CHAPTER 7

ACCOUNTABILITY - THE IMPACT OF SECRECY PROVISIONS

INTRODUCTION

7.1 Some Authority activities will still require a high degree of secrecy. Future Directions, the current Corporate Plan and the attitudes of Justice Phillips all reflect a commitment to greater openness and accountability. However none of these changes alter the NCA Act. The changes cannot therefore be relied upon to last, because Authority membership and policies will change over time. For this reason, the Committee canvassed issues of accountability, and treated arguments that pre-dated Future Directions as relevant.

7.2 It was generally accepted in submissions and evidence to the Committee that the Authority cannot be totally open with the public about all its activities. It was argued by many, however, that the Authority should be more open. For example, the submission from the Law Council of Australia stated: 'Real questions arise whether a significant part of NCA information and hearings should not be made public'.[395]

7.3 It is argued that if the Authority is to be more open, changes to the NCA Act are required.[396] As the Australian Federal

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395. p. 4. See also Evidence, p. 752 (NSW Council for Civil Liberties); submission from the NSW Bar Association, p. 4.

396. In addition to the views of Mr Moffitt and Mr Griffith quoted below in paragraphs 7.7 and 7.8, see for example, Evidence, p. 348 (Victorian Council for Civil Liberties); p. 1149 (Queensland Bar Association); pp. 1199-1200 (Inspector John Johnston); p. 1339 (Mr Frank Costigan QC); p. 1526-27 (Mr Mark Findlay); submissions from the Tasmania Police, p. 7; Hon. Andrew Peacock MP, pp. 1-2. Sir Max Bingham QC, the present head of the Queensland CJC was a Member of the Authority from 1984 to 1987.

Police Association commented: 'there is sufficient contention to warrant amendments designed to produce legislative certainty'.[397] In some situations, the Authority quite properly refuses to provide information because the Act clearly prevents it from doing so. In many other cases, it has consistently refused to divulge information, arguing that the NCA Act prevented it from doing so despite legal opinions to the contrary.[398]

7.4 The major part of this chapter, therefore, consists of assessing the need to amend the NCA Act to improve provision of information and hence improve accountability. Consideration is first given to what information the Authority should be required to disclose to the Committee at its request. The next question is whether there ought to be any restrictions on disclosure by the Committee, or its members, of information received from the Authority *in camera*. Consideration is then given to whether the Act unnecessarily restricts the Authority from providing information to law enforcement agencies and the public. A major issue in this context is whether some Authority hearings should be held in public.

On 15 April 1991 he commented: 'We have been very enthusiastic about avoiding the difficulties that seem to have befallen the NCA, which, to a very large extent, I think are attributable to its inability to take the public into its confidence, because of its legislation, I should say'. (Queensland, Parliamentary Criminal Justice Committee, *Minutes of Evidence taken on 15 April 1991 at a public hearing ...*, May 1991, p. 10.)

397. Evidence, 1097.

398. cf. *Initial Evaluation*, para. 4.33: 'the Committee believes that the Authority has perhaps been over-zealous in its application of the secrecy provision in its Act, section 51'.

SECRECY AND PROVISION OF INFORMATION TO THE COMMITTEE

Scope of the Problem

7.5 Differing opinions exist on how sections 51 and 55 limit the power of the Committee to obtain information from Authority members and staff. The Authority has quite properly been concerned not to provide information where to do so could, depending on the interpretation adopted, be in breach of the Act. Uncertainties as to the proper interpretation of sections 51 and 55 of the NCA Act have resulted in disagreements between the Committee and the Authority in the past on whether the Authority was obliged to meet Committee requests for particular information.

7.6 The Committee earlier this year authorised the publication of the differing formal opinions which have been provided to it by:

- Mr C.M. Maxwell, Melbourne Bar, 3 June 1985;
- Mr P. Brazil, Secretary, Attorney-General's Department, 6 August 1985;
- Mr Harry Evans, Clerk of the Senate, 13 August 1990 and 28 August 1990;
- Mr Gavan Griffith QC, Solicitor-General, 20 August 1990.

A further opinion of the Solicitor-General of 12 August 1991, which refers to the NCA Act in the context of considering secrecy provisions and parliamentary inquiries generally, was tabled in the Senate on 16 August 1991.

7.7 The Committee does not consider it necessary to canvass the merits of the competing views expressed in these opinions. The Hon. Athol Moffitt CMG, QC referred to past confrontation between the Committee and the Authority and to the conflicting legal opinions:

> The problem you now have is that whether some of

> those opinions are right or wrong, they are different, and you are stuck with them. Some of them are opinions at high level. My theme is that, because of that history and because of those opinions, it is no good adding another opinion of mine or somebody else's as to which one is right or wrong. It is necessary to fix it up - to fix up the Act and to fix up the ambiguities ...[399]

7.8 The Solicitor-General, Mr Gavan Griffith QC, stated in reference to the secrecy provisions of the NCA Act:

> It always has been appreciated that the statutory provisions were imprecise. Although, as here, it is possible to advise with varying levels of certainty in respect to particular matters of proposed inquiry, clearly there is no future in seeking solutions to practical issues of inquiry by seeking the confident advice of counsel. What is needed are statutory provisions enacted to implement clear policy decisions on the relationship between the Committee and the Authority.[400]

The Committee concurs with the views of Mr Moffitt and Mr Griffith.

7.9 Subsections 51(1)-(2) of the NCA Act provide:

> (1) This section applies to:
> (a) a member of the Authority; and
> (b) a member of the staff of the Authority.
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> (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act or otherwise in connection with the performance of his duties under this Act, and either while he is or after he

399. Evidence, p. 1140. See similarly, Evidence, p. 1151 (Queensland Bar Association).

400. Gavan Griffith QC, 'In the matter of the Parliamentary Joint Committee on the National Crime Authority and National Crime Authority Act 1984, sections 51 and 55: Opinion', 20 August 1990.

ceases to be a person to whom this section applies:

(a) makes a record of any information; or

(b) divulges or communicates to any person any information;

being information acquired by him by reason of, or in the course of, the performance of his duties under this Act, is guilty of an offence punishable on summary conviction by a fine not exceeding $5,000 or imprisonment for a period not exceeding 1 year, or both.

7.10 Part III of the NCA Act contains sections 52-55, which deal with the establishment and operation of the Committee. Subsection 55(1), which is set out on page xiii above, defines the duties of the Committee using fairly broad terms. Subsection 55(2) provides, however:

Nothing in this Part authorizes the Committee:

(a) to investigate a matter relating to a relevant criminal activity; or

(b) to reconsider the findings of the Authority in relation to a particular investigation.

7.11 In effect, two separate issues are involved. One is the distinction between 'sensitive' information (that is, information which, if released, might prejudice Authority operations, trials, or the safety or reputation of individuals) and other information, with the Authority understandably concerned about the provision of the former. The second issue is what Authority decisions and activities lie outside the areas that the Committee is authorised to deal with. Much, but by no means all, that the Authority regards as sensitive also relates to matters that some would argue lie in the areas beyond the Committee's scrutiny.

7.12 As a hypothetical scenario, the Authority could withhold material by:

. focusing on the nature of the material, and relying on the secrecy provision (section 51);
. focusing on the purpose for which the material was sought,

and relying on the argument that the Committee was acting outside its duties (section 55); or

. combining the two approaches, and arguing that, because the Committee was acting outside its duties under the Act, the proviso to the secrecy provision ('except for the purposes of this Act ...') did not apply, and therefore the secrecy provision barred the supply of the material.

7.13 The question of which of the legal opinions before the Committee is correct has not been resolved. There is no court decision on the point. This has prompted the Committee to consider various alternatives that remain open. Any effective solution to the problem has to deal with all the alternatives - that is, with not only section 51 but also subsection 55(2).[401] The uncertainty left by subsection 55(2) on the ambit of the Committee's duties creates other problems apart from its impact on the provision of information by the Authority.

Need for Reform

7.14 On 5 November 1990, the Victorian Council for Civil Liberties told the Committee it did not believe that the Committee could carry out its evaluation, given the present statutory framework.[402] The Council's belief has not been supported by events. The Committee acknowledges that the Authority has in recent times cooperated in providing the Committee with requested information. On 29 July 1991, Justice Phillips referred to the extensive written and oral briefings he has given the Committee and told the Committee:

> I also answered your questions and each of you know, despite occasional misleading media reports to the contrary, that I have never ever refused or declined to

401. Evidence, pp. 358-9, 364, 1393-94 and 1403 (Victorian Council for Civil Liberties); p. 1101 (Australian Federal Police Association); pp. 1141-44 (Hon. Athol Moffitt CMG, QC); pp. 1520-21 (Mr Mark Findlay).

402. Evidence, p. 342.

answer a question from you as to the National Crime Authority's activities - not once.[403]

7.15 The Committee considers that the Act should be amended. It regards the issue of provision of information as too important to be left to the goodwill between Authority members and staff on the one hand and Committee members on the other, all of whom are subject to change. As Mr Frank Costigan QC said of Committee monitoring of the Authority: 'In the end you cannot rely on goodwill for that; I think you do need some powers.'[404] The present uncertainty has the potential to place Authority members in the awkward position of wishing to provide information to the Committee yet believing that the Act, on some views, prevents them doing so. The Committee does not regard it as a satisfactory long-term solution that Authority members and staff be placed in this position.

7.16 Moreover, it is important, in the Committee's view, that the public see the Committee as having a right of access to information from the Authority, in order that they perceive the Committee to have the ability to monitor the Authority effectively. This can only be achieved by litigation or by amending the NCA Act. Seeking a court decision would be undesirable on many grounds. There is no guarantee that a single case would resolve all the points on which there is uncertainty.

Amending Section 55

7.17 As explained in paragraphs 7.11 to 7.13 above, both section 51 and section 55 require clarification. Section 55 is considered first. Independently of the question of access to information, consideration needs to be given to whether subsection 55(2) imposes unnecessary or inappropriate restrictions on the performance of the Committee's duties to monitor and review. Both matters are conveniently considered together.

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403. Evidence, p. 1663.

404. Evidence, p. 416.

7.18 There are two broad options for amending subsection 55(2). One involves attempting to state more clearly what matters the Committee may or may not undertake. The other involves simply repealing subsection 55(2), leaving to the judgment of the Committee what matters it would choose to inquire into in discharge of its duties under subsection 55(1).

7.19 The aim of the limitations contained in subsection 55(2) appears to have been to stop the Committee from becoming an investigative body competing with the Authority or duplicating its work, or from acting as a de facto court of appeal reconsidering an Authority finding by redoing whatever investigation or process led the Authority to that finding.[405] It can be argued that the subsection

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405. Senator the Hon. Don Chipp, whose amendment altered the Bill to provide for the Committee, described the Committee's role:

> It could be a vehicle to receive complaints from people outside to the effect that the Authority is not doing its job, has not pursued a particular investigation, or has disregarded evidence of criminal behaviour which it should have regarded. Further, if somebody has his or her civil liberties infringed, it could be a vehicle to receive complaints of that sort. (Senate, *Hansard*, 6 June 1984, p. 2646)

In supporting the amendment, the Opposition spokesman, Senator the Hon. Peter Durack QC, said during debate on what is now section 55:

> The purpose of the committee will not be to get into the detail of particular cases. I think it would be most undesirable for the Parliament to turn itself into a grand inquisitor of crime. That is a quite inappropriate role for this Parliament or any committee of this Parliament. The amendment specifically provides that it is not to investigate particular cases. It will not be second guessing what the Authority has done in a particular case. (ibid., p. 2650)

Senator the Hon. Gareth Evans QC commented in the same debate:

> The dangers are overwhelmingly that under the guise of monitoring, under the guise of review, we will have a parliamentary committee exercising all the coercive

as presently worded not only does this but also prevents scrutiny that ought properly be open to a body charged with monitoring and reviewing the Authority's activities.

7.20 To give a hypothetical example, paragraph 55(2)(b) states that the Committee is not authorised 'to reconsider the findings of the Authority in relation to a particular investigation'. In so far as this prevents the Committee functioning as a court of appeal over the Authority, it is clearly appropriate. But the paragraph arguably extends to other matters. A number of prosecutions based on Authority investigations have failed when a key witness did not give evidence in the way the Authority expected. It would seem a legitimate activity for the Committee, given its duties, to review the adequacy of the Authority's procedures for assessing such key witnesses. To do this, however, would arguably involve reviewing a 'finding' by the Authority in each case that the particular witness was reliable, credible and so forth.

7.21 The Committee's review of procedures used by the Authority may show them to be seriously defective. However much the Committee attempts to confine its review to the adequacy of procedures, such a conclusion cannot help but undermine any Authority 'findings' made using the procedures in question. In practical terms, the Committee will be reconsidering the findings, even though its objective was only to review or monitor the adequacy of Authority procedures that led to the findings.

7.22 To add to the difficulty, it is a matter for argument whether, in referring to 'findings', the intention of the subsection is to cover only conclusions formally expressed by the Authority as

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> powers of which parliamentary committees are capable in fact to explore and investigate what it believes is a legitimate investigation, in the public interest, of organised criminal activity. But it will inevitably do that in a way that will have the potential to put at risk and in a quite serious way individual liberties. The only thing that makes the proposed amendment even remotely tolerable is the language of ...[what is now subsection 55(2) of the NCA Act]. (ibid., p. 2651)

'findings' at the time they were made, or whether any non-trivial conclusion reached by the Authority, whether expressly or by necessary implication, constitutes a 'finding'.

7.23 A second hypothetical example relates to paragraph 55(2)(a). This states that the Committee is not authorised 'to investigate a matter relating to a relevant criminal activity'. In so far as it prevents the Committee conducting investigations with a view to preparing prosecution briefs, the provision is plainly appropriate. But anything relating to a reference given to the Authority is arguably a 'matter relating to a relevant criminal activity'. If the Committee wishes to investigate how efficiently or effectively the Authority has pursued one of its references, arguably it is 'investigating a matter related' in the way prohibited by paragraph 55(2)(a).

7.24 The Victorian Council for Civil Liberties advocated repeal of subsection 55(2):

> Section 55(2) should be repealed. We say that is the mischief that has been caused to the system and we say that, if accountability is to exist at all, it is imperative that the limitations on the power of the Committee to fulfil its functions be lifted. We say that all the niceties of how this should be done are very easily resolved: you repeal section 55(2) ...[406]

7.25 The Committee rejects this solution. The Committee considers some of the limitations imposed by subsection 55(2) to be appropriate, as noted in paragraphs 7.19 and 7.20. The Committee considers, however, that subsection 55(2) should be amended to remove inappropriate limitations.

7.26 A number of witnesses who gave evidence to the Committee called for the deletion of the words 'a matter relating to'

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406. Evidence, p. 1391. See similarly the submissions from the Police Federation of Australia and New Zealand, p. 9; the Police Association of South Australia, p. 4.

in paragraph (a) of the subsection.[407] On 5 February 1991, Justice Phillips stated that there was 'an arguable case' for removal of these words.[408] Senator Spindler's private Senator's Bill currently before the Senate would amend the Act by deleting these words.[409]

7.27 The term 'findings' in paragraph 55(2)(b) should be better defined. Its meaning should be limited to major matters on which the Authority makes conclusions formally expressed to be findings. The paragraph should also be amended to make clear that the paragraph does not prevent the Committee reviewing the general adequacy of procedures used by the Authority, even if the end result of the Authority's use of the procedures is the making of a 'finding'.

7.28 The term 'investigation' in paragraph 55(2)(b) should be defined to make clear that the paragraph refers only to investigations that the Authority conducts into relevant criminal activity. The term should not cover inquiries or investigations into alleged maladministration, alleged unauthorised disclosures of information, personnel issues or other events within the Authority.

7.29 In summary, the Committee **RECOMMENDS:**

(a) that paragraph 55(2)(a) of the NCA Act be amended by deleting the words 'a matter relating to';

(b) that paragraph 55(2)(b) be amended to make it clear that the expression 'findings' refers only to major matters formally declared by the Authority to be findings at the time they are made, and does not include all conclusions reached by the Authority; and

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407. Evidence, p. 358 (Victorian Council for Civil Liberties); p. 512 (Police Federation of Australia and New Zealand); p. 1341 (Mr Frank Costigan QC). The same amendment was supported in the submission from the Hon. Andrew Peacock MP, p. 2.

408. Address to the Law Institute of Victoria, 5 February 1991, p. 6.

409. National Crime Authority (Duties and Powers of Parliamentary Joint Committee) Amendment Bill 1990, clause 4(a). The Bill was introduced into the Senate on 21 December 1990.

(c) that paragraph 55(2)(b) be amended to make clear that it does not prevent the Committee reviewing alleged maladministration within the Authority or the general adequacy of procedures used by the Authority, even if the end result of the Authority's use of the procedures is the making of a 'finding' in particular cases.

Amending Section 51

∃ Two options for reform

7.30 The amendments recommended in paragraph 7.29 will clarify the Committee's role. This will remove one impediment to the Committee's access to information. The remainder of this section considers a second impediment, section 51.

7.31 The Committee considers two options for amending section 51. One would allow the Committee unrestricted access to Authority information. This option is considered in paragraphs 7.33 to 7.37. If this option is to be adopted, the question arises whether there should be any restriction on Committee disclosure of information received *in camera* from the Authority. This question is considered in paragraphs 7.38 to 7.56.

7.32 The second option for amending section 51 would limit the information that the Authority is required to provide to the Committee. This option is considered in paragraphs 7.57 to 7.60. The limitations on what the Committee may receive would ensure that it does not receive 'sensitive information' - that is, information which, if publicly disclosed, might prejudice individual rights or safety, legal proceedings, or the Authority's operational methods.[410] Therefore, under the second option, there is no need to consider restrictions on what the Committee may disclose.

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410. See paras. 7.46 and 7.59 below for a more comprehensive definition of what the Committee refers to for convenience as 'sensitive information'.

∃ Option one - removing all restrictions

7.33 The Committee notes that on 8 November 1990 Senator Crichton-Browne introduced a private Senator's bill into the Senate to amend section 51.[411] Senator Spindler's Bill, referred to in paragraph 7.26 above, also deals with section 51.

7.34 Both Bills would amend section 51 in the same manner, by providing that the section does not affect the communication of material by Authority members and staff to the Committee. The Committee's preferred solution is that the amendment proposed in these Bills be adopted.

7.35 When the Hon. Justice Frank Vincent appeared before the Committee he was asked by the Chairman to comment on the fact that the Committee had had to operate with a partial blindfold due to the wording of the Act (or the interpretations put on that wording). He responded:

> It is all right for us as the wider community to have that, trusting that the monitoring will be done appropriately by the proper elected representatives. It is not acceptable that the monitoring body itself has a partial blindfold.[412]

The Hon. Athol Moffitt CMG, QC made the same point:

> The Authority must be trusted and must feel it has the confidence of the Committee and Parliament, so confrontations should be avoided, but in my view this Committee must in the end have a reserve power which is unrestricted. This is critical in respect of monitoring a permanent body so powerful as the National Crime Authority. The more it operates in secret, and the wider

411. National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990.

412. Evidence, p. 382.

> its discretions ... the more important it is that the watchdog have no legal restraints against watching.[413]

7.36 Mr Barry O'Keefe QC, President of the New South Wales Bar Association, told the Committee:

> I really do not understand why those who are supervising the operations of an organisation ought not to be entitled to know all there is to know about the operations of that organisation. It makes a bit of a nonsense of the supervisory function if you do not really know what you are supervising.[414]

The Committee endorses these views.

7.37 Accordingly, the Committee **RECOMMENDS that section 51 of the NCA Act be amended so as to make clear that section 51 does not prevent members and staff of the Authority providing any information or documents to the Committee, or appearing before it.**

∃ Disclosure by the Committee

7.38 Allowing the Committee full access to Authority information creates the theoretical possibility that the Committee, or individual members of it, might disclose 'sensitive information'.[415] A number of suggestions were made in evidence to the Committee for altering the present rules applying to disclosure of information provided to the Committee *in camera* by the Authority.

7.39 Such disclosure might, potentially, occur in a number of ways. The Committee might decide to authorise publication of the

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413. Evidence, pp. 764-65, emphasis added.

414. Evidence, p. 706. See also Evidence, pp. 1066-67 (Law Council of Australia); p. 1612 (Mr David Smith).

415. See para. 7.59 below on the meaning which the Committee gives to this expression.

information, either generally or to a limited class of persons. The Committee might disclose the information in a report tabled in the Parliament, which, once the House of Representatives or the Senate agrees to the tabling, becomes publicly available.

7.40 Apart from disclosures authorised by the Committee or the Parliament, the information might be disclosed by an individual Committee member, a former Committee member, a member's staff, a member of the Committee's secretariat or an adviser to the Committee. These persons may have come into possession of the information in the course of their duties.

7.41 The law is already adequate to deal with some of these avenues of possible disclosure. Section 13 of the *Parliamentary Privileges Act 1987* provides:

> A person shall not, without the authority of a House or a committee publish or disclose–
> (a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera: or
> (b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence,
> unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.
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> Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or (b) in the case of a corporation, $25,000

7.42 This provision deals with documents only if they are prepared for submission, and hence would not cover documents prepared by the Authority for other purposes but received *in camera* by the Committee (e.g. an internal Authority report, a copy of which

was provided to the Committee). However, Senate Standing Order 37 applies to the Committee and it refers to all documents presented to a committee:

> The evidence taken by a committee and documents presented to it which have not been reported to the Senate, shall not, unless authorised by the Senate or the committee, be disclosed to any person other than a member or officer of the committee.

Breach of this Standing Order can be treated as a contempt of Parliament and punished by a House of the Parliament with a maximum penalty of 6 months imprisonment or a $5,000 fine.[416]

7.43 The remaining issue is whether there should be any restriction on the Committee's present ability to authorise disclosure. At present, the only formal restriction on the Committee's recommunication of material provided to it by the Authority is that contained in the resolution of both Houses of the Parliament relating to the powers and proceedings of the Committee. Paragraph (q) of the current resolution provides:

> That, in carrying out its duties, the committee or any subcommittee, ensure that the operational methods and results of investigations of law enforcement agencies, as far as possible, be protected from disclosure where that would be against the public interest.[417]

7.44 For completeness, it should be noted that the Committee is required to observe the resolutions on parliamentary privilege agreed to by the Senate on 25 February 1988. Paragraph 1(8) of these resolutions provides:

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416. *Parliamentary Privileges Act 1987*, s. 7.

417. Resolution agreed to by the House of Representatives on 9 May 1990 and by the Senate the following day. The resolution is similar to those agreed to by previous Parliaments.

> Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.

7.45 On 5 February 1991, Justice Phillips suggested: 'The members of the Committee should accept a statutory obligation of confidentiality'.[418] The Hon. Andrew Peacock MP, the shadow Attorney-General, commented on this suggestion:

> I wholeheartedly agree with this suggestion. In my view, it is simply a matter of commonsense that should the Authority be more open in its dealings with the Committee, members of the Authority must have confidence that the Committee will treat sensitive information, particularly concerning any on-going operations, in an appropriate manner.[419]

7.46 Senator Spindler's private Senator's Bill provides a mechanism by which the Authority may object to the publication by the Committee of certain information received *in camera* from the Authority. The Committee must give notice to the Authority of its intention to disclose. The Authority may respond by certifying that disclosure of that information would:

> (a) identify persons in a manner which would be prejudicial to the safety or legal rights of those persons;
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> (b) prejudice legal proceedings, whether or not those proceedings have commenced; or
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> (c) disclose the operational methods of the Authority in

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418. Address to the Law Institute of Victoria, 5 February 1991, p. 5.

419. Submission, p. 3.

> a manner prejudicial to the operations of the Authority.[420]

The Committee and its individual members are prohibited from disclosing the information to the Parliament if the Authority makes a certification. The Committee may, however, make unrestricted reports to the Commonwealth Attorney-General or to the IGC.

7.47 The Spindler Bill recognises that disputes could arise between the Committee and the Authority on whether disclosure of a piece of information would have any of the effects defined in the Bill.

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420. National Crime Authority (Duties and Powers of Parliamentary Joint Committee) Amendment Bill 1990, clause 4. The NCA Act already contains a number of restrictions on the provision of information that are framed in terms of the harm that would or could occur if that information were to be revealed. Subsection 59(5) provides:

> The Authority shall not 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 and, if the findings of the Authority in an investigation include any such matter, the Authority shall prepare a separate report in relation to the matter and furnish that report to the Commonwealth Minister or Minister of the Crown of the State by whom the relevant reference was made.

Subsection 60(5) provides that the Authority shall not divulge in a public sitting or bulletin: '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'.

Subsection 61(4) of the NCA Act deals with the Authority's annual report and provides:

> In any report by the Authority under this section the Authority shall take reasonable care to ensure that the identity of a person is not revealed if to reveal his identity might, having regard to any material appearing in the report, 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.

The Bill makes provision for an arbiter to resolve such disputes. The arbiter is to be a judge of the Federal Court of Australia, acting as a private arbiter, not a judge of the Court.

7.48 The Committee considers that, if its recommendation in paragraph 7.37 is accepted, there should be restrictions on what *in camera* information received from the Authority the Committee may disclose. It endorses the Spindler Bill as a means of dealing with the matter, subject to the qualifications in the following paragraphs.

7.49 The Spindler Bill's mechanism applies 'Where the Committee considers that it is necessary, in a report to Parliament, to disclose ...'.[421] The Bill does not expressly apply to disclosure in other ways, although it is a necessary implication from the purpose of the Bill that it does so.

7.50 The Committee considers that, to remove any possibility of doubt, the Bill should expressly apply to all forms of disclosure.

7.51 The Spindler Bill's mechanism operates 'Where the Committee considers that it is necessary, in a report to Parliament, to disclose ...'[422]. It might be argued that this does not cover disclosure in a dissent to a Committee report which is tabled with the report.[423]

7.52 The Committee considers that the Spindler Bill should be amended to avoid possible doubt on this point. The Bill should state that its mechanism has to be followed for a dissent to a Committee

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421. Clause 4, adding s. 55(3) to the NCA Act; emphasis added.

422. Clause 4, adding s. 55(3) to the NCA Act; emphasis added.

423. The situation referred to in the text is where the Committee itself does not propose to disclose *in camera* evidence, only the dissenting Committee member does. The Bill does expressly cover the situation in which the Committee proposes disclosure, the proposal is referred to the Authority, and the Authority responds by saying that the material falls within one of the grounds of objection. In such a case an individual Committee member is bound by the restrictions and procedure in the Bill in relation to that specific disclosure in the same way as the Committee itself.

report in the same way as for the report itself. To do otherwise would allow a single member of the Committee to bypass a mechanism which the Committee as a whole was obliged to follow.

7.53 The Committee finds the use of an arbiter attractive as a means of resolving disputes between the Authority and the Committee over access to information. The Committee agrees with Justice Phillips, who asked the Committee:

> to try to seek a parliamentary solution bringing in another person or body. If I may respectfully say so, just as it would be unfortunate if the National Crime Authority were to sit in judgment on itself, it might also be said to be unfortunate if your Committee, in effect, were to sit in judgment on itself. It could be to your advantage to be able to say in a given situation, 'This went to an independent arbiter, and this is what that person or that body decided, and we acted accordingly'.[424]

7.54 However, the Committee does not consider it appropriate that a Federal Court judge act as arbiter. In the Committee's view, the arbitral function should be conferred on the Commonwealth Minister whose portfolio includes responsibility for the National Crime Authority. At present that Minister is the Attorney-General.

7.55 The Committee considers that political factors will be involved in many of the arbiter's decisions. It is not fair to ask a judge (even acting as a private arbiter) to resolve disputes of this type. If a Minister is arbiter, his or her decisions can be criticised in Parliament and elsewhere in a way that decisions of a judge cannot. The Minister can be called on in the Parliament to defend Ministerial decisions. Should the Parliament feel sufficiently strongly about a decision, the Minister could be obliged to reconsider it. It would not be appropriate for the Parliament to put the same pressure on a judge.

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424. Evidence, pp. 1694-95.

7.56 In summary, the Committee **RECOMMENDS that the Government support the amendments set out in clause four of the National Crime Authority (Duties and Powers of Parliamentary Joint Committee) Amendment Bill, introduced into the Senate by Senator Spindler on 21 December 1990, subject to the following qualifications:**

(a) that the Bill should <u>expressly</u> apply to all forms of disclosure, not just disclosure in reports to the Parliament; and

(b) that the Bill should <u>expressly</u> cover all aspects of disclosure in a dissent by a Committee member to a report by the Committee

(c) that the Commonwealth Minister with portfolio responsibility for the Authority should be the arbiter, not a Federal Court judge as provided for in the Bill.

∃ Option two - restricting Committee access to information

7.57 In paragraph 7.37 the Committee recommended that it be given unrestricted access to Authority information. The Committee recognises that this recommendation may not be fully acceptable to the Government, and may not be fully implemented. Accordingly, the Committee proposes the following, which it regards as a second best, but still acceptable, solution. In proposing this solution, the Committee has taken into account its recommendation in paragraph 6.77 that there be an Inspector-General with unrestricted access to Authority information who will be able to deal with individual complaints.

7.58 The Committee understands that the main concern of the Government and the IGC is over the Committee's access to information that is variously described as 'sensitive' or 'operational'. The Committee considers that the NCA Act should be amended to define this category of information.

7.59 The Committee regards the formula in the Spindler Bill (set out in paragraph 7.46 above) as an appropriate definition of 'sensitive information'. If the Committee's primary recommendation for amendment of section 51 is unacceptable to Government, the Committee recommends that this formula be inserted into section 51 to define the information which the Authority is not obliged to provide to the Committee.

7.60 As noted in paragraph 7.47 above, a dispute may arise between the Committee and the Authority over whether a piece of information fits within this definition. The Committee endorses the use of a third party to arbitrate these disputes. For the reasons given in paragraph 7.55 above, the Committee considers that the Commonwealth Minister with portfolio responsibility for the Authority should be the arbiter.

PROVIDING INFORMATION TO LAW ENFORCEMENT AGENCIES

7.61 The Authority told the Committee that 'there has been a perception of it treating intelligence material as confidential. Its present policy and conduct is of active dissemination of such material.'[425] The Committee was told that in the past Authority staff have sometimes told other law enforcement agencies that Authority information cannot be shared because of the secrecy provision in the NCA Act.[426]

7.62 The Committee does not consider that the provision

425. NCA, Written Answers, July 1991, B2.

426. Evidence, p. 518 (Police Federation of Australia and New Zealand); pp. 1276-68 (Assistant Commissioner Graham Sinclair). Others told the Committee of their impression that the secrecy provisions of the NCA Act prevented intelligence sharing, without claiming to have been explicitly told this by Authority staff. See for example Evidence, pp. 957, 963, 982 (Commissioner D.A. Hunt); p. 1193 (Tasmania Police); p. 1200 (Inspector John Johnston).

constitutes a genuine barrier to appropriate information sharing with law enforcement agencies.[427] Sections 11 and 59 of the NCA Act contain specific provisions authorising the furnishing information to other law enforcement agencies. Section 59A allows the information-furnishing powers conferred on the Chairman in section 59 to be delegated to other Authority members and to Authority staff. In the Committee's view, past problems in this area arose from the Authority's attitude to secrecy, not the requirements of the NCA Act.

7.63 There was some recognition that criticisms of what was seen as the Authority's excessively secretive attitude have to some extent been overtaken by the Authority's change in attitude. Mr Chris Eaton, for example, referred to:

> the openness of Judge Phillips. There is a marked improvement in the attitude, as far as we are concerned, of the NCA. To that degree alone, its openness has given us some insight into its difficulties and problems.[428]

7.64 Views such as these confirmed the Committee in its view that the basic problem with provision of information to law enforcement agencies was one of attitude, rather than one caused by the secrecy provision of the NCA Act.

7.65 The provisions in the NCA Act for furnishing information to other bodies refer to law enforcement agencies and government departments and instrumentalities. Professional bodies with statutory responsibility for enforcement of the standards of their members are not included. The submission from the Law Institute of Victoria noted that the Authority has refused to supply it with details of alleged criminal activity involving solicitors. If the evidence supports the allegations, the solicitors can of course be charged. Any disciplinary action can follow the criminal trial, using information disclosed at that trial. But the Institute submission pointed out:

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427. See Evidence, p. 1268, where Assistant Commissioner Graham Sinclair expressed the same view.

428. Evidence, p. 1105.

> It may well be that there are some instances of professional behaviour which come to the attention of the Authority which are questionable and unacceptable but which do not amount to crimes for which charges can be laid. That same behaviour may amount to professional misconduct for which action can be taken by the Law Institute. Under the present requirements for secrecy under the National Crime Authority Act 1984 no action would be taken unless the information came to the attention of the Institute from another source.[429]

7.66 The Committee asked the Authority if it regarded the secrecy provisions as a fetter in this regard, and if it thought the NCA Act should be amended to authorise the Authority to pass relevant information to bodies having statutory powers to discipline their members. The Authority responded:

> The answer to both questions is no. It is open to the Authority under section 59 of the Act to notify either the Commonwealth Attorney-General (who may then notify his relevant State counterpart) or the IGC Minister of State concerned of such allegations, which may then be referred to the Law Institute. The Authority has used this avenue (in another State), which would also appear to be open in respect of other professional bodies.
>
> The Authority is not aware of any case where it refused to supply to the Institute details of alleged criminal activity by solicitors.[430]

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429. pp. 1-2.

430. NCA, Written Answers, August 1991, E2.

PROVIDING MORE INFORMATION TO THE PUBLIC

Authority's Relations with the Media

7.67 In the Committee's view, the Authority's attitude to informing the public of its activities is crucial. An attitude that everything that the Authority does needs to be shrouded in secrecy would risk defeating whatever specific steps might be put in place to increase the Authority's accountability. It was argued to the Committee that the Authority's attitude on secrecy in earlier years had been unnecessarily strict.[431]

7.68 The Committee is pleased to note that the Authority has taken a less restrictive view on what information it can appropriately provide to the public. The Authority's submission noted: 'the NCA has over the last couple of years taken a number of steps to improve its public profile, including the appointment of a full-time Media Liaison Officer ...'.[432] Justice Phillips was quoted earlier this year as saying:

> There will always be a need for some confidentiality because the reputation of individuals or indeed their physical safety will be involved but, given that, I am convinced that there is a great amount of the authority's activities which can be and should be publicly disclosed.[433]

7.69 The Authority's *Corporate Plan July 1991 - June 1994* has as one of the nine objectives of the Authority: 'Promote public awareness and understanding within the Australian community of the nature and extent of organised crime and the role of the NCA

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431. e.g. see Evidence, p. 1199 (Inspector John Johnston); p. 1267 (Assistant Commissioner Graham Sinclair); p. 1612 (Mr David Smith).

432. p. 37.

433. C. Mitchell, 'In open partnership', *Law Institute Journal*, March 1991, p. 122.

and other agencies in counteracting it'.[434]

One of the six strategies the Plan identifies for achieving this objective is for the Authority to:

> Follow a media policy which is both proactive and responsive, to enable the NCA's point of view or information about the organisation and its operations to be offered promptly when issues affecting it are of potential interest to the public.[435]

7.70 The Committee endorses the Objective and the strategy. The Committee notes that subject matter of the Authority's operations - major and organised crime - is intrinsically a subject of high media interest. Yet on such a subject the Authority has quite properly to keep a considerable amount of information confidential from the media. A degree of criticism from the media of Authority secretiveness is therefore to be expected.

7.71 The strategies set out in the Authority's Corporate Plan indicate that it has learnt from its experiences with the media over the years.[436] As a result of these strategies, the Committee would expect there to be somewhat less friction between the Authority and the media in the future. But the basic conflict between the media's desire to know and the Authority's need to maintain a sizeable measure of secrecy will continue.

7.72 The Law Society of New South Wales expressed strong concern that media television cameras had been present when Authority staff made arrests in two separate cases.[437] The

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434. p. 15, Objective Seven.

435. p. 15. See similarly, Evidence, p. 1663 (NCA).

436. NCA Corporate Plan, p. 15.

437. Evidence, p. 832. See also Evidence, p. 629 where Mr Michael Foley stated his belief that someone from the Authority had contacted the media to enable them to be present when one of the arrests was made. Mr Frank Costigan QC in, 'Anti-Corruption Authorities in Australia', text of an address to the Labor Lawyers' Conference in Brisbane on 22 September

Committee shares this concern. In the Committee's view it would be wrong if the Authority were to provide advance notice to enable the media to be present at arrests. The resulting publicity risks prejudicing any subsequent trial, in addition to the damage it causes to the reputation of the person arrested.

Secrecy Provisions and the Media

7.73 Inspector John Johnston, a police officer who had worked for the Authority, told the Committee:

> It seems from my understanding of the legislation, that the only time it [ie. the Authority] is entitled to address questions raised by the media is through a public sitting or a public bulletin which seems to be a very formalised approach to dealing with the media.[438]

He suggested that the NCA Act be amended to give the Authority greater freedom to respond to allegations made in the media.

7.74 The Committee asked the Authority in August 1991 if it considered that the Act needed to be amended in this regard. It responded:

> No. It is probable that some of the criticism aimed at the NCA in the media has resulted from the NCA's historical reluctance to participate in public debate or make more general comment on its work. To some extent this reluctance was brought about by a perception that the NCA Act placed constraints on the organisation's ability to adopt a more progressive public relations profile. The current administration of the Authority does not share this perception.[439]

1990, p. 11 commented on NCA 'police arresting people, sometimes at six-o'clock in the morning, coincidentally in the presence of the media...'.

438. Evidence, p. 1199.

439. NCA, Written Answers, August 1991, C1. NCA submission, p. 31 notes that the Authority 'has sought the public's assistance in relation to four of

7.75 In addition to his point about response to media criticism of the Authority, Inspector Johnston commented:

> the media can be 'used' in the furtherance of investigations. Quite a common tactic in policing is to provide a particular level of information to the media and generate a response which can then be followed through as part of the investigation. Those tactics cannot be employed by the National Crime Authority. It is all part, as I understand it, of this section 51 problem.[440]

7.76 The Committee asked the Authority if it considered that section 51 deprived the Authority of a useful device - the media - for pursuing investigations. The Authority replied:

> No. Mr Johnston was referring to orthodox police operations ie. a murder is committed and the identity of the killer is required. The police give out a certain amount of information in this setting and await public response which is often very effective. The NCA usually operates in a quite different setting. Suspicion in varying degrees is held against a group of persons. Their associates are not accurately known. It is often difficult to determine initially whether their conduct has constituted a criminal offence. In this setting involvement of the public by the media would invariably be counter-productive.[441]

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its investigations (Matters Two, Seven, Eight and Nine), having informed it of the general scope and nature of those investigations'.

440. Evidence, p. 1200.

441. NCA, Written Answers, August 1991, D1.

Publication of Post-Operation Reports

7.77 The ICAC is required under its Act to issue public reports at the conclusion of its formal investigations involving public hearings.[442] The submission from the Hon. Athol Moffitt CMG, QC argued; 'The NCA on each reference should be required to provide open and secret reports on a defined basis, the relevant Minister then being required to table in the relevant Parliament the open reports'.[443]

7.78 The NCA Act makes no provision for the Authority to report to the public on its investigations as they are completed. On reporting to the IGC, subsections 59(4)-(6) provide:

> (4) Subject to subsection (5), the Authority shall furnish to the Inter-Governmental Committee, for transmission to the Governments represented on the Committee, a report of the findings of any special investigation conducted by the Authority.
>
> (5) The Authority shall not 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 and, if the findings of the Authority in an investigation include any such matter, the Authority shall prepare a separate report in relation to the matter and furnish that report to the Commonwealth Minister or Minister of the Crown of the State by whom the relevant reference was made.
>
> (6) The Authority may include in a report furnished under subsection (4) a recommendation that the report

442. Evidence, p. 1075 (Mr Malcolm Kerr, MP); submission from Mr Ian Temby QC, dated 14 February 1991, p. 2. Mr Temby said there had been a total of eleven investigation reports to the NSW Parliament. ICAC commenced operation in March 1989.

443. p. 11.

be laid before each House of the Parliament.

7.79 A number of Authority post-operational reports have been made publicly available, a fact apparently not known by many critics of the Authority's accountability. On 18 December 1987 the Government tabled in the Senate the Authority's 51-page report entitled *Operation Silo: Report of the Investigation*. The report was subsequently published as a Parliamentary Paper.[444] Some of the other Authority reports provided to the IGC and Ministers have been made public on the initiative of individual Ministers.[445]

7.80 The Authority should be prepared to provide post-operational reports to the Committee at its request. However, the Committee does not think it necessary to require the Authority to make such reports public, given that a reasonable proportion of post-operational reports have become available to the public under the present arrangements. Nor does it consider that there should be a requirement on Ministers to table all operational reports that they receive, either in full or in edited versions. Where an investigation leads to charges being laid, the subsequent court proceedings provide a large amount of information in public about the investigation.

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444. No. 369 of 1987. Operation Silo was an investigation into narcotics trafficking arising from Commonwealth Reference No. 3 and New South Wales Reference No. 1 to the Authority.

445. An Authority interim report, dated April 1989, on a number of fires in Sydney in the period 1979-82 was tabled in the New South Wales Legislative Assembly on 3 August 1989 by the Premier. Some deletions of material of continuing sensitivity were made in the tabled version. The South Australian Attorney-General publicly released the Authority's *South Australian Reference No. 2: First Report* on 25 January 1990, and subsequently tabled it in the State Parliament on 5 April 1990. In the South Australian Legislative Council on 12 February 1991, the Attorney-General tabled *Operation Hound: South Australian Reference No. 2, December 1990*, which dealt with allegations of illegal conduct on the part of some South Australian Police officers. In the South Australian Legislative Assembly on 5 March 1991, the Premier tabled *Operation Hydra: South Australian Reference No. 2*, *February 1991*. This report dealt with allegations against the State's Attorney-General. The Authority prepared it with a view to Ministerial tabling and made extensive use of code names to protect the identity of individuals.

7.81 Where the Authority's investigation does not lead to charges and the matter has been of significant public concern, a relevant Minister can make the report public, as happened with the report on Operation Hydra for example. Many of the Authority's operations in the past have been long-running. For these types of investigations, it would be difficult to identify a cut-off point when all matters could be said to be complete and a report required. There may also be difficulties in these cases in isolating past operations from current ones, so as to permit a meaningful report on the former to be made without adversely affecting the latter.

7.82 The Committee would encourage relevant Ministers to table the reports on completed Authority investigations that they receive, when appropriate and if necessary after the removal of confidential information. The Committee would also encourage the Authority to issue public reports on completed operations where the Authority considers it practical and the degree of public interest warrants. The Committee notes that the Authority's *Corporate Plan July 1991 - June 1994* has as one of its strategies to:

> Develop an active program for the publication of reports, assessments, articles and other papers by the Law Reform Unit, Strategic Intelligence Unit, inquiry and investigation teams and individual officers within the NCA.[446]

7.83 The NCA Act at present contains no provision expressly authorising the Authority to issue post-operational reports. The Committee asked the Authority if it considered that the Act needed to be amended to insert such a provision. The Authority responded that it did not: its view was that it would be preferable for post-operational reports to be published in Parliament through this Committee.[447] The Authority envisaged that the material presented to the Parliament should combine its report and the Committee's comments thereon.

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446. p. 15.

447. NCA, Written Answers, August 1991, B4.

The Arthur Andersen Report

7.84 For several of those contributing to the Committee's evaluation, a litmus test of the Authority's commitment to openness was its refusal to make public the July 1989 report of the Arthur Andersen & Co review of its organisation structure, management practices and support systems.[448] Although a copy was provided to the Committee, the Authority did not allow public access to the report.

7.85 The report does not contain material which, if publicly disclosed, would hinder on-going investigations, affect possible prosecutions, threaten personal privacy or safety, or reveal sensitive operational methods.

7.86 One or more copies of the review report, or draft versions of it, were leaked to the media. Thus the Authority obtained the worst of all worlds: the criticism of it in the report became known from the media's publication of the more headline-grabbing parts of it; the Authority's refusal to release the report confirmed the widespread image of it as obsessed with secrecy; yet the fact of the leak was used by some to suggest that the Authority lacked the ability to keep secrets.

7.87 The Committee considers that the type of information contained in the review ought to be released to the public. It would seem to the Committee that information of this kind is not generally exempt from disclosure under the Freedom of Information Act. The Committee is pleased to note that the Authority's *Corporate Plan July 1991 - June 1994* has been publicly released by the Authority. The Plan is a further step in the process of which the Arthur Andersen review formed a part. Because the review has been overtaken by the adoption of Future Directions, the Corporate Plan,

448. Evidence, pp. 745, 1045-46 (NSW Council for Civil Liberties); p. 798 (Mr Arthur King). See also Frank Costigan QC, 'Anti-Corruption Authorities in Australia', an address to the Labor Lawyers' Conference in Brisbane on 22 September 1990, p. 12.

and other changes at the Authority the Committee sees little purpose in requiring that the review report now be made public.

Authority Annual Reports

7.88 Section 61 of the NCA Act sets out what information the Authority must provide in its annual reports. The Committee has reported on the adequacy of several of these annual reports, most recently in June 1991 on the 1989-90 report. Apart from some minor issues, the Committee has found that the annual reports more than measure up to what the Act requires. They contain a wealth of useful information extending far beyond the Act's requirements, and are well indexed. Given this, the more extreme criticisms that the Committee received during the evaluation about the lack of information available to the public about the Authority's activities are simply not valid.

7.89 One witness suggested that the Authority should account publicly in its annual report for the basis on which it grants indemnities against prosecution to witnesses.[449] As Justice Phillips noted on the issue of indemnities:

> [public] knowledge is not helped by misleading media reports. For example, recently an ABC radio program asserted several times that the NCA had granted indemnities to witnesses. The NCA does not grant indemnities to witnesses; it has no power or authority to do so. Indemnities are granted by the law officers of the crown, the directors of public prosecutions, the Attorneys-General.[450]

7.90 The Authority has a power, under section 30 of the NCA Act and State underpinning Acts, to recommend to the appropriate Commonwealth or State law officer that an undertaking be granted to witnesses that evidence they provide to the Authority will not be

449. Evidence, p. 946 (South Australian Council for Civil Liberties).

450. Evidence, p. 1670.

used in proceedings against them. Past Authority annual reports have provided statistics on indemnities, comments on their use in specific cases and a brief statement on the Authority's policy on seeking indemnities.

USE OF PUBLIC HEARINGS BY THE AUTHORITY

The Present Position

7.91 The Authority is empowered to hold two types of hearings. Under subsection 60(1) of the NCA Act: 'The Authority may hold sittings in public for the purpose of informing the public of, or receiving submissions in relation to, the general conduct of its operations'. Five hearings of this type have been held since the Authority was created in 1984. All were for the purpose of informing the public, and only members of the Authority appeared at these hearings.

7.92 The second type of hearing is that held for the purposes of a special investigation. It must be held in private.[451] From its inception in 1984 to 30 June 1991, the Authority has examined a total of 1383 witnesses at this type of hearing.[452]

7.93 The National Crime Authority Bill 1983, subclause 21(5) provided: 'Subject to this section, the Authority may, in its discretion, direct that a hearing before the Authority shall, in whole or in part, be held either in public or in private'.

The Bill identified matters the Authority was to consider in exercising its discretion and provided for witnesses to apply to have their evidence heard in private. The Authority was required to hear evidence in private 'if the taking of that evidence in public might prejudice the safety or reputation of a person or prejudice the fair

451. NCA Act, s. 25(5).

452. See Table 3 in chapter 2. Some witnesses have appeared at more than one hearing.

trial of a person who has been or may be charged with an offence'.[453]

7.94 The majority of the Senate Standing Committee on Constitutional and Legal Affairs, in the 1984 Report on the Bill, recommended: 'The Bill should be amended to provide that all hearings of the National Crime Authority should be held in private'.[454] The majority argued:

> The Committee believes that a fundamental question as to the preferred model of a national crime authority is here at stake. The two contending models are, one the one hand, the royal commission of inquiry which conducts most of its operations in public, and, on the other, grand juries or police investigations which are conducted out of the public gaze. The Committee favours the latter.[455]

Senator Missen dissented on this issue. The Government accepted the majority's recommendation.[456]

7.95 In 1988, the *Initial Evaluation* noted the argument that there was merit in having hearings in public, as evidenced by the work of the Fitzgerald Royal Commission. It commented:

> The Parliament rejected this model when it established the National Crime Authority and nothing has occurred since to change the fundamental considerations of principle which underpinned that rejection.[457]

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453. cl. 21(7).

454. Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, para. 6.15.

455. ibid., para. 6.9.

456. Senate, *Hansard*, 10 May 1984, p. 1976.

457. I*nitial Evaluation*, para. 4.25.

Arguments for Change

7.96 On 5 February 1991, Justice Phillips said:

> I now call upon Parliament to consider committing to the Members of the NCA conducting hearings a discretion to conduct parts of them publicly. Such a discretion should be exercised with safeguards for individual's rights and accompanied by a further discretion to direct that part of the proceedings of open hearings be not published. The holding of an open hearing into, for example, a particular method of money laundering would be, surely, very much in the public interest.[458]

7.97 Others also suggested to the Committee that the Authority should be empowered to conduct at least some, perhaps almost all, investigatory hearings in public.[459] It was argued that hearings in public would improve the Authority's accountability and public image. The opportunity for rumour, speculation, innuendo and so forth is vastly reduced if hearings are public. The community is able to see how the Authority conducts itself and can directly gain some idea of its worth. Moreover, public hearings would assist the Authority to educate the public on the extent and types of organised criminal activity in Australia.

7.98 The Committee was told that the New South Wales ICAC conducts most of its hearings in public: during the year ending 30 June 1990, ICAC conducted 265 hearing days, of which 235.5 were held in public.[460] Unlike the Authority however, ICAC has as

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458. Address to the Law Institute of Victoria, 5 February 1991, p. 8. See also Evidence, p. 1673 (NCA).

459. Evidence, p. 509 (Police Federation of Australia and New Zealand); p. 772 (Hon. Athol Moffitt CMG, QC); p. 811 (Mr Arthur King); p. 938 (South Australian Council for Civil Liberties); p. 1030 (Hon. K.T. Griffin MP); pp. 1065-66 (Law Council of Australia); submission from Hon. Andrew Peacock MP, p. 3.

460. Mr Malcolm Kerr MP, submission, p. 6. Section 31 of the *Independent*

part of its statutory functions 'to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration'.[461]

7.99 Mr Malcolm Kerr MP, Chairman of the Joint Parliamentary Committee which monitors ICAC, told the Committee: 'From a purely supervisory point of view it makes it far easier if you are supervising a body that does most of its performances in public'.[462] Mr Ian Temby QC, the Commissioner of ICAC, noted differences between the Authority and ICAC and told the Committee: 'I think that the NCA would be much better off if it opened its doors and did more than it presently does in public'.[463]

7.100 Mr Peter Beattie MP, Chairman of the Parliamentary Criminal Justice Committee of Queensland told the Committee:

> Unlike the NCA, the CJC has the opportunity of public hearings of its own and has done them. That to me seems to be one of the reasons why the NCA has been so unpopular, because it has not had the power to have public hearings and has not done it, so it seemed to be some secretive organisation.[464]

Commission Against Corruption Act 1988 requires ICAC hearings to be held in public unless the Commission is satisfied that the public interest requires a private hearing.

461. *Independent Commission Against Corruption Act 1988*, s. 13(1)(i).

462. Evidence, pp. 1082-83.

463. Submission, p. 2.

464. Evidence, p. 1120. Sir Max Bingham QC, Chairman of the CJC and Member of the Authority from 1984 to 1987, recently referred to: 'the fact that our hearings are substantially in public - that the net of secrecy is drawn over only the smallest part of our functions, that is compatible with the proper discharge of our duties. I think all of those things have tended to help us to avoid the criticism that has been levelled at the National Crime Authority.' (Queensland, Parliamentary Criminal Justice Committee, *Minutes of Evidence taken on 15 April 1991 at a public hearing ...*, May 1991, p. 10.)

The Criminal Justice Commission itself made a similar point in an April 1991 submission to Mr Beattie's Committee.[465]

7.101 Justice Phillips has commented on the Authority's special investigative hearings:

> True it was, that provision was made for the presence of lawyers to represent witnesses at such hearings and for the proceedings to be reviewable in the Federal Court, but cries of 'Star Chamber' in connection with these proceedings have plagued the NCA since its inception.[466]

7.102 The submission from the Hon. Andrew Peacock MP supported giving the Authority a discretion to hold public hearings 'as it is often said that open hearings are an essential element for the fostering of public confidence in the administration of the criminal justice system'.[467]

7.103 As a separate aspect of accountability, it was suggested that holding hearings in public reduced the scope for behind-the-scenes political pressure on the Authority. Although on balance he did not favour allowing the Authority to hold hearings in public, the Hon. Justice Frank Vincent noted the merit of this argument:

> It is customary at the moment to say, 'Well, the Fitz-

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465. Queensland, Criminal Justice Commission, *Submission on Monitoring of the Functions of the Criminal Justice Commission*, April 1991, p. 182. See also p. 187 '... the Commission is not afflicted with the excessive secrecy required of the NCA, which must hold all of its hearings in private'.

466. Address to the Law Institute of Victoria, 5 February 1991, p. 4. See also Evidence, pp. 1673-74 (NCA).

467. p. 3. The Hon. Athol Moffitt CMG, QC in his supplementary submission in January 1991 made a similar point: 'it is necessary for the NCA at least by some public hearings to reveal what is going on and what it is doing about it. The lack of public confidence should be attempted to be restored by removal of some of the absolute secrecy of the NCA.'

> gerald inquiry was very successful, and that was dealt with in the public arena'. It clearly was, and I have little doubt that a substantial amount of the effectiveness of what Mr Fitzgerald did arose from the fact that those persons who might have been minded to try to stifle him were unable to do so in the public arena.[468]

The Committee regards this as a strong argument for hearings in public.

7.104 The Hon. Athol Moffitt CMG, QC considered that the Authority 'should be given an express exposure and remedial function'.[469] He linked this function to the need for public hearings. He referred to the 1966 Salmon Report, which considered that open hearings were essential to deal with some matters involving a crisis in public confidence.[470] Mr Moffitt continued:

> There are some areas of organised crime and corruption which do not answer the test of gravity of the Salmon Report, but some such hearings should be open, in my view. This is where there is widespread organised criminal activity involving many people, some with only minor involvement. This organised crime cannot be properly dealt with by investigation in private in some locality of operation and by prosecuting a few offenders against whom evidence is discovered. The better weapon is exposure by use of a sample to show what is happening, followed by remedy in the future. An example is the ICAC motor driver licensing inquiry. That was an inquiry only in one area and the object at the end was remedy in the future with procedures to stop it

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468. Evidence, pp. 382-83. See similarly Evidence, pp. 353-54 (Victorian Council for Civil Liberties).

469. Evidence, p. 771.

470. United Kingdom, Royal Commission on Tribunals of Inquiry 1966, *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon*, HMSO, London, 1966 (Cmnd.3121), p. 38.

> generally. The purpose of this type of open inquiry is to stop similar conduct by different people in different localities, involving many people in the consumer or user class. Often behind them - I am talking now of the organised crime area - there lies some criminals or organisers or different criminals operating similarly using different schemes.[471]

7.105 Mr Moffitt referred to areas involving different types of gambling, some types of land development, and the bottom-of-the-harbour crimes dealt with by the Costigan inquiry.

> All this shows that organised crime of some types in some areas must be countered by the exposure methods used selectively as a basis for public warning and future remedy and prevention. The Authority, in my view, will not perform its proper national role if its investigations are oriented solely to criminal prosecutions. It must use the exposure weapon...[472]

7.106 Mr David Hunt, the South Australian Police Commissioner, put a similar view in his submission dated 12 October 1990:

> It is my view that rather than adopting a blanket policy of secrecy, the special hearings before the NCA should aim to be more open to the public. Given the subject matter of NCA investigations, namely organised crime, it is in the public interest to have evidence of its existence and activities open to access by the community in which it may operate.[473]

Arguments against Hearings in Public

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471. Evidence, p. 773.

472. Evidence, p. 774. See similarly, Evidence, pp. 1152-53 (Queensland Bar Association).

473. p. 4.

7.107 The argument against allowing the Authority to hold public hearings in public was concern about the risk to innocent reputations.[474] These could be severely damaged if the hearsay, rumour, gossip, mistaken allegations and malicious claims which are part of any complex investigation were examined in public.

7.108 For example, the Hon. Justice Vincent told the Committee: 'We have to be particularly careful that we do not create an additional coercive power which is the power to publicly expose, as it were'.[475] He referred to the work of two committees in the United States, the Kefauver Committee and the House of Representatives Un-American Activities Committee, as examples of the unnecessary damage to individual reputations which may occur from pursuing investigations in public hearings. Justice Vincent considered that the other forms of monitoring could ensure Authority accountability, avoiding the need to allow public hearings.[476]

7.109 Mr Barry O'Keefe, President of the New South Wales Bar Association, referred to the experience with ICAC hearings in public:

> One of the problems there is that the very blaze of publicity may destroy a person, even though that person ultimately is found by the report not even to be a person who should be prosecuted. That is a very negative outcome of ICAC. If some suggested loss of confidence is the penalty for secrecy, in the sense of people not being

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474. Other arguments against hearings in public are not relevant because it is not proposed that all hearings be held in public. The proposal is that the Authority have a discretion to hold hearings in public. It can be assumed that the Authority would not elect to hold a hearing in public if that would be detrimental to its interests, for example, by threatening the safety of one of its informants, witnesses or staff, prematurely disclosing the Authority's state of knowledge to the targets of the investigation, or prejudicing the successful prosecution of these targets.

475. Evidence, pp. 384-85. See also the submission from Mr Michael Holmes, p. 14: 'I would not like to see 'trial by media' through open hearings'.

476. Evidence, p. 383.

> exposed in that way, then I think that is not a bad penalty to pay. I myself have some doubts as to whether that is a real ground in the public mind for criticism of the NCA. The opposite has been a much stronger ground for criticism of ICAC.[477]

7.110 The Queensland Council of Civil Liberties, expressed concern that a body with a discretion to hold its hearings in public may not balance the competing interests appropriately in deciding to hold a particular hearing in public:

> if there is public or media pressure that that body is not performing, that body may be tempted to hold public hearings in order to stifle media criticism that it really is not doing much.[478]

Committee's Conclusions

7.111 The Committee **RECOMMENDS that the NCA Act be amended so as to confer a discretion on an Authority member to hold investigative hearings in public.**

7.112 The Committee believes that the risk to innocent reputations from hearings held in public can minimised by the adoption of appropriate procedures. Justice Phillips responded to the argument that his proposal for hearings in public would put reputations at risk. He told the Committee:

> I do not believe there is any conflict between ... [this argument] and what I have proposed, because what I have proposed is conditional upon there being adequate safeguards to prevent damage to persons' reputations. I have no doubt at all criteria to satisfy that sort of situation can be easily developed.[479]

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477. Evidence, p. 705.

478. Evidence, p. 543.

479. Evidence, p. 1675.

7.113 A New South Wales Parliamentary Committee has recently examined whether ICAC public hearing procedures achieve the correct balance between publicity and safeguarding the reputations of the innocent.[480] The Committee recommended: 'In view of the considerable benefits of public hearings, the principle of public hearings should be adhered to'.[481] The Committee recommended improved safeguards to guard against the risk that reputations might be unfairly or unnecessarily damaged.

7.114 The Queensland Criminal Justice Commission acknowledged in April 1991:

> the Commission has faced significant difficulties in formulating procedures which have general application to all of its public hearings. It has modified its procedures and will no doubt continue to modify them as experience or legal requirements dictate.[482]

7.115 The Committee considers that the experience of ICAC, the CJC and royal commissions can be used to devise appropriate procedures to govern the Authority's discretion to hold investigative hearings in public. These procedures will need to cover matters such as the right of a witness to apply to have his or her evidence heard in private or public; a right of review of decisions on such applications; the power of the Authority member conducting the hearing to issue suppression orders; and rights of reply for those unfairly referred to in public hearings.

7.116 Once the procedures for Authority public hearings have

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480. See New South Wales, Parliamentary Committee on the ICAC, *Inquiry into Commission Procedures and the Rights of Witnesses - First Report - Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations*, November 1990.

481. ibid., para. 2.6.2.

482. Queensland, Criminal Justice Commission, *Submission on Monitoring of the Functions of the Criminal Justice Commission*, April 1991, p. 154. The CJC's 'Procedures for Public Hearings' are set out on pp. 155-58.

been developed, the Committee will examine them to ensure that they are fair and equitable.