



COMMONWEALTH OF AUSTRALIA

on

JOINT COMMITTEE

THE NATIONAL CRIME AUTHORITY

**Reference: Law Reform Commission proposals for handling complaints against the
NCA and AFP**

CANBERRA

Monday, 16 September 1996

OFFICIAL HANSARD REPORT

CANBERRA

WITNESSES

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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Law Reform Commission proposals for handling complaints against the NCA and AFP

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Present

Mr Bradford (Chair)

Senator Conroy

Mr Filing

Senator McGauran

Mrs West

The committee met at 10.10 a.m.

Mr Bradford took the chair.

[10.10 a.m.]

BARNETT, Mr Michael, Team Leader, Australian Law Reform Commission, 133 Castlereagh Street, Sydney, New South Wales 2000

EDWARDS, Mr David Charles, Deputy President, Australian Law Reform Commission, 133 Castlereagh Street, Sydney, New South Wales 2000

ROSE, Mr Alan Douglas, President, Australian Law Reform Commission, 133 Castlereagh Street, Sydney, New South Wales 2000

CHAIR—I declare open this public hearing of the Parliamentary Joint Committee on the National Crime Authority. I welcome the representatives of the Australian Law Reform Commission—Mr Alan Rose, the President; Mr David Edwards, the Deputy President; and Mr Michael Barnett, the team leader on the commission's inquiry into complaints against the AFP and NCA.

Although the committee does not require witnesses to give evidence under oath, I remind you that the hearings are proceedings of the parliament. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament.

Today we will be examining the proposals made by the Australian Law Reform Commission for improving the way in which complaints against the NCA and the AFP are handled. The commission has been inquiring into this topic since last year. In July this year, it issued a draft recommendations paper entitled: *Complaints against the AFP and NCA*. We will be referring to the recommendations and comments in this paper during the course of the hearing. Because the committee's statutory duties relate to the NCA, we will be focusing on those aspects in the paper that relate to the NCA.

This committee has an important statutory role to play in the oversight of the NCA. The NCA itself has as its main mission the counteraction of organised crime. For this purpose it has powers not available to traditional police services. In recent times, the NCA has come in for some judicial criticism that it may have exceeded its powers in certain respects. These criticisms are matters of concern to this committee. By the same token, only a very small number of complaints have been made against the NCA. Some of these have been investigated to varying degrees by this committee.

The committee believes that it is vital that the integrity of the NCA is upheld if it is to maintain the confidence of the Australian people. This means that there should be a satisfactory and transparent system for investigating or handling complaints against it. At present, there is no formal system for dealing with complaints made against those employed by the NCA. The NCA chairperson decides, on a case by case basis, how each complaint should be dealt with. Roughly a quarter of those working at the NCA are police seconded to it for varying periods from the AFP and state and Northern Territory police

forces. A complaint against one of these officers is normally referred by the NCA chairperson back to the officer's home force. There it is dealt with by whatever mechanism applies in that force for dealing with complaints against police.

The commission argues that the current system is inadequate. It recommends the establishment of a National Integrity and Investigations Commission to investigate, or to supervise the investigation of, complaints or corruption in relation to the NCA and AFP. The NIIC would have the powers of a royal commission. The ALRC estimates that the NIIC would have an annual running cost in the region of \$3½ million to \$4 million. It believes that roughly half of this can be achieved by offsets and efficiencies from the current system.

The committee appreciates the willingness of members of the commission to meet with us today and we hope our discussions will be productive and helpful—for you, your colleagues and also for the committee. Mr Rose, I understand you would like to make a brief opening statement. I ask that you proceed with that, please.

Mr Rose—Thank you, Mr Chairman and members of the committee, for inviting us to discuss our draft recommendations with you. As the committee knows, we have been involved in investigating this reference as a companion to the reference we were given three or four months earlier by the former Attorney-General to review the complaints system in operation at the moment with respect to the Australian Federal Police. As the committee would also know, that complaints system was established as a result of reports which this commission made—its first and ninth report. The former Attorney-General and the former Minister for Justice were, therefore, inviting us to do a review of the outcomes of a system that had been put in place after our recommendation some 14 or so years ago.

In that sense, the NCA was seen by the then Attorney-General and by us as an additional responsibility and one which we approached as an add-on to our investigation of the Australian Federal Police. But in saying that it is an add-on, we were surprised at what we found in looking at the NCA and we approached the task by looking at the work that this committee had done in its two reports—one being the principal report, *Who is to guard the guards?*—and also from the perspective of the incoming chairman of the NCA, Mr Broome.

The views which this committee had expressed in its report, Mr Broome's view and also the overwhelming consensus of all those consulted was that the NCA accountability process, as currently provided for in its act, is deficient in that it does not have any external scrutiny mechanism with teeth. The external scrutiny that is provided by this committee, by the intergovernmental committee and by the relevant Attorneys-General and ministers for police is capable of providing external policy scrutiny but it is not capable and was not set up for the process of dealing with individual complaints and allegations of criminality, fraud and corruption and dealing with failures in office of members of the authority and its staff. It is in no way able to deal, on the basis of ongoing

audit and report to the Attorneys, the IGC and this committee, on the capacity of the NCA to handle its own affairs internally—that is, to handle the discipline of its staff task forces and consultants engaged to carry out its functions.

Finally, there was concern expressed to us that a body with royal commission level powers that does not have external scrutiny inevitably fails not only in accountability but fails to maintain that level of public confidence that is necessary in the longer haul for it to be able to achieve its objectives effectively.

Our work has confirmed that internally there is no ongoing formal discipline process. In comparison with other law enforcement agencies, in its life of roughly 12 years the NCA as an authority has not attempted to develop its own discipline code. This is particularly disconcerting to us because the NCA, in comparison with all other law enforcement agencies, has a disparate work force. It has public servants employed under the Public Service Act, it has seconded police from most, if not all, of the Australian state and territory police forces as well as the AFP, it has appointed outside consultants—some from the private profession and some from the private sector—and it has a very large number of people who work with it on task forces from other state and federal agencies who in one way or another under the act are either discharging the authority of the NCA or at least have privileged access under its secrecy regime to the information of the NCA.

There is no discipline code which applies to all of that group. The NCA has not tried to manage its affairs in a single corporate way. As the chairman said at the outset, if there is a complaint against a state policeman, it is referred back to that state police force. The NCA itself does not take responsibility for the actions of that police officer, even though he or she was discharging an NCA responsibility.

At the moment the NCA does not have, as is required by Commonwealth policy, anti-corruption, anti-fraud and whistleblower protection arrangements. It is in the process of bringing its internal anti-fraud and corruption practices up to Commonwealth policy level, but it does not at the moment meet those requirements. It has no whistleblower protection.

So we found an authority that, while exercising quite extraordinary powers, does not by comparison with the AFP or any other federal agency itself internally have the capacity to discharge the obligations and the accountabilities which those other federal law enforcement and public service agencies have. We found that lack of an ability to discharge its accountability disturbing. That it is compounded by not having any external body that can provide by way of audit or by way of investigation any confirmation of the NCA's performance, we found doubly disturbing.

It has been put to us by a number of people that there are a small number of public indications of failure of the NCA to fulfil its legal obligations. Again, we disagree with that. As the committee would be well aware, and I will simply mention them in passing,

over the 12 years there have been a number of very high profile challenges to the NCA from the chairman down.

Chairman Faris left the NCA in very particular circumstances, in circumstances where, if there had been a National Integrity and Investigations Commission, that body would have been able to investigate that former chairman's performance and behaviour. As it transpired, there was nobody capable of doing that except from the inside—that is, by another member of the authority.

We have all seen in recent times Mr Justice Vincent's decision with respect to the investigations carried out now over quite some years by the NCA, among others, into Mr Elliott. What the judge has said in that case, again, confirms our view that there is not within the NCA—that is, not within its own internal accountability mechanisms—processes satisfactory to confirm to us they failed to confirm to the judge that they did perform their investigations according to law. Again, that case would have been of prime concern if there had have been a National Integrity and Investigations Commission at the very outset back in 1990. The performance of the NCA could have been put under challenge at that point and investigated by an independent, highly competent, external legal forensic body.

A third set of episodes I mention are those with respect to the particular reference given by a former South Australian Attorney-General, Mr Sumner, for the NCA to investigate, if I can call it this, the state of health of the South Australian police service with respect to a number of drug investigations. During those investigations there were a number of issues, some of which directly and indirectly involved that former Attorney-General which we believe would have been prime candidates for investigation by the NIIC if it had been in operation.

At the level of complaint, I mention just four which the committee will be well aware of. In relation to Mr Skrijel, there the lack of an external investigator led the then federal Attorney-General to invite a South Australian Queen's Counsel, Mr Quick, to do an investigation. One of Mr Quick's conclusions was that he could not reach a view without powers and that it should be subject in his view to something akin to a royal commission investigation. As we understand it, that matter is still being investigated by the Deputy Ombudsman in Victoria as a result of Mr Quick's investigation.

There is Mr Anderson's case, on which this committee passed a view. I think an unfavourable conclusion was reached. Operation Jodphur and Operation Ark was where the Privileges Committee of this parliament, again, came with a rather unflattering view of the way the NCA had exercised its powers in that investigation.

Without labouring the point, while these may be small in number, they are not small in consequence. Each one of them did raise very, very substantial questions about the NCA's own internal processes, firstly, to understand its legal authority and, secondly,

to discharge remedial investigative activity to the satisfaction of the parliament and of the public. In our view, only an external investigator will provide that accountability and, if I can put it in a couple of words, provide someone who can stand up and be counted on each of those occasions which inevitably occur when an investigative body with the powers that the NCA has is challenged to defend itself, is challenged to confirm that it is acting according to law.

In reaching the conclusion that we have—that is, it is better to establish a new body rather than graft the activity of external accountability onto an existing body—we did look at a number of models. We looked at extending the powers of the federal Ombudsman. We looked at this committee's earlier preferred option of the Inspector General of Intelligence and Security. We looked at the models, if I can call them that, of the Queensland Criminal Justice Commission and the New South Wales Independent Commission Against Corruption and its most recent variant by the Wood royal commission, the Police Integrity Commission. We have not come down in favour of any one of those models narrowly. That is, we have chosen a hybrid which has some of the elements, some of the characteristics, of a number of those bodies I have mentioned.

Briefly, we looked at the Ombudsman because that was the body that we had originally recommended in our first and ninth reports should play an oversighting role with respect to the Federal Police. In brief, our conclusion is that the Ombudsman has failed in that task. Therefore, we are not recommending a continuation of the Ombudsman oversight. Firstly, it failed because it is a function which does not sit easily with the traditional function of the Ombudsman. Secondly, it failed because, at least from the Ombudsman's perspective, she requires far more resources than are currently available to carry out the task. We doubt that that is essentially a problem.

We dismissed the Inspector General as an option because the Inspector General's role, functions and powers are quite different. The NCA is an executive body with royal commission level powers. It is a law enforcement agency capable of delivering a brief of evidence for prosecution to the federal and state DPPs. By contrast, the agencies that the Inspector General oversees are clandestine in the whole intelligence and security bodies that do not have any executive power. They have the power to bring matters to notice to make recommendations for action, but they themselves cannot carry out any action.

They also act on the fringes and beyond the law both under those that have statutes and under the charters of operation for those that do not. That is, they are covert operations. Essentially, if one is to maintain the public benefit of such bodies, you cannot subject them to the degree of accountability and transparency of accountability that is absolutely essential when dealing with law enforcement bodies whose aim at the end of the day is to deliver sustainable evidence in a court of law to handle a trial where the onus of proof is beyond reasonable doubt. So the Inspector General does not have the powers that we believe are necessary to conduct such a public investigation, nor, in terms of the balance of public policy and interest, do we think that the inspector-general style operation

suits the accountability requirements for a law enforcement agency.

On the other hand, with respect to the approach of the CJC and the ICAC, we do not believe that the accountability that should properly adhere to the AFP and the NCA can be maintained if there is a fully external investigation arrangement where, in effect, those bodies being supervised can wash their hands at the end of the day and say, 'It is the responsibility of that external accountability body and it's not part of ours beyond a particular internal point.' We did not like the notion that either the NCA or the AFP should be able to distance themselves completely from that final point of accountability.

So the hybrid which we have recommended tries to pick up the strengths of the ICAC, CJC and New South Wales Police Integrity Commission—that is, that it does have fully independent external authority—but, at the same time, ensures that it must work and there must be an ongoing dialogue between the National Integrity and Investigations Commission and the internal anti-corruption and complaints handling mechanisms of the AFP and the National Crime Authority.

With the AFP, that is not too large an ask because they already have well developed internal accountability, investigation, anti-fraud and anti-corruption policies and mechanisms. But the NCA has none of that. So there is quite a large task, we believe, internally within the NCA in building an apparatus that is capable of maintaining an effective dialogue with the external accountability agency.

In summary, therefore, the body that we have recommended takes fully into account the powers and responsibilities of the NCA, seeks to ensure that the NCA does develop, internally, mechanisms at least equivalent in quality and functionality to the AFP and that, despite what may superficially be seen to be a small number of external complaints, it does have a process which allows it to take responsibility for whatever that number is. At the moment, its approach is essentially to deny responsibility and to refer all difficult cases to the home force, whether that is the AFP or a state or territory force.

With respect to numbers, we think the size is understated for a couple of very clear reasons. Firstly, we have found that unless there is an independent agency to which one can complain, a number of people are dissuaded from making complaints. Secondly, unless there is an internal process that brings those complaints to the attention of the authority and maintains them as an ongoing statistical data base, the figures are rubbery. Thirdly, the internal complaints mechanism will only bring all of that matter to attention when it is known and when the law requires that the performance annually will be audited—and that is part of what the National Integrity and Investigations Commission is about. Finally, there are various numbers given by the NCA, but let us say they average something less than 20 recorded by the NCA and brought to notice by the NCA—none of this is published in their annual reports, we have it simply informally from them—that figure stacks up, given the limitations I have mentioned, very well against the AFP level of complaints annually.

The AFP records something approaching 900 complaints a year on average. But they are 900 complaints from something just less than 600 complainants. The overwhelming majority of those complaints come from the AFP's Canberra community policing operation—that is, the number of complaints the AFP gets from its municipal community policing is probably between 400 and 500 of those 600 complainants, which leaves between 100 and 150 for the national police force.

The national policing of the AFP is the comparable part with the NCA. The NCA force is something of the order of 400 and the Australia Federal Police is something now less than 2,500. In very rough statistical terms, one would not expect more than about 40 complaints against the NCA annually. The difference between the 20 and 40 you would say is 100 per cent, but we would say that that is not at all unusual given those other constraints—that is, that there is not an independent person to complain to, that there is not an established internal investigation process, that there is no external audit of the process and that the NCA has no statutory requirement to record them, whereas the AFP and the ombudsman do.

Mr FILING—Except that it does.

Mr Rose—It does not.

Mr FILING—It does. It records it in its annual report.

Mr Rose—It publishes in its annual report data that it can bring together. We challenged those figures and, from the officer concerned, we established that there is not internally a process that requires NCA officers to bring complaints to notice. What that records is what that officer has in her four-drawer cabinet.

Mr FILING—If I can just interrupt you there, because I was interested in that as well. The recorded complaints are the ones that are in the annual report.

Mr Rose—Yes, can I explain what that means. 'Recorded' means recorded by that central chairman's officer—that is, what is brought to her notice and what is on the files. However, there is no standing order in the NCA, as there is in the law of the AFP, that says all complaints made must be reported. There is no system in the NCA to do that, and no statistical process is maintained—that is, what is published is the annual count by an officer looking at the files in her filing system. We do not think that, in any way, is comparable with a statutory system that requires, firstly, all complaints to be recorded, secondly, all complaints to be investigated and, thirdly, all complaints to be externally audited.

Senator CONROY—Does that mean that if you—

CHAIR—Maybe we should let Mr Rose finish his opening statement, and then we

could come to questions.

Mr Rose—I am just about there.

CHAIR—I think it would be more efficient if you do that and then we can ask questions.

Mr Rose—Just finally, the recommendations we have made are aimed at doing a couple of things. Firstly, returning to the NCA the degree of public confidence that a body of that importance in our law enforcement and investigative arm should have. And, secondly, establishing a process that beyond all else allows periodically—and that would be, at the longest, annually—a report to be made to the attorneys and to this parliament against a background of a legally required system of anti-corruption and complaint handling. That would allow that individual or organisation, as we have recommended, to make that annual statement and give an audited report on those processes.

Therefore, in contrast with the current position, at least one body would take full accountability for the integrity and the competence of the NCA's operations within the law. That contrasts with the current disparate arrangements which make it impossible for any minister or parliament in Australia to receive or to have confidence in the integrity of the NCA.

CHAIR—Thank you, Mr Rose. I think you have actually answered a lot of questions that you might otherwise have had. Maybe we should deal with the matter Senator Conroy wanted to discuss—that is, the method for recording complaints. I do not know whether Mr Filing wants to pursue that line for a moment. I have a number of questions, and I am sure others will have other questions.

Senator CONROY—I am just interested in following up on the point you made. Complaints made and withdrawn do not go on the file and do not add up in that statistic. Is that the sort of difficulty you were alluding to?

Mr Rose—That is one possibility. Others are that a complaint is made, and an officer receiving the complaint deals with it over the phone. It may be to the satisfaction of the complainant; it may not. But there is no requirement to record it. Our belief therefore is that, firstly, there is a lack of confidence if one complains that it will be recorded and brought to notice and, secondly—and fundamentally—the system does not require it to be done. Therefore, there is no, in a loose sense, discipline in the system, nor is there any final accountability for the system.

Senator CONROY—In comparison to the AFP procedure, do those complaints need to be in writing? You just suggested that they could be dealt with by phone. Does that mean that the individual would receive the complaint in writing and then make a phone call to the complainant or would the complainant make a verbal complaint, which

would not fit into the AFP category?

Mr Rose—The AFP system requires that the complaints be in writing. The way that operate in practice is that if complaints are made orally over a telephone, the complainant is advised of their capacity to make those complaints in writing to the ombudsman or to the police. In many cases what transpires is that a complainant wishing to prosecute their complaint will either have someone reduce it to writing for them or there is a pro forma in every police station which allows them to fill out the detail of their complaint. That is then treated under the act as a formal complaint.

Senator CONROY—At what point does it become a recorded contact in the AFP system—at the verbal contact or once it is committed to paper?

Mr Barnett—Probably when it is actually written down.

Mrs WEST—Following from that, have you analysed the complaints actually received by the NCA to see how many of them fit into NIIC categories of serious criminal, serious misconduct, customer service or internal management matters? Do you have enough evidence or have you investigated it to the point where you can identify the types of complaints?

Mr Rose—Apart from those very high profile ones, a number of which I mentioned, the majority of the complaints which are in the NCA's annual report, as with the AFP, could be handled by workplace resolution. That is the lowest of our categories. The ones that have caused difficulty, including with this parliament, are ones that would be in the top category. Annually there would be two or three serious allegations or complaints of fraud, overstepping their powers or conducting themselves in an illegal fashion.

Mr Barnett—I think there is a middle category which would be unauthorised disclosure of information. That is quite a common complaint.

CHAIR—We have 20 or so missing complaints here, I take it, by the rule of thumb figures you have presented. Where there should be around 40, in fact, there are something approaching 20. The criticism is with the mechanism for recording complaints. I take it that that could be rectified fairly easily by the NCA. It does not need the NIIC to do that, does it?

Mr Rose—It needs a legal requirement to have a complaint system in place.

CHAIR—There is a deficiency there and as a result of this, it ought to happen anyway. Isn't that right?

Mr Barnett—It is a fundamental that you have a proper recording system in a

statutory obligation. But the other problem that is not addressed is that if you simply have a statutory obligation, people need an external place where they can make their complaint.

CHAIR—What happens to the complaint is the bigger question in a way, but there is criticism of the recording and that ought to be fixed.

Mr Rose—Fundamentally, there needs to be a legal obligation to bring to account all complaints and allegations made of fraud, corruption or acting beyond powers.

CHAIR—I do not think there would be any disagreement with that.

Mr FILING—How many specific examples do you have of complaints that haven't been recorded?

Mr Rose—It is hard to prove the negative.

Mr FILING—It is fair to say that it is easier to make the allegation. Are you aware of any allegations, unsubstantial or otherwise, where complaints have not been recorded? That obviously would substantiate the case that the recording system at present, legally not required as it is, is not working.

Mr Rose—What we did find is that, in asking those questions, the authority could not answer that question. The authority could not express to us any confidence that those complaints had not been made simply because they had no way of tracking them.

Mr FILING—In other words, if I could just clarify that, because that is something of importance, you are saying that the NCA was unable to completely say that it had not got any unrecorded complaints. So they were unable to find any instances, to your satisfaction, where a complaint had been made but not recorded or otherwise acted upon.

Mr Rose—That is right. I am not surprised at that given the size of that task. While there are of the order of 400 people variously employed by the NCA, there are very many hundreds more who are members of the staff of the authority, for the purposes of the act, who are members of task forces. Our basic concern is that the NCA does not treat those people, even though they have access to NCA information, as being within some corporately managed group.

Mr FILING—I understand.

Mr Rose—What I am not able to say to you is that we had people come to us and say that we have made a complaint that was not investigated or that we have made a complaint that was not recorded. What we found, and what the NCA itself finds, great difficulty in doing is in any way balancing the books.

Mr FILING—Can I just pursue that. You raised, in particular, the case of Mr Skrijel. In my view, from sitting on this committee for six years and from dealing with Mr Skrijel's matters for six years, I would have said that that was a question of the will of the government in dealing with the complaint because, at the end of the day, the Minister for Justice in the previous government made the decision about how to treat Mr Skrijel's complaint vis-a-vis the report of Mr Quick. Mr Quick called for a royal commission because he was not confident that he could extract sufficient information to come to a proper finding. The Minister for Justice then chose, in my view, wrongly to go for an inquiry by the deputy ombudsman in the Victorian parliament. Would it not be fair to say that that would not have been resolved by an NIIC because, at the end of the day, that was an executive decision made by the government?

Mr Rose—I think we disagree in that there would never have been an intervention, unless the NIIC itself had decided it, by Mr Quick. Mr Skrijel's complaint, if one simply applied the Federal Police complaints process, would have gone to the NIIC, which, under our model, would decide how it was going to handle that complaint. It may be that it would have conducted the investigation itself, being a body with royal commission powers. The outcome, therefore, would have been an NIIC investigation outcome not a Quick outcome saying, 'I haven't got the powers.'

Mr FILING—Could I just add to that. Skrijel has seen several inquiries, including the court's decision in Victoria to overturn his convictions. There have been a number of inquiries that have worked internally and there has also been the court scrutiny of his conviction for those matters that saw him gaoled. The convictions were overturned. Then we had the benefit of Mr Quick's inquiry and, at the end of the day, the matter is still unresolved. Let us just say an NIIC had come to some decision similar to Mr Quick's or perhaps some other decision. At the end of the day, it was a matter for the executive government's resolution of the problem. Mr Skrijel, as we know, is after some compensation and this sort of record squared off so that he is put back in the situation he was as a fisherman being able to go back to his work free of being tainted of any particular offences that were thrown at him.

Mr Rose—Unfortunately, the investigations up till whatever the Deputy Ombudsman in Victoria has to say have been by bodies without powers. Again, one of our fundamentals is that in dealing with a body like the NCA, unless you have, as Mr Quick recommended himself, the ultimate ability to press your investigations with compulsory powers, including in this case by the use of powers that the inspector-general of security, for example, does not have—that is, of surveillance, wire tapping and eavesdropping devices, et cetera, which is what I read Quick to be saying he thought was necessary—you will not come up with a decision.

We would only be speculating, as anyone else would, as to what might happen at the end of the day if a NICC did use those sorts of powers in looking at what the NCA did or did not do with respect to Mr Skrijel and that whole circumstance. What we are

saying—I guess it is consistent with what Mr Quick was saying, is that if you did apply that, you have some possibility of coming up with a yes or no, black or white, outcome, rather than where you were left, as Quick was left saying, ‘I feel unsatisfied, I feel unhappy about this outcome but I really can’t come down one side or the other.’

Mr FILING—In your report you state that you have not received advice from any organisation or individual in an informal position to come under the AFP or the NCA which currently has problems with corruption and misconduct of the same significance as some other Australian law enforcement bodies.

Mr Rose—Again, there seems to be a consensus that each individual has their own interpretation of those words—systemic or ingrained, or whatever, corruption. I noticed from the press this morning that Mr Harrison is about to start his investigation of allegations about AFP corruption. The balance of judgement that we have formed is that while there are very strong allegations made about individuals from the point of view of fraud, corruption or major criminality, it is not suggested, in the case of the AFP at least, that that is ongoing and built into the management and hierarchical arrangements and culture of the AFP in a way which Mr Justice Wood seems to have identified, documented and still be investigating with respect to the New South Wales police or that Mr Fitzgerald found with respect to the Queensland police in his investigation. That is the judgement.

Mr FILING—I wish to continue on from that. The line I am exploring with you is that at the end of the day decision making relating to particular inquiries or particular complaints may well involve the executive government making a decision. In the case of the Elliott matter, for example, there were five separate oversight instruments—one being the committee in a sense, but we were limited, and the other being the intergovernmental committee, which gave the references to the NCA in the first place. Then you have the Attorney-General of the Commonwealth. Then in relation to the specific prosecutions there is the Attorney-General of Victoria and the Director of Public Prosecutions. I suppose one could argue that the parliament of Victoria is involved because there is an NCA act under the Victorian legislation as well. All in all, there was a whole gamut of oversight bodies looking at this particular matter. In what way would a NICC have been able to achieve a better result, given that there were so many others looking at it at the time?

Mr Rose—I guess the short answer is that the NICC is an auditor of the lawfulness of the performance of the NCA at a very detailed level. Let us say, hypothetically, that the NICC had been in business and Mr Elliott or any one of the other four or five individuals had complained or had alleged illegality. At that point under our arrangements that would have been under a complaint to the National Integrity and Investigations Commission.

If I can simply play their role, the first thing that the chairperson of that commission would want to know is on what basis the National Crime Authority was proceeding. As I understand it—and we have not had access obviously to the particular

documents, but just from reading Mr Justice Vincent's reasons for the decision—it was clear that a NIIC would have at that time found that the National Crime Authority had not determined the legal bounds of the reference that Attorney-General Bowen had given them. That is, they did not start, and apparently have no processes internally to ensure that they do start, by asking—as any lawyer would—‘What is it that my terms of reference give me the powers to do? What are the bounds of my investigative capacity?’ Given that, the National Crime Authority is not a royal commission at large. It is a royal commission, if I can use that language, limited very much by its legislation.

Senator CONROY—Some aspects of Vincent's rulings are being appealed. Is that one of them?

Mr Rose—Yes. Again, I am not privy to how they are going to run their appeal or exactly what their appeal is identifying with respect to the disagreement with Mr Justice Vincent. What he has clearly identified as his difficulty is that, what one would have expected of a body with those powers and staff of senior lawyers, he found did not exist. That is, they had not put their mind very specifically to what the bounds of their powers were under the reference they were given. The reference they were given was quite an indeterminate reference—one where one would have been very much on notice at the outset.

Mr FILING—Is it fair to say that NIIC would not have any role to play, for instance, in the formulation of the reference by the intergovernmental committees?

Mr Rose—No. But it would, on receiving a complaint, investigate and form a judgment as to whether the National Crime Authority had properly determined to what extent it could investigate.

Mr FILING—On that point, the committee did not receive a complaint by Mr Elliott or by any others. Obviously, they chose to conduct their case within the courts. Under those circumstances, NIIC would not have had a role either.

CHAIR—Mr Elliott could have complained to the NIIC—that is what you were saying earlier.

Mr Rose—With no disrespect to the attorneys or any of the committees—parliamentary or intergovernmental—you do not have the powers to conduct investigations or to handle complaints with any legal backing. So, and I am simply hypothesising here, Mr Elliott's advisers would not have advised him to come to this committee—putting aside any political view they might have had—simply on the powers. On the other hand, the courts do provide and have provided a legally enforceable mechanism for dealing with what was alleged to be acting beyond its power by the NCA. Our proposal for the establishment of a National Integrity and Investigations Commission would be a clear alternative to that.

Mr FILING—But you could not act as a Court of Appeal, which is what you are saying in essence.

Mr Rose—But NIIC could investigate, conclude and report—and here I am simply using Justice Vincent's outcomes—that in fact the NCA was proceeding beyond its powers.

Senator CONROY—At the end of the day, that would be a report that could then be appealed back into the court system and for the NCA to say, 'Yes, we were.' Let us say that the NCA disagrees with the NIIC finding—

Mr Rose—It is very much more fundamental than that, in case our reports are not clear. If the chairman and members of the authority persisted with their investigation despite the report made by the NIIC, the NIIC would, under our arrangement, start prosecutorial action against the chairman and the members of the National Crime Authority as a breach of the law.

Senator CONROY—What I was suggesting was if NIIC made a point to stop the investigation, but the NCA did not agree and decided to take it to a higher forum.

Mr Rose—Sure.

Senator CONROY—As Mr Filing said, why do you put the extra step in there when, at the end of the day, the final decision is Mr Justice Vincent's rather than the NIIC's?

Mr Rose—There are two reasons. One, again if we can continue this hypothetical example, if Mr Elliott had gone to a NIIC and got a decision that the report was acting beyond its powers, there would then be a very, very salutary position for the National Crime Authority. Are they going to proceed despite the report, which would invite the NIIC to lodge a brief with the DPP to prosecute or to otherwise legally restrain? That is one possibility. The other possibility, as you suggested, would be that the National Crime Authority would seek to challenge the investigation. I guess a third possibility would be Mr Elliott and his advisers using the NIIC outcome to seek restraining action themselves. That would have taken place somewhere in that period 1990 to 1992.

The National Crime Authority would not accept that it got favourable legal confirmation either by the NIIC or by a court to proceed with any of its investigation at that point. So, in terms of public funds, the investigation would not have taken place and those funds would not have been spent. The long drawn out legal defence by Mr Elliott and others would not have taken place if in fact the NIIC had come up with the judgment that I am suggesting it possibly would have at that earlier point.

Mr FILING—I appreciate the line, but I just see you are saying that in authorising

the reference or in giving the reference to the NCA, in essence, the role of the intergovernmental committee ceases. The NCA's use of that reference, its interpretation of it and its investigations within the context or, obviously, in some instances, outside the context of the reference, is of no further interest to the intergovernmental committee. In other words, they do not have a role.

My view is that, having giving the reference in the first instance, surely there must be a greater role for that committee because the genesis of it, the reference, is there. They are in a much greater position to be able to examine the authority's work with the intent of the reference when the matter was discussed in the first instance.

Mr Rose—I agree with you on the substance. That is, they do have a very keen, ongoing interest in what the substance of the reference in an investigation is turning up. Essentially, though, the intergovernmental committee is looking for an outcome which would be to prosecute some organised criminal activity.

Mr FILING—Or not.

Mr Rose—Or not but, essentially, that is the business they are involved in. Neither are they well equipped nor would I think they ever could be equipped, given the nature of the body, to conduct an ongoing oversight of the exercise of the authority's powers in carrying through the reference that they have been given.

Mr FILING—I have no disagreement with you at all.

Mr Rose—While they may have an interest, again, if I were to try to play the role of someone on that intergovernmental committee, and let us assume that something is going wrong with the handling of the reference—not that it is not turning up any evidence to prosecute, but there is real concern that it may not be proceeding according do law—that intergovernmental committee, as is this joint committee, is interested at that point in someone, some body, with the ability to conduct an investigation to produce to them either a report or, better still, a well documented audit of whether in fact the NCA is proceeding according to law or not.

Mr FILING—What happens then if, hypothetically, the case has gone to the Director of Public Prosecutions, who also has an independent statutory authority? What role would you see yourself playing then? Let us take, for instance, this case which has aroused so much interest—the Elliott matter. How would you have involved NIIC, or how would a NIIC become involved, at the stage the DPP took on the prosecution and then decided to make whatever decisions in relation to that prosecution?

Mr Rose—That is, would there have been a role for the NIIC if in fact what happened had not been challenged by Mr Elliott? My assumption is that, at a much earlier point, well before the Elliott case got to the DPP, it would have been stopped.

Mr FILING—We are obviously making it very hypothetical because, clearly, a lot of these events, with the benefit of hindsight, did not take place. In a similar hypothetical case where there was a dispute and at the end of the day, for one reason or another, the NCA decided to continue with its original parameters of its prosecution and then the matter was referred to the DPP in one of the states, obviously the NIIC would have no role to play unless it was acting in a completely different sense because you are then moving from being an oversight of an investigative body to becoming another element in a legal trial.

Mr Rose—The NIIC's role is still fundamentally important because at this point, if I have understood what you have put to me, the DPP is exercising the Attorney-General's discretion to decide whether to prosecute or not. In doing that, the DPP weighs up a series of public interests as well as looking at the fundamental issues of evidence in the brief of prosecution put forward by the National Crime Authority. One of the fundamentals for the DPP is how this evidence was acquired. If it is acquired illegally—I am going down the track a bit—and if that is confirmed by a NIIC investigation, the DPP will say, 'Wait a minute, I'm not going to take this to a court. I know what Mr Elliott's counsel's going to argue. I know what the challenges are going to be and most of this evidence won't stand up.'

Senator McGAURAN—That is what the DPP is paid to do.

Mr Rose—The NIIC is *functus officio*, in the sense that it has completed its investigation. The DPP will have that investigation report and I would expect it to use it as one of those various tests which it applies to whether it is something the DPP should be taking before a court, knowing that the beyond reasonable doubt onus of proof in a criminal trial is a very high hurdle to get over and, whether it is Elliott or anyone else, counsel for that accused will fight all the way and this will be a prime piece of the defence of the attack on the legality of the evidence that is put.

Mr FILING—On that note, you may come to a judgement that may be unfavourable to a defendant.

Mr Rose—You being the DPP?

Mr FILING—Sorry, I mean the NIIC. Let us say that the NIIC comes to a decision that is unfavourable to a defendant's interests. Who then is able to test NIIC's decision making process? This is a difficulty. If the NIIC's determination became an element in a trial, clearly, it would be only fair if that particular process were as open and accountable and there were opportunities for counsel for the defence to make submissions to NIIC on an ongoing basis. NIIC could not arrive at a decision as a star chamber. It would have to make it in a judicial process, wouldn't it?

Mr Rose—It will have done its investigation and produced its report, if it has

proceeded according to law, according to the provisions in its act. Its report would be there as a public outcome of that process. If it were to fully substantiate the processes followed by the National Crime Authority, what the accused in your example has to tackle is not the NIIC's report, it is the NCA's evidence.

Mr FILING—If it is a public document, the NIIC's report may well have a compelling effect on the jury in a trial. It may well be something that is an element of a trial.

Mr Rose—It is no more than an external view of the legality of what the NCA has done. In the trial it would be up to the accused, if it was looking to do this, to tackle the NCA's evidence. In that sense, while it leads support and maybe comfort to a DPP and then to a jury, the fundamental is not the NIIC's evidence; it is the NCA's evidence, however that was.

Mr FILING—I appreciate that.

CHAIR—We really need to move off this line because we are out of time.

Mrs WEST—Would the outcome of the Elliott incident be any different with NIIC involved? Would you have perceived it to have been different?

Mr Rose—Again, that is hypothetical because obviously it was not applied. Back in that 1990-92 period, there would have been an alternative body. All Mr Elliott and any other accused person would have had to have had was knowledge that they were being investigated. At the early point, that is all they knew; it looked as though they were being investigated. They would then have lodged a complaint with the NIIC and have the NIIC investigate, firstly, whether there was an investigation and, secondly, the legality of what the NCA was or was not doing.

Beyond that point, it is pure hypothesis as to what the NIIC would have done. But, on our model, our assumption is that it would have treated that as a very serious complaint or allegation—that is, using compulsory powers, using particular methods of surveillance and so forth against a citizen if the National Crime Authority were not properly authorised to do that. In other words, if its reference did not give it the power.

So the outcome, I would assume, would have been quite different. What decision the NIIC would have come to is accepted. If one looks at what Frank Vincent has said, one realises that he is pointing, as we are pointing, to the fact that there is not, within the NCA, adequate mechanisms to confirm to the authority internally that it is acting legally in its handling.

Senator CONROY—NCA references are controversial, not just this most recent one. We have had a whole range of decisions about the references. My concern is that I

see the NIIC ending up, if you like, making a judgment on almost every reference on what the intergovernmental committee has referred to the NCA. You are almost in a situation where the committee says, 'We want you to investigate this,' and the NIIC then is in a position where it is potentially continually in conflict with the intergovernmental committee.

The intergovernmental committee is forced to go back on an ongoing basis as part of a toing-and-froing about, 'We meant this; we didn't mean this. You can do this under that reference.' You almost have the situation where you have an ongoing argument about the definition of the NIIC, which has effectively become a testing of the scope of each reference. As you said, the NIIC is not a royal commission at large. It is smaller.

Mr Rose—Firstly, I guess we are not recommending that the NIIC have a self-initiating role with respect to NCA references. That is, it does not of its own volition start an investigation into whether the NCA is or is not proceeding according to law with respect to a reference. It would need a specific allegation made before it got into that business.

Secondly, I do not think we would shrink from a judgment that the intergovernmental committee should, in framing its references—and this is well beyond our reference, but just in answer to your question—be very clear about what it is the NCA was being authorised to deploy its quite significant and intrusive royal commission style powers against. That is, the intergovernmental committee should be, I guess, urged to ensure that some particularity is included in the terms of its reference.

Senator CONROY—That comes to the point of, say, the South Australian judgment of the bikers, where the challenge has been, 'Name who you are going to investigate and what it is you are going to investigate.' It is very hard to conduct a secret investigation if you have named the people and what you are going after.

Mr Rose—Sure, down to that degree of particularity.

Senator CONROY—I am just interested in how you see the NIIC interpreting what you are putting forward, because that is where the real conflict over the biker reference has come into play.

Mr Rose—That is where the public policy and public interest balance is very difficult. While these forms of very heavy investigation processes may, in the public interest, be necessary against particular targets, I think there is, on the other side of that public interest, a very justifiable argument about that degree of intrusion. Take the bikers: there are, as I understand it, many organised groups of motor-cycle riders. There are—from what I have read in the press, at least—a number of those groups which have been identified by various law enforcement intelligence agencies as being involved in what is alleged to be organised criminal activity. I would expect the reference to at least sort out

with some degree of particularity those groups from other groups. I think there is a public interest balance to be drawn in providing any reference to the NCA.

CHAIR—I think all of the issues that have been raised by my colleagues with you obviously focus attention on some very practical concerns about how this is going to work. Obviously, Mr Rose, you have thought through a lot of these issues. I do not know whether any have come to light that you had not thought of. Obviously you have been able to address the questions up to a point, but I suppose that might give you some things to think about in that area. We might want to come back to that. Could I just run through a few practical issues that I think we need to discuss with you?

Mr Rose—Sure.

CHAIR—I am not necessarily putting a time limit on it, but we just need to get these things on the record, I think. In general terms in terms of your own terms of reference for this inquiry, you have come up with something that I think goes way beyond what was originally envisaged. You talked about how you have come up with this NIIC, which is a hybrid, as you described it, and which—I think you alluded to the possibility—could really be interpreted as a federal ICAC. Is that your intention?

Mr Rose—I would not use that ICAC label, but it certainly is a federal investigative body which has got the capacity to oversee, to conduct investigations, to lay down standards and rules and to audit against those standards and rules. It is certainly a body that could not only be involved with the AFP and the NCA but also with other federal law enforcement investigative groups. We have identified in our draft recommendations report that, while it is beyond our terms of reference, such a body—and we have had quite a deal of support for this in consultations—could play a role with respect to the investigators of the ASC, the Customs Service and the ACCC: in other words, those federal bodies that do have compulsory powers—many if not most more than the AFP powers—in carrying out their legitimate regulatory and investigative arrangements. So, yes, it is a body at the federal level that could exercise that central accountability and integrity role which some may see loosely as being at the base of the former New South Wales government's concern in establishing the Independent Commission Against Corruption.

CHAIR—In paragraph 2.65, Major defects in the NCA complaints process, you state:

The current ad hoc arrangement for complaints against the NCA is grossly deficient . . .

As we have already discussed, it is grossly deficient in the sort of public accountability to external scrutiny or recording of complaints, but in practice is it? There is a system for investigating complaints—ad hoc as it is—but have you seen evidence in that that the current system has actually failed, except in a few obviously high profile instances such as

the ones you have mentioned, to address complaints properly? That is the bottom line, isn't it? You are saying it is grossly deficient in a number of respects, but has it actually failed, ad hoc as it is, to address complaints adequately? Is that your view?

Mr Rose—It is our view. I guess Skrijel is probably the highest profile of those, but the other side of it is that whenever serious complaints are made—the 20 or so that are on those files are, as I think I said in answering Mrs West's question earlier, at the lower end—including complaints about assault, acting beyond powers with search warrants and so forth, they are not handled by the NCA. They are simply returned to the home force. So the 20 complaints which I said were probably roughly half is our best estimate of what you would have annually if you added together all of that totality. The most serious complaints on the whole are not investigated by the NCA at all. We find that is a deficiency, because under the memoranda of understanding the state commissioners undertake that their seconded police officers will be subject to the regime of control and management of the NCA.

In the case of Queensland, for example, the commissioner has said that, while those officers are with the NCA, they are not subject to his management oversight and scrutiny. Our concern is that the NCA does not have in place a substitute for those management and discipline processes that would normally apply to those offices if they were acting on behalf of their home forces. If any of them misbehave or it is alleged that they have misbehaved, they are simply returned to the home force that carries out the investigation. If we have a group that allegedly misbehaves—one is from Queensland, two are AFP and one is from Victoria—that has three police commissioners conducting three investigations of what, in essence, is the one incident that is not their responsibility but is 100 per cent the responsibility of the National Crime Authority.

Mr FILING—There is a very important question that goes begging. The NCA has come to a working situation which is seen to be acceptable by law enforcement agencies around the country, and that is operating in partnership with other law enforcement agencies and particular state police forces. There is a cooperative arrangement with the secondment and the management of seconded police officers from other police forces. In your conclusion about having a uniform or corporate disciplinary process, have you consulted the police commissioners of the various states that provide seconded officers? If so, have they agreed with it? Do you think at the end of the day that they are likely to work well in a framework that sets up a corporate disciplinary structure that would possibly involve their police officers in disciplinary matters long after they have left the NCA and gone back to their normal police duties?

Mr Rose—The answer to the first question is that we have raised it with them. The answer to the final question is that they have all signed up to a process of their officers being subject to the management regime of the National Crime Authority while they are there.

Mr FILING—Is that disciplinary as well?

Mr Rose—I was just coming to that. From memory, the South Australian commissioner and the Tasmanian commissioner were prepared to have the National Crime Authority conduct the investigation against their standard. We were calling it the discipline code. Other police commissioners were hesitant about the National Crime Authority exercising an independent disciplinary authority. I think it would be true to say that they were prepared to have the National Crime Authority or the central national integrity investigations commission carry out the investigation of the action with reports being made to them. We raised specifically with those commissioners whether they would be prepared to have some of their investigators involved, and the answer was yes.

What they did reserve to themselves—and I think this answers part of the final question—was what would be the outcome, hypothetically, of an investigation that found that one of their officers had acted unlawfully or some other way breached that discipline. There was real concern, not only by the commissioners but by the unions and individual police officers, that there may be—and only may be—some concern about a double jeopardy sort of position arising, that is, where they were investigated, found to have committed an offence and punished by an NCA regime and then punished again, as they saw it, by having that outcome taken into account in their home force on return as part of their police record there.

In summary, we believe that there would be every prospect of all commissioners coming to an agreement and building on the current memorandum of understanding with respect to the national investigation. There is not a majority support for the National Crime Authority carrying out some disciplinary process on the basis of that report. The majority of commissioners would want to be taking that final step of deciding what it was they were going to do within their state discipline code and law with respect to an adverse finding by the National Integrity and Investigations Commission of one of their officers.

We believe that there is certainly the foundation for a cooperative national arrangement for investigating activity by seconded police by task force members which would not in any way undercut the very healthy arrangements that in operational terms have developed within those National Crime Authority task forces involving most states.

CHAIR—I think that is fully answered. The question of funding of the NIIC is obviously a concern. You suggested that the NCA would contribute to it. The NCA says that their funding has already been cut by 20 per cent in real terms in the last few years. Is that a realistic expectation that they should contribute \$150,000 a year to it? Following on from that, you suggested that the Ombudsman cannot do the job because she does not have the resources. If she had the resources, could she do the job? Rather than creating something new, could you give the Ombudsman adequate resources to do the job?

Mr Rose—On the first point, the \$150,000 is obviously an estimate by us. It is an

estimate as best one can make it from the assumptions that we have drawn as to the level of complaint. I am not saying—I have said this to John Broome—that you could find that money easily, but it is the best estimate we can draw as to the value of the NIIC from a complaints handling perspective for the National Crime Authority.

CHAIR—But as you said, they are not spending \$150,000 a year resolving these complaints now. Is that what you are saying—that you figure they are spending that much money investigating complaints and therefore you should take it off them and give it to you?

Mr Rose—No, we are not saying that. They do not really have the level of management statistical information that would allow you to come to that conclusion. It is simply our estimate on what we think they should be spending in effect.

With respect to the Ombudsman, the bulk of our report dealing with the AFP/Ombudsman relationship has led us to conclude that our original reporting was wrong. We plumped for a wrong body. The Ombudsman herself argues that she is grossly underfunded. In trying to get from the Ombudsman the figures that she spends, we found that the amount spent on police complaints is as a result of the Ombudsman applying her own priorities to police complaints. In fact, she spends less today than she did three years ago on police complaints. That is our fundamental problem with the Ombudsman.

This function—whether it is carried out for the AFP alone or the AFP and the NCA or the wider federal law enforcement community—is a full-time job that does need high priority attention. It is not one that should be, this year, offset against investigations of Telstra billing or offset against social security. As important as those are, it needs to be a primary responsibility.

We would argue that if there is to be an additional resource—and our recommendations do require additional resourcing—it ought to be for a purpose built organisation that will have as 100 per cent of its attention the accountability and integrity of these principle law enforcement agencies.

Secondly, the Ombudsman's modus operandi to date has fundamentally failed in this respect. On the occasions when the Ombudsman was in a position to stand and take accountability for the complaints system, she has been unwilling to do so. It seems to us that publicly taking accountability for a system apart from her own internal administration does not sit well with an ombudsman's role in the wider government system. She sees herself, and past ombudsmen have seen themselves, as being the investigator of maladministration of Commonwealth agencies, in a sense, an institutional investigator and whistleblower on that system, but none of them have seen themselves as a federal executive agency taking responsibility, that is, to stand up and be counted for the overall integrity of the system, in this case, of the AFP. No-one has done that.

On each occasion that it is challenged, whether it is in the media or by individuals, the system is only able to be defended by the police commissioner. The police commissioner, regardless of what the actual facts of the situation are, is automatically perceived as being a defender in his own cause. From our consultations, the Australian people are not prepared to accept the police commissioner's word at that level, which is probably coloured by what is happening in other police forces around Australia. They are looking for another body, another individual, who makes their judgment from a position of informed investigation and ability to get at the facts, which is what the Ombudsman should be able to do, but also stand up, whether it is with the Attorney-General of the Commonwealth and the states, with this committee or within a government committee, and say, 'This is our judgment; we stand by the judgment. The system works or the system does not work.'

CHAIR—I have one other question. My interpretation of your proposal is that this committee investigate complaints against the complaint investigator. We have been reluctant in the past as a committee to get into investigating complaints, although we are involved in one at the moment and we may well get involved in another one. We are sort of looking at them on a case by case basis. But, in practice, is that what you intend we would do as far as the NIIC is concerned?

Mr Edwards—I think we have probably inexpertly expressed ourselves on that sort of thing. We are very well aware that this committee does not want itself to undertake that investigative role. Historically, it has not wanted to do it.

CHAIR—That is a matter for each committee. At the moment we have adopted the position that this committee will look at them on a case by case basis. At the moment, we are up to our necks in one particular complaint.

Mr Edwards—That was not the final guiding determinant of our position. We were aware of it. What I was going on to say is that perhaps we could have been singly sensitive to the way in which we expressed that. We do see accountability flowing through to this committee and to the executive government for what it does. But we would not see it sitting as a court of appeal on decisions made by the NIIC. We would see strong lines of accountability to this committee and to the Attorney-General. I think our final report would reflect that, at the end of the day, if there is something adrift or amiss about what NIIC is doing, ultimately, that is a matter in which the executive government, and particularly the Attorney-General, would have to make a decision about. But, that said, we would not want that sense to dilute the importance that we see from the role of this committee. It is a reviewer—a regular, systematic and also ad hoc reviewer of action taken by NIIC.

CHAIR—So at least the NIIC, in tabling its annual report, would meet with this committee to discuss that report. It may meet more routinely, but it would be the same as, say, the Reserve Bank, which appears before the finance committee.

Mr Edwards—Can I draw another parallel in answer to that. One with which I am quite familiar is the role of the Joint Committee on Corporations and Securities. It has been going for a few years now and it takes a very important, robust and very constructive role in monitoring the performance of the Australian Securities Commission and its investigative powers, et cetera. We would see a similar type of collaborative and review role here.

CHAIR—I think that allays our concerns which might have been interpreted slightly differently.

Mr FILING—Given that the NCA PJC is, in your view, unable to properly make the NCA accountable under these circumstances, how is it going to be able to do so with NIIC?

Mr Edwards—How is the NCA going to be more accountable with NIIC?

Mr FILING—No, sorry, in your report you conclude that the parliamentary joint committee is not the appropriate body for oversight of complaints in relation to the NCA. On the one hand, we are ineffectual, in a sense, under the meaning of the act in relation to the NCA and complaints, but then we would take a role in relation to NIIC. Surely that would be a contradiction.

Mr Edwards—I think we have to look at NIIC and how NIIC is constituted. NIIC would be a separate, independent statutory body. It would be headed by a judge or person of similar standing. It would have included in its ranks one full-time member who is a complaints commissioner. So, in that sense, it is a fully fledged independent body with a level of standing in the community that we do not have in any oversight capacity for any of these agencies at this time.

You could endlessly go on and say, ‘Who is going to oversight whom?’ At the end of the day, there has to be confidence by the parliament and the Australian community that there is a process of direct accountability. I think it is clear from the president’s answers, the accountability model is bound to be a failed one.

Mr FILING—Yes, I agree with that.

Mr Edwards—Here we have a clear and complete accountability model. It has to end somewhere short of this parliament’s and the executive government’s accountability for it. We are putting in an accountability model for the NIIC which would have standing powers and reporting accountability, which is unprecedented and which would allay a lot of the problems that currently exist with the NCA particularly floating around in an indefinite accountability environment for these things.

One has only to go back to what you were saying about the executive government,

et cetera, and the Elliott matter, and I do not want to rehearse all that. But, at the end of the day, if you have a strong independent NIIC which is seen by the community as having been established by the parliament for that ultimate purpose of cleanliness of review, you get this swiftness of action.

You said ultimately action resides in the executive government on a lot of these things. True, it is, but let us take some of these processes. If there is an immediately available avenue of, firstly, complaint and, secondly, total and comprehensive review—although, I cannot produce evidence because we are still in the hypothetical situation—I would be so bold as to say it is unimaginable that a lot of the processes which then take place over several years of testing matters would be abruptly halted or interrupted by the fact that, firstly, there is a NIIC there; secondly, it has the standing and integrity to make an independent inquiry; and, thirdly, it can come out with conclusions and reports which mean that corrective action takes place.

I think that is the big emphasis—that is, corrective action is capable of being put in place very, very quickly. At the end of the day, we get what the president has been emphasising—that is, we have a process that gives confidence by the community in the organs of investigation enforcement.

Mr FILING—If I can just dwell on that because that, in my view, is one of the critical features of the process you have gone through. At the end of the day, if there is a requirement for executive government to take action, whether it is on a recommendation or otherwise, that executive government may have some influence in relation to committees—and I say that with due respect to all members. I am still not sure how the Joint Committee on the NCA can have that role in overseeing the NIIC, given that we are not able to do that effectively in relation to the NCA, a matter that we have commented on ad nauseam over the years.

Mr Rose—Just to test that with an assumption, which I think is probably the hardest test to pass. A dissatisfied complainant—such as Mr Skrijel—is most likely to be on your doorstep. In comparison with the present circumstance, the NIIC will have done an investigation, and it is that investigation that Mr Skrijel would be unsatisfied with and he comes to the committee.

By comparison with the NCA's operation itself, our recommendations, if they are implemented, would have the NIIC as a body—as the chairman of your committee has just said—that would maintain a regular pattern of consultation and briefing with this committee. Its standards for investigation, by comparison with both the AFP and the NCA, are on your table. Its modus operandi is on your table. With respect to Mr Skrijel, if I can jump to the end, its report is on your table, and you have the relevant officers quite able and willing to discuss what they have done with respect to investigating Mr Skrijel.

Let us take the worst case scenario. You have a concern at the end of the day. As

Mr Edwards was saying at the outset, we have tried to fashion this—and have maybe not quite explained it adequately enough—within an ongoing responsible government system. I guess one possible reaction on reaching that point the committee could have is to draw the Attorney-General's attention to this by saying, 'This is what the NIIC has told us about Mr Skrijel. Here is the documentation. We, the PJC, would like the Attorney-General's view.'

That could have a number of consequences. The attorney might look at this and decide he or his officers are going to take some action with respect to it. If you were dissatisfied, it would be a very insensitive chairman of the NIIC who has not got that message very clearly. In other words, what we are proposing be set up is a process of accountability that this committee would be at the centre of.

Mr FILING—I am just conscious of the fact, looking at the Skrijel matter as a good example, that the Attorney-General and the previous Minister for Justice—I am not singling them out for any special attention, because there are other AGs and justice ministers who have looked at the case—had a report from an eminent independent QC

Mr Rose—But without powers.

Mr FILING—No. He specifically made recommendations in relation to his findings which they ignored. I can cite you a number of instances where royal commissions and government commissions around the country in relation to accountability and questions of behaviour and standards have totally ignored recommendations made to them. So, at the end of the day, executive government has the final say.

In a case like Mr Skrijel—and I am not speaking for Mr Skrijel—if the outcome is not what he sincerely believes it ought to be, you are still going to have him back here saying that the NIIC has not done it properly and we ought to be looking into it. I am just saying that we are back to square one, because you are in a better position.

CHAIR—Let me put—

Mr FILING—Excuse me, I am asking the questions, Mr Chair.

CHAIR—But let me put a view to you that Mr Rose can take into account. Whilst this committee may or may not have been reluctant to get into matters, if the NIIC has dealt with them, surely we would have much stronger grounds to say to Mr Skrijel, or someone, 'Look the NIIC has dealt with it, and this committee will not deal with it any further.' At the moment we are a little doubtful about that because the Mr Skrijels of this world have nowhere else to go. But would that not give us much stronger grounds for saying 'Look, finish; the NIIC has dealt with it.'

Mr FILING—Why would you give oversight then? I cannot see the logic.

CHAIR—As I understand it, we would oversight on a minimalist basis the annual report situation, which is tabled directly to the parliament—such as a Reserve Bank annual report and others. That would give us then the right to examine matters arising out of that annual report in an annual or bi-annual public hearing, or whatever. But isn't that the point? A Mr Skrijel comes to us after it has been through the NIIC. Doesn't that give us—I am putting the proposition, I know, but—

Mr FILING—I am asking the question.

Mr Edwards—Mr Skrijel has a problem. Where can he go? He can go to the executive government and complain. He is not necessarily going to be satisfied that the executive government has not got an axe to grind, being the executive government. So he does not get a satisfactory outcome from that perspective—and that is not a reflection on any minister. He can go to the NCA and say, 'We have the clarion call across Australia in what we are doing'—and people do not accept, nor would Mr Skrijel accept, that they should be the ultimate arbiter in their own course as to whether they acted properly. His third point of contact is to go to the courts to take up some sophisticated point of judicial review, which takes time but which obviously will be limited in its encompassment.

Those things run through a gamut of time. There is uncertainty in his mind as to whether there is justice. There is no guarantee to anyone standing independently that an independent process has looked at it. Under our system, Mr Skrijel comes in. If he goes to the NCA and raises his hand in anger against it, they would be required to record that as a complaint. Alternatively, he can come to the NIIC and complain. Immediately, right at day one, he has access to an independent organ headed by a judge or someone of a judicial standing who is responsible with these huge powers to say, 'Okay, this is important, this is serious; we will get into it now.'

If they do their job properly, then he can walk away from it. He can say, 'I'm unhappy; I would like NIIC to have said that they did all these things in a very heinous way.' But they walk away from NIIC. The executive government can point to the NIIC as having examined the matter independently. The parliament can point to the fact that it established an independent vehicle. Also, the parliament has the opportunity, as part of the accountability framework, to discuss the matter, to talk it over with the NIIC and satisfy itself that the NIIC is operating with the sort of integrity, independence and, importantly, giving that public confidence to the process that it as its foundation, its originators, its source the parliament envisaged.

CHAIR—I think the acronym 'NIIC' is a little unfortunate. You might come up with an alternative name.

Mrs WEST—On page 37 of your draft recommendations paper, you state:

. . . that there must be a formal complaints system for the NCA that includes effective external

review. This view has been overwhelmingly endorsed during the Commission's consultations and in submissions received.

Can you tell me how many submissions were received? Are they available to us for scrutiny?

CHAIR—You mean, I think, relating to the NCA in particular.

Mrs WEST—Yes. Were the submissions particularly focused on the NCA; and were they internal submissions from within the systems?

Mr Barnett—We have received about 88 submissions so far, and I expect that we will get quite a few more yet. We consulted very widely with NCA staff. We went to every regional office. We also spoke with the chairperson of the NCA individually. Their submissions are available too, subject to confidentiality.

Mrs WEST—Were any dissenting reports issued?

Mr Barnett—A few NCA staff members were sceptical of exactly what form the external review would take, but discounting that I think you can say the overwhelming response was that there should be an external review.

Mrs WEST—Is this going to go back to those people who made submissions? Will they be able to comment on the draft?

Mr Barnett—We are receiving submissions in response to the draft.

Mr Rose—If you are looking at the staff of the NCA, I think there was one fundamental concern because of the disparate nature of the way the staff were employed under the public service act core of the NCA. Whilst not arguing against external oversight, the staff were concerned about one feature. You probably know that a few years ago the AFP had an employment regime which was similarly mixed. There were those traditional police officers employed under the AFP act and about 300 or so staff employed under the public service act.

The result of introducing fixed term appointments into the AFP was to bring all of those Public Service act staff into the AFP act. They are all on fixed term appointments now. The NCA staff, the Public Service act staff, were concerned that our recommendations for a single disciplinary system et cetera may mean that they would be forced to become either fixed term employees of the authority or in some other way subject to a discipline system which was being applied to police officers. It is well beyond our terms of reference to deal with how the chairman of the authority would handle implementing a uniform discipline code, but there was such a concern and I think it is probably going to be an ongoing concern.

CHAIR—Mr Filing has taken a private point of order. There is some dispute as to whether or not we have a quorum. I have indicated to him that I am comfortable to deal with the matter down the track, in which case we might be faced with deleting a little from the record. I think we will bring the hearing to a close. He has a political point to make about the standing orders, and I can handle that.

It has been a very productive meeting from our point of view, and I hope from yours as well. There may be further questions that we would like to submit. Perhaps we could engage you in some further correspondence. Obviously the role of the committee is important in this whole consideration. We want to be seen to be taking very seriously our responsibilities in respect of the NCA. Therefore we want to be actively involved in the process that you are engaged in as to determining that complaints are properly, comprehensively and transparently dealt with. We are not opposed to what you are suggesting. We have obviously explored it and thought about it in some detail. Some of your recommendations directly affect the workings of this committee. Thank you very much for appearing this morning. We look forward to being in touch with you again.

Committee adjourned at 11.57 a.m.