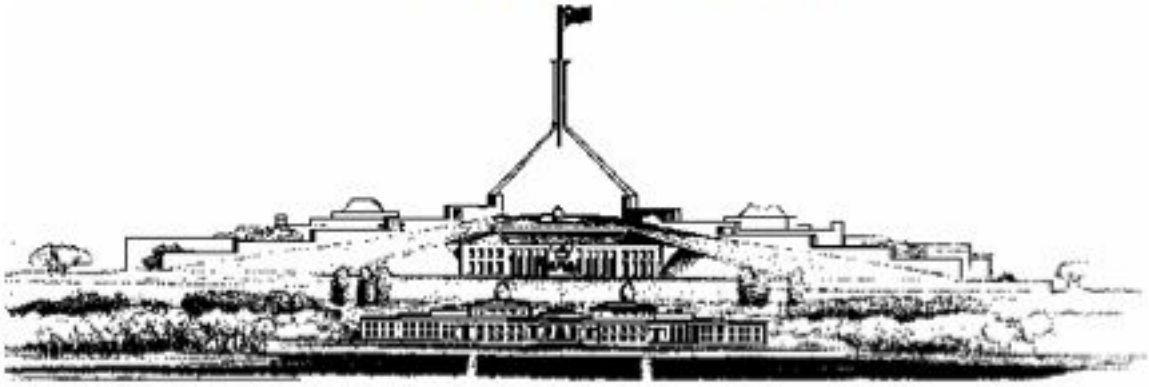
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

Main Committee

AUSTRALIAN CRIME COMMISSION AMENDMENT BILL 2007

Second Reading

SPEECH

Thursday, 20 September 2007

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

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Questioner		**Responder**	
Speaker	Hayes, Chris, MP	**Question No.**	

Mr HAYES (Werriwa) (10.46 am)—I fully support the remarks which have just been made by the member for Denison. The Australian Crime Commission Amendment Bill 2007 will probably be met with concern on two counts: firstly, the purpose of the bill itself, the fact that the Australian Crime Commission Act 2002 is to be amended in respect of examiners, the way they go about recording their reasons for issuing a summons before, at the same time or as soon as practicable after the event, and, secondly, the issue of retrospectivity, which I think should be seen as an anathema to all, but I do concede there are particular reasons on this occasion why it is being addressed. There is also the concept—and, Mr Deputy Speaker Barresi, you would be familiar with it—that, save for a legal technicality, it will not void proceedings. You would remember that, Mr Deputy Speaker, when you were processing awards in the Industrial Relations Commission. We are talking here about the country's premier law enforcement agency.

As most people here know, I have spent a fair bit of my career looking after the professional industrial interests of police officers in all states and territories, including the AFP. Coupled with that, I actually grew up in a police family, so I know how police view their position on fighting crime. It is not an academic exercise for them, with the niceties of court structures. They actually believe that, when they are going out there to make arrests, they are doing it in all good conscience because they want to rid the community of the scourges inflicted by crime.

Consider a body like the ACC that seconds into it either former police officers or sworn police officers from other police jurisdictions. The sentiment is no different. I know how much strife a young constable will get into if they fail to complete procedure when they are making an arrest. It is not necessarily just their boss who will give them the rounds of the kitchen; it is their fellow colleagues, because it goes back to what these people genuinely believe is why they are in law enforcement in the first place. In respect of this organisation, just imagine this issue in the case that is live now, the Brereton case, after the matter has gone before the Magistrates Court, in November last year, and then before the Supreme Court, with a judgement coming down only recently, in August, on someone involved in a serious and organised crime—and I think this one actually came under the Wickenby investigations—and the prosecution fails simply because of the technicality that the statutorily appointed legal officer, who will be the examiner, was going to get around to signing the record of subpoena at some stage. As I raised with the shadow minister the other day, what would be the likely effect if, before he got around to signing this subpoena, he fell off his perch—if he got hit by a bus or something else and was not able to complete the exercise? Would that mean the whole investigation into a matter of serious organised crime would fall over on a legal technicality because someone did not dot the i's or cross the t's at the time of putting out a subpoena?

Having looked after police officers for many years I have to say that that would not suffice; it would not satisfy the station sergeant if a constable did that. Yet this seems to be the practice, and we do not know how long it has been in existence. As the shadow minister mentioned, this was dealt with back in the days of the NCA in 2002—as a matter of fact it was in the dying days of the NCA—when there was a unanimous recommendation by the then joint parliamentary committee that this matter should be corrected, that it should be clarified and put beyond doubt. Whilst, as I understand it, the minister did not at that time respond to that recommendation of the parliamentary joint committee, on establishment of the Australian Crime Commission it was nevertheless acknowledged that this matter would be taken up.

I am not sure—and unlike others here I am not a lawyer—but, in reading section 28 of the Australian Crime Commission Act, I have to say that I did think it meant that, if you were going to execute a subpoena, you would record your reasons. I just assumed that you would do that at the time. I have to say that, if those were the instructions given to a constable out there who was applying for this, I am sure the station sergeant would insist that it would be done contemporaneously.

This is of concern to me as a member of the Australian Crime Commission parliamentary oversight body, the Parliamentary Joint Committee on the Australian Crime Commission, because under section 55 the committee has a specific role. There are various obligations. It is part of the counterweight of balance because of the coercive nature of this very special law enforcement body. This body has extreme powers. Its powers are akin to a royal

commission and, at the time of its being set up, the parliament in its wisdom decided, as was the case with the NCA, that there would be a measure of parliamentary oversight and that it would be done through a parliamentary joint committee.

I and the member for Denison, who is the deputy chair of that committee, had the opportunity only recently of participating in the most recent inquiry of the committee. In that inquiry various submissions were made and, interestingly, one of those submissions actually came from one of the examiners. When the examiner, Mr William Bolton, appeared before the committee he wanted to talk about an issue that seemed to be emerging in their investigations into serious and organised crime: a practice is apparently developing, particularly in relation to outlawed motorcycle gangs, whereby the witness whom they subpoena simply refuses to take the oath or affirmation and refuses to supply documentation. It was argued by the examiner that: 'We need to have some more streamlined procedures because this is now being used as an orchestrated tactic to ensure that people cannot be forced into giving evidence at this stage. If we have to wait another 2½ to three years for a prosecution on that basis, the trail has sometimes gone cold, the investigation has moved on and all that was going to be targeted in a particular operation has simply evaporated.'

That being the case, I was one of those on the committee who thought that we needed to do something and encourage the government to look at that aspect of it. I mean not that it should be referred to as contempt but that, quite frankly, we should look at streamlining the provisions of what occurs where somebody, when they respond to a subpoena, simply refuses to answer questions. Otherwise it usurps the ability of an examiner to coerce people to answer questions and produce documentation and to then make judgement on whether or not a prosecution should take place. We were very sympathetic to that and we dealt with it. By the way, that was not the first time that this committee has dealt with that. As a matter of fact—and I will be corrected by the member for Denison if I am wrong—this is probably the second or third time. On the last occasion, we recommended to the Attorney streamlining arrangements, where the appropriate courts would deal with contempt in these matters. We consider this a body which, apart from being our premier law enforcement organisation, by definition operates in respect of serious and organised crime. Therefore, we support the coercive nature of this body. We support that, in this instance, there will not be the right to silence as there is in the normal application of courts. There will not be those things. Therefore, it is considered—and we support this—to be almost at the same level as a royal commission.

Having said that, we supported what the examiner was looking for in streamlining that which could be considered—and I will use a colloquial term; I am not sure it is necessarily a legal term—contempt of an examiner's questioning. Yet only this week we learned that back in November, before a Magistrates Court in Victoria, there was a matter about the validity of a subpoena being issued. At no stage was that ever raised with the parliamentary oversight committee. The committee was set up under section 55 of the act to oversight the body. For all intents and purposes, the committee is the contact that the Australian Crime Commission has in its responsibilities to the Australian parliament. At no stage was that mentioned. Yet, as I said, they did want to have a discussion about contempt powers. I also refer to the report by Mark Trowell QC that will soon be coming down. I think that also deals with this. I think the report has gone to the intergovernmental committee. I understand it deals with contempt. On this issue, something that could possibly invalidate a lot of existing prosecutions and jeopardise existing investigations, there has been not one word.

One obligation of the parliamentary joint committee is to review the annual reports. We reviewed last year's annual report this year, and I would like to take you through a couple of things that occurred in that review. We deal with the issue of the coercive powers. We deal with the position that there must be accountability and the necessary counterbalances. Apart from the PJC itself, those other counterbalance measures are the Minister for Justice and Customs, the intergovernmental committee of the Australian Crime Commission, the board of the Australian Crime Commission and the Ombudsman. You cannot say—or at least I hope we are not saying—that none of these organisations or the people in authority knew what was occurring.

It is also relevant to note that the report last year essentially indicated that coercive powers were used on 480 occasions out of 605 examinations that were conducted. In that period, 218 people were charged. There were something like 894 charges against offenders and 77 people were convicted. I do not know where all these people went, but if they are in Long Bay, I suspect there will be a hotline to defence lawyers at the moment to see about getting their clients out on the basis of a legal technicality.

This was dealt with in the transitional period of the NCA into the ACC. It was certainly spelt out on that occasion. The minister—I think it was Senator Campbell at that stage—indicated that, in setting up the ACC, recommendation 14 was accepted, although it was not prescribed in the legislation that the examiner would

have to issue his reasons before or at the time of issuing a summons. If this is a practice within the ACC, a practice which was before the courts, a practice which the oversight bodies were not made aware of—including the Commonwealth Ombudsman, who, on a yearly basis, reports to the parliamentary joint committee about its investigation of this body as well—I would hate to think that we were, yesterday, at the threshold of seeing a lot of people who are either subject to investigations or prosecutions for serious and organised crime escaping on the basis of a legal technicality.

I reiterate our support for this organisation. It is the premier law enforcement body in this country. It has significant and special powers and rightly so, but there must be not only a counterbalance in name but in substance. That includes not just paying lip-service to the parliamentary joint committee on these matters. I do not know what transpired, whether briefings were given to the government since November of last year, but, quite frankly, the last thing those 50,000 police officers involved in crime fighting want to see is our premier law enforcement body not being able to satisfactorily prosecute serious crime figures or have their investigations into serious and organised crime fall over simply because another form of independent statutory appointed legal officer decided to read down this provision in section 28, that as long as we get around to it at some stage, here or whenever, to go through the details about the reasons for issuing a subpoena, everything will be right. Everything is not right at the moment. It needs to be corrected. It is certainly not just the government in this. I do not know the extent to which the government was aware of this. I think there is sloppiness and tardiness within the ACC on this matter. Certainly from my perspective, Minister, being on the parliamentary joint committee and not being knowledgeable about this as being an issue going to the administration of the ACC in procedures, I think there is a clear break in accountability, which is the counterweight for significant and special powers exercised by this body.

In terms of the questions that the shadow minister has asked, I do not think it is unreasonable, if an examiner has not completed the reasons at the time of issuing the subpoena, to have the examiner also be responsible for why he or she has not and to require them to put that in writing as well. It is regrettable that we must treat this as retrospective legislation. There is no way around that. I know from what I have read in the papers of late that it has certainly reached some magnitude of criticism from some areas of the civil liberties movement as well as from certain defence lawyers. But realistically—I want to be quite forthright—our position must be to collectively seek to protect the Australian people from the ravages of serious and organised crime. We do not see this as a game. We do not see that this could or should fall over simply on the basis of a legal technicality. Those niceties might be great for lawyers, but those at the sharp end of looking after the community—police officers throughout this country—support strong measures to protect the community from crime.