STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

NATIONAL CRIME AUTHORITY (STATE PROVISIONS) AMENDMENT BILL 2002

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON WEDNESDAY, 25 SEPTEMBER 2002
HEARING No 1

Members

Hon Adele Farina (Chairman)
Hon Paddy Embry
Hon Simon O'Brien

Committee met at 11.35 am

BARROW, MS ROBYN
Principal Policy Adviser to the
Minister for Police and Emergency Services,
examined:

ATHERTON, MR TIM
Assistant Commissioner (Metropolitan Region),
Western Australia Police Service,
examined:

BENNETT, MR JAMES
Member, National Crime Authority
examined:

The CHAIRMAN: On behalf of the committee, I welcome you to the meeting. You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIRMAN: These proceedings are to be recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to talk into them. Please also ensure that you do not cover them with papers or make noise near them, and try to speak in turn. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. For your information, neither are present at the moment. Please note that until such time as a transcript of your public evidence is finalised it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and the material published or disclosed will not be subject to parliamentary privilege. Would any of you like to make an opening statement about the questions that were forwarded to you? We have a copy of your written replies, and Hon Paddy Embry and I have some questions about those replies. Is there an opening statement?

Mr Bennett: I have been caught by surprise. I am in Western Australia to conduct hearings, and learnt that the committee was sitting. I am taking this opportunity to address you. I have been shown the questions. I note that our general counsel, Mac Boulton, has provided a written response. He would have been fairly fulsome in addressing the issues that have been raised. I will do whatever I can to assist you with any further information you need.

Ms Barrow: The National Crime Authority (State Provisions) Amendment Bill, which is in the upper House and which we are considering here, is national legislation. We are asking for amendments to the legislation to provide national consistency, to compel people appearing before a hearing to give evidence, and to increase the fines that are imposed on people who do not cooperate with a National Crime Authority hearing.

Mr Atherton: I can give some operational focus. The relationship between the Western Australia Police Service and the NCA has for a number of years been very effective, and should not be

underestimated. The WA Police Service supports these legislative changes. They have been brought about because of problems in both this and other jurisdictions whereby well-advised witnesses have frustrated a hearings process that is established as a result of the uncovering of evidence in relation to high-level organised crime. These people have exploited loopholes in the legislation and the process. They have manipulated the process by either failing to answer questions or claiming self-incrimination. The hearings process must then be terminated and the matters sent to another jurisdictional court for determination. In some cases this has resulted in delays of some years, by which time the trail of the operation being undertaken has gone very cold. These amendments simply reflect the legislative changes made to the commonwealth legislation. In fact, in laymen's terms, all that has happened is the word "Commonwealth" has been removed and "State" substituted. I have only recently rotated from the position Assistant Commissioner (Crime Investigation Support). I worked with the NCA in dealing with high-level organised crime. From my point of view, these legislative changes are very necessary for the hearings process that the NCA quite often undertakes on our behalf to be effective.

The CHAIRMAN: The assistant commissioner made reference to the fact that there are sometimes very lengthy delays when someone claims "reasonable excuse". That point is drawn out in the answers that have been provided. How frequently does that occur? Has it been the exception to the rule, and what evidence can you provide to substantiate that as a real concern and problem?

Mr Bennett: I will provide my experiences as a member of the authority conducting hearings. If it would assist you in considering this proposition, I will draw upon our policy people to extract those matters for which there is a lot of empirical evidence. The most obvious example that comes to mind is a matter that arose in Western Australia. I will not provide names or operational details. In essence, a matter was being pursued, under, as I recall, an earlier version of the commonwealth legislation. I was not the sitting member; it occurred before another member and prior to my appointment. The presiding member required the witness to answer a question, and he refused. A process was followed. I am instructed that it took close to two-and-a-half to three years before the procedures had been completed and he was required to reappear before the member. By that time, the trail had well and truly gone cold. A similar example occurred in New South Wales. A witness refused to answer a question and went overseas. That matter is now three years old. It finally came to a resolution through the Federal Court earlier this year. However, the matter has reached the point at which the trail is well and truly cold. Other priorities have overtaken that matter, and the opportunity to deal with it has been well and truly lost. Those are but two examples.

The CHAIRMAN: What is the cause of the delay? Is it a problem with a bottleneck in the other courts?

Mr Bennett: The delay is occasioned from a multitude of causes. People who were called before the National Crime Authority under the older legislation and who wanted to disrupt our processes - they did not want to cooperate and wanted to delay the investigation - used whatever remedies, lawful or otherwise, they could pursue. They had statutory rights to review a determination. Under the old legislation, if someone refused to answer a question and used a reasonable excuse, I would have been called upon to determine whether that excuse was reasonable. If I came to the conclusion that the person did not have a reasonable excuse and that he would be required to answer the question, I could not proceed with the hearing until he had had an opportunity to have that decision reviewed by the Federal Court. That in itself involves time through having the proceedings brought on and finding a place within the Federal Court system to get the matter heard. Rights of appeal are available from that through to the Full Bench of the Federal Court. There is a reported case in which the matter was taken to the High Court to test the issue. It was a hollow victory when the ultimate judicial body ruled in our favour. We sometimes have to go back three or more years to start the job again.

The CHAIRMAN: Are those examples the exception rather than the rule; and if so, why should we amend the legislation to cater for the extreme case?

Mr Bennett: Our work is the exception to the rule. When the National Crime Authority makes use of these coercive powers, it does so in respect of those persons who are engaged in complex national organised crime. Traditional methodologies are unable to address the threat to the community. The cases themselves are exceptional, and within those cases are people who are dedicated to the defeat of our endeavours. They will use whatever methods they have available to them.

Mr Atherton: Quite often the people who are more highly organised have access to advice about the types of ways they can frustrate the process. They are highly likely to use them. They might be the exception to the rule, but the damage that can be done by frustrating the process is often extensive.

The CHAIRMAN: Is there not some other means by which you can achieve that same goal which does not infringe on the rights of these people who could legitimately make use of the reasonable excuse defence as it currently stands in the State?

Mr Bennett: It is not really a defence under either the existing or former legislation. Determining whether there is a reasonable excuse or whether a prosecution will proceed is an administrative issue. If the courts say that the excuse was not reasonable and that the determination by the member or chairperson to require the witness to answer a question was proper, and the person continues to refuse to answer the question, a prosecution might follow. Forgive me for not being completely au fait with your legislation as I am an east coaster, but I note that in Western Australia the defences that are available to persons who cannot for whatever reason comply with what might be demanded of them have been codified.

The CHAIRMAN: They are very limited and restricted defences, whereas "reasonable excuse" would provide a much wider scope.

Mr Bennett: That is an administrative process that occurs prior to your codified defences, which are really a reflection of common law and are statutory in the east coast.

Mr Atherton: That is an important point. I draw the committee's attention to the explanation in point 1.1 of the written answers, which points out that NCA hearings are an administrative and investigative process and not a prosecutorial process. A person is not on trial. The answers he gives only enable the NCA to conduct its investigation. If there is any subsequent prosecution, the person charged with the offence has the normal defences at law available to him.

The CHAIRMAN: It might be too late by then.

Mr Atherton: The hearings only facilitate the NCA investigating the relevant activity that is subject to the reference it is working on. It is important to divorce the normal defences from the hearings processes.

Hon PADDY EMBRY: The problem with the word "reasonable" is that we all think we are reasonable. I might have a different opinion. Who decides what is "reasonable"? That would be an easy question to answer. What would happen if someone went overseas on holiday and an airline strike or something occurred so that he had no reasonable means of returning to the country?

The CHAIRMAN: He had intended to be back in time for the hearing.

Hon PADDY EMBRY: Would that be considered reasonable? Another example that has been suggested was a person who had booked his holiday many months earlier. His vacation had been paid for. He could be a reasonable person but has no means of getting his fares refunded by the airline. Would that be considered a reasonable excuse or would the fares be refunded?

The CHAIRMAN: The question is not whether that would be a reasonable excuse. It is more than likely that the first example would be considered a reasonable excuse. The problem is that once the

provision for a reasonable excuse is removed, there is no avenue for the person to present a defence under the code.

Mr Bennett: I strenuously disagree with that.

The CHAIRMAN: What defence could that person use under the code? The code provides no defence. It would not be an emergency or duress.

Mr Bennett: I draw upon an example. A specific individual was issued with a summons to appear before me here. He had booked a holiday with his family on the east coast. He gave notice of that via a facsimile transmission after he had departed for the east coast. The hearing had been set for a Thursday and he could not be back before the Saturday without losing the benefit of the cheap air fare or whatever. My view was that it would have been completely unreasonable to expect him to fly home and leave his family over there. I granted his application to have the matter stand over. I could have taken a more robust view and said that he should come back and that I was not concerned about his personal circumstances. In that case, he could have said that he could not return because it would be too much of a burden but that he was available on the following Monday or Tuesday. In those circumstances we would have been hard-pressed to prosecute him for failing to comply with the summons.

The CHAIRMAN: The proposed Bill removes that discretion and makes it a crime for a person to not appear in response to a summons. The hearing officer or member does not have a discretion. It is being removed.

Mr Bennett: You say that I do not have a discretion to stand the matter over once I issue a summons. Under the legislation, I regulate the proceedings as I see fit to discharge the duties and functions that I must perform. I could not imagine any member of the authority requiring that man to return and, knowing that he was not coming, going to the expense of engaging Auscript Pty Ltd, a lawyer to represent the authority and the investigative staff to provide instructions for the purpose of the hearing. We compel him to be there in the hope that he will turn up and, if he does not, we start a prosecution.

The CHAIRMAN: Is it your evidence that a discretion continues to apply? We have legal advice that that is not the case.

Mr Bennett: I have the power to regulate the proceedings as I see fit. I see that as extending to the granting of an application for an adjournment.

The CHAIRMAN: The amendments make non-appearance in response to a summons a crime.

Mr Bennett: Yes. If somebody does not turn up and does not make an application for an adjournment, that may be the case. However, if somebody gives notice that he will have difficulty being there and says that we should adjourn the matter, and it seems to me to be appropriate to grant that adjournment or reappoint the hearing, I do not see that as the person committing an offence. It is within my scope as the presiding member to regulate those proceedings.

Mr Atherton: Under state jurisdiction, if a person fails to answer a summons to appear in a state court, the judge or magistrate can issue a warrant for his immediate arrest. I do not see the difference. If the person provides the court with an explanation for why he could not attend, in most, if not all, cases the judge or magistrate concerned will approve an amended appearance date.

The CHAIRMAN: The concern with the amendments is that the reasonable excuse provision will be removed, and the discretion relates only to defences under the Criminal Code, which are far more restricted in their application. If a person does not fit into one of those categories, he might not be able to present a defence and automatically be found guilty of having failed to appear.

Mr Bennett: With respect, a person has committed the prima facie offence of not responding to the summons when required to do so if he has not given any notice to the authority that he cannot appear for whatever reason. If he does not turn up and the offence has prima facie been committed,

he then has the opportunity to advance his defences or, where the Crown bears the onus of proof, put the Crown to proof upon those defences that are provided in this State's Criminal Code or, in the absence of that, under common law. As I understand it, all those defences have been caught by the code. That provides the person - generically speaking - with the opportunity to say that he could not be there for various reasons. A person does not commit an offence by not telling us that he cannot be there. He commits an offence by not responding to the summons. The defences that are provided in the Criminal Code are then available to him. It would seem that if the defences are not adequate to do justice in the prosecution of a person who did not turn up, your defences as codified are not capable of justice in any criminal prosecution. The defences have been codified to address those circumstances in which a person cannot turn up to a hearing because he is being held prisoner or the airline has failed to provide an aircraft - any number of reasons that would have made it impossible for the person to be there on the day. He might have been sick and could not be there. All those opportunities are available. The reasonable excuse in the legislation with which the committee is dealing is an administrative matter. As sitting members, we must determine whether the person has a reasonable excuse for failing to comply with whatever the requirement might be. If we come to the conclusion that he has no reasonable excuse, that is not the end of the matter. The person then has the opportunity to go through the administrative appeal process to have our decision reviewed.

The CHAIRMAN: Does that still exist?

Mr Bennett: It exists under your legislation but not in the Commonwealth and Tasmania. I am not sure about Victoria.

The CHAIRMAN: My understanding is that in this State there is no right of appeal against an administrative decision. That is in part where the concern lies. There are two concerns: first, whether once the amendments go through, there remains a discretion to exercise -

Mr Bennett: That is so, and that is so in the Commonwealth. Going back to the example, if a person came to me and said that he cannot be there on the day because he wants to see his bank manager, I would say that the contingencies of the operation, the imperatives we have to address and the obligations I have to this investigation require that the hearing proceed at that time, that what the person has advanced is not sufficient to justify me adjourning the hearing, and that he is required to attend. If he did not attend and did not respond to the summons, he would have committed an offence prima facie. He can be prosecuted for that offence. Of course, that goes through to the Director of Public Prosecutions. If he is prosecuted for failing to respond to or comply with the requirement, the defences provided in the Criminal Code are available to him. Under the existing legislation in this State and the former legislation in the Commonwealth, if the person refused to answer a question, I would determine whether the person had a reasonable excuse for failing to do so. This happened to me a number of times under the old structure. If I came to the conclusion that the person did not have a reasonable excuse, he would be given a notice. He would then be able to pursue whatever mechanisms he wants to pursue or that are available to him under the legislation until the matter is ultimately determined by the Federal Court in the commonwealth sphere. After he has exhausted his rights of appeal against those decisions, we proceed to reassemble the hearing. Again, if it is three years down the track, the utility of that has been lost.

The CHAIRMAN: What about circumstances in which the person is not able to provide you with advance notice that he cannot appear? For example, a flight may have been delayed. If that occurred at midnight and the hearing is at nine o'clock the following morning, there would be no way of contacting anyone at the offices. Technically he would be advising you at the time of or after the hearing.

[12.00 pm]

Mr Bennett: That has happened to me on several occasions in Sydney. It would be ridiculous for me to tell the lawyers to go to the Director of Public Prosecutions and get a warrant issued for their arrest or whatever. That would be crazy because there is no way that any court in any part of this country would ever proceed to a conviction upon any such allegation.

The CHAIRMAN: The question arises whether you can exercise discretion in those circumstances. We have been given advice that under the current wording of the proposed legislation, that discretion is being removed.

Mr Bennett: I would be interested to see that advice. The fact that somebody does not comply with a summons might provide prima-facie evidence of an offence, but there is no obligation on any law enforcement official in this country that I am aware of that requires them to proceed to a prosecution. Any constable of police and I have the discretion to decide whether to pursue a prosecution. If there were not that discretion, the system would not work. I would be interested to see that advice.

The CHAIRMAN: We will move on because you have made your opinion on this matter clear. I have some questions arising from the answers that have been provided. What would be the consequences for Western Australia if it did not enact the Bill?

Mr Bennett: I can draw on another anecdote. Prior to the Tasmanian legislation being amended, and following the amendments to the Tasmanian legislation, I was engaged in an operation there on abalone poaching by organised crime. The misconduct extended beyond the mere poaching of the fish to fraud on the Commonwealth through the evasion of taxation. We proceeded with two terms of reference: swordfish and oakum reference. The hearings were conducted under both state and commonwealth legislation depending upon the topic that was being pursued in the course of the hearing. I acted under the state legislation for matters that were being pursued strictly under the oakum reference, and I acted under the commonwealth legislation when I pursued matters under the swordfish reference. There was a dichotomy whereby I acted between the broader powers of the commonwealth Act and the limited powers, such as Western Australia now has, under the state Act. It took some skill to negotiate the reef. However, it worked because, essentially, most of the work was ultimately pursued under the swordfish reference. The Act was later amended, so it ultimately did not matter because the state legislation mirrored the federal Act.

To not amend the legislation increases the burden. It gives the people who are the subject of these investigations greater scope to interdict our efforts. Generally, not all the people who come before the hearings are the targets of an investigation; a significant number of them are witnesses who come forward with information and evidence on some very important and serious matters. When they come to us, under the commonwealth legislation, my standing practice is to advise them of their rights and obligations at the beginning of the hearing whether or not they are represented. I advise them that they may invoke the privilege against self-incrimination if they fear that an answer to a question or a document or thing required of them may tend to incriminate them or render them liable to suffer a penalty. I explain to them that they do not have to be certain that it is so or be of the view that it is probably so, but if they have that fear, they are entitled to make that claim. Within the power I have to regulate those proceedings, if they make the claim, I do not require them to make the claim in response to each question. They make the claim in relation to their evidence and they thereby invoke the protection against the use of the answers and the document or thing that they produced in the course of the hearing or that is produced through them to me in the course of the hearing. They then have full scope to give evidence upon these matters that enable us to get to the truth.

We exist to not only catch crooks, but also consider a raft of matters including law reform, administrative arrangements that could be improved, to identify where evidence might be located and, depending on the nature of the matter, how people might investigate further to bring the matter to a stage of readiness for the DPP where criminality is uncovered, or it might be disseminated to an

appropriate law enforcement agency to continue that side of the work using their traditional methods without us having to use our coercive powers. We are not there to get people that we think are crooks from whom we want to gain evidence in order to deal with them; we perform a broader role. We have people before us who come in under compulsion, but are thereby protected, because they have the protection from self-incrimination when they make a claim. You looked at me strangely when I said that, Madam Chairman.

The CHAIRMAN: We will get to that matter later.

Mr Bennett: They have that protection if they have done something inadvertently or something else along the way that might be tangentially relevant to the investigation. They also have protection that they might not otherwise have if they simply make a statement to an investigator with whom they might feel inhibited from being fully frank in their disclosures because of the consequences that could flow to them in their employment or another context.

The CHAIRMAN: Is the answer to my question that no severe consequences, other than administrative difficulties, would flow if Western Australia did not enact the legislation?

Mr Bennett: The consequences would flow to the Western Australian community because organised crime is actively engaged in its endeavours in this State, just as it is in all States of the Commonwealth. Since the introduction of the commonwealth legislation, the results of our work to address organised criminal activity at the commonwealth level have increased exponentially. The denial of these amendments will limit the opportunity to pursue the same outcomes within this jurisdiction.

Mr Atherton: We have some concerns about Western Australian legislation not being consistent with the commonwealth legislation for the reasons about which Jim has spoken. There is no doubt that criminal groups have manipulated the process to escape prosecution. If we did not fall into line with the Commonwealth and the other States' legislation in this regard, it would be a problem. Something else that has not been addressed in the committee's questions, but which is contained in the amendments, is the issue of penalties.

The CHAIRMAN: We do not have a problem with the fines and penalties whereby someone is found guilty of those offences. That is not an issue for us.

Mr Atherton: It is not just that, there are also some penalties in relation to the failure to answer questions. I do not want to be specific, but recently, some high-level criminals have been fined substantial amounts of money, although they have not been fined any more than the maximum penalties that currently exist in the Western Australian legislation. In one case, a person opened his wallet in the courtroom, pulled out $2 500 and asked where he could pay the fine. That is the type of thing that we are up against.

The CHAIRMAN: We do not have an issue with the increase in the fines.

Mr Atherton: I would also like to refer to the point Jim made about the hearings process being relevant to people who are not necessarily the targets of a certain operation, but who are on the periphery. Our experience in a number of recent major investigations that we have conducted when we asked the National Crime Authority to assist us with hearings, is that the primary evidence that has enabled us to proceed to a successful conclusion of the investigation has come from witnesses who might not usually cooperate with the police. That is a very important point.

The CHAIRMAN: If the Bill is enacted and in the future Western Australia determines that it wants to opt out of the scheme for whatever reason, what power or ability does the State have to opt out of the scheme after it has signed up to it?

Mr Bennett: That is a political issue -

The CHAIRMAN: It is more than just a political issue; it is also a legislative issue.

Mr Bennett: We would not be able to assist you with that matter.

The CHAIRMAN: Perhaps Robyn could provide us with a response with regard to the memorandum of understanding and the agreement that has been entered into by the state and commonwealth ministers. What power exists under that memorandum of understanding for States to opt out or to vary the terms of these amendments if, in the future, they consider that these amendments are not achieving what they set out to achieve?

Ms Barrow: We do not know whether the memorandum of understanding exists; we have not been able to locate it anywhere in Australia despite an extensive search for it. No-one has been able to identify an official document called a memorandum of understanding. The ministers agreed that this was the way to go. Template commonwealth legislation was drawn up, the States adopted the legislation and the Commonwealth subsequently amended the States' legislation after discussions with the state ministers and commissioners of police. The States are progressively adopting the legislation. It is up to the States whether they adopt the amendments to the legislation. It is also up to Western Australia whether it wishes to repeal a piece of legislation. I understand that nothing can bind a State and the Commonwealth to this legislative program. The State could repeal any piece of legislation at any time - even legislation that has impact on state-commonwealth agreements. As the committee is aware, negotiations are ongoing with regard to the Australian Crime Commission, which will eventually replace the NCA. Amendments will be made to the legislation; however, the time frames are not clear as to when that legislation will be available. The state ministers are still negotiating with the federal Attorney General. It is not considered desirable to amend the legislation at this time until the Australian Crime Commission legislation is in place. As the committee is aware, the NCA is currently conducting hearings in Western Australia. We do not wish to impede those hearings.

Mr Atherton: The administrative arrangements that exist between the Western Australian police and the NCA are all MOUs and can be cancelled or renegotiated at any time.

Ms Barrow: The MOUs are not between the State and the Commonwealth; they apply at a jurisdictional level.

The CHAIRMAN: With uniform legislation and national schemes, it is usual that state and federal ministers enter into a memorandum of understanding or a similar document that sets out the terms of the scheme and also provides the provisions for the review of the scheme and the roles of the parties with regard to that review. It also sets out circumstances whereby parties can opt out of the scheme - although they do not always cover that. I am concerned that we are proceeding down a path of uniform legislation without such a document being in place or being able to be located so that we can decide whether the legislative scheme that is being put in place reflects the ministerial understanding that was entered into.

Ms Barrow: We are still endeavouring to find the memorandum of understanding. We are searching national archives. This is not new legislation; it is old legislation, which is the problem.

The CHAIRMAN: That is standard for national schemes.

Ms Barrow: The Australian Crime Commission, the State and the Commonwealth will have made agreements. Currently, negotiations are continuing with the State and the Commonwealth about the ACC legislation.

The CHAIRMAN: I will turn to the answers that have been provided. I refer to the explanation provided at chapter 1.1. The second sentence of the second paragraph states that a suspect who is likely to be charged with an offence cannot be compelled to give evidence at an NCA hearing as a suspect and have the evidence he or she provides used against him or her in criminal proceedings. Could a suspect be interviewed by the NCA on the basis that that person was not a suspect at the time, but immediately after the interview becomes a suspect, which is a fairly standard police procedure. The police often conduct an interview, get the information that they need and then charge the suspect.

Mr Bennett: There is a distinction between the hearing and the interview process. The Chairman has accurately described the process if investigators were to interview somebody in the traditional way; that is, the police would adopt the time-honoured formula and advise the person of his right to be silent. The proceeding would be properly recorded in whatever electronic fashion was available at the time. The hearing process is a different function. In essence, it sits in the same way as a Magistrates Court; it is a formal process. The witnesses are sworn. We employ the formality of the courtroom to ensure that all of us continue to recognise the solemnity of the occasion and the significance of the oath or the affirmation that has been administered to the witness.

The CHAIRMAN: Is the hearing the investigatory function?

Mr Bennett: It is part of it. By way of analogy, I will draw on the example of a royal commission. A royal commission has a formal hearing processes, as does the NCA, in an investigation. That is one part - an integral part - of the investigatory process. If there is sufficient evidence to justify charging an identified target, he would be apprehended and charged. The hearing program would run in parallel with that process to explore and test evidence and identify witnesses. It would cover the full scope of evidence witnesses have and the information they were able to give and it would identify other sources of evidence through that process. There is a difference between the hearings and the interview process leading to somebody being arrested and charged. They are an integral part, but one does not necessarily flow into the other in the sequences that the Chairman described. Have I confused you?

The CHAIRMAN: Are the hearings aimed at witnesses or defendants?

Mr Bennett: A person who is a target could be called in to give evidence in a hearing. However, predominantly they are witnesses who will have information or evidence to give in relation to the investigation that is being pursued. The paragraph to which the Chairman referred, deals with the hearing process as opposed to the interview process. If people come into a hearing as witnesses and - this happens often - ultimately have a greater connection to the criminality than was first anticipated, they honour the oath or affirmation that they have submitted and they give truthful evidence, and ultimately, they implicate themselves in the criminality that is the subject of the investigation. Currently, a matter is occurring in Sydney whereby individuals within a structure, or an entity - I will not describe it further than that - were seen to be witnesses through whom access to records was going to be explored. Ultimately, they submitted to the oath and implicated themselves in these schemes whereby that information was being provided to the core criminals who exploited it. That was one of our very successful operations that made use of the legislation that we have been given through the commonwealth Act. Those people do not suffer the consequences of those answers being used against them in any prosecution of them.

The CHAIRMAN: Is it not the case that the Bill abolishes the derivative-use immunity; therefore, that information could be used to identify other sources by which that same or similar evidence could be obtained?

Mr Bennett: No, there is a distinction. Derivative evidence; that is, evidence that is derived as a consequence of information provided by a witness, is not another version of whatever confession, admission or statement has been made by the witness. It is the identification of evidence from some other source that is located more expeditiously as a consequence of the hearing process. I will refer to a purely hypothetical example of a person from the Roads and Traffic Authority who had been providing details from the repository of data held by the RTA. The person might have confessed to that in the hearing and identified those individuals involved. The particulars that the individuals had accessed could be identified by reference to the individuals to whom they related. However, rather than have the staff of the RTA go through a long process of checking computers to try to find all accesses by the witness and then having to sift through information to find out which of those accesses might have been relevant to the criminality, the evidence given by the witness that acknowledges what he or she had done provides a fast track to that material. That material would

be harvested, but it would otherwise be time consuming and expensive and would consume resources we do not have to waste. The opportunity that this legislation would provide would get us to that material much quicker. Witnesses will never be obliged to convict themselves out of their own mouths. The advice I give to all witnesses -

The CHAIRMAN: I refer to a witness who is giving evidence who admits to being present during and participating in an offence. That evidence cannot be used against him to incriminate him. However, he then gives evidence that a third person was present and gives the NCA the contact details of that third person. Could the evidence of the third person be used to convict the first person who gave evidence?

Mr Bennett: That third person would become a witness to attest to those facts. I have no difficulty with that whatsoever. We must face reality. We are not here to protect perpetrators from the consequences of their misconduct; we are here to get to the truth and at the same time protect the rights and liberties of all of us in the community. No-one will be obliged to convict himself out of his own mouth. When I have a witness -

The CHAIRMAN: I would argue that they are in that circumstance.

Mr Bennett: With respect, that is wrong, and the High Court says differently. I tell witnesses in the hearing room that they have rights and obligations. They are obliged to answer questions I require them to answer and they are obliged to produce documents or things when I require them to produce them; they have no relief from those obligations. However, if in answer to a question, a document or thing might tend to incriminate them to render them liable to penalty according to their perception, they are entitled to claim privilege against self-incrimination. When they do that, they are protected against the use of that answer or the use of the document or thing. It is not admissible against them in any proceedings for a criminal offence or for the imposition of a penalty. I religiously tell that to every witness the minute they get into the witness box. I do not require them to make a claim in respect of each and every question. I do not require them to have the experience or training of a member of the Bar to determine whether an answer might incriminate them. The power I have to regulate proceedings enables me to say to witnesses that, when they make that claim, they have that protection and they may proceed with the comfort of knowing that their answers will not be tendered again them in any prosecution or proceedings for the imposition of a penalty. However, that is subject to this: if they give evidence that is false or misleading in a material particular, the evidence will be admissible against them in a prosecution for the offence of having given false evidence. I tell witnesses that and remind them of it each day they come before me. Sometimes people say that they have nothing to hide and they want to speak. In that case, I urge them to make the claim if they think there is a mere risk. As a statutory right, they are entitled to do that. I wrote the paper that provides the opening remarks for the presiding member to address each witness. That is the policy that we apply in our hearings.

The CHAIRMAN: Civil libertarians would argue that you are attacking the pillars of the justice system by abolishing the right to silence and then abolishing the derivative-use immunity.

Mr Bennett: That is the perception of some members of the community. The right to silence is a narrow concept. Somebody else tried to extend the definition to mean that it prevented people from even opening their mouths so that a person's voice could not be heard. The High Court has put that issue to rest and has confined the right to silence to where it should be. No-one should be obliged to convict himself out of his own mouth. If people want to confess, they are perfectly entitled to do so, but they should not be obliged to do so. The right to silence is confined to that narrow concept. I do not believe that we are destroying the pillars upon which the criminal justice system rests. We are dealing with organised criminals. We are not dealing with mums and dads or somebody who had an unfortunate experience on the way home and was involved in a fatal accident; we are dealing with organised criminals who make it their business to attack our society to advance their interests at the expense of ours. We are not playing a game of chess; we are fighting for our society.

The criminals at this level where this legislation is focused have to be controlled. This legislation protects the rights and liberties of the community, but allows law enforcement to get to those people who are attacking us. That is where we should start. We are not taking away the civil liberties of you, me or anyone else in this room. We are not taking away the civil liberties of the criminals who are the targets of our investigations - we are not. They do not have to convict themselves out of their own mouths. They are obliged to tell us in a hearing room what they know of these matters. If they choose not to, they face the consequences of failing to answer the questions, but that is their decision, just as it is their decision to engage in the lifestyle that they have.

I do not speak only from the perspective of a member of the National Crime Authority. When I first started my career, I was a police officer. I spent 16 years at the private bar appearing as defence counsel in a multitude of criminal trials. I did not appear for organised crime; I appeared for the mums and dads who got into strife once in their lives. I have appeared before the Independent Commission Against Corruption. I know how intrusive these powers are. I know how much of a burden it is for people who are not criminals to have their telephones intercepted and to be subjected to the types of proceedings over which I preside. I am well aware of people's rights, and the risks, the stresses and pressures that they face. That is why we have limitation. These coercive powers are not used for general investigative work; they are used for relevant criminal activity as defined in the National Crime Authority Act. It is focused and is needed to deal with complex national organised crime at the highest level. To deny this State the opportunity to adopt these amendments leaves Western Australia in a unique position. If the rest of the Commonwealth agrees to adopt these powers to deal with organised crime but Western Australia does not have these powers for state offences, it will provide a haven for organised crime to flourish.

[12.30 pm]

Hon PADDY EMBRY: What prevents those powers falling into the wrong hands? You have obviously made a very good case -

The CHAIRMAN: Perhaps it is not a question of those powers getting into the wrong hands but about their possible abuse.

Mr Bennett: The whole concept of our democracy rests upon the separation of powers. The National Crime Authority is part of the Executive Government. At present - I am not speaking about the proposed Australian crime commission and the legislation to create that body - the role of the National Crime Authority is to investigate organised crime and look at administrative and law reform issues. They are the three broad functions we perform. When we prosecute someone, we go before a court. Ultimately, we have judicial review of all the actions we take. We do not grab somebody, charge him and deal with him through the investigative process; we are still subject to the review, test and examination of the judicial arm of the Government - the judges and the counsel who appear for the accused. We must still face those protections that are available to the community.

Mr Atherton: From a procedural point of view, the activity of the NCA is controlled by the National Crime Authority Intergovernmental Committee, which comprises the relevant state and commonwealth ministers. That committee provides advice and direction to the NCA about the relevant criminal activity that the ministers wish, on behalf of their constituents, to target.

Mr Bennett: There is also a joint parliamentary committee. The review process for the National Crime Authority includes the Commonwealth Ombudsman, a joint parliamentary committee and the intergovernmental committee. I have appeared before Senate committees scrutinising Bills and funding and inquiring into the NCA and the legislation that has been enacted from time to time, such as that which enhanced the powers under the commonwealth legislation and the 2000 amendments to the Telecommunications (Interception) Act, which related to warrants. We are tested backwards and forwards. Independent auditors go through our records to make sure that our

telecommunication interception warrants are properly managed and that phones that should not be monitored are not being monitored. A raft of bodies scrutinise the NCA.

Hon PADDY EMBRY: Is it correct that the sort of crime to which you are alluding is becoming more international, with possible liaisons between countries? Will this legislation aid our investigative services in bringing these people to justice?

Mr Bennett: It will.

Hon PADDY EMBRY: Will that process be impeded if this legislation is not passed?

Mr Bennett: The simple answer to the question is yes; the Bill will enhance the NCA's capability to deal with these organised criminals. If the legislation is not passed, what we can do will be inhibited. Essentially, using the commonwealth references and the budget that we have, we try to be as effective as possible in dealing with organised criminal activity in this State. If we are limited to the existing legislation and state offences and references without the federal aspect, we will be encumbered. Organised crime is an economic phenomena. It is a business. Those people are out there to make a lot of money. They are well resourced and monitor what is going on around the country. They know where are the best opportunities to make a dollar. If they think Western Australia has the softest laws, that is where they are likely to be.

Mr Atherton: With the benefit of nearly five years experience as the head of the crime command, I can say that Western Australia is certainly not isolated. There is no doubt that the highly organised criminal groups in Western Australia have links to those in other States and overseas, particularly for drug importation. Thankfully, we do not have a huge state-based drug manufacturing industry. Many of our better-known illicit drugs come from the eastern States, and are generally sourced from overseas. There are definite links across the jurisdictions in this country and very definite links to international drug suppliers.

Hon PADDY EMBRY: Thank you.

The CHAIRMAN: I draw your attention to 1.3(c) of the written answers, which says that under the proposed legislation the responsibility to decide on the appropriateness of any defence claimed lies with the hearing officer, chairperson or member of the authority conducting the hearing. Under point (d) it is stated that there is no right of appeal under the proposed legislation as it is intended to repeal section 21 of the National Crime Authority (State Provisions) Act, which provides for the appeal process. Would there be any problem if the Western Australian legislation retained a right of appeal?

Mr Bennett: I have not spoken to either Mac Boulton or the minister, under whose hand this document appears, about this. I found 1.3(c) a little confusing. It refers to the appropriateness of any defence claimed, but reasonable excuse is not a defence. If a reasonable excuse is obviated, it is not a matter for the hearing officer, chairperson or member of the authority; it is a matter for the Director of Public Prosecutions.

The CHAIRMAN: That is what I thought, which is what gave rise to the questions I asked earlier. It seems clear from these answers that the discretion of a hearing officer to lay the charge is removed.

Mr Bennett: That is slightly different. There are duties that we must perform. One might say that if somebody is in blatant disregard of his obligation to respond to a summons and there is no explanation given either before, after or at the time of the hearing, we have a duty to commence a prosecution in relation to that and that we would be acting improperly to not pursue that matter because it would disregard the Parliament's intention. That is different from the circumstance in which someone perceives he is unable to comply, and puts forward an explanation for not complying.

The CHAIRMAN: I would appreciate some advice from your legal advisers about whether that discretion still exists.

Mr Atherton: Chair, I draw your attention to the second paragraph of 1.3(c), which states -

> If the person has a genuine reason for not being able to comply with any requirements put on them by the NCA then it would not be in the interests of justice to try and bring a prosecution. The prosecution would still have to prove the guilty intent of the person.

The CHAIRMAN: That does not really answer the question either.

Mr Bennett: You are asking about the discretion that a law enforcement officer, whether he is a constable or someone in a higher position, has to take a particular course following the detection of an offence. There is a discretion. I understand that that is recognised both administratively and legally. It may be that the proper exercise of that discretion is to proceed and not to disregard the misconduct. Paragraph (c) might be better expressed if the words "appropriateness of any defence" were removed because they imply that the hearing officer, chairperson or member of the authority has some role in assessing the defence a person might have to a prosecution. He does not. He has a discretion to determine whether it is appropriate to initiate or direct the commencement of a prosecution. The appropriateness of a defence is really a matter for assessment by the Director of Public Prosecutions and, ultimately, the tribunal of fact before which the matter is brought for final determination. Paragraph (c) might have been better expressed by embracing that which is contained in the last paragraph of 1.3(d), which Tim brought to your attention. That paragraph fairly expresses the position as I understand and apply it.

The CHAIRMAN: If the Western Australian legislation were to include a right of appeal with respect to a decision made to -

Mr Bennett: Appeal from what?

Mr Atherton: About the reasonableness of the excuse?

The CHAIRMAN: Yes.

Mr Atherton: You are suggesting that we should not change the legislation as it now stands. I thought Jim had explained that that process is exploited by people to frustrate the investigation the NCA is conducting. You would leave a loophole that you could drive a bus through.

Mr Bennett: You are suggesting that the amendments as proposed be supplemented with some appeal mechanism. There is really nothing to appeal against. You are asking for an appeal against the exercise of the discretion to initiate or direct the initiation of a prosecution. That process is already available. If, for example, my witness who is on holidays said that he could not attend the hearing because he was in Queensland and unable to return, and I said that that was his bad luck and that I was going to start a prosecution, he would face the judicial process that begins with the Director of Public Prosecutions, who must, through his officers, assess - I presume he has responsibility for matters at all levels in this State - whether this matter ought to proceed. A tribunal will at the first instance determine whether there has been an offence and whether any available defence has been made out. That tribunal's decision can be tested in the appeal process.

The CHAIRMAN: Would the authority continue to have the opportunity to summons that person to a hearing?

Mr Bennett: Yes.

The CHAIRMAN: Would there be a right of appeal to a higher court against a judicial decision that there was not a defence under the Criminal Code for his non-compliance ?

Mr Bennett: That would be through the normal criminal justice process. The case would be heard by a magistrate or judge and jury in the first instance and then in the Court of Criminal Appeal. The judicial process varies slightly from State to State. In New South Wales, if it were a summary

offence and the magistrate determined that there was no reasonable excuse, the person would have two avenues of appeal: first, to the Supreme Court to have a question of law resolved; and second, to the District Court to have a re-hearing on the merits. If the judge got some issue of law wrong, the person could pursue remedies through the appellate courts. I noticed the other day that legislation has been passed to do away with preliminary hearings in this State. If it were an indictable matter, there would be a trial before a judge and jury, and appellate proceedings would be available if any errors were made in the course of those proceedings. Once we get past the administrative decision that sufficient evidence exists for a prosecution and move into criminal justice proceedings, the normal protections are available to ensure that justice is achieved.

The CHAIRMAN: What would happen if someone refused to answer a question even though he had been told that the reasonable excuse defence was no longer available to him?

Mr Bennett: The procedure I follow when someone does not answer a question is to make sure that the question is properly formulated and that it is material to the investigation. For example, I could not pursue you in this environment about what you had for dinner last night. The question must be material to the investigation, and it must be properly formulated to make sure that it is not duplicitous or in any way unfair. I would carefully read the question to the witness and require him to answer it. If he refused, the offence would be complete. The transcript would be prepared, the matter would be referred to the Director of Public Prosecutions and, generally, proceedings would commence by way of summons for the offence of failing to answer a question.

[2.45 pm]

The CHAIRMAN: In those circumstances, would the hearings have to be stopped pending the outcome?

Mr Bennett: Sensibly, it would because I could ask a witness questions all day and each time the offence would be complete if he did not answer them; however, that would be silly. If the witness indicated an intention not to answer questions, that would be the end of the hearing and he would be prosecuted. There is nothing more than a formal requirement that they answer the question.

Mr Atherton: I refer to the written response to questions asked by the committee on 12 September. If the word "defence" were replaced by the word "excuse", point 1.3(c) would be made a lot clearer. The preceding paragraph states -

> . . . where a person claims a reasonable excuse for non compliance . . . If the member holding the hearing then decides that the excuse is unreasonable then the person claiming the reasonable excuse has a right of appeal.

That is, under the current legislation. By replacing the word "defence" with "excuse", under the proposed legislation, paragraph (c) would read, the responsibility to decide on the appropriateness of any "excuse" claimed lies with the hearing officer. Paragraph (d) says that there is no appeal for their determination. It states -

> . . . in the event that they are considered unfounded there will be no appeal process. It will not be for the NCA to fine the offending person, a prosecution will have to be brought and the court would then decide on the person's guilt. Obviously in reaching a verdict the court would have to consider any excuses proffered by the person at the time of the hearing.

A prosecution would not be unreasonably broad in circumstances where there was a reasonable excuse because a prosecution would not proceed. The Director of Public Prosecutions would exercise his discretion not to prosecute if a person had a reasonable explanation for not appearing at a hearing or refused to answer questions.

Mr Bennett: Our time and our resources are better spent on the pursuit of people who commit crimes, rather than chasing people because they could not get to a hearing because of other

pressures they were under. I cannot imagine ever prosecuting anybody for failing to turn up to a hearing because they had a genuine reason for not being there.

The CHAIRMAN: I have no doubt at all that you would do that. The question is whether others acting in your position would do the same thing. I refer to point 1.4, which refers to proposed section 16A of the National Crime Authority (State Provisions) Amendment Bill. This matter is also dealt with in section 16 of the National Crime Authority (State Provisions) Act. That proposed section refers to the presence of a person other than a member of the staff of the authority at a hearing. Although this explanation provides me with an answer, I am still none the wiser as to who this other person might be. I am curious about that because the proposed section refers to another police officer or member of the NCA's task force. However, proposed subsection (5) exempts those people because they are already allowed to be there under an earlier proposed subsection. I am still unclear as to who these other people are who might be present at a hearing.

Mr Bennett: Hearings are conducted in private. At the conclusion of a hearing, a non-publication order is made. If I believe that there is a risk to the safety or reputation of a person or if a person who has been or may be charged is at risk of his trial being prejudiced, I must make a non-publication order. That limits the number of persons to whom publication of the fact of the witness being there is given, and the witness's name of course, the evidence they give or any documents or things that were produced to me in the course of the hearing. Only those persons who are authorised by me may be present at the hearing. Essentially, the Act provides that members of the staff engaged in the investigation may be at the hearing. However, there are occasions when someone who is not a member of the staff of the authority can attend. A member of the staff of the authority extends to five categories: the lawyers who are appointed to assist, seconded police officers, people who are employed under a consultancy, employees of the Commonwealth and one other category that I cannot remember. They cannot be there unless they have a role to play or a legitimate interest in the investigation. Therefore, I must consider whether they should be there and I authorise accordingly. On some occasions, some people outside that category might be required to be there. For example, when I was appointed to this position, the Commonwealth retained me as a consultant for three weeks prior to the issue of the Governor General's minute. I was not engaged as a consultant by the chairman, but in another capacity. I was authorised to be present to watch the hearing process to familiarise myself with the procedures of the organisation.

I conducted a hearing in Sydney some weeks ago when the manager of the implementation team who was from the Australian Federal Police command engaged in the implementation program whereby the NCA will transition its powers to the Australia Crime Commission, attended our hearings. The manager was unfamiliar with our hearing processes, so I authorised his presence to observe the procedures. If somebody comes into the room who does not fall within the categories of the members of staff - in this instance, I am referring to Mr Simon Overland from the Australian Federal Police who was there to observe the proceedings - I am obliged to ask whether the witness wants to make a comment about that. If the witness says that he does not want anyone there other than the members from the five categories, I must consider whether I should act on it. I am not bound to follow that person's wishes; however, I am obliged to consider them.

The CHAIRMAN: Would there be any circumstances in which another witness could be present in the room?

Mr Bennett: There could be. There could be occasions when I would allow the representative of another person to be present in the room. Again, I would have to give the witness an opportunity to comment on that.

The CHAIRMAN: My concern is that under the legislation that "other person" has the right to examine and cross-examine the witness. When they have the right to be there, it follows that they have the right to examine or cross-examine the witness. If the witness objects, it is at the discretion of the hearing officer or a member of the authority to either pay heed to that objection or not.

Mr Bennett: Witnesses are only obliged to answer questions that I require them to answer. Unless I require them to answer a question that is put to them by another witness or another witness's representative, they are not obliged to answer the question.

The CHAIRMAN: That is not clear in the legislation.

Mr Bennett: It is when the legislation says -

The CHAIRMAN: You can conduct the hearings in any manner as you see fit. Is that a catch-all phrase?

Mr Bennett: The legislation says that witnesses must answer questions that I require them to answer and if they do not, they commit an offence. If I do not require them to answer a question, they have not done anything wrong.

The CHAIRMAN: What if they feel intimidated because of the presence of the other witness?

Mr Bennett: They would tell me and I would make a decision on what to do. That happened in Tasmania recently. A witness said that he was uncomfortable about giving evidence while certain people were in the room so I excluded them from the hearing room.

The CHAIRMAN: If you made the decision not to exclude them in view of that concern being raised, what recourse has that witness got to the decision you made and the position in which they had been placed, particularly if the presence of that other person in the room intimidates them to the point at which they provide an answer that they might not otherwise have provided?

Mr Bennett: That implies that I would not be doing my job if I allowed that to occur. That would not be allowed to occur. The purpose of holding a hearing to is elicit reliable information from the person in the witness box. There is no point getting unreliable information from a witness. If that were not achieved, the whole exercise would be futile.

The CHAIRMAN: In some cases, cultural issues could come into play. For example, if the witness is Aboriginal, for cultural reasons, he might not feel comfortable to raise an objection in the first place or, alternatively, not to pursue that objection if you are likely to dismiss it.

Mr Bennett: People are entitled to be legally represented in the hearing; some people choose not to be. My view is that the people should be represented in these hearings so that their rights are protected. That gives me comfort because if I err, I have somebody to correct me to make sure that I correct whatever error I made. If somebody is socially or culturally disadvantaged, I will not proceed with the hearing unless they have proper representation through a legal representative or a support person. In the two and a half years I have been doing this job, I have not come across that problem. Although these hearings are conducted in private, they are sound recorded so there is a complete record of everything that is said within the hearing room. That in itself provides a significant protection. There might be occasions for concern because someone will not be sensitive to the cultural norms of an individual who comes before him, but I have not experienced that in my time. If the quality of the people who are appointed to those positions is maintained, I cannot imagine that that would happen. Generally, people who are appointed to the authority are senior members of the Bar who have practised extensively in the criminal law for the defence and the Crown. They come to these positions with a balanced approach.

Mr Atherton: From my perspective, it is not an issue. The situations in normal courts are of more concern whereby people give evidence and criminal elements are present in the public gallery and they intimidate witnesses who give evidence on behalf of the prosecution. We do not come across that situation very often in NCA hearings.

The CHAIRMAN: I refer members to the answer provided in point 1.6(a), which states -

> No provision of the Act allows for a person to be interviewed as a suspect.

Do you agree with that statement?

Mr Bennett: Yes.

The CHAIRMAN: It seems that there is a lot of scope for a person to be interviewed not as suspect, but as a likely or highly probable suspect.

Mr Bennett: There is no -

Hon Simon O'Brien entered the room.

The CHAIRMAN: Hon Simon O'Brien was detained this morning. He is the third member of our committee; he is not a member of the media or anything like that.

Hon SIMON O'BRIEN: We do draw the line somewhere.

Mr Bennett: The Act does not empower the police to conduct interviews. Police officers conduct interviews. We are not speaking about whether to draw the demarcation between the hearings and the interview process. The Act does not empower the police as police officers. They are seconded and deployed as police officers using their powers. As with any police officer, if they are engaged in an investigation and if a suspect is to be interviewed, the police follow their normal processes. This Act does not provide that empowerment. I read somewhere yesterday about the term "power to interview". There is really no such concept. Police are entitled to ask questions but they cannot compel someone to submit an answer.

Hon PADDY EMBRY: What happens following or during the interview when the person being interviewed becomes a suspect?

Mr Bennett: Are you referring to the interview process, rather than in the hearing room?

Hon PADDY EMBRY: Yes

Mr Bennett: If they are suspected of the crime and there is evidence to justify their prosecution either by way of them being arrested and charged or by summons, that step would be taken.

[1.00 pm]

Hon PADDY EMBRY: Would the interview have to cease if the investigating officer began to suspect that there was more to the person than -

Mr Bennett: The law that applies to the actions of police as investigators investigating crime is not affected by this legislation. The hearings do not impact upon them. If one of the investigators seconded to us by the Australian Federal Police or the Western Australian police were conducting his inquiries and it became apparent during an interview with a suspect that he or she had committed a crime or could be reasonably suspected of having committed a crime, there is no obligation on that detective to terminate the interview. He may continue the interview until its completion. If the person is being interviewed as a suspect, or during the course of an interview becomes a suspect, appropriate cautions would need to be administered at the appropriate time for the product of that interview to have any evidential value. However, they are separate issues from the role that the National Crime Authority performs when using these coercive powers.

Mr Atherton: I illustrate it with a hypothetical situation. A person is summonsed to appear at the hearing, and before he answers the questions, he claims that his answers may incriminate him. I emphasise that this is an information-gathering, or administrative, process rather than an adversarial criminal process. Half an hour after the process begins the officer decides that the person could be arrested for the offence. The officer cannot use any of the witness's evidence in his trial because he claimed protection from incrimination. The police officer or NCA investigator would have to ask the witness the questions again, and he can say that he will not answer them. His evidence could not be used against him to answer charges that have been preferred.

Hon PADDY EMBRY: I was more concerned the other way. Could the evidence be used against him?

Mr Atherton: Not if he had claimed protection from incrimination. A charge would have to be based on some other evidence which had already been gathered and which the officers believed was sufficient.

The CHAIRMAN: My last question relates to proposed section 16A(12), which provides for the Federal Court, in the interests of justice, to make available to a person or legal practitioner evidence that has been collected by the authority. I am trying to understand the circumstances in which that provision would be used. How would a person come to know about evidence that the authority has that would prompt him to make an application to the Federal Court for access to that evidence? Is there a positive duty on the NCA to fully disclose all evidence and information when a prosecution is commenced?

Mr Bennett: In any prosecution the Crown is obliged to disclose all relevant material to the defence. It can do that only if it is in turn advised by the investigative body, whether it be the Police Service, the NCA, the AFP or the Australian Taxation Office. There is an obligation on the Crown to properly disclose material. There are strict proscriptions on the publication and release of our holdings because of the risk to safety and reputations and of prejudice of fair trials. This provision will enable a person to have access to information that is relevant to his proceedings after he has persuaded the court that it is appropriate.

The CHAIRMAN: How would the person know that the NCA has that information? A person could not go on a fishing expedition to take that claim to the court. He would need to be able to identify the exact information or evidence he wanted. I cannot see any circumstances in which there would be up-front non-publication of evidence before the NCA and in which this provision could be used. The person would need to know what he was looking for and that the evidence was in the possession of the NCA.

Mr Bennett: I do not know how to answer that question because the circumstances would be many and varied.

Mr Atherton: I would have thought that information would be made available as a result of a general request by the defence counsel to the NCA or WA police for all matters relevant to the charge before the court to be disclosed. It is a very serious matter if, in the process of hearing the charges, the court becomes aware that certain evidence has been withheld from the defence. The judge would deal with that.

The CHAIRMAN: Establishing that fact is very difficult. Often people stumble on it only during the preliminary hearings, which have been abolished in this State.

Mr Bennett: If you are confining your question to the impact of proposed section 16A(12), what Tim says is correct. The obligation is to disclose the material, which includes not only transcripts of hearings but also all product harvested in the course of an investigation that is in any way relevant to the prosecution upon which is person is appearing.

The CHAIRMAN: Regrettably, that is not always fully disclosed. I am not saying that is done intentionally; sometimes it is an administrative oversight. It still creates a problem, and it appears that this legislation does not provide any avenues when such a situation arises. There does not seem to be any positive duty on the NCA to disclose information, or any penalties for wilful non-disclosure.

Mr Bennett: The penalty that applies if the Crown has not disclosed material or if material has been withheld from the Crown is one that the community faces. If an accused person were convicted without having had the opportunity to test the evidence or take advantage of evidence that might have provided a reasonable explanation for his alleged misconduct, the consequences would be quite serious.

The CHAIRMAN: It is also a matter that we as legislators need to address to ensure that those checks and balances are in place.

Mr Bennett: With respect, is this Bill the place to do that? There is a standing obligation for law enforcement agencies to properly inform crown prosecutors or Directors of Public Prosecutions of all material, and similar procedures are available through the courts. If the material is not disclosed, there are serious consequences for the administration of justice and the particular proceedings. The remedies may already exist.

The CHAIRMAN: Regrettably, the history in Western Australia is that, more often than not, there is not full disclosure. We will leave that; it is not an issue you can address or answer.

Mr Atherton: Jim might want to comment as he is more legally qualified than I am, but I would have thought that if, during either the hearing process or subsequent to the determination of the case, the court's attention was drawn to the fact that material had been deliberately withheld, a submission for abuse of process would be made which could overturn the conviction, if any.

The CHAIRMAN: Regrettably, it takes eight to 20 years for some people to establish that.

Mr Bennett: That might be an issue with the administration of justice that applies generally.

The CHAIRMAN: I take that point. Would you like to make any concluding comments?

Mr Bennett: I thank you for the opportunity to appear this morning. I have enjoyed this debate.

The CHAIRMAN: Thank you very much, and sorry for the grilling. I enjoyed the discussion as much as you did. Mr Bennett, good luck with your work here in Western Australia.

Committee adjourned at 1.09 pm