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National Crime Authority Legislation Amendment Bill 2000

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Law and Bills Digest Group
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Contents

National Crime Authority Legislation Amendment Bill 2000

Date Introduced: 7 December 2000

House: Senate

Portfolio: Justice and Customs

Commencement: The substantive provisions commence six months after Royal Assent unless commenced earlier by proclamation.

Purpose

Among other things, to amend the *National Crime Authority Act 1984* (the Principal Act) to enhance the National Crime Authority's powers and enable complaints to be made about the Authority to the Commonwealth Ombudsman.

Background

National Crime Authority

The National Crime Authority (the Authority) describes itself as being conceived as 'part royal commission, part police force'.[1] The Australian Law Reform Commission describes it in the following way:

> The NCA is a national law enforcement body whose main role is to counteract organised crime often by working in partnership with other agencies. The NCA's working definition of organised crime is 'a systematic conspiracy to commit serious offences.' Generally, the NCA investigates relevant criminal activities and collects, analyses and disseminates information and intelligence relating to those activities. Where appropriate it establishes and co-ordinates task forces with other law enforcement bodies for the investigation of those matters. It may also make recommendations for legal and administrative reforms.
>
> The NCA uses multi-disciplinary teams of lawyers, police, financial investigators, intelligence analysts and support staff to investigate organised crime. The Act gives the NCA coercive powers to compel people to produce documents and to give sworn evidence. Those powers are not available to traditional police services. The NCA can

> only exercise its coercive powers in matters which have been formally referred to it for investigation. These characteristics are meant to enable the NCA to co-ordinate national investigations against major organised crime by complementing the efforts of other law enforcement agencies and by working co-operatively with them.[2]

Section 7 of the Principal Act provides that the Authority consists of a Chairperson and members who are appointed by the Governor-General. The Chairperson must be a judge or a legal practitioner who has been enrolled to practise for at least five years.

The Principal Act enables the Authority to investigate 'relevant criminal activity'[3] an expression which is in turn linked to the concept of a 'relevant offence' against Commonwealth, State or Territory law.[4] The term, 'relevant offence' is defined as an offence involving two or more persons in substantial planning and organisation using sophisticated techniques. Further, it must involve an offence such as theft, fraud, tax evasion or illegal drug dealing which is punishable by imprisonment for at least three years.[5] This definition attempts to confine the Authority to the investigation of organised criminal activity.

According to the Authority's *Annual Report 1999-2000*, the most commonly investigated offences include drug importation, cultivation, manufacture and trafficking and associated money laundering, theft, fraud, tax evasion, bribery, extortion and violence.[6]

Under the Principal Act, the Authority has two types of functions. General functions are set out in subsection 11(1) and can be exercised on the Authority's own initiative. They include collecting, analysing and disseminating criminal information and intelligence, investigating matters of its own choosing, making arrangements for the establishment of task forces and co-ordinating their work. The Authority's coercive powers cannot be exercised in relation to its general functions.

Subsection 11(2) confers special functions on the Authority enabling it to investigate matters relating to 'federally relevant criminal activity' referred to it either by the Commonwealth Minister or the relevant State or Territory Minister or Ministers. These investigations are often called special investigations. Before referring a matter to the Authority the Commonwealth Minister must consult with the Inter-Governmental Committee.[7] The Inter-Governmental Committee consists of the Commonwealth Minister and a Minister from each of the States and Territories. A State or Territory Minister must obtain the approval of the Inter-Governmental Committee before referring a matter to the Authority.[8] Once a matter has been referred to the Authority either by the Commonwealth Minister or a State Minister the Authority can investigate that matter using its special coercive powers. These powers include 'hearings, including compulsory appearances and production of documents, imposition of penalties and warrants for search and seizure, for arrest and for interception of communications'.[9]

Accountability mechanisms were inserted into the Principal Act because of concerns about the powers of the Authority. These mechanisms include the Parliamentary Joint Committee on the National Crime Authority (PJC) which is established under section 53

of the Principal Act. Among other things, the Committee monitors and reviews the performance of the Authority.

Following the passage of the Principal Act and the *National Crime Authority (Consequential Amendments) Act 1984*, the States and Territories passed mirror legislation enabling the Authority to investigate offences against State and Territory laws.[10] The Principal Act has been recently amended on a number of occasions[11] to clarify its framework for inter-jurisdictional cooperation and respond to the High Court's decisions in *Re Wakim*[12] and *R v. Hughes*.[13]

Main Provisions

Schedule 1—Amendments to the *National Crime Authority Act 1984*

General

Many of the amendments in Schedule 1 relate to the Authority's powers to conduct special investigations. Special investigations are investigations into 'federally relevant criminal activity' which are referred by a Commonwealth, State or Territory Minister after consulting with or obtaining the approval of the Inter-Governmental Committee. Special investigations enable the Authority to use coercive powers to obtain documents and other evidence and summons witnesses to appear and give evidence.

Removal of the defence of 'reasonable excuse'

At present, in the absence of reasonable excuse, it is an offence for:

- an officer of a Commonwealth agency to fail to comply with a request for information from the Authority [subsection 19A(4)]—current penalty: $1,000 or 6 months imprisonment[14]
- an officer of a Commonwealth agency to fail to comply with a requirement for information from the Authority [subsection 20(4)]—current penalty: $1,000 or 6 months imprisonment[15]
- a person to fail to comply with an Authority notice to produce documents [subsection 29(3)]—current penalty: $1,000 or 6 months imprisonment[16]
- a person to fail to attend an Authority hearing when summonsed to do so and answer questions and produce documents [subsections 30(1) and (2)]—current penalty: $1,000 or 6 months imprisonment.[17]

Items 1, 3, 5 and 11 omit the words 'without reasonable excuse' from these offence provisions in the Principal Act.

Penalty increases

Items 6, 7, 12, 14 and 15 repeal certain penalty provisions in the Principal Act and insert new penalties.

For example, failing when summonsed to provide documents to the Authority or failing to attend an Authority hearing or answer questions are, at present, summary offences attracting penalties of $1,000 or 6 months imprisonment.[18] Being in contempt of the Authority is also a summary offence under the Principal Act and attracts a penalty of $2,000 or 1 years imprisonment.[19]

The new maximum penalties proposed by the Bill are a fine of $20,000 and/or 5 years imprisonment if the offence is prosecuted on indictment. The proposed maximum penalties are a fine of $2,000 and/or 1 years imprisonment if the offence is prosecuted summarily.

Self-incrimination and immunity from prosecution

Self-incrimination and immunity under the Principal Act

Under existing subsection 30(2) of the Principal Act a witness at an Authority hearing must not, without reasonable excuse, fail to take an oath, make an affirmation, answer questions or produce documents when required to do so. Subsection 30(4) then provides that a person will have a reasonable excuse if giving the answer or producing the document would tend to incriminate them. A person need not answer a question if the Authority decides he or she has a valid claim that the answer or document might be self-incriminating.[20] However, a person must answer a question or produce such a document if he or she has obtained an immunity from prosecution. The Commonwealth Director of Public Prosecutions is empowered to give an undertaking that evidence obtained 'as a direct or indirect consequence of the answer or the production of the … document or thing, will not be used' in criminal proceedings (except proceedings for perjury).[21] An undertaking can also be obtained from a State or Territory Attorney-General or DPP.[22] These undertakings provide a 'use and derivative use immunity' to the witness.

'Use and derivative use immunity' prevents a person's oral or documentary evidence being used against him or her in criminal proceedings ('use immunity'). It also prevents the use of information or other evidence that was obtained indirectly or derived from a person's oral or documentary evidence being used against him or her ('derivative use immunity'). The 'derivative use' aspect of the immunity thus prevents a witness's compelled testimony being used to find physical evidence or obtain other investigatory leads linking him or her to a crime.

Self-incrimination and immunity in the Bill

A number of changes are proposed to the statutory regime relating to self-incrimination and immunity. First, the defence of reasonable excuse is removed taking with it, among

other things, a defence based on fear of self-incrimination when a person is prosecuted for failure to answer a question or produce a document under section 30. Second, a person seeking protection from prosecution in respect of evidence that might tend to incriminate them will simply need to claim that an answer or document may be self-incriminating before answering the question or producing the document. The Authority will no longer have any role to play in deciding whether a person is entitled to refuse to answer or provide documents and consequently there will be no judicial review of that decision. Nor will it be necessary to obtain an immunity from prosecution from an independent law officer such as the DPP. However, a person claiming that evidence might be incriminating will only be protected by 'use immunity' and not, as at present, by 'use and derivative use immunity'. In other words, absent a defence[23], a person can be compelled to give evidence that may be used to obtain self-incriminating material derived from their answer or document. Failure to comply will expose the person to substantially increased penalties (see above) and the possibility of being dealt with under the proposed contempt regime (**see Part 15).**

Item 12 amends subsections 30(4) to (11) of the Principal Act. The amendments enable 'use immunity' to attach to evidence or documents provided to the Authority in certain circumstances. As at present, the immunity does not extend to proceedings for perjury [**proposed paragraphs 30(5)(c) and (d)**]. 'Use immunity' does not prevent a person being charged with the crime that was the subject of the person's testimony. However, such a charge would have to be proved by other evidence—including evidence obtained indirectly or derived from the person's evidence.

Use immunity will be available to a person who provides oral or documentary evidence at an Authority hearing but only if:

- the person claims, before answering the question, that the answer might be incriminating
- the person claims, before producing a document, that the production of the document might be incriminating. Note that if the document relates to an existing or past business, the privilege against self-incrimination will only apply if the document contains details of earnings and nothing else [**proposed subsection 30(4)**].

Removal of statutory judicial review of certain Authority decisions

Item 13 repeals those sections of the Principal Act[24] which establish a statutory regime relating to judicial review of Authority decisions about whether a person is entitled to refuse to answer questions or produce documents. For example, at present a person who is dissatisfied with an Authority decision about such matters can seek judicial review of the decision in the Federal Court.[25] The Explanatory Memorandum explains the reason for the amendments in the following terms:

> As a consequence of the omission of the defence of reasonable excuse (see Items 3, 5 and 11) the Authority will no longer be required to make a decision as to whether the person's claim is or is not justified.[26]

Item 17 provides that judicial review will still apply in relation to claims made by a person ('relevant claims') before the commencement of **item 13**.

Amendment of the definition of 'relevant criminal activity'

Subsection 4(1) of the Principal Act defines 'relevant criminal activity' as:

> … any circumstances implying, or any allegations, that a relevant offence may have been, or may be being, committed against a law of the Commonwealth, of a State or of a Territory.

The definition is significant because the Authority's general and special functions are defined with reference to relevant criminal activities. For example, under section 13 of the Principal Act, the Commonwealth can refer a matter relating to a federally relevant criminal activity to the Authority for investigation—enabling the Authority to use its special coercive powers. **Item 18** amends subsection 4(1) so that 'relevant criminal activity' will be defined as:

> … any circumstances implying, or any allegations, that a relevant offence may have been, may be being, or may in future be committed against a law of the Commonwealth, of a State or of a Territory.

In other words, as a result of the amendment, the Authority will be able to investigate offences that occur after, as well as before, a matter is referred to it for investigation.

Increases in the terms of appointment of Authority members

Items 19-21 increase the maximum term of appointment of the Chairperson and members of the Authority from 4 years to 6 years.[27]

Additions to the definition of 'relevant offence'

As stated earlier, the Authority's functions include investigating 'relevant criminal activity', an expression which is defined with reference to the expression 'relevant offence'. A 'relevant offence' is defined with reference to offences such as theft, fraud, tax evasion and drug trafficking.

Item 23 re-structures paragraph 4(1)(d) of the definition of 'relevant offence' and also adds two additional offences to the list. These are money laundering and perverting the course of justice.

Search warrants

Section 22 of the Principal Act enables Authority members to apply to a judge for a search warrant. Section 23 governs the circumstances in which a member can apply for a telephone warrant. Sections 22 and 23 also define the circumstances in which a judge can issue a warrant or telephone warrant. Section 4 of the Principal Act defines 'member' as a member of the Authority including the Chairperson.[28]

Items 27, 29, 30, 35, 36, 37, 38, 41, 42, 43 and 45 replace the word 'member' in sections 22 and 23 with the expression 'eligible person'. **Item 25** inserts a definition of 'eligible person' into subsection 4(1) of the Principal Act. An 'eligible person'—defined as Authority members and staff members who are Federal, State or Territory police officers[29]—will be able to apply for and obtain search and telephone warrants.

Items 28, 31, 32, 33, 34, 44, 46, 47 and 48 replace references to a judge in sections 23 and 24 of the Principal Act with references to an 'issuing officer'. An 'issuing officer' is defined by **item 26** as a Judge of the Federal Court, a State or Territory judge or a magistrate. This definition largely restates the definition of 'Judge of a prescribed court' which is repealed by **item 39**. However, it adds State and Territory magistrates to the class of judicial officer able to issue warrants under sections 22 and 23.

Items 40 and 49 insert **proposed subsections 22(14)-(16) and 23(8)-(10)**. These new subsections clarify that the function of issuing search warrants is conferred on judicial officers *personae designatae* (ie in a personal capacity) and not in their capacity as a court or members of a court. Nevertheless, issuing officers are protected by the same immunities they would otherwise have as judicial officers when they issue search warrants [**proposed subsections 22(16) and 23(10)**].

Non-disclosure of information about summonses and notices

Item 50 amends section 29A of the Principal Act by prohibiting a credit reporting agency from noting on a person's credit information file that it disclosed that person's credit information to the Authority if the Authority summons or notice requiring the disclosure contains a non-disclosure notation. The *Privacy Act 1988* would otherwise require the credit reporting agency to record that disclosure.[30] If the Authority's non-disclosure notice is cancelled then the credit file can be annotated. **Item 1** of Schedule 2 inserts a note into the Privacy Act which refers to the effect of section 29A.

Where a credit reporting agency notes a disclosure to the Authority on a credit reporting file before the commencement of item 50, a person seeks access to their file after the commencement of item 50, and a non-disclosure notation has not been cancelled the notation must be removed before the person is given access to their file (**item 51**).

The Parliamentary Joint Committee on the National Crime Authority (PJC) report on the Bill describes these amendments as clarifying a technical issue concerning the interaction of the Principal Act and the Privacy Act.[31]

Delegation of the Chairperson's powers

Item 54 amends section 59A of the Principal Act which enables the Chairperson 'by signed instrument' to delegate certain of his or her powers to 'a member, or to a member of staff of the Authority'.

The amendments enable the Chairperson to delegate additional statutory functions. **New subsection 59A(2)** will enable the Chairperson to delegate to an Authority member the power to revoke or vary a non-disclosure direction. **Proposed subsection 59A(3)** will enable the Authority Chairperson to delegate to an Authority member the power to pay witness attendance expenses. **Proposed subsection 59A(4)** will enable the Chairperson to delegate to an Authority member or Authority staff member who is an SES officer or acting SES officer, the power to engage consultants.

Hearings

Item 55 amends section 25 of the Principal Act which relates to the conduct of Authority hearings. **Proposed subsection 25(7A)** provides that if a person other than an Authority member or staff member is present at an Authority hearing while a witness is giving evidence, the witness must be informed and given the opportunity to comment on the presence of that person. **Proposed section 25(7B)** provides that a person's entitlement to be present is not affected if the Authority fails to comply with subsection 25(7A) or the witness objects.

Disclosure of information by legal practitioners

Under subsection 29B(1) of the Principal Act, a person who is served with a summons or notice containing a non-disclosure notation commits an offence by disclosing the existence of the summons or notice or any information about it. Disclosures are excused, however, in the circumstances set out in subsection 29B(2). For example, as a result of paragraph 29B(2)(e), a legal practitioner can make a disclosure:

> (i) for the purpose of complying with a legal duty of disclosure arising from his or her professional relationship with a client; or
>
> (ii) for the purpose of obtaining the agreement of another person under subsection 30(3) to the legal practitioner answering a question or producing a document at a hearing before the Authority.

Item 56 amends 29B(2)(e) by removing subparagraph (i). In other words, a lawyer will no longer be able to rely on a defence that he or she is under a legal duty of disclosure to a client.

Use of force in the execution of warrants

Items 57 and 58 amend sections 22 and 31 to stipulate that where a search warrant or arrest warrant is issued the person executing the warrant can only use 'such reasonable

force as is necessary for the execution'. **Item 59** applies these amendments to warrants issued before, on and after the commencement of the amendments.

Parliamentary Joint Committee on the National Crime Authority

The duties of the PJC are found in section 55 of the Principal Act. They include monitoring, reviewing and reporting to Parliament about the Authority's performance, reporting to Parliament about Authority annual reports, and examining trends in criminal activity and making recommendations to Parliament about the Authority. However, there are limits on the PJC's powers. For example, the Principal Act does not authorise the PJC to investigate a matter relating to a relevant criminal activity or reconsider the Authority's findings about a particular investigation.[32]

As a result of the insertion of **proposed subsection 59(6)** into the Principal Act (see **item 61**), the Authority will be obliged, subject to certain exceptions, to comply with a request from the PJC for information about an operation that has been conducted by the Authority or about the general conduct of the Authority's operations. **Proposed subsection 55(3)** enables the PJC to report to Parliament about this information (see **item 60**).

However, the Authority will not be obliged to comply with a request made under **proposed subsection 59(6)** if its Chairperson considers that public disclosure of the information would prejudice individual safety or reputations or prejudice the operations of law enforcement agencies. If the Authority refuses to provide information, the PJC can refer its request to the Minister. The Minister must then determine in writing whether the disclosure would be prejudicial and provide the PJC and the Authority with copies of his or her determination. However, the Minister cannot disclose his or her reasons for decision [**proposed subsections 59(6B)-(6D)**].

Dissemination of information overseas

Item 63 inserts **proposed subsection 59(12)** which enables the Authority Chairperson to give information in the Authority's possession to foreign law enforcement agencies if he or she considers it to be appropriate and if it is not unlawful to do so. The expression 'foreign law enforcement agency' is defined as the police force or other law enforcement authority of a foreign country (**item 62**).

Application of the Criminal Code to offences against the National Crime Authority Act

Item 64 applies Chapter 2 of the Criminal Code to all offences under the Principal Act. Chapter 2 sets out general principles of criminal responsibility. Among other things, Chapter 2 defines the fault and physical elements that apply to offences, deals with issues such as strict and absolute liability and sets out defences.

Item 65 repeals subsections 19A(7) and 20(4A) of the Principal Act. These subsections create offences of knowingly furnishing false or misleading information in response to a request or direction from the Authority. These provisions will not be required once

sections 137.1 and 137.2 of the *Criminal Code* commence.[33] These sections contain general offences relating to the provision of false and misleading documents and information.

Contempt of the Authority

Existing section 35 of the Principal Act creates summary offences of obstructing or hindering the Authority or its members in the performance of their functions, and of disrupting an Authority hearing. The penalty is $2,000 or 1 years imprisonment. As stated earlier in this Digest, the proposed amendments increase the penalties for contempt and enable it to be prosecuted on indictment or summarily. The offence of contempt of the Authority contained in section 35 of the Principal Act will remain. Additionally, the proposed amendments provide a new statutory contempt regime.

A new contempt regime is proposed by Part 15. The expression 'in contempt of the Authority' is defined for the purposes of the new contempt regime in **proposed section 34A** as obstructing or hindering the Authority or an Authority member in the performance of their functions, disrupting an Authority hearing, or refusing to take an oath or make an affirmation or give evidence when required to do so at an Authority hearing.

Proposed section 34B provides that if the Authority considers that, during a hearing, a person is in contempt of the Authority, it can ask a State or Territory Supreme Court to deal with the person. The application to the Supreme Court must be accompanied by an affidavit setting out the grounds for making the application and the evidence supporting it. The court then considers the affidavit and any evidence from the Authority and the person concerned. If the Court finds that the person was in contempt of the Authority without a reasonable excuse, it 'may deal with the person as if the acts or omissions involved constituted a contempt of that Court' [**proposed subsection 34B(3)**].

Where the Authority proposes to apply to the Supreme Court, it may direct a member of a law enforcement agency to detain the person 'for the purpose of bringing the person before the Court for the hearing of the application' [**proposed subsection 34C(1)**]. The Court may direct the release of a person detained under **new subsection 34C(1)** [**proposed subsections 34C(3) & (4)**].

Proposed section 34D enables the Authority to withdraw a contempt application 'at any time'. If a person has been detained under subsection 34C(1) he or she must be released immediately an application is withdrawn.

Item 68 confers a double jeopardy protection. It prevents a person being dealt with under new section 34B and being prosecuted for an offence against section 35.

Hearing officers

Item 76 inserts **proposed section 25A** which establishes the office of 'hearing officer'. According to the Explanatory Memorandum the appointment of hearing officers will 'increase the investigative capacity of the Authority'.[34]

Hearing officers will be appointed by the Governor-General on the advice of the Minister. In brief, a person can only be nominated by the Minister if he or she has the unanimous support of the Inter-Governmental Committee and has been admitted to practise for at least five years.

Proposed subsections 25A(4)-(12) govern procedures at hearings conducted by hearing officers and the powers of hearing officers. The conduct of hearings can be regulated by the hearing officer. A person giving evidence at a hearing can be legally represented, hearings must be in private, the hearing officer may determine who can cross-examine a witness when a hearing is being conducted for the purposes of a special investigation, and a hearing officer can make non-disclosure directions.

Items 77 to 141 amend sections 26-29, 29B, 30, 31, 33, 34, 34A-34D, 35-38, 41, 43 and 51 to insert references to hearing officers alongside references to Authority members in these sections. In brief, the amendments deal with administrative matters, the powers and immunities of hearing officers, their remuneration, disclosure of interests, and termination of appointments. It is important to note that hearing officers will not be endowed with all the powers of Authority members. For example, while they can hold hearings, they cannot issue search warrants or telephone warrants. Details of some of the amendments follow.

Section 26 of the Principal Act provides that a witness appearing before the Authority shall be paid attendance expenses. **Item 77** amends subsection 26(1) so that witness attendance expenses will also be met when the witness is appearing before a hearing officer.

Section 28 of the Principal Act empowers an Authority member to summon witnesses to appear, give evidence and produce documents, and take an oath or make an affirmation. **Items 79 to 87** amend section 28 so that these powers are conferred on hearing officers. **Items 93 to 103** amend section 30 of the Principal Act. Section 30 deals with failure of witnesses to attend Authority hearings and answer questions. The amendments extend the provisions to hearings before a hearing officer.

Items 111-121 extend the new contempt regime (described above) to hearings before hearing officers. **Item 122** amends the contempt offence provision in existing section 35 to prohibit obstructing or hindering a hearing officer performing his or her functions.

Item 124 amends subsection 36(1) of the Principal Act. Subsection 36(1) provides that a member of the Authority has the same immunities in the performance of his or her statutory hearing powers as a High Court judge. **Item 124** extends these immunities to hearing officers.

Items 134 and 135 amend section 38 of the Principal Act by providing that a hearing officer's remuneration and allowances are to be set by the Remuneration Tribunal. **Item 137** amends section 42 of the Principal Act which deals with disclosure of interests. The amendments require a hearing officer with a direct or indirect interest in a matter that arises or could arise in a hearing to disclose the nature of the interest to the Authority Chairperson. Unless the Minister decides otherwise, the hearing officer must not continue to hold hearings in relation to that matter. Further, the nature of the interest must be recorded in the Authority minutes.

Item 139 amends section 43 of the Principal Act. Section 43 deals with termination of appointment. **Proposed subsection 43(2A)** provides that the Governor-General must terminate the appointment of a hearing officer who becomes bankrupt or fails, without reasonable excuse, to comply with the disclosure obligations in section 42.

Schedule 3—Amendments to the *Ombudsman Act 1976*

Section 5 of the Ombudsman Act empowers the Ombudsman to investigate administrative actions by Commonwealth Departments and prescribed authorities. **Item 3** of Schedule 3 makes the National Crime Authority a prescribed authority.

Item 4 amends paragraph 5(2)(b) of the Ombudsman Act. Paragraph 5(2)(b) prevents the Ombudsman investigating 'action taken by a Justice or Judge of a court created by the Parliament'. As a result of the amendment the provision will prevent the Ombudsman investigating 'action taken by a Justice or Judge of a court created by the Parliament other than action taken by a Justice or Judge in his or her capacity as a member of the National Crime Authority'. This amendment flows from the fact that under subsection 7(9) of the Principal Act, the Chairperson of the Authority may be a judge.

Item 5 amends the Ombudsman Act to enable the Ombudsman to transfer the investigation of complaints about the Authority to another Commonwealth, State or Territory authority if that authority has jurisdiction to investigate the complaint and could more effectively or conveniently deal with it.

Item 6 enables the Ombudsman to make arrangements with Commonwealth, State and Territory authorities that are empowered to investigate Authority actions.

Section 9 of the Ombudsman Act empowers the Ombudsman to obtain information or documents relevant to a statutory investigation. There are certain limits to this power. For example, the Ombudsman cannot obtain information or documents where the Attorney-General has certified that the disclosure would be contrary to the public interest because it would prejudice national security or Commonwealth-State relations or because it would reveal Cabinet or Executive Council deliberations. **Item 8** amends section 9 by providing that the Ombudsman will not be able to obtain information or documents from the Authority where disclosure would prejudice a person's safety or fair trial, the effectiveness of an Authority investigation or the operations of a law enforcement agency.

Item 11 inserts **proposed section 35B** into the Ombudsman Act. **Proposed section 35B** provides that the Ombudsman must not disclose Authority information if the Attorney-General certifies disclosure would be against the public interest.

Schedule 4—Amendments to the *Administrative Decisions (Judicial Review) Act 1977*

Item 1 of Schedule 4 excludes administrative decisions made under **proposed sections 34B or 34C** from administrative review under the Administrative Decisions (Judicial Review) Act. These are administrative decisions relating to Authority contempt applications to a Supreme Court and administrative decisions about detaining a person so that they can be dealt with by a Supreme Court under the **proposed Part 15** contempt regime.

While the proposed amendments exclude statutory judicial review of these Authority decisions they do not and cannot remove a person's constitutional right to seek judicial review of the actions of an 'officer of the Commonwealth' under section 75(v) of the Constitution.

Concluding Comments

General

For more information about the Bill and its background, readers are referred to the PJC's *Report on the National Crime Authority Legislation Amendment Bill 2000* (March 2000)[35], the submissions to the PJC inquiry into the Bill[36] and its *Third Evaluation of the National Crime Authority* (April 1998).[37]

Removal of the reasonable excuse defence

The Bill omits the reasonable excuse defence in relation to a number of offences under the Principal Act. These are failure to comply with a request or requirement for information, failure to comply with a notice to produce documents, and failure to attend an Authority hearing, answer questions and produce documents.

The Explanatory Memorandum states that:

> The removal of the 'reasonable excuse' defence is consistent with the move to more specific defences under Chapter 2 of the *Criminal Code* (the Code). The Code, which will apply to all Commonwealth offences from 15 December 2001 and to offences under the NCA Act from the date of commencement of Item 64 of this Act, sets out general principles of criminal responsibility and includes defences applicable to all offences.[38]

Among the defences contained in the *Criminal Code* are intervening conduct or event, duress, sudden or extraordinary emergency, and lawful authority.[39] The Explanatory Memorandum says, 'By replacing the less clear notion of 'reasonable excuse' with these specific defences, the scope for disputes as to whether a reasonable excuse exists will be significantly reduced'.[40] A number of questions might be raised about the removal of the reasonable excuse defence and reliance instead on *Criminal Code* defences. The first is how relevant defences such as sudden or extraordinary emergency will be. The second is that a defence of lawful authority supplied by the Criminal Code does not cover the same ground as a defence of reasonable excuse. Reasonable excuse may include physical or practical difficulties.[41] The third is the appropriateness of removing the defence at the same time as the Bill proposes greatly increased penalties and a restriction in the scope of the immunity that can be obtained by witnesses who answer questions that are potentially self-incriminating. Fourth, while the Explanatory Memorandum states that the meaning of 'reasonable excuse' is unclear[42], the defence appears elsewhere in the Bill[43] and survives in a number of statutes administered by the Attorney-General's portfolio.

In general, in other statutes administered by the Attorney-General's portfolio, the defence of reasonable excuse will be retained where it currently exists, despite the application of the Chapter 2 of the *Criminal Code*. Examples are the *Defence Force Discipline Appeals Act 1955* and the *Native Title Act 1993*. It is an offence, without reasonable excuse, to fail to attend, produce documents, be sworn or give evidence when required to do so by the Defence Force Discipline Appeals Tribunal. However, under amendments proposed by the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 reasonable excuse will remain a defence to these charges.[44] Similarly, it is an offence to fail to attend the Native Title Tribunal without reasonable excuse when summonsed. Amendments proposed by the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 retain a defence of reasonable excuse in relation to this offence.[45]

Self-incrimination and immunity

Under the Principal Act, a witness who obtains an immunity from prosecution obtains a 'use and derivative use immunity'.[46] Under the amendments proposed by the Bill a person will have immunity by simply making a prior claim that the answer or document they will provide might be self-incriminating. However, the immunity will be restricted to a 'use immunity'. As a result, the compensatory protection afforded to a witness compelled to provide an answer will no longer be co-extensive with the privilege against self-incrimination. The Explanatory Memorandum explains:

> The Authority is unique in nature and has a critical role in the fight against serious and organised crime. This means that the public interest in the Authority having full and effective investigatory powers, and to enable, in any subsequent court proceedings, the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to

> self-incriminating material. The proposed provision is comparable to section 68 of the *Australian Securities and Investment Commission Act 1989*.[47]

The Explanatory Memorandum points to the need for effective investigations and prosecutions. And, derivative use immunity is certainly sometimes criticised as too extensive and as having limits that are too hard to define, making it '… too difficult to refute the presumption of causation between the original statement and the derivative evidence.'[48]

In its submission to the PJC inquiry into the Bill, the Law Council of Australia cited High Court authority characterising the privilege against self-incrimination as a human right[49] and suggested that the amendments may breach Australia's obligations under the International Covenant on Civil and Political Rights. It also remarked:

> … persons who faced questioning by the NCA will usually be persons who are *suspected* of being involved in certain serious sophisticated criminal activity (either what could be called "organised crime", or what could be called "white collar crime"). … the Law Council does not accept that because a person is suspected of sophisticated criminal activity [this] means that his or her basic rights should be lost—that he or she must answer questions that may lead to incriminating evidence being derived against them or face imprisonment.[50]

Oversight of the Authority

Appropriate and effective accountability mechanisms for the Authority have been an issue since proposals were first considered for its establishment.[51]

As originally introduced, the National Crime Authority Bill 1983 did not provide for a Parliamentary Joint Committee to oversight the Authority's operations. Instead, it contained provisions for regular judicial audits and enabled complaints to be made to the Ombudsman. However, the Senate Standing Committee on Constitutional and Legal Affairs concluded that judicial audit was likely to be ineffective and should be omitted from the Bill. The Committee commented:

> Clearly, there is legitimate concern that the Authority's performance of its functions should be kept under scrutiny both as to effectiveness and legality, and that individual rights and liberties should not be unduly trespassed upon. Rather than judicial audit, the Committee favours the more traditional methods of parliamentary supervision and speedy access to the courts.[52]

Concerns that the Ombudsman was unlikely to have an effective or useful role and fears that he or she might disrupt the Authority's operations led the Senate Committee to recommend against a role for the Ombudsman in 1984. The Committee endorsed normal parliamentary oversight processes and recommended against the establishment of a permanent parliamentary committee, given the 'complexity of the Authority's operations', the time constraints on members of Parliament and the possibility that the committee

might become 'too close to the Authority'.[53] The 1983 Bill was amended to delete provisions relating to judicial audits and the Ombudsman. However, amendments establishing a Parliamentary Joint Committee on the National Crime Authority were passed.

From time to time, the continuing role of the PJC and the effectiveness of the statutory regime that governs it have been questioned.[54] In its report on the Bill, the PJC commented that the Bill gives it:

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

The report goes on to recommend that the provisions relating to the NCA should be rejected and to comment that 'Either the Government substitutes provisions which will enable the PJC to have genuine scrutiny over the NCA's operations or Part III of the NCA Act, which creates the PJC, should be repealed.'[56]

While some questions were raised in submissions about the effectiveness of giving a complaints jurisdiction to the Ombudsman[57], the PJC's majority and minority reports endorsed the idea. However, the minority report commented that the Bill will enable the Attorney-General to place too many restrictions on the Ombudsman's access to NCA information and recommended that the relevant provision[58] be amended.

Contempt

If the Bill is passed there will be two contempt regimes under the Principal Act.

The existing offence provision (section 35) and the proposed contempt regime (**proposed sections 34A-34D**) differ in a number of ways. First, the offence regime in section 35 arguably defines contempt more narrowly than the proposed regime in **proposed sections 34A-34D**. Section 35 defines contempt as obstructing or hindering the Authority or an Authority member in the performance of their functions or disrupting an Authority hearing. **Proposed section 34A** defines contempt of the Authority to include these things. Additionally, it provides that a witness at an Authority hearing will be in contempt of the Authority if he or she refuses to take an oath, make an affirmation or answer a question. Second, the proposed section 34A regime enables a contempt of the Authority to be treated as if it constituted a contempt of court. Third, as a consequence there might be no limits on the punishment that might be ordered by a court. This contrasts with the maximum penalties that are provided in the case of a section 35 contempt and the fact that, if dealt with as an indictable offence under that section, a case is tried by a judge and jury and not by a judicial officer alone. Fourth, **proposed section 34C** effectively enables the

Authority to direct that a person be detained so that he or she can be brought before a court under **section 34B**.

The Explanatory Memorandum states:

> The [proposed] contempt regime will allow obstruction of the Authority to be addressed by a speedy and fair process, akin to that employed by courts in dealing with contempt. At present, it can take years to bring about a criminal conviction for conduct that obstructs the Authority, during which time a person may have successfully delayed an investigation and defeated justice. The proposed contempt regime has been designed as a more effective deterrent to such obstruction. It is similar to the regime under section 219 of the *Australian Securities and Investment Commission Act 1989*.[59]

The PJC's majority report on the Bill acknowledged the existence of similar contempt regimes for State bodies such as the Queensland Criminal Justice Commission and Authority dissatisfaction with the present contempt offence. The majority report continues:

> There is also some force in the contrary argument, however, that given that the Bill removes 'reasonable excuse' and significantly increases penalties, both of which have contributed significantly to the Authority's past problems of non-cooperation with its investigations, a contempt regime of possibly dubious effectiveness may simply be overkill. From the Authority's perspective, of course, the problem of reliance on those other provisions is the considerable delays to the investigation process which are experienced while prosecutions are launched, and even then with a distinctly uncertain outcome.
>
> With some reticence, the PJC has resolved to support the provisions because it accepts that, even though the contempt provisions may only rarely be used, the absence of such an option would represent a substantial hole in the range of alternative strategies that the NCA would have available to it to deal with an errant witness.[60]

The PJC's majority report recommended that the new contempt regime be approved, subject to its operation being reviewed and a report tabled in Parliament after 5 years.[61]

The PJC's minority report on the Bill recommended that the contempt provisions in **proposed Part 15** be rejected and that, instead, the effectiveness of the new penalty and self-incrimination provisions be monitored. The minority made this recommendation because it considered that the case for the additional contempt regime had not been made out, that it was unnecessary given proposed increases in penalties and changes to the 'reasonable excuse' defence and because of concerns about appropriateness and the separation of powers.

While the Bill does not (and constitutionally possibly could not) enable the Authority to punish contempt itself[62], it does enable a State or Territory Supreme Court to deal with a contempt of the Authority as if it were a contempt of that court. Few submissions to the PJC expressed unease about or opposition to the new contempt regime. However, the

former Chairperson of the NCA, John Broome and the South Australian Attorney-General raised constitutional questions about giving jurisdiction to a State or Territory Supreme Court to deal with contempt of an investigative arm of the Executive Government as though it were a contempt of court.

Such a provision appears unusual, although not unprecedented in Commonwealth law. The Explanatory Memorandum points to section 219 of the *Australian Securities and Investment Commission Act 1989* (ASIC Act). Another example is found in the *Defence Force Discipline Appeals Act 1955*.

Section 219 of the ASIC Act provides that where a witness fails to attend the Companies Auditors and Liquidators Disciplinary Board, refuses to take an oath, make an affirmation, answer a question or produce a document, the Board's Chairperson can certify the failure or refusal to a court. Once a certificate is provided a court can inquire into the matter and, if satisfied that the person does not have a reasonable excuse for the failure or refusal can order the person to comply or punish the person 'in the same manner as if he or she had been guilty of contempt of the Court'.

Under section 50 of the Defence Force Discipline Appeals Act, a person who contravenes certain sections of that Act is, in addition to being guilty of an offence, guilty of contempt of the Defence Force Discipline Appeal Tribunal and if the Attorney-General applies to a State or Territory court 'the contempt is punishable by the court to which the application is made as if it were a contempt of that court'.[63]

The constitutional doctrine of the separation of powers places limits on the Parliament's power to legislate in respect of Chapter III courts. Chapter III courts are the High Court, other federal courts and State courts invested with federal jurisdiction. In *Kable v. Director of Public Prosecutions (NSW)*[64] the High Court held that a preventive detention jurisdiction conferred on a State Supreme Court by a State law was invalid because it was incompatible with that court exercising federal judicial power.

As stated earlier, the Authority is an investigative arm of the Executive Government not a court. The power to punish for contempt is an integral aspect of judicial power designed to protect the administration of justice by penalising conduct which interferes with it. Criminal contempt has been described by the High Court as that part of contempt law comprising 'proceedings in the public interest to vindicate judicial authority or maintain the integrity of the judicial process'.[65] It may be arguable that a provision that effectively deems contempt of an executive authority to be a contempt of a Supreme Court and requires that court to treat it as such is constitutionally flawed because it is incompatible with that court exercising federal judicial power or because it requires a court to act inconsistently with judicial method. After all, the power to punish for contempt of court exists to protect judicial process and authority, not to protect bodies which do not and cannot exercise judicial power.

Endnotes

1 National Crime Authority, *1999-2000 Annual Report*, p. 2.

2 *Integrity: But Not by Trust Alone. AFP & NCA Complaints and Disciplinary Systems*, Report No. 82, AGPS, Canberra, 1996.

3 Subsection 4(1).

4 Subsection 4(1).

5 Subsection 4(1).

6 NCA, op.cit., p. 4.

7 Section 13.

8 Section 14.

9 A Leaver, *Investigating Crime. A Guide to the Powers of Agencies Involved in the Investigation of Crime*, LBC Information Services, Sydney, 1997, p. 350.

10 *National Crime Authority (Territory Provisions) Act 1991* (ACT); *National Crime Authority (Territory Provisions) Act 1985* (NT); *National Crime Authority (State Provisions) Act 1984* (NSW); *National Crime Authority (State Provisions) Act 1984* (Vic); *National Crime Authority (State Provisions) Act 1985* (Qld); *National Crime Authority (State Provisions) Act 1984* (SA); *National Crime Authority (State Provisions) Act 1984* (Tas); *National Crime Authority (State Provisions) Act 1985* (WA).

11 See *National Crime Authority Amendment Act 1999*, *Jurisdiction of Courts Legislation Amendment Act 2000* and *National Crime Authority Amendment Act 2000*. For a discussion of these pieces of legislation see Bills Digests No.96 of 1999-2000, No.149 of 1999-2000 and No.67 of 2000-2001.

12 *Re Wakim; ex parte McNally* (1999) 198 CLR 551—a High Court decision which invalidated important aspects of the cross-vesting scheme for corporations law and consequently cast doubt on the constitutional validity of at least some aspects of the cooperative legislative schemes involving the Commonwealth, the States and Territories.

13 (2000) 171 ALR 155—a decision about the Commonwealth-State cooperative scheme for corporate regulation implemented by interlocking and complex legislative regimes.

14 Section 19A.

15 Section 20.

16 Subsection 29(3).

17 Subsection 30(11).

18 Subsections 30(1)-(3) and (11).

19 Section 35.

20 This decision is presently subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

21 Subsection 30(5).

22 Subsection 30(7).

23 Imported by Chapter 2 of the Criminal Code—see **item 64**.

24 Sections 32, 32A, 32B and 32C.

25 See section 32.

26 Explanatory Memorandum, p. 9.

27 While the Chairperson and members can be re-appointed for one or more periods the total period of first and subsequent appointments cannot exceed 4 years under the present legislative scheme and 6 years under the proposed amendments.

28 Members and the Chairperson of the National Crime Authority are appointed by the Governor-General [subsection 7(3) of the Principal Act].

29 Subsection 4(1) of the Principal Act defines 'State' to include the Northern Territory and the ACT.

30 Subsection 18K(5).

31 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 27.

32 Subsection 55(2).

33 These provisions are inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and will commence on 24 May 2001 (unless commenced earlier by proclamation).

34 Page 20.

35 http://www.aph.gov.au/senate/committee/nca_ctte/ncabillreport/ncabill.pdf (current at 27 March 2001).

36 Some submissions are available electronically at http://www.aph.gov.au/senate/committee/nca_ctte/ncabill2000/nca2000subs.htm (current at 27 March 2001).

37 http://www.aph.gov.au/senate/committee/nca_ctte/3rd-eval/index.htm (current at 27 March 2001).

38 Explanatory Memorandum, p. 4.

39 Sections 10.1, 10.2, 10.3 and 10.5 respectively. A person can avail themselves of a lawful authority defence if the conduct constituting the offence is justified or excused by or under a law.

40 Explanatory Memorandum, p. 4.

41 See Submission of the South Australian Attorney-General to the PJC inquiry into the National Crime Authority Legislation Amendment Bill 2000, 22 January 2001.

42 Page 4.

43 See **proposed subsection 34B(3)** which enables a Supreme Court to deal with a person who is in contempt of the Authority and who 'did not have a reasonable excuse for being in contempt of the Authority'.

44 See **items 2-6** of Schedule 23 of the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000.

45 See **items 2 and 3** of Schedule 37 of the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000.

46 See subsection 30(5) of the Principal Act.

47 Page 8.

48 Suzanne McNicol, *Law of Privilege*, Law Book Company, Sydney, 1992, p.253.

49 *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

50 Law Council of Australia, National Crime Authority Amendment Bill 2000, Submission to the Joint Committee on the National Crime Authority, 2 February 2001, p.3.

51 See Senator Gareth Evans, Senate *Hansard*, 18 October 1983, pp.1647-51.

52 *Report on the National Crime Authority Bill 1983*, AGPS, Canberra, 1984 p.89.

53 ibid, pp. 94–5.

54 See Parliamentary Joint Committee on the National Crime Authority, *Who is to Guard the Guards? An Evaluation of the National Crime Authority*, November 1991; Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998.

55 PJC, 2001, op.cit, p. 23.

56 ibid.

57 Law Council of Australia, National Crime Authority Legislation Amendment Bill 2000. Submission to the Joint Committee on the National Crime Authority, 2 February 2001.

58 New paragraph 9(3)(e).

59 Page 18.

60 PJC 2001, op.cit, p. 23.

61 ibid.

62 The *Royal Commissions Act 1902* enables a royal commissioner who is also a judge to punish certain contempts but limits the penalty that can be imposed. A number of commentators have questioned whether this provision offends the separation of powers. For example, see Enid Campbell, *Contempt of Royal Commissions*, Monash University, Melbourne, 1984.

63 Section 50 of the Defence Force Discipline Appeals Act may arguably sit more easily with the separation of powers doctrine because the Tribunal appears to exercise judicial power. See *Re Tracey; ex parte Ryan (1989)* 166 CLR 518; *Re Nolan; ex parte Young* (1991) 172 CLR 460 and *Re Tyler; ex parte Foley* (1994) 181 CLR 18 in relation to service tribunals established under the *Defence Force Discipline Act 1982*. In these cases, the High Court

found that the service tribunals in question exercised judicial power—although not the judicial power of the Commonwealth.

64 (1996) 189 CLR 51.

65 *Witham v. Holloway* (1995) 183 CLR 525 per Brennan, Deane, Toohey & Gaudron JJ quoted in the *Laws of Australia*, vol. 10.11[9].