SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

NATIONAL CRIME AUTHORITY (STATE PROVISIONS) AMENDMENT BILL 2002

Presented by Hon Adele Farina MLC (Chairman)

Report 5
November 2002

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:

April 11 2002

Terms of Reference:

The following are extracts from Schedule 1 and Standing Order 230A of the Legislative Council Standing Orders:

"**7. Uniform Legislation and General Purposes Committee**

7.1 A Uniform Legislation and General Purposes Committee is established.

7.2 The Committee consists of 3 members with power in the Committee to coopt 2 additional members for a specific purpose or inquiry.

7.3 The functions of the Committee are –

(a) to consider and report on bills referred under SO 230A;

(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to consider and report on any matter referred by the House.

7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman) Hon Simon O'Brien MLC

Hon Paddy Embry MLC

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1 REFERENCE AND PROCEDURE

1.1 On June 20 2002 the *National Crime Authority (State Provisions) Amendment Bill 2002* (the "Bill") was referred to the Uniform Legislation and General Purposes Committee (the "Committee") under SO 230A(3).

1.2 The Bill lapsed when Parliament was prorogued on August 9 2002. Under the restoration procedure the Bill was reinstated on August 14 2002 and again referred to the Committee on that date.

1.3 The House agreed on report from the Committee to extend the report back date to November 28 2002.

2 SO 230A(5) – THE POLICY OF THE BILL

2.1 Pursuant to Standing Order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee. However, the actual "level of remoteness" at which this restraint can be said to operate is not always clear cut.

2.2 A Bill such as this which makes amendments to various provisions of the parent Act can present difficulty when it comes to isolating the policy considerations driving the changes. The process is impaired when the Committee is unable to obtain supporting documentation.

3 AVAILABILITY OF CONSTATING DOCUMENTS

3.1 When dealing with originating or amending legislation promoted by the governments of the participating jurisdictions, the Committee, not unreasonably in its opinion, expects the State Minister to provide the Committee with a copy of the memorandum of understanding or other instrument that recites what the several governments have agreed to and a description of the legislation that each jurisdiction will need to have enacted if the agreement is to have lawful effect.

3.2 The Committee's examination of the relevant inter-governmental agreement and supporting documents is not a perfunctory exercize. First, the governments' policy should be stated in obvious terms. Second, the legislation should reflect that policy

accurately. Third, the advantages and disadvantages to the State as a participant should be listed and examined. Fourth, the constitutional issues affecting each jurisdiction should be identified. The same considerations apply to subsequent amending legislation such as this Bill.

3.3 It is a matter of considerable concern to the Committee that the State Minister's officers could not locate any written material that records the original agreement between the Commonwealth, the States and Territories. As well there appears to be no State-held record of why this Bill has been introduced, whether its provisions accord with the Inter-Governmental Committee's agreement and whether other options had been considered.

3.4 Accordingly, the Committee has relied on primary source material produced by the Commonwealth in its consideration of the Bill. The Committee has been left with the impression that State Parliament is expected to enact this Bill without demur so as to harmonize cross-jurisdictional legislation in the wake of amendments enacted by the Commonwealth.

3.5 The importance the Committee attaches to the source documentation as an aid to interpretation is supported by the High Court when, speaking in context of the *Corporations Law*, the joint judgment stated —

> *The national scheme was implemented by legislation of the legislatures of all the polities that were parties to the Alice Springs Agreement[2]. In construing that legislation, regard may be had to the Alice Springs Agreement as part of the relevant context[3].*
>
> *R v Hughes* [2000] HCA 22

3.6 Commonwealth and State officials should disabuse themselves of any beliefs they may have that this Committee will simply endorse legislation in the form in which it is referred to this Committee. It is the Committee's expectation that State officers will provide the Committee with information and supporting documentation about any legislation coming before the Committee.

4 SUBMISSIONS AND WITNESSES

4.1 On June 29 2002 the Committee advertised in *The West Australian* newspaper for written submissions on the Bill and gave notice of its inquiry on Parliament's website. It also invited submissions from specific persons and organisations who could be expected to have an interest in the Bill's subject matter. The Committee did not receive any submissions.

4.2 Oral evidence was taken from the following —

4.2.1 Mr Laurie Levy, Committee Member, Criminal Lawyers' Association (WA) — September 18;

4.2.2 Assistant Commissioner (Metropolitan Region) Tim Atherton, Western Australian Police Service — September 25;

4.2.3 Mr James Bennett, Member, National Crime Authority — September 25;

4.2.4 Ms Robyn Barrow, Principal Policy Adviser to the Minister for Police and Emergency Services — September 25.

4.3 The Committee thanks these witnesses for their assistance.

5 NATIONAL CRIME AUTHORITY — OVERVIEW

5.1 The National Crime Authority (the "NCA") is established under section 7 of the *National Crime Authority Act 1984* of the Commonwealth (the "Cth Act"). It consists of 3 or more members appointed by the Governor-General. One is to be the nominee of the Commonwealth and State Attorneys-General and another is the nominee of the Commonwealth and State Police Ministers. Additional members may be appointed on the unanimous recommendation of the Inter-Governmental Committee, the participating jurisdictions' ministerial body established under the Act to formulate joint policy, approve referrals requested by one of those jurisdictions, and oversight the NCA's performance and effectiveness. The Authority chair must hold, or have held, or be eligible to be appointed to, judicial office.

5.2 Section 11 of the Cth Act assigns 2 main functions to the NCA —

5.2.1 **general functions** are those that relate to the gathering, analysis and dissemination to law enforcement agencies and other designated persons, for example, commissions of inquiry, information and intelligence about criminal activities. The NCA may also have single or multiple-jurisdiction taskforces formed to investigate criminal activities and coordinate the work of those taskforces;

5.2.2 **special functions** are investigations into criminal activities referred to the NCA by the relevant Commonwealth or State Minister with the Inter-Governmental Committee's agreement. In either case the activities must relate to matters that would constitute an offence under the law of the referring jurisdiction.

5.3 Each participating jurisdiction has enacted legislation permitting special function references and granted to the NCA the jurisdiction's powers necessary to conduct the relevant investigations. For this State the legislation is the *National Crime Authority (State Provisions) Act 1985* (the "State Act"). The Bill proposes amendments to the State Act.

6 REASONS FOR CHANGE — JOINT [PARLIAMENTARY] COMMITTEE (CTH) REPORTS

6.1 Part III of the Cth Act deals with the appointment and functions of a joint committee of the Senate and the House of Representatives (the "PJC"). Each House appoints 5 members. Section 55 provides —

55 Duties of the Committee

(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 authorizes 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.

6.2 In the Preface to its report on the *National Crime Authority Legislation Amendment Bill 2000* (Cth) presented in March 2001, the PJC records that the Senate referred the bill on December 7 2000 and states ―

> *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.*

p. xi

6.3 The PJC ends its Preface by saying ―

> *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 engaged in serious and organized crime.*

p.xiii

6.4 However, it recommends that the Government carry out a review after the amended provisions have operated for 5 years. The PJC then examines each bloc of proposed amendments. Five of the ten members of the PJC included a minority report relating to applications for, and issuing of, search warrants, contempt (of NCA), employment

of persons other than Commonwealth public servants, and the role of the Commonwealth Ombudsman. One member entered a minority report on the provisions relating to self-incrimination.

6.5 The 1998 and 2001 PJC reports are readily accessible on the Commonwealth Parliament's website at http://www.aph.gov.au/. The 2001 report is particularly useful for its discussion of the intended or likely effects of the amendments on the NCA's operational abilities. For this reason, the Committee has confined this report to those matters where its conclusions differ from the PJC either as to the intent or effect of an amendment or the reasons advanced for its adoption. For the information of members, the Committee has appended relevant extracts from the March 2001 report of the PJC on the National Crime Authority Legislation Amendment Bill 2000 (Cth) at Appendix 2.

7 CHARACTERIZING THE NCA

7.1 The NCA is a Commonwealth administrative tribunal exercizing powers conferred by the Commonwealth Parliament and those referred by each State Parliament in order to perform a special function. A useful explanation of the NCA, as an inquisition, and how it may conduct its investigations is found in the opinion of the Full Federal Court in *National Crime Authority & others v A1 and A2* [1997] 518 FCA.

7.2 Importantly, the NCA is not a court of judicature that tries cases brought by the Crown against named persons alleged to have committed a crime. It is more accurately described as a cross-jurisdictional standing royal commission with powers to compel the answering of questions and the production of documents when performing a general or special function.

7.3 The Committee has approached the referred Bill with that perspective very much in mind.

8 STRUCTURE OF THE BILL

8.1 The Bill contains 33 clauses in 7 Parts:

i) Part 1 – Preliminary

ii) Part 2 – Amendments relating to reasonable excuse, self-incrimination and increases in penalties

iii) Part 3 – Amendments relating to people who may apply for, or issue, search warrants

iv) Part 4 – Amendments relating to use of reasonable force to execute warrants

v) Part 5 – Amendments relating to hearing officers

vi) Part 6 – Amendments relating to references to the Chairman or Chairperson of the Authority

vii) Part 7 – Other amendments

9 PURPOSE OF BILL

9.1 The Bill's Title recites that it is a Bill for an Act "to amend the *National Crime Authority (State Provisions) Act 1985* so that it more closely reflects the *National Crime Authority Act 1984* of the Commonwealth, and for other purposes."

9.2 The State Act applies to a special function investigation referred by this State with the approval of the Inter-Governmental Committee by giving the NCA enumerated powers appertaining to the State and without which the NCA would lack the power of compulsion.

10 PART 2 CLAUSE ANALYSIS

10.1 Clause 6 of the Bill repeals section 21 of the State Act. The definition of "relevant claim" in clause 6(2) indicates the effect of the amendments made by Part 2 of the Bill to sections 18 and 19 of the State Act.

Refusal to produce documents or answer questions

10.2 Section 18 empowers the NCA to require a person to produce a document. Production may be refused on the ground of reasonable excuse. If the claim is disputed, the issue is referred to the NCA for a decision and judicial review of that decision, by the Federal Court, is permitted under the now-to-be repealed section 21.

10.3 Section 19 provides the defence of "reasonable excuse" to not attending an NCA hearing, or refusing to answer a question, or produce a document in the course of a hearing. Judicial review of the NCA's decision to disallow the claim is removed if section 21 is repealed.

10.4 The PJC in its report on the Commonwealth Bill states —

> *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 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 the general law to avail themselves of judicial review of decisions of the Authority.*
>
> 1.10, p 3.

10.5 The PJC does not elaborate what the right of judicial review under the general law comprises and which court has jurisdiction.

10.6 The PJC's reference to a Criminal Code is a reference to the Schedule to the *Criminal Code Act 1995* of the Commonwealth. That Code is very different in its drafting style and approach to defining criminal intent or conduct from the *Criminal Code* of this State. The following is an example of the Commonwealth Code style —

> *9.3 Mistake or ignorance of statute law*
>
> *(1) A person can be criminally responsible for an offence even if, at the time of the conduct constituting the offence, he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence or directly or indirectly affects the scope or operation of the offence.*
>
> *(2) Subsection (1) does not apply, and the person is not criminally responsible for the offence in those circumstances, if:*
>
> *(a) the Act is expressly or impliedly to the contrary effect; or*
> *(b) the ignorance or mistake negates a fault element that applies to a physical element of the offence.*

10.7 The State Code retains the defence of "reasonable" or "lawful" excuse which leaves the trial court to decide what, in the circumstances, is reasonable or lawful. The Commonwealth Code makes no such provision.

10.8 Importantly, the net result of the Commonwealth and State complementary amendments is that the defence is abolished when the NCA is exercizing Commonwealth or State powers.

Abolition of reasonable excuse as defence — parliamentary privilege

10.9 The Committee expresses its real concern if, under either the Cth Act or the State Act, the NCA may lawfully insist on a member of the State Parliament, or parliamentary officer or committee witness answering a question or producing a document where parliamentary privilege would be a "reasonable excuse" under the existing law. The Committee notes how McHugh J described the defence -

> *The expression "reasonable excuse" has an ambulatory operation. Absent a contrary indication from other provisions of the [Companies NSW] Code,* ***the intention of Parliament, therefore, was that the words "reasonable excuse" should include any current legal right to resist the compulsory production of documents or answering of questions.***
>
> *Corporate Affairs Commission NSW v Yuill* (1991) 172 CLR 319

10.10 Statutory modification or extinguishment of a common law privilege most often will devolve into a dissection of the intended effect on public interest immunity or legal

professional privilege. Rarely is there any exploration of what effect the intended enactment will have on parliamentary privilege.

10.11 The general rule of statutory construction is —

> *Regard should be had for the general interpretation of statutes, as laid down in the ordinary textbooks, the most important of these are —*
>
> *6. The presumption that the legislature does not intend any alteration in the rules or principles of the common law beyond what it expressly declares.*
>
> Ilbert, Legislative Methods and Forms, (1901 ed), 250.

10.12 So much was held in *Newcastle, Duke of v Morris* (1870) LR 4 HL 661. As for (Commonwealth) royal commissions —

> *However, counsel for the Commonwealth government claimed that there was no privilege under the Royal Commissions Act 1902 except that mentioned in s.6D(1) protecting secret processes of manufacture and contended that all other privileges were overridden by the plain words of the Act. This contention involved, as the Commonwealth accepted, that the privileges of Parliament were overridden. That is unacceptable. Until this case I would have thought it beyond question that such an Act does not affect parliamentary privilege (see Odgers, Australian Senate Practice, 5th ed. (1976), Ch. XXXIV, and "Privilege of Parliament" Australian Law Journal, vol. 18 (1944), p. 70). The privileges of Parliament are jealously preserved and rightly so. Parliament will not be held to have diminished any of its privileges unless it has done so by unmistakable language. It has not done so in the Royal Commissions Act 1902, nor has it abridged the privilege against self-incrimination.*
>
> *Hammond v Cth* (1982) 152 CLR 188 per Murphy J at p 200.

10.13 It may be said that mere abolition of the defence of reasonable excuse is not "unmistakable language" sufficient to oust parliamentary privilege. For example in 1996, the then Attorney General persuaded the House that it was unnecessary to expressly declare in the bill amending the *Official Corruption Act 1988* that the powers given to the re-named Anti-Corruption Commission did not override parliamentary privilege. Conversely, the Council made such an amendment to the *Royal Commission (Police) Act 2002*; the reason being the all-embracing language used to confer coercive powers on that royal commission and the attendant doubt as to its effect on parliamentary privilege.

10.14 The issue is more acute under the Cth Act. The question is whether a Commonwealth law may expressly negate what would otherwise be an immunity derived from State parliamentary privilege —

(a) for failing to comply with a requirement under compulsion; or

(b) to a criminal charge laid under that law.

10.15 The Committee acknowledges that there is no provision in the Cth Act that uses unmistakable language or express words. But if, as the PJC has stated, the intent of the section is to confine any defence to one of those specified in the Commonwealth's Criminal Code, that intent must be weighed against a defence based on parliamentary immunity.

10.16 It appears that there is no Australian case law directly in point. However, a comprehensive discussion of the issues, and the decisions of the Supreme Court of the United States is contained in a 1985 Report of the Senate's Standing Committee on Constitutional and Legal Affairs "*Commonwealth Lawmaking Power and the Privilege of Freedom of Speech in State Parliaments"*.

10.17 The Western Australian case of *Jacobsen v Rogers* (1995) 182 CLR 582, arose from federal officers executing a search warrant under the *Crimes Act 1914* (Cth) on the then State Fisheries Department. Documents seized included some that a State enactment prohibited from disclosure. The issue appealed to the High Court was whether execution of the search warrant was lawful in relation to the Fisheries Department's documents. The following quotes illustrate very different approaches. Brennan J upheld the lawfulness of the seizure –

> *The purpose for which the powers of entry, search and seizure are conferred are the prevention, detection and prosecution of offences against laws of the Commonwealth. To the extent that there is any limitation imposed on the exercise of the powers conferred by s.10, the powers cannot be exercised to effect their purpose.*
>
> *If State premises were excluded from entry and search, those premises could become alsatias for criminal activity; if State documents were exempt from search and seizure, the gathering of evidence for Commonwealth prosecutions would be in the discretion of the Executive Governments of the States. There is nothing in the text of s.10 or in the nature of the powers it confers which warrants an implication in the text exempting State premises from the places in which those powers might be exercised or State documents from the things which might be seized. If any limitation on the generality of the language of s.10 is to be implied, the implication must be derived either from general principles of the common law or from a limitation on the constitutional power of the Commonwealth to enact s.10.*

10.18 Justice Brennan concluded that the seizure, although detrimental to the intent of the State legislation, was nonetheless a valid exercize of a power conferred by a paramount (Commonwealth) law. Put another way, the State had no interest meriting protection or immunity from the use of powers conferred under Commonwealth law.

10.19 The contrary view is given by McHugh J —

> *Accordingly, in the present case one begins with the presumption that s.10 of the Crimes Act was not intended to bind the Crown in right of the Commonwealth or in right of the State of Western Australia. In my opinion, however, neither the subject-matter of s.10 nor its apparent purpose is sufficient to overcome the presumption that, unless an intention to affect the Crown is clearly discernible, the Crown, whether in right of the Commonwealth or a State, is not affected by legislation of the Commonwealth. The terms of s.10 authorise the seizure of the property and entry upon the premises of private individuals. The plain words of the section allow no escape from that conclusion. But nothing in those words implies an intention to override the presumption that legislation does not apply to the Crown. If they do, the presumption that statutes do not bind or apply to the Crown must now be regarded as a very weak one.*
>
> *14. In addition, the subject-matter of s.10 makes it less rather than more likely that Parliament intended s.10 to apply to the Crown. If s.10 applies to the Crown, it would mean that, on the information of any person, a magistrate or justice of the peace could authorise a constable to enter any government institution in Australia and seize papers that are alleged to contain evidence of the commission of a crime against the Commonwealth. Prima facie, **parliamentary papers,** cabinet papers, court papers and national security and defence papers could be seized.*
>
> *Furthermore, nothing in s.10 indicates an intention to overcome the presumption that Commonwealth statutes do not apply to the Crown in right of a State. In a federation, you do not expect one government to authorise the seizure of another government's papers or to authorise the forced entry of another government's premises.*

10.20 The Committee notes Justice McHugh's assumption that "Crown", in context, extends to the State Parliament.

10.21 For the future, the High Court may take a third approach propounded by Kirby J —

> *Suffice it to recall that there is a particular reason why the English rule of deference to parliamentary procedures has not been followed in this country[73]:*
>
> > *"Courts in this country, at least in the scrutiny of the requirements of the Australian Constitution, have generally rejected the notion that they are forbidden by considerations of parliamentary privilege or of the ancient common law of Parliament, from adjudging the validity of parliamentary conduct where this must be measured against the requirements of the Constitution. It is the nature of a federal polity that it constantly renders the organs of government, federal and State, accountable to a constitutional standard. State Parliaments in Australia, whatever their historical*

> *provenance, are not colonial legislatures. They are provided for in the Australian Constitution. To this extent, at least, they are rendered accountable to the constitutional text."*
>
> *Yourgala v WA* [2001] HCA 47

10.22 It seems that there are 3 matters that Kirby J would heed in any discussion of the paramountcy of Commonwealth law over State law. First, the matter is to be determined by reference to the Commonwealth Constitution alone. Although "received" law may inform the Court, it cannot stand in opposition to the Constitution which relevantly includes covering clause 5 —

> *This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth,* ***notwithstanding anything in the laws of any State;…***
>
> *Commonwealth of Australia Constitution Act 1900 (Imp)*

10.23 Second, the interrelationship of the polities comprising the Commonwealth is not rigid, but is nonetheless ascertainable at any time by reference to the Constitution. Third, because no one polity is in any sense subordinate to any other, the precise demarcation of jurisdiction or competence between the Commonwealth and the States and the States *inter se* is for the High Court to determine.

10.24 Even so, there is no way of predicting how the High Court would deal with the current matter. But the capacity for a clash of protected interests is more than fanciful speculation, taking into account the wide-ranging investigations undertaken by the NCA and the information it gathers in the process. It is highly likely that information will be sought from a member of State Parliament which that member believes is "privileged" or from a person whose evidence before a parliamentary committee is seen as relevant to an NCA investigation. Whether the privilege is absolute or qualified presents its own subset of difficulties associated with the actual reach of absolute privilege; that is, what is a "proceeding in Parliament"? It is absolute, not qualified, privilege that would constitute reasonable excuse.

10.25 Moreover, the NCA may well have a further argument that the State Act, rather than the Cth Act, is the law that, by necessary implication, overrides the powers and immunities of the 2 Houses that participated in its enactment. The State Act confers, and the Cth Act authorizes, Commonwealth officers to exercize State powers and functions. It would seem to follow that the State Parliament in enacting the State Act accepted the abrogation of what would otherwise be a defence to a compulsive proceeding.

10.26 The Committee believes that the Commonwealth and State amendments leave considerable uncertainty as to whether there is an intention to extinguish a defence of

reasonable excuse founded on a claim of absolute privilege. The matter should be clarified.

Case for abolition inconclusive

10.27 The Committee appreciates that some persons with the appropriate resources have used judicial review as a delaying tactic. What the PJC does not say is the number of times that the tactic has seriously impaired an NCA inquiry. To abolish the defence outright in order to deprive an unquantified number of persons of a capacity for delay seems to be an over-reaction. For example, there is no discussion of referring a disallowed claim to a Judge in chambers rather than the Federal Court. Was any consideration given to removing the right of appeal from a single Judge to a Full Court? Abolition of the right of appeal does not deprive a person from applying for an order to quash for error of law. Is it possible, as is the case for other purposes of the Act(s), to confer jurisdiction on State courts as well as the Federal Court?

10.28 The PJC appears not to have considered other ways of achieving the desired objective, short of outright abolition. The Committee is not persuaded that the case for abolishing the defence of reasonable excuse has been made. It further suggests that the defences that will be available under the Criminal Code (Cth) create a high level of uncertainty evidenced by the discussion on State parliamentary privilege.

Witness comments

Criminal Lawyers' Association

10.29 At its hearing on September 18 2002 Mr Levy, Committee Member, Criminal Lawyers' Association, advised the Committee that the Criminal Lawyers' Association was concerned about what appeared to it to be the continual erosion of the right to silence, which he submitted had been evidenced recently in Acts such as the *Criminal Property Confiscation Act 2000* and the *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002*.

10.30 He submitted that the Criminal Lawyers' Association was primarily concerned with the proposed amendments to sections 18 and 19 of the State Act which deal with the abolition of the defence of reasonable excuse and the derivative-use immunity.

10.31 Mr Levy expressed concern that the Bill mirrors the Commonwealth bill and that the Commonwealth amendments have *"…already eroded the right to silence"*.[1]

10.32 Mr Levy expressed concern about the effect of the removal of the defence of reasonable excuse. He noted that the general defences under the *Criminal Code* and common law defences would continue to be available in situations involving an emergency, accident or duress. These would apply where a person was threatened by

[1] Transcript of evidence taken at Perth, September 18 2002, p 1.

another person to attend before the NCA and give evidence, or where an accident may prevent a person from attending.

10.33 Mr Levy was concerned that the effect of the removal of the defence of reasonable excuse could be that in cases where the general defences under the *Criminal Code* or common law defences did not apply, a person would be punishable at law and would be liable to serious penalties.

10.34 The Committee notes that Mr Levy disagreed with the proposition that people use the defence of reasonable excuse as a delaying tactic or to avoid appearing before the NCA. He submitted that once a matter is referred to prosecution it still continues as the person would have to return before the NCA for continuation of the hearing.

10.35 The Committee notes Mr Levy's comments that the amendments to the Commonwealth Act have already been made and that if the Bill was not passed, it would have no real effect. He noted that the NCA is currently conducting hearings and will continue to do so regardless of whether or not the State Act is amended. The Commonwealth Act applies in the States and Territories to federally related offences. The State Act applies only to state related offences, of which there are few.

Western Australian Police Service and National Crime Authority

10.36 At its hearing on September 25 2002, Mr Atherton advised the Committee that the Western Australian Police Service supported the amendments in the Bill. He submitted that the amendments had been brought about as a result of problems in both Western Australia and other Australian jurisdictions whereby well-advised witnesses have frustrated the hearings process in relation to high-level organised crime.

10.37 Mr Atherton submitted that these people have manipulated the process by either failing to answer questions or claiming privilege against self-incrimination, thus terminating the hearing process. He told the Committee that in some cases this had resulted in delays of some years, by which time the trail of the operation being undertaken had gone cold.

10.38 Mr Atherton submitted that "From my point of view, these legislative changes are very necessary for the hearings process that the NCA quite often undertakes on our [the Western Australian Police Service] behalf to be effective."[2]

10.39 The Committee notes Mr Bennett's comments that the burden on the NCA would be increased if the Bill was not passed. It would give the people who are the subject of NCA investigations greater scope to frustrate the efforts of the NCA. He submitted that the consequences of the Western Australian Parliament not passing the Bill would flow to the Western Australian community *"…because organised crime is actively*

[2] Ibid, p 2.

engaged in its endeavours in this State, just as it is in all States of the Commonwealth."[3]

10.40 He submitted that if the Bill was not passed it would leave Western Australia in a unique position. He submitted that if the other Australian jurisdictions adopted the amendments and Western Australia did not, it would provide a haven for organised crime to flourish.

10.41 Mr Bennett advised the Committee that since the introduction of the Commonwealth Act the NCA's results in addressing organised criminal activity at the Commonwealth level had increased exponentially. He submitted that if the Bill was not passed, it would limit the opportunity to pursue the same outcomes within Western Australia.

10.42 Mr Atherton agreed and advised the Committee that the Western Australian Police Service had concerns about the State Act not being consistent with the Commonwealth legislation. He submitted that there is no doubt that criminal groups have manipulated the process to escape prosecution and that if the Bill was not passed to bring this State's legislation into line with the Commonwealth and other States, it would be a problem.

11 SELF-INCRIMINATION – THE HISTORICAL BASIS OF THE PRIVILEGE

> *31. According to Wigmore on Evidence ((41) McNaughton rev. 1961, pp.269, 277-292.), the historical basis of the privilege against self-incrimination had two strands. The first was the common law's reaction against the use of the* ex officio *oath by ecclesiastical courts and the Court of Star Chamber and against the unjust methods of interrogating accused persons, culminating in 1645 in a declaration that the use of the oath was unlawful ((42) Lilburn's Trial (1645) 3 How St Tr 1315, summarized in Wigmore, op cit, pp.282-283; and see* Hammond v. The Commonwealth *(1982) 152 CLR 188, per Brennan J at p.203 citing* Brown v. Walker *(1896) 161 US 591, per Brown J at pp.596-597.); the second was the subsequent recognition of the privilege in common law trials.*
>
> *By the second half of the seventeenth century, the privilege was well established at common law ((43) See, e.g., Scroop's Trial (1660) 5 How St Tr 1034; Crook's Trial (1662) 6 How St Tr 201; Penn's and Mead's Trial (1670) 6 How St Tr, cited in Wigmore, op cit, p.290.), which affirmed the principle* nemo tenetur accusare seipsum *or "no man is bound to accuse himself" ((44) Cited in Wigmore, op cit, p.290.). 32. Historically, the privilege developed to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt.*
>
> *EPA v Caltex Refining* (1993) 178 CLR 477 per Mason CJ, Toohey J.

[3] Ibid, p 7.

11.1 In the same case McHugh J, made an important observation —

> *The privilege in its* ***modern form is in the nature of a human right****, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. In respect of natural persons, a fair state-individual balance requires such protection.*

11.2 The American position where the Fifth Amendment provides a constitutional guarantee against self-incrimination appears from the following extract from a Supreme Court opinion —

> *It is consistent with the history of and the policies underlying the Self-Incrimination Clause [5th Amendment] to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information.*
>
> *Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber - the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offences, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion.*
>
> *Doe v. United States* ((101) (1988) 487 US 201, at p.212.)

12 SELF-INCRIMINATION — EXISTING LAW AND PROPOSAL FOR ABOLITION

12.1 Clause 8 of the Bill further amends section 19 by abolishing the right it currently accords a person to refuse to produce a document or answer questions of a self-incriminating nature unless an undertaking is given by the relevant jurisdiction's Attorney General or nominee (usually the DPP) —

> *that any answer given or document or thing produced, as the case may be, or any information, document or thing obtained as a direct or indirect consequence of the answer or the production of the first-mentioned document or thing, will not be used in evidence in any proceedings against that person for an offence against a law of the State other than proceedings in respect of the falsity of evidence given by that person and the Attorney General, or the person so authorized, states in the undertaking -*
>
> *(c) that, in his or her opinion, there are special grounds that in the public interest require that answers be given or documents or things be produced by the first-mentioned person; and*
>
> *(d) the general nature of those grounds.*
>
> section 19(5)

12.2 When such an undertaking is given, the person must produce the documents or answer the questions regardless of their self-incriminating nature.

Existing law affords 2 types of immunity

12.3 As it is now, section 19(5) provides 2 forms of immunity covered by an undertaking. The first is immunity from prosecution that could otherwise be commenced on the basis of the documents produced or answers given – what might be termed "immediate use" immunity. The proposed amendments, new subsection (5), retain this form of immunity. The immunity is conferred without need to obtain an undertaking from the appropriate Attorney General.

12.4 The second, and equally important immunity in the existing law is "derivative use" immunity. This prevents evidence sourced from the self-incriminating documents or answers provided being used to support a prosecution against the person independently of what was obtained under immediate use immunity. The Bill abolishes derivative use immunity.

Judicial views of the rule against self-incrimination

> *…the privilege against self-incrimination is not under our system of law inviolable, however clearly the legislature will need to express itself before the courts will discern an intention to abrogate or even weaken such an ingrained principle of the common law.*
>
> *In truth the appeal to due process of law can amount to no more than an appeal to the principle that the courts will not interpret legislation as departing from fundamental common law doctrine unless an intention to do so emerges in the clearest of terms. For due process of law, as we know it in this country, is a concept which derives its meaning only from the law, whether common or statute law, as it exists from time to time. It is not, as in the United States, a concept with a content of its own, procedural or substantive, against which the constitutional validity of particular laws may be tested.*
>
> *Hamilton v Oades* (1989) 166 CLR 486 per Dawson J.

12.5 Nearly 20 years before *Hamilton,* Barwick CJ put the matter bluntly –

> *The common law cannot maintain a right in the citizen to refuse to make incriminating answers in the face of a statute which by its expression clearly intends,…that all questions allowed to be put shall be answered...*
>
> *Mortimer v. Brown* (1970) 122 CLR 493

12.6 The *dictum* of McHugh J in the *EPA* case *(supra)*, that the principle against self-incrimination may be seen as a human right, does not translate into Australian municipal law as a substantive right that is insulated from legislative interference.

12.7 The Australian situation is accurately stated in Dawson J's statement in *Oades, supra* that, absent some form of constitutional guarantee, or the incorporation into municipal law of an international agreement declaring that a person cannot be compelled to admit to the commission of a crime, or a constitutional limitation on Parliament's legislative capacity to abrogate human rights, the privilege, as with any rule of common law, may be abolished or modified by ordinary legislation that evinces that intention in clear terms.

Abolition and need for review

12.8 The Committee does not agree with the PJC's conclusion that abolition of derivative use immunity in other Commonwealth and State contexts justifies or supports its abolition in an NCA investigation. The legislative abolition of a common law right, particularly one to which the superior courts attach significance, should be justifiable from the context in which abolition is sought and not on a "derivative use precedent".

12.9 It accepts the PJC's finding that the current procedure for obtaining an undertaking is cumbersome and time-consuming; that there is no assurance that every request for an undertaking will be met, creating a degree of uncertainty for both the NCA and the person concerned.

12.10 Having regard to the authorities traversed in *Oades* and the High Court's opinions on the balancing of public interest as against private right such as the privilege against self-incrimination, the Committee agrees with the proposed amendment on the understanding that the effect of abrogating derivative use immunity should be reviewed after 5 years' operation.

12.11 In reaching its conclusion, the Committee has made a very clear distinction between a failure to comply for reasonable excuse which carries no suggestion of unlawful conduct, and a similar failure to comply to avoid self-incrimination.

12.12 As a cautionary note, abolition of this aspect of the rule against self-incrimination may not have the effect intended. It is not difficult to envisage recourse to the courts, whether bona fide or as a delaying tactic, seeking nice distinctions between immediate and derivative use immunities or the application of evidentiary rules that reintroduce derivative use immunity in another guise.

Witness comments

Criminal Lawyers' Association

12.13 At the Committee's hearing on September 18 2002 Mr Levy submitted that there should be a balancing between the interests of the community and those of the individual. He submitted that the privilege against self-incrimination, the right to silence and the onus of proof are all part of our criminal justice system and are inextricably intertwined. He submitted that *"It is about our freedoms, our privileges*

and our liberty. If we hold dear those concepts - freedom, liberty and justice - then we must support a system that enshrines those rights and privileges."[4]

12.14 Mr Levy submitted that "When we start to erode any one of those rights and privileges, we start to undermine the fundamental precepts of our system of justice."[5]

12.15 The Committee notes Mr Levy's submission that the current provisions of the State Act are workable.

Western Australian Police Service and National Crime Authority

12.16 At the Committee's hearing on September 25 2002 Mr Bennett submitted that the right to silence is a narrow concept. He stated that *"If people want to confess, they are perfectly entitled to do so, but they should not be obliged to do so."*[6] He stated that the right to silence is confined to this narrow concept that *"No one should be obliged to convict himself out of his own mouth."*[7]

12.17 Mr Bennett expressed his belief that the amendments in the Bill do not destroy the pillars upon which the criminal justice system rests. He submitted that the NCA does not deal with *"…mums and dads or somebody who had an unfortunate experience on the way home and was involved in a fatal accident…"* but rather 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."*[8]

12.18 Mr Bennett submitted that the criminals at the level at which the Bill is focused have to be controlled. He submitted that the Bill protects the rights and liberties of the community, but allows law enforcement access to those people who are the target of NCA investigations.

13 CONTEMPT OF NCA

13.1 There is a preliminary issue that should be dealt with. The validity of the conferral of jurisdiction on State Supreme Courts under section 35 of the Cth Act was raised before the PJC. In accordance with the Council's own usage so too, the Committee does not question the validity of legislation of any participating jurisdiction. Any challenge to legislative capacity is a matter for the High Court. The Committee is aware that the conferral of jurisdiction on State courts was queried by witnesses appearing before the PJC.

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4 Transcript of evidence taken at Perth, September 18 2002, p 6.

5 Ibid.

6 Transcript of evidence taken at Perth, September 25 2002, p 11.

7 Ibid.

13.2 Clause 7 of the Bill repeals section 25 of the State Act and inserts a new section 25. Whether it is more appropriate to describe "contempt" of the NCA as "hindering or obstructing" is moot.

13.3 The amendment makes no sense until it is read in context of the Cth Act. Based on the NCA's evidence to the PJC, the actual intent of the change is to provide a swift, coercive ability to force recalcitrants to answer questions or produce documents. The NCA made the observation to the PJC that prosecutions for such failures occurred, in many cases, quite sometime after the event and in any case the answers were never given or documents failed to materialize.

13.4 Resorting to contempt proceedings means that the (State) Supreme Court has other ways of persuading people to cooperate; for example, imprisonment until there is a change of heart, unlimited fines. Whether, as a matter of law, the Supreme Court has the requisite jurisdiction was raised before the PJC but, for reasons given above, is not an issue for the Committee.

13.5 The real issue that presents itself here is why, if prosecutions for non-compliance are punitive, does the State Act continue to create the offences when, accepting the evidence before the PJC as accurate, it is much more effective (and productive) to charge an uncooperative person with contempt? If the objective is to obtain information, sometimes by employing coercive means, rather than punishing for non-compliance but still leaving the NCA without the information, it seems sensible to recast the applicable provisions by —

13.5.1 deleting the offence provisions in the proposed amendments to sections 18 and 19; and

13.5.2 enacting a new section 25 that permits the NCA *ex parte* to refer a case of non-compliance to the Supreme Court, which is authorized in its discretion (after hearing the person concerned on application or summons) to make an order requiring compliance.

13.6 It is the failure to comply with the Court's order that would then constitute the contempt able to be dealt with in the exercize of inherent jurisdiction.

13.7 Further provision could be made creating offences of hindering or obstructing NCA proceedings (however described), but they would be criminal offences, not a contempt.

13.8 The Committee suggests that this is a more coherent approach to ensuring compliance by coercion and making any contempt that of the Court, not the NCA.

[8] Ibid.

Recommendation 1: The Committee recommends — That the amendments in the Schedule (Appendix 1) be made to the Bill.

14 PARTS 3, 4, 5

14.1 The Committee can add nothing that is useful to the PJC's discussion of the relevant Cth Act's provisions. The Committee notes that federal magistrates now have authority to issue warrants.

15 PART 7 — SECTION 18B

15.1 Section 18A(1) requires or permits, depending on whether the matter falls under sections 17 or 18, the NCA to endorse a summons or notice forbidding disclosure of receipt or anything relating to its content. The circumstances for non-disclosure may be specified.

15.2 Section 18A(2) describes the circumstances that justify the notation. Essentially, they are to ensure a fair trial, avoid prejudice to an investigation, or protect a person's reputation, or where it is considered to be in the public interest.

15.3 The public interest ground permits a very broad discretion which, were the Committee to be examining the 1995 Amendment Act that inserted section 18A, would most likely be reported with recommended criteria as to what, in context, might be seen as "contrary to the public interest" bearing in mind that this provision allows for a gag on a person's communication with others, including spouses and family members. The public interest leaves too wide a discretion and, in effect, enables any summons or notice to be made subject to section 18A(1).

15.4 Section 18B(1) creates an offence for unauthorized disclosure of a summons or notice to which section 18A applies. Section 18B(2) lists the types of disclosure that are not to be subject to subsection (1).

15.5 As currently enacted, section 18B(2)(e) provides —

(2) Subsection (1) does not prevent the person from making a disclosure —

(e) if the person is a legal practitioner —

(i) for the purpose of complying with a legal duty of disclosure arising from his or her professional relationship with a client; or

(ii) for the purpose of obtaining the agreement of another person under section 19 (3) to the legal practitioner answering a question or producing a document at a hearing before the Authority.

15.6 Clause 32 amends paragraph (e) by deleting subparagraph (e)(i). The PJC deals with the Cth Act equivalent in ¶5.23-25 of its report. The PJC, despite the Law Council's deep concern, accepted the provision as placing lawyers in a different position to that of other "professionals" consulted by a client on receipt of a section 18A(1) notice. The Federal Government saw no reason for lawyers to be treated differently and stated that legal professional privilege was not affected by the repeal.

15.7 Section 18B(2)(b) permits a person receiving a non-disclosure notice to consult a legal practitioner. Paragraph (e)(i) is where such a notice is served on the legal practitioner, the reverse situation to paragraph (b). The matter in the notice may relate solely to the legal practitioner's own affairs or, as is the case under paragraph (e)(i), it may involve a client's affairs in which case the client would be informed of receipt.

15.8 The point may be made that accountants, doctors and other professionals do not usually sit at the Bar Table as advocates - lawyers are retained for that purpose. The Committee believes that the intent behind the amendment is to prevent a lawyer from providing a client with an early warning that the NCA is investigating the client's affairs or activities. The question is therefore to ascertain where the public interest lies. Is it with the NCA as it goes about investigating serious and organized crime? Or is the lawyer/client relationship of such a nature that the State ought not to attempt to restrict the free exercize of communication within that relationship?

15.9 The House may wish to consider and decide the issue that arises from this amendment.

16 INCREASED PENALTIES

16.1 The Committee notes that penalties generally will be increased substantially when this Bill becomes law. Given the NCA's operational sphere and the seriousness of the offences investigated by the NCA, the Committee sees nothing unreasonable in what is proposed.

17 REVIEW OF ACT

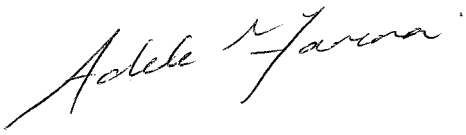
17.1 The Cth Act is to be reviewed after 5 years' operation to assess whether any improvement in the NCA's operation is attributable to the abolition of the defence of reasonable excuse, the abrogation of derivative use immunity, and the increased investigatory powers conferred. The review is to include the appropriateness of retaining one or more of these provisions.

17.2 The report is to go to the Inter-Governmental Committee and, with that Committee's comments (if any), be transmitted to the Commonwealth Minister responsible for the NCA. The report must then be tabled in the Senate and the House within 15 sitting days of the Minister receiving the report.

17.3 The Committee sees considerable merit in a subsequent review of the State's legislation, that is, a requirement inserted by an amendment to the Bill that the responsible State Minister, immediately the Cth report is tabled in either House, is to carry out a review of the State's complementary provisions, using the same criteria as used by the Cth review, and that the report be tabled in the Council and the Assembly within 12 months of the tabling of the Cth's report.

Recommendation 2: That the Bill be amended by providing for a review of the State Act's provisions in accordance with paragraph 17.3 (above).

Recommendation 3: The Committee recommends that the National Crime Authority (State Provisions) Amendment Bill 2002 be passed subject to recommendations 1 and 2.



Hon Adele Farina MLC **Date: November 28 2002**
Chair

APPENDIX 1

SCHEDULE

APPENDIX 1

SCHEDULE

Amendments recommended to clauses 4, 5 and 7 of the National Crime Authority (State Provisions) Amendment B ill 2002

Clause 4

Page 3 — to delete lines 8 – 29.

Clause 5

Page 5 — to delete lines 11 – 27.

Clause 7

Page 7 — to insert after line 3 the following —

"

25. Hindering or obstructing Authority — contempt of Court

(1) Where a person refuses or fails to comply with a notice served under section 18 or contravenes section 19(1), (2), or (3), the Authority may apply *ex parte* to the Court or a Judge for an order requiring that person to answer questions or produce documents for the purposes stated in the Authority's application. The Authority is to serve a copy of the application on the person against whom an order is sought under this subsection at the time it is made.

(1a) An application under subsection (1) is to state the type of function the Authority is performing with a copy attached of the reference approved by the Inter-Governmental Committee, and provide a general description of the documents sought or answers required.

(1b) An order is not to be made without the Court or a Judge first providing the person who is the subject of the application an opportunity to appear and provide any relevant explanation for the person's failure, refusal, or non-compliance, or the person's argument against making the order sought.

(1c) The grant or refusal of an order is to be decided by the Court or a Judge on the sole ground of whether or not the person concerned had an honest belief that his or her failure, refusal, or non-compliance was justified by law, regardless of the existence or otherwise of the law said to justify that honest belief.

(1d) On being satisfied that the person had no honest belief as required under subsection (1c), the Court or a Judge must make an order in

terms of the application together with directions (if any) as to its operation.

(1e) A person who contravenes an order made under subsection (1d) may be dealt with as for contempt of that Court.

"

Page 7 line 6 — delete "(1)" and substitute "(2)". ***(Clerk's amendment)***

Page 7 — to insert after lines 16 the following —

" but this subsection does not apply to a person against whom an order is made under subsection (1d) unless the Court or a Judge directs that the person be dealt with under this subsection rather than as for contempt of court. "

APPENDIX 2

EXTRACTS FROM THE MARCH 2001 REPORT OF THE COMMONWEALTH PARLIAMENTARY JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY LEGISLATION AMENDMENT BILL 2000 (CTH)

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EXTRACTS FROM THE MARCH 2001 REPORT OF THE COMMONWEALTH PARLIAMENTARY JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY LEGISLATION AMENDMENT BILL 2000 (CTH)

1. EXTRACTS FROM THE MAJORITY REPORT

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.*[9]

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.*[10]

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

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

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

the Criminal Code had been amended to specifically include 'lawful excuse' as a defence.[11]

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'.[12] No other submission expressed such concerns, however, with most critical commentary in relation to this Part of 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.[13] 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.[14] 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*

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

12 *Submissions*, p. 38.

13 *Evidence* pp. 7-8.

14 *Evidence* p. 10.

> *whether it will or will not. In the meantime, the efficiency of the administration of justice is greatly undermined.*[15]

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 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

15 *Evidence* p. 11.

be able to be used in evidence against the person.[16] 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.*[17]

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':

> *… 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.*[18]

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.

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16 *Submissions*, pp. 44-45.

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

18 *Evidence*, p. 16.

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.[19]

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.

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*,[20] 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.

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

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

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'.[21]

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.[22] 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.*[23]

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 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.[24]

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*

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21 *Submissions*, p. 58.

22 *Submissions*, p. 92.

23 *Submissions*, p. 92.

24 *Evidence*, p. 19.

> *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.*[25]

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.[26]

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 criminals may not object to another gaol term, the increased penalties may be persuasive for some people.[27]

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

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25 *Evidence*, p. 24.

26 *Submissions*, p. 89.

27 *Evidence*, pp. 14-15.

currently subject to review as part of the Criminal Code Act exercise.[28] 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).[29]

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.[30]

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.[31]

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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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.[32]

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28 *Evidence*, p. 13.

29 *Evidence*, p. 13.

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

31 *Evidence*, p. 14.

32 *Submissions*, p. 103.

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.[33]

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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.*[34]

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.*[35]

2.3 Accordingly:

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33 *Evidence*, p. 52.

34 *Submissions*, pp. 48-49.

35 *Submissions*, pp. 58-59.

> *The proposed contempt regime is designed to encourage cooperation and compliance with the Authority's hearing process.*[36]

2.4 The Government has pointed to similar contempt regimes in section 219 of the *Australian Securities and Investments Commission Act 1989 (Cth)*[37] the *Independent Commission Against Corruption Act 1988 (NSW)*[38] and the *Criminal Justice Act 19879 (Qld)*[39] as models for that proposed in the Bill.

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.[40]

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

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

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

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

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

40 *Submissions,* p. 96.

> *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.*[41]

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 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.*[42]

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.*[43]

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'.[44]

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

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41 *Submissions*, pp. 33-34.

42 *Evidence*, p. 12.

43 *Evidence*, p. 32.

44 *Submissions*, p. 21.

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.*[45]

2.12 At the hearing the PJC was assured by Mr Crooke that legal counsel 'at the highest level' had dismissed this constitutional concern.[46]

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'.[47] It has pointed to the decision of the High Court in *Re Refugee Review Tribunal: Ex parte Aala*[48] which provides support to the view that NCA 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'.[49]

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

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45 *Submissions*, p. 37.

46 *Evidence*, p. 25.

47 *Submissions*, p. 105.

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

49 *Evidence*, p. 55.

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'.[50]

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.*[51]

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 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

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50 *Submissions*, p. 24.

51 *Submissions*, p. 59.

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.

2. EXTRACTS FROM THE MINORITY REPORT

…

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.