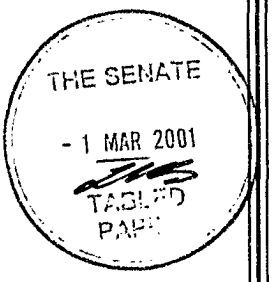
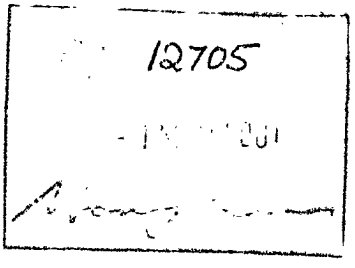


Parliamentary Joint Committee on the National Crime Authority

NATIONAL CRIME AUTHORITY LEGISLATION AMENDMENT BILL 2000



MARCH 2001

Parliament of the Commonwealth of Australia

NATIONAL CRIME AUTHORITY LEGISLATION AMENDMENT BILL 2000

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

MARCH 2001

ISBN 0 642 71124 0

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

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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.

RECOMMENDATIONS

Recommendation 1: That the provisions relating to 'reasonable excuse' be agreed to (para. 1.13).

Recommendation 2: That the provisions removing derivative use immunity be approved subject to their operations being reviewed, and a report tabled in the Parliament, after five years (para. 1.29).

Recommendation 3: That the increased penalties be agreed to (para. 1.35).

Recommendation 4: That the contempt provisions be approved subject to their operations being reviewed, and a report tabled in the Parliament, after five years (para. 2.19).

Recommendation 5: That the NCA be authorised to employ non-APS staff, subject to the approval of the Minister in writing as to the terms and conditions of employment (para. 3.20).

Recommendation 6: That attention be paid to the relationship between the NCA Act and the FTR Act in relation to access to FTR information by all NCA personnel (para. 3.22).

Recommendation 7: That the provisions in the Bill which relate to the Commonwealth Ombudsman being given complaints jurisdiction over the NCA be agreed to (para. 4.12).

Recommendation 8: That Part 16 of Schedule 1 of the Bill be rejected. Either the Government substitutes provisions which will enable the PJC to have genuine scrutiny over the NCA's operations or Part III of the NCA Act, which creates the PJC, should be repealed (para. 4.19).

Recommendation 9: The PJC endorses Schedule 1, Parts 2-11, Parts 13-14 and Part 17 and Schedules 2 and 4 of the Bill, but draws the Government's attention to the matters raised in Chapter 5 (para. 5.42).

TABLE OF CONTENTS

PREFACE

Terms of reference

On 7 December 2000, on the motion of Senator the Hon Ian Campbell at the request of the then Minister for Justice and Customs, Senator the Hon Amanda Vanstone, the Senate referred the *National Crime Authority Legislation Amendment Bill 2000* to this Committee (referred to in this report as the PJC) for inquiry and report by 1 March 2001.

The statutory authority for the PJC to comply with the Senate's reference is paragraph 55(1)(e) of the *National Crime Authority Act 1984* (NCA Act), which places on the PJC a duty 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.

The Bill

According to the Minister's Second Reading Speech, the *National Crime Authority Legislation Amendment Bill 2000*:

> ... is an important measure to enhance the effectiveness of the National Crime Authority in combating organised crime. In particular it will create a significant deterrent to those who seek to obstruct and frustrate the Authority's hearing process. At the same time, the Bill contains important accountability measures, notably a role for the Ombudsman and clearer reporting requirements to the Parliamentary Joint Committee on the Authority.[1]

The Bill is the Government's legislative response to the PJC's April 1998 report entitled *Third Evaluation of the National Crime Authority* as well as addressing a number of other matters relating to the NCA's administration and operations.

Other than preliminary provisions for the Act's short title and commencement, the Bill essentially consists of four Schedules. The first Schedule contains 18 Parts which will amend the *National Crime Authority Act 1984*. Schedule 2 inserts a note in the *Privacy Act 1988*. Schedule 3 will amend the *Ombudsman Act 1976* to extend the jurisdiction of the Commonwealth Ombudsman to deal with complaints against the Authority. Finally, Schedule 4 will amend the *Administrative Decisions (Judicial Review) Act 1977* to exclude the operation of that Act in relation to certain decisions made under the NCA Act.

The PJC's inquiry

Advertisements inviting submissions on the Bill's contents were twice placed in the national press during December 2000. The PJC also wrote directly to a range of groups and individuals known to have an interest in the NCA's operations. Further, given their particular

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1 Senate *Hansard*, 7.12.2000, p. 21027.

knowledge of the deficiencies of the existing statute from past practical experience, the PJC wrote to every former NCA chair and member to invite comment on the Bill's proposals.

The PJC received 24 submissions. Details are shown in Appendix 1.

A public hearing was conducted in Canberra on 9 February 2001, details of which are shown in Appendix 2. The hearing was conducted as a series of panels, with representatives of the NCA and the Attorney-General's Department explaining the purpose of each of the Bill's provisions then responding to issues raised by representatives of concerned community groups and other governmental agencies.

It should be noted that, while the Bill is in response to a report of this committee, only one current PJC member, Senator McGauran, was a member of the PJC at the time of its finalisation of that report. The current PJC's consideration of the Bill was therefore relatively unconstrained by prior prejudice or preconceived notions on normative outcomes.

The PJC was also reassured by the fact that the Bill had been the subject of consultation with and review by the NCA's principal oversight body, the Inter-Governmental Committee, which consists of the Commonwealth, State and Territory Ministers with responsibility for policing, and had met with near unanimous agreement. The PJC received a submission from the Hon K Trevor Griffin MLC, Attorney-General for South Australia, in which concerns in two respects were raised. At its public hearing, the PJC was informed by the representatives of the Commonwealth Attorney-General's Department that, while it was not desirable for one of the States or a Territory not to amend their underpinning legislation, it would not be fatal to the operation of the national scheme. It was also pointed out that, despite expressing certain concerns, Mr Griffin had not expressly opposed the Bill.

The report

The report has been structured to address issues in the groupings in which they were examined at the PJC's public hearing. This was found to be a rational basis for a cogent discussion of the Bill's provisions. Chapter 1 addresses Part 1 of Schedule 1 of the Bill, which deals with provisions that remove the defence of reasonable excuse, remove derivative use indemnity, and increase penalties for non-compliance with the Act. Chapter 2 addresses provisions to introduce an expanded contempt regime for the Authority. Proposals to enable the Chairperson to employ staff otherwise than under the *Public Service Act 1999* are examined in Chapter 3, while Chapter 4 looks at several provisions to address the accountability structure under which the NCA operates. Finally, Chapter 5 deals with the Bill's remaining provisions and raises issues not addressed by the Bill.

The report contains the PJC's *conclusions* on the appropriateness of each of the Bill's provisions. Given the Senate's tight timetable, it does not attempt to describe in detail the extensive history of each of the provisions and the competing arguments advanced at the hearing. This material is readily available on the public record and does not warrant extensive repetition in this report.

It should be said at the outset, however, that the PJC agrees with the Bill almost in its entirety. The general proposition put to the committee by witnesses concerned with what they saw as an expansion of the NCA's powers was that the PJC should not support any such expansion unless a clear case is made out for them. There is scope for argument about whether the Bill represents an expansion of the NCA's powers, a refinement of its existing

powers, or simply corrects errors in the original structure created in 1984 in the light of contemporary experience. The NCA itself consistently pointed out to the PJC that it supports the provisions contained in the Bill simply because they remedy problems which are being experienced with the existing statutory provisions. The clear inference is that the Bill may not go as far as the NCA might like, but that it recognises that it is a proper consideration for the Government to hold a different view of the acceptable balance between its desire for effectiveness and human rights considerations.

It has to be recognised that there is an inevitable element of speculation about what will be the practical outcome of the enactment of certain of the Bill's provisions. On the one hand, the PJC heard evidence from such agencies as the Australian Securities and Investments Commission (ASIC) and Queensland's Criminal Justice Commission (CJC), which already have experience of operating under similar statutory provisions, and can base judgements on their precedents. The alternative view is that these organisations are not the National Crime Authority - capable of conducting a criminal investigation into any individual in any location in Australia - and that potentially far worse consequences may arise.

The PJC wishes to state that it accepts that a sufficiently persuasive case was made out in relation to most of the Bill's proposals on the basis that current arrangements are demonstrably and unacceptably hindering the Authority in pursuing those anti-social members of our community who are engaged in serious and organised crime. In recognition that there is a lingering uncertainty about the likely practical effect of some of the provisions, however, the PJC is urging that the Government review their application after five years experience.

Acknowledgements

The PJC wishes to express its appreciation to submitters to its inquiry. The Senate's reporting deadline required the PJC to seek submissions over the Christmas/New Year period when the staff of many organisations could be expected to be away on leave. Nonetheless the 24 submissions received were of a high standard and proved of great assistance to the PJC's inquiry.

The PJC also thanks those bodies and their representatives who made themselves available at relatively short notice to attend the PJC's public hearing. In particular the PJC expresses its gratitude to Mr John Broome who, as the NCA's immediate past Chair, brought a considerable wealth of knowledge and experience to discussions.

Finally, the PJC recognises the efforts of its Secretary, Michael McLean, its Senior Research Officer, Barbara Allan, and James Warmenhoven, an officer of the Department of the Senate, who gave the PJC considerable assistance with the conduct of the inquiry.

Peter Nugent MP
Chairman

CHAPTER 1

AMENDMENTS RELATING TO REASONABLE EXCUSE, SELF INCRIMINATION AND PENALTIES

The Bill's provisions

1.1 As the then Minister for Justice noted in her Second Reading Speech:

> The Authority's task in investigating organised crime has been particularly difficult because of the way persons under investigation have manipulated existing legal rules and procedures to defeat the investigation. If a person refuses to answer a question in a hearing, it is possible for that refusal to be litigated through the courts, with delays of months or even years. In the interim, an investigation might be entirely frustrated, such that when proceedings are concluded and questioning can continue, the criminal trail has gone cold. Even worse, penalties for failure to answer a question at an NCA hearing have regularly been very modest - a few hundred dollars. This is not much of a deterrent where obstructing the Authority can impede an investigation that might have led to a person being gaoled for years for a serious offence such as drug trafficking.[1]

1.2 The Explanatory Memorandum also notes that NCA targets who are facing penalties of many years imprisonment or fines of hundreds of thousands of dollars for serious offences such as drug trafficking have a significant incentive to obstruct the investigation in any way possible.

1.3 It is against this background that the Bill introduces four major initiatives which are intended to strengthen the NCA's investigatory powers. One measure, the introduction of a comprehensive contempt regime, is addressed in Chapter 2. In this Chapter the **PJC** examines Part 1 of Schedule 1 of the Bill which contains the other three measures: removal of the defence of 'reasonable excuse'; removal of derivative use immunity; and increased penalties.

1.4 While the PJC addresses each of the four initiatives separately in this report, it notes the submission of Chief Justice John Harber Phillips, AC, Chief Justice of Victoria, a former NCA Chair, in relation to the general issue of obstruction and frustration of the NCA's activities. He wrote:

> That this has occurred in large measure in the past is beyond dispute and the need for reform of the law relating to refusal to answer questions and the penalties for unwarranted refusal is manifest. I think the Bill addresses these matters in an

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1 Senate *Hansard*, 7.12.00, p. 21028.

> effective and balanced way - and I include the new contempt regime in that observation.[2]

Reasonable excuse

1.5 The NCA Act currently contains a range of provisions which require compliance with an NCA direction to provide information, documents or answers to questions unless the witness can claim to have a reasonable excuse. Self incrimination is one such excuse. The intent of this provision is, according to the submission of the Attorney-General's Department, to:

> ...remove the unclear defence of reasonable excuse, which is currently available for certain offences under the NCA Act, and replace it with more clearly defined defences set out under the *Criminal Code*. The application of the *Criminal Code* to offences in the NCA Act will also clarify the fault element to be established by the prosecution before a person can be convicted.[3]

1.6 The Explanatory Memorandum states:

> The removal of the 'reasonable excuse' defence is consistent with the move to more specific defences under Chapter 2 of the *Criminal Code* (the Code). The Code, which will apply to all Commonwealth offences from 15 December 2001 and to offences under the NCA Act from the date of commencement of Item 64 of this Act, sets out general principles of criminal responsibility and includes defences applicable to all offences.
>
> The general defences are contained in Part 2.3 of the Code, and include defences relating to intervening conduct or event, duress, and sudden and extraordinary emergency. By replacing the less clear notion of 'reasonable excuse' with these specific defences, the scope for disputes as to whether a reasonable excuse exists will be significantly reduced.[4]

1.7 The PJC was informed at its hearing by witnesses from the Attorney-General's Department that, despite there being a large number of offences in the Commonwealth statutes, very few contain a 'reasonable excuse' provision. It was also informed that the Criminal Code had been amended to specifically include 'lawful excuse' as a defence.[5]

1.8 The PJC has spelled out this background detail at length because it might have been anticipated that this was a relatively straightforward proposal, suggesting that this was part of a general legislative reform exercise at the Commonwealth level to replace less clear provisions with clearer ones. However, the submission from the Hon K Trevor Griffin, South Australian Attorney-General, described it as 'legally mistaken'.[6] No other submission expressed such concerns, however, with most critical commentary in relation to this Part of

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2 *Submissions*, p. 51.

3 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000: Submissions, Volume 1*, 2001 [hereafter *Submissions*], p. 48.

4 *National Crime Authority Legislation Amendment Bill 2000, Explanatory Memorandum*, p. 4.

5 *Hansard Proof Transcript of Evidence*, Joint Committee on the National Crime Authority, 9.2.2001, [hereafter *Evidence*] pp. 4-5.

6 *Submissions*, p. 38.

the Bill being directed solely at the issue of the removal of derivative use immunity. Nonetheless, Mr Griffin's comment proved to be the basis for substantial discussion at the PJC's hearing.

1.9 The key point raised by Mr Griffin was that 'reasonable excuse' connotes a more flexible and wider notion than the Criminal Code defences and that the case for change was not being argued on an intention to narrow the scope of defences. He went on to argue that the exercise of the NCA's coercive powers should be kept within 'reasonable limits'.

1.10 The principal purpose for the removal of the defence of 'reasonable excuse' and its replacement with more clearly defined Criminal Code defences such as 'intervening event' or 'sudden emergency' will be to deny a witness the opportunity to delay the Authority's hearing process by challenging, in the Federal Court, the Authority's decision that he or she did not have a reasonable excuse for, amongst other things, failing to answer a question. While there would no longer be a reviewable NCA decision in this respect, witnesses would still have the right under general law to avail themselves of judicial review of decisions of the Authority.

1.11 At the PJC's hearing, the NCA gave several alarming examples where witnesses had substantially delayed the investigation process by challenging in the Federal Court an NCA members' ruling that they had no reasonable excuse not to cooperate. NCA General Counsel, Mr Mac Boulton, described a case that ran for four years before one of the principal witnesses voluntarily agreed to answer all the questions that had been at issue.[7] Mr Broome noted that he had had witnesses appear before him who had refused to confirm a familial relationship on the grounds that to do so would be self incriminating.[8] The NCA investigation was then delayed while the matter was tested in court. ASIC representative, Mr Joseph Longo, noted that:

> Whether an answer to a question incriminates you or not can be very complicated and it is a very time consuming process to establish whether it will or will not. In the meantime, the efficiency of the administration of justice is greatly undermined.[9]

1.12 The PJC accepts that it is desirable to remove the broad notion of 'reasonable excuse', which is capable of such abuse, and replace it with a set of specific defences. Witnesses at NCA hearings, especially those who are not the targets of the investigation but who are being asked questions to gain information about possible criminal behaviour by others, are required to cooperate with the NCA. That is, of course, the point of the NCA's special investigatory powers - to gain information which could not be obtained by the use of ordinary police powers.

1.13 Under the several provisions contained in the Bill, if witnesses still choose not to cooperate, the NCA member presiding over the hearing can then apply judgement how best to proceed. They could simply apply a level of commonsense in relation to the acceptability of the reasons given, by perhaps granting an adjournment if the witness is unwell. Where a witness refuses to answer a question that is not considered crucial by the member, they could choose to continue the hearing with the witness by pursuing other lines of inquiry to which

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7 *Evidence* pp. 7-8.

8 *Evidence* p. 10.

9 *Evidence* p. 11

the witness may not take exception. They could decide to apply to a Supreme Court for a contempt outcome or they could seek to prosecute. In making those decisions, the NCA member will bear a range of considerations in mind, including the need for speed. They will also consider the Criminal Code defences, because they would be aware that both the Court and the DPP will not pursue the matter further if the witness does in fact have a sound defence.

Recommendation 1: That the provisions relating to 'reasonable excuse' be agreed to.

Self-incrimination

1.14 As the Victorian Bar explained in its submission, under the NCA Act as currently drafted, a witness before the NCA who raises a reasonable claim that the answer to a question or the production of a document or thing may tend to incriminate him or her is entitled to refuse to answer the question or produce the document or thing unless he or she receives an undertaking from the appropriate DPP or other person that the answer, document or thing or anything derived therefrom will not be used in evidence against the person in any later proceedings for an offence. This is a 'use' and 'derivative use' immunity. When such an undertaking is granted, the witness is obliged to answer the question or produce the document or thing.

1.15 The Bill proposes to remove *derivative use* immunity. A witness who raises a reasonable claim that the answer to a question or the production of a document or thing may tend to incriminate him or her will be required to answer the question or produce the document or thing, and it is an offence if he or she fails to do so. The answer, document or thing is not admissible in evidence against the person in later criminal proceedings but evidence *derived* from that answer, document or thing will be able to be used in evidence against the person.[10] In short, a person's self-incriminatory admissions could be used to find other evidence that verified those admissions or was otherwise relevant, and such derived evidence could be used against the person.

1.16 The proposed legislation enshrines use immunity, without the need for a DPP to give an indemnity. Once a witness claims that the answer to a question might tend to incriminate him or her, that answer will not be able to be used directly against the person in a later trial.

1.17 The Explanatory Memorandum points out that the NCA has a critical role to play in the fight against serious and organised crime and that as a consequence,

> ... the public interest in the Authority having full and effective investigatory powers, and to enable, in any subsequent court proceedings, the use against the person of incriminating material derived from evidence given to the Authority, outweighs the merits of affording full protection to self-incriminatory material.[11]

Discussion

1.18 The present situation with regard to immunities was described by the NCA Chair, Mr Gary Crooke, as 'unworkable' and 'cumbersome and impractical':

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10 *Submissions*, pp. 44-45.

11 *National Crime Authority Legislation Amendment Bill 2000, Explanatory Memorandum*, p. 8.

> ... if there were to be an abrogation of the privilege against self-incrimination, a journey had to be made to all appropriate DPPs or Attorneys-General to get an appropriate undertaking. This proved very difficult because it was before the witness gave evidence and one was never certain as to what they were going to say and as to what the breadth of the undertaking would have to be. There is a deep-seated principle that says that one should not give an indemnity or an undertaking in advance of what is likely to fall from a witness.[12]

He also pointed to the delays such a regime involved, and to the compounding of the difficulty through the national scope of the NCA's investigations, in which evidence given by a witness might well relate to criminality in a number of States.

1.19 Mr Crooke also alluded to what he described as a very real danger that, with derivative use immunity in place, witnesses would be immunised against prosecution because it would be suggested that what had been found against them was the result of what they had said under compulsion. He suggested that investigatory bodies did not even question certain persons because of the doubts about the useability of evidence so obtained. The retention of derivative use immunity in the NCA Act would be a 'retrograde step' and would severely compromise the effectiveness of the NCA. Further, he pointed out that the proposed amendment was already in place in the enabling legislation of other investigatory bodies.

1.20 A longstanding example of derivative use in the federal jurisdiction exists in section 68 the *Australian Securities and Investments Commission Act 1989*, which was amended to this effect in 1992 following an inquiry by the Parliamentary Joint Committee on Corporations and Securities. After extensive inquiry and debate, the amendments removing derivative use immunity were passed, but with the addition of a requirement for a review after five years. That review was conducted in 1997 by Mr John Kluver, Executive Director of the Companies and Securities Advisory Committee, who concluded that a satisfactory and workable balance between the interests of persons subject to then ASC investigations and the public interest had been achieved.[13]

1.21 In her Second Reading Speech on the Bill, Senator the Hon Amanda Vanstone, the then Minister for Justice and Customs, acknowledged that 'the modification of the immunity provided in relation to compelled answers will cause mixed feelings on the part of some in the community' but that the Government was persuaded that the measures were a necessary response to a very serious problem. In short, the removal of derivative use immunity was a pragmatic proposal to enable the NCA to operate more efficiently.

1.22 As the Minister anticipated, vigorous opposition to the proposed measure was voiced by a number of witnesses, including the Victorian Bar, the Law Council of Australia and the NSW Council for Civil Liberties (NSWCCL), on the grounds that a centuries-old common law privilege against self-incrimination was being set aside. The Law Council suggested that the proposed amendments could even be contrary to Australia's legal obligations under the International Covenant on Civil and Political Rights. No support for this view was advanced, however.

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12 *Evidence*, p. 16.

13 Kluver, John, *Report on Review of the Derivative Use Immunity Reforms*, 1997.

1.23 Mr Michael Rozenes QC, appearing for both the Victorian Bar and the Law Council, also questioned whether the situation of ASIC was comparable with that of the NCA. He suggested that ASIC had a concern about keeping the market informed and needed to ensure that creditors of companies were not disadvantaged by dissipation of assets while lengthy investigations went on. Hence it needed the power to go straight to the person with the information and to get the evidence quickly. The NCA, on the other hand, was a 'police agency', with a job to detect, to investigate and to prepare for prosecution trials in criminal courts and not necessarily to get to the bottom of the issue.

1.24 The NCA pointed out in its submission that the High Court had expressly acknowledged that Parliament may 'properly' decide to exclude derivative use immunity in relation to compulsorily acquired information. In *Hamilton v Oades*,[14] it held that excluding derivative use immunity was only a minor inroad into the privilege against self-incrimination and one that could be justified on public policy grounds. Chief Justice Mason justified his conclusion in that case by explaining that the principal matter to which the privilege is directed is 'guarding against the possibility that the witness will convict himself out of his own mouth'.[15]

1.25 The amendments were not objected to by both directors of public prosecutions who responded to the PJC's call for submissions. The Commonwealth DPP confirmed that he and his predecessors had been cautious about signing undertakings under section 30(5) of the NCA Act to provide immunity to NCA witnesses. Only eleven undertakings had been signed under that provision in the past five years.[16] His support for the removal of derivative use immunity was explained as follows:

> The DPP's experience is that it is easy for a person to claim that evidence was derived in some way from an answer given at the investigation stage. It is very difficult to show that there was no such connection. In a criminal investigation the material gathered by investigators is pooled and shared. It is rarely possible to track with precision the use that was made of every piece of information or to show what led the investigators to pursue a particular line of inquiry.
>
> The practical result is that it is rarely possible to prosecute a person who has been questioned under use/derivative use protection. In most cases the effect of giving a person an undertaking under section 30(5) of the NCA Act is to rule them out as a potential defendant.[17]

Summary

1.26 The PJC accepts that the removal of derivative use immunity in the context of the NCA legislation is, as claimed by its opponents, a major step. Yet, as became clear during the PJC's inquiry, what was once a ground-breaking initiative is no longer the case. The provision exists at the Commonwealth level already with ASIC and the Australian Competition and Consumer Commission, and with several State agencies. Representative of

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14 *Hamilton v Oades* (1989) 85 ALR 1.

15 *Submissions*, p. 58.

16 *Submissions*, p. 92.

17 *Submissions*, p. 92.

the Criminal Justice Commission, Mr David Bevan informed the PJC that, because its act is silent, derivative use is regarded as applying by the Commission.[18]

1.27 Mr Broome made a persuasive rebuttal of Mr Rozenes' argument that what is acceptable for the ASIC is unacceptable for the NCA. He said:

> I also find it a rather curious proposition put forward on behalf of the Law Council... that it is reasonable enough to use the ASIC powers to protect the market by early disclosure but it is not reasonable, in terms of [the notion of balancing law enforcement effectiveness with human rights concerns] to use those powers to protect the community from some of the criminal activity which is being investigated by the NCA. I know where my vote goes in terms of the balance being struck.[19]

1.28 Senator Vanstone had made the same point in her media release in relation to the release of the Bill on 7 December in the following terms:

> A power that is acceptable for a commercial regulator is absolutely essential for a body whose focus is upon major organised criminal activity.

1.29 The PJC is persuaded that the work of the NCA is being impeded with derivative use immunity in place and supports the passage of this amendment. It gives particular weight to the comments of the then Chief Justice of the High Court and the Commonwealth DPP. However, the PJC suggests that, as was done in the case of the then Australian Securities Commission, a five-year review of the effectiveness of the amendment be undertaken to provide an assurance to the community of the continuing appropriateness of these provisions. This had been the submission of the Law Society of Western Australia.[20]

Recommendation 2: That the provisions removing derivative use immunity be approved subject to their operations being reviewed, and a report tabled in the Parliament, after five years.

Penalties

1.30 While the NCA Act contains a range of penalties for different offences, maximum penalties for non-cooperation with an NCA hearing process are a fine of $1000 or imprisonment for six months. The proposed new maximum penalties contained in the Bill are a fine of $20,000 or imprisonment for five years or, if the offence is dealt with summarily before a magistrate, a fine of $2000 or imprisonment for one year. These penalties will equate with existing penalties in the NCA Act for giving false or misleading evidence.

1.31 Mr Geoffrey McDonald, representing the Attorney-General's Department, noted that what is proposed is a tenfold increase in the level of penalty and he assured the PJC that from a departmental perspective they are seen as being at the upper level for this type of offence. A penalty of five years is seen as being at the lower end of the recognised serious offence level which, he argued, should send an appropriate signal to the courts that imprisonment should be contemplated for breaching this offence. He argued that, while some hardened

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18 *Evidence*, p. 19.

19 *Evidence*, p. 24.

20 *Submissions*, p. 89.

criminals may not object to another gaol term, the increased penalties may be persuasive for some people.[21]

1.32 Mr Longo informed the PJC that ASIC seeks to use civil remedies and only resorts to the criminal justice system in the most serious of cases. Its penalties are currently subject to review as part of the Criminal Code Act exercise.[22] The CJC's Mr David Bevan noted that its legislation has a penalty range of two or three years imprisonment, but that many offences of non-cooperation with the Commission's processes are punishable as contempt (as discussed in Chapter 2).[23]

1.33 While welcoming the proposed increases in penalties, Mr Broome expressed doubts about their likely effectiveness, for several reasons. Essentially, he argued that any penalty would be imposed months or even years after a witness had refused to cooperate, a delay which plays into the hands of those wanting to disrupt or delay an investigation. He also expressed doubt that judges or magistrates would impose maximum penalties on uncooperative witnesses, and, even if they did, the size of the new maximum penalties (particularly in a magistrates court) will not deter those witnesses.[24]

1.34 NSWCCL President, Mr Cameron Murphy, also noted that the types of hardened criminals that the NCA is investigating are unlikely to be daunted by a gaol term.[25]

1.35 The PJC notes that increased penalties are unlikely to be a panacea for the problem of non-cooperation with NCA investigations. The PJC notes, however, that the prospect of imprisonment may weigh more heavily on the minds of such potential witnesses as lawyers or accountants, rather than members of the criminal milieu. More realistic penalties do, therefore, play an important role in the matrix of increasing the NCA's effectiveness and are therefore supported by the PJC.

Recommendation 3: That the increased penalties be agreed to.

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21 *Evidence*, pp. 14-15.

22 *Evidence*, p. 13.

23 *Evidence*, p. 13.

24 *Submissions*, pp. 14-15; *Evidence*, pp. 13-14.

25 *Evidence*, p. 14.

CHAPTER 2

CONTEMPT

The Bill's provisions

2.1 The submission of the Attorney-General's Department summarises this provision in the following terms:

> The Bill would ... introduce a contempt regime to enable a court to deal promptly with conduct that interferes with or obstructs the Authority's hearing process. As the Authority does not exercise judicial power, it is not proposed that the Authority would deal with the contempt as if it were a court. However, the provisions would enable the Authority to apply to the Supreme Court of the State or Territory in which it is holding the hearing for the court to deal with the conduct as if it were contempt of that court. The Bill would also prevent a review of the Authority's decision to initiate the contempt proceedings by excluding that decision from the operation of the *Administrative Decisions (Judicial Review) Act 1977*. However, the alleged contemptor would be able to raise any defence or justification for his or her behaviour during the substantive contempt proceedings.[1]

2.2 Section 35 of the NCA Act already contains a limited offence provision of contempt. The NCA submission suggests that:

> ... it may take several years for a prosecution for a breach of the NCA Act to be brought to a conclusion. By that time, the information that was originally sought by the Authority has lost its cogency and an opportunity has been squandered to take significant steps in an investigation into serious criminality.[2]

2.3 Accordingly:

> The proposed contempt regime is designed to encourage cooperation and compliance with the Authority's hearing process.[3]

2.4 The Government has pointed to similar contempt regimes in section 219 of the *Australian Securities and Investments Commission Act 1989 (Cth)*[4] the *Independent Commission Against Corruption Act 1988 (NSW)*[5] and the *Criminal Justice Act 19879 (Qld)*[6] as models for that proposed in the Bill.

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1 *Submissions*, pp. 48-49.

2 *Submissions*, pp. 58-59.

3 Attorney-General's Department, in *Submissions*, p. 49.

4 *National Crime Authority Legislation Amendment Bill 2000, Explanatory Memorandum*, p. 18.

5 Senate *Hansard*, 7.12.2000, p. 21105.

6 Minister for Justice and Customs, *Media Release*, 7.12.2000.

Discussion

2.5 The lack of a directly comparable contempt regime in any other comparable investigatory agency at the Commonwealth level was a matter of concern to the PJC. Unlike some of the other measures in the Bill for which there are reasonable such precedents on which the PJC can base a conclusion on the matter of appropriateness, the PJC is being asked to consider a provision with a State-based precedent only. Several submitters also raised concerns on legal principle grounds.

2.6 While the parallel with the provision in the *Australian Securities and Investments Commission Act 1989* looks appropriate at face value, closer examination weakens the comparison. ASIC's submission noted that sections 219 and 220 of the ASIC Act make provision for the consequences of failure to comply with specified requirements of the Companies Auditors and Liquidators Disciplinary Board (CALDB) or for obstructing or hindering the CALDB or a member of the CALDB or for disrupting a hearing. ASIC added:

> Sections 219 and 220 of the *ASIC Act* cover the same categories of behaviour as that which would fall within the proposed contempt regime contained in the *Bill*. A significant difference is that a person found to be in contempt of the CALDB could not be detained in the manner set out in proposed Section 34C of the *NCA Act*.[7]

2.7 The Committee received evidence from the Criminal Justice Commission (CJC) about the contempt provisions in its enabling legislation, the *Criminal Justice Act 1989* The Commission expressed its support for the proposed NCA amendments on the basis that, in its experience, the provisions in its statute had assisted the Commission to conduct its investigations efficiently and effectively. In fact, the provisions in its legislation are of broader application than those in the Bill. Its submission described a case where two Queensland Police officers refused to answer questions when called to a Commission hearing in respect of serious criminal conduct on their part. It added

> The Commission Chairperson certified the contempt in writing to the Supreme Court that afternoon. The matter was mentioned in the Supreme Court later that day and was adjourned until the next morning. The two officers were remanded in custody overnight and the next morning they agreed to appear before the Commission and answer questions. The contempt application was adjourned to await the outcome of the Commission's proceedings. The officers appeared before the Commission at 10am and answered all questions which were asked of them. The delay occasioned by their initial refusal to answer questions was 1 day. The actions of the Commission also sent a strong message to other witnesses who may have been disinclined to cooperate in Commission investigations.[8]

2.8 At the PJC's hearing, CJC representative Mr David Bevan summarised this issue of the NCA gaining access to a range of powers of the type to which the CJC had been accustomed in the following terms:

> ... it soon becomes well known that witnesses are obliged to answer questions in such circumstances... The CJC certainly could not have operated effectively without such a provision [use immunity] and without the corresponding contempt

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7 *Submissions*, p. 96.

8 *Submissions*, pp. 33-34.

> provision. A provision in the same terms as the NCA Act I believe would have meant that we had a weapon which took so long to load that the target was out of sight before you could load and fire it.[9]

2.9 NCA Chair, Mr Gary Crooke, argued along similar lines:

> It really gets back to something as simple as this: it is the most effective way - as royal commission experience has demonstrated - to get people who are reluctant to answer questions to answer a question. The prosecution process renders nugatory the investigation process because it takes too long and once the person has been prosecuted there is no pressure on him to answer the question.[10]

2.10 Mr John Broome noted that such cooperation cannot necessarily be anticipated from those engaged in the types of criminality under NCA investigation. Not only did he point to an example in relation to the Royal Commission into the NSW Police Service where a witness was imprisoned for contempt for nine months - and even then did not answer the questions for which he had been imprisoned - but that the penalty for non-cooperation may be preferable to the alternatives of being charged for the substantive offence or the risks associated with 'grassing'.[11]

2.11 The Hon K Trevor Griffin, South Australian Attorney-General, submitted two concerns in relation to these provisions. Firstly he argued that it was inappropriate that a person be found in contempt of the NCA on the basis that it is an administrative/investigatory body and not a court. He argued that a person hinders or obstructs an investigatory body His comments would, of course, apply equally to the CJC and ICAC. Secondly, he raised concerns about the concept of the Commonwealth legislating to confer jurisdiction on a State Supreme Court, especially in view of recent High Court rulings. He noted:

> The continuing attempts (of which this is one) by the Commonwealth in a variety of ways to tempt constitutional fate by mixing State and Commonwealth jurisdictions are an invitation to complexity and litigation. There is no argument supplied as to why this power is necessary in addition to the very substantial increase in penalties that are argued for, on a quite cogent basis.[12]

2.12 At the hearing the PJC was assured by Mr Crooke that legal counsel 'at the highest level' had dismissed this constitutional concern.[13]

2.13 The Law Council's submission did not raise the types of concerns raised by Mr Griffin. Rather it noted that the proposed exclusion of the right of review under the *Administrative Decisions (Judicial Review) Act 1977* will be 'ultimately unproductive ... [and] ... somewhat pointless'.[14] It has pointed to the decision of the High Court in *Re Refugee Review Tribunal: Ex parte Aala*[15] which provides support to the view that NCA

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9 *Evidence*, p. 12.

10 *Evidence*, p. 32.

11 *Submissions*, p. 21.

12 *Submissions*, p. 37.

13 *Evidence*, p. 25.

14 *Submissions*, p. 105.

15 *Re Refugee Review Tribunal: Ex parte Aala* [2000] HCA 57.

decisions in relation to contempt decisions would be able to be reviewed at common law in the High Court. Litigants will sue in the Federal Court at common law, invoking the Court's jurisdiction under section 39B of the *Judiciary Act 1901*. If this were excluded by the Parliament, then litigants would go to the High Court. The PJC agrees with the Law Council that this would be an inappropriate outcome as a matter of legal policy, but is reassured by the advice of Mr Karl Alderson of the Attorney-General's Department that this will be only one of many such exclusions from the AD(JR) Act 'and the High Court has not been flooded with litigation as a result'.[16]

2.14 The Commonwealth DPP expressed support for the Bill's contempt provisions on the basis of the inadequacy of the current provisions, especially in relation to the need for persons who refuse to cooperate with an NCA hearing to be dealt with in a timely manner. The PJC also notes that the DPP stressed the point that it is not proposed that the NCA itself be given power to punish for contempt.

2.15 Further to his comments cited above, Mr Broome also noted that, as far as he was aware, the provision in the Bill for a judge of a State Supreme Court to impose an 'open ended' penalty is without precedent in Commonwealth legislation. In particular he pointed to the operation of contempt under the *Royal Commissions Act 1902*, which he saw as a more appropriate system for the NCA given its status as effectively a standing Royal Commission The main difference to which he drew attention is that witnesses to a Royal Commission who give false or misleading evidence are subject to a normal prosecution process, and if they refuse to attend at a hearing they can be arrested and the presiding member, if he or she is a judge, can deal with the contempt with a penalty which Mr Broome described as 'quite small'.[17]

2.16 It is noteworthy that the NCA stressed in its submission that:

> It is expected that such a power would be exercised infrequently. It is a significant protection that the power is subject to direct supervision and control by State and Territory Supreme Courts.[18]

Summary

2.17 As noted above, the PJC has more of a concern about these provisions than many others, simply because the Bill would be creating a significant precedent at the Commonwealth level. It sympathises with the level of dissatisfaction with the current provisions expressed by the NCA and colleagues in the law enforcement community. It similarly notes the success that the CJC has achieved with similar contempt provisions and, in particular, the demonstration effect that a successful contempt action may have on witnesses' future preparedness to cooperate with its inquiries, which is so obviously lacking in relation to NCA inquiries at present. It also gives weight to the support of the concept by Chief Justice Phillips described in paragraph 1.4.

2.18 There is also some force in the contrary argument, however, that given that the Bill removes 'reasonable excuse' and significantly increases penalties, both of which have

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16 *Evidence*, p. 55.

17 *Submissions*, p. 24.

18 *Submissions*, p. 59.

contributed significantly to the Authority's past problems of non-cooperation with its investigations, a contempt regime of possibly dubious effectiveness may simply be overkill. From the Authority's perspective, of course, the problem of reliance on those other provisions is the considerable delays to the investigation process which are experienced while prosecutions are launched, and even then with a distinctly uncertain outcome.

2.19 With some reticence, the PJC has resolved to support the provisions because it accepts that, even though the contempt provisions may only rarely be used, the absence of such an option would represent a substantial hole in the range of alternative strategies that the NCA would have available to it to deal with an errant witness. In accordance with this reticence, the PJC recommends that the provisions be subject to a review after five years of operation. Mr Broome has pointed out that a question arises whether an answer of 'I do not recall' will be treated as a refusal or a failure to answer a question. The answers to this and other issues will only become clear from practical experience and the Parliament will have the benefit of the review report to determine whether the provisions should be continued.

Recommendation 4: That the contempt provisions be approved subject to their operations being reviewed, and a report tabled in the Parliament, after five years.

CHAPTER 3

NON-APS EMPLOYEES

The Bill's provisions

3.1 Part 18 of the Bill proposes to give the NCA Chairperson the power to employ 'such persons as the Chairperson thinks necessary for the purposes of the performance of the function of the Authority' and to offer such terms and conditions of employment as he sees fit. This is intended to complement the Chairperson's existing powers under the NCA Act to employ staff under the *Public Service Act 1999* (s. 47), to engage consultants (s. 48), and to second staff from the Australian Federal Police (s. 49) and State police forces (s. 58).

3.2 The NCA submission pointed to this capacity having been provided to other agencies in the Commonwealth sector and noted that:

> The proposed amendment would assist the Authority to have the necessary structural flexibility to be able to carry out its subject and operational specific tasks.[1]

3.3 NCA Chair, Mr Gary Crooke, told the PJC that such powers were needed to provide him with the flexibility to cope with short-term funding arrangements. He added:

> It may be that the focus and spread of resources will become different as an operation proceeds. One needs to have the flexibility to employ or deploy people to be able to be available at a particular area or, alternatively, suddenly to engage people who have particular expertise in certain fields that can be a demand of a particular operation which may not be ongoing.[2]

3.4 The submission of the Attorney-General's Department similarly expressed support for the proposed amendment in terms of the need to facilitate structural flexibility in NCA staffing. It also pointed out that much of the NCA's discretionary funding is targeted at specific operations for limited durations and requiring different mixes of specialised skills in different locations at various times.[3]

3.5 The Explanatory Memorandum to the Bill also stressed the NCA's flexibility needs in a task-oriented funding environment, and suggested that the amendments 'will assist the Authority by allowing the employment of persons to match those tasks, rather than on an ongoing basis'.[4]

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1 *Submissions*, p. 50.

2 *Evidence*, pp. 32-33.

3 *Submissions*, p. 50.

4 *National Crime Authority Legislation Amendment Bill 2000, Explanatory Memorandum*, p. 23.

Discussion

3.6 The Community and Public Sector Union (CPSU) raised a number of concerns about the proposed amendment. A major concern for the Union was that an unfettered and absolute discretion in staff appointments was potentially inimical to the merit principle It might threaten current security clearance requirements and hence compromise both the work of the NCA and the safety of its staff. The Union also suggested that the appointment of ad hoc temporary staff from time to time as required in specific locations would lead to a potential loss of corporate knowledge and downgrade the focus on the development and enhancement of skills of existing staff.

3.7 The CPSU also questioned whether the proposed amendments would work in practice, as it disputed the view that specialist expertise was readily available in the community to be brought in for the short term and, even if it were, such experts would require time to adapt their skills to the NCA environment.

3.8 The CPSU based its arguments that the proposed powers are unnecessary on its view that the current provisions of the *Public Service Act 1999* and its regulations provide sufficient flexibility to employ non-ongoing employees for the duration of a specified task, or for a specified term, or to cater to those individuals who might not wish to be employed under the Public Service Act. Subregulation 3.5(2) provides for the engagement of non-SES employees for a specified term for a number of reasons, including,

> To enable the agency to meet a temporary increase in the workload of the Agency, or of a component of the Agency, that the Agency Head does not expect to continue.
>
> The Agency has a temporary demand for employees for particular skills.

In both cases, the specified term of employment is not to exceed 18 months. Extensions are permissible if the reason for the employment continues to exist, the total term does not exceed three years, the Agency cannot fully meet its objectives by using the services of an ongoing APS employee in the Agency and the Agency's workload increase is temporary.

3.9 Subregulation 3.5(3) also provides for the engagement of non-SES employees for the duration of a specific task, provided that the Agency Head can reasonably estimate the duration of the task at the time of engagement, the services of the person are unlikely to be required after the completion of the task, and ongoing APS employees with the skills required are given the opportunity to express an interest in, and are considered for, performing the duties. Subregulation 3.5(2) item 8 also makes provision for the circumstance in which a prospective employee prefers to be engaged for a specific term and not on an ongoing basis

3.10 In addition, the NCA has the option of employing staff under flexible Australian Workplace Agreements.

3.11 As indicated in the NCA's submission, the proposal to provide a statutory authority chair with a relatively free hand in terms of the staff he or she employs is not without precedent in federal legislation. Subsection 120(3) of the *Australian Securities and Investments Commission Act 1989,* for example, gives a similar power to the ASIC chairman.

There is one significant difference in the ASIC legislation, however, in that the terms and conditions of staff so employed require the minister's written approval.[5]

3.12 In evidence to the PJC, ASIC representative Mr Joseph Longo, pointed out that ASIC used its powers to engage staff outside of the Public Service Act sparingly and only in cases where the organisation needed to retain the services of individuals who brought special skills or experience in rapidly changing fields for short or uncertain periods of time. He stressed that the provisions had been properly used; the staff so recruited had been seen to 'add value' and issues of merit or transparency had not been raised.[6]

3.13 The Commonwealth Director of Public Prosecutions (DPP) also has a similar power under subsection 27(3) of the *Director of Public Prosecutions Act 1983*. In its submission, the DPP indicated that it now used this provision less frequently than before the changes to the Public Service Act were introduced in 1999, but that it continued to find it of value because of restrictions in Public Service Regulation 3. It nominated three benefits of its 27(3) provision: there are no limits on the length of a contract that can be entered into; there are no restrictions on the power to renew a contract; and there are no formal requirements to be met in relation to advertising or interviewing. It added that 'the provision has proved of value in cases where the Office has needed people with specialist skills for limited periods, especially where the relevant task has been of uncertain duration'.[7] The DPP made the point that small agencies working in specialised fields needed as much flexibility as possible in their employment regimes.

3.14 Both ASIC's Mr Longo and the NCA disagreed with the CPSU about the effect of the proposed provisions on corporate memory. Mr Longo pointed out that in ASIC, the few persons employed outside of the Public Service Act were not those who are vital to the organisation's corporate memory. While the NCA case differs to the extent that a third of its staff are already on secondments, the PJC notes the view expressed by NCA General Counsel Mr Mac Boulton in the following terms:

> ... why would any responsible authority throw out its reservoir of corporate knowledge? It just will not happen - we rely too much on our skilled, experienced people. But we need flexibility.[8]

3.15 The NCA Chairperson already has the power to employ persons as consultants under section 48 of its enabling legislation. The PJC questioned why that power did not suffice for the occasions when greater staffing flexibility was required. Mr Boulton replied:

> Consultants do not always fit the bill. That provision is there advisedly; it is not really directed to engaging employees ... We do not like the idea that you have to disguise something as a consultancy when you are really talking about a proper employment relationship.[9]

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5 *Submissions*, p. 96.

6 *Evidence*, p. 35.

7 *Submissions*, p. 93.

8 *Evidence*, p. 36.

9 *Evidence*, p. 37.

Summary

3.16 The PJC recognises the force of the NCA's argument that its operations require an almost unique level of employment flexibility. The question for the PJC's determination is the appropriateness of the specific staffing provision in the Bill. The PJC notes that it would be undoubtedly easier for any agency in the Commonwealth sector to appoint staff without going through the relatively cumbersome and time-consuming public service advertising and interviewing requirements. As the CPSU pointed out, those requirements are there to guard against patronage and favouritism, nepotism and corruption. Such concepts should be anathema to an agency like the NCA.

3.17 The PJC is mindful of the fact that similar provisions to those in the Bill apply in other comparable Commonwealth agencies. As far as it is aware, those provisions have been used sparingly, in the circumstances for which they were intended, and without adverse affects on the agencies concerned. On this basis of positive precedent alone, it is inclined to support the extension of similar provisions to the NCA.

3.18 The PJC nonetheless has some concerns about the proposal. NCA General Counsel, Mr Mac Boulton, made his view clear that the 'terms and conditions' would be set by the market.[10] This appears to suggest a level of remuneration far in excess of what might be envisaged for a public servant performing comparable duties. The degree of accountability for such appointments is also a concern: such appointments would receive at best a modest level of disclosure in the annual report and the notes to the NCA's financial statements. Former NCA chair, Mr John Broome, confirmed that, in his experience, difficulties had been experienced with seconded investigators from State police forces working side by side on an investigation under significantly different terms and conditions of employment This has the potential to be exacerbated with the employment of staff under proposed subsection 47(3) and could potentially hinder investigations.

3.19 Whether the 'loss of corporate knowledge' scenario eventuates may depend to some extent on the ratio of permanent, or 'ongoing', staff to non-ongoing staff and also on the tenure of ongoing staff. The CPSU submitted that non-ongoing staff represented 23 per cent of the NCA workforce as of late last year, and ranged from a high of 45.5 per cent in Brisbane to 17 per cent in Melbourne; and that the attrition rate of staff employed under the Public Service Act was approximately 24 per cent for the year.[11] Ms Vanessa Twigg, an NCA staff member representing the CPSU, suggested that the usual tenure of seconded police officers was two years and, as they represent a third of the NCA workforce, the question of corporate memory was a very real issue. In its *Third Evaluation* report, the PJC expressed similar concerns about the impact on the NCA's operations of the high level of turnover of NCA members and staff and the resultant lack of continuity and corporate memory.[12]

3.20 In agreeing to support the staffing provisions in the Bill as a means to give the NCA chair the option to offer a sufficiently attractive package of employment to a person with special skills who may not otherwise be employable under one of the existing options in the NCA Act, the PJC wishes to stress its view that use of this power should be as an absolute

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10 *Evidence*, p. 37.

11 *Submissions*, p. 66.

12 Parliamentary Joint Committee on the NCA, *Third Evaluation of the NCA*, 1998, para 7.89.

last resort. The PJC would expect the NCA chair to have regard to the career nature of the public service and that he should not see lateral recruitment as a means to overcome the need for staff development. In such limited circumstances, the PJC believes that it is appropriate that the terms and conditions of employment be subject to ministerial approval, as is the case with ASIC.

Recommendation 5: That the NCA be authorised to employ non-APS staff, subject to the approval of the Minister in writing as to the terms and conditions of employment.

Specific difficulties in relation to access to FTR information

3.21 AUSTRAC alerted the PJC to the possibility that persons employed by the NCA chair on written contracts of employment might not be regarded as NCA 'staff' for the purposes of the *Financial Transaction Reports Act 1988* (FTR Act) or meet the other criteria as law enforcement officers as defined in the FTR Act. They would thus be ineligible to access FTR information. As the AUSTRAC submission made clear, subsection 27(15) of the FTR Act defines a law enforcement officer in reference to the NCA as: a member or acting member of the NCA; a member of staff of the NCA; a barrister or solicitor appointed by the Attorney-General to assist the NCA; or a person assisting a barrister or solicitor so appointed.

3.22 Mr Boulton indicated to the PJC at its hearing that this oversight is acknowledged and that it was intended, assumedly at the committee stage, to seek to make appropriate amendments.

Recommendation 6: That attention be paid to the relationship between the NCA Act and the FTR Act in relation to access to FTR information by all NCA personnel.

CHAPTER 4

ACCOUNTABILITY

The Bill's provisions

4.1 The Bill contains two mechanisms designed to address the NCA's accountability regime. Firstly, it proposes to place in the Commonwealth Ombudsman jurisdiction to deal with complaints against the Authority. These amendments are found in Schedule 1, Part 16 and Schedule 3 of the Bill. Secondly, it purports to clarify in Schedule 1, Part 12 what NCA information the PJC may have access to in its performance of its statutory duties.

4.2 The PJC notes that the NCA's accountability regime takes on a particular significance in the context of a Bill which will 'strengthen the arm' of the Authority, as the Minister described the Bill's several measures in her Second Reading Speech.[1] The PJC also notes that, while there is a tension between efficiency and accountability in any organisation, that tension is emphasised in an organisation which must necessarily eschew traditional notions of transparency and which is, in fact, reliant on a high degree of secrecy and subterfuge for its effectiveness.

4.3 The issue of how to make the NCA accountable has been exercising the minds of the cognoscente ever since the concept of an authority was first mooted - which debate will not be repeated here. This Bill is simply the latest attempt to seek to strike an acceptable balance.

Discussion

Commonwealth Ombudsman

4.4 Over the years there have been many models advanced for providing an effective, independent and accessible forum for people to take their complaints about the NCA's activities. The list includes a reliance on speedy judicial access, an inspector-general, the Commonwealth Ombudsman, a purpose-built agency with Royal Commission-type powers, and the creation of a specific parliamentary committee.

4.5 The current situation was best described in the submission of Mr Ron McLeod, the Commonwealth Ombudsman:

> The NCA is subject to the scrutiny of the PJC, but not in relation to individual investigations, and a person with an interest may seek review of its decisions by the Federal Court. While some of its actions can be criticised during legal proceedings, that will not always be the case. For example, a person may wish to complain about the incivility of a staff member or about the NCA's failure to pay an amount claimed or may wish to make a complaint about an investigation even though there is not to be a prosecution in which an issue could be raised.[2]

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1 Senate *Hansard*, 7.12.2000, p. 21029.

2 *Submissions*, p. 127.

4.6 The NCA Act is silent on how complainants can seek relief in such circumstances. If a complainant has a similar concern in relation to the Australian Federal Police, that complaint can be taken to the Commonwealth Ombudsman under the *Complaints (Australian Federal Police) Act 1981*. Mr McLeod made the point that consistency of approach suggests that the NCA should be treated in a similar way to other agencies with law enforcement responsibilities. It is also worth noting that the vast majority of NCA investigators are officers of the AFP on secondment.

4.7 The Law Council of Australia and the NSWCCL raised concerns about the effectiveness of the Commonwealth Ombudsman's office in its capacity as the complaints agency for the AFP, while Mr John Broome noted that there had been an issue in the past in relation to the Ombudsman's jurisdiction over State and Territory police when on secondment to the NCA. The PJC notes that these arguments may have some force, but that there will always be grounds for querying the speed and outcome of any complaints mechanism, especially in a situation of tight budgetary constraints.

4.8 Specifically NSWCCL member Mr Michael Kennedy raised concerns about the use of AFP personnel in the past to undertake inquiries on the Ombudsman's behalf. He rightly argued that this diminished the independence of their inquiries into AFP officers.[3] Mr Phillip Moss, Senior Assistant Ombudsman, assured the PJC that there are no current or seconded AFP officers working in the Ombudsman's police complaints area.[4]

4.9 The PJC supports the proposal in the Bill because it discounts the other options. The PJC itself is simply not an appropriate vehicle to handle complaints. The courts are not appropriate except for the most substantial of issues, and are relatively inaccessible except to the most persistent and patient, and perhaps wealthy, of complainants. An inspector-general based on the Inspector-General of Intelligence and Security had appeal when it was intended that the IGIS play a monitoring role on the PJC's behalf in reviewing the NCA's day-to-day operations, but the Government has emphatically rejected that concept. The PJC also considered that the Australian Law Reform Commission's proposal for a National Integrity and Investigations Commission was a solution out of all proportion to the size of the problem.

4.10 Accordingly, placing the complaints role with the Commonwealth Ombudsman is a reasonable and acceptable default position. As the Law Council noted, the Ombudsman's success in his new role would benefit from a review 'after two or three years of operation'.[5] Given the accountability of the Ombudsman to the Parliament, it is safe to assume that such review will take place continuously.

4.11 Concern was expressed during the hearing of the breadth of proposed section 9(3)(e) to be inserted into the *Ombudsman Act 1976* by Item 8 of Schedule 3. The proposal will extend the grounds on which the Attorney-General may issue a certificate to prevent the Ombudsman from requiring a person to provide certain information to the Ombudsman. Mr Broome similarly expressed his concern about these 'certificate provisions'.[6]

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3 *Evidence*, p. 42.

4 *Evidence*, pp 42-43.

5 *Submissions*, p. 107.

6 *Submissions*, p. 27.

4.12 The PJC has reached no concluded view on this issue but notes the advice of Mr McLeod in his submission that:

> While NCA information will ... be more likely to be protected than information provided by other agencies, I recognise the particular sensitivity of this material and consider that the certificate process will not interfere unduly with my investigations.[7]

Recommendation 7: That the provisions in the Bill which relate to the Commonwealth Ombudsman being given complaints jurisdiction over the NCA be agreed to.

Joint Committee on the National Crime Authority

4.13 It is important that the provisions relating to the future of the PJC are addressed only after the concept of the Commonwealth Ombudsman's role as the independent complaints agency for the NCA has been settled, since the question that must now be answered is what should be the PJC's continuing role?

4.14 In considering the original NCA Bill in 1984 the Senate replaced the Government's proposals for NCA accountability through the Ombudsman and regular judicial review with the operations of the PJC. In 1985 the then PJC stated that the provisions in the NCA Act were so poorly drafted that, unless they were appropriately amended, there was no point in retaining a parliamentary committee to act as a watchdog over the NCA. The situation was described as a 'charade'.

4.15 Sixteen years later, this Government Bill proposes to continue the charade, by giving to the PJC such qualified powers of access to NCA information as to render the PJC no more capable of scrutinising the NCA's operations than an existing standing committee using standard parliamentary committee powers. In particular the Bill leaves unamended the limitations on the PJC's role in subsection 55(2) and the PJC's rights of access to information under the NCA Act's secrecy provision (section 51), reform for which the Senate's Committee of Privileges called in 1998.[8]

4.16 The only submitter to comment in this respect was Mr Broome, who noted that the Bill is 'unnecessarily restrictive',[9] with several of the provisions unworkable.

4.17 Like its predecessors, the current PJC must emphasise that such narrow provisions are unacceptable. A parliamentary watchdog committee has to have access to whatever information it considers is necessary to perform the role asked of it by the Parliament. Either the PJC is trusted with the knowledge of what the NCA is doing operationally - and is in a position to reassure the Parliament and the public of the appropriateness of what is happening - or it may as well cease to exist.

4.18 During the life of the current Parliament, the PJC has performed valuable inquiries into the legislation underpinning controlled operations, the effectiveness of the AFP's witness

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7 *Submissions*, p. 128.

8 Senate Committee of Privileges, *70th Report: Questions arising from proceedings of the Parliamentary Joint Committee on the National Crime Authority*, April 1998.

9 *Submissions*, p. 18.

protection program and the law enforcement implications of new technology. Both Houses have a standing committee with oversight of the Justice portfolio which could just as appropriately have conducted these inquiries. Such inquiries were not the primary reason the PJC was created and are not a sufficient condition for its retention.

4.19 The PJC notes that, since its creation in 1984, the parliamentary committee 'watchdog' model has been reproduced in NSW, Queensland and Western Australia in relation to their State anti-corruption agencies. No watchdog committee was established, however, in relation to the operations of the two crimes commissions of NSW and Queensland. It may well be that the issue of politicians having access to secretive operational material is so intractable as to be beyond resolution. If that is the case, the PJC should be repealed and the NCA be held accountable through a combination of the courts, the Ombudsman and traditional parliamentary processes such as Estimates Committees and the review of annual reports by the relevant standing committees.

Recommendation 8: That Part 16 of Schedule 1 of the Bill be rejected. Either the Government substitutes provisions which will enable the PJC to have genuine scrutiny over the NCA's operations or Part III of the NCA Act, which creates the PJC, should be repealed.

CHAPTER 5

REMAINING PROVISIONS

5.1 In this Chapter the PJC addresses the remaining provisions of the Bill. Several amendments are of a minor technical nature which seek to do no more than correct flaws in the Act. These were largely uncontentious. Others that were thought to be uncontentious by the NCA in its submission proved otherwise. The PJC notes that this set of provisions appears to have the unanimous support of the State and Territory Ministers who are members of the Inter-Governmental Committee and it recognises that due heed should be paid to the intergovernmental nature of the National Crime Authority's operations. Finally, the PJC has taken the opportunity at the end of this Chapter to raise a small number of matters which are not addressed by the Bill.

Part 2 - Relevant criminal activity

5.2 The NCA is currently restricted to investigating relevant criminal activity that has occurred prior to the date of the reference given to it by the Inter-Governmental Committee at one of its biannual meetings. This is particularly relevant to its special investigations. The NCA supports this provision, which is intended to extend its capacity to pursue related criminal activity which occurs after the granting of a reference, because the current system is 'unduly restrictive' and 'artificial' and to overcome the administrative burden of having to seek renewed references every six or 12 months.[1]

5.3 Only the Law Council questioned this amendment, suggesting that it has the potential to allow the NCA to take on an inappropriately broad investigative role. Instead it argues that the NCA should seek another reference if an investigation discloses further criminal activity.

5.4 The PJC notes the advice contained in the Government's response to the *Third Evaluation* report that:

> The framing of references in broader terms is consistent with the decision of the Federal Court that references may be valid without specifying the offenders, the particular conduct, transactions or the time frame. ... [but] ... Each reference, therefore, requires some factual basis to justify the use of the National Crime Authority's special powers to enable the Inter-Governmental Committee to make a decision regarding the use of those powers.[2]

5.5 The PJC therefore cannot agree with the Law Council that, if the reference is already broadly framed around some factual basis, it is inappropriate for the NCA to follow the trail of related criminal activity after the date of the reference.

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1 *Submissions*, p. 60.

2 Senate *Hansard*, 7.12.2000, p. 21104.

Part 3 - Terms of appointment

5.6 Only Mr John Broome expressed reservations about the proposed extension of members' terms from four to six years, on the grounds that it would make it even more difficult for members appointed from the Bar to re-establish themselves than it is already. The NCA noted that the present regime made it difficult in terms of corporate knowledge and expertise, especially in long and complex investigations, periods of cultural change and management transition.

5.7 The PJC notes that the recommendation of its predecessors in the *Third Evaluation* report was for appointments to be for four years, with the option of renewal for a maximum of another four years, subject to satisfactory performance. The current PJC sees considerable merit in this proposal as it contains desirable elements of stability and continuity and a sufficiently long term for an appointee to make a major commitment to the NCA's activities, while providing a mechanism for the non-replacement of a poor performer.

5.8 Nonetheless, it is the Government's view that a potential maximum term of six years 'will provide some greater flexibility balanced against the safeguard of terms being capped'.[3] This is a matter of judgement and the PJC accepts the Government's preference.

5.9 Both the NCA and Mr Broome also referred to the need to ensure that members' terms of office do not expire concurrently. This is an administrative matter for Government, but it is a view which the PJC would wish to strongly endorse.

Part 4 - Definitions

5.10 These amendments add 'money laundering' and 'perverting the course of justice' to the definition of 'relevant offence' in the NCA Act and adopts the definition of 'document' from the *Evidence Act 1995*. They were not queried in any submission. The PJC recognises that the two matters to be added to the NCA's menu for special investigation are significant and warrant inclusion as relevant offences in their own right, rather than being able to be examined only as an adjunct to another relevant offence.

5.11 The PJC was informed that the involvement of the NCA in any future computer offences legislation would not require additional amendments to be made to these provisions. The PJC notes that any such new offences could, if the need should arise, be prescribed by regulations under section 62 of the NCA Act.

Part 5 - Police power to interview

5.12 These amendments are of a minor technical nature and were not queried in any submission. They make no material change to the rights of police to interview, but remove two redundant provisions.

Part 6 - People who may apply for, or issue, search warrants

5.13 The Bill proposes that the range of NCA personnel who are eligible to seek warrants (called 'eligible persons') be expanded to include members of police who are on the staff of the NCA (ie in addition to the Authority members and the seconded officers) and that

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3 Senate *Hansard*, 7.12.00, p. 21107.

magistrates now also be permitted to issue warrants as well as judges (to be called 'issuing officers'). The NCA's submission noted that:

> Section 22 of the NCA Act has been used rarely in the past. The proposed amendments will bring section 22 into closer alignment with search warrant provisions in other legislation and breathe new life into the provision.[4]

5.14 Only Mr Broome raised questions about these issues, while confirming the inadequacy of the NCA Act's current provisions. He repeated an argument raised by the PJC in its *Third Evaluation* report that the NCA should be able to issue search warrants in circumstances where they are satisfied that it is necessary to preserve evidence. While Mr Broome argued that the *Trade Practices Act 1974* has such a provision in relation to the activities of the Australian Competition and Consumer Commission, the Government has stated its view 'that to allow the National Crime Authority to issue its own search warrants is not appropriate or necessary'.[5]

5.15 The PJC notes that, if it is the intention of the Bill to enhance the efficiency and effectiveness of the NCA, even subject to appropriate controls and safeguards, these amendments may represent an opportunity missed.

5.16 The prospect of restricting the power to issue search warrants to members of the Federal Magistrates Service was raised at the hearing. The NCA and Attorney-General's Department witnesses noted that this was a matter of Government policy, as federal magistrates have no such jurisdiction at present.

Part 7 - Non-disclosure of information about summons, notices, etc

5.17 This Part and Schedule 2 are intended to clarify a technical issue concerning the interaction of the NCA Act and the *Privacy Act 1988*. It provides that a prohibition on disclosure that relates to the Authority's processes (e.g. a summons or notice on which there is a non-disclosure notation) overrides any contrary notation requirement under the *Privacy Act 1988* for so long as the prohibition remains in force.

5.18 Mr Broome's submission pointed out that, in practice, non-compliance with the relevant section of the NCA Act (section 29A) was a regular occurrence in circumstances where it is reasonable for the disclosure to occur but where, nonetheless, an offence is committed. If the situation is as described by Mr Broome, the PJC endorses his call for a policy review of the whole issue with a view to a more practical approach being found.

Part 8 - Delegation of chairperson's powers

5.19 These are minor provisions to enable the Chairperson of the Authority to delegate certain powers. Mr Broome noted that the amendments in Part 13 which relate to the Chairperson's power to disseminate NCA information to overseas agencies should also have a delegated authority to both NCA members and SES officers. The PJC also notes that the provisions may not be sufficiently broadly drafted to give full effect to the Bill's intention that 'hearing officers' will have the full range of powers necessary to run hearings.

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4 *Submissions*, p. 60.

5 Senate *Hansard*, 7.12.00, p. 21105.

5.20 The PJC draws these issues to the Government's attention.

Part 9 - Hearings

5.21 This is a minor amendment which is to clarify the power of the Authority to control who may be present at hearings (without impacting on the right for specified legal practitioners to be present). It requires an NCA member at a hearing to identify to a witness when there are non-NCA personnel in the room. While the witness can comment on the presence of such persons, the NCA member still makes the ultimate determination on the conduct of proceedings. Mr Broome submitted that the provision is unnecessary, may be inimical to the conduct of an investigation, and will not achieve its apparent purpose on definitional grounds.

5.22 The Bill fully implements an earlier PJC recommendation, however, and is acceptable to the current PJC.

Part 10 - Disclosure of information by legal practitioners

5.23 The purpose of this Part is to remove the defence of 'legal duty' in relation to a legal practitioner who receives a non-disclosure notice in relation to his or her client According to the Explanatory Memorandum, it removes a provision of uncertain meaning and application but leaves the law relating to legal professional privilege unaffected.

5.24 The Law Council submitted that is was 'deeply concerned' at this proposed amendment, which it argued meant that lawyers acting for persons under investigation by the NCA could face imprisonment simply for doing their job as lawyers.[6]

5.25 On the basis of comment in the Government's response to the *Third Evaluation* report, the PJC had understood the provision as doing no more than placing lawyers on the same basis as other professionals to whom a client might disclose their having received an NCA notice. The Explanatory Memorandum described the current situation as 'anomalous' The PJC accepts the advice of NCA General Counsel, Mr Mac Boulton, at the hearing that there is no alteration to the law relating to legal professional privilege.[7]

Part 11 - Use of reasonable force to execute warrants

5.26 These amendments clarify that only reasonable force is to be used in the execution of warrants under the NCA Act and arise from concerns expressed by the Senate Standing Committee on Regulations and Ordinances. They were not queried in any submission.

Part 13 - Dissemination of information overseas

5.27 While it has always been the intention of the NCA Act to engage in international cooperation and exchange of information, the amendment is designed to provide a clearer and less cumbersome mechanism to achieve this.

5.28 Mr Broome expressed his support for the provisions, but argued that the Bill does not go far enough to enable effective international cooperation. Ms Suesan Sellick of the

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6 *Submissions*, p. 103.

7 *Evidence*, p. 52.

Attorney-General's Department argued that overseas agencies are already able to engage in an NCA Task Force, provided that they are investigating relevant criminal activity.[8]

5.29 The NCA representatives endorsed Mr Broome's comments and indicated that this issue of cooperation with overseas agencies and dissemination of information was one that they would pursue. The PJC endorses the general principle of maximal cooperation between the NCA and relevant international law enforcement agencies and draws this issue to the Government's attention.

Part 14 - Application of the Criminal Code

5.30 This part will apply Chapter 2 of the *Criminal Code* to offences under the NCA Act. This issue was discussed in paragraphs 1.5 to 1.15.

Part 17 - Hearing officers

5.31 The purpose of this part is to increase the investigative capacity of the Authority by enabling the appointment of a number of persons who are empowered to conduct hearings on behalf of the Authority. The Government has opted for this approach, rather than the PJC's recommendation for part-time members.

5.32 Mr Broome noted that he had long been an advocate for the NCA to have such a capacity, but he raised objection to the concept of hearing officers on the grounds that it has been a fundamental principle of the NCA Act that the special powers would only be exercised by members of the Authority. He suggested that hearing officers would have less standing than members and thus it may be difficult to attract suitable candidates.

5.33 CJC representative, Mr David Bevan, informed the Committee that under its legislation the Chairperson and Commission officers who are legal practitioners can be appointed to conduct hearings on behalf of the Commission. Similarly, outside Counsel can be appointed to conduct a hearing. One advantage has been that investigative hearings have been able to be conducted simultaneously for tactical reasons.

5.34 The current PJC notes that its predecessors had essentially had a hearing officer concept in mind when recommending part time members and accordingly it strongly endorses the hearing officer provisions. It also gives weight to the advice of NCA Member, Mr Marshall Irwin, that hearing officers will be oversighted by a member, who will have issued any necessary summons in the first place.[9]

Schedule 2 - Privacy Act 1988

5.35 This provision cross-references in the Privacy Act the changes made to the NCA Act under Part 7. This was discussed above in paragraphs 5.17 and 5.18.

Schedule 4 - Administrative Decisions (Judicial Review) Act 1977

5.36 This provision cross-references in the AD(JR) Act the changes made to the NCA Act under Part 15. This was discussed in paragraph 2.13.

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8 *Evidence*, p. 53.

9 *Evidence*, p. 54.

Other matters

Annual reporting provisions

5.37 Mr Broome noted that section 61 of the NCA Act was unamended by the Bill. He raised two concerns. Firstly, that sub-section 61(3) of the Act prevents the NCA from commenting in its annual report on matters that are in the public domain. Secondly, that there is an ambiguity in the Act about when the Minister receives a copy of the NCA's annual report, which impacts on the timing of its tabling in the Parliament.

5.38 On the first issue, the PJC understands Mr Broome to be referring to the fact that persons who have been charged with offences cannot be named in the annual report prior to their conviction. Thus all court cases that are on hand as at 30 June each year cannot be included. The PJC accepts the thrust of Mr Broome's argument that the annual report should be able to draw together for the benefit of the Parliament all the otherwise disparate information on prosecutions which is already in the public domain. The PJC also sympathises, however, with people who might be named in an annual report only to be acquitted later. The same phenomenon happens where a person is convicted, and mentioned in the annual report, and is acquitted on appeal in a subsequent year. Only the most diligent of researchers is likely to accurately complete the picture. The PJC accordingly supports the current terms of section 61(3) of the NCA Act.

5.39 The second issue was raised by the PJC in the *Third Evaluation* report and, like Mr Broome, the PJC finds the Government's defence of the current provisions unpersuasive. The problem to which the PJC alluded in its report is that the NCA annual report is tabled in the Parliament later than that of virtually every other Commonwealth agency. The practical effect of this process is that the Parliament can only start scrutiny of some of the matters reported on not less than 18 months after they took place. The Government's explanation is that, given the NCA's intergovernmental nature, the report must first be circulated to members of the Inter-Governmental Committee for comment before it is provided to the Minister for tabling within another 15 sitting days.

5.40 The PJC shares Mr Broome's view that the ambiguity in the Act, which on its face suggests that the Minister has 15 sitting days to table the NCA's annual report from the date it is first provided to him or her as a member of the IGC, should be clarified.

Title of Chairperson

5.41 In 1992 the title of the head of the NCA was changed from 'Chairman' to 'Chairperson'. The PJC notes that section 18B of the *Acts Interpretation Act 1901* was amended in 1997 to provide that, where an Act establishes an office of Chair of a body, the Chair may be referred to as Chair, Chairperson, Chairman, Chairwoman or by any other such term as the person occupying the office so chooses.

5.42 The PJC notes that this Bill is a convenient vehicle to bring the NCA Act into alignment with this provision.

Recommendation 9: The PJC endorses Schedule 1, Parts 2-11, Parts 13-14 and Part 17 and Schedules 2 and 4 of the Bill, but draws the Government's attention to the matters raised in Chapter 5.

MINORITY REPORT

1. This is the report of Senator George Campbell, Senator Kay Denman, Hon Graham Edwards, MP, and Hon Duncan Kerr, MP, in relation to the majority report on the *National Crime Authority Legislation Amendment Bill 2000.*

2. We wish to confirm our emphatic support for the aims and objectives of the National Crime Authority (NCA). We also accept that, after some 16 years of operation, its enabling legislation is in need of repair. We therefore express support for the thrust of the Bill in seeking to improve the NCA's efficiency and effectiveness. Nonetheless, we draw attention to our concerns in relation to the Bill in the following four respects:

   - Schedule 1, Part 6 entitled 'People who may apply for, or issue, search warrants';
   - Schedule 1, Part 15 entitled 'Contempt';
   - Schedule 1, Part 18 entitled 'Non-APS employees'; and
   - Schedule 3, Item 8 relating to amendments to the *Ombudsman Act 1976.*

Each of these issues will be addressed below.

People who may apply for, or issue, search warrants

3. The Bill proposes to extend to State and Territory magistrates the authority to issue search warrants sought by NCA members and certain staff members under sections 22 and 23 of the NCA Act. These provisions currently apply only to Judges of the Federal Court and State or Territory Judges. The three groupings will collectively be referred to as 'issuing officers'.

4. The suggestion was raised at the hearing that consideration should be given to limiting this extension to magistrates only of the Federal Magistrates Court given their distribution nationally and in view of their status as appointees under Chapter III of the Constitution. It was also suggested that such an approach would go some way to allaying concerns held by some members of the community that NCA search warrants deserve to be handled at the most serious level.

5. The response from the representatives of the Attorney-General's Department was that this was a policy question for Government, given that the Federal Magistrates Court at present has no jurisdiction to issue such processes. The Bill is intended to extend to the NCA Act equivalent powers held by State and Territory magistrates under the *Crimes Act 1914* and other Commonwealth legislation that has warrant provisions.[1]

6. We urge the Government to consider that policy question as a matter of priority.

Recommendation 1: That the proposed definition in subsection 4(1) of 'issuing officer' should be amended by the repeal of paragraph (c) and its replacement with the phrase 'a member of the Federal Magistrates Court'.

[1] *Evidence*, pp. 50-51.

Contempt

7. The proposed extension of the NCA's contempt regime was the subject of adverse comment in several submissions and extensive discussion at the PJC's public hearing. The majority report, commendably, expressed reticence about this proposal but then took the soft option of agreeing to its implementation for a trial period of five years. It clearly gave weight to the view that the Parliaments of both New South Wales and Queensland had deemed such provisions appropriate for comparable investigatory agencies within their respective jurisdictions. This is not, in our view, a sound basis for introducing such measures at the Commonwealth level.

8. Under section 35 of the NCA Act a person who obstructs or hinders the Authority or a member in the performance of their duties, or disrupts a hearing, is punishable on summary conviction by a maximum penalty of $2000 or imprisonment for one year. As proposed by the Bill, persons who interfere with or obstruct the NCA's hearing process, or refuse to answer a question when required to do so, are liable either to prosecution subject to the massively increased penalties discussed in the majority report at para. 1.30, or to be detained and taken forthwith before the relevant Supreme Court for their conduct to be dealt with as if it were contempt of court.

9. The NCA has argued that the rationale for the expanded contempt regime is that the existing system is subject to excessive delays because of the need to seek a prosecution. It was also argued that the proposed regime will encourage cooperation and compliance with the NCA's hearing process.

10. The majority report notes several of the expressions of concern it received about these provisions, in particular from the Hon K Trevor Griffin MLC, South Australian Attorney-General and from former NCA chair, Mr John Broome. Their arguments were essentially twofold: firstly that as a matter of general principle it is inappropriate to seek to liken an investigatory body such as the NCA to a court; and secondly that the contempt provisions are unnecessary if the proposals contained in the Bill in relation to removing the 'reasonable excuse' concept and the substantial increases in penalties are enacted.

11. We concur with both views. The NCA is not a judicial body. It is an investigative agency of the Executive Government and it is therefore, in our view, a seriously flawed breach of the separation of powers concept to imply that hindering or obstructing an investigatory body can be equated to contempt of court.

12. We also believe that the case for the proposed contempt regime has not been made out. The Government's argument is that it is essentially the third leg of a tripod of provisions that, if struck out, would lead to the collapse of the model. We accept that a persuasive case has been made out in relation to 'reasonable excuse' and the massively increased penalties. They combine desirable 'carrot' and 'stick' elements. The contempt regime may be one extra power too many, and should therefore be treated with caution.

13. Thus, rather than the majority's approach of supporting the passage of the provisions and reviewing their operations after five years experience, we believe that it would be prudent to monitor the success of the other provisions and if the need can still be demonstrated in, say, five years time then the Parliament could be asked again to consider the matter.

Recommendation 2: That the contempt provisions in Schedule 1, part 15 of the Bill be rejected.

Non-APS employees

14. As noted in the majority report, the Bill proposes new subsections 47(3) and (4) to the NCA Act, giving the Chairperson the power to employ persons outside of the *Public Service Act 1999*. The NCA's justification for seeking these additional powers is that it perceives a need for more flexibility than that Act provides in relation to the terms and conditions of employment that can be offered. Mr Crooke pointed out that much of the organisation's funding was directed to specific operations and that, as they unfolded, he needed the flexibility to employ or deploy persons in a particular area or suddenly to engage persons with particular expertise for the short term.

15. We have no quarrel with the NCA's need for flexible employment provisions but believe that they already exist in the NCA's current legislation and in the Public Service regulations. This proposition was emphasised in the submission of Mr John Broome who, it should be recalled, was NCA Chairperson for a period of four years from 1995 to 1999. He submitted that the reasons advanced in the Second Reading Speech for these proposals were 'clearly spurious'.[2] In oral evidence to the PJC Mr Broome stressed that he had regularly faced uncertainty over the NCA's budgetary situation but that he had always been able to achieve the necessary degree of staffing flexibility within the NCA Chairperson's existing statutory powers.[3]

16. Mr Broome noted that the Chairperson already has the power to employ consultants on such terms and conditions as he determines under section 48 of the NCA Act. While we would not be keen to see the overuse of this power, it could be of use in the employment of persons with particular skills for the short term. The use of consultants is potentially a more accountable process than that proposed by the Bill, given that the NCA's annual report is required, as a matter of government policy, to list all consultancies to a value of $10,000 or more.[4]

17. If, as NCA General Counsel Mr Mac Boulton is quoted as suggesting in paragraph 3.15 of the majority report, the NCA needs to employ persons to meet short-term requirements in 'a proper employment relationship and not a consultant coming on board',[5] we support the contention of the Community and Public Sector Union (CPSU) that the public service regulations introduced in 1999 make ample

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[2] *Submissions*, p. 25.
[3] *Evidence*, pp. 38-39.
[4] Department of the Prime Minister and Cabinet, *Requirements for Departmental Annual Reports*, May 2000.
[5] *Evidence*, p. 37.

provision for just that situation. As the CPSU submission points out, regulation 3.5 of the Public Service Regulations 1999 allows for the engagement of non-ongoing employees for the duration of a specific task, with no specific time limits applying. The only requirements the agency must fulfil are to make a reasonable estimate of the duration of the task and to ensure that ongoing employees with appropriate skills are given an opportunity to apply and be considered for the position. Although Mr Boulton regards these requirements as constraints, we do not. Rather we believe that they are entirely proper provisions for the NCA - and all other agencies in the Australian government sector - to meet.

18. The terms and conditions of employment of persons employed under the proposed new powers would be at the discretion of the Chairperson and would receive minimal formal public disclosure, thus fuelling, rightly or wrongly, suspicions of favouritism and nepotism. While we do not imply that the powers would be misused, we note that Mr Boulton made it clear in the PJC's public hearing that the NCA 'would probably have to employ [persons] on better conditions' than APS Act staff.[6] That raises the spectre of persons working side by side on roughly similar tasks under different terms and conditions of employment. Apart from the inherent unfairness of such a situation, we cannot believe it would be conducive to harmonious or efficient working relationships.

19. We are not persuaded that the expanded employment powers provided for in the Bill are either necessary or desirable and we oppose them.

Recommendation 3: That Schedule 1, Part 18 of the Bill be rejected.

Amendments to the Ombudsman Act 1976

20. We share with the majority strong support for the NCA's complaints role to be brought under the jurisdiction of the Commonwealth Ombudsman. This is a long overdue reform. It will be rendered nugatory, however, if the Ombudsman's capacity to conduct investigations into the NCA's behaviour is unduly restricted by concerns about operational secrecy.

21. In this respect, attention was drawn at the hearing to the breadth of proposed paragraph 9(3)(e) to be inserted in the Ombudsman Act, which will extend the grounds on which the Attorney-General may issue a certificate to prevent the Ombudsman from requiring a person to provide certain information to the Ombudsman.

22. According to the Explanatory Memorandum:

> The purpose of the proposed provision is to ensure that the Ombudsman's ability to otherwise compel the disclosure of information that is relevant to his or her investigation of a complaint is only restricted **in limited circumstances** [emphasis added].

23. In this respect, it is instructive to set out the terms of the proposal. Proposed new paragraph 9(3)(e) will read as follows:

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[6] *Evidence*, p. 37.

(e) if the information, documents or records are, or were, in the possession of the National Crime Authority or under the control of the National Crime Authority - by reason that it would prejudice:

(i) the safety of a person; or

(ii) the fair trial of a person who has been, or may be, charged with an offence; or

(iii) the effectiveness of an investigation by the National Crime Authority; or

(iv) the operations of a law enforcement agency.

24. Mr Broome noted that existing section 9(3) of the Ombudsman Act deals with such 'contrary to the public interest' tests as international relations, relations between the Commonwealth Government and the Government of a State, and Cabinet and Executive Council confidentiality. He expressed concern that, on its face, the proposed provision would enable the Attorney-General to issue a certificate to the Ombudsman in relation to virtually any NCA operational matter.[7]

25. The Attorney-General's Department officers at the hearing emphasised that the role of the Attorney-General was as an independent arbiter and that the NCA itself will not decide what is or is not to be demanded by or given to the Ombudsman.[8]

26. We share Mr Broome's concerns. We also record our difficulty with the Explanatory Memorandum's view that the circumstances when the certificate process will apply will be 'limited'. After 16 years with no independent and transparent complaints system - which has been a constant source of resentment among complainants - it would be regrettable to fetter the Ombudsman's role in relation to the NCA to such an extent as to render his jurisdiction the 'charade' that the majority report notes the PJC's past role to have been.

27. Finally, we note that the Bill also contains a proposal for a new section 35B of the Ombudsman Act in nearly identical terms to proposed paragraph 9(3)(e). This proposed new section would confer on the Attorney-General a similar power to certify that the Ombudsman should not publicly disclose certain NCA information when such publication would be contrary to the public interest. This provision has our support. We accept that the Attorney-General should have such a power because of the very real risk of compromising an NCA investigation by any premature disclosure of its details. Our objection is solely in relation to the extent to which the Bill would allow the Attorney-General to intervene to stop the Ombudsman gaining access to the information in the first place.

Recommendation 4: That proposed paragraph 9(3)(e) to the *Ombudsman Act 1976*, to be inserted by Item 8 of Schedule 3 of the Bill, be replaced by a provision drafted in less broad terms.

Senator George Campbell
Senator for New South Wales

Senator Kay Denman
Senator for Tasmania

Hon Graham Edwards, MP
Member for Cowan

Hon Duncan Kerr, MP
Member for Denison

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[7] *Evidence*, p. 44.

[8] *Evidence*, p. 45.

National Crime Authority Legislation Amendment Bill 2000
Minority Report of the Australian Democrats
Senator Brian Greig

The Democrats agree with the Minority Report of the Australian Labor Party. In addition to the four issues raised in that report, we would raise one further matter.

Self-Incrimination

The Bill proposes to water down the existing right against self-incrimination of witnesses before the National Crime Authority. Currently, witnesses can only be compelled to provide self-incriminatory evidence when they have been given an undertaking that the evidence and *anything derived from it* will not be used against them. This is consistent with common law principles that have been observed for centuries.

The Bill proposes to remove *derivative use* immunity. Essentially this means that while self-incriminatory testimony provided by a witness under compulsion is not itself admissible in court, any evidence derived from that testimony would be admissible.

The Democrats fear that this has the potential to render nugatory the right against self-incrimination. The NCA could require from a witness all of the information that is needed to successfully investigate and convict that witness. It is quite conceivable that the NCA could summon a witness for the sole purpose of gathering enough information on that witness to provide the police with all of the leads they require for a successful conviction. In such circumstances, the remnants of the right against self-incrimination left by this Bill would be of little value.

These concerns were echoed in strong submissions by a number of witnesses, including the Victorian Bar, the Law Council of Australia and the NSW Council for Civil Liberties. The Law Council suggested that the proposed amendment could be contrary to Australia's legal obligations under the International Covenant on Civil and Political Rights.

The Democrats recommend that the provisions qualifying the right to self-incrimination be rejected.

Senator Brian Greig
Australian Democrats Senator for Western Australia

APPENDIX 1

SUBMISSIONS

1. Mr T.C. Boxall
2. Australian Federal Police
3. Tasmanian Minister for Police and Public Safety
4. Mr John Broome
5. Mr Peter H Clark SC
6. Northern Territory Police
7. Western Australian Minister for Police
8. Criminal Justice Commission
9. Northern Territory Minister for Police, Fire and Emergency Services
10. South Australian Attorney-General
11. New South Wales Council for Civil Liberties Inc
12. The Victorian Bar Inc
13. Commonwealth Attorney-General's Department
14. Chief Justice John Harber Phillips AC
15. South Australia Police
16. National Crime Authority
17. Community and Public Sector Union
18. Law Society of Western Australia
19. Commonwealth Director of Public Prosecutions
20. Australian Securities and Investments Commission
21. Law Council of Australia
22. Australian Transaction Reports and Analysis Centre
23. Commonwealth Ombudsman
24. Director of Public Prosecutions, Victoria

APPENDIX 2

WITNESSES AT PUBLIC HEARINGS

Friday, 9 February 2001, Canberra

Attorney-General's Department:
Mr Geoffrey McDonald, Assistant Secretary, Criminal Law Branch
Mr Karl Alderson, Principal Legal Officer, Criminal Law Branch
Ms Suesan Sellick, Senior Legal Officer, Criminal Law Branch

Australian Securities and Investments Commission:
Mr Joseph Longo, National Director, Enforcement

Mr John Broome, private citizen and former Chairperson of the National Crime Authority

Community and Public Sector Union:
Ms Vanessa Twigg
Ms Margaret Gillespie

Criminal Justice Commission:
Mr David Bevan, Director, Official Misconduct Division

Law Council of Australia/The Victorian Bar Inc:
Mr Michael Rozenes, QC
Ms Christine Harvey, Deputy Secretary-General, Law Council
Mr James Greentree-White, Legal Officer, Law Council

National Crime Authority:
Mr Gary Crooke, QC, Chairperson
Mr Marshall Irwin, Member
Mr Mac Boulton, General Counsel

New South Wales Council for Civil Liberties:
Mr Michael Kennedy, Committee Member
Mr Cameron Murphy, President

Office of the Commonwealth Ombudsman:
Mr Philip Moss, Senior Assistant Ombudsman
Mr Allan Overton, Director (Legal)