FIRST SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE
STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE

CRIMINAL INVESTIGATION
(EXCEPTIONAL POWERS) AND
FORTIFICATION REMOVAL BILL 2001

Presented by Hon Jon Ford MLC (Chairman)

Report 15
May 2002

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**1. Legislation Committee**

1.1 A *Legislation Committee* is established.

1.2 The Committee consists of 5 members.

1.3 The functions of the Committee are to consider and report on any bill or other matter referred by the House.

1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3 at the second reading or any subsequent stage is excluded from the Committee's consideration."

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman)
Hon Giz Watson MLC (Deputy Chair)
Hon Ken Travers MLC (as substitute member for Hon Kate Doust MLC)
Hon Bill Stretch MLC
Hon Peter Foss MLC

Staff as at the time of this inquiry:

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Note

The Fifteenth Report of the Standing Committee on Legislation consists of a Report, and a Minority Report of Hon Giz Watson MLC.

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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

List of Abbreviations

ACC	Anti-Corruption Commission
ACC Act	*Anti-Corruption Commission Act 1988* (WA)
ALRC	Australian Law Reform Commission
Attorney General	Hon J A McGinty MLA, Attorney General and Minister for Justice and Legal Affairs
Bill	Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001
CCL	Council for Civil Liberties in Western Australia (Inc.)
CLA	Criminal Lawyers Association of Western Australia
Commissioner of Police	The Commissioner of the Western Australia Police Service
Committee	Legislative Council Standing Committee on Legislation
DPP	Director of Public Prosecutions (WA)
Explanatory Memorandum	Explanatory Memorandum to the Bill
FOI Act	*Freedom of Information Act 1992* (Cwlth)
IGC	Inter-Governmental Committee established by the NCA Act to oversee the operations of the NCA
JCACC	Joint Standing Committee on the Anti-Corruption Commission appointed by the Parliament of Western Australia to monitor and review the performance of the ACC
LRCWA	Law Reform Commission of Western Australia
LSWA	Law Society of Western Australia
NCA	National Crime Authority
NCA Act	*National Crime Authority Act 1984* (Cwtlh)
NCA (WA) Act	*National Crime Authority (State Provisions) Act 1985* (WA)

NZ	New Zealand
Police Service	Western Australia Police Service
Schedule 1 offence	An offence described in Schedule 1 to the Bill
SD Act	*Surveillance Devices Act 1998* (WA)
Second Reading Speech	Speech given by the Hon Nick Griffiths MLC as Minister representing the Attorney General in the Legislative Council during the second reading of the Bill
section 4 offence	A section 4 offence is – (a) a Schedule 1 offence committed in the course of organised crime; or (b) an offence of wilful murder or murder, as defined in *The Criminal Code*, committed in connection with any other commission of a Schedule 1 offence
SRC	State Records Commission
WAJA	The Western Australian Journalists Association

CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 The Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 (Bill) was referred to the Legislation Committee (Committee) on December 19 2001 for inquiry.

2 The Bill provides the Western Australia Police Service with new and exceptional powers. It is intended that these powers be used to fight organised criminal activity.

3 The Bill establishes the office of a special commissioner, who is appointed by the Governor. The role of the special commissioner is to decide if the police may exercise the powers and functions provided by the Bill.

4 In its consideration of the Bill, the Committee concentrated on the main concerns raised in submissions. The Committee identified the key issues raised by the Bill as being:

i) accountability for the use of the exceptional powers provided for in the Bill;

ii) adequate safeguards to ensure that the exceptional powers provided for in the Bill are used appropriately and with propriety; and

iii) balancing individual 'due process' rights against the public interest in crime control.

5 Time constraints imposed on the inquiry by the Legislative Council have limited consideration of the entire Bill in detail.

6 The Committee has recommended a number of significant amendments to the Bill, which address the key issues.

7 The Committee draws the attention of the House to the recommendations that amend clauses 9 and 44 and insert new clauses 10 and 51. These amendments form a complete and integrated package of amendments to the Bill, designed to address the accountability issues raised by the Bill.

RECOMMENDATIONS

1 Recommendations are grouped as they appear in the text at the page number indicated:

Page 27

Recommendation 1: The Committee recommends that the reference to section 394 of *The Criminal Code* contained in Schedule 1 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted, as the section has already been repealed.

Page 27

Recommendation 2: The Committee by a majority (Hons Jon Ford, Ken Travers, and Giz Watson MLCs) recommends that the reference to section 451 of *The Criminal Code* contained in Schedule 1 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted, as proposed by the Government.

Page 27

Recommendation 3: The Committee by a majority (Hons Jon Ford, Ken Travers, Peter Foss and Bill Stretch MLCs) recommends that the Government give consideration to including sections 145 and 147 of *The Criminal Code* relating to assisting escape from custody in Schedule 1 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001.

Page 30

Recommendation 4: The Committee by a majority (Hons Giz Watson, Peter Foss and Bill Stretch MLCs) recommends that clause 4(b) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted.

Page 38

Recommendation 5: The Committee recommends that only retired judges be appointed as special commissioner.

Page 38

Recommendation 6: The Committee recommends that a retired judge from an equivalent court within Australia or any other jurisdiction having a similar basis of law be eligible to be appointed as special commissioner.

Page 38

Recommendation 7: The Committee recommends that the jurisdictions for the purposes of Recommendation 6 be prescribed by regulation.

Page 46

Recommendation 8: The Committee recommends that existing clause 9(3) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted and replaced with the following (in accordance with the amendment proposed by the Attorney General) -

"(3) The powers of a special commissioner under this Part cannot be exercised unless the Commissioner of Police has satisfied a special commissioner that the grounds described in section 9(1) exist in respect of the section 4 offence concerned.

Page 46

Recommendation 9: The Committee recommends that a new Part 3 be inserted into the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 as follows -

"Part 3 – Basis of use of Powers and Control by Special Commissioner

9. Finding as to grounds for exercising Part 4 or 5 powers

(1) On the application of the Commissioner of Police, a special commissioner may find whether or not the special commissioner is satisfied that:

- **(a) there are reasonable grounds for suspecting that a section 4 offence has been, or is being, committed;**
- **(b) there are reasonable grounds for suspecting that there might be evidence or other information relevant to the investigation of the offence that can be obtained under Part 4 or 5; and**
- **(c) there are reasonable grounds for believing that the use of powers given by Part 4 or 5 would be in the public interest having regard to –**
  - **i) whether or not the suspected offence could be effectively investigated without using the powers;**
  - **ii) the extent to which the evidence or other information that it is suspected might be obtained would assist in the investigation, and the likelihood of obtaining it; and**
  - **iii) the circumstances in which the information or evidence that it is**

suspected might be obtained is suspected to have come into the possession of any person from whom it might be obtained.

(2) If the special commissioner is satisfied that the grounds described in subsection (1) exist, the finding is to be reduced to writing and a copy of it is to be given to the Commissioner of Police.

(3) The special commissioner may direct that the powers capable of being exercised by reason of Part 4 or 5 may be exercised only in the circumstances directed by the special commissioner who may impose such conditions as the special commissioner considers fit and the special commissioner may impose or vary those directions or give further directions from time to time.

(4) Without limiting subsection (3) the special commissioner may direct that the powers under Part 5 be limited:

a) to apply to certain persons or classes or persons;
b) to be exercised only by certain persons or classes of persons;
c) to extend to certain powers only;
d) to be exercised in certain places or classes of places;
e) to be exercised with respect to certain articles or classes of articles; or
f) for a period of time.

Page 53

Recommendation 10: The Committee recommends that clause 16(4) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended to correct a typographical error, in the following manner –

Page 9, line 26 - To insert after "the" -
"special".

Page 60

Recommendation 11: The Committee recommends that the Government give consideration to amending the powers of the special commissioner to include the power to order the protection of a witness, in the same manner as that provided for in the *National Crime Authority (State Provisions) Act 1985* (WA).

Page 66

Recommendation 12: The Committee recommends that clause 23(2) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended as follows –

Page 11, line 29 - To insert after "appropriate" –
" , in accordance with the *State Records Act 2000*, ".

Page 66

Recommendation 13: The Committee recommends that clause 23(3) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended as follows –

Page 12, lines 3 to 5 – After "the" to delete the lines and insert instead –
" State Records Commission which may order that any record be dealt with as the State Records Commission considers appropriate in accordance with the *State Records Act 2000*."

Page 66

Recommendation 14: The Committee recommends that clause 23(4) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended as follows –

Page 12, lines 6 to 9 – To delete the lines and insert instead –
"(4) For the purpose of the *State Records Act 2000* any records that are transferred to the custody of the Director of State Records as State archives, shall be treated by the Director as restricted access archives unless the Attorney General requests otherwise."

Page 66

Recommendation 15: The Committee recommends that the Government draft an amendment expressly to prohibit the subpoena of documents and evidence without the permission of the Attorney General. Such a provision should not relieve the Crown of its obligation to disclose all relevant evidence upon a prosecution.

Page 93

Recommendation 16: The Committee recommends that clause 38 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended in the following manner –
Page 19, lines 12 to 16 – to delete the lines and insert instead –
"(1) Legal professional privilege does not prevent a summons under section 11 from requiring a person to produce a document that would otherwise be subject to that privilege.
(2) Unless it is claimed and allowed in accordance with this section legal professional privilege does not provide a reasonable excuse for failure to produce a document as required by a summons under section 11.
(3) A person who wishes to claim that a document is subject to legal professional privilege (which claim is permitted by subsection (4)) shall:
(a) attend and produce that document in accordance with the summons,

sealed up and identified as subject to a claim of legal professional privilege; and

(b) at the same time provide to the special commissioner a statement detailing the name and address of the person entitled to waive the privilege with regard to each document.

(4) A claim of legal professional privilege may only be made in relation to the following:

(a) proofs of evidence taken from clients and possible witnesses;

(b) notes of instruction taken from clients or possible witnesses with regard to events that have already occurred;

(c) documents created for the purposes of preparing:

(i) a defence to any existing or possible charges; or

(ii) for an appearance or reasonably anticipated appearance before a special commissioner,

arising out of events which have already occurred such as but not limited to:

(i) notes, letters and opinions which set out legal advice to a client;

(ii) internal memoranda or letters;

(iii) a solicitor's letter to a private investigator; or

(iv) a solicitor's letter to potential expert witnesses;

(d) correspondence between a solicitor and prosecuting authorities or police written in order to negotiate the possibility of a client giving a statement or testimony; and

(e) correspondence between a solicitor and prosecuting authorities or police written in order to negotiate a plea of guilty.

(5) Legal professional privilege is not to attach to any document by reason of this section unless that privilege would attach by law.

(6) The special commissioner shall determine with respect to each document for which a claim of legal professional privilege has been made whether that claim is valid.

(7) The special commissioner shall return any document, which the special commissioner has determined is subject to a valid claim of legal professional privilege, to the person who produced it without allowing the Commissioner of Police access.

(8) Until such time as a special commissioner has determined that a document is not subject to a valid claim of legal professional privilege a person other than the special commissioner may not unseal the document or have access to it.
Penalty: Imprisonment for 3 years and a fine of $60 000.

(9) In this section "document" includes any other thing.

Page 97

Recommendation 17: The Committee recommends that clause 44 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended in the following manner (in accordance with the amendment proposed by the Attorney General) -

Page 22, lines 4 and 5 – To delete "section 9(3) exist.' and insert instead –
" section 9(1) exist in respect of the section 4 offence concerned. "

Page 108

Recommendation 18: The Committee recommends that a new clause 10 be inserted into proposed new Part 3 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 (refer to Recommendation 9) in the following manner –

To insert the following new clause -
"10. Special commissioner to be informed
A special commissioner who has made a finding or given a direction with regard to powers under Part 4 or 5 is to have the right to be informed as to the manner in which they have been exercised and to call to account any person who exercises or purports to exercise a power pursuant to that finding or direction."

Page 108

Recommendation 19: The Committee recommends that a new clause 51 be inserted into Part 4 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 in the following manner (in accordance with the amendments proposed by the Attorney General) –

Page 25, after line 24 - To insert the following new clause -
"51. Report on use of Powers under this Part
(1) A police officer who exercises powers under this part is required to submit to the Commissioner of Police a report in writing of each occasion on which any of those powers were exercised, giving details of –
(a) what was done in the exercise of those powers;
(b) the time and place at which the powers were exercised; and
(c) any person or property affected by the exercise of the powers.
(2) The report is to be submitted within 3 days after the powers are exercised.
(3) The obligation of a police officer to submit a report under this section about a particular exercise of power within a particular time is sufficiently complied with if the police officer ensures that a report by another police officer who was present when the powers were exercised is made within that time dealing with all of the details about which a report is required. "

Page 117

Recommendation 20: The Committee recommends that the Government draft an amendment to provide that a regulation-making power be inserted into Part 7 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 and that such regulations be made by the Governor on recommendation of the Attorney General.

Page 120

Recommendation 21: The Committee recommends that the Government draft an amendment that provides for parliamentary oversight of the operation of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001.

Page 120

Recommendation 22: The Committee recommends that Recommendations 8, 9, 17, 18 and 19 be passed together as a package.

Page 120

Recommendation 23: The Committee by a majority (Hons Jon Ford, Ken Travers, Peter Foss and Bill Stretch MLCs) recommends that the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be passed subject to Recommendations 1 to 22.

CHAPTER 1

INTRODUCTION

REFERENCE

1.1 The Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 (Bill) was referred to the Legislation Committee (Committee) on December 19 2001. The Committee was to report back to the House by March 31 2002.

1.2 Pursuant to the Committee's request, the Legislative Council granted an extension of time within which to report until April 18 2002 and then a further extension to May 9 2002.

1.3 The Bill was referred during the second reading debate. Accordingly the policy of the Bill is open to inquiry by the Committee.

Reconstitution of the Committee

1.4 The constitution of the Committee was amended on April 11 2002, by resolution of the Legislative Council.[1] The Committee was appointed with five members, whereas previously it had seven members.

1.5 Therefore, the constitution of the Committee at the time of presentation of the report to the House differs from when the Committee received the reference.

1.6 The Legislative Council also passed a transitional resolution, which provided for the Bill to be referred to, and the inquiry to be continued by, the reconstituted Committee.[2]

PROCEDURE

1.7 The Committee wrote to stakeholders inviting submissions on the Bill and the proposed amendments to the Bill. A list of these stakeholders is attached at Appendix 1.

1.8 The Committee invited submissions on the Bill from the general public. On January 5 and 19 2002, the Committee advertised in *The West Australian* newspaper for written

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1 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, April 11 2002, p9411.

2 Ibid.

submissions pertaining to the Bill and the proposed amendments to the Bill.[3] A list of submissions received by the Committee is set out in Appendix 2.

1.9 The Committee held hearings on March 6 and 13 2002. A list of people who appeared before the Committee is set out in Appendix 3.

1.10 The Committee thanks the individuals and organisations that provided evidence and information to the Committee.

BACKGROUND TO THE BILL

The problem of organised crime in Australia

1.11 The existence of organised crime in Australia is an unfortunate fact. Further, there is every indication that the reach of organised crime is growing.[4]

1.12 Organised crime today differs greatly to that of 20-30 years ago. Organised crime in Australia does not generally conform to the hierarchical, familial structure of popular imagination and is not easily definable. Advances in technology and communications has seen organised crime become increasingly complex, sophisticated and dynamic, its structures more opportunistic and entrepreneurial.[5]

1.13 Organised crime today encompasses a myriad of complex activities including illicit drug importation, distribution and manufacture, large scale organised fraud, identity fraud, money laundering, bribery, extortion and tax evasion.

1.14 Violence and intimidation is a common tactic utilised by organised crime, to achieve its goals. This violence contributes to the diminution of societal security both in perception and reality.[6]

1.15 Proceeds from organised crime can be used to invest in or create legitimate businesses. These can be operated entirely separately or they can be used for money laundering. Legitimate businesses can be promoted by illegitimate tactics.

1.16 A report of the National Crime Authority (NCA) into the current state of organised crime in Australia stated:

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3 See Supplementary Notice Paper No 65, Issue No 1, Wednesday, December 19 2001.

4 National Crime Authority, NCA Commentary 2001, p13.

5 Irwin, Marshall P, *A National Focus on Organised Crime: the Role of Australia's National Crime Authority*, Conference Paper, Modern Criminal Investigation, Organized Crime & Human Rights, December 3-7 2001, p2.

6 National Crime Authority, NCA Commentary 2001, p13.

> *The reach of organised crime in Australia is pervasive, multi-faceted and carries enormous social and economic costs. Significantly, the cost is not just in direct monetary terms but in terms of lost productivity, health, violence and well being. It affects every aspect of our lives from the deaths of addicts on the streets, to the lost revenue of billions of undeclared dollars; from the overtaxing of our court and law enforcement resources, to the manipulation of markets and the creation of not merely unfair, but unlawful and unscrupulous competition; from the trauma caused by armed hold-ups and home invasions to the price we pay to insure our property*.[7]

1.17 Examples of the activity and impact of organised crime include:

- the primary activity of organised crime is the illicit trafficking and distribution of commodities such as drugs, tobacco products, alcohol, fauna, firearms, computer software, motor vehicles, and people;
- illicit drugs are currently the most lucrative commodities for Australian organised crime. The estimated cost of illicit drug abuse to the Australian community is at least A$ 1.7 billion annually;[8]
- worldwide, there is a $12 billion a year illegal trade in exotic animals, including Australian wildlife;
- current estimates of the extent of money laundering in Australia are A$ 3-9 billion per annum; and
- the trend in Australia and around the world is for growth in the trafficking of woman and children for sex work.[9]

1.18 The effectiveness of traditional law enforcement methods has been undermined by economic and technological changes that have occurred in the past decade, as the complexity, effectiveness and efficiency of major and organised crime organisations has increased. Law enforcement agencies face considerable challenges as criminal organisations have become harder to investigate.[10] Consequently, alternative mechanisms are increasingly being employed in the realm of criminal investigation.

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7 Ibid.

8 Ibid, p20.

9 Nelson, Craig, 'Ticket to Nowhere', *Sydney Morning Herald*, March 8 2001, at Internet site: http://old.smh.com.au/news/0103/08/features/features1.html

10 Parliamentary Joint Committee on the National Crime Authority, *Street Legal*: *The involvement of the National Crime Authority in controlled operations*, Commonwealth Parliament of Australia, December 1999.

Traditional methods are thought to be ineffective as the police lack the coercive powers needed to secure evidence and documents that would allow them to successfully tackle organised criminals. The creation of bodies such as the NCA was a direct result of the conclusion that ordinary police powers are inadequate to tackle organised crime.[11]

Western Australia

1.19 A view put forward in the book by Mark Findlay (et al) *Australian Criminal Justice*, is that the criminal justice system is failing to deal with the problem of organised crime. It is portrayed as beyond the competence of conventional criminal justice investigative agencies. Police investigative techniques are criticised for not keeping pace with the sophistication of criminal enterprise.[12] For example, it has been the experience of the Police Service for suspects and persons of interest involved in organised crime, to simply refuse to provide information to progress police investigations or to the court process.[13]

1.20 In September 2001, retired Detective Commander and former CIB chief Don Hancock and his friend, bookmaker Lou Lewis, were killed in a car bombing in Lathlain, an incident which has been linked with organised crime. This was, as stated in the Second Reading Speech to the Bill:

> *… a particularly graphic example of the very serious criminal activities with which our police now have to deal. Western Australians have never before seen car bombing assassinations …*[14]

1.21 This bombing, combined with other illegal activities occurring in Western Australia, including drug trafficking and money laundering, has led to the establishment of a Cabinet task force, in order to develop a comprehensive strategy to tackle organised crime:[15]

> *The task force is requiring an urgent examination of ways in which the law to combat organised crime could be improved. It is adopting*

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11 Donaghue, Stephen, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, 2001, p19.

12 Findlay, Mark; Odgers, Stephen; Yeo, Stanley, *Australian Criminal Justice*, 2nd ed, 1999, p72.

13 Submission No 25.

14 Second Reading Speech, December 5 2001, p6437.

15 Members of the Task Force are Deputy Premier Eric Ripper, Police Minister Michelle Roberts, and Attorney General Jim McGinty.

> *a three-pronged approach – more policing, toughening up existing laws and bringing in a new package of organised crime legislation.*[16]

1.22 In this Bill the Government seeks to adopt some of the tactics used by other jurisdictions to combat the problem of organised crime.

[16] Deputy Premier Eric Ripper in the article by Tickner, Liz, and Ruse, Ben, *The West Australian*, Wednesday September 5 2001, p7.

CHAPTER 2

OVERVIEW OF THE BILL

CONTENTS OF THE BILL

2.1 The Bill contains 67 clauses in 7 Parts:

i) Part 1 – Preliminary;

ii) Part 2 – Special commissioners;

iii) Part 3 – Examination before special commissioner;

iv) Part 4 – Entry, search, and related matters;

v) Part 5 – Surveillance devices;

vi) Part 6 – Fortifications; and

vii) Part 7 – Other provisions.

OVERVIEW OF THE BILL

2.2 The Government stated that the intention of the Bill is as follows:

> *This Bill is a key part of the strategy developed by the cabinet task force. It will provide the Western Australia Police Service with new and exceptional powers to fight organised criminal activity. These additional powers are vital to win the war against these highly organised criminals who have access to massive resources.*
>
> *Overall, the proposed reforms are aimed at providing the Western Australian community with greater protection from organised gang violence and related crimes, while at the same time leading to greater efficiencies within the criminal justice system generally, and in particular, in the use of police resources.*
>
> And further,
>
> *In other countries legislation has been enacted which confers additional powers on regulatory and investigatory bodies to fight organised crime. In general, such legislation increases the powers of*

> *those regulatory and investigatory authorities in several ways. … In general terms, such legislation, which has been enacted in Canada, Hong Kong, New Zealand, the United States and New South Wales, can be used only if there is criminal activity of a specified nature.*
>
> …
>
> *The proposed powers will not apply to citizens who are not engaged in organised criminal activity. In giving the authorities extraordinary powers to deal with organised crime, it is clearly understood such powers must not be used in the investigation of crime in general.*[17]

2.3 The Bill establishes the office of a special commissioner, who is appointed by the Governor. The role of the special commissioner is to decide if the police may exercise the powers and functions provided by the Bill. The special commissioner must be either a serving or retired judge of the Supreme Court or District Court of Western Australia.

2.4 The Police Commissioner makes application to the special commissioner, to be given wide powers to investigate relevant offences and suspicion of offences. In considering the application the special commissioner must be satisfied that there are 'reasonable grounds for suspecting' that a serious offence has been or is being committed in the course of organised crime, or that there are 'reasonable grounds for suspecting' that an offence of wilful murder or murder has been committed in connection with another serious offence. In addition the special commissioner must be satisfied that there are 'reasonable grounds for suspecting' that relevant evidence or information could be obtained and that there are 'reasonable grounds for believing' that the use of the powers are in the public interest.

2.5 Once the special commissioner is satisfied, the exceptional powers provided for by the Bill may be used. The special commissioner may order that witnesses be summonsed to a hearing, or ordered to produce documents, or both. Additionally, once the special commissioner is satisfied, the police are authorised to enter and search without warrant any premises or person connected with the investigation.

2.6 A person appearing before the special commissioner may be required to take an oath or make an affirmation that when answering questions, he/she will state the truth, the whole truth, and nothing but the truth. Refusal to do so may result in the witness being dealt with as if in contempt of the Supreme Court.

2.7 If a person refuses to appear in response to a summons, the special commissioner may issue a warrant for arrest. No notice of the warrant is required, and police may enter

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[17] Second Reading Speech, December 5 2001, pp6437-6438.

any premises for this purpose at any time of the day or night. The summons may be issued with a notation that disclosure about the summons or any official matter connected with it is prohibited.

2.8 The person appearing before the special commissioner is entitled to be legally represented, however, the special commissioner may allow the examination of the person to proceed without legal representation if the special commissioner considers that it is not in the public interest to postpone the examination.

2.9 Examination of a witness before the special commissioner is not open to the public and the rules of evidence do not apply to the proceedings. No appeal or other judicial proceedings may be taken against the exercise of powers or functions relating to a hearing.

2.10 Witnesses examined before a special commissioner will not be able to refuse to answer a question on the basis of the privilege against self-incrimination. However, any evidence obtained will not be admissible against that person in subsequent criminal proceedings other than proceedings for perjury or for offences related to the examination procedure.

2.11 A person may not use legal professional privilege as a reason to refuse to produce documents summonsed by the special commissioner.

2.12 The Bill provides for a number of offences and penalties, to ensure that the investigative procedure is effective, for example:

2.12.1 the failure of a witness to attend as required by a summons or produce documents or to give evidence, may result in the witness being dealt with as if in contempt of the Supreme Court (clauses 26 and 27);

2.12.2 a witness who knowingly gives false evidence before a special commissioner is guilty of a crime and faces a penalty of imprisonment for five years (clause 30);

2.12.3 a person who wilfully prevents or endeavours to prevent a person from appearing before the special commissioner as a witness is guilty of a crime and faces a penalty of maximum five years imprisonment and a fine of $100,000 (clause 34); and

2.12.4 a witness who contravenes an order not to disclose information in relation to a summons faces a penalty of maximum three years imprisonment and a $60,000 fine (clause 28).

2.13 The Commissioner of Police is provided with greater investigatory powers, via application to a special commissioner. Once authorised by the special commissioner, the police may:

- enter and search certain premises without a warrant, at any time and place (clause 45);
- stop, detain and search a person at any time and place (clause 46);
- seize documents or anything else that may assist the investigation (clause 45);
- use such force as is reasonably necessary to gain entry (clause 45(3));
- use surveillance devices on the basis of 'reasonable grounds for suspecting' rather than 'reasonable grounds for believing' as is currently provided by the *Surveillance Devices Act 1998* (SD Act) (clause 51); and
- dismantle heavily fortified premises. In this regard, the Bill sets out the process and circumstances in which heavy fortifications can be removed (Part 6).

2.14 The *Freedom of Information Act 1992* (FOI Act) is amended by the Bill to exempt the special commissioner from the provisions of that Act (clause 66).

2.15 The legislation is to be reviewed after three years from commencement of the Act. The responsible Minister is required to report the review to Parliament within four years of the commencement of the Act (clause 67).

CHAPTER 3

ISSUES RAISED BY THE BILL

INTRODUCTION

3.1 In this Bill, the Parliament is considering providing the police, through the medium of the special commissioner, with exceptional and coercive powers and processes to enable it to target organised crime. The Parliament must determine whether legislation of this nature strikes an appropriate balance between measures to protect the community from organised criminal activities and the entitlement to individual rights and freedoms and the principles which underlie these.

3.2 Of primary importance to the Committee's inquiry is consideration of whether the powers and processes proposed to be granted by the Bill can be justified to the extent proposed by the risk and gravity of the behaviour sought to be prevented. Can a balance be achieved between adequate law enforcement powers on the one hand, and the protection of civil and personal liberties on the other?

3.3 The Committee is concerned to ensure accountability for the use of the exceptional powers provided for in the Bill and to provide safeguards to ensure that these powers are used appropriately and with propriety. Examples of where similar investigative powers are provided for are the independent authorities of the Anti-Corruption Commission (ACC) and the National Crime Authority (NCA). The Committee notes that the power provided to the special commissioner, on application by the Commissioner of Police, are of the nature of that given to a Royal Commission and agencies such as the NCA.

3.4 It is with these considerations in mind that the Committee provides comment on key issues of the Bill. Time constraints imposed on the inquiry by the Legislative Council have limited the consideration of the entire Bill in detail.

3.5 In order to place into context many of the issues that have been raised by the Bill, a brief overview of the Criminal Justice System is provided below. A brief outline of some of the key issues that the Bill raises is also provided.

The Criminal Justice System

3.6 The system of criminal justice is concerned with the enforcement of the criminal law. The Criminal Justice System first begins to operate when a crime comes to the attention of police or other authorities. Should a victim of crime decide to report an offence, a complaint is made to the police (or other authority) and after investigation a charge may be laid. Alternatively, the police (or other government authority) may

initiate an investigation themselves. After apprehending a suspect and deciding to proceed with a prosecution, the suspect may be released, charged and granted bail or retained in custody while the authorities make further enquiries or prepare for trial. Alternatively, a suspect may simply be summonsed to attend court on a given date. Once charges are laid the suspect becomes a defendant. The defendant then goes to court and is tried. If convicted the defendant is sentenced. The defendant may appeal against the outcome of the trial.[18]

3.7 Key features of the current Criminal Justice System include:

i) The system is adversarial in nature.

ii) It is seen as in the public interest to prosecute and punish crime.

iii) The investigation of a crime is undertaken by the police.

iv) Police cannot arrest a person simply for questioning.

v) Broadly speaking, a person may only be arrested (detained against his or her will) if caught committing certain offences or if police already have reasonable cause to suspect the person of having committed or being about to commit certain offences.

vi) Generally there are strict limits on the powers of police to detain a suspect in custody during an investigation.

vii) Rules and procedures are seen as necessary to deter improper conduct by those in positions of power, such as the police.

viii) Operational and procedural safeguards for the individual apply to the police, other investigating agencies and the court.

ix) The defendant has a pre-trial right to silence in criminal matters.

x) The defendant may engage a legal practitioner to represent them and has a right to be represented at trial.[19]

xi) The defendant is presumed innocent until proven guilty in court.

xii) The defendant need not prove innocence.

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[18] The Law Reform Commission of Western Australia, *Review of the Criminal & Civil Justice System in Western Australia*, Final Report, Project 92, September 1999.

[19] Legal representation is considered important, especially in serious criminal cases, as the unavailability of legal representation at trial may mean that the defendant is denied the possibility of a fair trial. This was highlighted in the case of *Dietrich v The Queen* (1992) 177 CLR 292.

xiii) The state serves as prosecutor in nearly all criminal matters.

xiv) The defendant is not required to call any evidence or give any evidence.

xv) The prosecution bears the burden of proving its case beyond reasonable doubt.

xvi) If the defendant elects to give evidence in his or her own defence, the evidence must be sworn and will be subject to cross-examination.

xvii) Confessions that result from threats, inducements or improper pressure of any kind are rejected and cannot be acted on by the courts.

xviii) Everybody has the right to a fair trial. This includes examination of the admissibility of evidence and scrutiny of how evidence was obtained. Rules of fairness, voluntariness and public policy apply to the admissibility at trial of responses to all police questioning regardless of the form of the evidence.

xix) People are to be treated equally before the law.

KEY ISSUES RAISED BY THE BILL

Coercive powers

3.8 The Bill provides that the special commissioner will be given the power to require witnesses to answer questions or produce documents, even those that might tend to incriminate them. The rationale is that the police must be able to investigate where they know facts concerning the individual or company give rise to a suspicion that they are involved in organised crime. As the Bill is stated as being directed towards organised crime, the normal protections available to a suspect in a criminal investigation are to be removed as they are seen as a hindrance to the effective operation of the investigation.

3.9 It has been suggested that in situations where authorities are provided with similar powers to those described, generally, that the protection against the abuse of these powers, and the interference with a fundamental civil right is to be contained in various 'use immunities'. It has also been suggested that these immunities exist because successful investigations in these contexts do not always need to rely on an eventual criminal prosecution.[20]

3.10 The inadequacies of such immunities, the potential of abuse of these powers, and the interference with certain fundamental civil rights form the basis of the issues surrounding the Bill.

[20] Findlay et al, op cit, p64.

Accountability

3.11 The importance of accountability in the prevention of corrupt, illegal or improper conduct is widely acknowledged.

3.12 The Bill, due to the sensitive nature of its subject matter, that is, police investigations into organised crime, establishes a system that is not open to public scrutiny. The officials involved are aware from the outset that their conduct may not be judged by the public.

3.13 In view of this, it may be argued that the lines of accountability, the importance of which is heightened in the absence of openness, need to be clearly set. Rules are generally regarded as the tools to ensure accountability. Whilst there is undoubted importance in the personal ethical standards of those involved, (for example, of that found in a judge), this is not seen as a substitute for a structure and set of rules that work to prevent corrupt, illegal or improper conduct in the public sector. As the recommendation of the Commission on Government report states:

> *While acknowledging the importance of codes of personal conduct and ethical behaviour on the part of all public sector officials, the Commission On Government's inquiries demonstrate that there should be substantial institutional reform to prevent corrupt, illegal or improper conduct in the Western Australian public sector.* [21]

3.14 Thus, it is argued that it is only when the lines of accountability are clearly set, that the public can be confident that an administrative structure exists to prevent improper conduct and protect the rights of individuals.

3.15 An extraordinary amount of trust is placed in the special commissioner to make decisions based upon the public interest as the main form of 'check and balance' on the exercise of the exceptional powers that are provided for in the Bill. This is because in many aspects the special commissioner is the final arbiter.

Rights of the individual and the Rule of Law

3.16 Rights protect us from invasions of our liberty and autonomy by other people and by the government. In a democratic society these rights are protected by the rule of law.

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[21] *Commission on Government Report No 5*, August 1 1995, Chapter 2, p24. The Commission on Government was appointed in November 1994, in response to a recommendation made by the Royal Commission into Commercial Activities of Government and Other Matters. The Commission inquired and reported on a number of issues (see *Commission on Government Act 1994*). The Commission published a series of five reports between August 1995 and August 1996.

3.17 Civil and political rights are generally recognised as being preconditions for the existence of a truly democratic non-oppressive society.[22]

3.18 In considering this Bill, individual 'due process' rights need to be balanced against the public interest in crime control.

3.19 In order to strike a balance between these competing public interests courts have developed rules and procedures in criminal investigations, for example, the privilege against self-incrimination and legal professional privilege.[23] Submissions received by the Committee raised concerns that the Bill abrogates some of these rules.

Natural Justice

3.20 Natural justice means procedural fairness. It is impossible to lay down in advance universal rules as to what constitutes the content of natural justice. The requirements of natural justice vary depending upon the circumstances of the case, the nature of the inquiry, the rules under which the authority is acting, the subject matter that is being dealt with and so forth. In any case the procedures to be followed must depend on the nature of the proceeding.

3.21 The rules of natural justice are founded in the common law, but may be modified by statutory provision either to include or exclude the common law rules from their operation.

Challenges

3.22 The exceptional powers that are provided for in this Bill do however, present a potential challenge to persons of interest and those under investigation. In particular, the removal of the right to protection against self-incrimination and the removal of the right of legal professional privilege require critical evaluation.

3.23 A key issue to be considered is whether the effect of the Bill may be such that it will set the trend for the Criminal Justice System to begin to consistently favour the interests of the State over the individual.

Grand Jury Analogy

3.24 Comparisons have been made between this legislation and the system of that of the Grand Jury.[24] Many features of the investigative regime established under Part 3 of the Bill are analogous to or the same as that of a Grand Jury.

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22 'What are Rights', *Human Rights and Civil Rights*, Volume 139, p28.

23 Findlay et al., op cit, p64.

24 For example, Submission No 9.

3.25 The Grand Jury system originated in England and was spread throughout the English colonies, including the United States of America and Australia. Whilst today the system of the Grand Jury is no longer operational in England or Australia, it is still operational in the United States of America.[25] They are called 'grand' because of their size, not their function – they have 12 to 23 members.

What is a Grand Jury?

3.26 The purpose of the Grand Jury is to inquire whether there is 'probable cause' to believe a crime has been committed. The Grand Jury does not decide guilt or innocence - its function is inquisitorial and accusatorial. Should it so decide, an indictment (a formal accusation of crime) is returned and the accused must stand trial to determine the question of guilt 'beyond reasonable doubt'.

3.27 Key features of the Grand Jury include:

3.27.1 The Grand Jury is instructed by the court on questions of law and fact. In practise, its investigations are relatively free from supervision. Although the jury works with the prosecutor, it is not under his control. The court appoints the jury and describes their function and specific matters in the case.

3.27.2 Public officials (for example, police) provide information and summon witnesses for the jury. Its power over witnesses resembles that of a trial court.

3.27.3 Witnesses must appear and usually must testify. Refusal may constitute contempt. A witness cannot refuse to answer a question on the basis of self-incrimination but is usually granted some form of immunity related to the use of the evidence.

3.27.4 Their inquiries may become inquisitions because the normal protections afforded to the person being questioned (such as the right to the presence of a lawyer) are not allowed.

3.27.5 Examination of witnesses is at the jury's discretion and need not involve the prosecutor, who cannot in any event interfere with deliberations and voting. Ordinarily, suspects may not call witnesses, present evidence, or appear before the jury.

3.27.6 The proceedings are secret and informal, although the court may lift secrecy in the interests of justice. Any unauthorised disclosure of Grand Jury proceedings is itself, in some jurisdictions, an indictable offence.

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[25] MacquarieNet – online encyclopedia [www.macnet.mq.edu.au].

3.28 Grand Juries have come under criticism in the United States of America, as proceedings before them are considered by some to be inherently unfair. Claims have been made that:

- the rights that witnesses have in court trials are not present in Grand Jury hearings thus the hearings deny those protections that are guaranteed by the Constitution; and

- prosecutors have sometimes used Grand Juries for political ends or personal goals.[26]

3.29 Much of the criticism of Grand Juries arises from the fact that no mechanism has been built into the system to provide the 'checks and balances' that are evident in other parts of government and which are necessary to prevent the abuse of power. (For further details, see the article by Lynn Cobden, "The Grand Jury, Its Use and Misuse", *Crime & Delinquency*, April 1976, pp 149 – 165, attached at Appendix 4).

[26] Cobden, Lynn, "The Grand Jury - Its Use and Misuse", *Crime & Delinquency*, April 1976, pp149–165.

CHAPTER 4

SPECIFIC CLAUSES OF THE BILL – PARTS 1 AND 2

CLAUSE 3 - MEANINGS OF TERMS USED IN THIS ACT

Clause Overview

Clause 3 – Definition of Organised Crime

4.1 Clause 3 of the Bill gives 'organised crime' the following meaning:

> ***"organised crime"*** *means activities of 2 or more persons associated together solely or partly for purposes in the pursuit of which 2 or more Schedule 1 offences are committed, the commission of each of which involves substantial planning and organisation;*

4.2 The Explanatory Memorandum states that:

> *This definition of "organised crime" is an important element in the definition of one type of a 'section 4 offence'. It is also an element, which is integral to the exercise of the powers under this Bill.*

4.3 There are a number of components to the definition of organised crime. They are not merely a checklist. Each are intertwined and relate back to each other. Further, each are required to be satisfied, for the definition to apply. These are:

i) Number of persons: activities of two or more people. In this regard, the definition of organised crime does not require that the 'two or more persons' actually have to carry out the activity together.

ii) Association and purposes: associated together solely or partly for purposes in the pursuit of which two or more Schedule 1 offences are committed.

iii) Offences: two or more Schedule 1 offences. It should be noted that the persons do not need to be associated for the purposes of committing those crimes. They only need to be associated together. The nature of that association is not defined but is kept very loose. It must however, lead to, or have a connection with the commission of two or more Schedule 1 offences. In other words, it is the purpose of the association of the two people that leads to the commission of the offences, which is considered under the definition. The purpose may be general in nature.

iv) Substantial planning and organising: the commission of each offence must involve substantial planning and organisation. The Committee notes that the term 'substantial' is not defined.

4.4 A 'Schedule 1 offence' refers to the offences listed in Schedule 1 of the Bill. These include serious offences contained in *The Criminal Code*, the *Misuse of Drugs Act 1981*, the *Firearms Act 1973* and the *Criminal Property Confiscation Act 2000*. The Schedule 1 offences are (refer also to Appendix 5):

i) Murder (s278 of *The Criminal Code*)

ii) Wilful murder (s279 of *The Criminal Code*)

iii) Attempt to murder (except infanticide) (s283 of *The Criminal Code*)

iv) Disabling in order to commit indictable offence (s292 of *The Criminal Code*)

v) Stupefying in order to commit indictable offence (s293 of *The Criminal Code*)

vi) Acts intended to cause grievous bodily harm or prevent arrest (s294 of *The Criminal Code*)

vii) Intentionally endangering safety of person travelling by railway (s296 of *The Criminal Code*)

viii) Intentionally endangering safety of person travelling by aircraft (s296A of *The Criminal Code*)

ix) Causing explosion likely to endanger life (s298 of *The Criminal Code)*

x) Kidnapping (s332 of *The Criminal Code*)

xi) Assault with intent to rob (except if penalty is 14 years prison) (s393 of *The Criminal Code*)

xii) Section 394 of *The Criminal Code*, which has been repealed

xiii) Attempts at extortion by threats (except if penalty is 20 years prison) (s398 of *The Criminal Code*)

xiv) Obstructing and injuring railways (s451 of *The Criminal Code*)

xv) Endangering the safe use of an aircraft (s451A(1) of *The Criminal Code*)

xvi) Causing explosion likely to do serious injury to property (s454 of *The Criminal Code*)

xvii) Making or possession of explosives under suspicious circumstances (s557 of *The Criminal Code*)

xviii) Property laundering (s563A of *The Criminal Code*)

xix) Dealing with seized or frozen property (s50(1) of the *Criminal Property Confiscation Act 2000*)

xx) An offence against regulations made under s6(1) of the *Firearms Act 1973* that are committed in respect of 2 or more firearms; or committed in respect of a firearm and in association with the commission, by the same or any other person, of an offence against the *Police Act 1892* s65(4aa)

xxi) Drug trafficking (s32A(1)(b) of the *Misuse of Drugs Act 1981*)

4.5 No time is specified as to when the 'two or more Schedule 1 offences' are required to have been committed. The 'two or more Schedule 1 offences' do not have to be committed at the same time in the same act and they do not have to result from the same act. They can be committed years, months or days apart.

4.6 Therefore, it is the ongoing association for a particular purpose and it is the pursuit of a purpose that results in the commission of offences over a period. A crime needs to be seen as part of a plan and an ongoing series of actions to fit the definition of 'organised crime'.

Summary of Submissions

4.7 Points raised as concerns in submissions received by the Committee include:

4.7.1 The definition of 'organised crime' captures people that are not intended to be captured. The target of this Bill is organised crime. It may go further than picking up those who are participants in organised crime. It may catch other persons who have committed crimes. For example, Ms Clare Thompson, President, Law Society of Western Australia (LSWA) made this comment:

> ***Ms Thompson****: … I understand that, in the way it has been drafted, it intends to get certain high-end drug offences but because of the way the Misuse of Drugs Act is drafted, it gets both high-end and low-end drug offences. For example, two guys in a park who do two drug deals two days in a row fall within the definition of organised crime. That is not what is intended, but they are caught by it.* [27]

[27] *Transcript of Evidence*, Ms Clare Thompson, President, LSWA, March 6 2002, p12.

4.7.2 The definition of 'organised crime' is stated as meaning the activities of two or more people.

4.7.3 The Schedule to the Bill can be altered easily in the future without proper scrutiny.[28]

4.8 The Police Service submitted that the definition of 'organised crime' was appropriate in that:

i) it is an important element in the type of section 4 offences. Further, it is an element which is integral to the exercise of powers under the Bill;

ii) within the context of the definition provided in the Bill, the activity of organised crime involves serious offences carrying a penalty of 20 years imprisonment. Organised crime by its nature involves planning and organising of unlawful acts;

iii) it is to tackle the activities of 'crime facilitators'. These are persons who perform a function that contributes to a criminal outcome on behalf of a crime gang;

iv) a comparison of the definitions operating in various overseas jurisdictions indicates that the definition proposed in the Bill is not overly broad; and

v) it best meets the legislative criteria being sought to give law enforcement an improved capacity to challenge criminal enterprises.[29]

Discussion

Organised Crime

4.9 The Committee notes that the intention of the Bill is to facilitate the investigation of organised crime and the offence of murder or wilful murder in certain circumstances. The Committee also notes the many expressed concerns with the definition of 'organised crime' contained in the Bill.

4.10 The Committee considers it essential that an appropriate balance is struck between an overly broad definition of what constitutes 'organised crime', which poses the least amount of problems for police from an operational perspective, and an overly narrow

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28 Submission No 8.

29 F Gere, Acting Assistant Commissioner, Crime Investigation Support, Western Australia Police Service, Letter to the Committee, March 11 2002.

definition of what constitutes organised crime, which reduces the likelihood of the definition of organised crime applying to people who are not organised criminals.

4.11 The Committee notes that the definition of 'organised crime' may cover other persons who have committed crimes, to whom it is not intended that the Bill apply. The Bill targets organised crime, but there is some concern that the Bill may go broader than those that the Bill is targetting.

4.12 The Committee notes that in determining whether a crime falls within the definition of 'organised crime' it is important not only to look at the number of people involved, but also to link it to substantial planning. Organised crime is of an ongoing nature, part of a plan. The definition of organised crime is not just two people; it is two people *and* substantial planning. Other criteria apply. For example, if a crime has the quality of an ad hoc act of a serious nature it would not be caught by this definition, and it would not satisfy the criteria that the commission of the act involved 'substantial planning and organising'.

4.13 The Committee notes the comments of the Attorney General that the association is intentionally left loose, because the tighter the association, the more likely it could be circumvented by organised crime figures.[30]

4.14 The Committee notes that the definition of 'organised crime' appears consistent with that used by other jurisdictions.[31]

Observation

4.15 For the above stated reasons, the Committee does not agree with the concerns expressed at paragraph 4.7.1 and 4.7.2 as those concerns do not take into account the required element of 'substantial planning'.

Schedule 1 offence

4.16 It is the stated intention that the types of offences included in Schedule 1 are those in which the participants of organised crime are likely to be involved.[32]

4.17 The Committee has considered the offences that are listed in Schedule 1 and makes the following comments:

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30 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, November 28 2001, p6032.

31 See for example: *Organized and Serious Crimes Ordinance 1994* (Hong Kong) s2; *The Crimes Acts (1961 to 1999)* (New Zealand) ss98A and 312A; and *The Criminal Code* (Canada) s2.

32 Second Reading Speech, December 5 2001.

4.17.1 The Committee notes that some offences may be associated with a particular type of organised crime. For example, the offence of intentionally endangering the safe use of an aircraft can be associated with terrorist activity.

4.17.2 The Committee notes that the Bill includes organised crime for the purpose of creating terror not just organised crime for financial benefit.

4.17.3 The Committee notes that concern has been expressed over the inclusion of the offence of drug trafficking under the *Misuse of Drugs Act 1981*. The view expressed is that it may capture offenders who are not involved in organised crime. Section 32A(1)(b) of the *Misuse of Drugs Act 1981* provides:

32 A. Drug Trafficking

(1) If a person is convicted of –

…

(b) a serious drug offence in respect of –

(i)` a prohibited drug in a quantity which is not less than the quantity specified in Schedule VII in relation to the prohibited drug; or

(ii) prohibited plants in a number which is not less than the number specified in Schedule VII in relation to the particular species or genus to which those prohibited plants belong

the court convicting the person of the serious drug offence first referred to in paragraph (a), or the serious drug offence referred to in paragraph (b), as the case requires, shall on the application of the Director of Public Prosecutions or a police prosecutor declare the person to be a drug trafficker.

4.17.4 Schedule VII lists the amounts of prohibited drugs for purposes of drug trafficking, as follows:

Item	*Prohibited drug*	*Amount (in grams unless otherwise stated)*
1	AMPHETAMINE	28.0
2	CANNABIS	3.0 kg
3	CANNABIS RESIN	100.0
4	COCAINE	28.0

Item	*Prohibited drug*	*Amount (in grams unless otherwise stated)*
5	DIACETYLMORPHINE	28.0
5A	EPHEDRINE	28.0
6	LYSERGIC ACID DIETHYLAMIDE (LSD)	0.01
7	METHADONE	5.0
8	METHYLAMPHETAMINE	28.0
9	3, 4-METHYLENEDIOXYAMPHETAMINE (MDA)	28.0
10	3, 4-METHYLENEDIOXY-N, ALPHA-DIMETHYLPHENYLETHYLAMINE (MDMA)	28.0
11	MORPHINE	28.0
12	OPIUM	100.0

4.17.5 Schedule VIII lists the numbers of prohibited plants for purposes of drug trafficking, as follows:

Item	*Prohibited drug*	*Number*
1	Cannabis	250.0

4.17.6 The crimes listed under s32A(1)(b) would not capture some of the less serious crimes which are captured under other sections of the *Misuse of Drugs Act 1981*, which was a concern that was raised with the Committee.

4.17.7 The Committee notes that Schedule 1 includes s394 of *The Criminal Code*. That section has been repealed by s9 of the *Criminal Law Amendment Act 2001*, which came into operation on December 24 2001. The new and current s393 of *The Criminal Code* contains a similar offence to that of the repealed s394. Section 393 is contained in Schedule 1 of the Bill.

Observations

4.18 The Committee is of the view that crimes in s32a(1)(b) of the *Misuse of Drugs Act 1981* are of sufficient seriousness to be included in Schedule 1.

4.19 In reference to the concern outlined in 4.7.3 the Committee notes that should any amendments be required to Schedule 1 at a future date, the amendment is to be made by way of an amending Act. Thus, any proposal to amend Schedule 1 will be subject to parliamentary scrutiny prior to coming into effect.

Other offences

4.20 The crime of fraud is increasingly being linked to the activity of organised crime around the world. Fraud is a major problem for many countries, for example:

a) The National Criminal Intelligence Service in the UK has reported that fraud on the internet particularly is on the rise.[33]

b) The Australian Institute of Criminology estimates that fraud costs the community between $3 and $3.5 billion per year. This makes fraud the most expensive category of crime in Australia.[34]

4.21 To aid a prisoner in escaping or attempting to escape from lawful custody[35] is considered by some to be an activity in which organised crime is highly likely to be involved.

4.22 The Committee notes that Schedule 1 does not include offences relating to endangering the safe use of, and safety of a person travelling by, a vessel,[36] but does include similar offences relating to railway and aircraft.

Proposed amendment

4.23 The Committee has been advised that the Government is proposing to delete s451 of the Criminal Code from Schedule 1 of the Bill, as it is not considered to be of the same seriousness as the other matters listed.[37] Section 451 of *The Criminal Code* provides that a person who unlawfully and with intent obstructs the use of a railway or injures any property upon a railway is guilty of a crime and is liable to imprisonment for 20 years.

Observations

4.24 A majority of the Committee (Hons Jon Ford, Giz Watson, and Ken Travers MLCs) is of the view that s451 of *The Criminal Code* is not an appropriate offence for inclusion in Schedule 1, as the risk that it may capture offenders who are not associated with organised crime is too great to allow its inclusion.

4.25 A minority of the Committee (Hons Peter Foss and Bill Stretch MLCs) is of the view that s451 of *The Criminal Code* is an appropriate offence for inclusion in Schedule 1.

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33 "Organised crime 'growing'", BBC News, August 2 2000 at internet site: [http://news.bbc.co.uk/hi/english/uk/newsid_863000/863298.stm].

34 Australian Institute of Criminology, Fraud Prevention and Control, at internet site: [http://www.aic.gov.au/conferences/fraud/].

35 *The Criminal Code*, s145 and s147.

36 Vessel is defined (under *The Criminal Code*) as a ship, boat and every other kind of vessel used in navigation.

37 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p9.

4.26 The Committee notes that a number of offences are not included in Schedule 1 that may be associated with the activities of organised crime. These include:

i) fraud;

ii) assisting escape from custody;

iii) intentionally endangering safety of a person travelling by vessel; and

iv) endangering the safe use of a vessel.

4.27 The Committee endorses the definition of 'organised crime'.

Recommendations

Recommendation 1: The Committee recommends that the reference to section 394 of *The Criminal Code* contained in Schedule 1 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted, as the section has already been repealed.

Recommendation 2: The Committee by a majority (Hons Jon Ford, Ken Travers, and Giz Watson MLCs) recommends that the reference to section 451 of *The Criminal Code* contained in Schedule 1 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted, as proposed by the Government.

Recommendation 3: The Committee by a majority (Hons Jon Ford, Ken Travers, Peter Foss and Bill Stretch MLCs) recommends that the Government give consideration to including sections 145 and 147 of *The Criminal Code* relating to assisting escape from custody in Schedule 1 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001.

CLAUSE 4 - SECTION 4 OFFENCES

Clause Overview

4.28 A section 4 offence defines those things that will be investigated under the Bill.[38]

4.29 The Bill proposes two categories of section 4 offences:

[38] Explanatory Memorandum to the Bill.

a) a Schedule 1 offence which is committed in the course of 'organised crime'; or

b) an offence of wilful murder or murder, as defined in *The Criminal Code*, committed in connection with any other commission of a Schedule 1 offence.

4.30 The first part of the definition of a section 4 offence is that it is a Schedule 1 offence committed in the course of 'organised crime'. (Refer to paragraphs 4.1 to 4.14).

4.31 The second component of a section 4 offence, part (b), is a separate offence to that committed in the course of organised crime. Both the offences of murder and wilful murder are listed under Schedule 1. However, unlike the definition of organised crime, part (b) requires that the offence of murder or wilful murder must be committed *in connection with* the other Schedule 1 offence.

Summary of Submissions

4.32 Points raised as concerns in submissions include:

4.32.1 Clause 4 of the Bill contemplates the use of the Bill's powers even where organised crime and gang activities are not the subject of the investigation.[39]

4.32.2 Crimes of less complexity, gravity and seriousness are exposed to unwarranted investigative use of intrusive powers by law enforcement.[40]

4.32.3 The Bill should be tightened up to ensure that the absolute scope of its exceptional powers only relates to 'organised crime' offences. Section 4(b) should be removed.[41]

Discussion

4.33 For discussion in relation to a Schedule 1 offence which is committed in the course of 'organised crime' refer to paragraphs 4.1 to 4.14.

4.34 Clause 4(b) is an extension beyond 'organised crime' of the provisions of the legislation. When these offences are committed, there does not need to be an organised crime connection. For example, it may mean a murder and a murder, or a murder and a kidnapping. Thus, whilst the Bill deals in a general sense with organised crime, clause 4(b) is the exception.

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39 Submission No 16.

40 Submission No 11.

41 Submission No 24.

4.35 Clause 4(b) does not need to involve two or more people associated together. The only requisite is that the offence must be committed in connection with any other commission of a Schedule 1 offence. The offence may trigger the operation of the legislation. The Attorney General advised the Committee that it is the intention of the Government that clause 4(b) be included in the Bill.[42]

4.36 The Committee notes the comments of the Attorney General in relation to clause 4(b):

> *It is not an organised crime offence, but it could cover a serial killer.*[43]

4.37 The Committee notes that clause 4(b) could also cover a single murder. However, it is only intended to be utilised if the normal police powers have not been successful, that is, they have not been sufficient to capture an offender.[44]

4.38 The Committee notes that even if the criteria of a section 4 offence is satisfied, the powers provided for by the Bill will not necessarily be invoked. The special commissioner has the discretion not to use those powers. Further criteria under clause 9 must also be satisfied before the special commissioner will allow those powers to be used.

Observations

4.39 Public debate on the Bill has principally been focussed on organised crime but clause 4(b) is quite different in character. It brings within the powers conferred by the Bill the crimes of wilful murder and murder provided they are linked with another Schedule 1 offence.

4.40 The Committee can see no reason to link clause 4(b) to Schedule 1. This could lead to the application of the powers in the Bill to some murders and not others, without obvious justification.

4.41 It could also lead to confusion as to the definitive character of the crimes which should be in Schedule 1.

4.42 The Committee is of the view that in clause 4(b), the words "*committed in connection with any other commission of a Schedule 1 offence*" could be deleted.

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42 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 21 2002 and attached extract of the Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, November 29 2001, p6040.

43 Ibid.

44 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 21 2002.

4.43 Three options that then may be considered are:

a) amending clause 9(3)(c) to include additional matters for consideration when determining 'the public interest', before the powers can be used for clause 4(b) offences;

b) requiring the offence to be part of a suspected series of murders; or

c) deleting paragraph (b) altogether.

4.44 The problem with the first two of these options is that the murders in relation to which the powers are most likely to be used are those where the public pressure on the police for a solution is greatest: that is, those cases where a murderer has no apparent connection with the victim or victims and the public feels threatened.

4.45 The majority of the concerns expressed to the Committee about the conferral of these powers is that they will be abused. The combination of public pressure with the right to use these powers will give rise to a greater concern that there may be abuse.

4.46 The first option would make it clear that the powers can only be used in respect of clause 4(b) offences in an exceptional set of circumstances. Furthermore, the first option would be more acceptable if the other protections recommended by the Committee in this report were included in the Bill.

4.47 The third option avoids all of these concerns and results in the Bill being confined to organised crime.

Recommendation

Recommendation 4: The Committee by a majority (Hons Giz Watson, Peter Foss and Bill Stretch MLCs) recommends that clause 4(b) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted.

CLAUSE 6 – APPOINTMENT OF SPECIAL COMMISSIONER

Clause Overview

4.48 Clause 6 provides that either a serving or retired Judge of the Supreme Court or the District Court of Western Australia, is to be appointed as special commissioner.

4.49 The appointment of a special commissioner is to be made by the Governor. The term of office of a special commissioner is not to exceed four years. The Explanatory Memorandum states that an appointment for less than four years can be specified and that more than one special commissioner may be appointed at one time.

Summary of Submissions

4.50 Points raised as concerns in submissions include:

4.50.1 The imposition of this investigative function upon serving judges is inconsistent with the notion of separation of powers.[45]

4.50.2 Judicial independence will be threatened by the appointment of a judge as special commissioner, in so far as serving judges are concerned.[46]

4.50.3 This will have the effect of reducing public confidence in the judicial system.[47]

4.50.4 The public perception of the judges and the courts will be that they will no longer be seen as independent and impartial, but rather they will be seen as an extension of the police investigative process.[48]

4.50.5 The appointment of judicial officers to carry out administrative functions provides the potential for conflict with the other duties and interests of judicial officers.

4.50.6 That a serving judge would be removed from the court to fulfil duties as a special commissioner, could add to delays in the courts, thus creating the practical problem of resourcing. Mr Hogan of the LSWA made this comment:

> ***Mr Hogan****: … On the question of serving judges being commissioners, I believe it would lead to practical problems with manpower and resourcing the Supreme Court. Obviously, it would remove a judge from the court for some time. These sorts of investigations have the potential to extend their tentacles to charge all sorts of people. If that is added to delays in the courts when things can take a year or more to get through, it potentially removes one or two judges from the system.* [49]

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45 Submission No 8.

46 Ibid.

47 Submission No 16.

48 Submission Nos 16 and 8.

49 *Transcript of Evidence*, Mr Patrick Hogan, Barrister, LSWA, March 6 2002, p13.

Discussion

4.51 The Committee notes the comments of the Minister representing the Attorney General that judges were chosen as eligible to be special commissioners, as they are considered to be of appropriate qualification and status. These qualities are considered to be essential, to exercise the serious powers that the Bill provides to the special commissioner.[50]

Separation of powers

4.52 The separation of powers is the legal doctrine that the three arms of government: the executive, the legislative and the judicial, are separate and that their respective functions and powers are mutually exclusive.

4.53 At the heart of the separation of powers principle is the political philosophy encapsulated in the words of Montesquieu:

> *When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty … Again, there is no liberty if the power of judging be not separated from the legislative and executive powers.* [51]

4.54 The separation of powers doctrine is a constitutional doctrine implied from the Commonwealth Constitution and, as such, it inhibits the legislative power of the Commonwealth.[52] Unlike at the federal level however, the doctrine of separation of powers at the state level is not enshrined in each State's constitution. At the state level there is, therefore, no formal constitutional separation of powers nor does a strict doctrine emerge from the common law.[53] A State Parliament may confer non-judicial functions on any of the courts in that State and it may also confer non-judicial functions on any judge (as an individual independent from the court) in the State.

4.55 In Western Australia, there has not been strict adherence to the principle of separation of powers. For example, the Chief Justice who is the prime judicial officer of the State is also the Lieutenant Governor, sits on Executive Council and is an Electoral Commissioner.

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50 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, pp1-2.

51 Extract from XI *L'Esprit Des Lois*, 1750, pp215-217, contained in Flick, Geoffrey A, *Natural Justice, Principles & Practical Application*, 2nd Ed, Butterworths, 1984.

52 Commonwealth Constitution s1, s61, s71.

53 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; 20 IR 19.

Judicial independence

4.56 Judicial independence refers to the freedom from direction, control or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government. It is considered a safeguard of individual liberty and a fundamental attribute of constitutional government.[54]

Constitutional validity

4.57 It has been suggested to the Committee that the constitutional validity of the Bill may be questioned on the basis of the High Court case of *Kable v DPP*.[55] The Kable case proposes a doctrine based on 'incompatibility of function'. It is suggested that the application of this doctrine may result in substantially the same requirements being imposed on the State as the separation of powers doctrine.

4.58 The essence of the doctrine of 'incompatibility of function' is that the Legislature is prohibited from conferring jurisdiction or functions requiring a judicial body to act incompatibly with the integrity, independence and impartiality required of such a body exercising the judicial power of the Commonwealth.[56] The 'incompatibility of function' test applies irrespective of and quite independently from, the separation of powers doctrine.

4.59 The argument is, therefore, that a constitutional challenge may arise on the basis that by using judges in an investigatory role, this imposes upon them executive or administrative functions that are incompatible with judicial independence.

4.60 The Committee explored this issues with the Criminal Lawyers Association of Western Australia (CLA):

> ***Hon GIZ WATSON****: I have a question about part 2 of your written submission, in which you state -*
>
> *It may be that the legislation which imposes upon Judges an investigative role is in contravention of the constitution, this would be particularly so in relation to State Courts invested with federal jurisdiction namely the Supreme Court . . .*
>
> *Could you elaborate on whether you believe the Bill, if passed, would be subject to court challenge in the future?*

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54 Nygh, P, and Butt, P, (eds), *Australian Legal Dictionary*, Butterworths, 1997.

55 *Kable v Director of Public Prosecutions* (NSW) (1996) 180 CLR 51.

56 Ibid.

> ***Mr Bayly**: I am not a constitutional lawyer. However, there is a possibility that courts invested with federal jurisdiction, such as the Supreme Court, are subject to the restrictions placed on judges under the Constitution. If that is correct and judges are obliged to undertake an investigative role, that role and what judges can or cannot do may be contrary to the Constitution. That relates to the question of the judiciary being seen to be independent and the public having confidence in its independence, as required under the Constitution. The difficulty is that if judges are placed in an investigative role, they will lose that independence.*

And further:

> ***Mr Bayly**: … This legislation could not stop a constitutional challenge to the whole of the legislation, if that was thought appropriate on the basis that judges should not be placed in the position of investigators - a distinct possibility. Although I am not a constitutional lawyer, there would be some basis for making a constitutional challenge if judges were used for the process that the Bill sets out.*[57]

Appropriateness of judge as a special commissioner

4.61 A related issue raised was that by appointing judges as special commissioners, it is possible that a conflict of duty and interest may occur. This conflict may arise, for example, in a situation where a judge may hear a case in which a matter is raised that relates to something he/she had learnt during the course of an investigation in which he/she was the special commissioner and the evidence could impinge on that case.

4.62 Mr Bayly, President of the CLA, stated that even if such situation does not ever occur the very fact that it may be seen to have or is perceived to have occurred, brings into question the independence and impartiality of the judge. His view was that using judges in an investigative process would be a contamination of the criminal justice system:

> ***Mr Bayly**: … The use of judges would pervade the whole of the criminal justice system. By listening to the evidence that came before him, and deciding on questions and answers, a judge who sat and heard information about a particular reference would get information*

[57] *Transcript of Evidence*, Mr Richard Bayly, President, CLA, March 6 2002, p4 and p11.

> *about other people within the criminal justice system who came before the courts.*
>
> *The proceedings are held in secret. Although the judge would probably exclude himself from hearing a case that involves the particular term of reference about which he has given permission for the subpoenas to be issued, he may not exclude himself from hearing cases that involve other accused persons who have come before him or who have been referred to by other people in their evidence. This causes a contamination of the system. One of the drawbacks of having this type of secrecy is that the person on trial for another matter may never know that the judge involved in his trial has heard things about him in secret proceedings that he disagrees with. If judges are involved in this investigative process, one does not know if a judge, when trying another matter, is bringing an independent mind before the court on that day. While judges can have that investigative role, there will always be the suspicion that on other matters, they do not have an independent mind and are contaminated by what they have heard in secret proceedings from evidence that nobody can access.*[58]

Magistrate or Judge?

4.63 In light of the concerns raised, the Committee considered whether it might be more appropriate to appoint a magistrate to be special commissioner, rather than a judge. If the practise of using judges and justices to undertake various inquiries and commissions on behalf of the Executive may be seen as eroding the independence of the judiciary by giving judges an essentially 'administrative' role on behalf of the Government, then in such cases it may be better to leave such jobs to magistrates, who traditionally, in the past, were viewed as 'public servants'.

4.64 The magistracy in Western Australia was originally responsible for local law enforcement. Their duties were predominantly administrative, with a close association with the police. Over time this role has developed into that of a more judicial nature, and today stipendiary magistrates have come to be regarded, like judges, as judicial officers, although they have retained some administrative functions.[59]

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58 *Transcript of Evidence*, Mr Richard Bayly, President, CLA, March 6 2002, pp1-2.

59 For detailed information on the development of the role of magistrates refer to Lowndes, John, "The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part 2" (2000) 74 ALJ 561 at pp592-612. Also see the *Mining Act 1978* and the *Coroners Act 1996*.

4.65 The criminal jurisdiction exercised by the Court of Petty Sessions in Western Australia, which is usually constituted by a stipendiary magistrate who determines all questions of law and fact without the assistance of a jury, is as follows:

- to hear and determine complaints for simple offences;[60]
- to hear and determine certain complaints for indictable offences;[61] and
- to conduct an examination into a complaint of an indictable offence and commit for trial.[62]

4.66 Western Australian stipendiary magistrates also exercise summary jurisdiction over Commonwealth criminal matters under the *Crimes Act 1914* (Cwlth).

4.67 Magistrates are highly regarded throughout Australia and their judicial independence is widely recognised. Factors which have contributed to this includes:

- the gradual severance of the magistracy from the Executive;
- the emergence of a self-consciousness on the part of the magistracy as to the importance of the concept of judicial independence;
- the introduction of higher qualifications (that is, legal) for appointment as a magistrate;
- the expanding jurisdiction of magistrates which has diverted them from administrative to judicial functions; and
- the public expectation that magistrates will hear and determine cases in the same impartial and judicially independent way that judges do.[63]

4.68 Much of the daily work of the magistrate fits well with the functions of this Bill. However, the public policy issues which afford the protection under this Bill are not regularly encountered by them.

4.69 Judges, and in particular Supreme Court justices, are seen as having greater status than magistrates as they are regularly seen to rule on actions of the Executive by way of

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60 *Criminal Code*, ss428-437; *Justices Act 1902*, ss20(1), 134-159.

61 *Criminal Code*, ss1, 369, 409, 426A, 465, 473, 488, 512-514, 527, 549, 555, 555A, 559, 563, 599(2), 602A, 606.

62 *Justices Act 1902*, ss4, 98-130.

63 Lowndes, John, op cit, pp592-612.

judicial review, and to determine the validity of significant legislation of the Parliament.[64]

4.70 Thus, whilst in theory the use of a magistrate as special commissioner has merit, the Committee has concerns that a magistrate is not of sufficient status to give the public confidence in the proper use of the functions and powers of the Bill.

Serving or retired judge?

4.71 The Committee notes the problems that may arise as a result of the special commissioner being a serving judge. However, the Committee recognises that difficulties may be encountered in filling the position of the special commissioner if the position was limited only to retired judges. The number of retired judges available to act as special commissioners may be very small. A situation may arise whereby it is necessary that a special commissioner be appointed immediately, yet there may be no one available to fill the position.

4.72 The Committee believes that a way to address many of the concerns raised by the appointment of a judge as special commissioner, is to provide that the Governor has the option of appointing as a special commissioner, a retired judge from either an equivalent court within Australia or from a jurisdiction outside of Australia which has a similar basis of law, for example, Canada. If the judge who was appointed as special commissioner was not at that time a serving judge in Western Australia, none of the potential issues of concern will arise. This proposal will ensure that:

i) sufficient status for the position is maintained;

ii) conflict of interest and duty will be eliminated;

iii) judicial independence will be maintained, as the judge will not be involved in the day to day operations of the court in the State; and

iv) the problem of manpower on the state courts is mitigated.

4.73 So that the decision as to what jurisdictions fall within the ambit of this description does not itself become a complicated question of law, the Committee considers that the jurisdictions should be prescribed by regulation (refer to paragraph 8.2).

[64] See Justice Bruce Debelle, 'Judicial Independence and the Rule of Law', (2001) 75 ALJ 525, pp556-565.

Observations

4.74 The Committee notes that appointing serving judges as special commissioners gives rise to the possibility that the legislation may be the subject of a constitutional challenge, even if the legislation is not constitutionally invalid.

4.75 The Committee is of the view that the use of magistrates as special commissioners is not appropriate, as magistrates do not posses sufficient stature to ensure proper use of the functions and powers of the Bill. Magistrates are not as experienced in the making of judgments on what is 'in the public interest'. The key test of public interest is an area more frequently considered before higher courts than before magistrates. Judges are more likely to be versed in issues of the rights of individuals and personal liberties and making decisions in relation to these issues.

4.76 The Committee notes that if the special commissioner was not a serving judge then all the concerns raised in relation to clause 6, that is, constitutional validity, judicial independence, the contamination of the criminal justice system, and the problem of manpower, would be addressed.

Recommendations

Recommendation 5: The Committee recommends that only retired judges be appointed as special commissioner.

Recommendation 6: The Committee recommends that a retired judge from an equivalent court within Australia or any other jurisdiction having a similar basis of law be eligible to be appointed as special commissioner.

Recommendation 7: The Committee recommends that the jurisdictions for the purposes of Recommendation 6 be prescribed by regulation.

CLAUSE 7 – EFFECT OF APPOINTMENT

Clause Overview

4.77 Clause 7 provides that a special commissioner has the functions given by the Bill.

4.78 Clause 7 also provides that a special commissioner may resign by giving notice in writing to the Governor, but the resignation does not have effect until it has been accepted by the Governor.

Discussion

4.79 The Committee notes that both the *National Crime Authority Act 1984* (Cwlth) (NCA Act) and the *Anti-Corruption Commission Act 1988* (WA) (ACC Act) provide that members may resign by providing written notice. However, acceptance is not a requirement for the resignation to have effect.[65]

4.80 The purpose of the provision in the Bill is to give certainty about the precise time at which a resignation takes effect. Is it when it is written, placed in the post or received?

4.81 The Committee was advised that the intention of the clause was to provide that the executive act is identifiable in time, to mark the termination of the appointment, and to provide an opportunity to appoint a successor.[66] The clause clarifies the end of the commission.

4.82 The Committee notes that the Bill does not contain a clause providing for the termination of the appointment of the special commissioner prior to the expiration of the four year term. The Committee was advised that termination of the appointment of the special commissioner would occur by way of the application of the *Interpretation Act 1984*.[67] The Minister representing the Attorney General in the Legislative Council stated in evidence to the Committee that, in these circumstances, the Minister responsible for the Bill would recommend termination to the Governor, who would act, and the Executive Council would then remove the special commissioner from office.[68]

Observation

4.83 The Committee observes that it is not clear that s52 of the *Interpretation Act 1984* ensures that there is an ability to terminate the appointment prior to the expiration of the four-year term.

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65 ACC (WA) Act, s5(11); NCA Act (Cwlth), s41.

66 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p1.

67 *Interpretation Act 1984*, s52.

68 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p3.

CHAPTER 5

SPECIFIC CLAUSES OF THE BILL – PART 3

CLAUSE 9 – SCOPE OF THIS PART

Clause Overview

5.1 Clause 9(1) states that the purpose of Part 3 of the Bill is to facilitate the investigation of a 'section 4 offence'.

5.2 Clause 9(2) states that the investigation of an offence includes the investigation of a suspicion that the offence has been, or is being, committed.

5.3 Clause 9(3) states that the powers of a special commissioner under Part 3 cannot be exercised unless the special commissioner is satisfied that there are reasonable grounds:

a) for suspecting that a section 4 offence has been, or is being, committed;

b) for suspecting that there might be evidence or other information relevant to the investigation of the offence that can be obtained under Part 3; and

c) for believing that the use of powers given by Part 3 would be in the public interest having regard to three matters:

i) whether the suspected offence could be effectively investigated without using the powers;

ii) the extent to which the evidence or other information that it is suspected might be obtained would assist in the investigation and the likelihood of obtaining it; and

iii) the circumstances in which the information or evidence that it is suspected might be obtained is suspected to have come into the possession of any person from whom it might be obtained.

5.4 Therefore, clause 9 provides that a number of criteria must be satisfied before Part 3 may come into operation. Further, clause 9 gives the special commissioner the discretion to determine whether or not to grant the exceptional powers that are contained in the Bill.

Summary of Submissions

5.5 Points raised as concerns in submissions include:

5.5.1 The terminology used in relation to the 'suspicion' that an offence has been, or is being, committed, does not reflect that the 'suspicion' must be of reasonable certainty and gravity, to ensure that the 'suspicion' must be strong.[69]

5.5.2 Section 9 should expressly state that the investigation relates to a section 4 offence.[70]

Discussion

5.6 The Committee notes that the scope provided for by clause 9(2) is extremely wide. That is, the investigation undertaken under Part 3 of the Bill may be one that is based on suspicion only that an offence has been, or is being, committed.

5.7 Clause 9(3) provides a limit on the discretion of the special commissioner, in that a number of conditions must be satisfied before the powers of a special commissioner under Part 3 can be exercised. This threshold test is to ensure that adequate safeguards are in place before the exceptional powers provided for in the Bill are exercised.[71]

5.8 These conditions are extremely broad and open to wide interpretation. They include:

- 'reasonable grounds for suspecting';
- 'reasonable grounds for believing'; and
- the 'public interest'.

Reasonable grounds for suspecting

5.9 To understand what are 'reasonable grounds for suspecting', it is useful to look at what is meant by 'reasonable suspicion':[72]

69 Submission No 11.

70 Submission No 24.

71 Second Reading Speech, December 5 2001, p6439.

72 Nygh, P, and Butt, P, (eds), *Australian Legal Dictionary*, Butterworths, 1997, p982.

a) It is a suspicion based on facts which, objectively seen, are sufficient to give rise to an apprehension of the suspected matter.[73]

b) Suspicion carries less conviction than belief.[74]

c) To say that a suspicion is reasonable does not necessarily imply that it is well founded or that the grounds for suspicion must be factually correct.[75]

d) There may be different impressions produced from a single set of circumstances which can all be said to be reasonable. However, the facts must do more than merely give rise to conflicting inferences of equal or even lesser degree of probability where the choice between them is no more than a mere matter of idle speculation or mere imagination.[76]

5.10 'Reasonable suspicion' carries less conviction than 'reasonable belief' although there must still be some factual basis.

5.11 Whether the threshold has been met must be determined in all the circumstances of the particular case.

5.12 To understand what are 'reasonable grounds for believing', it is useful to look at what is meant by 'reasonable belief':

a) Belief carries more conviction than suspicion.

b) The concept can be fleshed out by reference to 'reasonable and probable cause,' that is, an honest belief based upon a full conviction, founded upon reasonable grounds, of the existence of a state of affairs which would justify the doing of something which would otherwise be unlawful.[77]

5.13 As with reasonable suspicion, whether the threshold has been met must be determined in all the circumstances of the particular case.

Observation

5.14 In reference to the concern outlined at paragraph 5.5.1 the Committee is satisfied that any decision to exercise the powers under the Bill based on 'suspicion' will be

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73 *R v Chan* (1992) 28 NSWLR 421 at 437.

74 *Tucs v Manley* (1985) 62 ALR 460.

75 Ibid.

76 *R v Chan* at 438 and 437.

77 *Hicks v Faulkner* (1881) 8 QBD 167.

sufficiently strong as it must have some factual basis. Further, the public interest test must be satisfied.

Public interest

5.15 What constitutes the 'public interest' is not delineated in this Bill except by reference to the three issues referred to at paragraph 5.3c), however the special commissioner must have regard to them.

5.16 A range of factors would be taken into account, which may include the seriousness of the offence, the amount of time that has elapsed, demonstration that the existing powers will not or have not worked, and whether the offence is at the heart of organised crime or at the fringes. However, the broad test is the public interest.

5.17 It is considered that the public interest test provides a 'check and balance' on the exceptional powers provided by the Bill. If, for example, the police sought to use the powers on a matter that was relatively minor but was technically within the ambit of this legislation, the special commissioner could determine, as a matter of discretion, that the public interest did not warrant the invoking of those powers. (Refer to paragraphs 5.42 to 5.45 for further discussion on the public interest).

Other legislation

5.18 The Committee notes that the threshold test for the use of the special powers in Part 3 (and Part 4) of the Bill is similar to that applied by judges in the Court of First Instance in Hong Kong to determine whether or not to grant an order for a person to answer questions or produce information.[78]

Amendments proposed by the Attorney General

5.19 The Attorney General has provided the Committee with a draft amendment to the Bill (attached at Appendix 6) and has advised the following in relation to these amendments:[79]

5.19.1 The amendment provides for a "*structural change to the Bill by moving clause 9(3) out of Part 3 and into Part 2. Therefore the Bill more clearly indicates that powers under Part 3 and Part 4 can only be exercised in respect of the offence in relation to which the special commissioner has been satisfied that the grounds in clause 9(3) exist.*"

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78 *Organized and Serious Crimes Ordinance 1994* (Hong Kong), s3.

79 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 20 2002.

5.19.2 "*In particular, you will note that proposed clause 9(3) specifically finishes with the words "in respect of the section 4 offence concerned". It is proposed that similar words also be included in clause 44. This ensures that there will be a relevant nexus with a specific section 4 offence*."

5.19.3 The express reference to Parts 3 and 4 in the proposed new clause 9(1)(b) and (c), "… *makes clear that the powers in Parts 3 and 4 can be exercised independently but in each instance only after the special commissioner has made the relevant clause 9 finding*."

5.19.4 "*In addition, a new subclause 9(2) has been added which requires the special commissioner to put their finding in writing. This will ensure that there is a written document evidencing the fact that the special commissioner has been satisfied that the grounds described in clause 9 have been satisfied*."

Committee comment on the proposed amendments

5.20 Clause 9(3) expressly provides one of the only protections contained in the Bill for the individual. It is also one of the few discretions given to the special commissioner to limit the application of the powers.

5.21 The Committee supports the removal of clause 9(3) from Part 3 into Part 2 and the amendments proposed by the Attorney General. However, the Committee is of the view that rather than inserting it into current Part 2, it should be inserted into a separate Part. In doing so, more clarity is provided. It would also complement the existing structure of the Bill.

5.22 The Committee is of the view that the Bill should provide that the special commissioner may impose, at his/her discretion, limitations to any order to exercise powers under Parts 3 and 4 of the Bill. This will provide a safeguard to the operation of Part 4 of the Bill, which provides the police with the authority to stop, detain, search and seize without a warrant. (Refer to paragraphs 6.32 to 6.56). The special commissioner should also be provided with the discretion to alter the conditions placed on the exercise of powers under Part 4, to allow for reaction to changes in circumstances relating to the investigation.

5.23 The amendment proposed by the Attorney General also address the concern raised at paragraph 5.5.2 and the concerns raised in relation to clause 44 of the Bill. Clause 44 is discussed at paragraphs 6.1 to 6.14.

5.24 The amendments proposed by the Committee later in this report address the problem of the lack of a 'paper trail' in relation to Part 4 of the Bill. This is discussed at paragraphs 6.47 and 6.50 to 6.58.

Recommendations

Recommendation 8: The Committee recommends that existing clause 9(3) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be deleted and replaced with the following (in accordance with the amendment proposed by the Attorney General) -

"(3) The powers of a special commissioner under this Part cannot be exercised unless the Commissioner of Police has satisfied a special commissioner that the grounds described in section 9(1) exist in respect of the section 4 offence concerned."

Recommendation 9: The Committee recommends that a new Part 3 be inserted into the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 as follows -

"Part 3 – Basis of use of Powers and Control by Special Commissioner

9. Finding as to grounds for exercising Part 4 or 5 powers

(1) On the application of the Commissioner of Police, a special commissioner may find whether or not the special commissioner is satisfied that:

- **(a) there are reasonable grounds for suspecting that a section 4 offence has been, or is being, committed;**
- **(b) there are reasonable grounds for suspecting that there might be evidence or other information relevant to the investigation of the offence that can be obtained under Part 4 or 5; and**
- **(c) there are reasonable grounds for believing that the use of powers given by Part 4 or 5 would be in the public interest having regard to –**
  - **i) whether or not the suspected offence could be effectively investigated without using the powers;**
  - **ii) the extent to which the evidence or other information that it is suspected might be obtained would assist in the investigation, and the likelihood of obtaining it; and**
  - **iii) the circumstances in which the information or evidence that it is suspected might be obtained is suspected to have come into the possession of any person from whom it might be obtained.**

(2) If the special commissioner is satisfied that the grounds described in subsection (1) exist, the finding is to be reduced to writing and a copy of it is to be given to the Commissioner of Police.

(3) The special commissioner may direct that the powers capable of being exercised by reason of Part 4 or 5 may be exercised only in the circumstances directed by the special commissioner who may impose such conditions as the special commissioner considers fit and the special commissioner may impose or vary those directions or give further directions from time to time.

(4) Without limiting subsection (3) the special commissioner may direct that the powers under Part 5 be limited:

- **a) to apply to certain persons or classes or persons;**
- **b) to be exercised only by certain persons or classes of persons;**
- **c) to extend to certain powers only;**
- **d) to be exercised in certain places or classes of places;**
- **e) to be exercised with respect to certain articles or classes of articles; or**
- **f) for a period of time."**

CLAUSE 16 – LEGAL REPRESENTATION

Clause Overview

5.25 Clause 16(1) provides that in proceedings before a special commissioner, the Commissioner of Police is to be represented by a legal practitioner. These proceedings include applications to the special commissioner for a summons requiring witnesses to attend hearings before the special commissioner.

5.26 This legal practitioner will be caught by clause 40(3) which imposes on the practitioner the same liabilities as if appearing before the Supreme Court when representing a person being examined by the special commissioner.

5.27 Clause 16(2) provides that a person being examined is entitled to legal representation at the examination. However there are two qualifications:

a) The special commissioner may decide that an examination may proceed without the benefit of legal representation for the witness (clause 16(3)). This may only occur if the special commissioner considers that "… *it would not be in the public interest to postpone the examination to enable the person to be legally represented* …" (clause 16(3)).

b) The special commissioner may refuse to allow a person to be legally represented by a person who is already involved in the proceedings or is involved or suspected to be involved in a matter being investigated (clause 16(4)).

5.28 The Bill does not specify guidelines as to what is considered to be 'in the public interest', but leaves it to general principles of law.

5.29 The Explanatory Memorandum states that clause 16 will enable a person to be examined without legal representation, for example, in order to prevent delays that would adversely impact on an investigation or jeopardise the safety of an individual.[80]

Summary of Submissions

5.30 Points raised as concerns by submissions include:

5.30.1 A number of submissions expressed concern at, and are opposed to, the notion that, should the special commissioner so decide, the witness may be examined without legal representation as provided for in clause 16(3).[81]

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80 Explanatory Memorandum to the Bill, p4.

81 These include Submission Nos 3, 6, 14 and 26.

5.30.2 Clause 16 is seen as an attempt to remove civil rights and civil liberties. For example:

> *The provisions in the bill relating to the citizen being taken from his home at any time and required to answer questions without the benefit of legal representation is contrary to all the present notions of a civilised criminal justice system and 'smack of the "Star Chamber"'; it conjures up notions of a police state.*[82]

Discussion

Director of Public Prosecutions

5.31 In respect of clause 16(1), the Committee considered whether it would be appropriate that the Director of Public Prosecutions (DPP) be involved in the proceedings.

5.32 The Office of the DPP is the independent State prosecuting authority of the Western Australian Government and prosecutes all serious offences committed against the State's criminal laws.[83] In addition, the DPP conducts all appeals flowing from those prosecutions and manages a range of matters pursuant to the *Criminal Property Confiscation Act 2000* and the *Misuse of Drugs Act 1981*. The DPP also conducts committal proceedings in the Perth Court of Petty Sessions and takes over the prosecution of the more serious indictable offences in the Children's Court.[84]

5.33 The DPP acts independently of the government in decision-making on criminal prosecutions. The DPP is, however, responsible to the Attorney General for the operation of the Office.

5.34 The DPP does not investigate crime - that is the role of the investigating agencies such as the Police Service and the ACC.[85]

5.35 The Committee notes the view of LSWA, that this would pose a possible future conflict of interest:

> ***Mr Hogan**: It may not be the appropriate thing to do. There might be reasons it should be someone out of the office.*

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82 Submission No 16, paragraph 3. See also Submission No 6.

83 Office of the Director of Public Prosecutions for Western Australia, *About DPP*, [http://www.dpp.wa.gov.au] (site accessed March 26 2002).

84 Department of Justice, Director of Public Prosecutions, [http://www.justice.wa.gov.au/displayPage.asp?structureID=736822&resourceID=46744654&division=The%20Department] (site accessed March 26 2002).

85 Office of the Director of Public Prosecutions for Western Australia, *Our Role*, [http://www.dpp.wa.gov.au] (site accessed March 26 2002).

> ***Ms Thompson**: Because of what may come later in terms of the prosecution of any offences that a person is charged with following evidence from the commission. A privilege problem might arise if the DPP is used in that situation. That is why we are saying that independent is better*.[86]

Legal representation

5.36 A central element of clause 16 is contained in subclause 2, which provides that a person being examined is entitled to legal representation at the examination.

5.37 Currently, at law, a person who is not on trial and is a witness at court proceedings is not entitled to legal representation. Proceedings under this Bill are not court proceedings but all persons before it are witnesses in respect of investigative proceedings. However, the Committee recognises that for some witnesses it is a very real prospect that as a result of proceedings under the Bill they may end up on trial. It is in this context that the question of legal representation is important.

5.38 It is generally considered that, whether charged or not, a suspect is entitled to the right to seek legal advice and representation at every stage of a proceeding. However, there is no common law right in Australia to be legally represented, as is commonly thought.[87] The right of an accused to a fair trial, however, is a fundamental element of the Australian criminal justice system.[88] For a trial to be fair, it would only be in exceptional cases that a trial should proceed where an indigent (that is, needy or poor) accused charged with a serious offence is not legally represented.[89] This principle does not apply to civil proceedings, committal proceedings, or in relation to indigent persons charged with criminal offences which are not serious and does not apply to protect the interests of witnesses.[90]

5.39 To ensure that any person summonsed to give evidence or to be cross-examined should have legal representation may be considered to be a 'check and balance' on the exceptional powers provided for in this Bill.

5.40 This 'check and balance' is modified by clause 16(3). As stated above at paragraph 5.27a), legal representation of a person during an examination before the special commissioner would only be denied if it would not be 'in the public interest' to

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86 *Transcript of Evidence*, Ms Clare Thompson, President, and Mr Patrick Hogan, Barrister, LSWA, Perth, March 6 2002, p9.

87 *McInnis v R* (1979) 143 CLR 575; 27 ALR 449.

88 *Jago v District Court of New South Wales* (1989) 168 CLR 23; 87 ALR 449.

89 *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385.

90 *New South Wales v Canellis* (1994) 181 CLR 309; 124 ALR 513.

postpone the examination to enable the person to be legally represented. Witnesses have no right to legal representation during a trial.

Observation

5.41 For the above stated reason, the Committee does not agree with the concern expressed at paragraph 5.30.2.

Public interest

5.42 The determination and meaning of 'public interest' is not defined at common law: "*Matters of public interest are very numerous; there is no specific formula for the determination of what constitutes public interest.*"[91]

5.43 The Committee notes that it is also the exception rather than the rule for legislation to define 'public interest'. Two exceptions are:

5.43.1 The *Surveillance Devices Act 1998* (SD Act) which defines public interest to include "*… the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens*."[92]

5.43.2 *Migration Regulations 1994* (Cwlth) which set out relevant public interest criteria that must be satisfied by a visa applicant. The most relevant determination of public interest for present purposes is that "*… the applicant is not assessed to be directly or indirectly a risk to national security*."[93]

5.44 What is 'in the public interest' is not defined or delineated by any principles in the Bill. The public interest is to allow for legal representation. It would only be in exceptional circumstances that the public interest to conduct an examination without legal representation for the witness would override. Thus, the Committee envisages that unless the situation was urgent and exceptional, a special commissioner would not proceed until the witness had legal representation.

5.45 The Committee has concerns that the possibility exists where the urgent nature of a hearing is not the fault of the person being examined but may have been created by action or inaction of the police. In such situations the person being examined should not be disadvantaged by not being legally represented. The Committee considers that the Bill does not include express provision to safeguard against such a situation occurring.

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91 *Bellino v Australian Broadcasting Corp* (1996) 185 CLR 183 at 240.

92 SD Act, s24.

93 *Migration Regulations 1994* (Cwlth), Schedule 4, Part 1, s4002.

Observations

5.46 The legal practitioner referred to in clause 16(1) will be caught by clause 40(3) which imposes on the practitioner the same liabilities as if appearing before the Supreme Court when representing a person being examined by the special commissioner. As an officer of the court, this standard of conduct is above partisan consideration.

5.47 The Committee has made a recommendation in relation to Part 7 of the Bill with regard to a regulation-making power, which, if adopted, would address many of the concerns that arise in relation to clause 16(3). (Refer to paragraph 8.2a)).

Other legislation

5.48 The Committee notes that examinees before the New South Wales Police Integrity Commission and the New South Wales Independent Commission Against Corruption are only permitted legal representation where it is authorised by the Commission. However both commissions are required to give a reasonable opportunity for a person giving evidence at the hearing to be represented.[94]

5.49 No matters are stipulated in the relevant legislation as to the factors to be considered although both Acts provide that a witness who is appearing or about to appear before either Commission may apply to the Attorney General for legal or financial assistance. The Attorney General may approve the provision of legal or financial assistance to the applicant if of the opinion that this is appropriate, having regard to any one or more of the following:[95]

a) the prospect of hardship to the witness if assistance is declined;

b) the significance of the evidence that the witness is giving or appears likely to give; and

c) any other matter relating to the public interest.

5.50 The Committee also notes that in proceedings before the NCA and the Queensland Criminal Justice Commission, all examinees are given the right to legal representation.[96]

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94 *Police Integrity Commission Act 1996* (NSW), s35; *Independent Commission Against Corruption Act 1988* (NSW), s33.

95 *Independent Commission Against Corruption Act 1988* (NSW), s52 and *Police Integrity Commission Act 1996* (NSW), s43.

96 NCA (WA) Act s16(4) and NCA Act s25(4); *Criminal Justice Commission Act 1989* (Qld), s95(1).

State-appointed legal representative

5.51 The Committee notes that both the New South Wales Police Integrity Commission and the New South Wales Commission Against Corruption make provision for application to the Attorney General and appointment of legal assistance in certain circumstances.[97] (Refer to paragraph 5.49 above).

5.52 It has been suggested that a way to address the issues raised by clause 16(3), would be to provide for the State to appoint a legal representative in urgent situations. This will ensure that the lack of legal representation cannot be used as a delaying tactic, and that in the event that the lack of legal representation is a legitimate issue, a person is provided with legal representation.

5.53 On this matter, LSWA expressed the following view in evidence to the Committee:

> ***Hon GIZ WATSON****: On the issue of legal representation, it has been suggested that one provision to add to the Bill would be that the person appearing would be appointed a legal representative if timeliness were a factor. Is that a reasonable remedy? The alternative is that the person would appear without any legal representation. In this case, the person would be allocated legal representation if there were urgency.*
>
> ***Ms Thompson****: If the matter is of sufficient urgency to raise the question of whether someone has the opportunity to brief counsel, it should be provided by the State.*
>
> ***Mr Hogan****: Yes, it is a remedy.*[98]

Observations

5.54 The Committee notes that such a proposal would have financial implications. It is outside the Committee's mandate to make recommendations which may amount to an appropriation.

5.55 The Committee also notes that even if legal representation is provided to a witness as an interim measure where the examination could not be postponed, the effectiveness of such representation may be questionable due to the 'last minute nature' of receiving and acting on instructions. The Committee reiterates its view that the preferred

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97 Section 52 of the *Independent Commission Against Corruption Act 1988* (NSW) and s43 of the *Police Integrity Commission Act 1996* (NSW) make provision for application to Attorney General and appointment of legal assistance in certain circumstances.

98 *Transcript of Evidence,* Ms Clare Thompson, President, and Mr Patrick Hogan, Barrister, LSWA, Perth, March 6 2002, pp9-10.

situation is not to hold the examination without legal representation unless there are urgent and exceptional circumstances.

Typographical error

5.56 The Committee notes that there is a typographical error in clause 16(4) of the Bill. The word 'commissioner' should be proceeded by the word 'special' to maintain consistency in terminology used throughout the Bill.

Recommendation

Recommendation 10: The Committee recommends that clause 16(4) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended to correct a typographical error, in the following manner –

Page 9, line 26 - To insert after "the" -
"special".

CLAUSE 19 – CONDUCT OF PROCEEDINGS

Clause Overview

5.57 Clause 19 states that in the proceedings before a special commissioner the rules of evidence do not apply and, except as otherwise stated in this Act, the special commissioner may determine how the proceedings are to be conducted.

5.58 The Explanatory Memorandum states that these are investigatory not court proceedings. Therefore, the rules of evidence, which apply to court proceedings, are not considered to be appropriate in this context. To provide adequate flexibility, the special commissioner can specify how proceedings are to be conducted. The exceptions are clauses 16, 17 and 18, which respectively address legal representation, the examination of witnesses and that the examination be in private.

Summary of Submissions

5.59 Points of concern raised in submissions include:

5.59.1 "*Rules of evidence should apply to the proceedings.*"[99]

5.59.2 "*The person in charge gets to make up the rules as he goes along. What is not permissible?*"[100]

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99 Submission No 26.

100 Submission No 3.

Discussion

What are rules of evidence?

5.60 Evidence is any matter of fact the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or non-affirmative, of the existence of some other matter of fact.[101]

5.61 Not all relevant evidence is admissible. While evidence may be logically probative, the law, for various reasons, excludes certain types of evidence.[102] 'Rules of evidence' are generally described as rules exclusionary of probative material, (although not all rules are exclusionary). By those rules "… *the law of evidence declares that certain matters which might well be accepted as evidence of fact by other responsible inquirers will not be accepted by the courts*".[103] Examples of exclusionary rules are the 'hearsay' rule, the 'previous conviction' rule and the 'best evidence' rule.

5.62 The rules of evidence control how a decision is arrived at, that is, by excluding probative material from the material on which the decision is made.[104]

5.63 There is no single rationale for exclusion of otherwise relevant evidence by application of the 'rules of evidence'. However, the basis includes: unreliability; the possibility that evidence has been concocted or manufactured; procedural fairness; the lack of opportunity to test evidence; and control of litigation where reception of the evidence may give rise to a multiplicity of issues.[105]

5.64 A further justification is that the probative value of the evidence is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing or cause or result in undue waste of time.[106]

5.65 Generally the 'rules of evidence' bind all courts and tribunals. However statute law may operate to alter or limit the way in which the rules of evidence apply. It is not uncommon to find statutory provisions specifying that, for example, a tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as

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101 *Cheney v Spooner* (1929) 41 CLR 532 at 537.

102 An item of evidence is probative if it is used to prove a fact required to be proved in a proceeding before a court.

103 *Cross on Evidence*, 3rd (Aust) ed, p1.

104 Justice Giles, 'Dispensing with the Rules of Evidence', (1991) 7 Aust Bar Rev 233, p234.

105 Heydon J D, et al (Eds), 'Evidence' *Halsbury's Laws of Australia*, para. 195-105, [www.butterworthsonline.com.au].

106 Ibid.

it thinks appropriate.[107]

5.66 The Committee notes that the Bill contains provisions providing for the examination of witnesses (clause 17), however the person representing any witness before a special commissioner may only examine, cross-examine or re-examine that witness insofar as the special commissioner thinks proper.

5.67 The reason that the rules of evidence are not to apply to the proceedings before a special commissioner under this legislation is that the proceedings are investigative, not proceedings of a court. The process is to seek evidence that will at a later date be admissible in a court of law. That the rules of evidence are not to apply makes it clear that the proceedings are that of an investigation not that of a court, where a person has been charged and is being tried for an offence.

5.68 The fact that the special commissioner is a former judicial officer and the Commissioner of Police and witness will normally be legally represented mean that legal formalities are likely to be observed.

Observations

5.69 For the above stated reason, the Committee does not agree with the concerns expressed at paragraphs 5.59.1 and 5.59.2.

5.70 It is interesting to note that under the proceedings of the Grand Jury the ordinary rules of evidence do not apply. Evidence such as hearsay and illegally seized evidence are admissible at a Grand Jury hearing.[108] However, it is noted that in a trial, the exclusionary rules of evidence exclude the admission of illegally seized evidence.

5.71 The Committee notes the necessity, as a result of the rules of evidence not being applicable, of the provision in the Bill for the examination be in private (clause 18):

> ***Hon PETER FOSS****: … we have had some people say that if proceedings are held in secret it is a bad thing. That provision was put in to protect people from having their evidence sprayed around the community and in the newspapers, as well as to protect advanced knowledge from going to criminals. Do you see evidence being taken in private as a plus or a minus?*
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> ***Mr Bayly****: With this sort of system it must be done in secret. An investigative body cannot investigate one person to see whether*

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107 Ibid, for example, see *Administrative Appeals Tribunal Act 1975* (Cwlth), s33(1).

108 Cobden, Lynn, 'The Grand Jury – Its Use and Misuse', *Crime & Delinquency*, April 1976, p151. (Article attached at Appendix 4).

> *another person has committed an offence and for the public and the press to be able to report on what was said. I would have thought that was obvious.*
>
> ***Hon PETER FOSS**: I agree with you. However, the Law Society of WA has criticised the fact that this process is happening in private. I would have thought that was a protection, rather than the opposite. However, it depends on how one looks at it.*
>
> ***Mr Bayly**: The Criminal Lawyers Association opposes the legislation and what it sets out to do. In the case of an investigation, it is not logical to make it a public event. When there are no rules of evidence, people can stand up and say awful things about other people that can then be reported. Those things may have no basis of fact at all, which is one of the problems with the investigative procedures as set out in this legislation. One ends up with a witch-hunt in which people say the most awful things about others, and if that was published …*[109]

Secrecy of information – Clause 29

5.72 Clause 29 of the Bill provides a penalty for breaching privacy of proceedings. The clause states that a person who, without the permission of a special commissioner, publishes any transcript of proceedings, any information obtained in the course of the proceedings or a report of the proceedings (the whole or any part of) commits an offence. The penalty is imprisonment for three years and a fine of $60,000.

5.73 Access to such documents therefore, would be governed by clause 29 and by the common law duties of confidentiality and various legislation.

5.74 The Committee notes that the NCA Act also contains a provision in relation to secrecy, applicable to a member of the NCA and to a member of the staff of the NCA. Under s31 of the NCA Act, it is a punishable offence to refer to, make a record of any information or divulge or communicate to any person any information acquired in the performance of a duty under the Act, for purposes other than those relevant to the performance of duties under the Act.

5.75 The Committee notes that other statutes contain provisions, which impose secrecy obligations. These include, for example, *Fish Resources Management Act 1994* (s250), *Police Force Regulations 1979* (s607), NCA (WA) Act (s31) and NCA Act (51), and *Biological Control Act 1986* (ss37, 39). These provisions restrict the use

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[109] *Transcript of Evidence*, Mr Richard Bayly, President, CLA, March 6 2002, pp3-4.

which government departments and other public bodies may make of the information they acquire.

5.76 The secrecy provisions contained in these statutes, all to varying degrees, cover the following areas: they may forbid disclosure in general terms; they may forbid the release of information by a public employee 'except in the performance of his duty' or 'except in such cases as may be required by law' or 'except with the consent of the person carrying on the business'; and the information is sought to be protected from the public or from other government agencies. They differ according to the kinds of protection they offer, the levels of applicable penalty, whether there is provision for ministerial waiver, and whether there is some exemption or scope for permitted disclosure.

5.77 The Committee notes that public servants in Western Australia are restricted in the ability to disclose any information acquired in the course of his or her duties, by legislation, public service regulations and administrative instructions. These include the *Criminal Code Act 1913* and the *Public Sector Management Act 1994*.

Observation

5.78 The Committee is of the view that for the Bill to be effective it is proper for it to contain express secrecy provisions for the following legitimate reasons of public interest:

i) to ensure the privacy rights of the individual;

ii) to prevent the use of proceedings as a forum to defame and prejudice;

iii) to protect information which, if disclosed, would imperil the investigation;

iv) to prevent the contamination of the views of the jurors;

v) to aid in protecting the witnesses from retribution; and

vi) to encourage candour and frankness in disclosure.

CLAUSE 20 - ARREST OF WITNESS FAILING TO APPEAR

Clause Overview

5.79 Clause 20 applies when a witness who has been personally served with a summons fails to attend. Proof that the summons has been served is required, in the form of a statement verified by statutory declaration.

5.80 The clause provides that if a person fails to attend as required by summons and section 13, the special commissioner may issue a warrant for the arrest of the person (the "defaulter").

5.81 The warrant authorises any person to whom it is addressed or a member of the Police Force of the State, to apprehend the defaulter at any time and bring the defaulter before the special commissioner. The defaulter may be detained in custody until released by order of the special commissioner or on appeal, by order of the Full Court of the Supreme Court. The detention is not unlimited and must only be for the purpose of bringing such a person before the special commissioner.

5.82 The defaulter may also be prosecuted for contempt for failing to comply with the summons, under clause 26 (Refer to paragraphs 5.120 to 5.180).

5.83 The person executing the warrant for arrest is authorised to break and enter any place, building or vessel for that purpose.

Summary of Submissions

5.84 Points raised as concerns in submissions include:

5.84.1 The clause does not account for legitimate reasons for not attending, such as illness.[110]

5.84.2 A warrant to enter premises should be required. The question was asked *"What if children or elderly were in the premises?"*[111]

5.84.3 A magistrate rather than the Full Court of the Supreme Court would be more appropriate to deal with appeal under clause 20(2)(b).[112]

Discussion

Execution of warrant

5.85 The Committee notes that similar provisions are contained in the NCA (WA) Act[113] and the ACC Act.[114]

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110 Submission No 6.

111 Ibid.

112 Ibid.

113 Subsections 19 and 20.

114 Section 40 (applied provision *Royal Commission Act 1968* s14).

5.86 The Committee notes that a warrant issued under clause 20(1) may be executed not just by a member of the Police Force but by 'any person to whom it is addressed'. The Bill does not define whom this may include, nor does the Explanatory Memorandum indicate whom this may include or why it is necessary to provide that a person who is not a member of the Police Force may execute the warrant. The decision is left to the discretion of the special commissioner.

5.87 The Minister representing the Attorney General advised the Committee that it is intended that this may include persons other than a police officer. The Bill leaves it up to the Commissioner to decide.[115] This may include a range of people such as a sheriff, a federal police officer or a customs officer. The Committee notes that the clause is similar to that contained in the *Royal Commissions Act 1968*, s16(3).

5.88 The Committee notes that it is not useful for warrants for arrest to deal with the legitimate reasons for non-attendance. These are addressed under clause 26 at paragraphs 5.120 to 5.123 and 5.134 to 5.141.

5.89 The Committee considers that the power to arrest a person who fails to appear before the special commissioner to be appropriate, in respect of the stated objective and intention of the Bill.

Security of witness

5.90 The Committee is of the view that the powers of the special commissioner should include the power to order the protection of a witness. The Committee is concerned that the Bill does not provide adequate protection to a witness. There are likely to be circumstances where a witness may not wish to appear before the special commissioner for fear of the potential consequences of doing so. Offering protection will provide a safeguard to the witness and aid in ensuring that the objective of the legislation is realised.

5.91 The Committee notes that the NCA (WA) Act provides for the protection of witnesses. Section 24 of the NCA (WA) Act states:

> ***24 Protection of witnesses, etc.***
>
> *Where it appears to a member that, by reason of the fact that a person–*
>
> *(a) is to appear, is appearing or has appeared at a hearing before the Authority to give evidence or to produce a document or thing; or*

115 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, pp3-4.

> *(b) proposes to produce or has produced a document or thing to the Authority pursuant to this Act otherwise than at a hearing before the Authority,*
>
> *the safety of the person may be prejudiced or the person may be subjected to intimidation or harassment, the member may make such arrangements (including arrangements with the Minister or with members of the Police Force of the State) as are necessary to avoid prejudice to the safety of the person, or to protect the person from intimidation or harassment.*

5.92 The Committee is not able to recommend an amendment in this regard, as it would require an appropriation.

Recommendation

Recommendation 11: The Committee recommends that the Government give consideration to amending the powers of the special commissioner to include the power to order the protection of a witness, in the same manner as that provided for in the *National Crime Authority (State Provisions) Act 1985* (WA).

CLAUSE 23 - RECORDS OF INVESTIGATION

Clause Overview

5.93 Clause 23(1) provides that the special commissioner is to cause records to be kept of every investigation, including transcripts of all proceedings before the special commissioner.

5.94 Clause 23(2) provides that it is at the discretion of the special commissioner as to how the records are to be dealt with on the completion of an investigation. At what point an investigation is considered to be 'complete' is not defined. For example, Part 3 relates to the questioning of a witness before the special commissioner. Whilst proceedings before a special commissioner may be complete, the investigation into the matters which the proceedings related, remains with the Commissioner of Police and may not be complete.

5.95 Clause 23(3) provides that any questions that arise after an investigation is completed about how any records are to be dealt with are to be referred to the Attorney General for determination. In respect of this, any other applicable written law does not apply.

5.96 Clause 23(4) provides that for the purpose of the *State Records Act 2000* any records transferred to the State Records Commission (SRC) are to be treated as 'restricted access archives' unless the Attorney General requests otherwise.[116]

Summary of Submissions

5.97 Points raised as concerns in submissions include:

5.97.1 Ministerial control of the State record is inappropriate. The independent SRC should retain control over the disposal of records created or received as a result of special investigations under the proposed Bill.[117]

5.97.2 The Attorney General may potentially destroy evidence 'at a whim' at the conclusion of an investigation. It was further submitted that this is a provision capable of easy abuse and it will undermine proper scrutiny and accountability at a later date.[118]

5.97.3 The evidence and transcripts should be treated the same as other High Court documents.[119]

5.97.4 There is a discrepancy in clause 23(4) in relation to references as it is the Director and not the SRC that has control of records in the State archives collection, in accordance with s36 of the *State Record Act 2000*.[120]

Discussion

State Records Act 2000 and the State Records Commission

5.98 If the *State Records Act 2000* applied to records of the investigation these records would be classified as government records.[121] However, records of the investigations of the special commissioner may not be subject to the full extent of the *State Records Act 2000,* if so determined by the special commissioner or the Attorney General. If they are transferred to the SRC they are to be treated as a 'restricted access archive'.

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116 'Restricted access archive' means a State archive (a record that is to be retained permanently) that is a government record and to which access is restricted until it is of a certain age.

117 Submission Nos 1, 4 and 17.

118 Submission Nos 8, 16 and 26.

119 Submission No 26.

120 Submission Nos 4 and 17.

121 D D R Pearson, Chair, State Records Commission, Letter to the Committee, February 6 2002. The *State Records Act 2000* ensures that the records of the State of Western Australia are properly managed and that relevant material is preserved for posterity.

5.99 Under the *State Records Act 2000* access to restricted archives is determined under the FOI Act. The Explanatory Memorandum notes that clause 66 of the Bill exempts the special commissioner from the operations of the FOI Act. Therefore, the records cannot be the subject of an application under the FOI Act.

Records

5.100 The Committee notes that the record-keeping provisions of the clause authorise either a special commissioner (under clause 23(2)) or the Attorney General (under clause 23(3)) to decide how records may be kept and disposed of during and after the completion of an investigation. Therefore, the special commissioner will not be accountable to the SRC for the proper management and disposal of investigation records.

5.101 Under the *State Records Act 2000*, records means any record of information however recorded and includes –

a) any thing on which there is writing or Braille;

b) a map, plan, diagram or graph;

c) a drawing, pictorial or graphic work, or photograph;

d) any thing on which there are figures, marks, perforations, or symbols, having a meaning for persons qualified to interpret them;

e) anything from which images, sounds or writings can be reproduced with or without the aid of anything else; and

f) any thing on which information has been stored or recorded, either mechanically, magnetically, or electronically.

5.102 It is envisaged that the records of an investigation of the special commissioner would include those that relate to the administrative processes of the investigation under Part 3 of the Bill. This would include such things as the application for a warrant for questioning to assist in an investigation, and documents or other evidence produced at the hearing. The special commissioner would not have any of the evidence or documentation that would come out of the search and seizure that is authorised under Part 4 of the Bill or surveillance under Part 5 of the Bill.

Attorney General

5.103 The Committee notes that clause 23(3) comes into operation only after the special commissioner fails to make adequate provision for the records. This is seen as necessary so that any questions that arise after an investigation is finalised, may be

dealt with. If, for some reason, the special commissioner has not made adequate provision by means of an order, someone must be given the power to determine how those records should be handled. This may occur, for example, in the situation where an investigation has been completed, but the laying of charges and the prosecution of offences may not be complete. Those records may be required as evidence, but the special commissioner may not have anticipated this and may have ordered the records to be archived.

Proposed amendments

5.104 A Supplementary Notice Paper to the Bill contains a proposed amendment to clause 23(3).[122] The amendment is to subsection 3, to replace reference to the Attorney General with reference to the 'State Records Commission' and that records be dealt with 'in accordance with the *State Records Act 2000*'.

5.105 The SRC also recommended amendments to clause 23 as follows:

5.105.1 Clause 23(2) be deleted and insert instead, "*A special commissioner may make any order considered to be appropriate, in accordance with the State Records Act 2000, as to how the records are to be dealt with when the investigation is complete*."

5.105.2 Clause 23(3) be amended as contained in the Supplementary Notice Paper,[123] "*If, after the completion of an investigation, any question arises as to how any records should be dealt with, the question is to be referred to the State Records Commission which may order that any record be dealt with as the State Records Commission considers appropriate in accordance with the State Records Act 2000.*"

5.105.3 Clause 23(4) be deleted and insert instead, "*For the purpose of the State Records Act 2000 any records that are less than 25 years old, and transferred to the custody of the Director of State Records as State archives, shall be treated by the Director as restricted access archives unless the Attorney General requests otherwise."*

5.106 The SRC advised the Committee that the proposed amendment to clause 23(4) is to correct a discrepancy, as it is the Director and not the SRC who has control of records in the State archives collection, in accordance with s36 of the *State Records Act 2000*.[124]

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122 Supplementary Notice Paper No 65, Issue No 1, Wednesday, December 19 2001. See Appendix 7.

123 Ibid.

124 Submission No 4.

5.107 If the SRC proposal is to be adopted then the Committee would favour the deletion of the words "*less than 25 years old, and*". This is because the Committee does not consider that 25 years is an adequate time frame to ensure protection of witnesses.

Security of records

5.108 Clause 22 provides a mechanism by which a copy of the documents produced before the special commissioner can be made, to be given to other authorised persons, such as the Commissioner of Police. The Committee notes however, that apart from this provision, the Bill does not provide any reference to how the records are to be dealt with during the investigation. This has an impact on the security of the records of the investigation.

5.109 The Committee notes that the Government appreciates the need for secrecy and confidentiality in the operation of Part 3 of the Bill.[125]

5.110 The Committee considers that confidentiality and security issues in relation to this Bill are critical. These include:

- ensuring secure storage of documentation, both during and after the investigation; and

- ensuring adequate safeguards for witnesses who give evidence before a special commissioner, including the non-disclosure of the evidence obtained and witness protection.

5.111 A key element of this is security of the records of investigations. The Committee is unaware as to how the confidentiality and security of records of investigations will be guaranteed, as the Bill does not contain specific provisions in this regard. The Committee is concerned that such administrative arrangements have not yet been worked out in detail.[126]

5.112 In so doing the Committee refers to its earlier recommendation in relation to the mechanisms and procedures for ensuring security to records accumulated in relation to the provisions of the Child Welfare Amendment Bill 2001.[127]

5.113 The Committee notes that the exclusion of the special commissioner from the operation of the FOI Act under clause 66, in some way protects the legitimate interests sought to be protected by such secrecy.

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125 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 18 2002.

126 *Transcript of Evidence,* Hon Nick Griffiths MLC, March 13 2002, p14.

127 Parliament of Western Australia, Standing Committee on Legislation, *Child Welfare Amendment Bill 2001*, Report No 10, (March 2002), pp 17 – 18 and Appendix 7 to that report.

5.114 The Committee notes that any measures that are to be taken to ensure security of records will have financial implications. (Refer to paragraphs 8.9 and 8.13).

Subpoena of the special commissioner's files

5.115 The Committee is concerned that the Bill does not appear to prevent parties to civil and criminal proceedings, from subpoenaing the special commissioner's files or other evidence.

5.116 There is no express protection in the Bill from the production of documents or any other evidence under subpoena in a court. The Attorney General advised the Committee that it is arguable that there is a public interest immunity that attaches to any information before a special commissioner (see clause 29). Whether such immunity exists may depend upon the particular circumstances of each individual case and may, for example, depend upon the nature of the information being sought. This is the position despite clause 39, which provides that a statement made by a witness is not admissible in evidence against the person making the statement in criminal proceedings.[128]

5.117 The Committee considers this 'arguable case' to be insufficient protection. A provision should be drafted to expressly prohibit the subpoena of documents and evidence without the permission of the Attorney General. This provision should not relieve the Crown of its obligation to disclose all relevant evidence upon a prosecution.

Observations

5.118 The Committee does not consider it adequate that the administrative procedures and arrangements necessary to ensure that something as important as confidentiality and secrecy requirements for the records of investigations, are not in place, and further that they have not yet been determined. The Committee seeks a detailed assurance from the Government as to the security of records.

5.119 Records other than those specified in clause 23(1) would be subject to the *State Records Act 2000*. The Committee believes that all records should be subject to the *State Records Act 2000*.

[128] Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 21 2002.

Recommendations

Recommendation 12: The Committee recommends that clause 23(2) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended as follows –

Page 11, line 29 - To insert after "appropriate" –
" , in accordance with the *State Records Act 2000,* ".

Recommendation 13: The Committee recommends that clause 23(3) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended as follows –

Page 12, lines 3 to 5 – After "the" to delete the lines and insert instead –
" State Records Commission which may order that any record be dealt with as the State Records Commission considers appropriate in accordance with the *State Records Act 2000*."

Recommendation 14: The Committee recommends that clause 23(4) of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended as follows –

Page 12, lines 6 to 9 – To delete the lines and insert instead –
"(4) For the purpose of the *State Records Act 2000* any records that are transferred to the custody of the Director of State Records as State archives, shall be treated by the Director as restricted access archives unless the Attorney General requests otherwise."

Recommendation 15: The Committee recommends that the Government draft an amendment expressly to prohibit the subpoena of documents and evidence without the permission of the Attorney General. Such a provision should not relieve the Crown of its obligation to disclose all relevant evidence upon a prosecution.

CLAUSE 26 – PENALTY FOR FAILING TO ATTEND OR PRODUCE ANYTHING

Clause Overview

5.120 Clause 26(1) provides that a person who has been served with a summons under clause 11 and fails, without reasonable excuse, to attend or produce any document or other thing as required, may be dealt with as if in contempt of the Supreme Court.

5.121 A 'reasonable excuse' is the same, as that which would apply to the Supreme Court, with three exceptions:

a) it does not include the excuse that the production of the document or other thing might incriminate or tend to incriminate the person or render the person liable to a penalty;

b) it does not include the excuse that the production of the document or other thing would be in breach of an obligation of the person not to disclose information or disclose the existence or contents of a document; and

c) it does not include a claim of legal professional privilege that is excluded by clause 38, that is, in respect of documents.

Summary of Submissions

5.122 Points raised as concerns by submissions include:

5.122.1 This provision is not appropriate and is unfair, unjust and outmoded:[129]

> *That a person who fails to attend or fails to answer questions during examination by a special commissioner is to be punished on the basis of contempt of court, without being charged with a crime or having the benefit of an open and public trial, is unsatisfactory.*[130]

5.122.2 By expanding the existing contempt jurisdiction of the Supreme Court, the preliminary recommendation of the Law Reform Commission of Western Australia (LRCWA) that the contempt of court procedures currently being used require reform is undermined.[131]

5.122.3 As was stated by LSWA in evidence to the Committee:

> *… The Law Reform Commission has made proposals in relation to contempt. We say that it is appropriate to deal with contempt in this instance in precisely the same manner as other contempt issues. The Law Reform Commission proposals recommended a wholesale change in the way in which contempt is dealt with. I understand that the Attorney General's program for legislation is that all Law Reform Commission proposals currently outstanding will be considered for legislation. That being the case, it would seem piecemeal to deal with*

129 Submission Nos 8 and 16.

130 Submission No 8.

131 Submission No 19.

> *contempt in this fashion in this legislation and set up a particular procedure, when a more general review of contempt laws is being undertaken. In that case we urge caution and say the Government should wait to see what the Attorney General will bring forward in relation to the contempt provisions as a result of the Law Reform Commission's proposals.* [132]

Discussion

5.123 As clauses 26 and 27 raise similar issues, such as, reasonable excuse, contempt of court, and abrogation of the privilege against self-incrimination and legal professional privilege, they are discussed concurrently.

CLAUSE 27 – PENALTY FOR FAILING TO BE SWORN OR TO GIVE EVIDENCE

Clause Overview

5.124 Clause 27 creates an offence of failing to be sworn or make an affirmation or answer questions. The offender may be dealt with as if in contempt of court. The clause expressly provides that self-incrimination is not an excuse for failing to answer any question.

5.125 The obligation to answer a question put by the special commissioner that is created by clauses 14 and 27 is subject to clause 10. Clause 10 effectively prevents a person being asked any questions about matters that are relevant to an offence with which the person stands charged but it does not prevent any other person from being examined about such matters.

5.126 A 'check and balance' on the abrogation of the privilege against self-incrimination is provided by clause 39. That clause provides a form of indemnity against the use of information obtained under clause 27.

Summary of Submissions

5.127 Points raised as concerns by submissions include:

5.127.1 The Bill is a threat to our civil rights and our civil liberties.

5.127.2 The Bill fundamentally abrogates the right of silence and the right against self-incrimination and there is no real protection against abuse of such abrogation. There are also insufficient immunities for people required to

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[132] *Transcript of Evidence*, Ms Clare Thompson, President, LSWA, Perth, March 6 2002, p2.

incriminate themselves before a special commissioner.[133]

5.127.3 "[The Bill] *presumes that a person who may be suspected of a conspiracy to commit an offence, assist in making statements to the crown to prove the burden of proof when suspects are ordinary presumed innocent until proven guilty.*"[134]

5.127.4 The example of the United Kingdom cases involving the 'Birmingham Six' and 'Guildford Four' demonstrate the dangers of interfering or trying to remove the 'right to silence' laws.[135]

5.127.5 The Bill will adversely affect the work of journalists, and undermines the ability of the media to function effectively in the public. The provisions of the Bill would deter journalists from seeking to make contact with individuals (that is, source) where there is a risk that information could lead to a criminal conviction for failing to disclose a source. The provisions of the Bill do not allow journalists to refuse to disclose information by claiming an ethical duty to protect a source, nor use any argument about the merit of protecting a source.[136] It would also deter individuals from approaching journalists. Further "*… the Bill seems to target journalists in their lawful profession in a manner that does not affect the rest of the community in their jobs*."[137]

5.128 Support for the removal of the right to silence (and imprisonment as a penalty for failing to provide the required information), was expressed by a member of the public, but with the proviso that this should be done publicly, before the judiciary and under the control of the judiciary.[138]

Discussion

Other legislation

5.129 The Committee notes that the *Criminal Property Confiscation Act 2000* (WA) is similar to the Bill but the requirement to submit to an examination or produce a document is pursuant to a court order. It is a serious offence not to comply with an order and a penalty of $100,000 or imprisonment for five years or both may be

133 Submission No 16.

134 Submission No 13.

135 Submission No 15.

136 Submission No 19.

137 Submission No 18.

138 Submission No 5.

imposed.[139]

5.130 Both the ACC Act and the *Prostitution Act 2000* contain similar provisions compelling a person to provide information or documents, however self-incrimination and legal professional privilege are retained as lawful excuses.[140] A penalty of $8,000 or two years imprisonment may be imposed in both cases.

5.131 The *Royal Commissions Act 1968* also provides for a penalty if a person fails to attend, produce documents, refuses to be sworn or to give evidence and in so doing that Act abrogates the privilege against self-incrimination. However that Act also allows a person to not provide materials that are "… *not relevant to the inquiry* …".[141]

5.132 A different approach is illustrated by the *Criminal Justice Act 1989* (Qld).[142] Similar to this Bill, that Act provides that self-incrimination is not an excuse, except in relation to an offence for which the person stands charged. That Act further provides that no person is excused from furnishing information or producing documents or other things to the Criminal Justice Commission in response to a request except:

a) where a ground of privilege is upheld by the Supreme Court;[143]

b) where the information or thing is not relevant to the investigation;[144] and

c) where it would disclose a secret process of manufacture applied by the person solely for a lawful purpose.

5.133 Since the enactment of the *National Crime Authority Amendment Act 2001*, ss29 and 30 of the NCA Act no longer permit witnesses to give 'reasonable excuse' for a failure to attend, answer questions, or produce documents or other things in response to a notice demanding such action. The NCA Act allows for maximum penalties of a fine of $20,000 or five years imprisonment.

Reasonable excuse

5.134 A reasonable excuse has been defined as *"A justification for conduct which is otherwise illegal where that justification is considered appropriate by a tribunal of*

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139 *Criminal Property Confiscation Act 2000* (WA), ss61(2) and 65(4).

140 ACC Act, ss37, 38, 44 and 46; *Prostitution Act 2000,* s13.

141 *Royal Commissions Act 1968,* ss13 and 14.

142 *Criminal Justice Act 1989* (Qld), ss77 and 94.

143 Grounds of privilege include legal professional privilege, Crown privilege or other public interest or parliamentary privilege. If the claim is made on the ground of Crown privilege or other public interest, the Court must also find that on balance the public interest is better served by withholding the information: *Criminal Justice Act 1989* (Qld), s77.

144 In most instances 'relevancy' is determined by the Commission.

fact given all of the circumstances in which the conduct occurred."[145]

5.135 As such it depends on the particular circumstances of each case. The real question in deciding whether something is 'reasonable' is to determine what circumstances are relevant.

5.136 The term 'reasonable excuse' has been used in many statutes and is the subject of many reported decisions. However decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case, but also on the purpose of the provision to which the defence of 'reasonable excuse' is an exception.[146]

5.137 In *Taikato v R* the High Court stated that:

> *However, the reality is that when legislatures enact defences such as "reasonable excuse" they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes is decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.*[147]

and further:

> *That being so, the courts must give effect to the will of Parliament and give effect to their own ideas of what is a "reasonable excuse" in cases coming within s545E* [the section of the *Crimes Act 1900* (NSW) under consideration in that case] *even when it requires the courts to make judgments that are probably better left to the representatives of the people in Parliament to make.*[148]

5.138 It is to be noted that clause 26 modifies the boundaries of 'reasonable excuse' in the removal of privileges and obligations of confidentiality from the scope. (Refer to paragraph 5.121).

5.139 The Committee notes that a distinction is made in the Bill in that reasonable excuse (as modified) may be as a defence to a penalty under clause 26 (failure to attend or produce documents) but not under clause 27 (failure to be sworn or give evidence).

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145 Nygh, P, and Butt, P, (eds), *Australian Legal Dictionary*, Butterworths, 1997, p982.

146 *Taikato v R* (1996) 186 CLR 454 at 464 per Brennan CJ, Toohey, McHugh and Gummow JJ.

147 *Taikato v R (*1996) 186 CLR 454 at 466.

148 Ibid.

5.140 Seeking clarification on this, the Committee wrote to the Attorney General who advised that this discrepancy was intentional.[149] There may be reasonable excuse for non-compliance in relation to a person attending before a special commissioner or to produce for example, a document, such as it might be impossible for a person to appear within a stipulated time period because there was no available air flight from a remote area of the State (clause 26). However, the Attorney General does not consider that there is any reasonable excuse to not swear an oath or make an affirmation, or fail to answer a question (clause 27).

5.141 As stated by the Attorney General in a letter to the Committee:

> *In relation to clause 27(1)(b), the requirement to answer a question only arises after the special commissioner has considered whether the person should answer and the special commissioner has required the person to answer a question. Again, in these circumstances, there are no reasonable grounds for refusing to answer.* [150]

Privilege against self-incrimination

5.142 Under the *Evidence Act 1906* a witness can decline to answer a question on the grounds that their reply might tend to incriminate them – the privilege against self-incrimination.[151] This right is usually exercised by the refusal to answer questions or to produce documents. It is to be distinguished from the right outside the court to remain silent, which is related but a separate legal concept. It is connected to the fundamental presumption of innocence in criminal matters and the adversarial nature of the common law system itself.

5.143 As the privilege is a basic common law right it is not merely a rule of evidence which rules are excluded by clause 19. The privilege is available generally and is available in administrative investigations as well as in judicial proceedings.

5.144 In some circumstances, however, it is acknowledged that government may need information to enable it to carry out its duties to the community. Thus the privilege against self-incrimination may not be absolute. The common law privilege can be modified or excluded by legislation and this is often done to facilitate investigative activities. The public benefit from a negation of the privilege should usually outweigh the resultant harm from its removal.

5.145 If, for sufficient reason, the law requires the abrogation of the privilege against self-incrimination, the law should generally provide safeguards. For example, the

149 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 18 2002.

150 Ibid.

151 *Evidence Act 1906*, s24.

legislative approach adopted by the Queensland Scrutiny of Legislation Committee, has been that a removal of the privilege against self-incrimination may be justified:

a) If the matters concerned are matters peculiarly within the knowledge of the persons denied the benefit of the privilege, and which it would be difficult or impossible to establish via any alternative evidentiary means.

b) The bill prohibits the use of the information obtained in prosecutions against the person.

c) In order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any condition such as formally claiming the right.[152]

5.146 The Explanatory Memorandum does not express any justification for the abrogation of the privilege against self-incrimination found in clauses 26 and 27, nor as to why the penalty of contempt is considered to be appropriate. However it is generally considered that the privilege may conflict with the public interest in having all relevant information available to both the investigating authorities and the courts.[153]

5.147 The Committee notes the comments by the Police Service that it is their experience for suspects and persons of interest to simply refuse to provide information to progress police investigations. Clauses 26 and 27 place a requirement on a person to produce documents and answer questions. It is anticipated that a substantial penalty for failing to provide documents and answer questions should act as a deterrent to non-compliance.[154]

5.148 Whether or not clauses 26 and 27 will achieve this outcome remains to be seen. The Committee notes the comment of the LRCWA, that:

> *... the practical reality is that if suspects and others refuse to answer questions, it is not possible to force them in a physical sense to answer short of returning to the techniques of the Star Chamber. … the issue remains: how reliable is information obtained under duress? This raises what it might mean to abolish the right to silence.*[155]

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152 Parliament of Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *Alert Digest No 8* 2001, p8.

153 LRCWA, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project 92 1999, p201.

154 F Gere, Acting Assistant Commissioner, Crime Investigation Support, Western Australia Police Service, Letter to the Committee, March 11 2002.

155 The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project 92, 1999, p202.

5.149 Mr Bayly of the CLA, in evidence to the Committee, expressed the following view on the abrogation of the right to silence:

> *The association is concerned about the abrogation of the right to silence. Under this legislation a person can be asked whether he has committed a particular offence. Historically, it is pretty rare for people to incriminate themselves under any circumstances, even if they are compelled to give evidence. The problem with compelling people to give evidence in circumstances in which they might incriminate themselves is that they will be encouraged to lie. That is of little benefit. I notice that a provision under the National Crime Authority legislation allows a person to object to a question if the answer would incriminate him. Even under the NCA legislation a person is not obliged to incriminate himself, whereas under this legislation he is.*[156]

5.150 The Committee notes the comments of the Minister representing the Attorney General in response to an inquiry by the Committee as to what protection existed from prosecution for people who are required to incriminate themselves and what safeguards existed against abuse of such abrogation:

> *The self-incrimination and legal professional privilege issues are interesting. It is important for the committee to note that a number of areas in our current law require people to incriminate themselves. Some of them are of a fairly minor nature and deal with matters such as those under the Road Traffic Act. Others are of a more important nature, such as those that relate to the operations of the Anti-Corruption Commission. The committee should bear in mind that a person is required to answer a question only in very defined circumstances. It must be relevant. This matter should not be of concern.*[157]

Legal professional privilege

5.151 The Committee notes that the availability of legal professional privilege as an excuse for non-compliance with certain requirements of the Bill differs according to the context in which powers may be exercised.

5.152 As a matter of Australian law, it is clear that legal professional privilege is capable of applying to limit coercive powers of commissions to compel the disclosure of

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156 *Transcript of Evidence*, Mr Richard Bayly, President, CLA, Perth, March 6 2002, p5.

157 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p4.

information and the power to seize documents.[158] However legal professional privilege may be abrogated either by express language or by necessary implication.[159]

5.153 With regard to clause 26 in Part 3 of the Bill, legal professional privilege is *not* available as an excuse for the non-production of documents required pursuant to a summons issued under clause 11. This is expressly provided by clauses 26(2)(b) and 38.

5.154 In contrast it appears that a claim of legal professional privilege may be raised:

5.154.1 as an excuse not to answer questions pursuant to a summons under clause 11 in the context of clause 27 in Part 3; and

5.154.2 as a response to the exercise of powers under Part 4, for example clauses 45 and 46.[160]

5.155 As a general matter courts are reluctant, especially in the absence of express statutory provisions such as clauses 26(2)(b) and 38, to hold that legal professional privilege has been curtailed or abrogated. The Attorney General has advised the Committee that, for this reason, express provisions have been included in the Bill so as to abrogate legal professional privilege in the circumstances outlined in clauses 26(2)(b) and 38.[161]

5.156 The Attorney General also advised the Committee that:

> *In view of this general legal position and the drafting of the Bill, which includes such express provisions, the clear statutory implication is that legal professional privilege does apply in relation to clause 27 and Part 4 of the Bill. This conforms with the intention of this proposed legislation to reach, in the context of the objective of combating organised crime, an appropriate balance between statutory powers and protecting individual rights.*[162]

5.157 This position is reinforced by the Explanatory Memorandum which states (in relation to clause 26) "*The operation of clause 26(3)(b) with clause 38 removes legal*

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158 *Esso Australia Resources Ltd v FCT* (1999) 168 ALR 123 at 125; *Baker v Campbell* (1983) 153 CLR 52 at 123.

159 *Baker v Campbell* (1983) 153 CLR 52 at 90, 96-7, 104-5, 116 and 123.

160 For example, clause 45(1) and (2) enables police officers to enter any place and demand production of articles and records and seize anything that the police officer suspects will provide evidence relevant to the investigation of the offence.

161 Hon J A McGinty MLA, Attorney General, Letter to the Committee, April 16 2002.

162 Ibid.

professional privilege as a reasonable excuse but only in relation to the production of documents." Further, it is only the privilege against self-incrimination which is expressly abrogated by clause 27(2).[163]

5.158 By way of 'checks and balances' the Committee notes that the exercise of powers under clauses 26 and 27 in Part 3 are pursuant to a specific summons issued by the special commissioner whereas the powers under Part 4 may be exercised at any time once the special commissioner has been satisfied that the grounds in clause 9(3) exist. Further the Committee notes that whilst judicial supervision is excluded in relation to performance of a function under Part 3 it is not excluded in relation to matters under Part 4.

5.159 Matters relating to legal professional privilege are further discussed in relation to clause 38 at paragraphs 5.207 to 5.225.

Contempt of court

5.160 The reason stated by the Government for the imposition of the penalty, being contempt of court, is to ensure compliance with a summons under clause 11. The Government views this penalty as that which would get people to talk and to get evidence. The investigative process that the Bill is putting in place, every provision and penalty of the Bill, is in an endeavour to get to the bottom of many of the activities of organised crime.[164]

What is contempt in the face of the court?

5.161 Liability for contempt in the face of the court is based on the general concept of 'interference with the due administration of justice'.[165] The source of the contempt powers of the Supreme Court of Western Australia resides in the common law and the *Supreme Court Act 1935*.[166] The Supreme Court is a superior court of record with general civil and criminal jurisdiction. As such, it has an inherent jurisdiction to punish contempts of court.

5.162 The mode of trial for contempt is summary. Significantly this means that a number of

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163 The *expressio unius* rule of statutory construction means that to expressly include one thing in a provision is to impliedly exclude another. In this case, express reference to the abrogation of the privilege against self-incrimination in clause 27(2) implies that the absence of any reference to the abrogation of legal professional privilege in the context of clause 27 means that a claim of legal professional privilege is available in those circumstances.

164 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, November 28 2001, p6083.

165 The Law Reform Commission of Western Australia, *Discussion Paper on Contempt in the Face of the Court*, Project 93(1) (2001) p(i). A comprehensive coverage of the law of contempt, though in some respects possibly out of date, is provided by the ALRC, *Contempt*, Report 35, 1987.

166 *Supreme Court Act 1935*, s6.

the features now regarded as fundamental to the right of a fair trial are absent. Judicial authority has to an extent, tempered the summary nature of the procedure in recent times, which has sought to preserve certain minimum standards of fairness.[167]

5.163 In the case of contempt committed in the face of the Supreme Court, the contemnor is likely to be without any effective rights of appeal. This is because the rights of appeal in criminal cases from the Supreme Court are provided for by s688 of the *Criminal Code*, which only applies where a person is 'convicted on indictment'. A finding of guilt of criminal contempt may be a criminal conviction but it is not 'on indictment'. Thus an appeal to the Court of Criminal Appeal from such a conviction is incompetent. Given the restriction on rights of appeal from contempt convictions generally in the Supreme Court, an appeal to the High Court may be the only remedy available.[168]

What penalties apply?

5.164 Sentencing powers for contempt in the face of the court at common law were unlimited as to the term of imprisonment or size of fine. These powers are largely preserved in the Supreme Court of Western Australia, which may impose a term of imprisonment or a fine or both.[169]

5.165 The law in relation to sentencing for criminal offences generally has received much attention from the legislature in recent years. The *Sentencing Act 1995* and the *Sentence Administration Act 1995* have greatly expanded sentencing options open to the courts and have sought to prescribe with greater particularity matters to be taken into account in sentencing offenders.

5.166 It is notable, therefore, that the power of the Supreme Court to punish for contempt of court is expressly excluded from the operation of the *Sentencing Act 1995*.[170] The effect is to prevent the Supreme Court, in relation to contempt, from using sentencing options such as community-based orders, intensive supervision orders and suspended sentences and, arguably, prevents a person guilty of contempt being granted eligibility for parole.[171]

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167 *Coward v Stapleton* (1953) 90 CLR 573 at 579-580.

168 The Law Reform Commission of Western Australia, *Discussion Paper on Contempt in the Face of the Court*, Project 93(1), 2001, p12. The right to appeal to the High Court in relation to contempt in the face of the court committed in the Supreme Court is conferred by s73 of the *Australian Constitution.* In this regard, the ability effectively to appeal to the High Court is subject to the requirements of the grant of special leave under s35(2) of the *Judiciary Act 1903* (Cwlth).

169 These powers are found in *Rules of the Supreme Court 1971* (WA), Order 55 Rule 7.

170 *Sentencing Act 1995*, s3(3).

171 The Law Reform Commission of Western Australia, *Discussion Paper on Contempt in the Face of the Court*, Project 93(1), 2001, p10.

5.167 In this respect the Committee notes that the Attorney General, in a letter to the Committee, advised that there are no statutory limits or criteria set out in the Bill for a contempt proceeding brought pursuant to the Bill. As each case depends upon its own particular circumstances, the Attorney General stated that it would not be appropriate to speculate about what penalties the Supreme Court may or may not impose for a contempt under this Bill.[172]

Observations

5.168 The Committee is of the view that it cannot be claimed that the Bill has coercive powers if penalties in the Bill are not specified (for example, clauses 26 and 27 – contempt) or, if specified, are not sufficiently high to have a coercive effect.

5.169 The Bill specifies penalties in the following circumstances:

- a penalty of two years imprisonment and a fine of $40,000 in relation to offence under Part 4 (clause 50);
- a penalty of three years imprisonment in relation to fraud on a witness or destroying evidence (clauses 32, 33);
- a penalty of three years imprisonment and a fine of $60,000 in relation to breaching disclosure or privacy requirements (clauses 28, 29, 61);
- a penalty of five years imprisonment in relation to giving false testimony, bribery of a witness (clauses 30, 31); and
- a penalty of five years imprisonment and a fine of $100,000 in relation to preventing a witness from attending, injury to witness, dismissal by employers of witness or hindering the removal or modification of fortifications (clauses 34, 35, 36, 62).

5.170 It is the view of the Committee that a different range of penalties should apply to an offender who is neglectful or uncooperative rather than to an offender who is obviously involved and defiant.

5.171 A penalty is unlikely to be coercive and to secure cooperation when it is weighed against the expected retribution from the organisation of the type being investigated. To facilitate compliance with the provisions of the Bill in such circumstances, the Committee considers that there should be an ability to offer immunity and protection. The Committee has recommended consideration of such an amendment at Recommendation 10.

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172 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 18 2002.

5.172 There are inherent problems with the open endedness of providing for punishment by way of contempt of court for certain offences. On the one hand, there is no limit as to the upper range of penalty that may be imposed. On the other hand there are obvious objections to sentencing even defiant offenders to very long periods of imprisonment on a summary trial and it is likely that a court would be reluctant to do so.

5.173 For those circumstances where it is clear that the evidence is closely related to the commission of the offence and a witness who could cooperate has refused to do so then there should be the ability for the court to impose a commensurate penalty.

5.174 For these reasons the Committee would prefer that the Bill included indicative ranges of maximum penalties as opposed to the open-ended provisions currently in the Bill.

Review of contempt in the face of the court

5.175 The Committee notes concerns expressed in the submissions and by witnesses that contempt in the face of the court is in the process of being reviewed by the LRCWA.[173] The Committee notes that the Government is aware of these concerns and has stated that consideration of this Bill should not pre-empt the report of the LRCWA or its recommendations.

5.176 The majority of the Committee is of the view that the passage of the Bill should not be delayed until such reviews are completed and notes that this issue may be revisited once the review is completed.

Limited privilege for journalists?

5.177 In its submission to the Committee the Western Australian Journalists Association (WAJA) mooted a limited privilege for journalists in order to protect their 'source'. (Refer to paragraph 5.127.5).

5.178 WAJA acknowledged that a limited privilege was one way of addressing their concerns, but that such a remedy was not their ultimate intention:

> ***Mr Cusworth**: The argument we have adopted in approaching this Bill is not so much a matter of seeking privilege, but an acknowledgment that it is a civic right for individuals to approach the media in confidence. If you are suggesting that journalists should be excluded from the provisions of, I believe, clauses 26 and 27, that would be one way to address our concerns. Another way would be to examine the recommendations of the Western Australian Law Reform*

[173] The Law Reform Commission of Western Australia, *Discussion Paper on Contempt in the Face of the Court*, Project 93(1), 2001.

> *Commission, which has suggested that a limited form of privilege be adopted in courts. In the past we have been somewhat divided over the issue of privilege because it is not generally accepted that journalism should attract privilege. Some journalists would be opposed to that from a personal, ethical perspective.* [174]

5.179 Torrance Mendez, Journalist and Private Citizen, was not supportive of a limited privilege for journalists:

> *The other point I would like to make briefly is about exemptions and special privileges within the proposed legislation. That would be counterproductive. I do not see journalists need to have any special privileges. We should all enjoy the ability to talk openly and freely. In this case, I cannot see a case for my profession getting any special privileges or exemptions under this proposed legislation.*[175]

5.180 The Committee notes the issues raised by the journalists in their submissions.[176] The Committee acknowledges the LRCWA review that is currently taking place in relation to the contempt of court process in Western Australia, which could include this issue.

Finding

5.181 A majority of the Committee (Hons Jon Ford, Ken Travers, Peter Foss and Bill Stretch MLCs) believes that the LRCWA review is the appropriate place to give consideration to the adoption of a limited form of privilege for journalists to ensure consistency with the court process.

Clause 39 – safeguard

General

5.182 Clause 39 provides a check and balance on the abrogation of the privilege against self-incrimination, by providing a form of indemnity against the use of statements obtained from a person (for example, under clause 27). Clause 39 does not apply to documents or other information provided by a person, under clause 26.

5.183 Clause 39(1) provides that a statement made by a witness in answer to a question that a special commissioner requires the witness to answer is not admissible in evidence against the person making the statement in:

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174 *Transcript of Evidence*, Mr David Cusworth, President, WAJA, March 6 2002, p2.

175 *Transcript of Evidence*, Torrance Mendez, March 6 2002, p1.

176 See Submission Nos 18 and 19.

a) any criminal proceedings; or

b) proceedings for the imposition of a penalty other than contempt proceedings or proceedings for an offence against this Part.

5.184 Clause 39(2) allows the statement to be used to under s21 of the *Evidence Act 1906* to establish that the witness has given a prior inconsistent statement.

5.185 Therefore, whilst the person being examined is afforded an immunity that their evidence is not admissible in any criminal proceeding against them, this immunity is not absolute. The person's evidence is still admissible in contempt proceedings and proceedings for an offence against Part 3 and can be used in other proceedings to prove an inconsistent statement made by the person.

5.186 In relation to clause 39 the NCA have advised the Committee that from its experience, the provisions of clause 39 are essential from the perspective of building and maintaining public confidence in the legislation through providing an effective tool to assist law enforcement to acquire the information essential to conduct investigations. This clause attempts to strike a balance between the need to protect witnesses from incriminatory aspects of their own testimony, and public interest considerations in ensuring compliance with the investigatory aims of the examination process.[177]

Forms of immunity

5.187 Immunity has been described as having two forms - 'transactional immunity' and 'use immunity':[178]

a) 'Transactional immunity' protects the witness from prosecution for any offence mentioned in or related to his/her evidence, regardless of independent evidence.[179]

b) 'Use immunity' protects the witness against use of the part of his/her evidence that he/she gave against him/herself. The person may be indicted for an offence concerning the evidence given if the indictment is grounded on evidence obtained from another source. Use immunity can be further subdivided into 'direct use' and 'indirect use' immunity (the latter is also known as 'derivative use' immunity). The Bill provides only for 'direct use' immunity.

177 Submission No 20.

178 Cobden, Lynn, 'The Grand Jury – Its Use and Misuse', *Crime & Delinquency*, April 1976, p152.

179 *Evidence Act 1906*, s24.

5.188 The Queensland Scrutiny of Legislation Committee has, on many occasions considered provisions which abrogate the privilege against self-incrimination. Over time it has adopted a benchmark against which legislation is measured to determine whether abrogation of this privilege may be justified. (Refer to paragraph 5.145).

5.189 In most instances the Queensland Scrutiny of Legislation Committee requests that there be an indemnity against the use of information gained in criminal proceedings both indirectly, (that is, through derivative use of the information) and directly.[180]

5.190 In this respect the Committee notes that clause 39 does not appear to contain any express restriction on the use of information obtained through answers to questions (derivative use immunity).

5.191 On occasion there may be justification for the absence or removal of the 'derivative use immunity'. For example, this may include those situations where an excessive burden is placed on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence has not been obtained as a result of information subject to the immunity.[181] Effective investigation and prosecution of criminal offences may be hindered by inappropriate evidentiary requirements in particular circumstances.

CLAUSE 36 – DISMISSAL BY EMPLOYERS OF WITNESS

Clause Overview

5.192 Clause 36(2) reverses the common law onus of proof so that in a proceeding under clause 36(1) it lies upon the employer to prove that the employee shown to have been dismissed or prejudiced was thus treated for a reason other than the employee having appeared as a witness before a special commissioner or on account of the employee having given evidence before a special commissioner.

Summary of Submissions

5.193 A point raised as a concern in submissions was that clause 36(2) imposes an unacceptable burden on an employer to prove that an employee has not been dismissed on account of an employee having appeared as a witness before a special commissioner, or on account of an employee having given evidence before a special commissioner. The penalty of imprisonment of five years and a fine of $100 000 is out of proportion to the other penalties imposed under the Act. The reversal of the onus of proof is unacceptable, particularly when interrogation before a special commissioner is intended to be confidential. In the absence of full facts coming to

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180 Parliament of Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *Alert Digest No 6,* 1997, pp1–3.

181 Ibid.

light the suggestion that an employer should be assumed to have discriminated against a person giving evidence before a special commissioner, is out of place.[182]

Discussion

5.194 The Committee notes that similar provisions are contained in the ACC Act and the *Royal Commission Act 1968* although the penalty is $1,000 or imprisonment for one year.[183]

5.195 At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence. The accused is not required to prove anything. Some provisions in legislation reverse this onus and require the person charged with an offence to prove or disprove some matters to establish his or her innocence.

5.196 The Committee sought clarification on why this clause was considered necessary for inclusion in the Bill:

> ***The CHAIRMAN:*** *Clause 36 provides that it is an offence for an employer to prejudice an employee on account of the employee's appearance before a special commissioner. On what basis do you justify placing the onus of proof on the employer in any subsequent proceedings relating to the offence?*
>
> ***Hon N.D. Griffiths****: As I understand it, this is similar to the Royal Commissions Act 1968. Nobody has raised this issue as a problem before. If something is seen to work, it is continued. That is the experience of stable government and communities.* [184]

Observation

5.197 There appears to be an inconsistency in the penalties for contraventions and offences under the Bill. For example, the penalty for destroying evidence under clause 33 is imprisonment for three years, whereas the penalty for dismissal by employers of a witness is imprisonment for five years and a fine of $100 000.

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182 Submission No 8.

183 ACC Act, s3 (definition of 'applied provision') and *Royal Commission Act 1968*, s30.

184 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p5.

CLAUSE 37 – JUDICIAL SUPERVISION EXCLUDED

Clause Overview

5.198 Clause 37 excludes judicial review in respect of the performance of functions under Part 3 of the Bill. The clause provides that a prerogative writ cannot be issued and an injunction or a declaratory judgment cannot be given in respect of the performance of a function under Part 3 and proceedings cannot be brought seeking such a writ, injunction or judgment.

5.199 The Explanatory Memorandum states that the exercise by a special commissioner of powers under Part 3 cannot be reviewed on the grounds that the special commissioner acted beyond power or took into account irrelevant considerations.

Summary of Submissions

5.200 Points raised as concerns in submissions include:

5.200.1 This is a fundamental and unprecedented abrogation of the Rule of Law. It is completely repugnant to the principle of the Rule of Law and the base requirement of accountability where great powers are conferred upon individuals in our society. No reason has been advanced as to why the exercise of extraordinary powers by an individual in secret should be beyond judicial scrutiny and beyond sanction for abuse.[185]

Discussion

5.201 In respect to the performance of a function under Part 3, proceedings cannot be brought seeking a prerogative writ, injunction or judgment. These are defined as follows: [186]

5.201.1 A prerogative writ is a court order providing remedies of a particular character for different kinds of administrative actions. The common law jurisdiction of the State Supreme Court provides an avenue for review of an administrative action or decision, through an application for a prerogative writ.

5.201.2 An injunction is a court order of an equitable nature requiring a person to do, or refrain from doing, a particular action.

5.201.3 A declaratory judgment is an authoritative but non-coercive proclamation of the court made for the purpose of resolving some legal issue. A declaration

185 Submission Nos 16 and 8.

186 Nygh, P, and Butt, P, (eds), *Australian Legal Dictionary*, Butterworths, 1997.

may be made on any issue of fact or law. An application for a declaratory order, rather than a court order, is appropriate where, for example, the parties merely seek clarification of their legal rights in relation to some matter and are willing to respect and act upon their legal position once it is ascertained.

5.202 The Committee has been advised that this provision is included in the Bill in order to assist in preventing delays that may hinder the effective operation of the legislation. The Committee notes the comments of the Minister representing the Attorney General:

> ***Hon N.D. Griffiths****: This comes back to what the Bill is dealing with. It is designed to deal with organised crime, not day-to-day events. It deals with extreme organised criminal behaviour. It is the experience of those who note what goes on elsewhere that unless a clause such as this is included, organised crime will use every conceivable process to delay, hinder and, frankly, prevent the Bill from operating effectively. I do not want to take up the time of the committee in going through the ways in which some individuals seem to occupy the time of the courts, in the relatively recent past. It is considered that organised crime will use every trick in the book to delay and hinder. Those with wealth acquired from criminal activities do not seem to have much difficulty in spending that money to escape the processes of justice. The experience of the National Crime Authority, as I understand it, is that hearings could be extensively delayed by witnesses who abuse process. We are dealing here with the sort of people who would do just that.*[187]

5.203 The Committee notes that comparable provisions are contained in both the *Parliamentary Commissioner Act 1971*[188] and NCA Act.[189] However, the Committee notes that the protection afforded by the NCA Act is limited due to the fact that legal challenges that are proscribed are those based on the ground that any necessary approval of the Committee or consent of the Minister was not obtained or was not lawfully given.

5.204 The Committee notes that clause 37 only excludes judicial supervision in respect of the performance of a function under Part 3. Clause 37 does not apply to other Parts of the Bill, nor does it prevent judicial supervision of functions allegedly performed under Part 3 that are outside the power of that Part. That is, actions that are 'ultra vires' the functions permitted by Part 3.

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187 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p5.

188 *Parliamentary Commissioner Act 1971*, s30.

189 NCA Act, s16 and NCA (WA) Act, s8.

5.205 The Committee notes the comments of Mr Bayly, CLA, on this matter:

> ***Mr Bayly**: … There are other problems, such as the difficulties in not having a judicial review, a matter that has probably been addressed by the Law Society.*
>
> ***Hon PETER FOSS**: Do you think that clause would be effective or would it still mean that certain cases need to be dealt with by the courts?*
>
> …
>
> ***Mr Bayly**: There will still be applications for review to the courts, particularly based on constitutional grounds. …*[190]

Observation

5.206 The Committee refers to its recommendation for the insertion of a new clause 10 (see Recommendation 18) which increases the supervisory role of the special commissioner, and notes that although this is not a substitute to judicial supervision, it is an improvement to the scheme proposed by the Bill.

CLAUSE 38 - LEGAL PROFESSIONAL PRIVILEGE

Clause Overview

5.207 Clause 38 provides that if a summons is issued under clause 11 for the production of documents, a claim of legal professional privilege does not provide a reasonable excuse for failure to produce those documents.

Summary of Submissions

5.208 Points of concern raised by the submissions include:

5.208.1 The clause is viewed, as eroding a citizen's right and is unjustified.[191]

5.208.2 The removal of the privilege may hinder the investigation as a person under suspicion will not obtain legal advice and without such advice, be unwilling to assist the authorities.[192]

5.209 As stated by LSWA in their submission:

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190 *Transcript of Evidence*, Mr Richard Bayly, President, CLA, March 6 2002, p4.

191 Submission Nos 6, 8 and 16.

192 Submission No 16.

> *The general principle represents some protection of the citizen – particularly the weak, the unintelligent and the ill-informed citizen – against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.*[193]

Discussion

5.210 The principle of legal professional privilege establishes that certain communications between lawyers and their clients are privileged from disclosure. In general, at common law, privileged communications are those "… *confidential communications between solicitor and client made for the sole purpose of the client obtaining, or the legal practitioner giving legal advice or for use in existing or contemplated litigation*".[194]

5.211 The privilege promotes the public interest by preserving the confidentiality of communications between lawyer and client, encouraging the client to make a full and frank disclosure of the relevant circumstances to the legal adviser. In so doing, the privilege outweighs the competing public interest that in the interests of a fair trial all relevant material should be available.[195] Documents or other material not created but merely delivered to the legal adviser for such purposes are not privileged.[196] Subject to statutory exceptions, the privilege applies to all forms of compulsory disclosure and is not confined to judicial and quasi-judicial proceedings.

5.212 It is also to be remembered that at common law, regardless of the type of document, legal professional privilege will not apply where the communication was part of a criminal or unlawful proceeding, or was made in furtherance of an illegal object.[197] The privilege will also be denied to a communication that is made for the purpose of frustrating the processes of the law even though no crime or fraud is contemplated.[198]

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193 *Baker v Campbell* (1983) 153 CLR 52, per Deane J.

194 *Grant v Downs* (1976) 135 CLR 674; 11 ALR 577.

195 Ibid.

196 *Commissioner of Taxation (Cth) v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 521-2; 23 ALR 480 per Gibbs ACJ; *Baker v Campbell* (1983) 153 CLR 52 at 112; 49 ALR 385.

197 *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382.

198 *Attorney-General (NT) v Kearney* (1985) 61 ALR 55 at 64.

5.213 At common law where legal professional privilege attaches to and is maintained in respect of documents held by a person, those documents cannot be made the subject of a search warrant.[199] Clause 38 however modifies this position and provides that the privilege does not prevent a summons from being issued under clause 11 and requiring a person to produce a document that would otherwise be subject to that privilege.

5.214 Like the privilege against self-incrimination referred to above at paragraphs 5.142 to 5.150, legal professional privilege is a common law right and not simply a rule of evidence. This means that, subject to the statutory modification in clause 38, lawyers and their clients could have relied on the privilege to resist producing documents in an investigation under the Bill as well as during any subsequent trial.

Is there a need for the modification of the privilege within the legislation?

5.215 The Committee notes the justification of the Government for this abrogation of legal professional privilege:

> ***Hon N.D. Griffiths**: At common law, the privilege is lost, as I understand it, if advice given relates to furthering an unlawful purpose. The contention is that, when investigating organised crime, investigators are seeking to prevent the furtherance of unlawful activities, and they are acting in the greater public interest. As the common law says that privilege can give way to higher purposes, the Government believes that the public interest in seeking to convict those involved in organised crime justifies this very partial abrogation of legal professional privilege which relates to documents. There is no abrogation with respect to oral communications.*[200]

5.216 The Committee also notes the concerns raised by Mr Bayly of the CLA, that a likely consequence of this abrogation will be that lawyers will stop taking proofs of evidence and also that people would be deterred from seeking legal advice:

> ***Mr Bayly**: …The question of professional privilege in relation to documents is a matter of concern. What will happen is that lawyers will not take proofs of evidence because these will presumably come under the definition of documents that can be subpoenaed. It is not healthy to take away legal professional privilege in the way proposed in this Bill.*

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199 *Baker v Campbell* (1983) 153 CLR 52; 49 ALR 385.

200 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p6.

> ***Hon PETER FOSS****: Can you see a problem with documents other than proofs of evidence?*
>
> ***Mr Bayly****: I can see a problem with all documents that are prepared for the purpose of assisting or giving advice to a person. The Bill is presumably aimed at documents that evidence agreements and arrangements between parties, but that is not how the Bill was drafted. If the purpose of the legislation is to evidence agreements and arrangements between parties, and it is not aimed at finding out what somebody has told a solicitor, the legislation should say that, rather than to leave it open-ended in the way that it does.*[201]

5.217 Mr Bayly stated further that:

> *… However, if professional privilege is not allowed, people will stop consulting lawyers. As I indicated, that is a source of people giving themselves up or of their giving assistance to the police. The investigative process should be all about trying to encourage people to go to the police and to give information voluntarily about crimes that have been committed; not trying to put them off from undertaking that process.*[202]

Other legislation

5.218 The Committee also notes that legal professional privilege is modified or negated in other legislation addressing investigatory proceedings. For example:

5.218.1 The *Criminal Property Confiscation Act 2000* (WA) effectively negates the protection of legal professional privilege in relation to property-tracking documents required by an order or warrant or otherwise obtained under that Act.[203] However the Act also limits the use of compelled evidence by specifically stating that evidence produced under a 'production order' is inadmissible in criminal proceedings.[204] The Act further expressly provides that information contained in documents or any statement or disclosure made is only admissible against the person in certain proceedings.[205]

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201 *Transcript of Evidence,* Mr Richard Bayly, President, CLA, Perth, March 6 2002, p5.

202 Ibid, p10.

203 *Criminal Property Confiscation Act 2000* (WA), s139(3).

204 Ibid, s110.

205 Ibid, s65(7).

5.218.2 Section 77 of the *Criminal Justice Act 1989* (Qld) does not remove legal professional privilege per se but rather minimises the opportunity for false claims by allowing the Criminal Justice Commission to have access to documents the subject of a claim of legal professional privilege if the Supreme Court determines that:

- the claim of privilege is not valid;[206] and
- if the claim is made on the grounds of Crown privilege or other public interest, that, on balance the public interest favours the Commission having access regardless.

5.218.3 Section 37(5) of the *Independent Commission Against Corruption Act 1988* (NSW) abrogates legal professional privilege, except in relation to privileged communications made in relation to an appearance or reasonably anticipated appearance before the Commission. The Act provides that a witness summonsed to attend or appearing before the Commission at a hearing is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege (which includes legal professional privilege).

5.218.4 The *Independent Commission Against Corruption Act 1988* (NSW) also provides a 'use immunity' extending to all answers or documents given or produced to the Commission provided an objection is taken before the answer or document is given or produced: s37(3) and (4). It is therefore possible to prevent legally privileged material from being used in subsequent proceedings against a witness who is compelled to produce such material to the Commission, simply by objecting before disclosing privileged information.

5.218.5 The *Australian Securities and Investments Commission Act 1989* (Cwlth) abrogates legal professional privilege.[207] It provides that a statement made at an examination is admissible in evidence against that person unless "… *the statement discloses matter in respect of which the person could have claimed legal professional privilege in the proceeding … and the person objects to the admission of evidence of the statement*".[208] The immunity is limited to statements. It is therefore not possible to prevent the admission in subsequent proceedings of legally privileged books or documents that a witness has been

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206 Privilege includes legal professional privilege, Crown privilege or other public interest and parliamentary privilege: *Criminal Justice Act 1989* (QLD), s77.

207 *Australian Securities and Investments Commission Act 1989* (Cwlth), ss69, 76 and *CAC (NSW) v Yuill* (1991) 172 CLR 319 at 336.

208 *Australian Securities and Investments Commission Act 1989* (Cwlth), s76.

compelled to produce to the Australian Securities and Investments Commission. There are equivalent provisions in the *Futures Industry Act 1986* (Cwlth).

5.219 The Committee notes that there is legislation which retains legal professional privilege in investigative proceedings: ACC Act, the NCA (WA) Act when read with the NCA Act, the *Police Integrity Act 1996* (NSW), and the *Organised and Serious Crimes Ordinance 1994* (Hong Kong).[209] For example, the *Queensland Crime Commission Act 1997* expressly preserves legal professional privilege as a ground for the non-production of documents or refusal to answer a question. That Act provides that:

a) A person who invokes legal professional privilege in order to refuse to produce a document or answer a question and who has no authority to waive the privilege must, if required to do so by the presiding member, provide the name and address of the person who is entitled to waive the privilege: ss105(5) and 107(4).

b) In the case of documents or things, the person must also seal the document or thing and give it to the commission for safekeeping while the claim of privilege is determined: s105(5)(d).

c) The presiding member must decide whether or not there is a reasonable excuse for refusing to provide a document or thing or for refusing to answer, and this decision may be reviewed by the Supreme Court in circumstances specified in the Act: ss105(4), 108(2) and 109.

Protection for certain types of documentation

5.220 The Committee considered whether certain documentation should remain protected by legal professional privilege. It explored this issue with Mr Bayly, CLA. Mr Bayly submitted to the Committee that the following should be exempted from the abrogation of legal professional privilege, although the list does not purport to be comprehensive:[210]

5.220.1 Proofs of evidence taken from clients and possible witnesses.

5.220.2 Notes of instruction taken from a client or possible witnesses.

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209 ACC Act, s47; NCA (WA) Act, s19(3) when read with the NCA Act, ss30(3) and (9); the *Police Integrity Act 1996* (NSW), s27; *Independent Commission Against Corruption Act 1988* (NSW), s24; and the *Organised and Serious Crimes Ordinance 1994* (Hong Kong), s3(9).

210 Mr Richard Bayly, CLA, Letter to the Committee, March 19 2002.

5.220.3 Notes, letters and opinions which set out legal advice to a client which opinion is based upon instructions obtained from a client or possible witness.

5.220.4 Correspondence between a solicitor and prosecuting authorities or police written in order to negotiate the possibility of a client giving a statement or testimony.

5.220.5 Correspondence between as solicitor and prosecuting authorities or police written in order to negotiate a plea of guilty.

5.220.6 Internal memo or letters in relation to client's instructions or legal advice given to a client.

5.220.7 Documents created for the purposes of preparing a defence to any existing or possible charges such as but not limited to:

- a solicitor's letter to a private investigator; or
- a solicitor's letter to potential expert witnesses.

5.221 The Minister representing the Attorney General agreed that proofs of evidence should be exempt.[211]

Observations

5.222 The Committee considers that legal professional privilege should attach to proofs of evidence. For instance, if a person had given his lawyer a proof of evidence regarding a charge, that or any similar document prepared purely for the purpose of advising the client how he should plead and what he should do, should not be seized. This differs slightly from some of the other things that have been subject to legal professional privilege. The Committee notes that the Minister representing the Attorney General has agreed with this exception. Accordingly the Committee proposes some amendments to clause 38.

5.223 The Committee considered the list suggested by Mr Bayly, CLA and agrees that, with some modifications, legal professional privilege should also attach to such documents. The list, as amended by the Committee, has been incorporated into the amendments to clause 38 proposed by the Committee.

5.224 The Committee notes that there is no provision in the Bill that prevents documents produced pursuant to a summons issued under clause 11 from being used in subsequent court proceedings. This is so even if the documents would, apart from

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211 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p4.

clause 38 in its present form, have been subject to a claim of legal professional privilege. This is in contrast to the 'check and balance' afforded by clause 39 to a person who has been made to answer a question where the privilege against self-incrimination has been removed. This is a further reason why the Committee considers that clause 38 should be amended, that is, to remove the possibility that certain documents can be used as admissible evidence in other proceedings.

5.225 The Committee notes that in making provision for claims of legal professional privilege made in relation to documents required to be produced (pursuant to a summons issued under clause 11), there also needs to be provision for the determination of the validity of such claims. The Committee considers that the special commissioner is the appropriate person to determine the validity of any claim of legal professional privilege in this context. The Committee notes that this is not dissimilar to the treatment of such claims by the Queensland Crime Commission.[212]

Recommendation

Recommendation 16: The Committee recommends that clause 38 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended in the following manner –
Page 19, lines 12 to 16 – to delete the lines and insert instead –
"(1) Legal professional privilege does not prevent a summons under section 11 from requiring a person to produce a document that would otherwise be subject to that privilege.
(2) Unless it is claimed and allowed in accordance with this section legal professional privilege does not provide a reasonable excuse for failure to produce a document as required by a summons under section 11.
(3) A person who wishes to claim that a document is subject to legal professional privilege (which claim is permitted by subsection (4)) shall:
(a) attend and produce that document in accordance with the summons, sealed up and identified as subject to a claim of legal professional privilege; and
(b) at the same time provide to the special commissioner a statement detailing the name and address of the person entitled to waive the privilege with regard to each document.
(4) A claim of legal professional privilege may only be made in relation to the following:
(a) proofs of evidence taken from clients and possible witnesses;
(b) notes of instruction taken from clients or possible witnesses with regard to events that have already occurred;
(c) documents created for the purposes of preparing:
(i) a defence to any existing or possible charges; or
(ii) for an appearance or reasonably anticipated appearance before a special commissioner,
arising out of events which have already occurred such as but not

[212] Refer to paragraph 5.219.

limited to:

(i) notes, letters and opinions which set out legal advice to a client;

(ii) internal memoranda or letters;

(iii) a solicitor's letter to a private investigator; or

(iv) a solicitor's letter to potential expert witnesses;

(d) correspondence between a solicitor and prosecuting authorities or police written in order to negotiate the possibility of a client giving a statement or testimony; and

(e) correspondence between a solicitor and prosecuting authorities or police written in order to negotiate a plea of guilty.

(5) Legal professional privilege is not to attach to any document by reason of this section unless that privilege would attach by law.

(6) The special commissioner shall determine with respect to each document for which a claim of legal professional privilege has been made whether that claim is valid.

(7) The special commissioner shall return any document, which the special commissioner has determined is subject to a valid claim of legal professional privilege, to the person who produced it without allowing the Commissioner of Police access.

(8) Until such time as a special commissioner has determined that a document is not subject to a valid claim of legal professional privilege a person other than the special commissioner may not unseal the document or have access to it.
Penalty: Imprisonment for 3 years and a fine of $60 000.

(9) In this section "document" includes any other thing.

CHAPTER 6

SPECIFIC CLAUSES OF THE BILL – PART 4

CLAUSE 44 – WHEN PART 4 APPLIES

Clause Overview

6.1 Part 4 provides the police with enhanced powers to search, enter, detain and seize, for the purposes of investigating a section 4 offence. Clause 44 provides that Part 4 becomes operative when, on application from the Commissioner of Police, the special commissioner is satisfied that the criteria in clause 9(3) exist.

6.2 Clause 9(3)(c) states that the powers of a special commissioner cannot be exercised unless the special commissioner is satisfied that there are reasonable grounds for believing that the use of powers given by this Part would be in the public interest. (Refer to paragraphs 5.7 to 5.17 for detailed discussion on clause 9(3)).

Summary of Submissions

6.3 Points raised as concerns in submissions include:

6.3.1 The interrelationship between clauses 44 and 45 is not clear enough.[213]

6.3.2 The criteria under clause 9(3) should expressly relate to the suspicion that a section 4 offence has been or is being committed in the course of organised crime.[214]

Discussion

6.4 The Committee notes the concern that there is uncertainty in respect of the meaning of clause 44.

6.5 Under clause 44 apparently the only requirement that must be met in order for Part 4 to become operative, is a statement from the special commissioner that he/she is satisfied. The Bill does not specify how the process is initiated or how the special commissioner expresses his or her satisfaction.

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213 Submission No 8.

214 Submission No 24.

6.6 Further, the Committee notes that the nexus between Part 3 and Part 4 of the Bill is unclear. The question arises: "Can Part 4 only be exercised if a summons has first been sought under clause 11?"

6.7 The Committee sought clarification on this issue from the Attorney General. The Attorney General advised that Part 4 of the Bill could be used independently of an examination under Part 3 so long as the grounds under clause 9(3) have been established to the satisfaction of the special commissioner. The Attorney General advised that it is the intention that Part 4 powers need not be used with Part 3 powers.[215]

6.8 The Committee notes that clause 44 does not provide any mechanism to ensure adequate accountability in respect of the powers that will be authorised by clause 44 of the Bill, for example, there is no requirement for any written documentation to be kept.

6.9 The administrative aspect of legislation requires some form of authorisation to give it effect. It is not clear how some of the required administrative functions will be carried out.

Amendments proposed by the Attorney General

6.10 The Attorney General has advised the Committee of amendments proposed to clause 9 of the Bill.[216] The amendments proposed will address the issues discussed above. (Refer to paragraphs 5.19 to 5.23 on clause 9 for discussion of these amendments).

6.11 The Attorney General has also advised the Committee of an amendment proposed to clause 44, that is to delete the words 'section 9(3) exist' and insert instead 'section 9(1) exist in respect of the section 4 offence concerned'. This will incorporate the amendment proposed to clause 9 of the Bill.

Observations

6.12 The Committee is of the view that the amendments proposed by the Attorney General to existing clause 9(3) of the Bill address the concerns that it has in respect of the relationship between clause 9(3) and Part 4, and also the issue of accountability. The amendments proposed by the Attorney General are contained in the amendments proposed by the Committee.

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215 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 18 2002.

216 Hon J A McGinty MLA, Attorney General, Letter to the Committee, March 20 2002.

6.13 The Committee supports the proposed amendment to clause 44, and is of the view that it adds further clarity to the nexus between the operation of Part 4 of the Bill and a specific section 4 offence.

6.14 The Committee believes that it is essential that the Bill provide adequate provision to ensure the confidentiality of the order that is made by the special commissioner, (which will be in writing in accordance with the Committee's amendments). The amendments that the Committee proposes to the amendments provided by the Attorney General will address this. These are discussed at paragraphs 5.20 to 5.24. (Refer to Recommendation 8 and Recommendation 9).

Recommendation

Recommendation 17: The Committee recommends that clause 44 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be amended in the following manner (in accordance with the amendment proposed by the Attorney General) -

Page 22, lines 4 and 5 – To delete "section 9(3) exist.' and insert instead –
" section 9(1) exist in respect of the section 4 offence concerned. "

CLAUSES 45, 46 AND 47 – ENHANCED POWER TO ENTER, STOP, SEARCH AND DETAIN

Clause Overview

General comment

6.15 Clauses 45, 46 and 47 are in Part 4 of the Bill which only becomes operative when the special commissioner is satisfied that the criteria in clause 9(3) exist. (Refer to paragraph 5.3).

6.16 There is no time specified within which the powers must be exercised after the special commissioner has been satisfied of the relevant criteria. This is in contrast to warrants, which are normally assigned a time period of operation, usually 30 days. Under the Bill, once the special commissioner makes the order, the powers in clauses 45, 46 and 47 are available for the duration of the investigation. The Government's intention is that the power might be exercised time and again in respect of the person, place, thing and so on.[217]

6.17 Judicial supervision is not excluded from this Part. Clause 37 limits the exclusion of judicial supervision to Part 3 of the Bill only. It has been suggested that this may provide a check to the operation of the Part. For example, if excessive power was

[217] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, November 29 2001, p6162.

exercised and irrelevant material was seized, that could be the subject of a writ in the Supreme Court.[218]

Clause 45 - Enhanced power to enter, search and detain

6.18 Clause 45 of the Bill gives police the power to enter, search and detain, for the purposes of investigating a section 4 offence, without the need for a warrant to be obtained.

6.19 Clause 45 expressly provides that the powers only apply for the purposes of investigating a section 4 offence. There must be 'reasonable grounds for suspecting' that the offence has been, or is being, committed at the place being entered. Once the entry has been effected a police officer has substantial powers including the power to:

a) search the place and secure it for the purposes of searching it;

b) stop, detain and search anyone at the place;

c) demand the production of, and inspect any articles or records kept at the place; and

d) photograph and seize any person or thing that the police officer suspects on reasonable grounds will provide evidence or other information relevant to the investigation of the offence.

6.20 A police officer may use any force that is reasonably necessary in exercising the powers.

Clause 46 - Enhanced power to stop, detain and search

6.21 Clause 46 gives a police officer power to, without warrant, stop, detain and search the person and any conveyance where the police officer reasonably suspects the person to be. This power may only apply where the police officer has 'reasonable grounds for suspecting' that a person is in possession of anything used, or intended to be used, in connection with the commission of a section 4 offence, or anything else that may provide evidence of, or other information about, the offence. The police officer may seize anything described.

6.22 The power to stop and detain a conveyance includes the power to detain anyone in or on the conveyance for as long as is reasonably necessary to search the conveyance even though, until the conveyance has been searched, the person may not be suspected of anything.

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218 Ibid.

6.23 A police officer may use any force that is reasonably necessary in exercising the powers.

Clause 47 - Provisions about searching a person

6.24 Clause 47 contains provisions about searching a person including:

a) A person of the same sex as the person being searched must carry out a search of a person.

b) If a person of the same sex is not immediately available a person may be detained for as long as reasonably necessary or conveyed to a place to enable them to be searched by a person of the same sex.

c) A medical practitioner or a registered nurse must carry out the search of a person's body cavities.

d) If a medical practitioner or registered nurse is not immediately available a person may be detained for as long as reasonably necessary or conveyed to a place to enable them to be searched by a medical practitioner or registered nurse.

e) Legal protection is provided for the medical practitioner or registered nurse in respect of anything reasonably done for the purposes of the examination.

f) A police officer may use any force that is reasonably necessary in exercising the powers.

Summary of Submissions

6.25 Points raised as concerns in submissions include:

a) *"Police in their own right should not make decisions to enter and search a private home under this proposed Bill"*.[219]

b) Obtaining a search warrant does not presently hinder police officers conducting enquiries.[220]

c) Clause 45 should be amended so as to limit the powers of police officers outlined in that section. A warrant should be obtained and police should have enough evidence to support suspicions.

219 Submission No 13.

220 Submission No 16.

d) Clause 45 means that *"… no private house or business in this State is immune from being entered into by police – if the police finds no crime then bad luck. The police do not have to apologise or pay for damages. This is an alarming retreat from the civil liberties that all West Australians should be entitled to at the moment."*[221]

e) There is no provision imposing an obligation on the police officer who has conducted a search without a warrant to inform the owners or itemise any of the items taken.[222]

f) The Bill does not provide any safeguards against the misuse of police powers, which are increased under the Bill.[223]

g) It was noted as surprising that extended police powers of this type are being considered at the same time as a Royal Commission examining alleged abuses of existing police powers and police corruption.

h) In relation to clause 47, which relates to the police being authorised to search body cavities, the provision omits the right of a person to have his/her legal representative in attendance and does not require any evidence by police to justify the search. [224]

Discussion

Reasonable grounds for suspecting

6.26 It is difficult to explain what is meant by the term 'reasonable suspicion' beyond that the suspicion must be reasonable in all the circumstances of the particular case. Case law provides some guidance but courts tend to make their assessment on a number of factors rather than any single issue. Generally it may be said that 'reasonable grounds for suspicion' involves less than a reasonable belief but more than a reasonable possibility. This is discussed in more detail at paragraph 5.9 to 5.13.

6.27 The 'threshold test' of *suspicion* is not uncommon in relation to the *issue of a warrant* by an authorised person. Where the application for the issue of a warrant is made to a justice it must be by way of information, or equivalent proceeding, on oath or affirmation attesting that *reasonable grounds exist for suspecting* that a search of the nominated premises, vehicle, vessel, aircraft or place will yield certain matters.

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221 Submission No 6.

222 Submission No 16.

223 Ibid.

224 Submission No 6.

6.28 As noted above at paragraph 6.15, in the context of the Bill, assessment of this 'threshold' by a person other than the person executing entry, search and detention powers, occurs when the special commissioner makes an assessment under clause 9(3).

6.29 There is no assessment required by an 'independent person' at the time when the powers under clause 45 and 46 (without warrant) are to be exercised although the powers may only be exercised if the Commissioner of Police has satisfied the special commissioner that the grounds described in clause 9(3) exist: clause 44. The special commissioner is to be satisfied of certain matters based on 'reasonable grounds for *suspecting'* and 'reasonable grounds for *believing*': clauses 9(3)(a) – (c). (Refer to paragraph 5.3).

6.30 Assessment of this 'threshold' at the time of the exercise of powers is conducted by the police officer exercising the powers.

6.31 All of these matters are addressed by the amendments proposed by the Committee (refer to Recommendations 8, 9, 17, and 18).

Existing powers without warrant

6.32 At common law, police officers have a general power to enter premises without warrant in order to prevent an apprehended breach of the peace to protect life or property in cases of emergency, and this power includes a power of search and seizure.

6.33 Statutory provisions empowering entry, search and seizure have gradually extended the scope of situations in which there are powers of entry and search without a warrant in certain circumstances, for example, in relation to weapons and drugs.[225]

Other legislation

6.34 Western Australian legislation that enables police to detain and search, or enter premises and search without warrant includes:

a) the *Misuse of Drugs Act 1981*, ss23 and 25 (detain and search upon suspicion of the commission of drug related offences);

b) *Criminal Property Confiscation Act 2000,* ss73 and 76 (stop, detain, search

[225] *Firearms Act 1973* s24 (2a), (4)(b) – if a member of the police force 'suspects on reasonable grounds' that a person is in possession of a firearm and harm to some person is likely, or the person is not a fit and proper person at the time, the member may enter and search the premises without warrant. There may also be a power to search people, vehicles and vessels without warrant where there are reasonable grounds to suspect that an offence has been committed with a weapon which is to be found on the person, vehicle or vessel.

and question if police have reason to believe that a person has certain property in their possession);

c) *Police Act 1982* s49 (stop, search and detain any vehicle upon suspicion that any stolen property may be in the vehicle); and

d) *Prostitution Act 2000* ss25 and 26 (stop, detain and search any person or conveyance on suspicion that the persons or someone in the car is committing an offence. A police officer may also enter any business allegedly involving the provision of prostitution at any time to inspect and search the premises and stop, detain and search anyone at the place and seize anything that may constitute evidence).

6.35 Under the NCA (WA) Act a warrant is required to enter, search and seize.[226] Provision is made for the application for a search warrant by telephone in case of emergencies.

6.36 The ACC Act gives the ACC powers to enter premises without warrant and to search, inspect and take copies of things there. However the power only applies to premises occupied or used by a public authority or public officer in that capacity.[227]

6.37 *The Anti-Terrorism, Crime and Security Act 2001* (UK) enables senior police to authorize the pre-emptive search (without warrant) of any pedestrian, or vehicle (including aircraft or boat) for a period of 24 hours within a locality where he or she has 'reason to believe' that an act of violence is anticipated or that persons are carrying weapons into the area without good reason.[228]

6.38 The Committee notes that in New Zealand, police have a range of statutory search powers that they can exercise without a warrant as long as certain prerequisites are met. However, in general where there is no power to search without a warrant, or where time permits, a search warrant is required when searching private property for evidence of the commission or suspected commission of an offence.

6.39 The *Customs Act 1901* (Cwlth) also has a number of provisions which, depending on certain factors (for example, the type of search or period of detention) may be exercised without warrant or may require a warrant.

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226 NCA (WA) Act, s12.

227 ACC Act, s45.

228 *The Anti-Terrorism, Crime and Security Act 2001* (UK), s96.

Rationale

6.40 Generally there should be adequate justification for powers to enter premises and search for and seize documents or other property without a warrant issued by a judicial officer. It should only be acceptable where the circumstances and gravity of the matter in question justify such powers being given.

6.41 The Police Service informed the Committee that such a provision is necessary to prevent the destruction of physical evidence. The Police Service commented that:

> *… exercising the powers under part 4 of the Bill would come about in circumstances where search and seizure needs to take place with an element of immediacy due to the circumstances existing at the time; such as the need to protect and secure an item of evidence or the like.*

and further, that it is

> *… essential to the evidence gathering process that police officers have the ability to enter, search and detain persons and property reasonably suspected of being involved in an offence in the nature of that referred to at clause 46(1)(a) and (b).* [229]

6.42 The Police Service also advised the Committee that obtaining a warrant is a hindrance to police investigations due to time considerations and it is essential to the success of police crime investigations that a high degree of secrecy be maintained. Dealing with a special commissioner assists to ensure that the appropriate controls and level of authority is in place whilst restricting knowledge of the investigation practices and targets.[230] The Police Service argued that in the course of normal investigations the obtaining of a search warrant should not present a difficulty to police, however, where serious offences are involved and the suspect is a member of organised crime groups, the ability to act without delay is a key element in securing evidence.

General principles

6.43 A report of the Commonwealth Senate Standing Committee for the Scrutiny of Bills published in April 2000 comprehensively examines issues surrounding entry and search provisions in Commonwealth legislation.[231] That report states that powers of

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229 Western Australia Police Service, Letter to the Committee, March 11 2002.

230 Ibid.

231 Refer to the report for a detailed discussion of the background and principles relating to entry and search provisions: Commonwealth of Australia, Senate, Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report, 2000. An inquiry into search and entry provisions in Queensland legislation is currently being undertaken by the Queensland Scrutiny of Bills Committee.

entry and search should always be regarded as an exceptional power, not as a power granted as a matter of course. This is because at common law every unauthorised entry onto private property is a trespass.

6.44 The Senate Committee considered that any statutory provisions which authorise search and entry should conform to a set of principles. These principles address:

a) the granting of such powers;

b) the authorisation of the use of such powers;

c) the governing of the choice of people on whom the power is to be conferred;

d) the governing of the kind of matters which might attract the grant of the power; and

e) the governing of the provision of information to occupiers, and of reporting requirements.

6.45 The Senate Committee concluded on the need for general principles that:

> *While powers of search and entry may be necessary for effective administration of the law in certain circumstances, they remain inherently intrusive. One basic form of protection is to ensure that all such powers are drafted according to a set of principles …*
>
> *Where greater powers of entry are proposed than are recognised in the principles, Parliament should acknowledge the exceptional circumstances that give rise to the proposal. … Where entry provisions have been granted, their exercise should be recorded, monitored and reported on, and the powers themselves should be subject to periodic long-term review.* [232]

Check and balances

6.46 There are no expressly stated safeguards contained in Part 4 apart from the provisions relating to searches of persons (clause 47) and the requirement that the Part only becomes operative when the special commissioner is satisfied that the criteria in clause 9(3) exist.

6.47 In particular there is no legislative requirement:

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[232] Commonwealth of Australia, Senate, Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation,* Fourth Report, 2000, p54.

a) that prior to entry the police officer identify himself or herself and the authority under which they may enter;

b) that the exercise of the powers are to be recorded, monitored and reported on (creating a 'paper trail' of accountability);

c) that the exercise of the powers are subject to periodic long-term review, separate to the review of the whole Act provided by clause 67; or

d) to itemise any material seized, inform the individual whose items have been seized, or stipulate a time limit for the return of any material seized, nor is there a requirement to inform that individual that his/her place has been searched (also creating a 'paper trail' of accountability).

6.48 In addition:

a) Part 4 powers can be exercised by any police officer. The ACC submitted to the Committee that an officer, proposing to exercise Part 4 powers, should obtain the prior approval of, for example, a commissioned officer before doing so.[233]

b) No checking mechanism exists to gauge whether excessive power has been exercised when places have been searched, people detained or material seized.

6.49 The Police Service argued that it is intended that internal procedures will underpin the exercise by police of powers under the Bill and that it is anticipated these procedures will provide the necessary check and balance in relation to the possibility of the inappropriate exercise of powers.[234]

6.50 The documentation that would normally be attached to a police investigation for the authorisation to conduct an investigation will not be required.

6.51 In relation to the question of a 'paper trail' of accountability:

> ***Mr Bayly****: … The important point about the process* [of obtaining a warrant in each case] *is that it leaves a paper trail, which means that somebody in authority has given his okay for a search warrant. A requirement to get a search warrant is no impediment to any investigation. I do not think it has ever been an impediment to an investigation.*

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233 Submission No 22.

234 Western Australia Police Service, Letter to the Committee, March 11 2002.

…

> *Under the proposed Bill, police officers could go into someone's property, take things and leave and not be obliged to tell the occupants that they have been there. There would be no paper trail and the occupant might never know that the police had been there.*[235]

6.52 The matter was put to the Minister representing the Attorney General, Hon Nick Griffiths MLC:

> ***Hon PETER FOSS**: One of the complaints that has been put to the committee is that there is no paper trail. As an example of what might occur, a policeman in the purported exercise of that power granted under part 4 goes into a person's house and removes something. The person whose house it is would have no knowledge that the policeman had been there, or that the object had been removed. It may not be discovered until six years later that somebody purported to exercise the powers in part 4. When the police officer is asked, he says he was doing it in respect to an investigation which has satisfied whatever needed to be satisfied under part 4. There is no paper trail to show any link between what the police officer did and any crime or investigation. The suggestion is that there should be some form of paper trail which says that that power will be exercised or has been exercised, so that people can be put contemporaneously on the record as using that power in relation to a particular basis of authority.*
>
> ***Hon N.D. Griffiths**: I note and understand the point. I am advised that that is an operational detail, and the police will set up appropriate procedures.*[236]

Amendments proposed by the Attorney General

6.53 The Attorney General has provided the Committee with a draft amendment, for a new clause 51 be inserted into the Bill (refer to Appendix 6) and has advised of the following in relation to this amendment:

> [The] *amendment also addresses the "problem of the lack of a paper trail in relation to Part 4 of the Bill" which is referred to in your letter. In this regard, new clause 51 will require police officers who use or rely on Part 4 powers to make a written report to the*

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235 *Transcript of Evidence*, Mr Richard Bayly, President, CLA, March 6 2002, p5.

236 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p6.

> *Commissioner of Police within three days after the powers are exercised. This clause adequately achieves the purpose of establishing a 'paper trail', without the additional requirements … which may be an unnecessary hindrance or complication in carrying out investigations under the Bill.*[237]

Committee comment on proposed amendments

6.54 The Committee supports the amendment to the Bill proposed by the Attorney General. The amendments address the concerns discussed at paragraphs 6.25e), 6.25f), 6.45 to 6.47d) and 6.48b) to 6.52.

6.55 A proposed amendment of the Committee to clause 9 (refer to the discussion at paragraphs 5.20 to 5.24 and Recommendation 8 and Recommendation 9) allows the special commissioner to impose terms and conditions on the warrant.

6.56 The Committee is of the view that the Bill should provide the special commissioner with the ability to oversee the exercise of powers under Part 4. This will provide a safeguard to the operation of Part 4 of the Bill and address the concerns discussed at paragraphs 6.25f), 6.45, 6.46, 6.47b), 6.48b) and 6.52.

Observation

6.57 The Committee believes that to mitigate against any abuse of power under the Bill that a paper trail capable of audit must be kept and must be ensured by the legislation and not left open to police operations procedure.

6.58 The combined effect of the proposed amendments discussed at paragraphs 6.53, 6.55 and 6.56 is to give the special commissioner an ability to control, supervise and monitor the powers under Part 4 of the Act. This will also require that a paper trail capable of audit be kept.

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[237] Hon J A McGinty MLA, Letter to the Committee, March 20 2002.

Recommendations

Recommendation 18: The Committee recommends that a new clause 10 be inserted into proposed new Part 3 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 (refer to Recommendation 9) in the following manner –

To insert the following new clause -
"10. Special commissioner to be informed
A special commissioner who has made a finding or given a direction with regard to powers under Part 4 or 5 is to have the right to be informed as to the manner in which they have been exercised and to call to account any person who exercises or purports to exercise a power pursuant to that finding or direction."

Recommendation 19: The Committee recommends that a new clause 51 be inserted into Part 4 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 in the following manner (in accordance with the amendments proposed by the Attorney General) –

Page 25, after line 24 - To insert the following new clause -
"51. Report on use of Powers under this Part
(1) A police officer who exercises powers under this part is required to submit to the Commissioner of Police a report in writing of each occasion on which any of those powers were exercised, giving details of –
(a) what was done in the exercise of those powers;
(b) the time and place at which the powers were exercised; and
(c) any person or property affected by the exercise of the powers.
(2) The report is to be submitted within 3 days after the powers are exercised.
(3) The obligation of a police officer to submit a report under this section about a particular exercise of power within a particular time is sufficiently complied with if the police officer ensures that a report by another police officer who was present when the powers were exercised is made within that time dealing with all of the details about which a report is required. "

CHAPTER 7

SPECIFIC CLAUSES OF THE BILL – PARTS 5, 6 AND 7

CLAUSE 51 – ENHANCED POWERS CONCERNING SURVEILLANCE DEVICES

Clause Overview

7.1 Clause 51 is intended to enable the use of surveillance devices in a greater range of circumstances to gain evidence of section 4 offences.

7.2 If a police officer is to apply for a warrant under s15 or s16 of the SD Act in relation to a section 4 offence, clause 51 changes the standard of which the court must be satisfied from 'reasonable grounds for believing' to 'reasonable grounds for suspecting'. The distinction between these thresholds is discussed at paragraphs 5.9 to 5.13.

7.3 Section 15 of the SD Act deals with applications for warrants including who can make application, how application should be made, it specifies the nature and grounds of the warrant, and requires the attachment of an affidavit. The warrant expires after 90 days and permits entry of premises by force. Section 16 of the SD Act provides that where a written application under s15 is impractical, alternate forms of communication may be used.

Summary of Submissions

7.4 Points raised as concerns in submissions include:

7.4.1 The SD Act already is far reaching in its application and erosion of traditional civil liberties.[238] There is an unwarranted and unexplained want to extend powers under the SD Act.

7.4.2 The proposed lessening of the constraints that the SD Act otherwise imposes on the application for surveillance devices, appears a serious shift in the intentions of the operation of that Act.[239]

Discussion

7.5 The Explanatory Memorandum states that the justification for the provision is the fact that the offence is a section 4 offence.

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238 Submission Nos 16 and 8.

239 Submission No 11.

7.6 The Second Reading Speech states that:

> *Experience has indicated that if the use of such devices is to be effective in the fight against organised crime, there must be some easing of the requirements that must be met before approval is granted.*[240]

7.7 The use of listening devices is considered to be an important tool available to police and other law enforcement agencies in the fight against organised crime. The SD Act allows police to use surveillance devices (which includes a listening device, an optical surveillance device, or a tracking device) and use the evidence gained in criminal prosecutions.

7.8 The SD Act, in its current form, is construed so as to prevent undue intrusion into people's private lives. The SD Act regulates the circumstances in which publication or communication of records and reports of private conversations and private activities gained by the use of surveillance devices can take place. This is to ensure that individual rights to privacy are protected.

7.9 Currently, a court may issue a warrant for a surveillance device (listening device, optical surveillance device or a tracking device) only if it is satisfied that there are 'reasonable grounds for believing' that an offence has been or is likely to be committed, and the use of the device would be likely to assist an investigation into that offence or suspected offence, or enable evidence to be obtained. The court must also consider a range of other matters, such as the nature of the offence, the extent to which the privacy of any person may be affected, the value of the information that may be obtained, and the public interest. The court has power to impose whatever conditions or restrictions on the use of the surveillance device or on the entry of premises as the court considers are necessary for the public interest.[241]

7.10 Under s15, an application for a warrant must (subject to s16) be in writing, with an authorisation from a very senior officer of the agency involved for the action proposed, for example, authorisation from at least an Assistant Commissioner of Police in the case of the Police Service, or the Chairman of the ACC or his delegate in the case of the ACC. An affidavit is required from the officer seeking the warrant setting out the facts on which the reasonable belief is based. The court may request further information to be provided orally or by way of affidavit. Under s16, where it is impractical to make the application in person and in writing, applications may be made by any form of instantaneous communication, orally providing the same

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240 Second Reading Speech, December 5 2001, p6440.

241 SD Act, s13(8)(j) and (12).

required information, with the required paperwork to follow as soon as possible after the warrant is issued (and not later than one day after the warrant expires).[242]

7.11 There is provision in the SD Act for authority to be given for the use of more than one type of device, in a single warrant. To guard the privacy of individuals further, the SD Act ensures that applications for warrants are not heard in open court and the records produced as a result of an application for a warrant cannot be disclosed except by the direction of the court.

7.12 Generally, the warrant system is the principal guarantee against abuse by the State of electronic surveillance. The system provides safeguards, which must be complied with before a warrant is issued. The court must be satisfied that there is sufficient evidence to support the applications and that less intrusive means of investigation are not available.

7.13 The Police Service have advised the Committee that the existing surveillance provisions are considered inadequate as organised crime operates with a high level of secrecy and sophistication and the nature of the offences are serious. Therefore, they suggest that it is in the public interest that the police be granted a lower degree of proof in respect of organised crime gangs in order to effectively target and monitor their activity.

7.14 The Committee notes that the evidence obtained under Part 5 of the Bill may be admissible in legal proceedings.

7.15 The Committee notes that, under that SD Act, the Court has wide discretion to impose whatever restrictions on the execution of a warrant that it thinks are in the public interest. There is also a requirement for senior officers to authorise applications to the court, for records to be kept of the evidence obtained, and for annual reports to be tabled in Parliament. No supplementary check has been added in order to offset the change to the standard that must be met before a warrant under the SD Act can be issued.

Observation

7.16 The SD Act establishes a comprehensive regime for issuing search warrants in relation to various types of surveillance devices. The proposed clause 51 of the Bill may, to some extent, confuse the issue by creating an entirely separate and unrelated piece of legislation which modifies the SD Act by altering the threshold required of officers seeking a s15 or s16 warrant from a 'reasonable belief' to the lesser standard of a 'reasonable suspicion'. In such circumstances, it would seem to be practical in terms of making the law simple and accessible to introduce at the very least a consequential

242 SD Act, s17(3).

amendment to s15 and s16 of the SD Act that simply states that the existing s15 and s16 standard is 'subject to investigations conducted pursuant to the *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002*.'

Finding

7.17 The majority of the Committee (Hons Jon Ford, Ken Travers, Peter Foss and Bill Stretch MLCs) endorses Part 5 of the Bill.

PART 6 – FORTIFICATIONS

Overview

7.18 Part 6 provides that the Commissioner of Police can apply to a special commissioner for the issue of a 'fortification warning notice'. Before issuing the warning notice, the special commissioner must be satisfied that, on the balance of probabilities, there are reasonable grounds for suspecting that the premises are heavily fortified, and that the premises are habitually used by members of a class of people a significant number of whom are reasonably suspected by the Commissioner of Police to be involved in organised crime.

7.19 The Bill provides for the contents of the warning notice (clause 54) and for how the warning notice is to be served (clause 55). The owner of the premises has 14 days after the warning notice has been served to satisfy the Commissioner of Police that the premises are not heavily fortified or used in the relevant way. If not satisfied, or the submission period has elapsed, the Commissioner of Police may issue a 'fortification removal notice'. After service of the removal notice, there is facility for judicial review on application within seven days of service. The Commissioner of Police may enforce a valid removal notice by removing heavy fortifications from the premises.

CLAUSE 52 – MEANING OF TERMS USED IN THIS PART

Clause Overview

7.20 Clause 52 of the Bill explains the meanings of the terms used in Part 6 – Fortifications.

7.21 The term "fortification" is defined in the Bill as:

> *… any structure or device that, whether alone or as part of a system, is designed to prevent or impede, or to provide any other form of countermeasure against, uninvited entry to premises;*

7.22 The term "heavily fortified" is defined by reference to clause 52(2) which states:

> *Premises are heavily fortified if there are, at the premises, fortifications to an extent or of a nature that it would be reasonable to regard as excessive for premises of that kind.*

Summary of Submissions

7.23 Points raised as concerns in submissions include:

7.23.1 The fortification provisions of the Bill, are not limited to investigation of section 4 offences and the Bill does not provide assurance that the power provided to the Commissioner of Police to remove fortifications can only be used in relation to crimes of a grave and serious nature.[243]

7.23.2 The fortification provisions of the Bill may include the average domestic home or business with security devices: "*Schedule 1 includes those homes in which firearms are lawfully owned and licensed in WA*".[244]

7.23.3 The removal of the right to secure your premises against uninvited entry (under clause 52) is an attempt to remove civil rights and civil liberties.[245]

7.23.4 The Bill provides no clear justification for the provisions relating to fortification removal.

7.23.5 There is no need for Part 6 with regard to fortifications. "*Every citizen can take any legal measures to ensure the safety of his/her family. What is wrong in turning houses into security castles?*"[246]

7.23.6 The fortification removal provisions of the Bill are not strong enough as they do not force a sufficiently rapid response by the owners of the fortifications. A 7-day time limit (the Bill provides for 14 days), after which the police should be permitted to use whatever methods are necessary to gain entry would be more appropriate.[247]

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243 Submission No 11.

244 Submission No 13.

245 Submission No 14.

246 Submission No 6.

247 Submission No 5.

Discussion

7.24 The Committee notes the comments in the Second Reading Speech that the provisions in the Bill will not apply to ordinary law-abiding citizens who have installed safety measures to protect their property from unwanted trespassers.[248]

7.25 The Committee notes the concerns raised in the submissions that the definition of fortification (as any structure or device that would prevent, impede or provide any countermeasure against uninvited entry to premises), is broad and may extend much further than structures put in place by criminal associations.

7.26 The Committee notes that Part 6 of the Bill is separate from the rest of the Bill in that it does not relate specifically to a section 4 offence. However, it does require the involvement of a special commissioner and only relates to the premises of those reasonably suspected to be involved in organised crime.

7.27 Clause 53 relates to the issuing of a fortification warning notice on application by the Commissioner of Police to a special commissioner. The special commissioner may issue a fortification warning notice if satisfied on the balance of probabilities that there are reasonable grounds for suspecting that the premises to which it relates are either heavily fortified, or habitually used as a place of resort by members of a 'class of people' a significant number of whom may reasonably be suspected to be involved in organised crime.

7.28 The Committee notes that in New Zealand a similar arrangement has been established in relation to fortifications, as that proposed by the Bill. The New Zealand legislation differs from the Bill in that:

i) the definition of 'organised crime' in the Bill means that the range of offences for which the fortification provisions can be considered is more restrictive than in New Zealand; and

ii) the test to be applied by the special commissioner in considering the evidence appears to be less restrictive than in New Zealand, that is, 'satisfied on the balance of probabilities that there are reasonable grounds for suspecting'.

7.29 The Committee notes the comments of the New Zealand Police that they have found the application process time consuming and complex. They have suggested to the Committee that any efforts to streamline the process may help to ensure that the provisions are used more frequently and to better effect. In respect of this, the New Zealand Police have noted that use of the word 'substantial' in the definition of organised crime and the word 'significant' in clause 53(2)(b) appear to create very

[248] Second Reading Speech, December 5 2001, p6440.

rigorous standards that must be met before a 'fortification warning notice' may be issued.[249]

7.30 In the time available the Committee was unable to take these comments any further.

CLAUSES 64 & 65 – NO COMPENSATION AND PROTECTION FROM LIABILITY FOR WRONGDOING

Clause Overview

7.31 Clause 64 provides that no claim for compensation can be made in respect of the removal of any fortification. Clause 65 protects a person and the Crown from an action in tort in respect of the damage to property at the premises that the person causes, in good faith, in the performance or purported performance of a function under Part 6 of the Bill (Part 6 relates to the removal of fortifications, refer to paragraphs 7.18 to 7.29).

7.32 The Explanatory Memorandum states that the owner whose property is damaged has no recourse to the courts for any form of compensation for the damage. The owner of fortified premises, or property within the premises, cannot claim that the removal of any offending fortifications could have been done without causing damage to the premises or property.

Summary of Submissions

7.33 Points raised as concerns in submissions include:

7.33.1 Clause 64 protects police personnel from being liable for any damage which they cause.

7.33.2 People are unfairly prevented from seeking compensation for damage done to their property during a police search.

Discussion

7.34 These clauses extend to public officials, legal immunities that are generally not available to citizens. Generally, a law should not confer immunity from proceedings or prosecution without adequate justification.

7.35 The Committee notes that such provisions are not uncommon. For example, under the *Police Act 1892*, a police officer is usually protected from liability for acts done in the

[249] Submission No 7.

execution of his or her duty in good faith, liability for such acts being transferred to the State.[250]

7.36 The Committee was advised by the Minister representing the Attorney General, that the inclusion of these clauses is essentially a public policy consideration:

> ***The CHAIRMAN:*** *Clauses 64 and 65 provide for immunity from compensation or liability from actions in tort. Why should not the responsible authority remain liable to pay fair compensation for proven damage to property caused by the actions of its officers?*
>
> ***Hon N.D. Griffiths****: The bottom line is that it is a public policy consideration. People should not have these fortifications. It has been pointed out to me that this is not particularly novel in our culture. Similar legislative provisions exist in New Zealand.*[251]

7.37 The Committee considers that these provisions are appropriate for inclusion in this Bill.

CLAUSE 66 – *FREEDOM OF INFORMATION ACT 1992*

Clause Overview

7.38 Clause 66 amends the FOI Act to provide that a special commissioner is exempt from its operations.

Discussion

7.39 The FOI Act provides for right of access to information in the possession of government agencies. Clause 66 ensures that any information or documentation obtained under the operation of the Bill may not be accessed under the FOI Act. This is consistent with the exemptions already contained within the FOI Act, which include documents relating to law enforcement, public safety and property security, deliberative processes and legal professional privilege.

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250 *Police Act 1892*, s137.

251 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p9.

CHAPTER 8

OTHER ISSUES RAISED BY THE BILL

REGULATIONS

8.1 The Bill does not contain any provision for regulations to be made.

8.2 The Committee is of the view that Part 7 of the Bill should contain a regulation-making power. This power may then be used, for example:

a) to prescribe the circumstances which must be taken into account under section 16(3) in considering whether it is in the public interest to postpone an examination and which would indicate that it should be postponed (refer to paragraphs 5.42 to 5.47); and

b) in relation to the appointment of a special commissioner to certify which other jurisdictions are applicable (refer to paragraphs 4.71 to 4.73).

8.3 It is the view of the Committee that the regulation-making power should be, and remain, with the Attorney General irrespective of who is responsible for the administration of the Bill.

Recommendation

Recommendation 20: The Committee recommends that the Government draft an amendment to provide that a regulation-making power be inserted into Part 7 of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 and that such regulations be made by the Governor on recommendation of the Attorney General.

RESOURCE ISSUES

Judicial Resources

8.4 Time and resource issues pose major implications for the courts if judicial resources are used in relation to the operation of Part 3 of the Bill.

8.5 If judges are used in relation to the operation of the Bill, it follows that the court system, the recording system and the people involved in the courts, including court staff will also be used to support the processes required by the Bill. This could result in an increase in the delays and inefficiencies already being experienced in the courts.

8.6 The Committee sought clarification from the Minister representing the Attorney General as to whether it was intended that court staff be used:

> ***Hon PETER FOSS****: Is it intended that court staff will be used?*
>
> ***Hon N.D. Griffiths****: I am advised that there is no intention to use court staff as such. It will be a separate arrangement from the courts. Remember that the special commissioner would not be sitting as a judge of the Supreme Court. When members go through the Bill, they will see that if somebody failed to answer a required question, the action would be brought before the Supreme Court and would not be dealt with by the special commissioner, because the special commissioner is not sitting as the Supreme Court.* [252]

8.7 The Committee is not aware of what arrangements will be provided in this regard.

Serving judge as special commissioner

8.8 The Committee notes the comments of Mr Hogan of the LSWA, in relation to the appointment of a serving judge being a special commissioner:

> ***Mr Hogan:*** *On the question of serving judges being commissioners, I believe it would lead to practical problems with manpower and resourcing the Supreme Court. Obviously, it would remove a judge from the court for some time. These sorts of investigations have the potential to extend their tentacles to charge all sorts of people. If that is added to delays in the courts when things can take a year or more to get through, it potentially removes one or two judges from the system.*[253]

Other resource implications

8.9 The Committee considers that the requirement for secrecy and the security of witnesses in relation to the Bill are critical (see paragraphs 5.78, 5.90 to 5.91 and 5.108 to 5.118).

8.10 The Committee notes that it is necessary to develop and monitor a comprehensive security system around the approval and investigative processes provided for by the Bill. This includes the security of the records of the investigation, the security of the witnesses and the security of the staff involved, during and after the investigative

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252 *Transcript of Evidence*, Hon Nick Griffiths MLC, March 13 2002, p3.

253 *Transcript of Evidence*, Mr Patrick Hogan, Barrister, LSWA, March 6 2002, p13.

process. Consideration of these security concerns is essential in order for this legislation to operate effectively.

8.11 The Committee notes that development of a system of security will have major financial implications.

Observation

8.12 The Committee notes that the establishment of the office of a special commissioner and the operation of Part 3 of the Bill will have major practical and financial implications for the operation of this legislation.

8.13 It is outside the Committee's mandate to make recommendations in relation to the office of a special commissioner, which may amount to an appropriation.

ACCOUNTABILITY

8.14 The Committee notes that agencies such as the NCA and the ACC, which are provided with similar investigative powers to those that are provided for by the Bill, are subject to accountability mechanisms.

8.15 For the NCA these accountability mechanisms include:

a) oversight by the Inter-Governmental Committee (IGC). The IGC was established by the NCA Act and consists of the Ministers with responsibility for police matters from the Commonwealth and all States and Territories, under the chairmanship of the Commonwealth Attorney-General. It principally determines the areas of operation where the NCA has access to its coercive powers and generally monitors the work of the NCA;[254]

b) oversight by the Commonwealth Parliamentary Joint Committee on the National Crime Authority. This Committee has a statutory duty to monitor and review the performance by the Authority of its functions; and

c) decisions by the NCA are subject to review under the *Administrative Decisions (Judicial Review) Act 1997*.[255]

8.16 For the ACC these accountability mechanisms include:

a) oversight by the Joint Standing Committee on the Anti-Corruption Committee (JCACC). JCACC is required to monitor and review the performance of the ACC and then report to the Parliament on issues affecting the prevention and

254 NCA Act, s9(1)(e).

255 NCA Act, s57.

detection of corruption in Western Australia's public sector. The Committee is not permitted access to detailed ACC operational information. The terms of reference of JCACC are attached at Appendix 8; and

b) reports to Parliament or the responsible Minister on specific matters.[256]

8.17 The Bill provides for exceptional powers to be provided to a special commissioner and to the police. As these exceptional powers are coercive in nature, the Committee is of the view that they must be subject to a system of external accountability.

Observations

8.18 The Committee is of the view that there should be some form of parliamentary oversight of the operation of the Bill.

8.19 The Committee is of the view that the accountability mechanism that the ACC is subject to, namely JCACC, could be appropriate to monitor and review the performance of duties and functions and the exercise of powers under the Bill.

8.20 In the event that parliamentary oversight is facilitated by the appointment of a parliamentary committee then in consideration of the committee's terms of reference, regard should be had to the terms of reference of JCACC with specific consideration of the appropriateness of items relating to the access to and confidentiality of information.

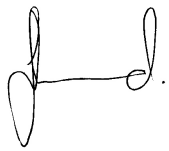
Recommendations

Recommendation 21: The Committee recommends that the Government draft an amendment that provides for parliamentary oversight of the operation of the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001.

Recommendation 22: The Committee recommends that Recommendations 8, 9, 17, 18 and 19 be passed together as a package.

Recommendation 23: The Committee by a majority (Hons Jon Ford, Ken Travers, Peter Foss and Bill Stretch MLCs) recommends that the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 be passed subject to Recommendations 1 to 22.

256 ACC Act, Division 6 and 7.



Hon Jon Ford MLC
Chairman

Date: May 7 2002

APPENDIX 1

STAKEHOLDERS TO WHOM THE COMMITTEE WROTE

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STAKEHOLDERS TO WHOM THE COMMITTEE WROTE

NAME	ORGANISATION	DATE
Ms Bronwyn Keighley-Gerardy, Information Commissioner	Office of the Information Commissioner	January 3 2002
Mr Barry Matthews, Commissioner	Western Australia Police Service	January 3 2002
Mr Graeme Charlwood, Acting Chief Executive	Anti-Corruption Commission	January 3 2002
Mr Robert Cock, Director of Public Prosecutions	Office of the Director of Public Prosecutions	January 3 2002
Hon David Malcolm, Chief Justice	Supreme Court of Western Australia	January 3 2002
Hon Kevin Hammond, Chief Judge	District Court of Western Australia	January 3 2002
Ms Alison Gaines, Executive Director	Law Society of Western Australia	January 3 2002
Mr Phil Eaton, President	Western Australian Bar Association	January 3 2002
Mr Robert Meadows, Solicitor General	Office of the Solicitor General	January 3 2002
Mr Peter Weygers, President	Civil Liberties Council of Western Australia	January 3 2002
Mr Nick Anticich, National Director	National Crime Authority	January 3 2002
Mr Chris Coggin, Director State Records	State Records Office	January 3 2002
Mr Tony Abbott, President	Law Council of Australia	January 3 2002
Mr Robert Cornall, Secretary	Attorney-General's Department (Cwlth)	January 3 2002
Mr Richard Bayly, President	Criminal Lawyers Association	January 3 2002
Mr Terry O'Gorman, President	Australian Council for Civil Liberties	January 3 2002
Mr Colin McKerlie	Freedom Forum	January 3 2002

APPENDIX 2

WRITTEN SUBMISSIONS RECEIVED

APPENDIX 2

WRITTEN SUBMISSIONS RECEIVED

No.	NAME	ORGANISATION	DATE
1.	Kye O'Donnell Arma, WA Branch Secretary	Records Management Association of Australia	February 7 2002
2.	Harry McNally		February 7 2002
3.	Colin Robert McKerlie, Convenor	The Freedom Forum	February 8 2002
4.	D D R Pearson, Chair	State Records Commission	February 6 2002
5.	Gordon Edwards	Private Citizen	February 8 2002
6.	Peter Weygers, J P, President Khaled Mustafa, Chairman	Council for Civil Liberties in Western Australia (Inc.)	February 7 2002
7.	Catherine Halliday, Executive Support Officer, Commissioners Support Group	New Zealand Police	
8.	Clare Thompson, President	Law Society of Western Australia	February 5 2002
9.	Jim Health	Private Citizen	February 1 2002
10.	Tony and Gail Henzell	Private Citizen	February 4 2002
11.	Paul Wright	Private Citizen	February 4 2002
12.	Richard Egan, State President	National Civic Council	January 30 2002
13.	Lawrie Poole	Private Citizen	January 30 2002
14.	Dave Finnie	Private Citizen	January 31 2002
15.	Liam Barry	Private Citizen	February 2 2002
16.	Richard Bayly, President	Criminal Lawyers Association of Western Australia	February 8 2002
17.	Dr Karen Anderson	Australian Society of Archivists Inc	February 7 2002
18.	Torrance Mendez	Journalist	February 8 2002
19.	David Cusworth, President Michael Sinclair-Jones, Secretary	The Western Australian Journalists' Association	February 8 2002
20.	Marshall P Irwin, Member	National Crime Authority	February 8 2002
21.	T O Connor QC, Chairman	Anti Corruption Commission	February 14 2002
22.	Eddie Hwang, President	Unity Party WA	February 13 2002
23.	Philip Achurch, Executive Director	WA Small Business and Enterprise Association Inc	March 8 2002

No.	NAME	ORGANISATION	DATE
24.	K O O'Callaghan, Assistant Commissioner (Strategic & Corporate Development)	Western Australia Police Service	February 27 2002
25.	Adrian O'Malley	Private Citizen	February 7 2002

APPENDIX 3

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

APPENDIX 3

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Name	Organisation	Date
Ms Clare Thompson, President	Law Society of Western Australia	March 6 2002
Mr Patrick Hogan, Barrister	Law Society of Western Australia	March 6 2002
Mr Ferdinand Gere, Superintendent, Organised Crime Division	Western Australia Police Service	March 6 2002
Mr Tim Atherton, Assistant Commissioner (Crime)	Western Australia Police Service	March 6 2002
Mr Martin Saxon, Production Sub-Editor, The Sunday Times	Western Australian Journalists Association	March 6 2002
Mr Michael Sinclair-Jones, WA Branch Secretary, Media, Entertainment and Arts Alliance	Western Australian Journalists Association	March 6 2002
Mr David Cusworth, President	Western Australian Journalists Association	March 6 2002
Ms Anne Burns, Political Editor, The West Australian	Western Australian Journalists Association	March 6 2002
Mr Christopher Smyth, Senior Lecturer, Journalism, Murdoch University	Western Australian Journalists Association	March 6 2002
Mr Torrance Mendez	Journalist	March 6 2002
Mr Richard Egan, State President	National Civic Council	March 6 2002
Mr Richard Bayly, President	Criminal Lawyers Association of Western Australia	March 6 2002
Mr Colin McKerlie, Convenor	The Freedom Forum	March 6 2002
Mr Paul Wright	Private Citizen	March 6 2002
Mr Liam Barry	Private Citizen	March 6 2002
Hon Nick Griffiths MLC	Minister representing the Attorney General in the Legislative Council	March 13 2002

APPENDIX 4

THE GRAND JURY – ITS USE AND MISUSE

APPENDIX 4

THE GRAND JURY – ITS USE AND MISUSE

The Grand Jury—Its Use and Misuse

LYNN COBDEN
Editor, *Reachout,* New York Conference, United Church of Christ;
Member, Committee on Youth and Correction, Community Service Society

Although the grand jury is an important component of the court system, the general public has little knowledge of its origin, its function, and its mode of operation. This study argues in favor of reforming it.

A brief account of its history is followed by a description of make-up, function, and proceedings. Cases are then related to show how the grand jury has been used politically during the last decade, pointing out how the inherent weaknesses of the present grand jury system have permitted it to be misused in various ways. Finally, the study marshals various informed suggestions for reform and stresses the urgency of reform to return the grand jury to its rightful role: investigator of suspected crime and protector of individual liberty.

IN 1166 KING HENRY II summoned twelve knights ("good and lawful men") to the Assize of Clarendon; throughout England similar groups were drawn from the various villages. They were charged with ferreting out crimes in their districts and, under oath as "jurors," revealing the names of those believed guilty. The investigations were conducted by the jurors themselves and the accused reported to the royal sheriff and the royal justices. The charges could be lodged not only on evidence but also upon the community's prevailing belief (*fama publica*) that a suspect was guilty.

This was the beginning of what is known as the grand jury. Its original function was to enlarge and centralize the power of the king and give him the benefit of local knowledge.[1]

Upon receipt of charges (indictment) with its accompanying presumption of guilt, the burden of proof fell on the accused, the burden of proving his innocence. Early trials under this system allowed the defendant to deny his guilt under oath and submit himself to "ordeal by water." Having been flung into a river or a pond, the suspect was declared guilty if he floated—that is, was "rejected" by the water; if he sank—that is, was "received" by the water—he was drawn out and declared innocent. Even if he was vindicated by the ordeal but was "of bad renown and publicly and evilly reputed by the testimony of many lawful men," he was exiled and sworn to "never come back to England save by the King's permission."[2] If guilty, he was subject to a variety of punishments, including fines and forfeitures, which enriched the royal treasury.[3]

1. William J. Campbell, "Eliminate the Grand Jury," *Journal of Criminal Law and Criminology,* June 1973, p. 175.

2. See M. Tigar and M. R. Levy, "Grand Jury as the New Inquisition," *Michigan State Bar Journal,* November 1971, p. 695.

3. *Ibid.*

In the thirteenth century the dual function of the jury—presentment and trial—was split, indictment remaining with the grand jury and trial assigned to twelve men selected from grand juries in several communities who served as a "petit" jury.[4]

In 1681 Charles II charged the Earl of Shaftesbury with treason and demanded that the grand jury hear the evidence in open court. The jury refused to do this, succeeded in interviewing the witnesses separately and privately, and then returned the indictment to the king, stamping it "Ignoramus" ("We know nothing of it"). The case signified not only the grand jury's freedom from royal control but also its evolution into an investigatory and accusatory body with the right to conduct its meetings in secret.[5]

The first grand jury empaneled in America sat in the Massachusetts Bay Colony in 1635. Early grand juries concerned themselves with violations of the law but after 1700 the colonists realistically viewed the grand jury as a means of obtaining redress of grievances and opposing the power of the royal officials. By the end of the colonial period grand juries were proposing new laws, protesting against abuses in government, and performing many administrative functions. A Boston grand jury refused to indict the leaders of the Stamp Act riots (1765) and the editors of the *Boston Gazette* accused of libeling the royal governor (1768). In 1770 a Philadelphia grand jury, after refusing to bring in indictments by the Crown, proposed that the colonies form a union to oppose British taxes. During the Revolution the grand juries in virtually all the colonies supported the effort for independence.[6]

Though the grand jury was held in high favor, some of the founding fathers in 1789 felt that, as a shield protecting the individual from governmental oppression, it was unnecessary in a nation where the form of government was representative. Nevertheless, several of the thirteen original states and most of the new states provided for a grand jury in their constitutions, and, in 1791, with ratification of the Fifth Amendment, the U.S. Constitution provided that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . ."

The function and operation of the grand jury have changed considerably since the first one was established 810 years ago. The next section will deal with the grand jury in the United States today.

Function and Operation

A federal grand jury is composed of twenty-three members, of whom sixteen are a quorum necessary for the conduct of business. Some states require that number; others stipulate fewer. In most jurisdictions, including the federal system, jurors are selected at random from voter-registration rolls; a notable exception to this procedure is Cali-

4. *Ibid.*

5. "Grand Juries," *Editorial Research Reports* (Washington, D.C.: Congressional Quarterlies, 1973), p. 851.

6. *Ibid.*

fornia, where judges may choose jurors from their friends or from persons recommended by former grand jurors.[7]

Qualifications for service are minimal—customarily, a minimum age, mental and physical competency, and residence in the jurisdiction for a prescribed period. Persons conversant with law and related fields are rarely permitted to serve on a jury.

The grand jury may be empaneled to sit for a term as short as one month or as long as eighteen months (with provision for extension beyond that time). The foreman (the presiding member) is selected from the total panel by the judge, who generally chooses a juror with prior experience. The grand jury has two basic functions: (1) consideration of criminal indictments and (2) investigation of "suspected crimes" committed within its jurisdiction.

In the first instance a case comes before a grand jury in the following manner: Accusations in the form of sworn complaints are filed with a magistrate sitting in the locality of the alleged crime. Should he, upon consideration, determine that there is probable cause to believe that a crime has been committed and that the accused committed it, he will order the accused to be held, either in custody or on bail, for appearance before the grand jury. At this stage all relevant information in his possession is turned over to the prosecutor, who becomes responsible for presenting the matter to the grand jury.[8] Not all criminal cases are brought before a grand jury for indictment action. In the federal system, only those cases that might result in a prison term of more than one year are considered. The practice varies among the states, some using "information" in even the most serious felony cases, some requiring grand jury action for only the most serious capital cases, and others using the federal guidelines.

In other cases, where the grand jury performs its investigative function, there is no specific suspect. The prosecutor may call many witnesses and try to gain evidence against a specific person or persons for a known crime. Most investigating that grand juries perform is under the firm direction of the prosecutor. But it is possible for the grand jury, on its own, to study the office of the district attorney himself if it has cause to suspect him of misconduct or malfeasance.

Grand jury proceedings are nonadversarial. The prosecutor selects the witnesses the jury will subpoena. Rule Six of the Federal Rules of Criminal Procedure authorizes the U.S. district court clerk to issue blank grand jury subpoenas to the federal prosecutor, who fills in the names of those witnesses he wants to appear. Witnesses are not entitled to counsel. A witness may, however, ask to be excused from the hearing in order to confer with counsel outside the room. Unlike the procedure at a jury trial, questions asked the witness are not subject to the ordinary rules of evidence. Hearsay, for instance, is admissible at a grand jury hearing, as is illegally seized evidence.

Grand jury hearings are conducted in secrecy. A witness, especially a frightened one, is more likely to talk freely if he knows his testimony will not be made public. A

7. Campbell, *supra* note 1, p. 177.

8. Melvin P. Antell, "The Modern Grand Jury: Benighted Supergovernment," *American Bar Association Journal,* February 1965, p. 154.

suspect who has no idea that he is being investigated will not put pressure on individual jurors, destroy evidence, or flee. Since the grand jury hears only evidence against a suspect, sometimes hearsay and much of it damaging, secrecy protects the reputation of the unindicted suspect.[9] However, witnesses are not under the obligation to keep their testimony secret (but may be requested by the court to do so). Thus a person under investigation by the grand jury can sometimes learn of the proceedings.

All federal grand juries use a stenographer to have a transcript of their hearings (not their deliberations); in this regard, the states vary, some having no written record whatsoever.[10]

A witness has two privileges applicable as a defense against questioning: the common-law husband-wife, attorney-client priest-penitent confidentiality privilege, recognized by the federal courts but rarely invoked[11]; and the right not to incriminate himself. Should he choose to invoke his Fifth Amendment privilege against self-incrimination, the prosecution can grant him immunity and compel him to testify.

Immunity has two forms, "transactional" and "use." Transactional immunity protects the witness from prosecution for any offense mentioned in or related to his testimony, regardless of independent evidence. Use immunity protects the witness against use of that part of his testimony that he gave against himself; he may be indicted for an offense concerning which he testified if the indictment is grounded on evidence obtained from other sources. The Supreme Court decided in 1972 that use immunity does not violate a witness's Fifth Amendment right.[12]

Should the witness still refuse to testify, he can be held in contempt and jailed immediately. The conventional civil contempt sentence is imprisonment until the witness is willing to testify or until the grand jury expires—a period of up to eighteen months in general and up to thirty-six months in special instances. Rarely are uncooperative witnesses able to get bail for an appeal on these decisions.

After hearing all the evidence and receiving some legal instructions from the judge (who appears before the grand jury only when it is empaneled and when he gives it these instructions on the law), the jury adjourns to deliberate. The prosecutor is not permitted to attend the grand jury's deliberative sessions.

If the grand jury decides by majority vote (16 is a quorum, 12 a majority) that there is probable cause to believe that the suspect has committed a crime, it issues a "true bill" or indictment, recommending that the person be brought to trial. If it decides that the evidence for that conclusion is insufficient, it votes a "no true bill." A third option is available—a report called a "presentment," its findings and

9. Irving R. Kaufman, "The Grand Jury: Sword and Shield," *Atlantic Monthly,* April 1962, p. 60.

10. James P. Whyte, "Is the Grand Jury Necessary?" *Virginia Law Review,* April 1959, p. 489.

11. David J. Fine, "Federal Grand Jury Investigation of Political Dissidents," *Harvard Civil Rights-Civil Liberties Law Review,* Vol. 7, 1972, pp. 453-54.

12. *Kastigar v. United States,* 405 U.S. 411, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

conclusions issued when the wrongdoing, on which sufficient evidence has been presented, does not constitute an indictable crime. Presentment is rare in federal practice; among the states its uses and results vary. In some states the reports are made public; in others the secrecy of a presentment is carefully guarded for the reasons given above.

In some cases a true bill is not filed because the jury concluded that the offense was not a felony. In that event, the jury recommends that the case be sent to the local trial court having jurisdiction of the offense in question.

With a working knowledge of the grand jury system let us turn to some examples of how the grand jury has been used during the last decade.

Political Use of the Grand Jury

Little public attention was paid to the functioning of the grand jury until the late sixties, when questions that were raised about its politically motivated use brought some of the system's inherent weaknesses to the surface and stimulated many suggestions for reform.

A study of recent action by federal grand juries against antiwar activists, the Catholic Left, the Pentagon Papers principals, the Black Panthers, and others espousing unpopular, dissenting, or radical views indicates that the executive branch of government has been using the judiciary to intimidate and silence those who do not agree with its policies. As Judge Shirley M. Hufstedler stated in a recent decision in the Ninth Circuit Court of Appeals: "Today, courts across this country are faced with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissidents. It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression."[13]

Much of the federal activity has been directed by the Internal Security Division of the Department of Justice. The grand jury, recites one charge, has been used as a cover for "(1) a secret White House-sponsored network for systematic collection of political intelligence by illegal means and for purposes unrelated to law enforcement, (2) the laundering or legitimizing through grand jury interrogation of such tainted evidence, (3) the development of evidence through the grand jury process to support an indictment already handed up—a form of pre-trial discovery not permitted in criminal cases, and (4) the use of civil contempt, not to obtain testimony but solely to punish uncooperative witnesses."[14]

In October 1970, Guy Goodwin, head of the Special Litigation Section of the Internal Security Division, began a grand jury investigation in Tucson, Ariz. The ostensible subject of this investigation was the alleged purchase in Tucson of dynamite by a young man who drove a car registered to a Los Angeles woman. The seller of the dynamite had become suspicious

13. Barry Winograd and Martin Fassen, "The Political Question," *Trial*, January-February 1973, p. 16.

14. Frank J. Donner and Richard I. Lavine, "Kangaroo Grand Juries," *Nation*, Nov. 19, 1973, p. 519.

of the buyer's radical looks and referred the license number of the car to the FBI, which immediately placed the Los Angeles house under heavy surveillance. Soon afterward the seller identified the purchaser from the FBI picture file of Weatherman activists. Having gained little or no information from their surveillance, the FBI turned the case over to ISD.

The owner of the car and the four persons who shared her home were subpoenaed to Tucson,[15] and most of the grand jury's time was spent questioning these individuals *after* an indictment had already been returned against the dynamite buyer. Typical of the questions asked:

"I want you to tell the Grand Jury what period of time during the years 1969 and 1970 you resided at 2201 Ocean Front Walk, Venice [Los Angeles], who resided there at the time you lived there, identifying all persons you have seen in or about the premises at that address, and tell the Grand Jury all of the conversations that were held by you or others in your presence during the time that you were at that address."[16]

"Tell the Grand Jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation you traveled and who you visited at all of the places you went during the times of your travels after you left your apartment in Ann Arbor, Michigan, in May of 1970."[17]

All five witnesses decided not to testify. Given full transactional immunity, they again refused to answer the questions and, upon being cited for contempt,[18] were remanded to jail in November 1970. Receiving the conventional sentence, they were kept in jail until the grand jury was disbanded in March. Upon release each witness was served with another subpoena to appear before a grand jury on April 7.

Karen Duncan, one of the five, reacted as follows to the new subpoena:

"It then appeared that there were no legal restrictions to the kinds of questions a grand jury could ask or the number of grand juries one could be called before and thus the time one could be jailed for contempt. It looked like we could be continually jailed on repeated 18-months sentences forever. It looked as though the only way we could ever get out of jail was by testifying."[19]

Two of the witnesses did just that and answered Goodwin's questions so fully that the three other witnesses were dismissed. However, Goodwin managed to elicit so many names and facts regarding activity of the Left that the Tucson event became a rallying point for the entire radical community in Los Angeles.

15. Every federal grand jury has the advantage of nation-wide service of subpoena. Under the guise of a conspiracy charge a grand jury can be convened in a district several hundred miles from the residence of all or most of the witnesses, or two grand juries at opposite ends of the country can be considering the same subject (e.g., the Boston and Los Angeles panels both conducted hearings on the Pentagon Papers case).

16. See Winograd, *supra* note 13, p. 17.

17. See Frank J. Donner and Eugene Cerruti, "The Grand Jury Network," *Nation,* Jan. 3, 1972, p. 6.

18. Although grand jury proceedings are secret, contempt hearings are public. Should a prosecutor choose to use "red herring" questions, bringing up bombs, dynamite, and other such subjects regardless of the absence of any reason to suspect the witness has information on them, these questions can become known through such hearings, thus creating the image of terrorist conspiracy and further intimidating opposition activists.

19. Donner and Cerruti, *supra* note 17, p. 7.

In December 1970 the brothers Berrigan were serving prison terms for their participation in the destruction of draft records at a Selective Service office in Baltimore. The FBI was using a prison informer, Boyd F. Douglas, Jr., to keep tabs on Philip Berrigan at Lewisburg Penitentiary and was checking his correspondence and making use of wiretaps. In August of that year the FBI had learned of an alleged plot by a group of Catholic activists to blow up the electrical conduits and steam pipes in the Capitol and to kidnap someone like Henry Kissinger for the purpose of demanding an end to the bombing in Southeast Asia.

Upon investigation, ISD concluded that the plot (which informer Douglas tried to keep alive) was little more than a fantasy. It made no move to convene a grand jury and instead continued surveillance to gain more information. However, J. Edgar Hoover believed that action on this dangerous plan ought to be initiated. In executive session, following a rather routine appearance before the House Appropriations Committee to ask for supplemental funds for the Bureau, he disclosed his information and asked for a hearing before the Senate Appropriations Committee. Informing a subcommittee aide that he wanted his testimony made public (executive sessions are made public at the discretion of the committee), Hoover arrived for his appearance armed with forty-five copies of his prepared statement, distributed to newsmen as soon as he began to testify. The subcommittee heard the testimony and immediately made it public—a meaningless gesture, since Hoover had already done so.

Its hand forced by Hoover's reckless public statement, the Justice Department convened a grand jury in mid-December in Harrisburg, Pa. On January 12, 1971, indictments on the kidnaping-bombing plot were handed up against six persons; seven others were named as co-conspirators but not indicted.

Following these indictments the grand jury called an additional thirty-four persons to testify. On April 30, having apparently been unable to find sufficient evidence to sustain the kidnaping-bombing plot, it returned a superseding indictment, substituting for the orginal plot a multifaceted conspiracy whose principal objectives were the destruction of draft records in a city in Delaware, Rochester, N.Y., and Philadelphia. The kidnaping-bombing plot was relegated to only one of several charges: thus the government could prove conspiracy without proving the original charges. Two new defendants were named in the second indictment. One of them, John Theodore Glick, was already serving a jail term, having been convicted of destruction of a draft file in Rochester. Indeed, all the antidraft actions cited had already been investigated or prosecuted by federal or state authorities.

This use of the grand jury was, if nothing else, an extraordinary—and sad—effort to protect Hoover from the consequences of his serious misconduct.

The "Fort Worth Five" case illustrates both the political use of choice of situs (location) of the grand jury and the kind of personal toll that is exacted by a subpoenaed appearance.

Early in 1972 the Treasury De-

partment, at the request of the British government, began to investigate the shipment of illegal arms to Northern Ireland. A grand jury was convened in Fort Worth by the Justice Department. On June 21 twelve Irish-Americans living in New York were summoned to appear before it. Subsequently seven of the subpoenas were dismissed or suspended. The five remaining witnesses (a male nurse, a real estate salesman, a bus driver, a carpenter, and a housepainter) had no official connection with the Irish Northern Aid Society, the organization supposedly under investigation. The questions addressed to the witnesses concerned events and persons in the New York City area and had no connection with activity in Texas. In light of the large Irish-American population in New York City, it would appear that Fort Worth was chosen as the situs so that local protest would not be forthcoming.

Despite immunity grants all the witnesses refused to testify and were remanded to jail. This action cost them dearly. "During their first six weeks in jail they weren't allowed to telephone their families. Two of them lost their jobs. The bus driver's wife had a miscarriage. One of the male nurse's sons, a seven-year-old, suffered severe anxiety because he thought his father was dead."[20] The witnesses served four months in jail until pressure for their release on bail pending appeal of their contempt citations was exercised by Senator Edward Kennedy, Congressmen Lester Wolff and Mario Biaggi, and others. Six months later, when the Supreme Court refused to review a Court of Appeals order that they testify, the five were sent back to prison. After seven months of additonal imprisonment they were released by order of Justice Douglas on evidence that the government had violated the attorney-client privilege by use of wiretaps. Shortly thereafter the contempt charges against them were dismissed.

On March 13, 1973, while the men were still imprisoned, Rep. Bella Abzug held a public hearing on her resolution requiring the Justice Department to explain why it had summoned them to Fort Worth. It was at this hearing that Senator Kennedy said:

> "We have witnessed the birth of a new breed of political animal—the Kangaroo grand jury. . . . And so it goes, as the Special Litigation Section of the Internal Security Division plies its trade, with its small army of grand inquisitors barnstorming back and forth across the country, hauling witnesses around behind them, armed with dragnets of subpoenas and immunity grants and contempt citations and prison terms. These tactics are sufficient to terrify even the bravest and most recalcitrant witness, whose only crime may be a deep reluctance to become a government informer of his closest friends or relatives, or an equally deep belief that the nose of the United States Government has no business in the private life and views and political affiliations of its free citizens."[21]

Former Vice-President Spiro Agnew called the Black Panther Party "a completely irresponsible, anarchistic group of criminals." Assistant Attorney General Jerris Leonard said, "The Black Panthers

20. Paul Cowan, "The New Grand Jury," *New York Times Magazine,* April 29, 1973, p. 140.

21. Donner and Lavine, *supra* note 14, p. 533.

are nothing but hoodlums and we've got to get them." J. Edgar Hoover stated that, of all the "violence-prone black-extremist" groups in the United States, "the Black Panther Party without question represents the greatest threat to the internal security of the country."[22]

The alleged purpose of the police raid on the Black Panther Party's Chicago headquarters on December 4, 1969, at 4:45 a.m., was to execute a search warrant for illegal weapons. The raid was led by a detail of fourteen Chicago police officers assigned to the Cook County State Attorney's office, dressed in plain clothes and carrying side arms, five shotguns, and one submachine gun. After ten minutes of massive gunfire, two occupants, Fred Hampton and Mark Clark, were dead, and four were wounded. (Two police officers were slightly wounded: one was hit by flying glass; the other was shot in the leg by a fellow officer.) At the close of the raid police arrested the seven remaining occupants of the apartment and charged them with, among other crimes, attempted murder.

The raiding officers neglected basic investigative practices such as fingerprinting, preserving evidence, cataloguing confiscated firearms, examining and photographing the dead and wounded before removal, and sealing the premises. The apartment was not sealed until December 17, by order of the coroner; in the intervening two weeks, several thousand persons had made their way through the premises. The office of State Attorney Edward Hanrahan gave an "exclusive" account (later proved partly erroneous) of the raid to the *Chicago Tribune* on December 11; that night the local CBS-TV station broadcast a re-enactment of the raid in which the raiding officers depicted their own roles.

On December 19 the Internal Inspections Division (IID) of the Chicago Police Force stated that the raiders had done nothing wrong; on January 6, 1970, the county coroner's jury entered a finding of justifiable homicide; and on January 30 the first of three grand juries indicted the seven survivors on charges ranging from attempted murder to illegal possession of firearms.

A federal grand jury was empaneled and began to look into the case. By law, it could consider only federal offenses—in this case, possible violations of the federal civil rights acts. After meeting for five months, hearing testimony from nearly 100 witnesses, and sifting through numerous reports and findings, it issued no indictments but a presentment, in which it deplored the publicity released by the state attorney's office and the Chicago police force, whose statements to the press it found to be "grossly inaccurate or grossly distorted."[23] The federal grand jury concluded that the performance of the IID "was so seriously deficient that it suggests purposeful malfeasance."[24] It found that the Police Crime Laboratory had made an erroneous and incomplete analysis of the ballistics

22. Roy Wilkins and Ramsey Clark, *Search and Destroy* (New York: MARC, 1973), pp. 10-11.

23. U.S. District Court, Northern District of Illinois, Eastern Division, *Report of the January 1970 Grand Jury* (Washington, D.C.: U.S. Govt. Printing Office), p. 118.

24. *Id.*, p. 122.

evidence (which partially explains why the original county grand jury sent up indictments on the survivors) and that the firearms examiner was pressured by the state attorney's office to sign the deficient report. And it made available the FBI finding that only one of the 80 to 100 shots fired could be identified as having come from a Panther weapon. (The police maintained that the occupants had attacked them with massive gunfire.)

One week before the federal grand jury issued its "Report," the indictments were dismissed.

This grand jury issued no indictments against the police participants or their superiors either for their part in the raid or for obstructing justice during the investigations after the raid. Instead, "In the first five pages alone of the report, the words used to characterize the Black Panther Party, its members, and their activities include 'militant,' 'controversial,' 'stridently militant,' 'violently,' 'hostility,' 'policy of violence,' 'violence and threats,' 'vehement,' and 'stormy.' Rousing unfavorable descriptions of the Black Panthers continue throughout the 132-page report. This sort of pointless slur, which leaves the recipients without recourse to counter the libelous statements, is often an unfortunate side effect of grand jury investigations."[25]

Several law and civic associations asked for a special grand jury (to be the third involved in the case) headed by a disinterested special prosecutor. In June, Barnabas F. Sears was appointed as special state's attorney by Chief Judge Joseph A. Power, of the Cook County Criminal Court. (Judge Power was a neighbor, life-long friend, and former law partner of Mayor Richard Daley and could be considered eager to protect State's Attorney Edward Hanrahan, Daley's protégé.) After working over the evidence for six months, Sears began to present evidence to the new grand jury on December 8, 1970.

On April 22 this grand jury tried to give Judge Power a "true bill." He refused to accept it, demanded that the jury hear more witnesses, asked for a transcript of all testimony, and held a private meeting with two of the jurors. Sears appealed to the Illinois Supreme Court to enjoin Power from interfering with the independence of the grand jury. Again the jury presented Judge Power with the indictment. This time he refused to open it and ordered it suppressed until he determined whether the grand jury had been unduly influenced.

Sears again went to the Supreme Court, requesting that the indictment be made public.[26] Finally, on August 24, two months after it had been issued, the indictment was opened and read. Fourteen law enforcement officials, including Edward Hanrahan, were indicted for "knowingly and willfully, fraudulently and deceitfully conspiring, combining, confederating, and agreeing to obstruct justice."

One case with three different results from three grand juries—the first, a jury so eager to indict on the scantiest evidence that a change in the ballistics report caused the

25. Helene Schwartz, "Demythologizing the Historical Role of the Grand Jury," *American Criminal Law Review,* Vol. 10, 1972, p. 769.

26. Jon R. Waltz, "Mayer Daley's Way with Justice," *Nation,* Nov. 8, 1971, pp. 464-65.

dismissal of all its indictments; the second, an example of the dangers inherent in the grand jury presentment; the third, a demonstration of outside influence on the grand jury's independence.

These actual cases illustrate the way some of the weaknesses inherent in the grand jury system today[27] affect the people involved in them. Next we shall consider these weaknesses theoretically.

Criticism of the Present System

Earlier we cited the traditional reasons given for holding the grand jury proceedings in secret. But secrecy is a two-edged sword, and it has several consequences that are undesirable.

In the first place, it isolates the interrogation procedure from the public, which might well have a modifying influence on the questions and tactics used by the prosecutor. Recall the questions asked of the witnesses in the Tucson hearing. The prosecutor, the only person in the room well versed in the law, may easily take more liberties with the witness's constitutional rights if testimony cannot be made public.

Second, testimony in secret can mean future distrust of the witness by his friends and associates. Earl Caldwell, a black reporter for the *New York Times,* specialized in covering the Black Panthers. Subpoenaed to appear before a grand jury, he asked that the motion be quashed. The court denied the request but gave him a protective order that granted him the right to remain silent on certain matters. Caldwell still refused to appear and was held in contempt. On appeal he maintained that his mere appearance before a grand jury would "drive a wedge of distrust and silence" between him and his sources in the Black Panther Party. The case eventually made its way to the U.S. Supreme Court, which decided in June 1972, in a 5-to-4 decision, that he would have to appear. (Caldwell never did actually testify since the grand jury had disbanded while his case was in the courts.) In a similar instance Professor Samuel Popkin, of Harvard, refused to testify in the Pentagon Papers case regarding his sources of information on Vietnam. For both journalists and scholars the issue is clear: to testify would violate their professional ethics and possibly put their livelihood in jeopardy since, once they betray a source, they run the risk that all other sources will dry up. If the testimony cannot be made public, their political associates can never be certain that their confidence has not been betrayed.

Third, the secrecy policy is used to justify exclusion of the witness's attorney from the jury room. For a highly intelligent, well-educated witness like Professor Popkin, remembering a question, understanding its implications, and discussing it with his lawyer in private in the hall outside the jury room may not be very difficult; for the average witness, it is not so easy. In regard to immunity, answering even only one question without legal advice may deprive the witness of his privilege against self-incrimination. The

27. Grand jury deficiencies could be examined also in the Leslie Bacon case, the Tallahassee action on the Vietnam Veterans Against the War, and in the Boston and Los Angeles grand jury investigations of the Pentagon Papers case, as well as others.

presence of his lawyer in the jury room would place some restraint upon the prosecutor.

The persons to be subpoenaed, how many subpoenas are to be issued, the time of delivery, the method of service, the information they shall contain, and the amount of time to be allowed between service to and appearance of the recipient—all are matters of the prosecutor's discretion.

Subpoenas are usually served by federal marshals but 1970 legislation now allows service by FBI agents. In the Harrisburg case mentioned above, the prosecutor had one set of subpoenas served by teams of FBI agents, with as many as twelve agents for three subpoenas, certainly a psychological ploy.[28]

Time of service and time given until appearance are important aspects of the subpoena. The Los Angeles grand jury investigating Daniel Ellsberg in the Pentagon Papers matter served Robert Ellsberg, his fifteen-year-old son, with a subpoena at 7:30 a.m., commanding him to appear before the jury at 9:30 that same morning.[29] "Forthwith" or short-notice subpoenas leave the witness with little or no time to find a lawyer should he suspect that he needs one. Since the federal subpoena calls upon the person to "give evidence on the part of the United States," he could easily not perceive the need for an attorney and, upon beginning testimony, may find that he has waived his important Fifth Amendment privileges.

Unlike a trial subpoena, a grand jury subpoena does not name the person being investigated and does not specify the criminal statute involved; instead, it may refer in general to a conspiracy statute and may state that the object of investigation is "a person unknown"—"John Doe."

Obviously the witness is, under these circumstances, hard put to prepare himself for his appearance.

Since there are no rules of evidence for the grand jury proceeding, irrelevant evidence, hearsay, or illegally seized evidence is often introduced and, more frequently—especially when the subpoenaed witness belongs to a dissident group—is used to elicit information from him. The maneuver is known as "laundering tainted evidence."

In a trial the exclusionary rule excludes illegally seized evidence from admission and is designed to deter authorities from obtaining evidence in violation of the Constitution. Allowing the prosecution to use tainted evidence at a grand jury hearing in effect gives law enforcement officers an incentive to do just what the above rule is designed to prevent.

Some headway has been made in the fight against illegal wiretaps. In the Harrisburg case, Sister Jogues Egan refused to testify, contending that the questions being asked were based on illegal wiretapping. On June 29, 1972, the Supreme Court dismissed a contempt citation on a refusal to answer questions because the Justice Department would not reveal whether the witness had been wiretapped.[30]

28. Fine, *supra* note 11, p. 446.
29. *Ibid.*
30. "Grand Juries," supra note 5, p. 856.

But in the Frank Costello case, the Supreme Court upheld the validity of an indictment based on hearsay evidence[31] even though that evidence could not be used at a trial to obtain a conviction.[32]

Though the "key man" selection system is no longer used in most sections of the country, selection of the grand jury panel from the voter-registration rolls does not automatically eliminate discrimination. Blacks, other minorities, transients, and young people tend not to be registered and thus are underrepresented on most grand jury panels.

Many critics maintain that the grand jury serves merely as a rubber stamp for the wishes of the prosecutor. Some years ago Professor (later Senator) Wayne Morse conducted an extensive study of state grand jury action. Out of a sample of 6,453 cases he found only 348 (5 per cent) in which the prosecutor did not get an indictment.[33] More recently the National Advisory Committee on Criminal Justice Standards and Goals, studying the extent to which grand juries returned indictments on cases presented to them in 1969, cited the following percentages: Baltimore, 98 per cent; Cleveland, 93 per cent; Philadelphia, 97 per cent.[34]

Increased concern has also been expressed regarding the symbiotic relationship between prosecutors and the FBI. Prosecutors have traditionally utilized the resources of the FBI. The question now is whether the FBI should be permitted to use the resources of the grand jury.

Techniques of infiltration and covert investigation, effective in such bureaucratic organizations as the Communist Party and certain crime families, have proved ineffective with the more free-floating, dissident alliances of the sixties and seventies. The living habits, frequent movement, and use of drugs are stumbling blocks in the paths of FBI operatives. A. William Olson, head of Internal Security Division, has acknowledged that traditional intelligence techniques have not worked with today's activists.

> "These people have life styles that are very hard to infiltrate . . . . In many cases you go into an investigative grand jury with only a suspicion that criminal laws have been violated. And sometimes as the grand jury progresses you get bits and pieces. And sometimes they fit in not with what you started out to investigate, but with other crimes, not necessarily in the same jurisdiction."[35]

Since Congress has consistently refused to grant the FBI subpoena power, one wonders whether this recent "fishing expedition" trend does not signify an attempt to short-circuit the usual checks placed upon law enforcement officials.

Let us consider next an alternative procedure and some of the reforms proposed to deal with these problems.

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31. Costello v. United States, 350 U.S. 359 (1956).

32. Isidore Silver, "Not So Grand Jury," *Commonweal,* Dec. 14, 1973, p. 290.

33. Fine, *supra* note 11, p. 440.

34. National Advisory Commission on Criminal Justice Standards and Goals, "Limitations of Grand Jury Functions," *Courts* (Washington, D.C.: U.S. Govt. Printing Office, Jan. 23, 1974), p. 75.

35. Cowan, *supra* note 20, p. 139.

Recommendations for Change and Reform

ABOLITION

In twenty-two states "information" is available as a substitute for grand jury indictment in all criminal prosecutions. Most of them wisely provide for empaneling a grand jury in cases of inaction by prosecuting officers and corruption. In this alternative process a prosecutor files an information with the court, stating that there is reason to believe that a crime has been committed and that a certain person committed it. Following the filing, a probable-cause hearing is held before a judge to determine whether the evidence is sufficient to proceed to trial.

The Supreme Court has held that the state's use of information in lieu of grand jury indictment does not violate the federal Constitution. No state that has provided for this option has ever abandoned it.

Information has certain advantages. When commenced by information, prosecution achieves a higher percentage of convictions. It costs less in time and money. It eliminates duplication in felony cases where both a grand jury hearing and a preliminary hearing are held. But it cannot be used as an option in the federal system without repealing that portion of the Fifth Amendment which guarantees indictment by the grand jury.

The National Advisory Commission on Criminal Justice Standards and Goals has suggested that information replace the grand jury indictment in all criminal prosecutions. It urges that, if information cannot be made an option immediately, legislation be enacted permitting the defendant to waive the grand jury indictment proceeding. The Commission does believe, however, that the grand jury should be retained as an investigatory body.

Suggestions that the grand jury be abolished in favor of the information process come from varied sources. Essex County (Newark, N.J.) District Court Judge Melvin P. Antell writes that judicial review, political controversy, legislative intervention, and press commentary all bear on the growth and performance of our important institutions but that the grand jury is left inviolate, with no parallel mechanism that makes its shortcomings known to the public. Only the courts, he says, protect individual rights, by the application of law. He urges use of the information-preliminary hearing system, which, he believes, would transfer the indictment function to those who have learned restraint from the judicial process.[36]

Judge William J. Campbell (U.S. District Court, Northern District, Illinois) agrees. In addition, he suggests, subpoena power should be lodged with the prosecutor since that is where it rests in reality now. Testimony can be taken under oath and in secret and be recorded by a court stenographer. With a probable-cause hearing following, the determination of whether an individual would be charged with a crime would rest with a member of the judiciary, one trained and skilled in the law and not subject to the direction of the prosecuting attorney.[37]

Another recent advocate of abolition of the grand jury is former Rep. Angelo Roncallo, who asserts

36. Antell, *supra* note 8, p. 153.
37. Campbell, *supra* note 1, p. 180.

that he himself has been a victim of grand jury abuse. The change to information-preliminary hearing, he says, would protect the average citizen since evidence at a preliminary hearing would be heard not only to incriminate but also to exonerate.[38]

Many of those calling for outright abolition point to elimination of the grand jury in Great Britain as long ago as 1933 without untoward results. Far more attention, however, has been given to retention but reformation of the present system.

SUGGESTIONS FOR REFORM

1. *Witness Protection*

One suggestion proposes that the witness be allowed (a) to have a complete transcript of his testimony and (b) to have his attorney in the grand jury room.

Allowing a transcript would give the witness proof that he had been promised immunity and would therefore protect him on the full scope of matters to which he testified. It would likely deter the prosecutor from unfair questioning practices and would permit newsmen, scholars, and others to prove to sources or affiliates that they had not betrayed any confidences. On the other hand, should the witness feel that secrecy would give him better protection, he could request that his testimony be taken in secret and remain sealed. Whether he needs protection is something that the witness can decide for himself.

Allowing the attorney for the witness to be present in the grand jury room would be equally beneficial. His presence would certainly temper the actions of the prosecutor. As it now stands, of all the persons in the grand jury room (jurors, witnesses, the prosecutor), only the prosecutor has any basic knowledge of the law. Granted the grand jury hearing is not intended to be adversarial. This suggestion does not mean that the witness's attorney would be given the right to make arguments about the legitimacy of questions, to conduct cross-examinations, etc. He would be present only to advise his client.

It has been pointed out that this reform has a strong constitutional argument going for it.[39] In cases from *Powell* through *Escobedo* and *Miranda* to *Wade,* the Supreme Court has held that a person is entitled to counsel at any pretrial confrontation that can be considered critical. When the government is either unable or unwilling to specify which persons testifying are only witnesses and which are prime suspects, it would follow that each witness should be granted the right to counsel so that he can receive the protection to which he is entitled.

A variant on counsel in the hearing room has been proposed by Professor Silver. Currently the prosecutor serves the double (and perhaps unconstitutional) role of actively seeking an indictment and, at the same time, advising the jurors of the adequacy of the evidence to support his position. Silver's proposal would place in the courtroom, to serve the second function, an independent, court-employed attorney, who would advise the laymen on the jury on points of law, on the issuing of subpoenas, etc.[40]

38. Joel Kramer, "Indicting the Grand Juries," *Newsday Magazine,* July 21, 1974, p. 26.

39. Fine, *supra* note 11, p. 497.

2. *Subpoena Issuance; Immunity; Contempt*

One of the reforms proposed by the Coalition to End Grand Jury Abuse (an alliance of the National Lawyers Guild, the American Civil Liberties Union, the National Conference of Black Lawyers, the Unitarian-Universalist Association, and others) calls for the grand jury to vote on whether it should (a) issue a subpoena, (b) offer immunity, and (c) ask for contempt rulings.[41]

(a) The first of these three requirements would make the prosecutor explain why he wanted to call certain persons. This would, in effect, return to the jurors a role that was originally theirs and that has over the years been given more and more to the prosecutor alone.

It has also been suggested that rules on subpoena content and service be drafted. In the same way that an arrested person is given the *Miranda* warning, a subpoena would carry the notation that a witness has a right to counsel. It would also be delivered at a reasonable time (say, between 9 a.m. and 9 p.m.), would describe what the witness is expected to testify on, and would give him adequate time before appearance.

An alternative to authorizing the jury to review subpoenas is to place this responsibility directly in the hands of the court. If the prosecutor has to make an appearance at a hearing before a judge to explain the kind of investigation he wants to conduct, the reasons for it, and the need for certain individuals to be subpoenaed, the groundwork for the scope of the investigation is laid. Thus, the decision for the reasonableness of the investigation as a whole would be placed in the hands of the court, which could then determine the witness's right not to answer particular questions on the grounds of irrelevance. This would also provide a check on the FBI's use of the grand jury as an investigative tool. Since the scope of the inquiry would be defined at the outset, peripheral lines of questioning would be easily detected.

(b) The Coalition suggests that "use" immunity be eliminated and that there be a return to full "transactional" immunity. One additional proposal would stipulate that the court must obtain the written consent of a witness before granting him immunity. This would allow the witness to continue to assert his Fifth Amendment privilege if he so chose.

(c) The Coalition proposes a limit on the sentence if the witness had already been jailed once for refusing to answer questions about the same subject. Consecutive contempt sentencings would, therefore, be eliminated.

3. *Rules of Evidence*

There has been a suggestion that trial rules of evidence be made applicable to grand jury proceedings. The hearsay rule in trial proceedings protects the right of cross-examination. Since there is no right of cross-examination before the grand jury, it has been assumed that there is no need for application of this rule. But because this rule tends to raise the quality of the evidence offered and also because the grand jury affords the only independent review of his case a defendant is likely to get, this

40. Silver, *supra* note 32, p. 290.

41. Donner and Lavine, *supra* note 14, p. 533.

would appear to be a good reform.[42]

As for illegally seized evidence, discouragement of this practice can only be applauded.

4. *Jury Selection and Quality*

In 1974 a bill before the New York legislature would have expanded the population base from which grand jurors are chosen by reducing the minimum age of *all* jurors from twenty-one to eighteen and by eliminating the automatic exemption of women from jury service. It passed both houses but was vetoed by the governor. As good as this reform measure would have been, additional thought must be given to including more of the automatically disenfranchised. Perhaps juror registration drives should be organized in the same way that voter registration drives were conducted in the South. A campaign is required to inform the public of the importance of adequate representation on grand jury panels and to support legislative reforms on qualifications. Finally, when a grand jury is empaneled, more time should be taken to supplement the judge's instructions—perhaps through films and manuals—to acquaint the jurors with their rights and responsibilities.

5. *Reports*

Several suggestions have been made regarding grand jury reports, ranging from discouragement of the practice to making the presentments available to the proper body (investigative agency or the legislature) should the grand jury feel that the condition requires further investigation or remedial legislation.[43] The latter procedure would, to a large degree, eliminate the problem created by public reports that pass judgment on citizens' conduct without finding evidence of indictable criminal activity and without providing an appropriate vehicle for defense against the charges.

I believe that the grand jury should be retained but reformed. This country has changed in many ways over the years since its first grand jury was empaneled in 1635. With the growing complexity of society and its laws, the grand jury has more and more relied on the prosecutor for guidance and direction. Many of the criticisms noted can be traced to this one basic fact. No mechanism has been built into the system to provide the checks and balances that are evident in other parts of our government. Without such a correcting device, the grand jury has evolved into something not originally intended. The system must be reformed.

With curbs on the prosecutor's now virtually unlimited power, with jury panels more truly representative of society, with jury participation in decisions on subpoenas and immunity grants, with the barrier of secrecy lifted, with rules of evidence instituted, and with safeguards against use of the grand jury for political suppression, the grand jury can be returned to its original and respected place in the court system—as investigator of suspected crime and protector of individual liberty.

42. Fine, *supra* note 11, p. 457.

43. Kaufman, *supra* note 9, p. 59.

APPENDIX 5

SCHEDULE 1

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Schedule 1 — Offences that may be relevant for this Act

[s. 3]

1) An offence under any of the following enactments:

The Criminal Code

s. 278
s. 279
s. 283 (except if the circumstances of the attempted or intended killing are such that, if it were carried out, the crime committed would be infanticide)
s. 292
s. 293
s. 294
s. 296
s. 296A
s. 298
s. 332
s. 393 (except in circumstances in which the maximum penalty that can be imposed is imprisonment for 14 years)
s. 394 (in circumstances in which the maximum penalty that can be imposed is imprisonment for life)
s. 398 (in circumstances in which the maximum penalty that can be imposed is imprisonment for 20 years)
s. 451
s. 451A(1)
s. 454
s. 557
s. 563A

Criminal Property Confiscation Act 2000

s. 50(1)

2. An offence against regulations made under the *Firearms Act 1973* s. 6(1) that —

   a) is committed in respect of 2 or more firearms; or

   b) is committed in respect of a firearm and in association with the commission, by the same or any other person, of an offence against the *Police Act 1892* s. 65(4aa).

3. An offence referred to in the *Misuse of Drugs Act 1981* s. 32A(1)(b).

32A. Drug trafficking

(1) If a person is convicted of —

(a) a serious drug offence and has, during the period of 10 years ending on the day, or the first of the days, as the case requires, on which the serious drug offence was committed, been convicted of 2 or more —

(i) serious drug offences;
(ii) external serious drug offences; or
(iii) offences, one or more of which are serious drug offences and one or more of which are external serious drug offences;

or

(b) a serious drug offence in respect of —
(i) a prohibited drug in a quantity which is not less than the quantity specified in Schedule VII in relation to the prohibited drug; or
(ii) prohibited plants in a number which is not less than the number specified in Schedule VIII in relation to the particular species or genus to which those prohibited plants belong,

the court convicting the person of the serious drug offence first referred to in paragraph (a), or the serious drug offence referred to in paragraph (b), as the case requires, shall on the application of the Director of Public Prosecutions or a police prosecutor declare the person to be a drug trafficker.

(2) An application for a declaration under subsection (1) may be made at the time of the conviction giving rise to that application or at any time within 6 months from the day of that conviction, and more than one such application may be made in respect of that conviction.

(3) In this section —

"external serious drug offence" means —
(a) offence against a law of another State, or of a Territory, which offence is prescribed to correspond

to an indictable offence under section 6(1), 7(1) or 33(2)(a); or

(b) offence against section 233B of the *Customs Act 1901* of the Commonwealth;

"serious drug offence" means indictable offence under section 6(1), 7(1) or 33(2)(a).

[Section 32A inserted by No. 50 of 1990 s. 4; amended by No. 69 of 2000 s. 5(2) and (3).]

Schedule VII

[Section 32A(1)(b)(i)]

Amounts of prohibited drugs for purposes of drug trafficking

Item	*Prohibited drug*	*Amount (in grams unless otherwise stated)*
1	AMPHETAMINE	28.0
2	CANNABIS	3.0 kg
3	CANNABIS RESIN	100.0
4	COCAINE	28.0
5	DIACETYLMORPHINE	28.0
5A	EPHEDRINE	28.0
6	LYSERGIC ACID DIETHYLAMIDE (LSD)	0.01
7	METHADONE	5.0
8	METHYLAMPHETAMINE	28.0
9	3, 4-METHYLENEDIOXYAMPHETAMINE (MDA)	28.0
10	3, 4-METHYLENEDIOXY-N, ALPHA-DIMETHYLPHENYLETHYLAMINE (MDMA)	28.0
11	MORPHINE	28.0
12	OPIUM	100.0

[Schedule VII inserted by No. 50 of 1990 s. 6; amended in Gazette 29 Nov 1991 p. 6041; 22 Mar 1994 p. 1245.]

Schedule VIII

[Section 32A(1)(b)(ii)]

Numbers of prohibited plants for purposes of drug trafficking

Item	*Prohibited Plants*	*Number*
1	Cannabis	250.0

[Schedule VIII inserted by No. 50 of 1990 s. 6.]

APPENDIX 6

AMENDMENTS PROVIDED BY THE ATTORNEY GENERAL

APPENDIX 6

AMENDMENTS PROVIDED BY THE ATTORNEY GENERAL

Legislative Council

Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001
(No. 65 — 2)

When in Committee on the *Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001*:

Clause 9

The **Minister for Racing & Gaming** to move:

Page 5, lines 7 to 28 — To delete the lines and insert the following subclause instead —

"

(3) The powers of a special commissioner under this Part cannot be exercised unless the Commissioner of Police has satisfied a special commissioner that the grounds described in section 9(1) exist in respect of the section 4 offence concerned.

".

Clause 44

The **Minister for Racing & Gaming** to move:

Page 22, lines 4 and 5 — To delete "section 9(3) exist." and insert instead —

" section 9(1) exist in respect of the section 4 offence concerned. ".

New clause

The **Minister for Racing & Gaming** to move:

Page 4, after clause 8 — To insert the following new clause —

"

9. Finding as to grounds for exercising Part 3 or 4 powers

(1) On the application of the Commissioner of Police, a special commissioner may find whether or not the special commissioner is satisfied that —

(a) there are reasonable grounds for suspecting that a section 4 offence has been, or is being, committed;

(b) there are reasonable grounds for suspecting that there might be evidence or other information relevant to the investigation of the offence that can be obtained under Part 3 or 4; and

(c) there are reasonable grounds for believing that the use of powers given by Part 3 or 4 would be in the public interest having regard to —

(i) whether or not the suspected offence could be effectively investigated without using the powers;

(ii) the extent to which the evidence or other information that it is suspected might be obtained would assist in the investigation, and the likelihood of obtaining it; and

(iii) the circumstances in which the information or evidence that it is suspected might be obtained is suspected to have come into the possession of any person from whom it might be obtained.

(2) If the special commissioner is satisfied that the grounds described in subsection (1) exist, the finding is to be reduced to writing and a copy of it is to be given to the Commissioner of Police.

".

[Clerks:
Renumbering of subsequent clauses will be required.]

New clause

The **Minister for Racing & Gaming** to move:

Page 25, after clause 50 — To insert the following new clause —

"

51. Report on use of powers under this Part

(1) A police officer who exercises powers under this Part is required to submit to the Commissioner of Police a report in writing of each occasion on which any of those powers were exercised, giving details of —

(a) what was done in the exercise of those powers;

(b) the time and place at which the powers were exercised; and

(c) any person or property affected by the exercise of the powers.

(2) The report is to be submitted within 3 days after the powers are exercised.

(3) The obligation of a police officer to submit a report under this section about a particular exercise of power within a particular time is sufficiently complied with if the police officer ensures that a report by another police officer who was present when the powers were exercised is made within that time dealing with all of the details about which a report is required.

".

[Clerks:
Renumbering of subsequent clauses will be required.]

APPENDIX 7

SUPPLEMENTARY NOTICE PAPER

APPENDIX 7

SUPPLEMENTARY NOTICE PAPER

WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

AMENDMENTS AND SCHEDULES

Supplementary Notice Paper No. 65
Issue No. 1

WEDNESDAY, DECEMBER 19 2001

CRIMINAL INVESTIGATION (EXCEPTIONAL POWERS) AND FORTIFICATION REMOVAL BILL 2001 *[65-2]*

When in committee on the *Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001*:

Clause 11

Hon Peter Foss: To move -

1/11 Page 6, after line 18 - To insert -

"

(4) All proceedings by the Commissioner of Police before a special commissioner shall be initiated and conducted on behalf of the Commissioner of Police by a legal practitioner within the meaning of the *Legal Practitioners Act 1893* instructed for that purpose who may be assisted by others not so qualified but who are under the direct supervision of a legal practitioner.

".

Clause 23

Hon Peter Foss: To move -

2/23 Page 12, line 3 - To delete "Attorney General" and insert instead -

" State Records Commission ".

Hon Peter Foss: To move -

3/23 Page 12, lines 4 and 5 - To delete "Attorney General considers appropriate, regardless of any other written law" and insert instead -

"

State Records Commission considers appropriate in accordance with the *State Records Act 2000*

".

Clause 25

Hon Peter Foss: To move -

4/25 Page 12, after line 17 - To insert -

"

(2) Where in this Part an offence is created, then in the absence of any other specific penalty the penalty shall be imprisonment for 20 years and a fine of $1 000 000.

(3) Despite subclause (2) the Supreme Court shall be entitled to imprison a contemnor until a contempt is purged in addition to any specific penalty for the offence.

(4) In imposing a penalty under this Part the Court shall take into account whether the act or omission leading to an offence is such that had the act or omission not occurred evidence could have been given so that some person known or unknown is likely to have been convicted of a specific offence (the "offence under investigation") and if so satisfied as to that matter on the balance of probability the Court shall impose a penalty upon the defendant which the Court considers would be appropriate to impose on a person found guilty of the offence under investigation.

".

Clause 28

Hon Peter Foss: To move -

5/28 Page 15, line 14 - To delete the line.

Clause 30

Hon Peter Foss: To move -

6/30 Page 17, line 5 - To delete the line.

Clause 31

Hon Peter Foss: To move -

7/31 Page 17, line 23 - To delete the line.

Clause 32

Hon Peter Foss: To move -

8/32 Page 17, line 30 - To delete the line.

Clause 33

Hon Peter Foss: To move -

9/33 Page 18, line 7 - To delete the line.

Clause 34

Hon Peter Foss: To move -

10/34 Page 18, line 14 - To delete the line.

Clause 35

Hon Peter Foss: To move -

11/35 Page 18, line 22 - To delete the line.

Clause 44

Hon Peter Foss: To move -

12/44 Page 22, line 5 - To insert after "exist" -

"

and the special commissioner has made an order that this Part applies.

(2) An order under this section shall state the general nature of the offence that it is suspected has been or is being committed, and may impose such limitations as the special commissioner thinks fit as to the exercise of the powers including but not limited to —

(a) the persons or class of persons to whom it applies;

(b) the person or class of persons who may exercise the powers;

(c) the powers that may be exercised;

(d) the places or class of places to which it applies;

(e) the articles or class of articles that it applies to; and

(f) the period of time during which the powers may be exercised.

(3) A person exercising these powers must carry a copy of the order when exercising them and shall endorse on the back of the copy the manner of

its execution and shall deliver the endorsed copy of the order to the special commissioner within 3 days of the exercise of the power.

(4) The copy referred to in subsection (3) need only be a true copy and need not be certified. It shall be sufficient where the powers are being exercised by a number of police officers if one of the police officers carries a copy of the order and endorses and delivers it.

(5) A person exercising the powers is not required to produce the order to any person other than a person authorised in writing by the Commissioner of Police.

".

Schedule 1

Hon Peter Foss: To move -

13/S1 Page 37, after line 22 - To insert -

" s. 409 ".

APPENDIX 8

TERMS OF REFERENCE OF THE JOINT STANDING COMMITTEE ON THE ANTI-CORRUPTION COMMISSION

APPENDIX 8

TERMS OF REFERENCE OF THE JOINT STANDING COMMITTEE ON THE ANTI-CORRUPTION COMMISSION

On Wednesday 18 June 1997 the Legislative Assembly passed the following resolution to establish the Joint Standing Committee on the Anti-Corruption Commission. This resolution was agreed to by the Legislative Council on 18 June 1997.

(1) That a Joint Standing Committee of the Legislative Assembly and the Legislative Council be appointed-

(a) to monitor and review the performance of the functions of the Anti-Corruption Commission established under the Anti Corruption Commission Act 1988;

(b) to consider and report to Parliament on issues affecting the prevention and detection of "corrupt conduct", "criminal conduct", "criminal involvement" and "serious improper conduct" as defined in section 3 of the Anti-Corruption Commission Act 1988. Conduct of any of these kinds is referred to in this resolution as "official corruption";

(c) to monitor the effectiveness or otherwise of official corruption prevention programs;

(d) to examine such annual and other reports as the Joint Standing Committee thinks fit of the Anti-Corruption Commission and all public sector offices, agencies and authorities for any matter which appears in, or arises out of, any such report and is relevant to the terms of reference of the Joint Standing Committee;

(e) in connection with the activities of the Anti-Corruption Commission and the official corruption prevention programs of all public sector offices, agencies and authorities , to consider and report to Parliament on means by which duplication of effort may be avoided and mutually beneficial co-operation between the Anti-Corruption Commission and those agencies and authorities may be encouraged;

(f) to assess the framework for public sector accountability from time to time in order to make recommendations to Parliament for the improvement of that framework for the purpose of reducing the likelihood of official corruption; and

(g) to report to Parliament as to whether any changes should be made to relevant legislation.

(2) The Joint Standing Committee shall not –

(a) investigate a matter relating to particular information received by the Anti-Corruption Commission or particular conduct or involvement considered by the Anti-Corruption Commission;

(b) reconsider a decision made or action taken by the Anti-Corruption Commission in the performance of its functions in relation to particular information received or particular conduct or involvement considered by the Anti-Corruption Commission; or

(c) have access to detailed operational information or become involved in the operational matters.

(3) The Joint Standing Committee consist of 8 members, of whom –

(a) 4 shall be members of the Legislative Assembly; and
(b) 4 shall be members of the Legislative Council.

(4) No Minister of the Crown or Parliamentary Secretary to a Minister of the Crown be eligible to be a member of the Joint Standing Committee.

(5) A quorum for a meeting of the Joint Standing Committee be 5 members, each House of Parliament being represented by at least one member.

(6) The Joint Standing Committee have power to send for persons, papers and records, to adjourn from time to time and from place to place, and, except as hereinafter provided, to sit on any day at any time and report from time to time.

(7) The Joint Standing Committee not sit while either House of Parliament is actually sitting unless leave is granted by that House.

(8) A report of the Joint Standing Committee be presented to each House of Parliament by a member of the Joint Standing Committee nominated by it for that purpose.

(9) In respect of matters not provided for in this resolution, the Standing Orders of the Legislative Assembly relating to Select Committees be followed as far as they can be applied.