morality. Professor Nyman made seven points in his opening statement to the Committee summarising the Law Society's position. Briefly these were:

- a balance must be maintained between the rights of individuals and police powers;
- two decades of legislation has significantly eroded citizens' privacy and civil rights;
- this kind of legislation is dangerous because it makes lawful crimes committed by police;
- law enforcement agencies should be resourceful rather than seeking expanded powers;
- as applications for controlled operations certificates are ex parte, most will be granted;
- the fabric of morality is damaged first within the police and then within society; and
- the NCA's functions do not include the organisation and commission of fresh crimes.[33]

2.29 Professor Nyman argued strongly against the proliferation of this type of legislation and concluded by advising the Committee that the Law Society would prefer to have the law restated as it was pre-*Ridgeway*.[34]

Function creep

2.30 One of the main concerns expressed about the introduction of this type of legislation is what Mr Terry O'Gorman, President of the Australian Council for Civil Liberties, referred to as 'function creep'. That concept is used where the government legislatively provides for a new administrative function and subsequently considers the expansion of the powers conferred. The concept is particularly relevant where the new function confers powers on an arm of government which that arm previously did not have and where those powers are of a nature that arguably have the potential to detract from basic rights and freedoms: Mr O'Gorman described it thus:

> It is the police powers equivalent of the economics of bracket creep. It is simply this: when you look at major increases in police powers that have been brought in federally - at state level as well, but I particularly want to address the federal sphere - they have all been brought in, using the spectre of high-level drug trafficking, to make respectable what people would otherwise have significant reservations about.[35]

2.31 Mr O'Gorman used the introduction of legislation to authorise telephone tapping to demonstrate the concept. Telephone tapping was introduced federally in 1979, in the immediate aftermath of Royal Commissions, including those of Stewart and Costigan. Mr O'Gorman claimed that, in contrast to the initial assurances that the use of telephone tapping would be confined to the investigation of the most serious federal offences, telephone tapping is now available for most indictable offences.

---

33 Professor Trevor Nyman, NSW Law Society, Evidence, pp. 65-66

34 ibid., p. 74

35 Mr O'Gorman, ACCL, Evidence, p. 99

2.32 In Mr O'Gorman's analysis, the call by law enforcement agencies for wider powers in relation to controlled operations legislation is another instance of function creep. The legislation was introduced in 1996 to counter the *Ridgeway* decision, which he described somewhat rhetorically as 'the terrible calamity that law enforcement was going to face because of this awful High Court decision that meant that no-one could wear anything other than a uniform in the police field'.[36] Now, law enforcement agencies are arguing that the powers under that legislation should be extended beyond the investigation of offences involving the importation of narcotics. Mr O'Gorman said:

> The argument is: look at South Australia, look at New South Wales - and the NCA looks longingly at those two pieces of legislation saying, "I want one of those too, please." Those pieces of legislation say, "controlled operations across the field of indictable offences". No longer are we talking about the most serious offences - function creep is happening again.[37]

2.33 Mr O'Gorman submitted that the call by law enforcement to extend this legislation is typical of the function creep that has occurred in criminal law at the Federal and state levels over the last two decades. The legislation, passed three years ago, permits the AFP and the NCA to actually import heroin and other drugs into Australia. It is now proposed to extend the power to commit unlawful acts in relation to a much wider range of lesser offences:

> The process is categorised by controversial legislation being justified at inception as being directed at serious and high level drug trafficking and then, once the hoo-ha dies down, there are then moves made by law enforcement agencies to extend the formerly controversial and restricted legislation effectively across most of the calendar of indictable offences.[38]

2.34 Dr Tim Anderson, Secretary of the NSW Council for Civil Liberties, also expressed concern about the possible extension of powers in controlled operations legislation. Dr Anderson said that, in formally authorising criminality, as well as breaches of privacy, there is a substantial change from the former models. In the past, the accepted model was that one had to apply to a senior judicial officer to get a warrant for a breach of privacy, for example, let alone for an act of criminality:

> Now that door has been opened in a sense, the arguments coming from the executive agency are to universalise the extension of that executive power such that now that, for example, we can engage in drug trafficking, we want to be able to do other things as well and we want our informants to be able to do it as well.[39]

2.35 Similarly, Professor Nyman representing the NSW Law Society said:

> If I can say this, the Law Society recognises that legislation has been passed that opens the door, just as the door was opened by the federal parliament for phone tapping. The Law Society advises you not to proliferate this type of activity by

---

36 Mr O'Gorman, ACCL, Evidence, p. 99

37 ibid.

38 Australian Council for Civil Liberties, Submission volume, p. 158

39 Dr Anderson, NSWCCL, Evidence, p. 21

> police forces because it will become an industry, just as phone tapping has already become an industry.[40]

2.36 Mr Broome rejected the suggestion that expanding the powers and functions of law enforcement agencies was function creep. Mr Broome called it 'function retrograde'. He said that post *Ridgeway*, in New South Wales, the advice of the then Solicitor-General was that the *Ridgeway* case did not require any change to law enforcement operations and procedures. The reality was, however, that prosecutors wanted clarity about what agencies were allowed to do and were 'jittery about the continuation of what was in fact the status quo'. The result was Commonwealth legislation that was in fact much narrower than what Commonwealth agencies had been able to do previously. It was not an expansion of powers but a contraction of powers:

> There really is a failure to just understand the fundamental law and the facts involved, and from that develops a whole range of myth, innuendo and allegation which needs a little bit of sunlight being cast upon it to show it for what it really is.[41]

Entrapment

2.37 One of the principle concerns expressed about this type of legislation is that it will lead to the commission of offences, which, but for the opportunities presented by the investigators, people would not have committed. This is commonly referred to as entrapment. Dr Anderson gave a recent example of entrapment made to him personally:

> I was speaking to a man last week who has been released from gaol after having served a long sentence for drug trafficking. He was approached by someone he discovered was an informant who offered to sell him a large amount of drugs at a very cheap price. He discovered that that person was wired up with a bugging device – an attempt at entrapment, clearly. That is the sort of operation at ground level, at the pointy end of policing, which is going on as a result of controlled operations activities.[42]

2.38 In its submission in relation to the NSW controlled operations Bill in 1997, the NSW Law Society expressed concern about the potential for the proposed provisions to authorise activities that amount to entrapment. The Society submitted that it was clearly indicated in both common law and statute law that law enforcement officers should not be involved in organising the commission of a crime. The Society referred to section 15I(2) in Part 1AB of the *Crimes Act* and noted that it actually helps to safeguard against this type of situation whereas the NSW Bill had no such safeguard provision. Section 15I(2) provides that officers are not exempted from liability for prosecution if their conduct involves intentionally inducing the person to commit an offence where the person would not otherwise have had the intent to commit that offence. The Society warned that an approval in general terms (in

---

40 Professor Nyman, Law Society of NSW, Evidence, p. 72

41 Mr Broome, NCA, Evidence, p. 202

42 Dr Anderson, NSWCCL, Evidence, p. 23

relation to activity that can be engaged in by an officer) could enable action that amounts to entrapment to be protected under the umbrella of a broad and specific approval.[43]

Administrative convenience

2.39 Dr Anderson warned the Committee that while covert operations are valuable tools of trade 'many things are done in the name of administrative convenience'. He said that it might be the case that more people can be arrested for drug offences by giving greater powers to an executive arm of government but that there will be implications in terms of people's rights and responsibilities:

> If the parliament is now going to codify those sorts of things and codify executive powers and deliver substantial powers to the executive arms of government, then the parliament really has to have a very careful look at the codification of rights and responsibilities.[44]

New problems

2.40 Dr Anderson told the Committee that the NSW Council for Civil Liberties did not have major problems, in principle, with the police engaging in certain activities in the pursuit of surveillance and detection. He warned, however, that delivering increased power to an executive agency would have the consequence of raising new problems. For example, once police are authorised to traffic in large amounts of heroin, the police will want to know whether they should be dealing with fifty kilos or one. The risks of failure will increase and so too, will the risks of their responsibility.[45]

> It may be that there are some more arrests. As I said, I am prepared to accept that these agencies will come to the parliament and ask for more power and more resources to arrest more of the middle ranking people, and they will do it. But they will seriously corrode the rights and responsibilities of citizens in the course of extending those powers, without acknowledging that. Typically, administrators do not acknowledge that there are consequences of their own extended powers and their legitimised criminality.[46]

Effectiveness

2.41 Dr Anderson argued that the consequences of expanding police powers and resources are questionable. If you increase police fivefold, you will have more arrests but also a similar crime rate. He claimed that some types of criminal activity such as robbery that are associated with institutionalisation would be aggravated. In Dr Anderson's view, there are serious strategic problems involved in expanding police powers: He said:

> What is the point? You can arrest a person and put them back in gaol. You can create scenarios and it looks good on your statistics and your annual report looks

---

43 Law Society of NSW, Submission volume, p. 141

44 Dr Anderson, NSWCCL, Evidence, p. 23

45 ibid., p. 24

46 ibid., p. 29

> better. You have not done anything about the drug problem. Underlying this, of course, we have to remember that police operations in this country do not fundamentally affect the price of heroin – to take heroin as an example.[47]

2.42 The NSW Crime Commissioner, Mr Phillip Bradley, agreed with Dr Anderson's fundamental proposition. He described the capacity to arrest criminals as 'a mathematical thing'. Increasing police resources will result in more arrests, but the effectiveness of that in terms of drugs is an open question. Resources alone cannot solve the drug problem. There comes a point when increasing resources becomes inefficient. It is a balancing act. The view of law enforcement, however, is that, police should arrest the more serious offenders.[48]

Different classes of citizens

2.43 The NSW Council for Civil Liberties claimed that a consequence of controlled operations legislation is that it creates different classes of citizens. In contrast to most citizens, the legislation creates a class of citizens who hold 'superior' rights who are exempted from the legal process:

> This formal fragmentation of citizens rights, we believe, is deplorable. It is true that such disparities have de facto existed for a very long time. However, to formalise them, we believe, exacerbates the fracturing of civil society. We do not expect that those who are subject to the sanction of the law, will be impressed that their prosecutors have effective immunities. We note the damage done to civil society in other countries (such as Chile and Argentina) where immunities for state officials has been created. In this regard we recall the first sentence of Article 7, *Universal Declaration of Human Rights:* "All are equal before the law and entitled without any discrimination to equal protection of the law." Article 8 then speaks of everyone's entitlement to "an effective remedy" for breach of one's rights. Where is the "effective remedy" if the perpetrator is a state official with a certificate of immunity?[49]

2.44 Professor Nyman was also concerned about the apparent double standards the legislation creates. He claimed that the existence of these double standards damages the fundamental principle that we should abide by the law. He remarked that although the law says one thing, many members of the public believe the opposite:

> If some persons are permitted to commit crimes with impunity, why can't I? Why can't he? Why can't my son?[50]

Right to a fair trial

2.45 An important consideration is the effect that this kind of legislation might have on the individual's right to a fair trial. Mr Bronitt referred to the recent decision from the European Court of Human Rights, *Teixeira de Castro v Portugal* which is directly concerned with the issue of entrapment and the accused's right to a fair trial. The court distinguished

---

47 Dr Anderson, NSWCCL, Evidence, p. 28

48 Mr Bradley, NSWCC, Evidence, p. 30

49 NSW Council for Civil Liberties, Submission volume, p. 149

50 Professor Trevor Nyman, NSW Law Society, Evidence, p. 67

between legitimate undercover operations and police incitement. The decision indicates that while legitimate ruses can be employed to pursue serious criminals, the accused's right to a fair trial remains fundamental. The public interest of obtaining convictions against criminals cannot justify the use of evidence that is obtained as a result of police incitement.

2.46 Mr Bronitt's analysis is that this decision is significant in terms of international human rights law because it recognises that the right to a fair trial is relevant not only in any subsequent court proceedings against an accused but also during the investigative stage when evidence is gathered. He stated that any decision to legislate on controlled operations should take this important international standard into account:

> This is a very important question of compliance, ensuring that any legislative regime for controlled operations meets with the international standards laid down in that case. The question is not if such a challenge occurs but rather when. I think the NCA's idea of balancing crime control and human rights is a utilitarian approach which could lead to more and more extraordinary powers granted to the state to investigate serious crimes. The difficulty with that approach is that the balance inevitably tilts in favour of crime control. It is really a zero sum game. As the seriousness of the alleged criminal activity increases, so does our need to uphold fundamental human rights. I oppose using any kind of idea of balancing as the basis of such legislation. It is about ensuring that, in the intrusion into the suspect's rights to privacy and fair trial, we give utmost respect for those rights.[51]

Conclusion

2.47 The Committee recognises that controlled operations are a necessary tool in law enforcement, particularly in the context of combating organised and serious crime. It acknowledges the important contribution of undercover police operatives to the effort of law enforcement agencies to disrupt that kind of criminality. At the same time, the Committee is concerned to ensure that the rights of citizens are not undermined by the implementation of any legislative regime to govern the proper administration of those operations. In conclusion, the Committee's view is that a regime with proper checks and balances is necessary to ensure that any expansion of police power to conduct controlled operations is met by an appropriate approval process and strict accountability requirements.

---

[51] Mr Bronitt, Evidence, p. 140

CHAPTER 3

THE IMPACT OF THE CURRENT LEGISLATIVE REGIME ON THE OPERATIONS OF THE NCA

3.1 As described in Chapter 1, there are a range of approaches by the various Australian jurisdictions to the issue of controlled operations. In this chapter, the Committee discusses the implications of this situation for the NCA's current operations and also the options for reform.

Cross jurisdictional operations

Operational problems

3.2 The NCA informed the Committee that the lack of uniformity throughout Australian jurisdictions causes the NCA major difficulties when it is involved in operations that are cross-jurisdictional in nature or cross jurisdictional lines. As stated by NCA Operations Manager, Mr Peter Lamb:

> We are currently targeting interstate trafficking networks. Sydney is the hub of the heroin trade in this country. Whilst a lot of the heroin may not be imported into Sydney, it will come here to get brokered at the very least. Taking it out of Sydney to the other states and attacking that network is as important as the barrier itself. It is there that you learn about who the major profit takers are, you learn about the networks, you learn about the individuals and groups involved. But simply put, taking it from jurisdiction to jurisdiction is an absolute nightmare.[1]

3.3 The Criminal Justice Commission submitted that:

> The NCA suffers from the additional burden that in the absence of uniform Commonwealth legislation it must conduct its operations in accordance with State and Territory law which varies considerably from jurisdiction to jurisdiction. In the present case some jurisdictions have no legislation whatsoever which authorises undercover operations for the purpose of obtaining evidence of criminal activity.
>
> Not only is this an administrative burden for the NCA but is extremely cumbersome when an investigation concerns criminal activity which transcends State and Territory borders as the NCA's operations frequently do.[2]

3.4 The absence of controlled operations legislation in any particular State, for example Queensland, poses particular problems for the NCA in the context of its cross-jurisdictional operations:

---

1 Mr Lamb, NCA, Evidence, p. 7

2 Criminal Justice Commission, Submission volume, p. 47

> As I said before, we do not have controlled operations legislation in this state. Where the National Crime Authority is involved in joint or collaborative arrangements with the Crime Commission, that represents a gap in its ability to track offenders from other states across the borders into Queensland.[3]

NCA denied power to issue certificates

3.5 Although the NCA can issue its own certificates when conducting controlled operations under the Commonwealth *Crimes Act*, it is not able to do so under the various State legislative regimes. Several submissions claimed that the inability of the NCA to issue its own controlled operations certificates under State legislation adversely affects the NCA's operational capacity:

> ... the majority of the narcotics trade takes place in Sydney. However, the NCA is not included in the *Law Enforcement (Controlled Operations) Act 1997* (NSW) though that legislation is currently under review. Accordingly, controlled operations cannot be approved under the legislation by the NCA Chairperson or Members. As a result, the NCA has a lesser ability to conduct controlled operations than its operational partners in New South Wales. It is undesirable for the NCA to be placed in a position of being less effective than it ought to be due to the uneven operation of Commonwealth and State law.[4]

3.6 This was confirmed by the findings of the Finlay Review of the NSW Act:

> This multi-jurisdictional capacity of the NCA is a unique feature in Australian Law Enforcement and one of the underpinning reasons for the NCA being created. As it stands the Act substantially restricts the NCA in the performance of its role within the State both operationally and strategically. The pivotal importance of Sydney, in terms of Australian organised crime dynamics means that the NCA's capacity to make any reasonable strategic impact at the National level is also severely impeded.[5]

3.7 Although the NCA's involvement in controlled operations can be achieved by engaging officers of the State in which it wants to conduct a controlled operation, the approval process is undertaken through the relevant State police service in accordance with the legislation in that jurisdiction. It was claimed that the requirement for the NCA, when conducting operations under State legislation, to obtain approval through an external agency such as the NSW Police Service, is inconsistent with the perception of the NCA as an independent entity.[6] Similarly, where the NCA conducts joint operations with the NSW Crime Commission under the NSW legislation, the Chair of the NSW Crime Commission has to issue the authority because the NCA has no power to issue an authority itself. It was submitted that it is appropriate for the NCA to be able to issue its own certificates.[7]

---

3 Mr Carmody, QCC, Evidence p. 78

4 National Crime Authority, Submission volume, p. 100. See also NSW Crime Commission, Submission volume, pp. 1-2. An in camera submission also made the same point.

5 Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act)*, April 1999, p. 13

6 Hon Tom Barton MLA, Minister for Police and Corrective Services (QLD), Submission volume, p. 85

7 NSW Crime Commission, Submission volume, pp. 1-2

Absence of uniform controlled operations coverage for covert police operatives

3.8 In States and Territories where there is no specific legislation governing controlled operations, NCA officers are in the same uncertain situation as officers of the police services of those jurisdictions. If directed by their superiors to act in an undercover capacity, such officers who commit what would otherwise be offences are criminally liable for those offences. In those situations, the officers must rely on the discretion of the Director of Public Prosecutions in that State or Territory. Referring to the situation in Queensland, Mr Brendan Butler, Chairperson of the Criminal Justice Commission submitted:

> It is totally unconscionable that law enforcement officers in this State are expected every day to engage in conduct which renders them liable to criminal prosecution.

And again:

> The NCA suffers from the additional burden that in the absence of uniform Commonwealth legislation it must conduct its operations in accordance with State and Territory law which varies considerably from jurisdiction to jurisdiction. In the present case some jurisdictions have no legislation whatsoever which authorises undercover operations for the purpose of obtaining evidence of criminal activity.[8]

3.9 The lack of protection afforded to police operatives is also an issue in terms of the kinds of offences in respect of which exemption is granted under Part 1AB. The Commonwealth Director of Public Prosecutions pointed out that the protection afforded to police operatives under the Commonwealth legislation as it currently stands is inadequate. In the view of the DPP, a major deficiency of Part 1AB of the *Crimes Act 1904* is that the exemption from criminal liability afforded by a controlled operations certificate does not extend to State and Territory offences involving the supply of narcotic goods.

3.10 The objective of most controlled operations involving the importation of narcotics is to identify the persons who arranged the importation. The usual scenario for the issue of a certificate is where narcotic goods are detected at the customs barrier in circumstances where police had no prior knowledge of the importation. To identify the person behind the importation of the drugs, the controlled operation usually involves the supply of the imported narcotics to the intended recipient in circumstances where the police would have committed an offence under State or Territory law of supply.

3.11 One of the rationales behind the enactment of Part 1AB was to provide police with the authority to engage in otherwise unlawful conduct where the police objective in doing so was to frustrate the criminal activity under investigation. The DPP claims that the lack of coverage for offences involving the supply of narcotics means that an important objective of the legislation has not been met:

> Given that most controlled operations will require the police to engage in conduct which will involve the supply of narcotic goods to the target of the operation, it is illogical to provide police with only a partial exemption from criminal liability. In that regard, were the police to decide not to conduct any controlled operations which would require the police committing offences relating to the supply of narcotic goods it will be obvious that there would be very few controlled

8 Criminal Justice Commission, Submission volume, pp. 45-46

> operations. As a consequence, it would become far more difficult to investigate and successfully prosecute those who organise and finance drug importations.[9]

Evidentiary issues arising in absence of uniform legislative coverage

Coverage limited to narcotics offences

3.12 The effect of the *Ridgeway* decision is that if police officers commit offences during the course of investigations and there is no special or statutory immunity available, the evidence so obtained may be tainted and therefore subject to the judicial discretion to exclude such evidence from any subsequent criminal proceedings. This has the practical effect of jeopardising all prosecutions that might result from police investigations that require police to participate in criminal activities.[10] The NCA identified the problem that exists with the current form of the Commonwealth scheme in Part 1AB of the *Crimes Act*:

> By legislating in relation to one set of offences only, the Parliament leaves the admissibility of evidence in all other areas to judicial discretion, the exercise of which is unappealable by the prosecution. But there is at least an implied assumption that other unauthorised conduct by law enforcement agencies is sanctioned. The question arises whether this is a satisfactory situation. Should Parliament be concerned about protecting investigations in narcotics investigations only? Or should a broader perspective be taken? In our view the answer is obviously 'yes' because the courts should be given clear guidance by the Parliament of what is acceptable behaviour and, therefore, which evidence should be admissible.[11]

Coverage limited to certain jurisdictions

3.13 Similar arguments apply in relation to the admissibility of evidence in different jurisdictions. In the absence of uniform legislative coverage of controlled operations throughout Australia, the success of NCA operations, which are generally multi-jurisdictional and international, may be jeopardised. The NCA points out that at the early stage of an investigation it can be difficult to foresee whether a Commonwealth or State controlled certificate is more appropriate. Investigators have to predict whether the investigation will result in Commonwealth or State charges. If a certificate is issued under the Commonwealth scheme, for example, and State charges are eventually preferred, then the risk arises that the evidence obtained in the investigation may be excluded.[12]

---

9 Commonwealth DPP, Submission volume, p. 82. Although the NCA could obtain this coverage by applying for a certificate under the NSW Act, it means that the NCA cannot conduct its own investigations independently. It also conflicts with the assertion by law enforcement agencies that there should be national uniformity of controlled operations legislation as discussed in paragraphs 3.19–3.27.

10 Not all types of conduct will necessarily result in the exclusion of evidence. The exercise of the discretion may involve the court in weighing several factors such as the degree of police criminality involved and the availability of other like offences for which the accused could have been prosecuted without the involvement of police officers in criminal activities. These factors have to be balanced against the competing public interest in the prosecution and conviction of wrongdoers for a particular class of offence: See *Ridgeway v The Queen* 184 CLR 19 at 37 and 43

11 National Crime Authority, Submission volume, p. 90

12 ibid., p. 98

3.14 Similarly, if a certificate is obtained under the NSW Act, but the investigation leads to the involvement of police officers in criminal activities in Queensland, the same risk of judicial exclusion may arise if charges must eventually be laid under either Queensland or Commonwealth legislation.

Cross jurisdictional problems in terms of Commonwealth-State differences in offences

3.15 Cross-jurisdictional problems exist in terms of the delineation between Commonwealth and State offences as well as cross-border differences between controlled operations legislative regimes. In relation to the example of money laundering, it was noted that:

> Money laundering as an offence is generally reflected in Commonwealth legislation, in the Proceeds of Crime Act, sections 81 and 82. Some of the states do have equivalent provisions, but the South Australian act does not apply in respect of Commonwealth offences. So while it may be possible to deal with the trafficking of drugs or some other kind of unlawful activity in South Australia through a controlled operation, that will not give you coverage in respect of Commonwealth offences. The only Commonwealth legislation which relates to controlled activities is limited to narcotics offences under the Customs Act. So the problem we face is both the delineation between Commonwealth and state offences, and the jurisdictional dimension.[13]

3.16 NCA Chairperson Mr John Broome referred to the difficulties arising from the absence of compatible legislation in relation to electronic surveillance devices. If the NCA wishes to place a listening device on a controlled delivery of drugs that arrives in Sydney, so that it will know where the drugs end up, it may have to get approvals under the *Crimes Act* and under the NSW Act for controlled operations certificates as well as obtaining the relevant approval for the surveillance device itself:

> If the package is transported by air to Queensland, we have got the obvious problem that ... [I]f it is taken to another state, we may or may not have problems. If it goes to Victoria, controlled operations there can be effectively be authorised by police officers of a certain rank. In any event, the admissibility of any evidence obtained through a listening device will still depend upon the availability of the relevant authorisation in the relevant jurisdiction.
>
> So you may find yourself trying to leapfrog around the countryside in front of an aircraft to get hold of a judge who can issue you with the relevant approval for a listening device.[14]

3.17 The Attorney-General's Department advised the Committee that it had identified the difficulties arising from the lack of uniformity of controlled operations legislation as part of its review of Part 1AB of the *Crimes Act*.[15]

---

13 Mr Broome, NCA, Evidence, pp. 7-8

14 ibid., p. 8

15 Attorney-General's Department, Submission volume, p. 120 and Mr Alderson, Evidence, p. 183

Reform options

3.18 The Committee accepts that there are major difficulties for the NCA's operations arising from the lack of consistency between the Commonwealth and the State legislative regimes. Throughout the inquiry, the Committee heard evidence in relation to possible options for reform. Those are:

- the enactment of uniform controlled operations legislation; and
- a return to the pre-*Ridgeway* position.

Option1: Enactment of uniform controlled operations legislation

3.19 There was widespread support for the adoption of uniform legislation throughout Australia. The NCA advocated that uniformity is particularly important in relation to criminal law yet, because it is fundamentally a State/Territory responsibility, there are huge differences across the country. Mr Broome said that law enforcement agencies need appropriate legislative frameworks in which to exercise their powers and responsibilities:

> There really is that need for some degree of uniformity and a recognition across the country that all our jurisdictional boundaries do is assist criminal activity across state borders. Effectively, we have these invisible barriers which prevent law enforcement from acting cohesively. The NCA is the only agency in the country which has a cross-jurisdictional capacity, and that is one of the real problems.[16]

3.20 Mr Broome noted that uniformity may not be politically achievable.[17] He warned the Committee that standards should not be sacrificed for the sake of uniformity and that agreement on the basis of the lowest common denominator is not acceptable in this area:

> We should set some national benchmarks in relation to this material. For those states who do not wish to meet that level or cannot for whatever reason, then so be it. But we should not drag everybody down to a level where, unless there is total agreement, something cannot take place.[18]

3.21 The Attorney-General's Department submitted that the cross jurisdictional problems of the NCA would be overcome by the enactment of uniform controlled operations legislation by the Commonwealth and each State and Territory. Uniformity would enable the NCA and other agencies to operate in a certain and consistent environment. Where an operation crossed borders, the same information and documentation could be used to seek authorisation under each jurisdiction. This would obviate the need for the NCA to factor in the consequences of the widely differing rules when planning and undertaking an operation. The Department also informed the

16 Mr Broome, NCA, Evidence, p. 9

17 This was also the view of Mr Delaney, Commonwealth DPP, Evidence, p. 181

18 Mr Broome, NCA, Evidence, p. 9

Committee that the Government will be pursuing increased consistency in law enforcement legislation and practice between the Commonwealth, States and Territories.[19]

3.22 If uniformity cannot be achieved, the Department suggested implementing other measures to minimise the difficulties experienced under the current non-uniform regime:

- States and Territories without controlled operations legislation that can confer immunity on NCA staff could enact such legislation, allowing scope for the authorisation and conduct of NCA controlled operations in each jurisdiction;
- all jurisdictions should have legislation enabling NCA members to authorise controlled operations;
- Part 1AB should be amended so that the scope for controlled operations is not confined to the investigation of specified narcotics offences. This would remove some of the differences between Part 1AB and the NSW and SA legislation.[20]

3.23 A representative of the Department, Mr Karl Alderson, said that removing discrepancies and differences is a central part of the Government's uniformity project. Mr Alderson also commented that the existing Commonwealth legislation, in its application to State officers involved in Commonwealth operations, reflects an intention that Commonwealth and State officers should operate together.[21]

3.24 The Australian Federal Police Association supported the call for uniform controlled operations legislation across Australia and thus relieving agencies from having to 'legislation shop'. In the AFPA's view, uniformity would give certainty to its members who work across a number of jurisdictions. Currently, the Commonwealth legislation only protects AFPA's members from limited offences under the *Customs Act* and the possession of illegal drugs. Technically, it does not protect them from trafficking under the State legislation in which they work.[22]

3.25 Similarly, the Police Federation of Australia supported the call for uniform controlled operations legislation across all jurisdictions, based on the widest interpretation of controlled operations – that is 'of any criminal offence' as in the NSW model, subject to the current review of that legislation:

> The principal concern of the Police Federation in this matter is for the immunity of police officers whilst they are working in controlled operations. The NCA is predominantly staffed by police officers from state, territory or federal jurisdictions and we believe that all Australian police officers should have the same level of protection regardless of which state, territory or federal jurisdiction

---

19 Attorney-General's Department, Submission volume, p. 120. It was reported in *The Canberra Times* on 25 July 1999 that Australia's Attorneys-General had agreed to establish uniform national laws for the use of listening devices to achieve 'seamless surveillance' of suspects. A report by AAP on 3 November 1999 suggested that Australia's police ministers had agreed to look at national uniform legislation to address the Outlaw Motor Cycle Gang issue.

20 Attorney-General's Department, Submission volume, p: 120

21 Mr Alderson, Attorney-General's Department, Evidence, p. 186

22 Mr Phelan, AFPA, Evidence, p. 173

> *they work for. Similarly such police officers should not suffer less protection* when working for such national agencies as the National Crime Authority.[23]

3.26 Mr Terry Collins, Chief Executive Officer of the Police Federation of Australia distinguished between the concepts of Federal legislation and national uniformity, noting that Federal legislation is not necessary to get national uniformity. In other areas, law *enforcement agencies in conjunction with the Police Federation, are moving towards national* competencies and national qualifications, perhaps even registration. Although these are State prerogatives, there is a national theme developing:

> ... if you get two that recognise each other and then a third, you have a blueprint with which the others will catch up and adopt in time, whether it is professional *registration of policing, national competencies, mobility or controlled operations.* That is why, given the movement from Queensland to look at New South Wales and this opportunity for the NCA to look at New South Wales ... because it seems to be the widest – then we say, "Good, let that be the national model." South Australia only has to remove the word "serious". They are then on the national model and, in due course, it will change and the rising tide lifts all boats.[24]

3.27 Mr Peter Alexander, President of the Police Federation of Australia, described criminals as being very mobile. He insisted that the criminal's ability to move freely between jurisdictions and to arrange crimes interstate on the telephone demands that there be uniformity. A further concern of the Association is that while police are working as NCA operatives, they continue to be subject to their own State's disciplinary codes. Therefore, police doing the same operation could be subject to different sanctions. When they are working for the Federal government there should be no doubt about what they can and cannot do[25]:

> ... I just do not think it is professional for our country to have a National Crime Authority that picks up all of the different state jurisdictions and members of state forces who are not working in a generic scenario. I do not think that is right, as we evolve in law enforcement in this country. I am getting on my hobbyhorse here. The Constitution is just totally silent on policing, it is a colony scenario, and here we are now talking with you people about things which are not even picked up by the Constitution. Policing was left to the states and territories.[26]

Uniformity based on the NSW model?

3.28 It is the NCA's view that there should be uniform legislation based on the NSW model, taking into account the results of the recent review of the legislation.[27] According to Mr Broome, it has the advantage of being tested and contains many features worthy of reproduction in the Commonwealth Act.

---

23 Police Federation of Australia, Submission volume, p. 144

24 Mr Collins, PFA, Evidence, p. 54

25 Mr Alexander, PFA, Evidence, p. 44

26 ibid., pp. 44-45

27 National Crime Authority, Submission volume, p. 89

3.29 Queensland Crime Commissioner Mr Tim Carmody also preferred the NSW model as it covers a wider range of offences and has a better accountability regime:

> That is important if you want to ensure that good law enforcement is not bought at too high a price. You have to be sure that the line is drawn, not only legislatively but operationally, at the right place. That is always difficult. There always has to be an area of discretion. The idea is to make sure that those exercising that discretion know that their discretion has to be transparently examinable and reviewable and that they will be accountable for the decisions they make. The experience is that that has a disciplining effect. If you know that you will be called to account, you will exercise the discretion you are given so that it will withstand scrutiny. That has been the practical experience since the introduction of both the Commonwealth and the New South Wales schemes.[28]

3.30 Mr Richard Perry, Queensland's Public Interest Monitor, said that although the NSW model has significant advantages over the Federal legislation, the NSW model has three areas of weakness: the approval process and the monitoring and accountability mechanisms. These are dealt with in detail in Chapters 4 and 5. As a starting point in looking for the right model, Mr Perry said that the expansion of police powers needs to be accompanied by the parallel development of accountability mechanisms:

> There are a series of parallel factors, each of which has to be looked upon in the context of the others, so that if you develop wider powers for law enforcement agencies, it is done only – and I emphasise 'only' – upon the basis of appropriate accountability and reporting methods. It is in respect of that aspect that I have some criticism of the New South Wales legislation.[29]

3.31 Dr Tim Anderson for the NSW Council for Civil Liberties said that the NSW model was one that the Council 'abhors and that there is no need for'. The Council's principal concern in relation to the current legislative models (in NSW as well as in SA and the Commonwealth) is that power is passed across to executive agencies to authorise serious criminal behaviour prospectively without the benefit of full knowledge of the circumstances in which the offences will be committed, so that, in effect, the person has a 'green light'. This model contrasts with that where the officer's actions are assessed or subjected to independent scrutiny after the event:

> We have an executive officer of government, head of a secretive agency, who is now relied on to make those absolutely fundamentally critical decisions and the parliament is saying, 'We are going to trust this person's decision,' rather than having people subject to a law – it is one of these old fashioned concepts of people being equal before the law, whether they are a government agent or not – and the circumstances being independently scrutinised after the event.[30]

3.32 Dr Anderson criticised the NSW model as having gone through with very little debate in the State Parliament. He described the process of its enactment as having involved little more than a request by police for more powers in post royal commission circumstances and the subsequent granting of it by the Parliament and both major parties. In Dr Anderson's

---

28 Mr Carmody, QCC, Evidence, p. 79

29 Mr Perry, PIM, Evidence, p. 120

30 Dr Anderson, NSWCCL, Evidence, p. 25

view, this was insufficient debate given that, under the legislation, any form of criminality by law enforcement officers can be authorised (discounting the provision that bars the retrospective authorisation of murder). Dr Anderson referred to the words of Chief Justice Mason in the *Ridgeway* case:

> Circumstances can arise in which the need to discourage unlawful conduct on the part of the enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in a conviction of those guilty of crime.[31]

3.33 Despite these criticisms, the Committee notes that the review of the NSW legislation conducted by Mr Mervyn Finlay QC, found that the legislation is essentially sound but would benefit from some amendment to clarify its operations. In the course of that review, some of the more extreme proposals to extend the scheme's operations as sought by law enforcement agencies were rejected.[32]

A return to pre Ridgeway?

3.34 The NSW Law Society postulated a return to the pre *Ridgeway* position. In its 1997 submission to the Minister of Police in relation to the enactment of the NSW model, the NSW Law Society advised that the society was fundamentally opposed to legislation that permitted law enforcement officers to engage in unlawful conduct. Secondly, the Society claimed that controlled operations legislation was unnecessary as the then existing law governing undercover police work as stated in the *Ridgeway* case, was workable and satisfactory. The society quoted the following passage from the judgement of Mason CJ, Deane and Dawson JJ:

> The effective investigation by the police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of opportunities for the commission by a suspect of a criminal offence. When those tactics do not involve illegal conduct, their use will ordinarily be legitimate notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity. ... A finding that law enforcement officers have engaged in such clearly improper conduct will not, of course, suffice of itself to give rise to the discretion to exclude evidence of the alleged offence or an element of it. As with the case of illegal conduct, the discretion will only arise if the conduct has procured the commission of the offence with which the accused is charged.[33]

The Society argued that the evidence in fact indicated that the courts were admitting evidence rather than excluding it.[34]

---

31 Dr Anderson, NSWCCL, Evidence, p. 22

32 NSW Inspector of the Police Integrity Commission, *Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act)*, April 1999

33 *Ridgeway v The Queen* (1995) 69 ALJR 484 at 493

34 The Law Society of NSW, Submission, Attachment, copy of the Society's submission in relation to the Law Enforcement (Controlled Operations) Bill 1997, Submission volume pp. 140-141

3.35 In addition, the Law Society pointed out that operatives and their supervisors were not being charged either criminally or departmentally in relation to their activities while working in covert operations.[35] Representing the Law Society at the Committee's hearings in Sydney, Professor Trevor Nyman pointed out the dangers inherent in legislation of this nature (referred to in paragraph 2.28) and concluded that:

> The Law Society would be happiest to leave the law as it was in Ridgeway.[36]

3.36 This was expressly rejected by all of the law enforcement agencies. Mr Carmody, deplored such a suggestion:

> What will happen there is that you will have operatives who take risks, stick their necks out to enforce the law and be left unprotected by the legislation ... We as a society are really asking those civilians and law enforcement officers who do this difficult and dangerous work to do something that no-one else in society is expected to do, and that is, to act nobly and in the best interest of pursuing law enforcement objectives, without the protection. You do not send firefighters in to fight a fire without fireproofing them. You do not send law enforcement officers into a dangerous situation without bulletproofing them.[37]

3.37 Mr Carmody said that pre *Ridgeway*, law enforcement action in covert operations was uncontrolled. Risks were taken, unseen and often undiscovered, and the results were achieved. By contrast, controlled operations legislation acknowledges the reality of undercover work, that if society wants to get these outcomes, then police have to be engaged in operations involving subterfuge, deceit, trickery, infiltration, and sometimes the commission of criminal offences. Mr Carmody argued that it is unacceptable that such operations should be uncontrolled. In his view, control is needed at a level where the control will be effective and where accountability can have an impact if something goes wrong.[38]

3.38 Mr Brendan Butler, Chairperson of the Criminal Justice Commission, said it was not possible to 'go back to the future'. The greater awareness that has developed in relation to controlled operations is part of the normal development of the law. The enactment of legislation by some States will have an impact on Queensland being a State that has not yet moved in that direction. As other States will have legislative guidelines, there will be a tendency to look for clearer guidelines in Queensland rather than wanting to rely on judge-made law. Mr Butler advised that law enforcement should be aiming towards a national scheme of mutual recognition to facilitate cross border operations and to ensure that police operatives have the protection of the law and are also accountable for their actions during controlled operations.[39] He said:

---

35 The Law Society of NSW, Submission, Attachment, copy of the Society's submission in relation to the Law Enforcement (Controlled Operations) Bill 1997, Submission volume, p. 141

36 Professor Trevor Nyman, NSW Law Society, Evidence, p. 74. Dr Anderson, NSW Council for Civil Liberties, commented: 'We did not see a need for this legislation in the first place'; Evidence, p. 24. But Dr Anderson went on to say that if there is legislation of this nature then 'there is a responsibility on the Parliament to codify the protections the court would have otherwise put in', Evidence, p. 25

37 Mr Carmody, QCC, Evidence, p. 80

38 ibid., p. 83

39 Mr Butler, CJC, Evidence, p. 91

> As I said earlier, people in agencies we work with across state borders who have this legislation in place and who have nice clear guidelines for their behaviour are going to be increasingly unsettled in dealing with people in a place like Queensland where there is no legislative basis, because they will become accustomed to having that legislative scheme in place. Over time, that will decrease the effectiveness of agencies in Queensland - whether they be the police service, the NCA operating in the state sphere, us or the QCC – in our proactive operations in things like drugs and corruption.[40]

Conclusion

3.39 The National Crime Authority is an outstanding example of cooperative federalism. It exists only because all State and Territory Governments reached unanimous agreement in the early 1980s to pass uniform legislation within their respective jurisdictions to underpin the Commonwealth legislation establishing the NCA, and thereby provide it with the authority to act in all Australian jurisdictions.

3.40 The Committee acknowledges that it is the Constitutional and sovereign right of State and Territory Governments to legislate in relation to law enforcement of State and Territory offences and to determine the structure and powers of their police services as they see fit. Those States and Territories that have not adopted controlled operations legislation for their own law enforcement personnel may have genuinely held concerns about its desirability. But, as indicated in footnote 18, Australia's Attorneys-General acknowledge that policing in the new millennium will require national and international responses that will necessitate them foregoing the exercise of certain of their powers in the national interest.

3.41 As the discussion in this chapter has highlighted, the current legislative regime in relation to controlled operations is far from uniform and it is clear that this situation has had an adverse impact on the effectiveness of the NCA. It is absurd that organised crime groups should benefit from this lack of uniformity while the agency specifically established to thwart their criminal activities is constrained by it.

3.42 Accordingly, the Committee is recommending the introduction of uniform controlled operations legislation in Australia. Uniformity would provide the most supportive environment for the NCA's operations. The Committee strongly urges those jurisdictions without controlled operations legislation to give the matter their most earnest consideration on the basis that they are failing to give their covert operatives, who engage in such work at great personal risk, the support they deserve.

3.43 Where the ideal of uniformity cannot be achieved, the Committee is recommending that those jurisdictions which do not currently authorise NCA controlled operations should introduce appropriate amendments to enable them to do so.

Recommendation 1: That the Government recommend to the Standing Committee of Attorneys-General that uniform controlled operations legislation be enacted by the Commonwealth, States and Territories in terms similar to the *Law Enforcement (Controlled Operations) Act 1997 (NSW)* subject to the foreshadowed amendments in the Finlay Review Report and the further recommendations in this report.

---

40 Mr Butler, CJC, Evidence, p. 95

Recommendation 2: That, if uniform controlled operations legislation cannot be secured then:

(a) the Government call for those States and Territories that do not have controlled operations legislation, to enact such legislation as is necessary for the NCA to authorise and conduct controlled operations in each jurisdiction;

(b) the Government call for those States and Territories that allow officers of a State or Territory agency (eg police service) to authorise controlled operations to amend their legislation to allow NCA members to authorise their own controlled operations.

CHAPTER 4

THE APPROVAL PROCESS FOR CONTROLLED OPERATIONS

Introduction

4.1 Having confirmed the appropriateness of the NCA's involvement in controlled operations, the Committee's terms of reference require it to examine the adequacy of relevant national and state legislation in relation to the conduct of controlled operations by the NCA. The Committee has done this by analysing the appropriateness of the essential elements of the controlled operations regime in Part 1AB of the *Crimes Act 1914* against the options currently utilised in the States and those proposed by inquiry participants. Throughout the inquiry, some important civil liberties considerations were raised and the Committee has dealt with this aspect of its terms of reference as and when relevant to the context of the Committee's analysis of the issues rather than in any cognate sense.

4.2 Although some of the elements overlap, the Committee has found it convenient to deal with the regime under several discrete headings. In this chapter, the Committee deals with the approval process for controlled operations. The Committee then examines the important and related matter of the accountability system in Chapter 5, before dealing with residual issues in Chapter 6.

The approval process: Overview issues

4.3 In relation to the approval process of controlled operations, the following key areas were the focus of much of the discussion:

- the current internal authorisation of controlled operations by the agencies conducting the operations and options for reform;
- the appropriateness of a tiered authorisation process;
- the inability of the NCA to issue its own certificates under State controlled operations legislation;
- the matters to be taken into account by those determining an application for a controlled operation certificate.

The approval processes under the current legislative regimes

4.4 The question of who should authorise certificates for controlled operations dominated the discussion. The Commonwealth regime provides for the internal approval of applications as do the regimes under the various State acts. The Committee was urged to

recommend transferring the approval process to an external agency notwithstanding the concerns raised by law enforcement agencies about the potential for such a process of external authorisation to detract from operational efficiency.

The approval process under the Commonwealth legislation

4.5 The approval process of controlled operations certificates under Part 1AB of the *Crimes Act 1914* is an internal one, where law enforcement officers approach more senior members of their own agency or the agency conducting the operation. Officers of the AFP, NCA, ACS or of a State or Territory police force in charge of a controlled operation may apply to either the Commissioner, Deputy Commissioner or Assistant Commissioner of the AFP or a member of the NCA (including the Chairperson) for a certificate authorising a controlled operation.

4.6 Section 15M sets out the preconditions to the issuance of a certificate. The authorising officer must be satisfied that:

- all available information about the nature and quantity of the narcotic goods has been provided;
- irrespective of the operation, the target is likely to commit an offence against section 233B (or an associated offence);
- the operation will make it easier to obtain evidence of the offence; and
- after the operation, any narcotic goods in Australia will be in the control of an Australian law enforcement officer.

The approval process under State legislation

New South Wales

4.7 The authorisation process for controlled operations under the *Law Enforcement (Controlled Operations) Act 1997* (NSW) is also an internal one. An officer of the Police Service, the ICAC, the NSW Crime Commission or the Police Integrity Commission may apply to their Chief Executive Officer for authority to conduct a controlled operation.[1] Authorities may not be issued unless a code of conduct has been prescribed by regulation for that agency.

4.8 To justify issuing an authority, the CEO must be satisfied, amongst other things, that:

- there are reasonable grounds to suspect criminal or corrupt conduct within the administrative responsibility of the agency;

1 There is no provision for NCA Chairperson or Members to issue authorities in respect of NCA operations in NSW.

- the nature and extent of the criminal or corrupt conduct must justify the controlled operation; and

- the nature and extent of the controlled activities must be appropriate to the suspected conduct and can be accounted for in detail under the reporting requirements of the Act.

The CEO must also have regard to the reliability of information, the nature and extent of the suspected criminal activity or corrupt conduct and the duration and likely success of the proposed controlled operation.

4.9 An authority may not be issued where a participant would be induced to engage in criminal activity or conduct that the participant would not otherwise engage in or where the health or safety of a person would be endangered or cause serious loss or damage to property. Authorities must contain certain particulars including the persons so engaged, the nature of controlled activities that civilians and officers may engage in and the period for which the authority is to remain in force. Authorities may also be renewed.

South Australia

4.10 The approvals process under the *Criminal Law (Undercover Operations) Act 1995* (SA) is also an internal procedure with police superintendents (or above rank) approving undercover operations for the purpose of gathering evidence of 'serious criminal behaviour'.

4.11 The preconditions for approving an operation are that the authorising officer must reasonably suspect that persons are engaging in or about to engage in serious criminal behaviour. The officer must be satisfied that the proposed operation is proportionate to the suspected criminal behaviour, that the means are proportionate to the end and that there is no undue risk that persons without a predisposition to serious criminal behaviour will be encouraged to commit an offence.

Victoria

4.12 As set out in paragraph 1.55, while Victoria does not have any legislation specifically directed at regulating controlled operations, administrative arrangements and police procedures have been developed on the legislative base of the *Police Regulation Act 1958* (Vic). Under that Act, the Chief Commissioner of Police derives his power to supervise and control the Victoria Police and to make and amend orders for the administration of the police force and the conduct of the force's operations. The Victoria Police's *Operating Procedure Manuals* contain the procedures for the conduct of controlled operations. For the purposes of the Victoria Police, controlled operations involve the controlled delivery or purchase of narcotics using either undercover police operatives or police informers.

4.13 The approval process in Victoria is a tiered one although, once again, an internalised one. Although approval is required for any kind of covert operation, the method for obtaining approval differs depending on the level of seriousness of the investigation proposed. Paragraph 5.1.15 of the Manual states that generally approval for a covert operation must be obtained from either the Covert Investigation Target Committee or Deputy Commissioner (Operations). The role of the Target Committee is to hear and determine applications to conduct covert operations. It is comprised of a chairperson, being an officer

in charge of State Crime Squads, and three other members, being another officer in charge of State Crime Squads, the Regional Crime Coordinator of the General Policing Department and the officer in charge of the Covert Investigation Unit. Approval at this level, however, is not required in relation to minor covert investigations. These can be authorised by the officer in charge of the Covert Investigation Unit after consultation with the chairperson of the Committee.[2] A further tier of approval also exists in relation to controlled operations to investigate licensing, gaming and other vice-type offences. Approval for these operations must be obtained from the District Commander. A further discussion on the Victorian tiered approval process is at paragraphs 4.66-4.67.[3]

Criticism of the process of in-house approvals

4.14 The chief criticism of the approvals process in the Commonwealth and State legislative regimes is that they are in-house approvals processes of an ex parte nature. President of the Australian Council for Civil Liberties, Mr Terry O'Gorman, described the process whereby a junior officer obtains approval from a more senior officer in the same agency as a 'cosy arrangement'[4] and alluded to some of the dangers of in-house approvals:

> Senior police officers were once junior police officers. I know some senior police officers who, when they were junior police officers, were regarded as part of the problem rather than part of the solution. Yet, naively, we say that because a police officer gets pips on his shoulder, suddenly he is responsible. If you look at Fitzgerald, if you look at Wood, if you look at the anti-corruption commission in WA and if you look at the broken windows – not crims this time but police breaking windows – in Victoria you see that senior police often carry some of the baggage in terms of misbehaviour that they carried when they were junior police.[5]

4.15 Similarly, Mr Richard Perry, the Queensland Public Interest Monitor, told the Committee that one of the weaknesses in the NSW and the Commonwealth legislative regimes is the application process whereby applications for certificates or authorities are made to the CEO or a relevant officer of the agency undertaking the operation. He contrasted the approval process for telephone interception warrants in the Federal sphere (those warrants are approved by senior members of the AAT) and the approval process for applications for listening devices and surveillance warrants in Queensland (those warrants are approved by a Supreme Court Judge). In Mr Perry's view, the standard required for the approval of controlled operations which authorise illegality by police officers is inconsistent with the higher standards required for the approval of telephone interception and surveillance warrants:

---

2 Victorian Government, Submission volume, pp. 186-187 (Attachment A; Operating Procedures, Victoria Police Manual, Chapter 5, paragraph 5.1.15)

3 Victorian Government, Submission volume, pp. 187-188 (Attachment A; Operating Procedures, Victoria Police Manual, Chapter 5, paragraph 5.1.15). In addition, as mentioned at paragraph 1.57, immunity from criminal prosecution for police officers and other persons for drug-related offences is contained in section 51 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*. To qualify, the police officer or person must be acting under written instructions by a police officer not below the rank of senior sergeant.

4 Mr O'Gorman, ACCL, Evidence, p. 100

5 ibid., p. 102

> What we are doing under those warrants is listening in on people's at times quite private and sensitive conversations. But without in any way belittling the impact upon privacy that that involves, those warrants are doing no more than that. Yet at the same time we have a regime which authorises conduct which would otherwise be illegal by law enforcement officers and which may necessarily, firstly, have an impact upon members of the public and, secondly, involve other members of the public in such activity. Yet we do not require that the authority or authorisation for that be given the same level as we do for surveillance devices. It seems to me that there is a logical inconsistency in that, and that is one which I think has to be addressed.[6]

4.16 Mr Simon Bronitt and Mr Declan Roche argued that the approval process for controlled operations should be in the hands of someone independent of the applicant agency. They supported a move to involve someone like a public interest monitor claiming it would make the process more independent and accountable.[7] In their view, the internal approval process is problematic in that the opportunities for review of that approval are very limited prior to any subsequent trial. Mr Bronitt suggested that a tribunal or a panel should be established, perhaps comprised of lawyers and appropriately qualified lay individuals such as ex-police, to hear applications for controlled operations in which police would have to establish that they have met the criteria in the legislation:

> That is a more appropriate model and, in fact, is what is required under international human rights law. It is not necessary that it has to be a judge that grants permission. That is very clear from the international case law on the privacy right, but it has to be a system of administrative control which is reviewable. I think the current model we have is deficient in that regard. I think third party agencies, human rights organisations, can play a role, perhaps, but I would rather see those interests represented on the decision-making panel rather than as parties making submissions for and against a particular operation.[8]

4.17 Dr Tim Anderson, Secretary of the NSW Council for Civil Liberties, objected to an approval process which allows executive authorisation of breaches of privacy and serious criminality. According to the Council, this amounts to the 'dangerous process of licensing arbitrary power'. In cases where passive engagement is required in a drug operation, the Council's preferred course is that the operation should be authorised by bench warrant. It is opposed to the current system that allows for the issuing of a 'certificate of illegality' from the members of the investigating agency.[9]

Arguments in favour of the in-house approval process

4.18 By contrast, the Victorian Government, referring to the NSW legislation, complained that the need for a controlled operation to be authorised by a Chief Executive Officer (with extremely limited capacity to delegate that authority) causes delays in obtaining authorisations. The Victorian Government claimed that this process can be fatal to an operation. It was submitted that if the Victoria Police gathered highly rated intelligence on a

---

6 Mr Richard Perry, PIM, Evidence, p. 120

7 Messrs. Bronitt and Roche, Evidence, p. 138

8 Mr Bronitt, Evidence, pp. 141-142

9 NSW Council for Civil Liberties, Submission volume, pp. 148-149

major importation of heroin into Sydney and that it was destined for Sydney the following day, the cumbersome nature of the authorisation process in the NSW legislation would prevent the timely execution of a controlled operation:

> To place this difficulty in context, Victoria Police conduct approximately 200 operations each year involving covert operatives, of which some 120 involve drug investigations. While it is essential that there is accountability to the senior management of law enforcement agencies for such operations, it is simply not practicable from an operational perspective for the head of a large law enforcement agency to be required to personally authorise each such operation.[10]

4.19 Law enforcement agencies argued that the possible alternatives to the in-house approval process for controlled operations were inappropriate and many of the reasons for their position are set out in paragraphs 4.35-4.46.

Criticism of the approval process: Insufficient monitoring

4.20 It was claimed that a significant weakness in the current legislative regimes for controlled operations at both Commonwealth and State levels is the inadequate monitoring of the progress of controlled operations once authorised. Under the NSW Act, for example, the Ombudsman has the right to monitor records and must do so every 12 months to present his or her annual report. Mr Perry claimed that this type of monitoring is ineffective because it occurs too far down the track. Involvement at too late a stage in a controlled operation means that the person doing the monitoring is not sufficiently informed about the history of the operation and this prevents any active monitoring from taking place.[11]

4.21 The claim that controlled operations are inadequately monitored and covert police operatives are inadequately supervised is supported by Mr O'Gorman's observations:

> There is far too little requirement for CPOs to tape record when it is quite safe for them to do so. CPOs frequently operate out of unnumbered Spirax notebooks that are bought from newsagents, as opposed to paginated notebooks. So there is a lot of monitoring of the activities of CPOs that I argue is a logical follow-on from putting the controlled operation certificate concept in the hands of the court and out of the hands of senior police.[12]

---

10 Victorian Government, Submission volume, p. 172. The Victorian Government noted two other aspects of the approvals process in the NSW legislation that might cause difficulties for the NCA and the AFP. First, the requirement that the written request for authorisation to the relevant Chief Executive Officer must be faxed or mailed to NSW gives rise to opportunities for security breaches and the possible identification of covert operatives or informers. Secondly, once a controlled operation is authorised in NSW, the authorised officer in NSW has control over the operation and may terminate it without consulting the external law enforcement agency overseeing the investigation. In summary, the investigators from the external law enforcement agency cannot oversee or control the security of intelligence relevant to their operation while in NSW.

11 Mr Perry, PIM, Evidence, p. 122

12 Mr O'Gorman, ACCL, Evidence, p. 101

4.22 Mr O'Gorman told the Committee that in his experience, his attempts to obtain information about the activities of CPOs have been met with claims that it would 'reveal police methodologies'. In his opinion, a more open system would allow for greater accountability of CPOs and their activities and roles in prosecutions and subsequent court actions.[13] NCA representatives denied that Mr O'Gorman's assertions applied to their organisation, but noted that they strongly resist 'fishing expeditions' by defence counsel for information with no legitimate forensic purpose.[14]

Options for reform

4.23 In light of these adverse comments about the current approval process, the Committee gave consideration to three alternative approaches:

- external authorisation with public interest monitor involvement ;
- judicial authorisation with/without public interest monitor involvement; and
- tiered levels of authorisation within either or both internal or external approval process.

Alternative 1: External authorisation with public interest monitor involvement

4.24 The Committee heard evidence from Mr O'Gorman that the Public Interest Monitor model in Queensland is an appropriate model for the authorisation of controlled operations certificates.[15]

The Public Interest Monitor Model

4.25 The position of Public Interest Monitor (PIM) was established in Queensland in April 1998 and operates under three separate acts: *Police Powers and Responsibilities Act 1997, Crime Commission Act* 1977 and the *Criminal Justice Act 1989.* The monitor's principal functions are: to appear on applications by law enforcement agencies before a Supreme Court judge or magistrate for a search warrant and for the installation of surveillance devices; to monitor the surveillance techniques; and to report to the Parliament annually.[16]

4.26 The PIM's primary role is to represent the public interest where law enforcement agencies seek approval to use search powers and surveillance devices which have the capacity to infringe the rights and civil liberties of citizens. The role is based on the public interest in ensuring that law enforcement agencies meet all the legislative requirements and that their proposed actions do not extend beyond the parameters laid down by the Queensland Parliament.

---

13 Mr O'Gorman, ACCL, Evidence, p. 101

14 Messrs Melick and Irwin, NCA, Evidence, pp. 192-193

15 Mr O'Gorman, ACCL, Evidence, p.98

16 There is no controlled operations legislation in Queensland for the PIM to monitor.

4.27 In practice, the PIM appears at relevant applications by law enforcement agencies before a Supreme Court judge or magistrate. These are applications that involve search warrants where the subject of the warrant is unaware of the application and applications for the installation of surveillance devices either by way of audio devices, video devices or tracking devices. The monitor may issue written questions to the agency for answer prior to the hearing or cross-examine the applicant at the hearing. The PIM can also prescribe the time frame within which the application is to be brought.

4.28 The PIM monitors surveillance activities by imposing conditions on the warrant allowing the PIM unfettered access to all information obtained under the surveillance system, being the transcript and any film. The PIM checks that all conditions are complied with and if not, can report the matter to the Commissioner of Police. The PIM may also apply to the court for the destruction of material that has been obtained. There is not yet provision for the PIM to apply to have the warrant cancelled but the Committee was advised that this is a desirable power that would enhance the PIM's role.[17]

4.29 The PIM reports annually to the Parliament although there are restrictions on the information contained in the reports as it can impact on operational secrecy. These restrictions, however, are counterbalanced by the PIM's unfettered access to the material and the PIM's ability to report misbehaviour or non-compliance to the Police Commissioner.

4.30 Mr Perry advised the Committee that a similar system would be appropriate for the authorisation of controlled operations. In his view, such a system should be characterised by the following:

- uniformity - There should be a uniform Federal and State scheme;[18]
- an external approval process;[19] (Mr Perry recommended either referral of applications to the AAT for determination or the establishment of a separate issuing authority for applications in the Federal sphere.[20])
- the involvement of a monitor throughout the entire controlled operation, from the initial application to the end of the controlled operation;[21] (Mr Perry suggested there should be monitors in every State operating under the relevant State scheme for their own State forces and under the cooperative scheme in respect of any Federal agency operating within that State area.[22]) and

17 Mr Perry indicated that the power to apply to have a warrant cancelled would be desirable, a matter he proposed to raise with the Queensland Government, Evidence, p. 118

18 Mr Richard Perry, PIM, Evidence, p. 127

19 ibid., p. 120

20 ibid., p. 126: Mr Perry expressed a preference for judicial determination but for the reasons discussed in paragraph 4.58, rejected it

21 ibid., pp. 121-122

22 ibid., p. 127

- the issuer should be separate from the monitor;[23] The monitor may need to go back to the issuer to have the certificate or authority cancelled, so the two roles should be treated separately. The issuer issues the certificate and the monitor should appear on the application, support or oppose it, and monitor the compliance with the certificate. Separating the two functions also avoids any suggestion of conflict of duty or interest.[24]

4.31 Applying the PIM model to applications for controlled operations certificates, a monitor would appear at an application before either the AAT or an external issuing authority, to represent the public interest. The monitor would be able to cross-examine the law enforcement agency to ensure that the operation was necessary and to ascertain whether particular conditions should be imposed. The PIM would monitor the progress of the operation and perhaps have the capacity to apply for the termination of the operation if it became clear that the conditions were not being complied with or that some other circumstance demanded that the operation cease.

4.32 Mr Perry advised that in setting up such a scheme, it should be remembered that crime is not neatly confined by state boundaries. Any scheme would have to make provision for cases where a federal application is made in respect of suspected criminal activities where there are real prospects that they will operate interstate. In Mr Perry's opinion, the scheme should enable an application in relation to an operation that runs interstate to be heard or grounded in one place. He suggested the question of where such an application should be heard might be determined by individual operational considerations in each matter such as where the operation is running from or where the senior officers are located.[25]

4.33 The Public Interest Monitor in Queensland is involved in the actual application and approval process of surveillance devices and search warrants. Mr Perry claims there are advantages in a system where the monitor is involved in the original application and in the subsequent monitoring being on-going and close. Some of the significant points included:

- monitors must be 'up to speed' on the application and operation in order to be able to engage in active monitoring;
- for monitoring to be meaningful, it must not occur 'too far down the track';
- for monitoring to be meaningful, information obtained during an operation must be constantly monitored; and
- close monitoring ensures that law enforcement agencies comply with the legislature's expectations.[27]

---

23 Mr Richard Perry, PIM, Evidence, p. 126

24 ibid., pp. 126-127

25 ibid., pp. 127-128

26 ibid.

27 ibid., p. 122

4.34 Mr Perry also reported that the use of legal advisers by police services in the approvals process for surveillance devices warrants has added another dimension:

> One of the things which I think has been a positive step in the QPS, for example, is the employment of legal officers in the various sections and, indeed, now a legal adviser to the Commissioner for Police. I think it is important because those people add another perspective to the approval process, and they are people with whom any ombudsman will work in the first instance.[28]

Arguments against external authorisation and PIM model

Operational efficiency

4.35 Mr Perry predicted that the response of law enforcement agencies to an external authorisation process would be that it would impact on operational efficiency. Mr Perry agreed that it would not be as efficient for an applicant to go before an external body, particularly with the intervention of a public interest monitor, as it is to obtain the same from a superior officer. Mr Perry said, however, that operational efficiency, while an important consideration, is not the paramount consideration:

> I can see no reason why operational efficiency or effectiveness is considered to be so paramount that a regime cannot be implemented in which the appropriateness of conduct to be authorised is reviewed by an appropriate independent person with the intervention of an appropriate ombudsman or public interest monitor or whatever you wish to call them.[29]

4.36 When the office of the PIM was first created in Queensland, law enforcement agencies feared that it would negatively impact on operational efficiency. Mr Perry advised the Committee that, in fact, this has not been the case. Although on occasions, a window of opportunity for a search warrant had closed because of the application procedure, according to Mr Perry, such occasions were 'rare'. The objective of those involved in the application process has been to facilitate the bringing of applications on an urgent basis. Either the PIM or his deputy is available 24 hours a day, seven days a week, to ensure that matters are dealt with as and when necessary. In addition, the PIM's role has been assisted by the attitude of the judiciary. Where necessary, the PIM has been able to have other matters stood down so that urgent applications can be brought on and heard before a Supreme Court justice:

> I think it is fair to say that, since the regime has started in Queensland, there has not been an occasion on which the operational efficiency has been, in a detrimental sense, affected by the necessity to go before a Supreme Court justice. What that means in simple terms is that the system can work and does work if it works with the cooperation of all parties to it, and to date that cooperation has been forthcoming. Frankly, I can see no logical reason at all why a similar regime would not operate with equal efficiency in any other state or in the federal sphere. 'Operational efficiency' is a term used perhaps too frequently to deny what seems to me an otherwise logical imperative.[30]

---

28 Mr Richard Perry, PIM, Evidence, p. 122

29 ibid., p. 121

30 ibid.

4.37 As predicted by Mr Perry, law enforcement agencies did warn that operational efficiency might be compromised if the approval process for controlled operations has to involve a PIM, particularly in quick time response operations. There was general agreement that matters can arise that require almost instantaneous decisions as to whether an operation will be undertaken or not. NCA Member Mr Greg Melick told the Committee that some controlled operations come up immediately and may be over and done with in 24 hours:

> It then becomes a real problem if you have to get a public interest monitor in. As it is, with three members of the Authority it is difficult at times to get us in a timely manner either for a controlled operations certificate or to sign the warrant for a listening device. If you then got a fourth person involved, it could make life a bit difficult. I do not have problems with a supervisory role in an audit type situation. I do have a problem in an on the ground and operational sense. You should be able to trust the people you have put in those positions, bearing in mind also that, when it gets to court and we are using evidence such as a certificate, the certificate itself is tendered and the court can scrutinise the procedures, et cetera, if they consider it appropriate.[31]

4.38 The classic case is when narcotic goods are detected at the barrier and a decision has to be made as to whether to let the goods go, arrest those detected or conduct a controlled delivery to follow the narcotics through to their intended recipient. The Australian Federal Police Association asserted that an external approval process would not be appropriate to these very quick-time response jobs.[32]

4.39 Mr Melick told the Committee that external approval was not a viable alternative because the issuer must be kept closely informed about the progress of the operation. He said that matters can arise very quickly which are relevant to the issue of the controlled operation certificate and which the issuer should be aware of:

> A lot of people do not understand that a controlled operation is a very fluid matter. Once you sign a certificate, and especially when the drugs are getting close or coming into the country, you have to be kept informed because you are the person responsible. You have certified that you are satisfied that they are going to be under the control of the law enforcement agency at the end of the operation.[33]

4.40 The AFP asserted that the approval process is not the appropriate stage at which to introduce independent accountability in any form. Although scrutiny is a crucial part of a regime to regulate controlled operations, the AFP advocated it should be after the event. The type of scrutiny the AFP considers appropriate is judicial scrutiny at any subsequent prosecution coupled with the scrutiny of controlled operations certificates in the report to the Minister responsible and, through that, to the Parliament. According to AFP Assistant Commissioner Michael Keelty, scrutiny at the approval process stage is not pragmatic, particularly in relation to drugs arriving at the barrier. In those situations, decisions and applications have to be made quickly so that operations can occur in a very short time-frame:

---

31 Mr Melick, NCA, Evidence, p. 197

32 Mr Phelan, AFPA, Evidence, p. 168

33 Mr Melick, NCA, Evidence, p. 196

> ... it might be that my officers have received a call from Sydney airport to say a person has been stopped by Customs with a quantity of narcotics. The way that the narcotics industry works is that, in more cases than not, somebody would already be waiting for that person to come to the other side of the Customs barrier. Delays are critical in terms of obtaining the ultimate goal, and the ultimate goal is not only the seizure of the drugs and the prosecution of any persons in possession of the drugs; it is to dismantle the syndicates that are responsible for bringing the drugs into the country.[34]

Mr Keelty suggested that an external approval process is inconsistent with the ultimate goal of the National Illicit Drugs Strategy to be 'tough on drugs' and to 'seize every opportunity to prevent drugs from getting to street level'.[35]

4.41 Mr Michael Atkins, Principal Legal Policy Adviser, AFP, advocated that the accountability mechanisms in the telecommunications interception regime, in terms of the Ombudsman's compliance monitoring role, is an appropriate one for the Committee to consider. Mr Atkins said that the monitoring of warrants after their issue and during their life is a powerful accountability mechanism and one that could be useful in terms of controlled operations certificates.[36] These issues are discussed further in Chapter 5.

4.42 The AFPA asserted that an external approval process for controlled operations involving a PIM would have a deleterious impact on police investigations. The AFPA claimed that:

- police should have authority over what investigations they do and how they are conducted. (Police have a statutory right not to have their activities interfered with. Involving a third party at the approval stage could have the effect of fettering the discretion of the police as to what matters they should investigate and how they should investigate them);

- there are dangers associated with involving third parties in decisions affecting operations particularly when those parties may not have been privy to the whole investigative process; and

- practical problems could arise where circumstances change during an investigation which might alter the objective of an operation and the original intention behind the issuance of a certificate:

> It could well be that the independent person who was there in the beginning could be caught up in what you actually authorised not being what happened in the end, and they may not be privy to all of the facts later on. I do not know what sorts of practical problems could occur, but you can see how that could perhaps embarrass that person, or something similar.[37]

---

34 Mr Keelty, AFP, Evidence, p. 158

35 ibid.

36 Mr Atkins, AFP, Evidence, p. 159

37 Mr Phelan, AFPA, Evidence, pp. 168-169

Another layer of bureaucracy

4.43 The NCA and the AFP argued that introducing an external authorisation process, especially with the involvement of a public interest monitor would just add another layer of bureaucracy to an already laden agency:

> When you have an organisation such as ours which is supervised by a minister, an IGC, a parliamentary joint committee and, when the legislation comes in, either an inspector-general or an ombudsman, and you appoint three people who are very experienced and supposed to be moderate and reasonable people ... I cannot see why we need an additional layer or an embuggerance sitting in our office at 2 o'clock in the morning when the drugs are landing on the port and deciding whether the certificate should remain in force or whether the drugs should be pulled in and all the rest of it. That person probably will not have the relevant experience.[38]

4.44 The AFP contended that mechanisms that work at the State level will not always work at the Commonwealth level. In terms of accountability, the AFP is currently subject to oversight by the Ombudsman, the Privacy Commissioner, the usual standard public sector accountability mechanisms, the Australian National Audit Office and the AFP's own legislation:

> To have a doubling up in a way, as they do in Queensland, of a monitor appearing notionally for the person you are investigating may work there, but I do not know whether it is appropriate at the Commonwealth level. There are pragmatics too: you have an organisation spread nationally.[39]

Controlled operations are of a different nature

4.45 Law enforcement agencies argued that applications for controlled operations involve different considerations than those matters for which the PIM model is used in Queensland. The applications that the PIM deals with in Queensland are basically of a procedural nature and the issues that arise are governed by familiar legal concepts. Mr Perry described them thus:

> When you are okaying a surveillance warrant, you are doing it in fairly confined circumstances: here are the facts; this is why we think it meets the statutory criteria; yes, I will okay the surveillance warrant.[40]

4.46 The Committee was told that, in contrast, applications for controlled operations involve making value judgments about the operation. The matter under consideration is the appropriateness of conduct that would otherwise be illegal. Those applying for certificates need to have a thorough understanding of the operation to a far greater degree than is needed in the case of procedural matters such as approving surveillance devices. In the NCA's view, those who are in a position to make decisions concerning a controlled operation almost need to be members of the investigative team. The decisions are subjective, based on the feel that the

---

38 Mr Melick, NCA, Evidence, p. 196

39 Mr Atkins, AFP, Evidence, p. 157

40 Mr Perry, PIM, Evidence, p. 125

agency has for the way that an operation is progressing.[41] Referring to the approval process being in the hands of an external tribunal, NCA Member Mr Marshall Irwin stated that:

> In my view, the only way that a proper decision could be made about the granting of one of these certificates is if the tribunal and, indeed, the public interest monitor had sufficient familiarity with the whole operation – it might have been going on for many years; certainly for many months – so that they could make the sort of value judgments that Mr Perry accepts have to be made in these areas. I consider that that is a real weakness in the system. Indeed, in cases where something went wrong, it could leave the public interest monitor in a situation where he would be liable to be called as a witness. He may even be liable to civil suit ... .[42]

Alternative 2: Judicial authorisation with/without Public Interest Monitor involvement

4.47 Mr O'Gorman urged the Committee to consider recommending the judicial authorisation of controlled operations. The system of judicial oversight envisaged by Mr O'Gorman would be complemented by the intervention of a public interest monitor who would appear at each application and represent public interest considerations. He described the current system as an 'ex post facto, supposed "analysis" of the legitimacy of a controlled operations certificate'. By contrast, he argued that his proposed system would enhance accountability:

> The model of the public interest monitor enables a person to go in and argue, in relation to a court application, whether a certificate should issue. I am obviously arguing that the cosy arrangement where senior police issue certificates to slightly less senior police should stop and that controlled operation certificates should be issued by a court with the involvement of a public interest monitor.[43]

4.48 Mr O'Gorman referred to the approval regime for warrants for telephone interception. When telephone interception was first legitimised by legislation, such warrants were to be authorised by the Federal Court. Following the recent enactment of the *Telecommunications (Interception) and Listening Device Amendment Act 1997*, this responsibility has been essentially transferred to the AAT. In Mr O'Gorman's view, the effect of the transfer of responsibility is that telephone interception warrants are now issued by AAT members who have 'no tenure and significantly less legal experience and standing than judges'.[44]

4.49 Mr O'Gorman pointed out that AUSTRAC had relied on the Financial Action Task Force recommendation to support its position that controlled deliveries is an investigative technique that should be used throughout the world's legal systems. According to Mr O'Gorman, the FATF had also argued for judicial authorisation.[45]

---

41 Mr Irwin, NCA, Evidence, pp. 194-195

42 ibid., p. 196

43 Mr O'Gorman, ACCL, Evidence, p. 100

44 ibid., p. 99

45 ibid.

Objections to judicial authorisation

4.50 Recent judicial opinion suggests that the purported conferral of a jurisdiction of this nature on a Federal Court Judge or a High Court Judge might be rejected.[46] This is the case notwithstanding that the High Court has ruled, by a clear majority, that the issue of telecommunications interception warrants is not incompatible with the exercise of judicial functions. In *Grollo v Commissioner of Australian Federal Police and Others* (1995) 184 CLR 348, the High Court held that the issue of a warrant is an administrative and not a judicial power. Nonetheless, the court went on to hold that the conferral of that power on judges in their capacity as *persona designata* is not incompatible with the judge's judicial functions. The relevant provisions of the *Telecommunications (Interception) Act 1979* (the TI Act) conferring that jurisdiction on eligible judges (being Federal Court judges nominated by the Minister) were constitutionally valid.

4.51 In the course of his dissenting judgement, McHugh J summarised the concerns of the judiciary:

> In my opinion, the functions undertaken by Federal Court judges acting as persona designata in accordance with the Act are of such a nature and are exercised in such a manner that public confidence in the ability of the judges to perform their judicial functions in an independent and impartial manner is likely to be jeopardised. That being so, the power to authorise the issue of intercept warrants is incompatible with the exercise of the functions of a judge of a federal court.[47]

4.52 Despite the majority decision in the *Grollo* case, judges have taken the view that they should not exercise powers of an administrative nature. The 'eligible judges' have decided that they should not perform the function of issuing interception warrants under the TI Act[48]:

> The unwillingness of the judges to continue as the repository for the power to issue warrants means that questions as to constitutionality and incompatibility of function take on less significance. The government has no choice but to find someone else to exercise the power. The majority in *Grollo* expressly provided that a non-judicial function cannot be conferred on a judge without his or her consent.[49]

---

46 See Mr Irwin, NCA, Evidence, p. 196; Mr Kerr, Evidence, p. 105; Mr Perry, Evidence, p. 125-126. There is a stream of authority for this proposition, some of the notable cases being: *Grollo v Commissioner of Australian Federal Police and Others* (1995) 184 CLR 348, *Love v Attorney-General (NSW)* (1990) 169 CLR 57, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220 and *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577

47 *Grollo v Commissioner of Australian Federal Police and Others* (1995) 184 CLR 348

48 Attorney-General and Minister for Justice, Daryl Williams MP, Second Reading Speech, House of Representatives, Hansard, 14 May 1997, p. 3445

49 Department of the Parliamentary Library, Bills Digest No. 3 1997-98, *Telecommunications (Interception) and Listening Device Amendment Bill 1997*, p. 6 citing *Grollo v Commissioner of Australian Federal Police and Others* (1995) 184 CLR 348 at pp. 364-365

4.53 Accordingly, the Parliament enacted the *Telecommunications (Interception) and Listening Device Amendment Act 1997* extending the range of persons who can issue interceptions warrants and warrants authorising the use of listening devices to certain members of the AAT.

4.54 Subsequent cases have strengthened the resolve of judges not to perform administrative functions. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[50] the High Court held that the nomination of Justice Jane Matthews to prepare a report under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was incompatible with her commission as a Federal Court Judge and/or with her judicial functions as a Judge of that Court.

4.55 In *Kable v Director of Public Prosecutions (NSW)* the High Court held that provisions of the *Community Protection Act (1994) (NSW)* which purported to authorise the Supreme Court to order the preventative detention of Gregory Kable was invalid. The Court found that the powers conferred were incompatible with Chapter III of the Constitution, The Judicature. Amongst other things, the Court held that the power purportedly conferred by the NSW Act required the making of an order to deprive an individual of his liberty, not because he had breached the law, but because an opinion was formed, on the basis of material not necessarily admissible in court proceedings, that Kable was more likely than not to breach the law by committing a serious act of violence. The Court held that process constitutes the antithesis of the judicial process.[51]

4.56 Against this background, it would seem fruitless to argue for judicial authorisation of controlled operations. In recognition of such constraints, Mr O'Gorman conceded that the authorisation should at least take place at the tribunal level of the AAT.

4.57 Mr Perry advised the Committee that judicial authorisation is not appropriate because of the sort of approval involved, that is, the licensing of illegality during the investigative process. He said that the consideration of applications for controlled operations certificates could be classified as part of the investigative process and it is undesirable that the judiciary is seen to be too closely involved in the regulation of the criminal investigation process. He drew a distinction between surveillance warrants (which are approved if relevant statutory criteria are met) and controlled operations certificates:

> These certificates are a bit different. What you are considering here is the appropriateness of conduct which would otherwise be illegal. That requires some value judgements about the investigative process itself. My concern would be that, if you framed an appropriate approval system which required some degree of involvement from the issuer or approver and that person was a judge, we run smack into the Kable proposition, et cetera.[52]

4.58 Mr Perry said that although judges might be best qualified to undertake the decision-making task in these types of applications, such a regime might not withstand constitutional scrutiny. He noted the recent removal of applications for telephone interception warrants in the federal sphere from judicial consideration to the AAT. Mr Perry suggested this may be

---

50 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220

51 *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577

52 Mr Perry, PIM, Evidence, p.126

problematic for the States because the States do not have recourse to a tribunal of similar standing and experience as the AAT. Mr Perry concluded that a separate issuing authority may have to be established. He said:

> I would prefer it to be judges, but I do not think it can be, because of the criteria concerned and because of the sort of approval you are talking about. That is, you are sending police out to engage in illegal activity which will on occasions necessarily involve other people in such activity. I do not think the judiciary can get involved in that.[53]

Alternative 3: Tiered levels of authorisation within either or both internal or external approval process

4.59 Some witnesses suggested that the approval process for controlled operations should be tiered depending on the seriousness of the investigation.

4.60 The evidence on the public record indicates that law enforcement agencies have used the procedures under Part 1AB of the *Crimes Act* to a greater degree than anticipated.[56] Agencies have reportedly taken a 'cautious view'[57] of the circumstances in which the protection of a certificate should be obtained. Certificates are now sought in relation to some of the traditional activities of law enforcement where previously none was sought. For example, applications for certificates tend to be sought whenever an investigation requires drugs to pass through the Customs barrier. In addition, however, agencies are also inclined to obtain certificates just in case a controlled operation becomes necessary at a later stage in an investigation.[58] The NCA submitted that the complex and technical nature of the legislation has attracted legal advice, some of which has been conflicting, resulting in this conservative approach to the legislation.

4.61 There is some fear within law enforcement agencies that a tendency may develop where the judicial discretion to exclude evidence is exercised whenever collected during the course of an unauthorised controlled operation. Consequently, law enforcement agencies are obtaining certificates in a wider range of circumstances than anticipated by the Parliament.[61]

---

53 Mr Perry, PIM, Evidence, p.126

54 Mr Keelty, AFP, Evidence, p. 155

55 Mr O'Gorman, ACCL, Evidence, p. 102

56 Attorney-General's Department, *Crimes Act 1914* Part 1AB Controlled Operations, Second Annual Report under Section 15T, 1997-1998, p. 5

57 ibid.

58 National Crime Authority, Submission volume, p. 105

59 Attorney-General's Department, *Crimes Act 1914* Part 1AB Controlled Operations, Second Annual Report under Section 15T, 1997-1998, p. 5

60 NCA, Submission volume, p. 105

61 Mr Broome, NCA, Evidence, p. 2

4.62 By contrast, the New South Wales Act has been under-used. One of the reasons advanced for this is the high level of authority and complex documentation required to authorise the simplest of covert drug operations.[62] This, coupled with the perception that any evidence collected during an unauthorised operation will be excluded in a subsequent prosecution, has seriously impacted on police operations. Mr Broome described this as an unintended consequence of the legislation:

> I do not believe it is what the state parliament thought would happen but what has happened – because it is a safety first approach – is that there has been quite restrictive legal advice given to agencies that, since the New South Wales Act came into effect, anything that comes within its description which is not authorised should not take place. That gets back to my point about the planned and unplanned kind of activities. You will find that there is significant evidence that it has had a very significant effect on the conduct of controlled operations in New South Wales and one which I think has gone further than it was intended to.[63]

4.63 It is significant to note that these same matters were raised during the Finlay Review of the New South Wales legislation. Mr Finlay concluded that the New South Wales Act had been under-used for the reasons noted above in paragraph 1.47. Particularly relevant here was the assertion that law enforcement officers had taken an unnecessarily restrictive interpretation of the Act. Mr Finlay suggested that what is required to address the problem of agencies taking an unduly restrictive approach to the legislation is training and education rather than amendments to the terms of the Act.[64]

4.64 The NSW Crime Commissioner, Mr Phillip Bradley, suggested a different approach to overcome the problem of under-use of the NSW legislation. He recommended that a tiered approach to issuing authorities for controlled operations would alleviate the cautious attitude to operations that has developed in law enforcement agencies as a result of the legislation. At present, law enforcement agencies take the view that they have to get approval from the Deputy Commissioner of Police in relation to every covert operation with the result that they decide, on occasions, not to proceed rather than go through the onerous task of making an application at such a high level. As a result, policing operations have been significantly limited. Mr Bradley advocated that there should be different levels of authorities recognised, so that some controlled operations can be authorised at the local level. In his view, the problem with the NSW Act is that it is used to authorise very low level activity that should be authorised locally and conducted according to guidelines:

> A good example is the undercover police who hang about Canley Vale and Cabramatta railway stations with a fist full of dollars. Someone will come up to them and offer to sell them heroin. There will be an exchange of drugs and money and then they will be apprehended. That is a normal form of policing, whether you regard it as effective or not. ...

---

62 Inspector of the Police Integrity Commission, Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act), April 1999, p. 11

63 Mr Broome, NCA, Evidence, p. 14

64 Inspector of the Police Integrity Commission, Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act), April 1997, p.11

> I do not think that *Ridgeway* ever contemplated that evidence gathered by these sorts of methods should be inadmissible, but the act would seem to make it necessary to have an authority. There are two things to say about that. Firstly, police do not like to act without an authority where there is provision for them to do so with an authority, otherwise there would be misconduct provisions and things like that. Secondly, there is a view abroad that if you have a chance to get an authority, applying a *Bunning v Cross* type approach to things, and you do not get one, then the evidence ought to be inadmissible.[65]

4.65 The tiered system contemplated by Mr Bradley comprises all levels of covert operations that extend from the lowest or local levels of covert operations to those where law enforcement officers are actively involved as partners, promoters or principals in a criminal enterprise. At the latter end of the scale there should be very strict authorities and guidelines, not just a code of conduct. At the local level of covert operations, the approval process should be less intimidating and less restrictive and therefore less likely to discourage normal policing such as low level sting-type operations. Even things like trespass to a vehicle for the purpose of the installation of a listening device or tracking device should be capable of being authorised.[66]

4.66 The in-house approval system for controlled operations in the Victoria Police is a tiered process. Approval for a controlled operation must be obtained from the Covert Investigation Target Committee or the Deputy Commissioner (Operations) unless the operation is being conducted in relation to an investigation of a minor nature. Where an investigation is of a minor nature, the Officer in Charge of the Covert Investigation Unit, after consultation with the Chairperson of the Target Committee, can approve the operation.

4.67 An investigation is classified as being minor if it has certain characteristics. It must be a very short-term investigation involving minimal contact between a covert operative and a suspect(s). The operation plan in the application must comply with the Covert Policing Guidelines. The application must be authorised and signed by the applicant's Divisional Commander or Detective Inspector. Finally, a police agent/informer must not be used to obtain evidence with the aim of giving sworn testimony.[67]

Conclusion

4.68 The Committee is of the view that in-house approval, while convenient and appropriate to some kinds of controlled operations, is neither necessary nor appropriate to all controlled operations. To date, the scope of controlled operations that can be approved under the Commonwealth legislation has been restricted to the investigation of offences involving the importation of narcotics. Under these circumstances, the in-house approval regime was appropriate. As is discussed in Chapter 6 the Committee has decided that the scope of controlled operations should be widened. Under these circumstances and, taking into account the public interest concerns raised about in-house approvals, the Committee is of the view that there should be an external approval process for certain kinds of operations.

---

65 Mr Bradley, NSWCC, Evidence, pp. 34-35

66 ibid., pp. 35-36

67 Victoria Government, Submission volume, p. 187 (Attachment A, Operating Procedures, Victoria Police Manual, paragraph 5.1.15)

4.69 The Committee considered the evidence in relation to the alternative systems for external authorisation. In conclusion, the Committee has decided not to recommend the PIM model because it is not appropriate for these kinds of authorisations. The Committee accepts the advice of law enforcement agencies that the involvement of a third person to appear on applications would adversely affect operational efficiency. At a stage when time is of the essence, those involved in the approval process really need to have knowledge of the investigative process and the case itself. The Committee is of the view that little, if anything, would be gained by the appearance of a PIM to argue the public interest. The Committee believes that the accountability mechanisms that it recommends in Chapter 5 will ensure that the public interest is protected.

4.70 The Committee is also persuaded that judicial authorisation is not an option for the reasons outlined in paragraphs 4.50-4.58.

4.71 In its report *Third Evaluation of the National Crime Authority*, tabled in April 1998, the Committee recommended that certain functions, such as receiving and considering complaints about the NCA, be made the responsibility of the Inspector-General of the NCA. The Committee's proposal was that the Inspector-General of Security and Intelligence should be given the appropriate designation and this responsibility. Having considered all of the options for an external approval process, the Committee believes that the Inspector-General of Security and Intelligence, being already in existence and dealing with sensitive and operational material, is the best option.

4.72 The Committee notes, however, that there has been no Government response as yet to its previous report. Should the Government not accede to the establishment of an Inspector-General for the NCA then the Committee believes that the Government must determine another appropriate authority for the independent approval process. This may be the AAT.

4.73 The Committee is concerned to ensure that operational efficiency is not adversely affected by the approval process. For this reason, it has recommended a two tiered process. Applications to conduct controlled operations in short-term investigations into minor offences will continue to be approved in-house. Longer-term operations where there is no time constraint will be subject to the approval process by the Inspector-General or other independent authority as determined by the Government. In addition, where approval is required urgently, say, for barrier operations, the provisions for urgent applications should be preserved.

4.74 Although law enforcement agencies argued for a tiered, in-house approval system to overcome operational problems that have arisen in terms of understanding the impact of controlled operations legislation, the Committee favours Mr Finlay's approach. Accordingly, the Committee is recommending the development of education and training schemes to ensure the proper application of the legislation.

Recommendation 3: That a two tiered approval process be established for the authorisation of controlled operations under Part 1AB of the *Crimes Act 1914*:

(i) Applications for minor controlled operations should be subject to an in-house approval regime. That is, a law enforcement officer in charge of a controlled operation may apply to the Commissioner, a Deputy Commissioner or an Assistant Commissioner of the AFP or to a member of the NCA for a certificate authorising a controlled operation. Minor controlled operations are to be defined as short-term investigations (not exceeding one month's duration) involving minimal contact between a covert operative and a suspect or suspects, where law enforcement officers are required to engage in activities involving unlawfulness of a technical nature. If a minor controlled operation exceeds one month's duration, it should be re-classified as a longer-term operation and subject to the external approval process set out in paragraph (ii).

(ii) Applications for longer-term controlled operations should be subject to an external approval process. The function of determining applications for longer-term controlled operations should be transferred to the office of the Inspector-General of the NCA as described in recommendation 19 of the Committee's 1998 report *Third Evaluation of the National Crime Authority*. Should the Government not accede to the establishment of an Inspector-General for the NCA, then the power to approve longer-term controlled operations should be conferred on such other independent authority as the Government sees fit, such as the AAT.

Nothing in this recommendation should affect the ability of law enforcement agencies to make urgent applications for a certificate authorising a controlled operation in accordance with section 15L of Part 1AB of the *Crimes Act 1914*. Urgent applications should be able to be made in-house either in person, by telephone or by any other means of communication in respect of both minor and longer-term controlled operations. In particular, the requirements in sections 15L(5) and (6) for the follow-up provision of a written application and certificate in relation to urgent applications should be retained. These written records will be subject to the stringent accountability processes outlined in Recommendation 10.

Recommendation 4: That law enforcement agencies devise appropriate training and education courses in relation to the operations of the controlled operations legislative regime.

NCA should be able to issue its own authorities

4.75 As mentioned at paragraph 3.5, several witnesses to the Committee's inquiry argued that there is a deficiency in State controlled operations legislation concerning the capacity of the NCA to issue certificates authorising operations involving State offences. Under the NSW Act, for example, certificates authorising controlled operations can be issued by the Chief Executive Officer of the NSW Police Service, the ICAC, the NSW Crime Commission or the Police Integrity Commission. There is no power for the Chairperson or Members of the NCA to issue authorities in respect of controlled operations undertaken by the NCA either

alone or jointly with a NSW law enforcement agency under the NSW Act. Where the NCA conducts joint operations with, say, the NSW Crime Commission, the authority is issued by the Commission Chair.

4.76 It is claimed that this procedure may cause unnecessary delays and is inconsistent with the character of the NCA as an independent law enforcement agency charged with investigating serious criminal activity of a cross-jurisdictional nature. For example, the *Queensland Minister for Police and Corrective Services, the Hon Tom Barton MP, submitted* that:

> The NCA's involvement in controlled operations under State legislation can be achieved through engaging officers of the relevant State. However, the approval process is normally undertaken through the relevant State Police Service in accordance with the legislation of the jurisdiction. This is particularly the case in New South Wales. This type of external approval process is clearly inconsistent with the perception of the NCA as being an independent entity.[68]

4.77 The recent Finlay review of the NSW Act recommended that that Act should be amended to enable the NCA to issue its own authorities.[69] The Committee is similarly of the view that the NCA should have the power to issue authorities in respect of its own investigations and in respect of those investigations which it conducts jointly with other law enforcement agencies under State legislation. This is particularly important in terms of achieving national uniformity in controlled operations legislation and is inconsistent with the level of support given to the NCA by the States and Territories in most other respects.

Recommendation 5: That those States and Territories that have enacted specific controlled operations legislation should make appropriate amendments to allow the NCA Chairperson and Members to authorise controlled operations certificates.

Grounds on which certificates are authorised: Standard of satisfaction required by authorising officer

4.78 Having determined who should be responsible for approving controlled operations certificates and in what circumstances, the next logical step in the approval process is to examine the grounds upon which a certificate may be issued.

4.79 In the case of the Commonwealth legislation, section 15M sets out the preconditions to the issuance of a certificate. Before issuing a certificate, the authorising officer must be satisfied of four things: firstly, that all available information about the nature and quantity of the narcotic goods has been provided; secondly that, irrespective of the operation, the target is likely to commit an offence against section 233B (or an associated offence); thirdly, that the operation will make it easier to obtain evidence of the offence; and fourthly, that after the operation, any narcotic goods in Australia will be in the control of an Australian law enforcement officer.

---

68 Hon Tom Barton MLA, Minister for Police and Corrective Services (QLD), Submission volume, p. 85

69 NSW Crime Commission, Submission volume, pp. 1-2; See also: Inspector of the Police Integrity Commission, Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act), 16 April 1999, pp. 13-15

4.80 Referring generally to these preconditions, the NCA submitted that there is a need for realism:

> While the authorising officer may be satisfied of the matters when issuing the certificate, in the real world one can never be entirely sure and no guarantees can be given that things will turn out as expected or planned. The nature of any operation, no matter how carefully planned, can quickly change due, for instance, to the intervention of third parties or the persons involved taking anti-surveillance measures.[70]

4.81 The NCA submitted that the requirement that the authorising officer must be 'satisfied' of these four conditions is problematic. The NCA's preferred standard would be consistent with the standard required for the issuance of a listening device warrant, a telecommunications interception warrant and a search warrant: that the authorising officer should be 'reasonably satisfied' or 'satisfied on reasonable grounds'.[71]

4.82 The NCA used the hypothetical case of a vessel arriving in Western Australia suspected of being involved in the importation of narcotics to demonstrate the practical difficulty associated with the current wording in section 15M. In such a case, there would be insufficient basis on which to obtain a certificate because, for example, the authorising officer cannot be satisfied that at the end of the operation the narcotics will indeed be in the possession of a law enforcement officer. The very nature of undercover operations can make this impossible. Consequently, there would be no authority for the ACS to let the narcotics 'run' to their intended recipients. In the absence of a controlled operations certificate, the ACS may be obliged to search and locate the narcotics.

4.83 The better scenario would be to let the narcotics run so that much-needed intelligence could be obtained, to the greater overall benefit of the law enforcement effort against drugs. Where narcotics are let run, it is sometimes even possible to arrest the intended recipient of the drugs and so dismantle some of the organisation behind drug trafficking.[73]

Recommendation 6: That the standard of satisfaction required by the authorising officer in relation to the preconditions in section 15M of Part 1AB of the *Crimes Act 1914* should be expressed in such terms as 'reasonably satisfied' or 'satisfied on reasonable grounds'.

Section 15M(b): The target is likely to commit an offence ...

4.84 The second precondition to the issuance of a certificate in section 15M is that the authorising officer must be satisfied that:

---

70 National Crime Authority, Submission volume, p. 100

71 ibid., p. 101, referring to paragraph 219B(5)(a) of the *Customs Act 1901*; Subsection 6A(2) of the *Telecommunications Interception Act 1979* and subsection 3E(1) of the *Customs Act* respectively.

72 ibid.

73 ibid.

(b) the person targeted by the operation is likely to commit an offence against section 233B of the Customs Act 1901 or an associated offence whether or not the operation takes place.

4.85 In support of this requirement, Mr Roche pointed out that section 15M(b) is the only precondition that really constrains the issuance of controlled operation certificates in any way. Mr Roche contended that, of the four preconditions in section 15M, this is the only ground directed towards a consideration of the appropriateness of the proposed operation. The other matters to be taken into account are either merely procedural or, in any event, readily satisfied by law enforcement agencies. For example, it is hard to imagine circumstances where the requirement that the operation will make it much easier to obtain evidence would not be met (section 15M(c)). Mr Roche concluded that the grounds upon which a certificate may be issued should be stricter.[74]

4.86 Parliament's intention is that there should be no entrapment of suspects, an issue that raises important civil libertarian aspects of the legislation. Mr Bronitt and Mr Roche argued that there is a serious danger with controlled operations legislation that suspects with a history of drug abuse may be vulnerable to exploitation by paid informers (agents provocateur) or undercover police. The co-authors argued that the Commonwealth scheme does not contain sufficient safeguards against the improper exploitation of vulnerable suspects.[75]

Recommendation 7: That the 'no entrapment' test in section 15M(b) of Part 1AB of the *Crimes Act 1914* be enunciated with greater clarity.

Section 15M(d): Any narcotic goods will be in the possession of an officer ...

4.87 The fourth precondition for the issuance of a certificate is set out in section 15M(d) that the authorising officer must be satisfied that:

(c) any narcotic goods:

(i) to which the operation relates; and

(ii) that will be in Australia at the end of the operation;

will then be under the control of an Australian law enforcement officer.

4.88 The NCA submitted that this fourth criterion will often be difficult to satisfy, given the nature of importation and undercover operations.[76] The Committee is of the view that the wording in relation to this condition should be amended to overcome any operational difficulties experienced by relevant law enforcement agencies in terms of satisfying this criterion.

---

74 Messrs. Bronitt and Roche, Submission volume, p. 130; Mr Roche, Evidence, p. 138

75 Mr Roche, Evidence, p. 137

76 National Crime Authority, Submission volume, p. 100

Recommendation 8: That in relation to the precondition in section 15M(d) of Part 1AB of the *Crimes Act 1914* the paragraph be reworded to better reflect the need for operational flexibility by relevant law enforcement agencies.

The criminal activities of law enforcement officers should be proportionate to the matter under investigation

4.89 The Commonwealth scheme in the *Crimes Act*, in its current form, does not impose a requirement that the criminal activities undertaken by law enforcement officers in the course of a controlled operation should be proportionate to the offence they are investigating. In contrast, the NSW model provides that the nature and extent of the suspected criminal activity or corrupt conduct must be such as to justify the conduct of a controlled operation and the nature and extent of the operation must be appropriate to the suspected criminal activity.[77]

4.90 It was contended that another precondition should be inserted into section 15M requiring that a controlled operation must be proportionate to the offence under investigation.[78]

4.91 The Committee is of the view that this would be an appropriate amendment, especially in terms of bringing a measure of national uniformity in controlled operations legislation.

Recommendation 9: That section 15M of Part 1AB of the *Crimes Act 1914* be amended to adopt similar conditions to those contained in paragraphs 6(3)(b) and (c) of the *Law Enforcement (Controlled Operations) Act 1997 (NSW)* that the nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation and the proposed controlled activities.

77 See section 6(3) of the *Law Enforcement (Controlled Operations) Act* 1997 (NSW)

78 Messrs. Bronitt and Roche, Submission volume, p. 130

CHAPTER 5

ACCOUNTABILITY

The Commonwealth legislation

5.1 One of the objectives of the *Crimes Amendment (Controlled Operations) Bill 1995* was to provide for a 'full and open system of accountability'[1] This intention was enshrined in the objects clause of the Act. Section 15G recites the three objects of the Act, one of which is to require:

(i) the Commissioner and the Chairperson of the NCA to report to the Minister on requests to authorise controlled operations and on the action taken in respect of authorised operations; and

(ii) the Minister is to report on these matters to Parliament.[2]

5.2 The fundamental guiding principle that accountability under the Act should be as full and frank as possible is reflected throughout the relevant sections.[3] Section 15R is concerned with the reporting of each decision to authorise a controlled operation to the Minister by the heads of the AFP and the NCA. An essential element of that reporting requirement is that it is to take place 'as soon as practicable' after a decision has been made.

5.3 The other significant element in this part of the reporting regime is that the heads of the two agencies must provide the Minister with the reasons for their decision to authorise a controlled operation. Again, it is plain from the wording in the section that Parliament was encouraging as full and frank disclosure as possible. Section 15R(3) reads that statements of reasons 'must include (but are not limited to)' the extent to which the authorising officer's decision was influenced by the seriousness of the criminal activities under investigation.

5.4 Within three months after the cessation of a controlled operations certificate, the authorising officer, being the AFP Commissioner or the NCA Chairperson, must provide the Minister with a written report stating whether the operation was carried out. If it was, the report must include details about the nature and quantity of the narcotic goods, the route through which they passed, any persons and agency that had possession of the goods, whether the goods have been destroyed and, if not, the identity of the agency or the person (if not a law enforcement officer) who has possession of the goods. This last requirement may be satisfied by the use of a code name if the disclosure of the person's identity would endanger his or her safety or prejudice a prosecution.[4]

---

1 Hon Duncan Kerr MP, Minister for Justice, *Hansard,* House of Representatives, 22 August 1995, p. 4

2 *Crimes Act 1914,* Part 1AB, section 15G(1)(b)

3 The accountability regime is contained in sections 15R, 15S and 15T of Part 1AB of the *Crimes Act 1914*

4 *Crimes Act 1914,* Part 1AB, section 15S

5.5 The second part of the accountability regime is the annual report by the Minister to the Parliament pursuant to section 15T. Again, Parliament's intention that public disclosure should be open and frank is reflected in the wording of section 15T that the report 'must include (but is not limited to)' the following information: the date of the application, the decision with reasons taken about the application and the information previously furnished to the Minister under section 15S.[5] The report is not to mention anything about a named person that has not already been published about that person.[6] If the Minister forms the view, on the advice of the NCA Chairperson or the AFP Commissioner, that the inclusion of any information will endanger a person's safety or prejudice an investigation or prosecution, then the Minister must exclude that information. As soon as those dangers no longer exist, the Minister must include that information in the next annual report.[7]

State accountability regimes: South Australia and New South Wales

5.6 The regime under the South Australian controlled operations legislation is similar to the Commonwealth regime in that the flow of reporting in the accountability chain is direct from the agency to the Minister who has responsibility for the agency to the Parliament. Under section 3(6) of the *Criminal Law (Undercover Operations) Act 1995,* a senior police officer must, within 14 days after granting or renewing an approval for a controlled operation, cause a copy of the instrument of approval or renewal to be given to the Attorney-General. In turn, under section 5, the Attorney-General must report annually to Parliament by 30 September each year. The report must specify the classes of offence for which approvals were given or renewed under this Act during the period of 12 months ending on the preceding 30 June. The report must also stipulate the number of approvals given or renewed during that period for offences of each class.

5.7 The regime under the New South Wales legislation differs in that it inserts independent oversight into the process. The approval process for NSW authorities to conduct controlled operations is subject to oversight by the NSW Ombudsman. The Ombudsman is then accountable to the Parliament. This model constitutes an alternative option for ensuring proper accountability in the controlled operations process and is dealt with in detail in paragraphs 5.26-5.33.

Criticism of current Commonwealth regime

Inadequate reporting regime

5.8 Some witnesses argued that the principal deficiency identified in the current Commonwealth system is that the reporting regime is inadequate despite the stated policy objective within the legislation that, save to the extent that there was a legitimate reason for non-disclosure, the matter should be fully disclosed. The witnesses' concern with the current regime was said to be that the reports contain insufficient information and consequently do not satisfy the underlying policy objective of open and frank disclosure that facilitates public accountability. In particular, the reports have been described as containing:

---

5 *Crimes Act 1914,* Part 1AB, section 15T(2)

6 *Crimes Act 1914,* Part 1AB, section 15T(3)

7 *Crimes Act 1914,* Part 1AB, section 15T(4)

- purely statistical information; and
- pro forma reasons in relation to the issuance of certificates.[8]

5.9 Speaking for the Australian Council for Civil Liberties its President, Mr Terry O'Gorman, asserted that the lack of relevant information in annual reports constitutes the principal civil liberty concern in relation to controlled operations regimes. The annual reporting requirement is designed to safeguard civil liberties as well as to fulfil community expectations regarding open and transparent government. Therefore, it is unacceptable that the requirement should be satisfied by 'proforma and typically uninformative' reporting which has characterised most annual reports in relation to telephone tapping in the last twenty years.[9]

5.10 Referring to the 1996-97 annual report on the operation of Part 1AB of the *Crimes Act 1914*, Mr O'Gorman claimed that 'the information that is in the certificates is meaningless'.[10] Mr O'Gorman pointed out that the report refers to some certificates issued for controlled operations involving very substantial quantities of drugs and that the only information provided as to the outcome of the operation is that it did not go ahead:

> If you look at that annual report, there are probably upwards of 10 instances where it says "controlled operation certificate issued, controlled operation did not go ahead". There is almost an equal number of examples of the controlled operation resulting in the delivery and the stuff is never picked up. You have to ask, "Aren't we entitled to a little bit more information than simply being told 'certificate issued, drugs dropped off at address X, no-one picked them up, drugs now in the AFP vault'"? You have to ask, "If that is happening, why was the certificate needed in the first place?" It intrigued me when I read that annual report as to why there was so little information. Look at the reasons - they are all pro forma.[11]

5.11 The reports to date have chiefly been comprised of copies of certificates for controlled operations with minimum details provided as to the actual operation and the outcomes of operations. It is argued that the effect of this style of reporting is that:

- it raises unanswered questions about operations; and
- it is not sufficient for Parliament to form a proper view as to whether the certificate permitting police to import a significant amount of drugs for the purpose of making relevant arrests was rightly issued.[12]

5.12 To demonstrate this point, Mr O'Gorman referred to some of the cases in the 1996-97 annual report. For example, the annual report indicates that a certificate issued to the ACS on 22 May 1997 involved one kilo of heroin. The only information given, however, was that the controlled operation did not proceed and that the heroin was stored with the AFP.[13]

---

8 Australian Council for Civil Liberties, Submission volume p. 159

9 Mr O'Gorman, ACCL, Evidence, p. 107

10 ibid.

11 ibid.

12 Australian Council for Civil Liberties, Submission volume, p. 159

13 *Crimes Act 1914* Part 1AB Controlled Operations, Annual Report under Section 15T, 1996-97, p. 60

Similarly, the report notes that a certificate was issued on 20 January 1997 to the ACS in relation to the importation of 6 kilos of heroin into Australia. The report simply notes that the controlled operation did not proceed although the importation occurred with the knowledge of law enforcement officers. There is no relevant detail given as to the circumstances of the importation:

> It is argued, therefore, that the reporting mechanism to Parliament is near to useless in that the unexplained non-provision of information or the exclusion of information on the basis of ongoing operational "necessity", has the effect of the reader posing more questions than are answered by the content of the Certificates.[14]

5.13 Numerous other certificates were issued but there are pro forma notations that the controlled operation did not proceed or that it did proceed to delivery but the package was recovered unopened:

> ... the reasons for the decision to issue a Controlled Operation Certificate are almost invariably couched in proforma and, indeed, identical language from one Certificate to the next. This descent into proforma, rubber stamp-like reasons for a decision to issue a Controlled Operation Certificate follows the precedent set in Annual Reports to the Federal Parliament in relation to telephone tapping, namely that the proforma reasons are so uninformative as to make the reporting mechanism close to useless.[15]

5.14 The NCA submitted that the courts have not commented adversely on the NCA's practices in relation to the issue of controlled operations certificates or the conduct of controlled operations.[16] The counter argument was put that courts have had little opportunity to comment. Courts are rarely fully apprised of the circumstances leading to the issue of a controlled operation certificate or of the steps taken by police to conduct a controlled operation. According to Mr O'Gorman, public interest immunity and police methodology claims raised by the AFP and the NCA effectively prevents judicial scrutiny.[17]

Contrary view: Public interest not served by disclosure to Parliament

5.15 In its submission the NCA expressed concern that the current reporting system contains too much scope for inadvertent disclosure of sensitive operational material. It stated its view that:

> The NCA does not see any need for the Minister to report anything beyond statistical information to Parliament. Given the fact that the circumstances surrounding a certificate will be subject to detailed scrutiny during a prosecution, the NCA asks whether the public interest is served by requiring the Attorney-General to give the Parliament detailed information which may inadvertently prejudice a prosecution.[18]

---

14 Australian Council for Civil Liberties, Submission volume, p. 161

15 ibid., p. 160

16 National Crime Authority, Submission volume, p. 95

17 *Australian Council for Civil Liberties, Submission volume, p. 162*

18 National Crime Authority, Submission volume, p. 104

5.16 Commenting on the philosophy behind the legislation that law enforcement agencies should be encouraged to disclose more information rather than less, NCA Chairperson Mr John Broome elaborated on the possible adverse consequences of the inadvertent disclosure of information:

> One of the difficulties is that, if you wish to include more information in those documents rather than less, then you have the potential difficulty of their publication at a time which may be prejudicial to a prosecution - and this almost occurred - which may be two or three or whatever years after the certificate has been issued. Equally, you may find that information which is of relevance to enable you to make judgements about whether the certificates were properly issued might also have the potential to disclose, even some years after the event, the source of information that you had.[19]

5.17 Mr Broome also argued that the current system is inappropriate because it results in different versions of the documentation that 'float around'. There is the letter from the NCA to the Attorney-General (or, depending on administrative arrangements, the Minister for Justice and Customs) giving quite specific details about a certificate. Then there is the report provided to the Department that is eventually tabled. Mr Broome warned that if those reports are tabled without further consultation, some information that may not be in any way prejudicial after a trial has been completed because, for example, evidence has been given, may be quite prejudicial beforehand.

5.18 During Mr Broome's appearance at the Committee's public hearing in Sydney, he told the Committee that he preferred a system of graded reporting involving, perhaps, disclosure in the first instance to a parliamentary committee, rather than the current approach of the general publication of certificates, that has the potential to prejudice sources of information.[20] At a subsequent hearing, however, he adjusted the NCA's position on the reporting issue:

> On reflection, our view is that we would prefer to leave the reporting obligations as they are and to deal with the administrative difficulties as they should be between us and those who publish the material. We can probably overcome the difficulties, providing there is adequate consultation. We had a problem in the past, but I think we can overcome that. So for our part we are quite content to leave those arrangements as they are in place at present.[22]

5.19 The Committee rejects any suggestion that by giving purely statistical information in relation to controlled operations the NCA would or could satisfy the public policy objectives behind the legislation. It believes that while the current arrangements are an attempt at striking an appropriate balance between the need for proper accountability and maintaining operational confidentiality, the provision of purely statistical information fails to meet the original objectives of the legislation - that is, proper Parliamentary scrutiny. Any administrative difficulties being experienced in the reporting system should be met by administrative solutions, rather than by a lessening of the reporting requirements.

---

19 Mr Broome, NCA, Evidence, p. 19

20 ibid., pp. 19-20

21 ibid.

22 ibid., p. 191

Alternative systems of accountability

5.20 There are essentially two options available for the oversighting of the NCA's involvement in controlled operations. The first is the present arrangement whereby the NCA reports to the Minister and then the Minister reports in a summary form annually to Parliament. This kind of oversight is characterised by the flow of accountability proceeding directly through the agency's usual chain of accountability to Parliament. Unfortunately, the value of the reporting is much diminished because the level of disclosure to Parliament is significantly less than that provided to the Minister. Therefore, while it can be said that there may be adequate executive accountability - and the Committee has no way of knowing this due to an inadequate response from the Attorney-General's Department - there is very limited ability on the part of the Parliament to exercise effective accountability due to 'information starvation'.

5.21 The second and alternative model would entail oversight external to the NCA by an independent intermediary between it and the Minister.

Fundamental guiding principle for an accountability regime

5.22 The overwhelming message to the Committee during its inquiry has been that in any system that provides for the approval of controlled operations, the empowering provisions need to be matched by proper accountability. The NCA argued that the legislation should provide a balanced and workable arrangement to ensure adequate accountability without limiting the need for effective operations, particularly in the area of serious drug trafficking.[23] Mr Tim Carmody, Queensland Crime Commissioner, advised that the essence of controlled operations legislation is to balance the competing public interest objectives of detecting and convicting the guilty and protecting the integrity of the criminal justice system.[24] Similarly, referring to the development of controlled operations legislation in New South Wales, Mr Phillip Bradley, NSW Crime Commissioner, described it as a 'balancing act':

> ... there is a balancing act to be applied. That is one of the difficulties: how you have an authority against which you can measure the conduct of those who are authorised in a proper, accountable way which permits people to have sufficient scope to be able to engage with others in criminal activity in order to gather the evidence and intelligence that we really need.[25]

5.23 On behalf of the Attorney-Generals' Department, Mr Karl Alderson, described the thrust of the Commonwealth legislation as providing a system for legislatively approved and controlled undercover operations mirrored by appropriate accountability mechanisms:

> I guess the rationale for the existing legislation is that, given the unusual nature of these things, it is desirable that, if law enforcement officers are to be authorised to engage in unlawful conduct, that needs to be matched by an appropriate accountability framework and appropriate limitations and controls within the legislation, though the need to properly match powers as against

23 Mr Broome, NCA, Evidence, p. 1

24 Mr Carmody, QCC, Evidence, p. 76

25 Mr Bradley, NSWCC, Evidence, p. 34

> limitations and accountability will be carried through into any review and development of further legislation.[26]

Oversight by a parliamentary committee: Complementing the Public Interest Monitor model

5.24 In the course of advocating a public interest monitor regime for the approval of authorities to engage in controlled operations, Queensland's Public Interest Monitor, Mr Richard Perry, advocated that appropriate oversight in a controlled operations regime would be for the monitors to address a parliamentary committee. Such a system would enable the monitor to address the committee on an in camera basis in relation to any concerns he or she had about operational matters.[27] Mr Perry advised the Committee that the PIM model works well when the monitor is also oversighted:

> The old 'who guards the guards' motto still works fairly well.[28]

5.25 The reporting mechanisms of the Queensland PIM are twofold. The PIM reports to Parliament annually and, in addition, the PIM can report to the Police Commissioner about any particular matter on an ad hoc basis.[29] The PIM's reporting facilities are limited to this regime because of the security considerations involved. If reporting went beyond this, there is always the possibility of disclosure of information that should be secure:

> You tend to be possessed at any one time of an awful lot of knowledge about particular operations and, because of what you are talking about, you do have to be careful about the extent to which you can do it publicly.[30]

The New South Wales model

5.26 As outlined in paragraph 5.7, the accountability regime in the New South Wales legislation effectively involves the reporting of decisions to authorise controlled operations combined with oversight by the NSW Ombudsman's office. Within 28 days after completing an authorised operation, the principal law enforcement officer responsible for the operation must report to the CEO. The matters to be included in that report are those specified in the relevant regulations.[31] Within 21 days after granting, renewing or varying an authority, or receiving a report on the conduct of a controlled operation, the CEO must give a written report to the Ombudsman. The Ombudsman can require such information as is necessary for a proper consideration of it.[32] The Ombudsman must inspect the records of each law enforcement agency at least once a year and may conduct inspections at any other

---

26 Mr Alderson, Attorney-General's Department, Evidence, p. 188

27 Mr Richard Perry, PIM, Evidence, p. 131. The model is analogous to the oversight committees of the US House of Representatives in relation to security intelligence organisations. Presentations to committees are made in confined circumstances so that operational secrecy is not compromised.

28 Mr Perry, PIM, Evidence, p. 131

29 ibid. Mr Perry suggested the PIM might also have the facility to report to the chairman of the CJC if a matter involved potential misconduct

30 ibid.

31 *Law Enforcement (Controlled Operations)Act 1997*, section 15

32 *Law Enforcement (Controlled Operations) Act 1997*, section 21

time. The provisions of the *Telecommunications (Interception) (New South Wales) Act 1987* regarding inspection by the Ombudsman under that Act, apply to the Ombudsman's inspections of controlled operations records. The Ombudsman may make special reports to Parliament in relation to those special inspections.[33]

5.27 The Ombudsman must report annually to Parliament after 30 June each year about his or her work and activities under the NSW Act. The reports must include statistical information about the authorities granted or refused, the nature of the criminal activities investigated under the authorities, the number of law enforcement officers and civilians that participated and the nature of the activities in which they participated.[34]

5.28 Some ancillary matters are stipulated. For example, the annual reports must not include information that would, if made public, endanger a person, disclose investigation methodology or prejudice an investigation or legal proceeding. Sections 30(2) and 31AA of the *Ombudsman Act 1974* apply to Ombudsman's reports about controlled operations as they apply to reports under section 30 of that Act. The Ombudsman must give a copy of any report to the CEO of the agency to which the report relates and to the Minister responsible for that agency.

5.29 In his review of the NSW legislation, the Inspector of the Police Integrity Commission, Mr Mervyn Finlay QC, recommended that the NSW Act be amended to provide for further review by the Minister in another three years and that the outcome of that further review should be tabled in Parliament.[35] In terms of recommending amendments to the accountability provisions in the NSW Act, Mr Finlay supported:

- a statement of intention that the Act provides for accountability to ensure authorities are appropriately granted and for external auditing by the Ombudsman;[36]
- the adoption of uniform forms by law enforcement agencies making applications;[37]
- extending the time frame in which the principal law enforcement officer for the operation must report to the CEO from 'within 28 days' to 'within two months';[38] and
- Ombudsman's inspections to take place within twelve months of the commencement of a controlled operation (rather than in every twelve month period).[39]

5.30 Mr Finlay considered but rejected a proposal that in the case of very sensitive matters, the CEO should be permitted to certify that a matter is of such a sensitive nature that inspection should be deferred for a specified period not exceeding twelve months:

---

33 *Law Enforcement (Controlled Operations) Act 1997*, section 22

34 *Law Enforcement (Controlled Operations) Act 1997*, section 24

35 Inspector of the Police Integrity Commission, *Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act)*, April 1999, p. 45

36 ibid., p. 44

37 ibid., p. 41

38 ibid., p. 38

39 ibid., p. 33

> The assessment by a CEO of what are considered *"very sensitive matters"* is a subjective exercise. I consider there is a risk in this proposal that the Ombudsman's powers and functions of her office under the Act, may in practice be limited or diluted.[40]

New South Wales model in practice

5.31 Mr Bradley discussed the practical consequences of Ombudsman oversight. The relevant officer from the Ombudsman's office attends at the New South Wales Crime Commission office and physically inspects all of the applications. That kind of inspection causes some concern because some operations are extremely confidential and involve informers and undercover operatives who may still be 'in the field'. These operations might be known to only two or three people, yet the agency is required to submit to full and open inspection by the Ombudsman's office. According to Mr Bradley, the Ombudsman's approach to the NSWCC's concerns regarding extreme confidentiality has been very reasonable. The Ombudsman has nominated the Deputy Ombudsman as the person who will inspect those particular kinds of cases and has not ruled out the possibility of waiving the inspection of the actual application in certain cases. The Ombudsman's policy of only one person inspecting confidential cases has alleviated the NSWCC's concerns. After the inspection, the Ombudsman reports to Parliament in the general terms referred to in paragraphs 5.27-5.28.[41]

5.32 To date, the NSWCC's experience has been that the Ombudsman has identified some errors, but those errors have not been part of the substantive application or the authority. Errors in applications and authorities have included: the wrong number of participants, wrong dates (the date of a previous application had been left on a current application); and certificates having passed their expiry dates without being renewed, due to administrative oversight[42]:

> The documentation, as it is used at the moment, having been drafted by lawyers within agencies like mine, is unduly complicated. Little things which can be overlooked in the administrative process can result in the Ombudsman writing in her annual report that we have breached the rules in some way or other, which is not a desirable outcome. I do not want to have people such as the Ombudsman saying that I cannot comply with an act, that I keep getting things wrong. But, because of the complexity in the administrative process, there are always little things which are left out or left in.[43]

5.33 In addition to the independent oversight by the Ombudsman, there is oversight by the courts in cases where a prosecution results. If a law enforcement officer acting under a controlled operation authority has acted outside the terms of the authority, then the common law rules would apply to the evidence gathered during that operation. The officer's

---

40 Inspector of the Police Integrity Commission, *Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act)*, April 1999, p. 34. Emphasis in original. It should be noted that Ms Irene Moss was NSW Ombudsman at the time of Mr Finlay's review.

41 To date, the NSW Ombudsman has tabled two reports.

42 Mr Bradley, NSWCC, Evidence, pp. 37-38

43 ibid., pp. 36-37

conduct would be tested in the course of a prosecution and to that extent, there is judicial oversight. In summary Mr Bradley said:

> The Ombudsman has very wide authority to look at all of the documents, to inspect closely what has been done and to look at the reports of the conduct. The Ombudsman is reliant upon what is reported rather than what in fact occurred to the extent that there may be a discrepancy. If an officer were minded to tell lies about what happened in the report, the Ombudsman would not be alerted to that unless he or she had some other source of information. Where that would be likely to arise, I would suggest, would be in the prosecution process.[44]

Appropriate degree of public accountability: Finding the right balance of disclosure

5.34 The Committee was concerned to ensure that the system of accountability for controlled operations conducted by the NCA strikes the right balance between competing interests. As already stated, proper accountability was identified as the most significant civil liberty consideration. Against that important concern, the Committee had to weigh the arguments of law enforcement agencies that favoured confidentiality in relation to certain information and the consequences that could flow from its disclosure.

5.35 Mr Carmody favoured the NSW model of accountability[45] because it has sufficient independent oversight by the Ombudsman coupled with reporting precautions. In particular, Mr Carmody endorsed the 'filter' role of the Ombudsman in relation to withholding certain sensitive information. While that information is still reported to the Ombudsman, it is not reported further.[46] According to Mr Carmody, the regime provides an area of discretion so that certain information that would endanger health or safety or prejudice a prosecution is not disclosed in the Ombudsman's reports. He said that in those cases there is a clear justification for secrecy:

> That is important if you want to ensure that good law enforcement is not bought at too high a price.[47]

Mr Carmody acknowledged, however, that the exercise of that discretion has to be transparently examinable and reviewable so that those exercising the discretion are accountable for the decisions they make. This, in turn, has a disciplining effect on those involved in the system.[48]

5.36 It was put to Mr Carmody by a Committee member that 'sunlight is the best disinfectant', that the greater the transparency the better the system of accountability.[49] Mr Carmody, however, claimed that the concept of accountability has to be distinguished from the concept of publicity. The two concepts must not be confused. That is, accountability requirements should be imposed to account for the actions of government

---

44 Mr Bradley, NSWCC, Evidence, p. 39

45 Subject to the recommendations of the Finlay Review

46 Mr Carmody, QCC, Evidence, p. 88

47 ibid., p.79

48 ibid.

49 Hon Duncan Kerr MP, Evidence, p. 86

without unnecessarily revealing or publicising the operations of law enforcement. Where publicity is involved, the question should be asked what additional accountability does the publicity give? Many operations in government are scrutinised independently without being scrutinised publicly[50]:

> Just like information is power to law enforcement, publicity is also power to our opponent because they are part of the public. They can get access to information and they can devise their strategies and countermeasures on the basis of information we give them. Unless we keep that information confidential, within limits that are safe for accountability but are there to protect the integrity of our ongoing investigations, then that is a compromise that I think is a fair one and a reasonable one. In the end you become self-defeating. If you keep telling people how you are doing things, what your success rates are and where you are being most effective, they will move to some other area. They are very responsive.[51]

5.37 Mr Carmody warned that over-publicity of police operational methods would result in criminals taking steps to defeat law enforcement efforts, for example, by changing their methods of concealment. This counteracts police attempts to be proactive rather than reactive.

5.38 Criminal Justice Commission Chairperson Mr Brendan Butler similarly claimed that there needs to be a sense of balance in relation to accountability. The public reporting of police investigations and the use of these powers should be controlled, particularly in relation to individual operations. Agencies sometimes use civilians who may not wish to be identified or to give evidence in court. In some cases, civilians might be placed in danger if certain information were reported. On the other hand, there is widespread acceptance amongst law enforcement agencies that their public support is dependent on the community's better understanding of how they operate. This means there has to be proper transparency and full communication to the Parliament and, through the Parliament, to the people of Australia. The inclusion of progressively more information in the NCA's annual reports reflects this trend. Mr Butler argued that while this kind of open accountability is desirable, there should be caution when dealing with sensitive and individual operations.

5.39 Mr Butler advocated external oversight of the NCA in a manner similar to either the Parliamentary Criminal Justice Commissioner in Queensland or the Inspector of the Police Integrity Commission in New South Wales. The existence of an independent statutory officer, with considerable powers to receive and investigate complaints about the NCA and to report to Parliament or to a parliamentary committee would assure the community that the agency is properly supervised. In terms of achieving the right balance in relation to what information is disclosed and what is withheld, Mr Butler suggested that certain aspects of the scheme could be contrived in order to achieve the right sense of balance. For example, three-year terms would be appropriate for inspectorate type positions, coupled with high level reporting requirements.[52]

---

50 Mr Carmody referred to the example of the Parliamentary Criminal Justice Commissioner who oversights and investigates complaints against the CJC at the fiat of the Parliamentary Criminal Justice Committee, Evidence, p. 86

51 Mr Carmody, QCC, Evidence, p. 87

52 Mr Butler, CJC, Evidence, p. 96

5.40 In summary, Mr Butler suggested that in determining the appropriate level of disclosure in reporting, regard should be had to the effect of disclosure on individuals, their personal safety and their recruitment as well as the effect of disclosure on the investigative techniques and methods of law enforcement agencies. Absolute openness might have a detrimental effect on both of these aspects of the investigative process.[53] At the same time, however, the Committee was urged by Mr Carmody that the system of accountability for controlled operations should not be one where secrecy is valued above all other public interests.[54]

Ombudsman oversight: Telecommunications interception regime

5.41 The Commonwealth Ombudsman is responsible for oversighting the telecommunications regime under the *Telecommunications (Interception) Act 1979* (the TI Act). Warrants for telecommunications interception have to be obtained from a source external to the agency conducting the investigation. While this can be an eligible Judge of the Federal Court or the Family Court, amendments in 1997 extended the power to approve such applications to certain members of the Administrative Appeals Tribunal.[55] Applications are required to be in writing but, in urgent circumstances, may be made by telephone but with written follow-up within one day after the warrant is issued. As safeguards, the TI Act requires that the applicant agencies, including the NCA and the AFP, are obliged to maintain records which are regularly inspected by the Ombudsman. The Attorney-General is kept informed of the agencies' activities by means of reports from the agencies and the Ombudsman.[56]

5.42 The Act contains a number of provisions designed to facilitate the monitoring of the operations of the agencies applying for warrants and to render the agencies accountable for their actions under the legislation. For example, the Commissioner of the AFP has to maintain a General Register which is required to show relevant particulars about each warrant. The Register is subject to inspection by the Ombudsman and the Commissioner has to deliver to the Attorney-General every three months so much of the General Register as has not been previously inspected.

5.43 A copy of each warrant and of each instrument revoking a warrant must be given to the Attorney-General as soon as practicable. A written report about the use made of information obtained by interception must be made within three months of the warrant ceasing to be in force to, in the case of the AFP and the NCA for example, the Attorney-General. The Attorney-General must also table a report each year containing certain information.

5.44 Mr Michael Atkins, the AFP's Principal Legal Policy Adviser, described the oversight by the Commonwealth Ombudsman of the telecommunications interception regime as a 'very powerful accountability mechanism':

> ... one of its great virtues is the compliance monitoring role that the Ombudsman has after the issue of the warrant. Warrants are a very useful device for ensuring

---

53 Mr Butler, CJC, Evidence, p. 97

54 Mr Carmody, QCC, Evidence, pp. 86-87

55 See paragraphs 4.50-4.58 and the judiciary's decision not to be involved in the approval process

56 The NCA's annual report for 1997-98 at page 40 notes that the Ombudsman had reported a 'high level of compliance' for both inspections undertaken during the year

> that, yes, the boxes are ticked. Very few warrants are rejected. For agencies to know that there is an independent body that can step in and check during and after the life of the thing that, yes, the commission has been used lawfully and properly is a very powerful accountability mechanism.[57]

5.45 The NSW Ombudsman has responsibility for monitoring compliance of telephone interception under the *Telecommunications (Interception)(NSW) Act 1987* after the issue of the warrant. The agencies involved in telephone interception are required to retain comprehensive records concerning interceptions. The Ombudsman is required to inspect those records twice a year and to report to the NSW Attorney-General concerning the agency's compliance with the legislation. It is important to note that the Ombudsman is prohibited from including any details of those inspections in that agency's annual report.[58]

5.46 As set out at paragraph 5.26, the NSW Ombudsman also plays a key role in oversighting the controlled operations regime in that State. Mr Atkins described the Ombudsman's involvement as an ongoing compliance mechanism:

> They have some restrictions on what the Ombudsman can do, but it is still there. We know if you act unlawfully and improperly not only are you going to be held to account at the end of the process if it gets to court but you may well be held to account during the process.[59]

5.47 The AFP stated that it welcomes accountability by bodies like the Ombudsman because ultimately, accountability protects the agency and its members who act lawfully and appropriately. In addition, Mr Atkins asserted that this kind of accountability also protects the public:

> So in terms of accountability, whatever mechanism is used has to be effective, and the most effective mechanism is one that acts as part of the normal process, one that everyone knows is there, one that is a disincentive for people to try to push the limit too far, and one that gives assurance to the parliament, to the executive and to the public that if something does go wrong the chances are it is going to be detected.[60]

Conclusion

5.48 The capacity to conduct controlled operations is a powerful law enforcement tool and as such should be exercised subject to proper accountability. Given that the Committee has essentially accepted the view that particular regard must be paid to the need for confidentiality in the approvals process in the interests of operational efficiency and for the personal protection of participants, it favours a comprehensive accountability system as the balance.

5.49 The Committee rejects the suggestion that a parliamentary committee should play a primary role in oversighting the controlled operations process. As the Committee noted in its

---

57 Mr Atkins, AFP, Evidence, p. 159

58 NSW Ombudsman, *1997-98 Annual Report*, p. 202

59 Mr Atkins, AFP, Evidence, p. 159

60 ibid.

April 1998 report *Third Evaluation of the National Crime Authority* the proper role of parliamentary committees is to call the Government to account for the performance of its executive responsibilities and to independently and fearlessly report to the Parliament about its findings. They should not join with the Government in the performance of its executive role.[61]

5.50 In addition, the Committee appreciates that oversighting the investigative operations of an organisation involved in secretive and dangerous work is a particularly inappropriate function for a parliamentary committee. There would be genuine concerns raised about security of information. In Queensland, for example, the statutory office of the Parliamentary Criminal Justice Commissioner has been created to examine CJC matters on behalf of the Parliamentary Criminal Justice Committee. It is notable that the PIM is not subject to the committee's monitoring, because of the security considerations involved.

5.51 The Committee is impressed with the manner in which the telecommunications interception system is held accountable, as was described in detail above. It seems to strike the correct balance between reassuring the community of the integrity of the system while maintaining an appropriate level of operational protection.

5.52 The Committee also agrees with Mr Perry that the issuer of the certificates should be separate from the monitor or the person responsible for accountability. As set out in Chapter 4, the Committee has recommended that the Inspector-General of Security and Intelligence (designated as the Inspector-General of the NCA) should be responsible for determining applications for controlled operations of a long-term nature. The Committee has added the proviso that, in the event that the Government does not accede to the establishment of that office, then that power should be conferred on another independent body such as the AAT.

5.53 The Committee is aware that the Commonwealth Ombudsman has gained particular and relevant expertise in the oversight of the telecommunications interception process. In addition, the Committee is persuaded that the NSW system of oversight of controlled operations by the NSW Ombudsman satisfies the criteria for open and frank accountability. The Committee believes that the NSW model should be adopted by legislatures throughout Australia in the endeavour to secure national uniform legislation for controlled operations.

Recommendation 10: That there be an appropriate system of accountability provided within the legislative regime of controlled operations involving oversight by the Commonwealth Ombudsman. The oversight should be in identical terms to that required of the NSW Ombudsman under the *Law Enforcement (Controlled Operations) Act 1997 (NSW).*

Recommendation 11: In order that the Parliament be appropriately involved in discharging its responsibility for scrutiny under the legislation there should be a requirement placed on the Ombudsman to annually brief the Parliamentary Joint Committee on the National Crime Authority on a confidential basis in relation to the Authority's involvement in controlled operations.

---

61 Para 5.102 of the report refers

CHAPTER 6

FURTHER ASPECTS OF CONTROLLED OPERATIONS

6.1 Having examined in the preceding two chapters the issues of the approval and accountability processes for the NCA's involvement in controlled operations, in this chapter the Committee draws together suggestions for reform of the Commonwealth legislation in relation to the following four areas: the scope of the legislation; the timeframe for validity of certificates; retrospective authorisation, and civilian involvement.

Scope of the legislation

6.2 Under Part 1AB of the Crimes Act, a certificate for a controlled operation may only be obtained for the investigation of offences against section 233B of the *Customs Act 1901* and 'associated offences'. Section 233B creates a series of offences relating to narcotics such as the possession without any reasonable excuse of a prohibited import, the bringing into Australia of any prohibited import, conveying of a prohibited import, and conspiracy to import a prohibited import.

6.3 By comparison, the State legislation is much broader. The NSW Act allows operations in relation to 'criminal activity and corrupt conduct'[1] regardless of subject matter; and confers immunity from criminal liability in respect of any offence committed within the terms of the authority for the operation.[2] The South Australian Act allows operations in relation to the investigation of any indictable offence, and some summary offences[3] and confers immunity from criminal liability for any offence committed by 'an authorised participant' taking part in the operation in accordance with the terms of the approval[4].

6.4 Several reasons were advanced as to why the scope of Part 1AB of the Crimes Act should be broadened.

Commonwealth legislation more restrictive than State legislation

6.5 It was pointed out to the Committee that, compared to the legislative regimes available in some of the States, the Commonwealth regime was restrictive. The AFP, for example, described the States regimes as more flexible, broadly based and less complex than that applying under part 1AB of the *Crimes Act.*[5]

---

1 *Law Enforcement (Controlled Operations) Act 1997,* section 6

2 *Law Enforcement (Controlled Operations) Act 1997,* sections 16 and 18

3 *Criminal Law (Undercover Operations) Act 1995,* section 3

4 *Criminal Law (Undercover Operations) Act 1995,* section 4

5 Mr Keelty, AFP, Evidence, p. 155

6.6 The DPP considers that the present approach as reflected in Part 1AB should be abandoned in favour of the more open-ended approach which has been adopted in the *Law Enforcement (Controlled Operations) Act 1997* (NSW). Under that legislation provision is made for a controlled operation to be authorised where the purpose of the operation is to obtain evidence of a 'criminal activity', which is defined to mean 'any activity that involves the commission of an offence by one or more persons.' The DPP can see no reason why the ambit of the Commonwealth legislation should be restricted to the investigation of Commonwealth drug offences.[6]

6.7 The Police Federation of Australia is in favour of the scope of the Commonwealth controlled operations legislation being broadened so that it is capable of being used in a wide variety of criminal activities. The Federation's Chief Executive Officer, Mr Terry Collins, said it was 'illogical' that New South Wales police working with Queensland police and perhaps with the Federal Police in a joint operation would have different levels of coverage. The practical result is that when working in a joint operation with the NSW Police, the AFP or the NCA will rely on the New South Wales certificate, which has that widest possible interpretation. If that is the result that they are achieving anyway, Mr Collins argued it is illogical for legislation not to recognise it:

> In other words, if the NCA have legislation now that is less than New South Wales and they need it, then they will continue to seek the certificate from New South Wales and operate under that. Therefore, why wouldn't you bring the NCA legislation ... as a blueprint, if you will, for all state legislation? Then that gives us our maximum protection, we would argue.[7]

NCA needs to be able to investigate other crime

6.8 The effect of the limited scope and utility of the controlled operations legislation is that there are activities that the NCA cannot take part in and arguably has resulted in 'lost opportunities'. NCA Chairperson Mr John Broome said that by broadening the scope for controlled operations, there would be a significant increase in the NCA's capacity to detect and deter significant criminal activity. The result would be that the NCA would have more success.[8] There is no offence, for example, of drug trafficking under the *Customs Act 1901*.[9] This constitutes a limitation from an operational perspective because there will frequently be clear evidence of trafficking by the overall organiser or distributor but that person will

typically be one step removed from the actual importation and possession of the prohibited import. Consequently, the NCA cannot obtain a controlled operations certificate to investigate the criminal activities of those people.

6.9 The NCA argued that the legislation would be a more potent tool if certificates could be given in relation to investigations into a wide range of offences or a course of dealing, such as in New South Wales. Certificates could then be sought in investigations of high level

---

6 Commonwealth DPP, Submission volume, p. 83

7 Mr Collins, PFA, Evidence, p. 45

8 Mr Broome, NCA, Evidence, p. 14

9 Although a charge of knowingly concerned in an importation is available in some cases under paragraph 233B(1)(d) of the Customs Act

traffickers and other heads of criminal networks not directly connected to offences under section 233B of the Customs Act. Further, certificates could be sought at the commencement of operations in respect of a course of conduct, rather in respect of collecting evidence of specific offences that come to attention as the investigation unfolds. Finally, the NCA submitted that controlled operations should not be linked to narcotics investigations alone, as the technique is useful in investigations into a wide range of criminality.

6.10 The NCA proposed that the legislation could be amended so that controlled operations certificates are available in any investigation or any narcotics investigation conducted by the NCA. This would ensure that certificates would not be available in criminal investigations involving less serious criminal activity. There are several reasons why this should be done including that:

- NCA investigations are into serious criminal offences, are multi-jurisdictional and may not possess clear evidence of narcotics importation;

- controlled operations are important to the effectiveness of narcotics investigations and should be available in a wider range of situations; and

- while the majority of the narcotics trade takes place in Sydney, the NCA is not included in the *Law Enforcement (Controlled Operations) Act 1997* (NSW) though that aspect of the legislation is currently under review.[10] Accordingly, controlled operations cannot be approved under the legislation by the NCA Chairperson or Members. As a result, the NCA has a lesser ability to conduct controlled operations than its operational partners in New South Wales. It is undesirable for the NCA to be placed in a position of being less effective than it ought to be due to the uneven operation of Commonwealth and State law.[11]

6.11 The DPP claimed that the present restriction of controlled operations to Commonwealth drug offences has adverse consequences. First, drug related investigations will often reveal evidence of other serious crimes such as money laundering, tax evasion, bribery, forgery and corruption type offences. That is, there will often be Commonwealth and state offences involved with those who participate in that trade. The admissibility of that evidence may be contested at a resulting prosecution. Secondly, it can place the investigator in the position of having to choose whether to act unlawfully or to abandon the pursuit of evidence of serious offences. Thirdly, it can place the DPP's office in an invidious position in that an investigator may seek some indication that he or she will not be prosecuted for possible involvement in offences that are not authorised under Part 1AB.

Corruption

6.12 It was argued that the capacity of the NCA and other law enforcement agencies to investigate corruption is reduced because such investigations do not come within the terms of the controlled operation legislation. Queensland Crime Commissioner, Mr Tim Carmody, said that without the ability to conduct controlled operations to detect corruption within their

---

10 See paragraph 1.48 and the current definition of 'law enforcement agency' in section 3 of the *Law Enforcement (Controlled Operations) Act 1997 (NSW).*

11 National Crime Authority, Submission volume, pp. 99-100

own organisations, there is a gap in the ability of law enforcement to regulate itself from within or through anti-corruption agencies:

> They cannot set a trap to catch a crook in a context that is going to work. You need it from an anti-corruption point of view as well as from an anti-crime point of view. Controlled operations legislation actually enhances the anti-corruption armoury rather than diminishes it.[12]

The nature of organised crime: sophisticated, globalised and victimless

6.13 It was contended by a number of participants that the characteristics of organised crime are such that controlled operations are a necessary tool. The AFP believes that the sophistication and globalisation of organised crime, particularly at the international level, has created a requirement for controlled operations to be utilised and applied against a range of criminal activity outside the limitations of Part 1AB.[13]

6.14 Mr Brendan Butler, Chairperson of the Criminal Justice Commission, described organised crime as being typically committed in secret and seemingly victimless, although there are, of course, victims at the end of the chain of criminal activity. Other police work is ordinarily initiated by a complaint that someone has been assaulted and there is an apparent victim, 'the blood-stained body on the floor'. In those cases, it is relatively easy to identify the offence and to commence the investigative process. By comparison, the investigation of organised crime is different. There is no victim to start with, no 'blood-stained body'. In organised crime like drug offences, corruption and people trafficking (illegal immigration) criminals deal with criminals. Neither party to a transaction is likely to make a complaint to the police. Therefore, different investigative tools are required to seek out that sort of criminality. The only way is for covert operatives to infiltrate the criminal group to detect offences and obtain evidence of their commission. Mr Butler said the need to use undercover officers is not limited to drug investigations. It is particularly important in relation to the investigation of corruption offences and some of the fraud and money offences:

> I urge that the NCA's scope be extended there. It seems inappropriate that there be different sorts of rules – a clear legislative scheme in relation to drugs and then a no man's land, working with judge made law, in relation to all other offences.[14]

6.15 The Committee notes that the issue of people trafficking, where organised crime groups facilitate illegal entry into Australia, is a current issue that has potentially enormous ramifications for Australia's security and stability. Again, the victims of the chain of that criminality are difficult to identify. Yet it is a serious problem for Australia. The Committee notes that the use of controlled operations would serve as an important investigative tool in relation to that kind of criminality.

---

12 Mr Carmody, QCC, Evidence, p. 86.

13 Mr Keelty, AFP, Evidence, p. 156

14 Mr Butler, CJC, Evidence, p. 92.

Community expectations

6.16 It was claimed that the limited scope for conducting controlled operations under the Commonwealth legislation is no longer appropriate in terms of the community's expectations of law enforcement. The AFP asserted that there is an increasing expectation in the community for more concerted action against the international supply of drugs.[15]

Constraints on law enforcement agencies to follow the money trail

6.17 Substantial evidence was provided to the Committee that the limited scope of controlled operations under Part 1AB constrains the ability of law enforcement agencies, like the NCA and the AFP, to participate with overseas law enforcement agencies in large scale international money laundering.[16] AUSTRAC advocated that consideration should be given to amending the controlled operations legislation so that operations can be conducted to investigate offences involving the proceeds of crime and the 'money trail':

> By way of clarification, the rationale behind "money trail" investigations is that the "kingpins" of crime keep very much closer to the money generated by their illicit activities than they do the "product" of their illicit activities. By following the money as opposed to the product (for example, the drugs) it is more likely to lead to the top of a criminal organisation.[17]

6.18 The NCA has used AUSTRAC's information to identify 'kingpins'. However although Financial Transaction Reporting (FTR) information provides a money trail, that is not always sufficient. AUSTRAC claims that the ability to undertake controlled delivery of proceeds of crime would increase the efficiency of the NCA's efforts to apprehend the kingpins.[18]

6.19 AUSTRAC, through it's international work, has had the advantage of studying ways in which other jurisdictions investigate serious crime like money laundering and major tax evasion. A range of countries have controlled delivery in relation to money laundering, for example the United States, Belgium and the Netherlands. According to AUSTRAC, the technique of controlled deliveries, however, is used in all jurisdictions, some more than others. Director of AUSTRAC, Ms Elizabeth Montano, said that while it is not a power that should be used every day, in appropriate circumstances, it is considered to be a very useful tool amongst a range of tools.[19] AUSTRAC has concluded that, as an investigative tool, controlled deliveries would be appropriate for use in the Australian context.

6.20 The recommendation by the Financial Action Task Force that controlled deliveries should be used as an investigative tool in the international sphere of finance reflects the

---

15 Mr Keelty, AFP, Evidence, p. 156

16 ibid.

17 AUSTRAC, Submission volume, p. 50

18 ibid., pp. 50-51

19 Ms Montano, AUSTRAC, Evidence, p. 60

international acceptance and usage that this method has.[20] AUSTRAC advocated that there should be authorised controlled deliveries in relation to funds:

> It is not only drugs and nuclear fissionable materials and all those sorts of things that are valuable and can be the subject of controlled deliveries. Money itself, particularly in our work, is seen to be a very useful commodity to be passed around in suitcases. It still does happen, by the way, and we have a big trend in that at the moment in our analysis. There is a lot of cash moving. It is not a cashless society, nor is it going towards being a cashless society. There is still a lot of money moving, and a lot of money moving in very suspicious ways.[21]

6.21 A 'general' anti-money laundering reference was given to the NCA by then Minister for Justice, the Hon Duncan Kerr on 26 May 1994 (known as the 'Limbeck Reference'). AUSTRAC believes that the 'philosophy' underlying the Limbeck Reference should be adopted in respect of the fight against organised crime. The indications from AUSTRAC are that many criminal groups and activities can be detected by first finding their financial transactions. For the NCA to do this, it must be empowered to undertake investigations without knowing in advance who the criminals are. The Limbeck Reference allows it to adopt this approach. Consequently, AUSTRAC believes that the scope of controlled operations should be broadened to include investigations of the 'money trail':

> The financial sector is a wonderful instrument. It allows amazingly quick transfers of funds. It allows criminals to do some terrific things. For the law enforcement agencies, in working out their strategies about how they are going to actually proceed with an investigation, the range of tools available to them is very important. It is important in terms of how fast they can react to what is going on. How fast can they intercept? How fast can they watch? How fast can the people who are under cover do things? How fast can they react? What can they do without having to go back to base? All those sorts of things are very important.[22]

6.22 AUSTRAC is engaged in information sharing with agencies in countries where the controlled delivery of funds is used as an investigative tool. Although AUSTRAC has not been involved in any operations of this nature, its Director Ms Montano said it was not hard to see how it could arise. International organisations involved in any kinds of criminality, for example drugs or paedophilia, would also necessarily be dealing with the proceeds of crime. The ability to conduct controlled deliveries in relation to money as well as the product that produced the money would be a very useful for tool for law enforcement agencies to have.[23]

6.23 Prior to the Ridgeway case, AUSTRAC was asked to cooperate with the international counterparts of some primary investigative agencies. AUSTRAC was asked to establish relations with Australian banks, to facilitate and monitor the movement of funds through accounts and to hold that information on behalf of the primary agencies that were investigating. AUSTRAC was also to act to prevent the information from being picked up by

---

20 See the FATF recommendation at paragraph 1.15

21 Ms Montano, AUSTRAC, Evidence, p. 56

22 ibid., p. 58

23 ibid., pp. 58-59

other agencies in case another agency intervened and affected the investigating agency's operation. This type of activity ceased when the Ridgeway decision was handed down.[24]

6.24 The Australian Federal Police Association also supported the extension of the scope of controlled operations to the investigation of money laundering. AFPA noted that the commission of narcotics offences is often associated with money laundering offences. Technology is making it increasingly easy for money to be laundered quickly and without being detected. The Committee was told that as technology changes the way financial transactions occur, it is increasingly difficult for law enforcement agencies to counter these types of activities. The AFPA called upon the Committee to recommend expanding the scope of controlled operations to cover not only narcotics investigations but also other types of serious criminal activity, in particular money laundering and other sorts of property crimes:

> As we gallop towards the 21st century, a lot of these crimes that are committed, particularly money laundering and so forth, go hand in hand with narcotics investigations and, as technology gallops ahead, it is very hard for us as investigators to get hold of either the assets or indeed to trace the evidence, particularly with e-commerce. Transactions now occur in a millisecond, and it could well be in future that the only way to get those proceeds of crime, or the elements involved within the criminal activity, is to be a part of the criminal activity in some form, whether it be to set up a front bank or to place people within the criminal enterprise itself. Invariably they would be conducting unlawful *activities, and certainly they need to be protected.*[25]

6.25 In relation to the notion of expanding controlled operations to include investigations in relation to the money trail, Mr Broome said one of the key issues to be resolved is what kinds of operations ought to be able to be conducted. Should they be elaborate operations, as in the US and Canada, where law enforcement agencies are able to establish money laundering businesses for the purpose of identifying the users of those types of services? Alternatively, should they be confined to lower level operations, such as law enforcement officers working in an undercover capacity with criminals and laundering funds out of Australia.

6.26 According to the NCA, controlled operations in the financial sector often need to be conducted early in the process. Once funds have actually entered the financial system, there are significant limitations on what can be done to reverse those transactions. That is, once funds have moved from one branch/bank to another, or externally, the funds cannot simply be removed because there is a whole range of guarantees provided through the financial system that will honour the order to pay.

Scope of protection for covert police operatives (and others)

6.27 Under the existing Commonwealth legislation, covert police operatives have limited protection from prosecution in respect of certain offences committed for the purposes of authorised controlled operations. That protection is limited to 'narcotic goods offences' only. A 'narcotic goods offence' is defined as an offence against section 233B of the *Customs Act 1901,* certain specified offences relating to the possession, importation or

---

24 Mr Pinner, AUSTRAC, Evidence, p. 59

25 Mr Phelan, AFPA, Evidence, pp. 167-168

exportation from Australia of narcotic goods, and State and Territory offences which involve the element of possession.[26]

6.28 This contrasts with the wider immunity conferred in the New South Wales and South Australian legislation. In New South Wales, immunity is conferred in relation to any offence committed within the terms of the authority for the operation, such operations being allowed to investigate 'criminal activity and corrupt conduct'.[27] Under the South Australian Act, immunity is conferred from criminal liability for any offence committed by an authorised participant within the terms of the approval for the operation, which may be to investigate any 'serious criminal activity'.[28]

6.29 The Attorney-General's Department submitted that the Government has accepted that there is a need for Part 1AB to extend to the investigation of crimes other than drug trafficking. Law enforcement agencies propose that this should be accompanied by a corresponding widening of the immunity from criminal liability in relation to the range of offences that might be committed by them in the course of an operation:

> If law enforcement officers are to infiltrate criminal schemes and gain evidence of those schemes, those officers will potentially be party to various forms of illegal conduct, eg, money laundering or the smuggling of weapons (depending on the nature of the criminal scheme). Such operations may continue for long periods, even years, and law enforcement agencies argue that it is impossible to define in advance the subject matter of the offences an undercover officer may need to commit. Sophisticated criminal schemes often engage in a diverse range of criminal conduct, the scope of which tends to change from to time.[29]

6.30 The Department submitted that the current legislation is not even broad enough to allow the effective infiltration of drug networks because such infiltration involves exposure to fraud, corruption and other forms of crime, for which Part 1AB confers no immunity.

6.31 According to the Department, law enforcement agencies propose that controlled operations should be allowed in relation to any infiltration operation, regardless of subject matter, subject to appropriate authorisation and accountability requirements. Covert police operatives would then be shielded from criminal liability in respect of any offence necessarily committed in the course of an operation. The Department stated that:

> The breadth of the proposed immunity is justified by the proven effectiveness of infiltration operations in securing evidence of organised criminal activity.[30]

The proposal would bring Part 1AB more into line with the NSW *Law Enforcement (Controlled Operations) Act 1997* and the SA *Criminal Law (Undercover Operations) Act 1995.*[31]

---

26 See section 15I of Part 1AB of the *Crimes Act 1914,* and the definition of 'narcotics goods offence' in section 3.

27 See *Law Enforcement (Controlled Operations) Act 1997,* sections 16 and 6.

28 See *Criminal Law (Undercover Operations)Act 1995,* sections 4 and 3.

29 Attorney-General's Department, Submission volume, p. 121

30 ibid.

31 ibid.

State supply offences

6.32 In terms of the present scope of Part 1AB and its application to State offences, the Commonwealth DPP made the point that it does not provide any immunity for involvement by Commonwealth investigators in State supply offences but is restricted to offences involving possession. For those reasons, the DPP supported an extension of the ambit of controlled operations to cover all Commonwealth offences in order that a Commonwealth investigator involved in the technical commission of such an offence would not be acting unlawfully.[32]

6.33 The AFP similarly complained about the lack of protection for its officers under the existing law from State and Territory offences and the lack of coverage to those assisting the police in controlled operations.[33]

Testing of covert operatives

6.34 An important argument in favour of expanding the scope of controlled operations is the need to avoid the detection of covert operatives by criminal groups in which they are working. According to NSW Crime Commissioner Mr Phillip Bradley, covert operatives are frequently subjected to 'testing' by the criminal groups they are trying to infiltrate. The concern is that the current legislation is so restrictive in the way it permits operations to be conducted that when the limitations of investigators become known, they will be tested to see whether they try to delay matters in order to get a new authority:

> A few years ago we were involved in a lot of operations which were designed to change the rules. For example, it was always the case that if you went to a drug purchase you would show the money and hang on to it until the drugs arrived. One of the tests that the criminals always used was to say, "Unless you allow us to take some or all of the money away, entrust us with it, then we are not going to deliver the drugs because we have not dealt with you before, or your credentials are at the ounce level and not at the kilogram level." So we did what has now become known as "running and burning" - in other words, allowing large amounts of money to go into the night and, in some cases, not seeking to recover it, so that we would move to a higher level.[34]

6.35 Mr Bradley told the Committee that those operatives who are in a 'deep cover' situation are likely to be given 'jobs' to do by the criminals with whom they are associating so that the criminals can be sure of their 'credentials'. These 'jobs' will be of escalating degrees of seriousness, as the operatives gain the trust of the criminals. The 'jobs' may start with something simple, like delivering an envelope containing money, but they may escalate to quite serious criminal activities:

> It is not known what you might be expected to do, what test might be given to you as you go along in the course of immersing yourself in a particular group. I think it was in the *Donnie Brasco* movie where the undercover policeman was with a group

32 Mr Delaney, Commonwealth DPP, Evidence, pp. 174-175

33 AFP, Evidence, p. 156

34 Mr Bradley, NSWCC, Evidence, p.33

> of criminals and they killed a person in his presence. While that has not happened, as far as I know, in New South Wales, there would be situations which would arise where, if you were acting responsibly, you would attempt to stop that sort of serious crime from occurring. In doing so, you would put your own life at risk - you may die as a consequence.[35]

6.36 Mr Bradley favoured the position that the controlled operations legislation should be as specific as possible as to what can and cannot be authorised and that those things which an operative is incidentally engaged in should probably be the subject of the usual rules about the application of judicial discretion.[36]

6.37 Mr Carmody said the testing by criminals of their associates to establish their credentials is called 'street cred'. These secret organisations have got a lot to lose; the drug trade, in particular, is a very high-yield, low-risk business enterprise. It is a market-based operation and general business principles apply. As a first principle, businesses assess the risks to their profitability. In respect of organised crime today, and drug trafficking in particular, the most important risk is detection. That risk must be assessed as being so low that the drug trade can operate quite comfortably in this environment. The QCC published a recent report that showed that law enforcement recovers about 1.3 per cent of the heroin available annually in the Queensland market:

> That has got to be a low-risk business enterprise to be involved in. So what we have to do is to acknowledge that we still have to keep doing that as best we can with the methodologies that we can devise and the legislative support we can have, and that is where the controlled operations come in. We also have to work smarter rather than harder. We have to attack the profitability motive and we have to make it more difficult for them to make money and keep it. So you need an integrated package. Controlled operations is an essential part of that package and so too is civil based confiscation.[37]

6.38 The Police Federation of Australia is concerned that members should not do anything that has not got the support of legislation:

> Whilst we admire the entrepreneur, we worry for them ... . At the end of the day, they are people who then find themselves coming to us with their problems. What they do on behalf of the Commonwealth government or the state government or their jurisdiction might be extremely noble, but we do not want them being exposed. The reality is that there is litigation now in this country against police officers that was not there several years ago - there is an increase in that. So our concern would be that there should not be too much opportunity for people to move outside of what is prescribed. Having said that, I know that there are circumstances, the greater good, the public interest ... .[38]

---

35 Mr Bradley, NSWCC, Evidence, p. 34

36 ibid.

37 Mr Carmody, QCC, Evidence, p. 85

38 Mr Alexander, PFA, Evidence, p. 47

6.39 In the Federation's view, it is appropriate for parliaments to decide what police and law enforcement agencies should be allowed to do.[39]

Fundamental argument against expanding the scope of controlled operations

6.40 President of the Australian Council for Civil Liberties, Mr Terry O'Gorman, argued that there is a very strong case for restricting controlled operations to high-level drug importation based on the fact that the underlying proposition of controlled operations is fundamentally unacceptable. That proposition is that law enforcement officers will be authorised to commit crime. Mr O'Gorman distinguished the use of controlled operations in drug investigations from investigation of white-collar crime. He argued that there was no justification in expanding the use of controlled operations for white-collar crime because that type of crime is almost invariably traceable through documentation, whereas 'drugs is a different beast':

> I worry considerably about the prospect of saying to police, "Now that we have sold, by the drug spectre, the idea to the public that police can commit crime in order to catch criminals, we will now put it into organised crime, white-collar crime and currency crime." I think that is opening a huge Pandora's box.[40]

6.41 Professor Trevor Nyman, representing the New South Wales Law Society also argued against the expansion of controlled operations legislation expressing the Society's opposition to legislation that legitimates what would otherwise be unlawful activity. Responding to the suggestion that the controlled operations legislation should at least be expanded to enable the NCA to participate in controlled operations to investigate money laundering, he said:

> I did not hear a word that was said this afternoon that persuaded me at all that the delivery of cash by a person who is sworn to uphold the law would be justified. The AUSTRAC role is a limited role in the assistance of real law enforcement personnel and, absent any written submission that would have given me further guidance, I saw nothing that suggested to me that members of AUSTRAC or law enforcement personnel ought to be encouraged to do what would otherwise be a breach of the law.[41]

Options for widening the scope of investigations for controlled operations

6.42 Many inquiry participants advocated that the scope of controlled operations in the Commonwealth legislation should be widened to reflect either the New South Wales or South Australian models. Queensland's Public Interest Monitor, Mr Richard Perry, however, suggested that the Committee should consider establishing a regime for determining which criminal activities should be subject to controlled operations. This would address the concern that controlled operations are being used across too wide a range of criminal activities.

6.43 Mr Perry told the Committee that a similar issue is currently being reviewed in Queensland. That issue is how to identify the range of offences for which surveillance

---

39 Mr Alexander, PFA, Evidence, p. 50

40 Mr O'Gorman, ACCL, Evidence, p. 108

41 Professor Nyman, NSW Law Society, Evidence, p. 67

devices should be available. At present, surveillance devices can be used in the investigation of 'serious theft'. This definition is problematic because it is unclear whether that means theft involving something worth a lot of money or whether it also includes a small thing that is of intense value to an individual or to the public at large. It is an extremely difficult debate to resolve. The same argument is relevant in relation to what is 'serious criminal activity' as used in the South Australian controlled operations legislation.

6.44 Mr Perry advocated that two classes of circumstances should be specified in which a controlled operation can be authorised. The first class would be where applications for a controlled operation are made in relation to statutory criteria, as in the New South Wales legislation. For example, controlled operations could be used to investigate offences that carry a sentence of twenty years or more. The second class would be those offences which at face value are less serious, but which may have a compelling public interest. In relation to this second class, a break and enter, which carries a far lower term of imprisonment, is a typical example. Under ordinary circumstances, it would be inappropriate to conduct a controlled operation to investigate an offence of break and enter. But there may be certain circumstances where there is a public interest at stake that requires such an operation to be authorised:

> Let us say that somebody breaks into Queensland University's biolab and takes a phial of something fairly significant. The offence itself, in legal terms only, is minor. The impact on the public interest by not having it resolved is significant. I think the way that it has to be done is to have these two classes of offences but to never go away from the fundamental proposition that these powers are, by their very nature, so significant and carry within them the seeds of such significant problems that they should be warranted only in the most particular and serious circumstances. You cannot do more than that, because the factual cases that you run into are so varied that it will defeat the skill of any draftsman to preview every possible circumstance.[42]

Innocent bystanders

6.45 In the course of determining the scope of controlled operations and the immunity that should be available to covert operatives engaged in controlled operations, the Committee was acutely aware of the need to also address the rights of other individuals who may be adversely affected by a controlled operation. In his submission, the Queensland Minister for Police and Corrective Services advised the Committee that one of the benefits of having legislation to regulate controlled operations is that it provides an opportunity to address other issues associated with those types of operations. One such issue is the provision of a mechanism for the payment of compensation to members of the community who suffer loss as a result of a controlled operation.[43] The Committee is of the view that the consideration of the provision of such a mechanism is an appropriate adjunct to the consideration of immunity from criminal and civil liability for covert operatives during a controlled operation.

---

42 Mr Perry, PIM, Evidence, p. 129

43 Hon Tom Barton, MLA, Minister for Police and Corrective Services (QLD), Submission volume, pp: 84-85

Conclusion

6.46 The Committee is persuaded that the current scope of controlled operations in Part 1AB of the *Crimes Act 1914* is too narrow and does not allow the NCA to operate to its fullest capacity. The Committee is particularly concerned that the NCA should be able to conduct controlled deliveries of funds and to follow the money trail. This seems to be imperative for the NCA's efforts against the drug trade.

6.47 The Committee is concerned, however, that the scope of controlled operations should not be widened by the use of vague and unambiguous terminology that may give rise to conflicting interpretation. This also applies to the suggestion that a formula for classification should be used. Different people may well assign different classifications to particular criminal activities.

6.48 In conclusion, the Committee has decided that the most appropriate course is to codify those criminal activities that Parliament considers should be the subject of a legislative regime for controlled operations. Recommendation 11 is framed in terms of the definition of 'relevant offence' in section 4 of the *National Crime Authority Act 1984* which, by virtue of section 11 of that Act, defines the functions of the National Crime Authority. In addition, the Recommendation specifically includes money laundering and people trafficking to remove any doubt as to the Committee's intention that controlled operations should be legitimised in respect of these two key areas.

6.49 The Committee believes that the immunity provision for covert operatives should also be widened to take account of the additional kinds of controlled operations that should be available to the NCA under the legislation. The Committee has decided to recommend this wider immunity in terms of not only criminal liability but also civil liability. This will bring the Commonwealth legislation into line with the New South Wales Act. In terms of recommending wider immunity, the Committee is keen to ensure that immunity is contained within the parameters set out in the New South Wales Act. Immunity from criminal liability should only be available where the unlawful activity was authorised by and engaged in in accordance with the certificate authorising the operation. Similarly, immunity from civil liability should only be available where the conduct engaged in was done so in good faith and for the purposes of complying with the provisions of the legislation governing the controlled operation.

6.50 Having recommended that the scope for controlled operations should be widened and that covert operatives are adequately immunised in respect of their activities, the Committee believes the legislation should also address the rights of citizens who may inadvertently suffer loss or injury as a consequence of a controlled operation. A mechanism should be available so that such persons can apply to be justly compensated in those situations. The Committee has recommended the inclusion of a provision expressly acknowledging the right of such individuals to be compensated.

Recommendation 12: That the scope of the definition of 'controlled operations' in Part 1AB of the *Crimes Act 1914* should be widened to refer to operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining a financial benefit by vice engaged in by others, extortion, violence, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, dealings or illegal importation or exportation of fauna into or out of Australia, money laundering and people trafficking.

Recommendation 13: (i) That the immunity conferred on covert operatives should be widened commensurately with the scope of controlled operations to confer immunity from criminal liability on any person authorised to participate in a controlled operation in terms of section 16 of the *Law Enforcement (Controlled Operations) Act 1997 (NSW)*. As prescribed in section 16 of that Act, immunity should only be available where the unlawful activity engaged in has been authorised by and is engaged in in accordance with the Authority for the operation.

(ii) The Commonwealth Act should be amended to include a provision in terms of section 19 of the NSW Act to immunise covert operatives from civil liability. As prescribed in section 19 of that Act, immunity from civil liability should only be available where the conduct engaged in was in good faith and for the purpose of executing the provisions of the Act regulating controlled operations.

(iii) The Commonwealth Act should also be amended to include a provision expressly acknowledging that where an individual suffers loss or injury as a result of a controlled operation an action can be maintained against the State for compensation in respect of that loss or injury.

Timeframe for validity of certificates

6.51 Under Part 1AB of the *Crimes Act 1914*, a certificate authorising a controlled operation may remain in force for up to 30 days, such lesser time as is specified in the certificate or until the certificate is surrendered, whichever time comes first.[44] There is no provision for renewal of certificates. If an operation has to continue for more than 30 days, a new certificate must be obtained.

6.52 Under the *Law Enforcement (Controlled Operations) Act 1997(NSW)*, the authority to conduct a controlled operation may remain valid for a period not exceeding three months.[45] There is also provision for authorities to be renewed.[46] In the recent Finlay Review of the NSW Act, the NSW Police Service recommended that that period should be extended to 12 months. Mr Finlay, however, recommended the extension of the term of authorities to

---

44 See section 15P

45 Section 8(1)(g)

46 Section 11

6 months, noting that such a period ensures that the status of the operation is appropriately reviewed.

6.53 Under the SA regime, approvals may be given for three months and are renewable.[47]

Investigations and operations may be protracted

6.54 The Attorney-General's Department noted that law enforcement agencies argue that the 30 day time frame under the Commonwealth legislation is 'manifestly inadequate for the conduct of controlled operations':

> In some cases, they argue, the effective infiltration of a criminal organisation may take many months or even years.[48]

6.55 Mr Michael Phelan, National Secretary of the Australian Federal Police Association, told the Committee that he thought it was appropriate for the timeframe for certificates to be extended, or alternatively, that provision should be made for the extension of certificates. He said the AFPA members carry on some major protracted inquiries that perhaps have their genesis overseas and take a long time to get to Australia and that such operations take more than 30 days.[49]

6.56 A different perspective was taken by the NCA. In relation to whether the timeframe for certificates should be extended, Mr Broome said that while he knew other agencies have argued for an extension of time and that in his view an extension to three months would be appropriate, such an extension, while desirable, is not critical:

> ... if one of the ways that people can feel more comfortable and confident that there is an appropriate degree of oversight is to keep the time frame at a month, that is something we could certainly live with, although I think you can make a very reasonable case for, say, a three-month time frame.[50]

6.57 Mr O'Gorman, on the other hand, was 'sympathetic' to the argument that the time frame for certificates should be extended from 30 days to 60 days, but only if the approval process is changed so there is no longer the cosy arrangement whereby senior police officers issue them.[51]

An important safeguard

6.58 The NSW Law Society urged the Committee not to recommend extending the 30 day limitation period because it operates as an important review mechanism. The Society

---

47 *Criminal Law (Undercover Operations) Act 1995 (SA),* sections 3(4)(f) and 3(5) respectively

48 Attorney-General's Department, Submission volume, p. 122; See also the Inspector of the Police Integrity Commission, *Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act),* p. 19 where it is noted that some complex operations clearly require a longer period than three months for their effective completion.

49 Mr Phelan, AFPA, Evidence, p. 172

50 Mr Broome, NCA, Evidence, p. 13

51 Mr O'Gorman, ACCL, Evidence, p. 102

noted that, since the NSW Act came into operation, not one application for an authority by any agency had been refused and that it was quite common for more than one certificate to be issued in relation to each investigation. In practice, many investigations are conducted over long periods of time and many of the certificates issued expire before the controlled operation actually takes place. The need to re-apply for certificates every 30 days is an important safeguard in the monitoring of controlled operations and the period should not be extended.[52]

6.59 Mr Broome informed the Committee that the reason why no applications had been rejected is because an application is not made unless those making it believe that it is appropriate and that there is a reasonable chance that the person involved is going to approve it. Mr Broome said there is a significant standard in place in relation to the making of applications for controlled operations:

> So far as our organisation is concerned ... we know what is needed before an application is going to be considered, let alone approved. What is required to comply with the statutory requirements is a very full statement of what is known about the operation, which sometimes will not be a lot at all, and I will probably ask a series of questions if there is anything in the application which causes me any concern whatsoever.[53]

6.60 This was also the experience of the NSWCC. Mr Bradley said that the statistics do not reflect what happens in practice and he drew a parallel with the issuing of telephone interception warrants, where few warrants have been refused. The reality is that the applications have to be properly prepared and satisfy internal processes in the law enforcement agency before the application is heard by a court:

> In fact, in the Federal Police arena, for example, they have to go through a number of internal approval stages before they get anywhere near the judicial process or the administrative process exercised by a court or the AAT. It is not something that is done lightly. That is just one of the misapprehensions that often apply where people have not had exposure to the practical application of those things.[54]

6.61 In respect of the NSW Law Society's observation that often a number of certificates are issued in respect of the same operation, Mr Broome said there are two reasons for that. The first reason is the short time frame itself. Certificates often expire before the operation is conducted or before it has concluded. The second is that 'out of an abundance of caution', certificates are often obtained prematurely as the result of intelligence that something is being contemplated and when the NCA may not be aware of the kinds of details which will subsequently be sought. According to Mr Broome, it was the DPP's advice when this legislation was first enacted that certificates should be sought and obtained at an early stage in an operation to avoid a situation arising where a law enforcement officer might be involved in something which was not the subject of a certificate:

> There is a bit of a catch-22 in that: you have to have sufficient information to enable you to at least make a sensible decision under the Act. At the same time, the DPP says, "Issue early and protect yourself in that way." Obviously as time

---

52 NSW Law Society, Submission volume, p. 139

53 Mr Broome, NCA, Evidence, p. 12

54 Mr Bradley, NSWCC, Evidence, p. 31

> progresses more information will come to light, and it may be that in the subsequent issuing of certificates in respect of the same operation greater detail is available and more information is put into place. Just to make the obvious point: if you are bringing cocaine from South America via a vessel, depending on the kind of vessel used and so on it may well take some months from when the initial intelligence of the operation comes to hand to when the product might end up on Australian shores. So you may go through one, two or three certificates in that time frame.[55]

Conclusion

6.62 The Committee accepts that there are some complex controlled operations that may require a longer period than the current 30 day period to be effectively and satisfactorily completed. While the Committee is keen to ensure that law enforcement agencies are not unduly burdened by unnecessary administrative paperwork, it also recognises that the requirement to renew certificates does act as a safeguard to ensure the timely review of authorities to conduct these operations. For this reason, the Committee has declined to follow the New South Wales model where, instead of applying for a new authority at the expiry of an existing one, law enforcement agencies can apply for a renewal.

6.63 In conclusion, the Committee has determined that the timeframe for controlled operations certificates should be extended but only to three months, notwithstanding the recommendation of the Finlay review to extend timeframes in New South Wales to six months.

Recommendation 14: That the timeframe for which an authority to conduct a controlled operation may remain in force be extended to three months. If an investigation exceeds that timeframe, law enforcement agencies must apply for a new certificate in respect of the same investigation.

Retrospective authorisation

6.64 There is no provision for retrospective authorisation of controlled operations under the Commonwealth legislation. This contrasts to the NSW position where section 14 allows for retrospective authorisation of unlawful activity in relation to life threatening situations. That exception, however, is subject to further restrictions. The approval must be sought within 24 hours of the unlawful activity having been undertaken and it is not available in respect of the offence of murder or any offence for which the common law defence of duress would not be available.

The Finlay Review

6.65 The Review of the New South Wales legislation by Mr Finlay considered a proposal to extend the retrospective authorisation provision. The proposition was that retrospective authorisation should be available in respect of unforeseen activities undertaken in a controlled operation where failure to do so would jeopardise either the operatives or the operation. The

---

55 Mr Broome, NCA, Evidence, p. 13

nature of the activities for which the retrospective authorisation is sought must be such that, had time permitted for prospective authorisation to be sought, the authorisation would reasonably have been approved. In addition, the application would have to be sought within 24 hours of the activity having been undertaken. This proposal would have extended retrospective authorisation to activities occurring before the commencement of an operation as well as during an operation.

6.66 The Review Report noted that the proposal arose from repeated advice by operatives that criminals are opportunistic:

> Where a controlled operation is undertaken involving a group of practicing criminals, it is not uncommon that the target or the nature of their serious criminal activities will change so suddenly that a variation authorising the participants to engage in additional or alternative controlled activities would be too late even by telephone application.
>
> In the result the opportunity to obtain evidence of the group's serious criminal activity or corrupt conduct or to frustrate it, is lost.[56]

6.67 The central argument against the proposal was that some variations to authorisations may be obtained by telephone in urgent situations, which should cover some of the unforeseen circumstances that arise.[57]

6.68 In addition, throughout the course of the Review, the ICAC raised the following arguments:

- if it were available, a refusal to give retrospective authorisation might have unintended adverse consequences on the admissibility of evidence worse than the mere fact that an unforseen activity was not included in a controlled operation;
- the availability of retrospective approvals may encourage inadequate consideration of the types of conduct which may occur in controlled operations;
- chief executive officers may be inclined to give retrospective approvals too readily and this may reduce confidence in the legislation.[58]
- it is unfair, unwise and unnecessary for a CEO to have to decide whether to retrospectively approve and make lawful that which was unlawful;
- it is undesirable to focus attention on the approval process and increase the potential for CEOs to be called to give evidence;
- conflicts of interest would arise for the officer which would be hard to resolve;

---

56 Inspector of the Police Integrity Commission, Report: Review of the Law Enforcement (Controlled Operations) Act 1997 (the Act), April 1999, p. 20

57 ibid.

58 ibid., p. 21

- increases the risk of officers embarking on foreseen unlawful activities expecting to obtain retrospective approval;
- not all unlawful activities will lead to a controlled operation and this could have adverse consequences; and
- retrospective approval is conducive to corruption – officers might make false applications to cover their criminal/corrupt activity.

6.69 The Finlay Review noted that there could be even further ramifications than those raised by the ICAC. For example, if a CEO refused to retrospectively authorise an unlawful activity, is there an obligation to prosecute or discipline the officer?

6.70 In the end, the Finlay Review rejected the proposal to extend the retrospective approval process preferring to allow the Act more time to operate in order to better judge the effectiveness of its provisions without extending the circumstances in which retrospective authority may be granted. Mr Perry agreed with Mr Finlay's decision to reject the proposal to widen the retrospectivity provision in the NSW legislation.[59]

Retrospectivity would increase uncertainty about the operation of the Act

6.71 Mr Bradley was of the view that to introduce retrospectivity into the Commonwealth Act would add to the uncertainty that presently exists in relation to the operation of controlled operations, its effect and consequences. Having had considerable experience in the operation of the NSW Act, Mr Bradley reported there is a degree of uncertainty about what does and what does not require an authority. This uncertainty would only be increased if there was retrospectivity:

> I should also say that, as Mervyn Finlay also reported, there is a limit to the understanding of the way the act works and there is a need to educate police in particular. If there was a general perception that you could get approval after the event for things which were otherwise illegal, that could work some mischief in society.[60]

6.72 In addition, Mr Bradley reminded the Committee that a judicial discretion is available to cover those situations where undercover police officers are involved in illegality but the illegality is not covered by an authority.[61]

Retrospectivity would give necessary flexibility to protect covert operatives

6.73 Mr Collins argued that a process of retrospective authorisation would provide the flexibility that covert operatives need. He described undercover situations as being 'very fluid' where things can happen to put operatives outside the certificate authorising the operation. Without the facility of being able to get approval retrospectively in relation to

---

59 Mr Richard Perry, PIM, Evidence, p. 122

60 Mr Bradley, NSWCC, Evidence, p. 31

61 ibid.

these sorts of things, Mr Collins claimed that the risks to professional police officers are increased. He said:

> The law is not a precise thing. Criminal activity and the detection of it is not a precise science and so you need this flexibility.[62]

6.74 Mr Collins was concerned that everything that their members do should be covered by legislation. Accordingly, he supported the provision of retrospective authorisation as well as prospective authorisation on the basis that members should be protected in relation to unplanned activities as well as planned. In relation to police officers taking part in unplanned activities for the sake of an investigation, Mr Alexander, the President of the Police Federation of Australia said:

> What they do on behalf of the Commonwealth government or the state government or their jurisdiction might be extremely noble, but we do not want them being exposed.[63]

Alternative option: judicial discretion

6.75 The AFP expressed opposition to retrospective authorisation of controlled operations. Assistant Commissioner Michael Keelty said that, from an operational perspective, retrospective authorisation would undermine the current standards required in the planning of controlled operations. Under the current arrangements (legislation and guidelines), the AFP requires its officers to plan extensively on the possible adverse outcomes that may arise during any operation. In the AFP's experience, the significant planning of operations by the officers has overcome many problems that might arise because of unplanned situations. There has been no significant need for retrospectivity to his knowledge.

6.76 Crimes do occur unpredictably during major operations and the need sometimes arises for officers to be involved in unplanned activities. Mr Keelty argued that where they arise, the most pragmatic way to deal with it is for the evidence to be tested for admissibility in the normal course. Mr Keelty said it is not possible to legislate for every possible and conceivable incident that might arise during an operation.[64]

> The reason being that ... to get retrospectivity really defeats the purpose of the act in the first place. The retrospectivity should be up to a more independent tribunal, in my view, because the actions of the officers will need to be judged in the circumstances. I would suggest to you that it undermines the intention of the legislation. We see nothing wrong with the legislation in terms of its intent; our difficulty is with its narrowness.[65]

6.77 In terms of unplanned activities and unanticipated issues arising during an undercover operation, Mr O'Gorman agreed that it was not acceptable from a community perspective that the operation should fail. Rather, he said it was a question of determining

---

62 Mr Collins, PFA, Evidence, p. 47

63 Mr Alexander, PFA, Evidence, p. 47

64 Mr Keelty, AFP, Evidence, p. 156

65 ibid.

whether retrospective authorisation was the best process to ensure the operation continued. One of the difficulties with retrospective authorisation is that judges may be awed over the outcome of the operation and tend to rubber-stamp it. Mr O'Gorman believes that judges are not immune from media pressure and suggested that some judges might baulk at applying the law as it should be for fear that they might be subject to some media ridicule later on.

6.78 Mr O'Gorman suggested that the preferred course might be to go back to the common law and the discretions. He did not accept Mr Carmody's suggestion that under those discretions, officers wake up wondering whether they are going to 'start work today as a copper and finish as an accused?' and referred to Mr Butler's evidence that such an action never happens.[66] Mr O'Gorman also didn't accept the suggestion by the PFA that there were civil actions being taken:

> I would like to see from the police association the evidence that civil actions have been taken in that scenario. They often put that up as a bogeyman spectre, but I very rarely see the evidence that those cases are taken.[67]

Retrospective authorisation could be given to escape consequences

6.79 Messrs Bronitt and Roche did not support retrospective authorisation. Mr Roche quoted from a recent book entitled *Drug Law in New South Wales* where it was suggested that retrospective authorisation could be used to inappropriately shield police operatives from the consequences of their actions:

> ... the shooting of an innocent bystander who is rendered a quadriplegic by shots unlawfully fired by a participant in a police controlled operation, whether that participant is an officer or an informant, may otherwise give rise to a charge of assault occasioning grievous bodily harm. However, if the commissioner gives a retrospective authority, the participant is shielded from criminal and civil consequences of his or her action.[68]

6.80 As to what should happen when a covert officer is being tested, Mr Roche responded:

> I would still favour prospective authorisation. In the situation you are describing, if it does come down to that choice, where you have not had an opportunity to gain urgent prospective authorisation, then I would prefer the person to walk away or, if they proceed, to take their chances with relying on a defence in that situation. That is not a firm opinion but that is my tentative one.[69]

Mr Bronitt said he would want to see that there is real evidence that this was causing operational constraints rather than an assertion that police officers have this fear that their operations would be jeopardised.[70]

---

66 Mr O'Gorman, ACCL, Evidence, p. 104

67 ibid., p. 105

68 Mr Roche, Evidence, p. 139

69 ibid., p. 152

70 Mr Bronitt, Evidence, p. 152

NCA perspective

6.81 The NCA called for the provision of retrospectivity in life threatening situations in the same terms as are provided in the NSW Act. Referring to the rejection by the Finlay review of the proposal to extend it, Mr Broome noted that while the Review didn't recommend extending the retrospective provisions, the Review recommended keeping it.[71] In terms of the retrospective authorisation provisions available under the NSW legislation, Mr Broome said they were there to cover circumstances where the progress of the operation has to be changed because the safety of those involved in the operation or perhaps members of the public is threatened. The NSW legislation enables an appropriate person with the power to issue certificates to do so retrospectively.

6.82 Mr Broome agreed that the retrospective authorisation of certificates raises some issues. A significant issue is whether, after the event, there is a real discretion to say no. The retrospective authorisation of certificates would, however, be subject to scrutiny in any subsequent prosecution.

6.83 Mr Broome assured the Committee that the proposal to provide for retrospective authorisation is not about giving police officers a carte blanche to break the law. It is about recognising the fact that criminal activities and the operations to investigate them do not always go according to plan and that a device is needed so that the evidence obtained in the course of those investigations will not be ruled inadmissible:

> If things go differently ... it seems to me, on balance, to be reasonable to ensure that one of us can exercise the discretion to validate the evidence that has been obtained by issuing that retrospective approval. It is a difficult question to deal with. I think the focus needs to be on the purpose of controlled delivery certificates, and the purpose is not to let the police break the law.[72]

Civil liberty view

6.84 Dr Tim Anderson spoke of the NSW legislation as one that the NSW Council for Civil Liberties, of which he is Secretary, 'abhors' and he suggested the NCA never seek refuge in it. He told the Committee that despite the provisions of section 14 of the NSW Act, prohibiting the retrospective authorisation of murder, it is arguable that the NSW law allows the commission of any offence up to and including murder.[73]

Conclusion

6.85 The Committee is generally opposed to retrospective approval of any kind, but particularly in these kinds of situations where the issue involved is the commission of unlawful activities by covert police operatives. At the same time, the Committee is keen to ensure that the safety of covert operatives is assured. In conclusion, the Committee has decided that retrospective approval should only be available in life threatening situations and so bring the Commonwealth legislation in line with that of New South Wales. Further, the

---

71 Mr Broome, NCA, Evidence, p. 198

72 ibid.

73 NSW Council for Civil Liberties, Submission volume, p. 150

conditions that apply to the granting of retrospective approval under the New South Wales Act should also apply under the Commonwealth Act. That is, the unlawful conduct requested to be retrospectively approved must have been engaged in for the purpose of self-protection or for protecting another person from death or serious injury and the application must be made within 24 hours of the unlawful conduct.

***Recommendation 15: That Part 1AB of the Crimes Act 1914 be amended to include a provision to allow for the retrospective authorisation of controlled operations only where the life or safety of a covert operative is at risk, in terms of section 14 of the Law Enforcement (Controlled Operations) Act 1997.* In particular, the amendment should include the conditions that the relevant unlawful conduct was engaged in only for the purpose of protecting an operative or other person from death or serious injury and that the application must be made within 24 hours of the unlawful conduct having been engaged in.**

Civilian involvement

6.86 Civilians are frequently required to assist police with their investigations, including participating in controlled operations. The assistance rendered by civilians can range from something quite simple, on the periphery of an investigation, to a civilian playing a significant undercover role that is both central to the investigation and dangerous. The question that arises is whether such persons, given that they are frequently required and sometimes their cooperation may be essential to the success of the operation, should be protected from liability in relation to offences necessarily committed in the course of that assistance. As NCA Operations Manager, Peter Lamb, told the Committee:

> ... in the investigation of organised crime, informants are crucial. They are usually on the periphery, but at times they may well be entrenched in the central criminality. How you utilise them is one thing, and how you provide for their protection in terms of their involvement in the criminality is another.[74]

Classes of civilian operatives

6.87 There are different categories of civilian involvement in controlled operations:

- **Innocent bystanders, eg bank tellers, accountants.** The first class involves those *civilians who innocently are involved in a consequential way to criminal activities. For* example, a bank teller may become aware that somebody is making structured deposits into an account. If the police require their cooperation in an operation, those civilians may require some form of protection. As noted by Mr Butler of the CJC:

> ... civilian operatives are not always criminals. You can have non-police operatives who themselves have not been committing criminal offences but, because of their knowledge of the people involved or some other aspect, it makes them appropriate to use in that situation.[75]

---

74 Mr Lamb, NCA, Evidence, p. 6

75 Mr Butler, CJC, Evidence, p. 93

The AFPA told the Committee that professional people who assist the police with investigations deserve protection:

> Whether they be bank officers, accountants or lawyers, we will need civilians to assist for us to gather evidence and take possession of proceeds of crime.[76]

- **Criminal civilian operatives, either low level or high level:**

1. **Couriers coming through the barrier.** Couriers who are detected at the barrier are described as 'essentially low level desperados' who have been taken advantage of as much as they have sought to take advantage of the situation themselves. Given the chain of criminality involved in drug trafficking theirs is of the least significance.

2. **The engagement of informants in long term operations.** The NCA has some operations where they involve informants in long-term operations. These people often have significant criminal backgrounds. One of the complicating factors with these type of informants in controlled operations is that they may be seeking to use the law enforcement agency and the grant of immunity to further their own criminal objectives, such as undermining a rival criminal organisation. It is important to be quite clear who is being protected in these types of situations. The community would need to be confident that the granting of immunities to these sorts of people was being exercised in the public interest and perhaps with greater safeguards than when it is authorising a sworn police officer.

6.88 The CJC distinguished criminal operatives from non-criminal operatives:

> I think the concerns you have in relation to criminal informants and their use as operatives are real and ones that law enforcement agencies address. They can be addressed by quite tight processes in terms of the use of those operatives. It would be normal, for example, in our agency, if you are utilising an operative like that, to have what they are doing completely controlled. Everything they did would be the subject of monitoring and would be under considerable supervision.[77]

The Commonwealth legislation

6.89 As it currently stands, the protection afforded by a section 15M certificate under Part 1AB of the *Crimes Act 1914* does not confer any exemption from criminal liability in respect of the acts of a civilian who participates in a controlled operation in conjunction with a law enforcement agency. Section 15I only provides immunity to 'law enforcement officers'. A 'law enforcement officer' is defined as: a member, staff member or special member of the AFP, a member of the police force of a State or Territory, a member of the NCA staff, an officer of the ACS and a member of a police force or law enforcement agency of a foreign country.[78] This means that any other persons who assist police are not shielded from liability.

---

76 Mr Phelan, AFPA, Evidence, p. 168

77 Mr Butler, CJC, Evidence, p. 93

78 *Crimes Act 1914*, section 3(1), see definition of "law enforcement officer"

Position in the States

6.90 The position in NSW and SA is different. In NSW, the use and activities of civilians in controlled operations are clearly confined. A civilian participant must not be authorised to participate in any aspect of a controlled operation unless the chief executive officer is satisfied that it is wholly impracticable for a law enforcement officer participant to undertake that aspect of the operation. Further, a civilian participant must not be authorised to engage in a controlled activity unless it is wholly impracticable for the civilian participant to participate in the aspect of the controlled operation without engaging in that activity. The NSW Act also states that a person is not acting unlawfully if they are acting in accordance with an authority.[79]

6.91 While in force, an authority for a controlled operation authorises each civilian participant to engage in the particular controlled activities specified in the authority. It is interesting to note that civilians have the same access to retrospective approval for activities engaged in during a controlled operation as police officers. If a civilian engages in unlawful activity during a controlled operation for the purpose of protecting a participant or any other person from death or serious injury, that civilian may, within 24 hours after the unlawful conduct, apply to the CEO for retrospective authority for that conduct.[80]

6.92 It should also be noted that under section 26 of the NSW Act, the DPP is to be notified if evidence has been obtained in the course of an authorised operation. This requirement has the effect of an accountability mechanism so that the DPP is always aware of when a civilian has been used in a controlled operation.

6.93 Procedures have been established within NSW law enforcement agencies to reflect the intention of Parliament that the use of civilians in controlled operations be confined to particular circumstances. In the NSW Crime Commission, for example, briefings take place where the person responsible for the conduct of the operation has to personally get undertakings from the civilian as to conforming with the authority. The civilian participant has to undertake not to do things that go beyond what the legislation allows, such as inciting people to do things that they otherwise would not have done. Most (but not all) of the civilians who are used by the NSW Crime Commission have been arrested by the Commission or another agency and are seeking some sort of assistance.[81]

6.94 In SA, civilians who participate in controlled operations incur no criminal liability by taking part in undercover operations in accordance with the terms of the approval. Under section 4 of the SA Act, the immunity is given to 'authorised participants'. Authorised participants are defined as persons authorised under the terms of the approval to take part in the operations or, in the case of operations commenced prior to the Act, a person authorised by a law enforcement authority to take part in the operations.[82]

---

79 *The Law Enforcement (Controlled Operations) Act 1997*, sections 13 and 16

80 *The Law Enforcement (Controlled Operations) Act 1997*, section 14

81 Mr Bradley, NSWCC, Evidence, pp. 39-40

82 *Criminal Law (Undercover Operations) Act 1995*, sections 2 and 4.

6.95 In Victoria, there is a short immunity provision in the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* extending immunity to persons acting under written instructions from a senior sergeant or person of higher rank.[83]

Arguments for extending immunity to civilians

6.96 Several law enforcement agencies advocated that civilians who assist in controlled operations should be immune from liability in relation to those unlawful acts committed by them in the course of such an operation, although agencies differed in respect of how this issue could best be dealt with.

6.97 In the NCA's view, civilians who are informants ought to be covered by the scope of the certificate. They are vulnerable in three ways. First, they are often the people on the ground. Secondly, they do not get any protection under the legislation. Thirdly, it makes the prosecution more vulnerable because you have got their involvement, which will remain unlawful and therefore give rise to a negative exercise of the *Bunning v Cross* discretion.

6.98 The CJC advocated the inclusion of civilians in controlled operations legislation. The guiding principle being not to protect them from being charged with a criminal offence. According to Mr Butler, this had never happened. The main justification for legislative provision would be that it avoids the situation where people such as the CEOs of law enforcement agencies have to make determinations about whether a person is going to be asked to commit a technical criminal offence. Mr Butler said:

> I just find that an unattractive thing for me to have to do. ... I would much prefer to have it on the table as part of a legislative scheme where the decisions that I am making, as head of an investigative agency, follow a legislative scheme and what I am asking people to do is legal and subject to appropriate checks and balances. The important thing in all of this is that you enhance the accountability of the whole process by putting it on the table rather than putting one's head in the sand and saying, 'Let everyone just go on doing it the way they used to,' and where the whole legal situation is rather clouded.[84]

Civilians: a valuable part of the investigation strategy

6.99 Law enforcement agencies use civilian informants for much the same purpose as covert police operatives. In some cases, such as where a law enforcement agency is aiming to infiltrate a criminal organisation, civilians may be the only viable investigative strategy. It is the view of law enforcement agencies generally that using civilians as undercover operatives can save valuable resources and get to the core of the problem really quickly.[85] This is because the civilian may have a pre-existing relationship with a member or members of the organisation that facilitates infiltration. The civilian may, in fact, be in a position of

---

83 *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*, section 51.

84 Mr Butler, CJC, Evidence, p. 94

85 Mr Keelty, AFP, Evidence, p. 161

trust to the target of the operation because of past association or because the civilian has a criminal record[86]:

> ... one of the alternative ways to infiltrate the higher level of a syndicate ... is to indoctrinate someone who is already part of the syndicate and have them working on your behalf. That is probably the better alternative.[87]

6.100 The Commonwealth DPP supports the extension of the immunity to civilian informers because of the assistance they render to police investigations.[88] Civilians are often involved in controlled operations where a courier has been detected at the Customs barrier in possession of narcotic goods and he or she agrees to cooperate with the police by making a controlled delivery of those narcotic goods. The success of those operations usually depends on the courier's cooperation. However, in making a delivery of the goods to the intended recipient, the courier is, in fact, committing offences against both Commonwealth and State law.

> In the view of the DPP it is no answer to this criticism of the existing legislation that the conferral of an exemption from criminal liability is not necessary in order to ensure the admissibility of any evidence obtained. As indicated earlier, the objectives in enacting the *Crimes Amendment (Controlled Operations) Act* were not limited to ensuring the admissibility of evidence which would otherwise have been excluded in the exercise of the court's *Ridgeway* discretion. Once it is accepted that there are circumstances where it will be necessary for a civilian to participate in a controlled operation by arrangement with police then the appropriate course is to exempt such persons from any criminal liability they would otherwise incur by reason of the assistance they provide the police.[89]

Different treatment for police and criminals

6.101 The treatment of civilian operatives as opposed to police operatives has always been different, regardless of any controlled operations legislative framework. The CJC described the situation in Queensland, where undercover police operate without the support of legislation. In relation to the charging of undercover police and civilians for criminal offences committed while working on a controlled operation, Mr Butler said that in his experience, police operatives were never charged:

> ... no-one has ever suggested they should be charged and, indeed, they have not been. Directors of public prosecutions have constantly presented prosecutions where these people are the star witnesses. Judges have heard their evidence and, while recognising that there had been technical breaches of the criminal law, have nevertheless ruled that the evidence was admissible and had not been improperly obtained.[90]

---

86 *Criminal Justice Commission, Submission volume, p. 43*

87 Mr Keelty, AFP, Evidence, p. 161

88 Mr Delaney, Commonwealth DPP, Evidence, p. 175 and submission volume p. 81

89 Commonwealth DPP, Submission volume, p. 83

90 Mr Butler, CJC, Evidence, p. 92

6.102 By comparison, however, the situation in respect of civilian operatives is different. Where civilian operatives commit offences during a controlled operation, it is a matter for the subsequent decision of the DPP, as to whether those people should be given an indemnity. Indemnities are granted by either the DPPs or the Attorney-General, depending upon the particular jurisdiction involved. In Queensland, prospective indemnities are not available. There is a decision of the Court of Appeal to the effect that you cannot indemnify people in advance for the commission of criminal offences.[91] Under those circumstances, the CJC cannot promise civilian operatives an indemnity. Rather, civilian operatives have to await the determination of the DPP as to whether an indemnity can be provided at a later stage, after the act has been committed.[92]

6.103 Similarly, the indemnification procedure for civilians in NSW has also been retrospective in terms of the DPP deciding not to proceed with a prosecution because of recommendations given by the investigating authorities. The position of civilians in NSW, however, has to be read in conjunction with the immunity available under the NSW controlled operations legislation referred to in paragraphs 6.90-6.92).

Civilians may be critical link in the criminal chain

6.104 A principal argument in favour of extending immunity to civilians is that such persons are frequently required and their cooperation is often essential to the successful outcome of the operation. Many controlled operations arise at the barrier and involve the detection of drugs and identification of the courier. The police enlist the assistance of the courier so that they can follow the drugs to the intended recipient who is usually far more involved in actual drug trafficking than the courier. Yet, unless the police can enlist the courier's assistance, there would be a much-reduced chance of tracking the intended recipient of the drugs. Under these circumstances, it is argued that it would be advantageous if law enforcement agencies were able to guarantee some type of immunity:

> For example, a drug courier who agrees to assist police may need to carry the narcotics on to the intended recipient if the recipient is to take delivery. At present, the courier is potentially liable for offences relating to possession of the narcotics.[93]

The evidence is vulnerable

6.105 In addition to civilians/informants being vulnerable to a possible prosecution, the law enforcement agency also has to consider that evidence gathered by the civilian during the operation might be excluded on the grounds of public interest (the *Bunning v Cross* discretion). Therefore, agencies have to weigh up the possibility that the use of informants in a controlled operation may give rise to challenges by a defence subsequently which could leave the prosecution at nought:

> ... the purpose of the immunity is twofold: it is to protect those who are involved in the operation from any potential prosecution for the unlawful acts which they

---

91 *R v D'Arrigo* [1994] 1QdR 603

92 Mr Butler, CJC, Evidence, p. 93

93 Attorney-General's Department, Submission volume, p. 122

> commit, and it is done for the purpose of ensuring that the subsequent evidence which is obtained cannot be challenged on the basis of the unlawful behaviour.
>
> So, if you leave the informant vulnerable, you leave the evidence vulnerable. That is the trade-off.[94]

6.106 There is an alternative view that the conferral of immunity on the civilian participants is not necessary to ensure the admissibility of evidence.[95]

Lack of coverage for civilians affects operational decisions

6.107 Mr Broome pointed out that the lack of legislative coverage for civilians impacts on operational decisions. Although the use of civilians/informants in drug related matters is a relatively commonplace occurrence, it remains a difficult issue that requires much consideration by the agency conducting the controlled operation. When deciding whether or not to use a civilian, one of the primary considerations is that they are vulnerable to prosecution for their actions throughout the operation. Notwithstanding that there may be an expectation that the DPP would consider a prosecution of a civilian participant as being inappropriate, there is no guarantee. Further, the agency also has to factor into the equation the possibility that the admissibility of any evidence collected without the benefit of a certificate may be called into question at a subsequent prosecution.[96]

6.108 Mr Broome contended that there have been cases, and some quite recent, where the prosecution has been dropped because of the issue of the informant's conduct. The reason for the decision not to proceed was based primarily on the need to avoid disclosure of the informant's activities. The problem of disclosure varies according to the stage of the operation. Where an informant has been used on a number of occasions, for example, on a number of smaller jobs leading up to, say, a major importation of heroin, if they are not protected by the certificate, their cover may be disclosed in the course of prosecution. In addition, they may still be charged with an offence in relation to their activities. In summary, Mr Broome said:

> What I am suggesting is that if we have prior knowledge of that involvement, if it is appropriate to indemnify an undercover officer, then it is no less appropriate to indemnify the behaviour of the informant. ... They are saying, 'Unless you can assure me I am not vulnerable, I do not want to go ahead.' That is the sort of trade-off that you are involved in.[97]

Personal safety and welfare of civilian operatives

6.109 The Committee is mindful of the fact that persons who agree to assist law enforcement agencies sometimes do so at the risk of their own personal safety. This is particularly so when the investigations involve organised criminal groups and serious criminal activity. The Committee was informed of the murder of a woman who gave

---

94 Mr Broome, NCA, Evidence, p. 16

95 Commonwealth DPP, Submission volume, p. 83

96 Mr Broome, NCA, Evidence, p. 16

97 *ibid.*, p. 17

evidence against her husband in relation to a double murder involving bikies. Although the woman was not working in an undercover capacity, the case demonstrates the high price that can be paid for assisting police:

> She was shot while she slept alongside her six-year-old son a few months ago. I think that case perhaps highlights the role of informants and the protection of informants as something requiring attention by our parliaments and by our politicians. I spoke to the police officers only recently involved in that matter who had to deal with that woman who had the courage to give evidence. It just struck me when you made that point about the status of an informant. I am not just talking witness protection; I am talking the involvement of people in this. I think we have not done enough about it.[98]

6.110 It is argued that if law enforcement agencies, and by inference, society, encourage civilians to engage in undercover work, then a corresponding obligation arises to take account of the personal welfare of those people. That obligation should include providing protection from liability in respect of unlawful acts engaged in while acting under instruction during the undercover operation. Providing that protection would acknowledge the important part civilians play. NCA General Manager, Operations, Mr Peter Lamb told the Committee:

> Whilst these people may well be criminals themselves – they may be on the periphery but at times they may be at the heart of things – they are the single biggest tool to elevate us to the major profit takers of organised crime. Therefore, the protection that is afforded law enforcement officers in the legislation should be in some way extended to cater for civilians.[99]

Formalising the relationship between investigator and informer

6.111 Although informers have been a longstanding part of traditional policing, the relationship between investigators and informers has been largely unregulated, left to the discretion of individual police officers and supervisors or to procedural guidelines. By contrast, one of the consequences of including civilians in controlled operations legislation has been the injection of some formality into the relationship between investigators and informers. This is due, in part, to the reporting requirements in, for example, the NSW Act. An important requirement is to report the existence of authorities where evidence has been gathered as a consequence of an authority.[100] It is also a requirement that within 28 days after the operation, the principal officer in charge of the operation give a written report to the CEO. Further, the NSW Ombudsman must annually report to Parliament and the report must include, amongst other things, details of the number of civilian participants in the operation and the number of civilian participants who have engaged in controlled activities under an authority. This has changed the nature of the relationship:

> The investigator-informer relationship has been too casual in the past. There has been not enough reporting of associations, and there has been not enough care exercised in how the relationship develops, what is disclosed to informers and a range of things. Some of the instances of corruption – for example, those we saw

98 Mr Alexander, PFA, Evidence, p. 44

99 Mr Lamb, NCA, Evidence, pp. 6-7

100 Mr Bradley, NSWCC, Evidence, p. 40, *Law Enforcement (Controlled Operations) Act 1997*, section 26

> at the Royal Commission – I think came out of that. I think all of the Royal Commission problems were supervision problems, and supervision is necessary with informer relationships.[101]

6.112 The NSW legislation has caused the development of specific procedures for dealing with informers that have formalised these relationships, especially with a view to encouraging better supervision. The NSW Police Service, for example, has developed a complex informant management plan that raises an obligation for the police service to brief the informer, to obtain certain undertakings and to report that that has been done. Similarly, the NSWCC has also set out procedures for dealing with informers:

> At the Crime Commission, when we enlist informers to do particular things, we often have a very formal process, usually involving a hearing, whereby the informer is told a number of things, including, "Don't step over the line. If you do, you'll be in the same position as any other criminal, and don't cause people to commit crimes" – those sorts of things. I think that that sort of formality is positive.[102]

Options for reform

6.113 A number of options were proposed for dealing with the involvement of civilians in controlled operations:

- prospective immunity provided as part of the legislative framework governing controlled operations;
- the provision of retrospective indemnities after the operation;
- support at the time of sentencing; or
- a graded system of indemnities.

Prospective immunity

6.114 The Attorney-General's Department supported the notion that there are circumstances where civilians should have statutory immunity from prosecution but noted that there are difficulties associated with it. In particular, the Department was of the view that there are dangers in giving a broad, open-ended immunity given the lack of a defined 'duty' (or disciplinary rules) to which civilians are subject. Law enforcement officers, on the other hand, are subject to those kinds of disciplinary controls. The Department concluded that if prospective immunity is to be given to civilians in relation to certain criminal offences, then an appropriate means to limit and control that immunity should also be provided.[103]

6.115 The NCA preferred the provision of a prospective statutory immunity for civilian participants. In the NCA's view, the current position where informants can be considered for

---

101 Mr Bradley, NSWCC, Evidence, p. 40

102 ibid.

103 Attorney-General's Department, Submission volume, p. 122

an indemnity from prosecution after the operation is completed, is unsatisfactory. By contrast, a clear prior statutory immunity reflects the true importance of the role of those operatives in undercover work:

> The role of a civilian participant is essential to the success of many controlled operations. In some cases, the safety of an undercover officer will depend on an informant or agent. There is no logical distinction between the legislative approaches adopted, particularly as, in most cases, approval may be needed under both Commonwealth and State legislation.[104]

6.116 The NCA suggested that this lack of legislative protection for informers could be remedied by inserting a subsection in section 15I to extend the immunity to include those acting on the instructions of police. Terminology could be adopted similar to that in paragraphs 3G(b) and (c) of the *Crimes Act* concerning assistance given in the execution of a warrant by duly authorised persons.[105] Further, Mr Broome suggested that the involvement of civilians in controlled operations should be a matter for consideration by the person who issues the controlled operations certificate.[106]

Prospective immunity for civilians: A role for the DPP?

6.117 The DPP was in favour of giving prospective undertakings to civilians/informers where they agree to act in accordance with a set of arrangements with a law enforcement agency during a controlled operation.[107] The DPP was not, however, of the view that the DPP itself should grant immunities. This view is based on the fact that the prosecutorial and the investigative functions are separate functions and it would be unacceptable for the one authority to do both. The prosecution should not be a position of giving a statutory immunity on the basis of a hypothetical situation or in the expectation that certain events might unfold. Operations often unfold in ways quite different from those initially expected.[108]

6.118 DPP Principal Advisor (Commercial Prosecutions and Policy) Mr Grahame Delaney also pointed to some operational issues:

- investigative decisions may need to be made in a very short time frame and the consideration by the DPP of whether a particular civilian should be granted prospective immunity might cause delays; and

- there may be some reluctance on the part of investigators to outline the nature of the operation, the extent to which it has gone and the prospective way in which they hope it will go. Such a proposal would result in the blurring of the prosecutorial and investigative functions.

---

104 National Crime Authority, Submission volume, p. 91

105 ibid., p. 102

106 Mr Broome, NCA, Evidence, p. 6

107 Mr Delaney, Commonwealth DPP, Evidence, p. 175 and Submission volume, p. 81

108 Mr Delaney, Commonwealth DPP, Evidence, p. 176

6.119 Mr Delaney distinguished the granting of immunities prospectively from the current situation where it grants immunities or indemnities after the event. Mr Delaney said that this discretion is exercised in accordance with tight guidelines that require, amongst other things, a statement from the witness seeking immunity, the investigator's views on the witness's credibility and the importance in the overall scheme of the particular prosecution.

6.120 Although Mr Delaney assumed that there would be no constitutional objection to power being conferred on a DPP to issue prospective immunities to civilian participants, the DPP cannot do so under its present legislative arrangements. Mr Delaney also referred to a recent case in Queensland where the Criminal Court of Appeal held that no immunity could be granted in future.[109]

6.121 In relation to the suggestion that the DPP should be the body approving the involvement of civilians in controlled operations, the AFP said:

> One of the problems with involving the DPP is that, once you make them a formal participant in the investigative process, in the trial their investigative involvement becomes part of the trial process.[110]

And:

> I think it is a pragmatic problem that, in trial, the fact is the defence sees the bundle of papers and sees the DPP's involvement, and that is another issue that gets caught up in the trial. You have the DPP in the uncomfortable position of possibly having to put its officers into a witness box, its officers giving evidence. I think it would be an uncomfortable situation to be in.[111]

Arguments against prospective immunity for civilians

The potential for misbehaviour of civilian participants

6.122 Mr O'Gorman rejected the proposal to grant prospective immunity to civilian participants. He referred to the Trident scam in Queensland which illuminated some of his concerns:

> In 1996 ... retired Supreme Court judge Bill Carter QC presented a report under the aegis of the CJC where he reported on a number of Queensland police who were standing by in car parks near railway stations while crims stole the cars – mostly of low income people in poor suburbs – so that the police could then monitor the ring of receivers to whom those cars were passed on. You only have to look at that particular report and the activities of a fellow called Riesenweber who was later convicted to see the very worrying consequences of allowing civilians to be covered by these certificates.[112]

---

109 Mr Delaney, Commonwealth DPP, Evidence, p. 176

110 Mr Atkins, AFP, Evidence, p. 164

111 ibid., p. 165

112 Mr O'Gorman, ACCL, Evidence, p. 103

Insufficient knowledge of the civilian

6.123 The AFP advised that the area of prospective indemnities and getting informers to conditionally cooperate with law enforcement agencies on the basis that they will be granted an indemnity is problematic. At that early stage in the relationship between investigator and informer, there is often little known about the civilian and his or her activities. This means it is difficult to accurately assess the extent to which an indemnity would be appropriate:

> Often, you do not know enough at that point in time about their complicity in not only that crime but perhaps many other crimes. Indemnities are problematic for that very reason.
>
> ... you are quite often not sure of the motivation of the informant until much later in the piece and having dealt with the informant.[113]

6.124 As an alternative, the AFP favoured an approach whereby the investigating law enforcement agency offers support at the time of sentencing, by way of a letter to the court. This would avoid the problems of blanket indemnities which is a very difficult and dangerous area for anyone to get involved in.[114]

6.125 Mr Keelty alluded to some of the problems that can arise from granting prospective indemnities to civilian/informant participants in controlled operations. He said:

> The DPP, of course, is a major stakeholder in the sense that, in any decision about immunity from prosecution or involvement in a criminal enterprise, someone has to weigh up the potential value of evidence and a comparison needs to be made about those prosecuted and those not prosecuted. From experience, there are often times where you get caught out in these situations. Although it has not happened often, an example is where the person who you have given immunity to – is probably more complicit in other crimes, or more of a criminal in the community sense, than some of the people who are ultimately prosecuted and have been opportunistic or entrepreneurial about the way that they have come into their involvement with the police.[115]

Retrospective indemnity

6.126 Mr O'Gorman favoured a system of granting indemnities ex post facto to civilian participants. The advantage of that system is that it ensures greater control over the actions of the civilian. Mr O'Gorman maintained that if the civilian operative is properly controlled and oversighted and he or she stays within the parameters of the law enforcement agency's directions, then that civilian will get an indemnity after the event.[116]

6.127 Mr Bradley distinguished between retrospectively indemnifying people and retrospectively authorising illegal acts. Mr Bradley advised the Committee that he was not opposed to the retrospective indemnification of civilians because that is already done in NSW

---

113 Mr Keelty, AFP, Evidence, p. 162

114 ibid.

115 ibid., p. 165

116 Mr O'Gorman, ACCL, Evidence, p. 102

by the Attorney-General on the advice of the DPP. He did, however, advise that retrospectively authorising illegal activities is problematic because it gives a more general licence than is contemplated by the legislation. This kind of retrospectivity is an area that requires a great deal of consideration and debate, as recommended by Mr Finlay. Mr Bradley stated:

> To say even to police that it is permissible to do things which are illegal, so long as you come along after the event and get a tick for it, has some problems.[117]

6.128 Mr Bradley said that one of the problems with the NSW legislation is that there is uncertainty about what does and what does not require authority. There would be greater uncertainty if there was retrospectivity. He identified that there is a need to educate police as to how the act works:

> If there was a general perception that you could get approval after the event for things which were otherwise illegal, that could work some mischief in society.[118]

Support at the time of sentencing

6.129 Mr Keelty classified civilian participants into two types, criminal and non-criminal. In the AFP's view, prospective undertakings are not appropriate in the case of criminal civilian participants, because they are problematic for the reasons given at paragraphs 6.123-6.125. The better approach is to offer support at sentencing by way of letter to the court:

> You say to an informer, 'We, as police officers, cannot condone your criminal behaviour, nor are we authorised – nor should we be authorised – to provide you with an indemnity for your criminal behaviour. However, should you cooperate with us in bringing the principals to justice, we are prepared to recognise that by way of a letter to the court at the time of your sentencing.'[119]

A graded system of indemnities

6.130 The potential for legislating in respect of any form of civilian immunity is complicated by the different ways in which civilians become involved in controlled operations, resulting in different classes of civilians, essentially criminal and non-criminal. The AFP proposed that, from a legislative perspective, the issue of indemnities and what type of assurance might be appropriate in any given case might require some form of grading of civilian operatives.

6.131 Grading could be based on:

- the crime being investigated; and
- the nature of the role of the civilian/informant;

---

117 Mr Bradley, NSWCC, Evidence, p. 31

118 ibid.

119 Mr Keelty, AFP, Evidence, p. 162

Depending on the categorisation/classification of the civilian, a decision would be made as to whether it was appropriate for the Commissioner or his delegate to provide appropriate sanctions for the involvement of the informant in the controlled operation or whether the matter should be determined by an external body, such as the DPP.[120]

6.132 The Committee was told that the degree of difficulty involved in assessing civilians varies from case to case. For example, the appropriate indemnity for a courier at the barrier would be relatively easy to assess. The case of civilian participants used on a long-term basis is complex and possibly requires independent consideration about how an undercover operation might be structured and what roles law enforcement participants should play. According to AFP Principal Legal Policy Adviser Mr Michael Atkins, there must come a point when the law enforcement agency must hand the operation and the decisions over to an independent agency for consideration.[121] Mr Atkins suggested that the appropriate authorising body might be an independent auditor or independent audit body or public monitor. It was his view, however, that the function should be given to a body other than the police or the DPP.[122] It was pointed out that the performance by the DPP of his responsibilities is, in fact, the Attorney-General exercising a delegated task through the Director of Public Prosecutions. It was suggested that on this analysis, it was not inconsistent with the Attorney-General's charter to have responsibility for the investigation and management of law enforcement and prosecutorial functions because, prior to the statutory provision, that was inherent.[123]

Concerns regarding immunising criminals

6.133 It is recognised that granting prospective immunity to civilians/informants is different from granting immunity to sworn members of the police force and that there are different types of informers or civilian participants in controlled operations.

6.134 Protessone Trevor Nyman, for the NSW Law Society said:

> The role of informers is a longstanding role, and it is a role which has always lived in the shadows of the law. That is really where it belongs. Criminals are the last people that should be encouraged to commit crimes by the expansion of this type of legislation. To allow them to operate as criminals, with the blessing of the law, is one of the most serious examples of what the Law Society is arguing against. It is actually encouraging criminals to continue with criminal activity under the aegis and encouragement of law enforcement authorities.[124]

6.135 One of the concerns is that informants who are working on the 'shady side of society ... once so immunised basically can play both sides against the middle with no fear

120 Mr Keelty, AFP, Evidence, pp. 162-163

121 Messrs. Keelty and Atkins, AFP, Evidence, pp. 163-164

122 Mr Atkins, AFP, Evidence, p. 164

123 Hon. Duncan Kerr MP, Evidence, p. 164

124 Professor Nyman, Law Society of NSW, Evidence, p. 68

of prosecution'.[125] Mr Broome, however, responded by pointing out that informants would only be immunised for the activities covered by the certificate.

6.136 The NCA representatives confirmed that informants have used the cover of working in a controlled operation for their own gains, such as playing one organisation off against another, 'doing deals with the devil'.[126] The NCA told the Committee that this situation will probably happen again and that although procedures for managing informants have been developed to the point where the risk is minimal, the risk cannot be entirely eliminated:

> We would have to do everything we could to ensure that we were close enough to the informant, that we had management practices in place that reviewed his activities, his involvement. Indeed, we now have all that – that is there. Of course, you cannot be with someone 24 hours a day, listening, watching their activities; but, with all the other tools that we have and with all the other mechanisms and management processes we have today, informants are much more under the microscope than they ever were. But what you suggest, of course, can happen.[127]

6.137 Clearly, there are concerns in the community that the decision by a law enforcement agency to obtain sufficient evidence in an investigation for a person to be charged and put to trial should not involve the prosecution in 'doing deals with the devil'. Further, the authority for such an arrangement is made at an early stage in the investigation and may lead an over-zealous investigator into 'overreaching the existing rules'. The NCA, however, assured the Committee that there are enough checks and balances in the system that would deter the enthusiastic investigator. Mr Broome said that in the case of informants being used in controlled operations:

> ... if you were going to extend this immunity to informants, you would want to know a great deal about what we know about them, what we know about the circumstances of the particular operation and so on because, at the end of the day, if it goes wrong, I am going to wear it – and probably wear it very publicly.
>
> That is a fairly significant and appropriate counterbalance to those considerations. I am not going to give somebody carte blanche in a way that could prove to be quite inappropriate, unless I am satisfied that is something I should do in all the circumstances.[128]

Conclusion

6.138 The Committee is concerned to encourage the participation of civilians in law enforcement. It is clear that without that participation, the success of agencies such as the NCA would be severely diminished. In particular, the Committee recognises that sometimes civilians are in a particular position, perhaps by reason of their profession or employment, where they are able to give special assistance to police. Where civilians agree to do so, their responsibilities and privileges should be clearly defined by the legislation.

---

125 Hon Duncan Kerr MP, Evidence, p. 16

126 ibid., Evidence, p. 18

127 *Mr Lamb, NCA, Evidence, p. 18. Mr Lamb was responding to the Mr Kerr's proposition that informants could use their position and immunity from criminal prosecution to further their own ends.*

128 Mr Broome, NCA, Evidence, p. 18

6.139 The Committee believes that there is a clear obligation on the part of the legislature to ensure that those civilians who would otherwise not be involved in any criminality and who agree to render special assistance to police are protected from the consequences of unlawful activities committed by them at the request or direction of police during a controlled operation.

6.140 The Committee, however, is not prepared to recommend that informants and other civilians who participate in controlled operations by reason of their own criminal connections or to further their own ends in respect of their suspected or known criminality, should have the same protection. Although the Committee appreciates their significant strategic role in law enforcement, the considerations involved are beyond this inquiry. In terms of those civilians, the Committee is of the view that the status quo should prevail.

Recommendation 16: That Part 1AB of the *Crimes Act 1914* be amended to include a provision to authorise the participation of civilians in controlled operations. The term 'civilians' should be defined so as to exclude those persons who are police informants or who become involved in a controlled operation by reason of their having knowledge, position or influence as a consequence of their own involvement in criminal activities. The position of that class of civilians should remain subject to the current system of retrospective indemnities and assistance at the time of sentencing that operates according to the discretion of the Director of Public Prosecutions.

129 Para 5.102 of the report refers

Supplementary Statement

Senator Stott Despoja
Deputy Leader of the Australian Democrats

Ridgeway* v *The Queen

The development of controlled operations legislation in the Commonwealth jurisdiction followed the case of *Ridgeway* v *The Queen* (1995) 184 CLR 19. Since the facts of that case and subsequent legal developments are frequently referred to as having somehow blocked controlled operations, it is critical that we understand the central theme of the judgement. The *Ridgeway* case was frequently referred to by law enforcement officers during the Committee's hearings as a turning point which impeded the further conduct of controlled operations. With respect to that evidence, this is a rather simplistic interpretation of the *Ridgeway* case.

Courts have always possessed, and have frequently invoked, the discretion to exclude evidence obtained through impropriety or illegality. While law enforcement agencies have claimed that the High Court "unreasonably restricted the ability of law enforcement agencies to detect and break up drug rings"[1] the application of the discretion was limited to those entrapment cases where the illegality was an integral part of the offence charged.[2]

The *Ridgeway* case left considerable scope for controlled operations, but law enforcement agencies were not comfortable with the level of uncertainty and immediately clamoured for a administrative regime which could authorise the conduct of controlled operations.

Legislative Response to Ridgeway

The Commonwealth legislative response to the Ridgeway Case took the form of the *Crimes Amendment (Controlled Operations) Act 1996*, which inserted Part 1AB in the *Crimes Act 1914*. The amendments introduced a legislative scheme which provides for the conduct of controlled operations.

Contrary to statements contained in the preface to the Chair's Report, the Australian Democrats are not satisfied that there was sufficient debate of the merits of controlled operations legislation at the time of the amendments.[3] There are a number of concerns which the Australian Democrats believe should be addressed prior to any further codification or expansion of executive power.

A number of these concerns are addressed in Chapter 2 of the Chair's Report. It is the view of the Australian Democrats that these concerns should be addressed prior to any further legislative action. While balance is a noble and appropriate goal, it must be understood that many concerns must be understood outside the paradigm of efficiency. Some of the concerns are not able to be quantified and simply cannot be traded against law enforcement interests.

The Australian Democrats are not satisfied by the argument advanced by Mr Carmody that:

---

[1] Messrs. Bronitt and Roche, Submission volume, p137
[2] ibid., p126
[3] Chair's Report, p.xx

> What you have to look at is the routine case. In the end we have to work out whether this law does more social good than harm. If it does, then that answers your civil liberties complaint.[4]

While it may often be perceived that 'extreme cases make bad law,' efficiency arguments do not answer civil liberties complaints.

As outlined by Dr Anderson:

> It may be that there are some more arrests. As I said, I am prepared to accept that these agencies will come to the parliament and ask for more power and more resources to arrest more of the middle ranking people, and they will do it. But they will seriously corrode the rights and responsibilities of citizens in the course of extending those powers, without acknowledging that. Typically, administrators do not acknowledge that there are consequences of their own extended powers and their legitimised criminality.[5]

The possible erosion of rights is a major concern to the Australian Democrats and we believe that it should be addressed prior to any further legislative action.

External Authorisation

The Australian Democrats favour an external authorisation process due to the need for both independence and accountability.

The main argument against an external authorisation process relates to operational efficiency.[6] As mentioned above in regard to the protection of civil liberties, the Australian Democrats do not believe that rights can be traded for efficiency.

Two other arguments against external authorisation have been identified in the Chair's report. These relate to the creation of an extra layer of bureaucracy and the unique nature of controlled operations.[7] Neither of these arguments have been sufficiently examined at this stage, but as with the efficiency arguments, they cannot be equated with civil liberties concerns.

The Australian Democrats agree with the concerns expressed about the operation of judicial authorisation mechanisms. Clearly, the nature of controlled operations and the inherent licensing of illegality make judicial involvement inappropriate, if not constitutionally invalid.

Public Interest Monitor

The Australian Democrats believe that the model of the public interest monitor which has been adopted in Queensland for the issue of interception warrants should be investigated further. While the direct application of the model to the issue of authorisations for controlled operations may not be appropriate, there are many aspects of the model which should be reflected in any authorisation scheme. One of the most important of these is the ongoing educative and policy role which is undertaken by the Public Interest Monitor.

---

[4] Mr Carmody, QCC, Evidence, p81
[5] Dr Anderson, NSWCCL, Evidence, p23
[6] Chair's Report, para 4.35
[7] ibid., paras 4.43-4.46

Uniformity
Given the problem of multiple overlapping jurisdictions and law enforcement agencies in Australia, uniformity must be a primary concern in the creation of any controlled operations framework. A number of witnesses referred to the jurisdictional problems involved in current operations. It would be extremely unfortunate if this inconsistency were to continue.

Accountability
The Australian Democrats support an increased role for the Parliamentary Joint Committee in the oversight of the National Crime Authority. However, as noted in the Chair's report there is clearly a need for that role to be limited by the Committee's primary task of overseeing the exercise of executive power. It would not be appropriate for the Committee to be involved in the direct oversight of controlled operations, but there is clearly a role to be played in reviewing the operation of any legislative framework.

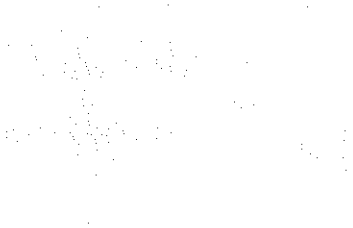
Conclusion
The Australian Democrats support the recommendations of the Chair's report, with the significant caveat that civil liberties concerns must not be weighed against efficiency considerations.

Senator Stott Despoja
Deputy Leader of the Australian Democrats
Senator for South Australia
December 1999

APPENDIX 1

SUBMISSIONS

1	New South Wales Crime Commission
2	Confidential
3	Northern Territory Commissioner of Police
4	Criminal Justice Commission
5	Australian Transaction Reports and Analysis Centre
6	Commonwealth Director of Public Prosecutions
7	Hon Tom Barton MLA, Queensland Minister for Police and Corrective Services
8	National Crime Authority
9	Australian Federal Police
10	Attorney-General's Department
11	Messrs Bronitt & Roche
12	The Law Society of New South Wales
13	Police Federation of Australia
14	Queensland Police Union of Employees
15	New South Wales Council for Civil Liberties
16	Australian Council for Civil Liberties
17	Hon Bill McGrath MLA, Victorian Minister for Police and Emergency Services



APPENDIX 2

WITNESSES AT PUBLIC HEARINGS

16 August 1999, SYDNEY

National Crime Authority:
Mr John Broome, Chairperson
Mr Peter Lamb, General Manager, Operations

New South Wales Council for Civil Liberties:
Dr Tim Anderson, Secretary

New South Wales Crime Commission:
Mr Phillip Bradley, Commissioner

Police Federation of Australia:
Mr Peter Alexander, President
Mr Terry Collins, Chief Executive Officer

Australian Transaction Reports and Analysis Centre:
Ms Elizabeth Montano, Director
Mr Graham Pinner, Deputy Director, Money Laundering Targeting

The Law Society of NSW:
Professor Trevor Nyman, Spokesman on Criminal Law

17 August 1999, BRISBANE

Queensland Crime Commission:
Mr Tim Carmody, Commissioner

Criminal Justice Commission:
Mr Brendan Butler, Chairperson
Mr David Bevan, Director, Official Misconduct Division

Australian Council for Civil Liberties:
Mr Terry O'Gorman, President

Queensland Police Service:
Mr Colin McCallum, Detective Chief Superintendant, State Crime Operation Command
Ms Anne McDonald, Detective Inspector, Covert and Surveillance Operations Group

Queensland Police Union of Employees:
Mr Mervyn Bainbridge

23 August 1999, CANBERRA

Mr Richard Perry, Queensland Public Interest Monitor

27 August 1999, CANBERRA

Mr Simon Bronitt and Mr Declan Roche

Australian Federal Police:
- Assistant Commissioner Michael Keelty, General Manager National Operations
- Mr Paul Brown, Federal Agent
- Mr Michael Atkins, Principal Legal Policy Adviser

Australian Federal Police Association:
- Mr Michael Phelan, National Secretary

Commonwealth Director of Public Prosecutions:
- Mr Justin McCarthy, Senior Assistant Director (Policy)
- Mr Grahame Delaney, Principal Advisor (Commercial Prosecutions and Policy)

Attorney-General's Department:
- Ms Kelly Williams, Acting Assistant Secretary, Criminal Law Division
- Ms Liz Atkins, Assistant Secretary, Law Enforcement Coordination Division
- Mr Karl Alderson, Principal Legal Officer, Criminal Justice Branch

National Crime Authority:
- Mr John Broome, Chairperson
- Mr Marshall Irwin, Member
- Mr Greg Melick, Member

APPENDIX 3

EXHIBITS

17 August 1999, BRISBANE

Australian Council for Civil Liberties:

- *Annual Report of the Public Interest Monitor delivered pursuant to the Police Powers and Responsibilities Act and the Crime Commission Act.*

27 August 1999, CANBERRA

Mr Simon Bronitt and Mr Declan Roche:

- *Between Rhetoric and Reality: Sociolegal and Republican Perspectives on Entrapment;* unpublished, by Simon Bronitt and Declan Roche.
- *Entrapment Evidence: Manna from Heaven, or Fruit of the Poisoned Tree?* by Geoffrey Robertson QC, published in Criminal Law Review, 1994, pp 805-816.