GOVERNMENT RESPONSE
TO
THE PARLIAMENTARY JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY'S REPORT "WHO IS TO GUARD THE GUARDS?"

The Report on the Parliamentary Joint Committee's evaluation of the National Crime Authority, tabled on 28 November 1991, follows on from the Committee's earlier evaluation in 1988. That earlier Report recommended that a comprehensive evaluation of the Authority's work, and the need for a body such as the Authority, be undertaken seven years after the date of commencement of the National Crime Authority Act 1984. The Committee has a statutory duty under section 55 of the National Crime Authority Act "to monitor and to review the performance by the Authority of its functions" and to report its findings to Parliament.

It is now nearly eight years since this House enacted the National Crime Authority Bill. In delivering the Second Reading Speech, the then Minister for Communications said:

- the Authority was "designed to effectively co-ordinate and lead on a national basis the attack against organised crime";

- "the basic role of the proposed Crime Authority - although there are others as well - will be to operate as an arm of the criminal investigation process, gathering and assembling evidence for transmission to other law enforcement agencies for use ultimately in conducting prosecutions".

So far as the Government is concerned, the Authority has generally lived up to the hopes placed in it. Indeed that is also the view of the other Governments represented on the Inter-Governmental Committee, the Ministerial Committee to which the Authority is primarily accountable, and which now comprises all nine Governments in Australia. The Inter-Governmental Committee's submission to the Parliamentary Committee said, in part, ".... the NCA remains the most effective national vehicle for countering organised crime that can be devised, given the division of responsibilities amongst the Australian jurisdictions and the need to balance effectiveness with accountability ...".

In its current evaluation, the Parliamentary Joint Committee has come to a similar conclusion and supports the continued existence and activities of the Authority, and acknowledges that it is now a vital part of Australia's law enforcement regime. The Committee accepts the continued validity of the reasons that led to the establishment of the Authority, and does so notwithstanding a number of submissions to it critical of the Authority and opposed to its continuation.

As the only law enforcement agency in the area of organised crime able to operate in and across all Australian jurisdictions, the Authority has been able to ensure that the targets it pursues have not been able, as in the past, to evade proper investigations because of jurisdictional problems. The Mr Asia group is perhaps the classic example of such evasion, as Mr Justice Stewart showed in his 1983 Royal Commission report.

There are some aspects of this national role which should be emphasised. The Authority has working with it officers from every police service in Australia, numbering in total 91 at 31 December last. The scope of the Authority's activities is reflected in the multiple sources of its references: of the 13 references it has received so far, the Commonwealth is involved in 12, New South Wales 8, Victoria 5, South Australia 4, Western Australia 2, Queensland 2 and the Northern Territory 1.

As a result of Authority investigations, persons have been convicted in all the mainland States. Each State and Territory has its own legislation underpinning the Commonwealth Act. Those jurisdictions which have granted references have contributed substantially to the Authority's operating costs - directly under the cost-sharing arrangements to the tune of more than $22m to 30 June last, and indirectly through the provision of the police officers mentioned earlier, the salaries of most of whom continue to be met by their parent forces.

The Authority co-ordinates its activities with those of other agencies. These co-ordination arrangements were formalised in 1991 by the establishment of a Consultative Committee and a Secretariat, which are the primary selection vehicles for recommendations on Authority references and inquiries to the Inter-Governmental Committee. Represented on these two bodies are the Australian Securities Commission, the Cash Transaction Reports Agency, the Australian Bureau of Criminal Intelligence and all the Commissioners of Police. No other law enforcement agency is subjected to such a discipline.

In the area of investigative techniques, the Authority has adapted and extended the model of the Costigan and Stewart Royal Commissions and uses all the relevant investigative talents - lawyers, accountants, police officers, intelligence officers - supplemented where required by tax officers, customs officers and other specialists. Where appropriate, the Authority has concentrated on the financial assets of those whom it has investigated, using the pecuniary penalty provisions of the Customs Act and the Proceeds of Crime Act and referring understated or undeclared income to the Australian Taxation Office. It has also introduced new investigative techniques in some particular areas of organised crime.

The proceeds of crime frozen or secured up to 30 June 1991 as a result of Authority investigations amounted to more than $38m. The Authority also makes use of the money laundering provisions of the Proceeds of Crime Act. Most of the people facing proceedings in this complex area have been charged following Authority investigations. In one investigation, the value of assets frozen or secured is $9m.

The Taxation Office has issued assessments amounting to more than $47m as a result of Authority investigations. In addition, the Authority has notified the Tax Office of a further $22m in understated or undeclared income, and has assisted in the issue of other assessments amounting to more than $14m. These figures demonstrate that the Authority is targetting people at the top of the tree and that it is doing so with some success.

An example of its leadership in the area of investigative technique is the Authority's use of Chinese officers, beginning some years ago, in its investigations into drug importations, an initiative recently taken up by the NSW Crime Commission and the NSW Police Service.

The Queensland Criminal Justice Commission, the NSW Crime Commission and the NSW Independent Commission Against Corruption are well aware that innovative and successful investigative techniques arise from mixing investigative talents. The first two in particular have followed in the Authority's footsteps. The Government commends this path to police forces. The use of accountants and investigative lawyers is critical to the effective investigation of organised crime.

The Authority has also displayed leadership in other areas. It has organised operational conferences on particular aspects of organised crime. It is making a substantial contribution to lifting the standard of strategic intelligence in law enforcement agencies generally. Its innovations with information technology and electronic surveillance have attracted attention elsewhere.

The Government and the Inter-Governmental Committee believe the Authority is an essential element of the Australian law enforcement strategy, and has justified its existence hitherto. It should not be assumed, however, that the Authority can rest of its laurels. As was indicated in the Parliamentary Committee's Report, the Authority's role and function must remain under critical evaluation. While the reasons for the establishment of the Authority are still valid, there has been significant development over the past 8 years in the capacity of Australian police forces to undertake sophisticated investigations. The Authority itself has contributed to those changes, and their implications for the role and operations of the Authority require continuous assessment. Members of the Inter-Governmental Committee look to the new Chairman, Mr Tom Sherman, to move firmly to consolidate and build upon the foundation now established and to lead the Authority in a productive partnership with other law enforcement agencies.

Most of the genuinely held concerns about what the Authority might suffer and do or not do have turned out to have been misplaced. No credible evidence has been forthcoming that the Authority has been a danger to civil liberties. Nor has it been shackled in what it wishes to do: it has never been refused a reference. The prospect of political interference was a concern in 1983 and 1984, but there has been no suggestion that this has occurred. Legal challenges to the Authority's powers and the like have been few - perhaps surprisingly so. Those proceedings which have reached the Federal Court involving the use by the Authority of its powers have all been resolved in the Authority's favour. One such matter did not reach the Court, the Authority having altered its view. That these and similar fears

have been allayed is largely due to the good sense of successive Chairmen and Members of the Authority, and its staff, who have established both its independence and its credibility.

The Parliamentary Joint Committee received 56 submissions and took evidence from 64 individuals at 12 public hearings in six cities. The public hearing with the Authority in the course of the evaluation was the first time that the Committee had heard evidence from the Authority in public. The approach adopted by the Committee in holding public hearings was in contrast to that adopted by a previous Committee in 1988 when conducting an evaluation of the Authority: all its hearings were in private. The public hearings seem to have been successful.

The Authority being constituted as it is, the Government has consulted the Inter-Governmental Committee on the Report's recommendations. What follows is accordingly a response not simply from the Commonwealth but from all nine jurisdictions.

The Parliamentary Joint Committee's first recommendation was that the re-allocation of resources required by police forces to compensate for the Authority's changed emphasis be given urgent attention. These are matters for Police Ministers and Commissioners. No doubt the NCA's new Chairman, Mr Tom Sherman, and the other Members of the Authority, together with the Inter-Governmental Committee, will keep the directions and resource implications of the Authority's investigations under constant review.

The number of police officers attached to the Authority fell significantly between 30 June 1990, when the number was 145, and 30 June 1991, when the number was 95 - a fall of more than one-third. The change in the Authority's emphasis has already returned some resources to police services. The Minister for Justice will be examine recommendation as it affects the Australian Federal Police (AFP), and his State and Territory counterparts will no doubt be doing the same for their police services. The reduction in police numbers is not necessarily permanent or long-term. The Authority's emphasis may well change again and create new demands for police officers. These are properly matters for negotiation as and when the need arises.

The second recommendation is that there be a continuing review of the potential for duplication of intelligence functions between the Authority, the AFP and the Australian Bureau of Criminal Intelligence (ABCI). The Inter-Governmental Committee accepts this recommendation. It will ask the three agencies themselves to keep the matter under review, and it will obtain a report from them annually on the situation.

The need to remove the prospect for duplication has been, and continues to be, a concern of all of the participating jurisdictions. The National Crime Authority Act specifically refers to the need for the Authority to consult with the ABCI. The co-operation between the Authority and the ABCI has improved significantly to the extent that they are jointly involved in the development of several strategic overviews of specific intelligence targets. The current Director

of the ABCI has acknowledged in his evidence to the Parliamentary Committee that the two bodies have a good working relationship and healthy communication links. The Australian Police Ministers' Council, which has responsibility for the ABCI, has before it matters relating to the operational efficiency of the intelligence gathering resources of law enforcement agencies generally, including the Authority, the ABCI, the AFP and State and Territory Police.

The third recommendation is that the Inspector-General of Intelligence and Security be given jurisdiction to investigate complaints against the Authority, its staff and those seconded to work for it. A complaints procedure was recommended by the Inter-Governmental Committee to the Joint Committee, so the Inter-Governmental Committee has no difficulty in accepting the recommendation.

The Government will bring forward legislation to create the position of Inspector-General of the National Crime Authority. It is intended that complaints could be made by members of the public direct to the Inspector-General, or be referred by the Parliamentary Joint Committee or a member of the Inter-Governmental Committee. For the purposes of investigating a complaint, the Inspector-General would be given full and unfettered access to all Authority information, materials and staff. He would also have discretion to refuse to investigate complaints which are frivolous, vexatious, trivial or otherwise without merit, or where he is of the view that no useful purpose would be served. It is not proposed that the Inspector-General would investigate complaints against individuals working for the NCA where such a matter fell within the ambit of existing legislation, such as Commonwealth or State police complaints arrangements. The Inspector-General would report his findings to the Minister responsible for the Authority, and would report annually to the Parliament.

The fourth recommendation is that the Attorney-General's Department, in consultation with the Privacy Commissioner, develop specific privacy guidelines to cover the Authority's activities. The reasons for the recommendations are set out fully in the Committee's report. The Authority has no difficulty with it. The Inter-Governmental Committee accepts the recommendation. It is proposed that compliance with the guidelines, once developed, be monitored by the Inspector-General of the Authority. The Attorney-General's Department will be consulting the Authority and the Privacy Commissioner shortly. It is noted, however, that the matter is complex and not without difficulty - as has been the case in developing similar guidelines for the Australian Security Intelligence Organization.

Recommendations five to seven go to the heart of the relationship between the Joint Committee and the Authority.

Broadly, what is proposed in the Report is that the legislative constraints which limit the Joint Committee's access to certain information about the Authority's activities should be swept away.

The Parliamentary Joint Committee has itself, in the body of its Report, acknowledged that the question of the extent to which it should be permitted access to Authority information is a matter of grave concern to each of the Governments represented on the Inter-Governmental Committee. It is not as simple a matter as is represented by some current and past members of the Parliamentary Committee.

It was not the intention of the Government, nor the Parliament, when the National Crime Authority Act was passed in 1984, that the Parliamentary Joint Committee would become involved in the operational activities of the Authority.

History has shown, however, that the relevant sections of the Act suffer from some ambiguity. This is perhaps due to the fact that these provisions were inserted by the Senate in 1984 and were not as well developed as might have been desirable. Thus, although the original Bill provided for the Inter-Governmental Committee "to monitor generally the work of the Authority", the addition of the Joint Committee provided for it "to monitor and review the performance by the Authority of its functions."

The Inter-Governmental Committee regards itself as the body to which the Authority is primarily accountable. It is the Ministers on that Committee, as representatives of all Australian Governments, who have created the Authority and keep it in being. It is they who give references to the Authority. Without their support, the national character and capacity of the Authority would immediately dissolve. It is they who provide financial and human resources to the Authority, and monitor priorities and direction. It is they to whom accountability is primarily owed. The Joint Committee does not and cannot do any of these things, and the accountability owed to it is accordingly of a different character.

It was recognised in 1984 that, because of the nature of the special powers given to the Authority there was a need for special attention to the balance maintained between the civil liberties of individuals and the operational needs of law enforcement, and to the balance between those civil liberties and the concept of accountability. The Parliamentary Joint Committee was the watchdog established with principal responsibility to ensure that these balances are appropriately maintained.

It is the opinion of both the Government and the Inter-Governmental Committee that certain principles need to be established to ensure that the Parliamentary Joint Committee can fulfil its responsibilities without impinging on the necessary operational security of the NCA's investigations. The Government and the Inter-Governmental Committee are of the unanimous view that the Parliamentary Committee should have access in principle to all non-operational information, but should not have access to operational information the disclosure of which might prejudice - the safety or reputation of a person or the fair trial of a person who has been or may be charged with an offence; the effectiveness of an investigation; or the operations of law enforcement agencies.

The solution first proposed by the Parliamentary Committee to the disputed question of access to information from the Authority is, in effect, that it become the superior body, with powers greater than the Inter-Governmental Committee. By the operation of section 59(5) of the Act, the Authority is unable to furnish to the Inter-Governmental Committee "any matter the disclosure of which to members of the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies". Such matters may be furnished to individual Ministers who have issued the relevant reference, but not to the Committee. The Parliamentary Committee proposes no such constraint on itself in acquiring such material, only on disclosing it.

The Inter-Governmental Committee does not accept this solution.

In paragraph 7.57 of its Report, however, the Parliamentary Joint Committee itself recognises the problems involved in its having unrestricted access to information, and has indicated its willingness to accept a second option which would provide it with the power to access all save "sensitive" information held by the Authority. This appears to the Inter-Governmental Committee to be a preferable approach.

The Government will, after discussions with the new Chairman of the Authority and the Inter-Governmental Committee, present to the Parliament a proposal for an amendment to the National Crime Authority Act which would provide the Parliamentary Joint Committee with access to all non-operational information, together with a clear definition of operational information. The Government accepts that even with a clear definition of the type of information not to be disclosed to the Parliamentary Joint Committee, there may be occasions where the Parliamentary Joint Committee would wish to dispute a decision by the Authority that material was "operational" and therefore not available to the Committee. In the past such situations have not been resolved easily, if at all.

It is proposed to include in the draft legislation a procedure for review of the Authority's decision. It is envisaged that, following a request from the Parliamentary Joint Committee, the Inspector-General of the Authority (referred to in relation to recommendations three and four above) be empowered to review the Authority's determination and report to the Minister responsible to the Parliament for the Authority, who should retain the final decision on disclosure. These arrangements would ensure the accountability of that final decision, through the Minister, to the Parliamentary Committee and the Parliament as a whole.

It is intended that the proposed amendments to the National Crime Authority Act be formulated in a manner acceptable to the Government, the States and Territories, the Parliamentary Joint Committee, and the Parliament as a whole.

Recommendation eight is that the National Crime Authority Act should be amended to confer on a member of the Authority a discretion to hold investigative hearings in public.

This recommendation raises important issues of principle, which are well presented and canvassed in Chapter Seven of the Joint Committee's report. The Inter-Governmental Committee has, in examining this recommendation, also taken into account the view of the Authority itself, which is that the recommendation should be adopted. After very careful consideration, however, the Inter-Governmental Committee has decided that the recommendation should not be taken up, the essential reason being that the risks in the Authority conducting public hearings outweigh the benefits. The risks include danger to the reputations, rights and civil liberties of persons called before public hearings, as well as prejudice to future court proceedings. There are also operational considerations. As is noted above, the Authority's basic role is investigative: its aim is to gather admissible evidence of offences with a view to people being prosecuted. Evidence given at hearings can be and is used as evidence in court, although witnesses at hearings cannot be obliged to incriminate themselves.

In the view of the Inter-Governmental Committee, this sets the Authority apart from the other agencies which are quoted in the Report. The role of the NSW Independent Commission against Corruption, for example, is primarily the exposure of corruption, so that while the Commission can insist on answers to its questions, such evidence given before it is not admissible in proceedings. In this aspect it resembles a Royal Commission, the object of which is the truth rather than admissible evidence. In the present context, the relevant part of the charter of the Criminal Justice Commission in Queensland is the investigation of organised crime which is beyond ordinary police methods, clearly with a view to the gathering of admissible evidence. As the Inter-Governmental Commitee is advised, the Commission has never used its public hearings powers in such investigations. Indeed, the Commission has adopted a properly narrow view of the circumstances in which it will use its public hearings powers. In its 1990-91 Annual Report, it says that the public hearing process "cannot be taken lightly" and "should be reserved for serious matters of substantial public interest which go beyond the conduct of the individual and point out some issue of public principle".

It is relevant to note that the National Crime Authority Act provides for the Authority to hold public sittings (as distinct from hearings) "for the purpose of informing the public of, or receiving submissions in relation to, the general conduct of its operations." The Authority is prevented from divulging at such sittings "any matter the disclosure of which to members of the public could prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence". It is a matter of regret that the Authority in the nearly seven years of its existence has held only five such sittings, the last in March 1990. It may be that the greater use of public sittings could achieve the objectives of those who urge public hearings - notably the fostering of public confidence and a reduction in secrecy - without running the risks attendant on public hearings mentioned earlier. Accordingly, the Inter-Governmental Committee will be asking the Authority to examine that possibility, and in doing so to consult with the Joint Committee. The possibility of some legislative change to section 60 of the Act is left open, but not so as to change the character of the sittings as distinct from hearings, nor to reduce the existing safeguards. Any proposals the Authority

might wish to make will be carefully considered by the Commonwealth and of course by the Inter-Governmental Committee.

Recommendation nine is that at an appropriate time in the future the appointment of Authority Chairmen be formally reviewed. This recommendation arose from the criticisms of a number of witnesses who appeared before the Joint Committee and urged that judges not be appointed to the position of Authority Chairman. The recommendation has been overtaken by events with the appointment of Mr Sherman as Chairman of the Authority. Mr Sherman is not a judge, but he is a distinguished legal practitioner. It is the sole concern of the Government and members of the Inter-Governmental Committee in such matters that the appointee be the best person available.

Recommendation ten is that consideration be given to appointing a senior police officer, either serving or retired, as a member of the Authority. The Inter-Governmental Committee is of the view that the sole concern in assessing prospective members of the Authority should be the suitability of available candidates to fulfil that role, regardless of background. On this basis, no special consideration will be given to a police officer, serving or retired. Neither is such a person in any way disqualified from appointment. The question of future membership will be discussed with members of the Inter-Governmental Committee prior to the expiry of the current members' terms of office on 30 June 1992.

The eleventh and last recommendation is that the Attorney-General's Department consider the effect of section 12 of the National Crime Authority Act and address any ambiguities that may exist in subsection 12(4). This recommendation is entirely acceptable. An examination of the matter is in hand, and the considered views of the Authority will be taken into account, as will those of the Inter-Governmental Committee.

The Government and the Inter-Governmental Committee will continue to monitor and review the activities of the National Crime Authority, as will the Parliamentary Joint Committee.