

**MINORITY REPORT BY
SENATOR CRICHTON-BROWNE, SENATOR VANSTONE,
MR SINCLAIR MP and MR FILING MP**

Introduction

1 The majority report is silent on matters which should be adduced and put before the Parliament in relation to the Authority's report on the Operation Ark investigation.

2 It is now common knowledge that the National Crime Authority prepared a report under the Chairmanship of Justice Stewart which was not published until after the media made the public aware that the report had been withheld and an alternative report was forwarded by the Authority.

3 Chapter 3 of the majority report refers only in passing to the Committee's 1990 Ark report tabled on 17 October 1990. It has, in our view, failed to properly inquire into and report on the issues raised by the existence of two reports dealing with the same investigation and the decision by the Authority not to forward the report prepared by the Authority under the chairmanship of Justice Stewart to the appropriate authorities. The Committee now has two conflicting versions as to the propriety, or lack thereof, in the Authority not sending the Stewart Ark report forward in the first instance. The Committee should ascertain which version is correct. The answer to that question is germane to the administration of the Authority and the Authority's accountability to the Parliament.

4 The matters that have not been addressed in the Majority Report include

- . the existence of two versions of the Authority's Operation Ark report and, in particular the propriety of, in the first instance, not having forwarded the Stewart Ark report; and

. the likelihood that natural justice has been denied to former members of the Authority

5 The majority report does not deal with the unresolved issues raised in the Qualifying Statement to the Committee's 1990 Ark report notwithstanding that the Qualifying Statement, which contains the view of 4 members of the Committee, drew Parliament's attention to these issues which we believe the Committee has an obligation to address if it is to properly fulfil its statutory duties to monitor the activities of the Authority.

6 With the exception of the hearing held with Justice Stewart on 11 March 1991, the Committee has not taken the opportunity presented by the evaluation to properly address the serious questions raised in the Qualifying Statement.

7 In addition, Government members of the Committee have consistently incorrectly criticised the authors of the Qualifying Statement for publishing *in camera* evidence referred to in the Statement. Unfortunately this view has been perpetuated in the Government Response to the Committee's Operation Ark report which was tabled on 15 October 1991 in the Senate. The writers trust now that the Government has had the benefit of reading Justice Stewart's evidence to the Committee, it will properly respond to the Parliament.

Issues Raised by the Qualifying Statement to the Committee's 1990 Ark Report

8 The Qualifying Statement to the Committee's 1990 Ark Report analysed in detail matters which required proper examination by the Committee if questions surrounding the existence of two reports on Operation Ark, and the suppression of one of those reports, by the National Crime Authority in 1989 are to be properly answered. The matters the writers of the Qualifying Statement believed should be addressed are

. Was there a completed report on 30 June 1989?

- . Can an authority report be 'duly authorised' without there being a minuted meeting of the persons purporting to so authorise?
- . Does a newly constituted authority have the responsibility to ensure that it is satisfied with a report from the previously-constituted authority?
- . Did a former authority member doubt the propriety of the report being transmitted?
- . Prior to 30 June had internal conflict arisen over the Stewart Report?
- . What events occurred after 30 June?
- . Did internal conflict arise following the decision to not proceed with an alternative report?
- . What were the consequences of this internal conflict, and what was the substance of this internal conflict?

(See Committee's 1990 Operation Ark report, qualifying statement, paras. 2.0 to 2.8)

9 It is obviously necessary for the Committee to seek evidence from former members of the Authority on whose behalf the original Operation Ark report was signed, and Mr Faris QC, who succeeded Justice Stewart as Chairman of the Authority in 1989. Thus far these people have been denied an opportunity to put their case before the Committee.

10 The conclusion to the Qualifying Statement said in part

In the opinion of the writers, the Committee's decision not to take further evidence relating to Operation Ark has resulted in members of the Committee being unable to make a proper assessment of the impact of the internal tension and conflict caused by the Operation Ark Report controversy on the

capacity of the NCA to effectively fulfil the duties and functions during the relevant period.

In the writers' opinion, the internal conflict and tension within the NCA and its potential impact on the Authority's capacity to effectively fulfil its duties and functions is relevant to the statutory obligations of the Committee.

11 The members of the Committee who wrote the Qualifying Statement were also convinced that the unresolved issues could, and should, be the subject of proper inquiry during the current evaluation

The apparent failure of the Authority to manage the internal conflict and tension arising from the Operation Ark Report and the impact of this on the Authority's capacity to fulfil its duties and functions is in our opinion relevant to the current evaluation of the NCA being conducted by the Committee and should be examined further in the course of the evaluation.

12 It was incumbent on the Committee to properly follow up the Qualifying Statement, particularly with former members of the Authority, including the former Authority Chairmen, Justice Stewart and Mr Peter Faris QC; and former members Mr Robberds QC and Mr Mark Le Grand.

13 In the event, the Committee has regrettably not followed the course suggested by the Qualifying Statement, with the exception of its hearing with Justice Stewart - a hearing prompted by his criticism of the majority report in the Committee's 1990 Ark report.

14 In a letter dated 30 November 1990, Justice Stewart wrote to the Committee on his own behalf and also on behalf of Mr Robberds, QC and Mr Le Grand regarding the Committee's 1990 Ark report. (A copy of his letter is attached) Justice Stewart's letter was tabled in the Senate on 21 February 1991.

15 In his letter, Justice Stewart raised matters in which

the Committee's Ark report was, in his view, in error. We note he said

One of the objects of the Committee's deliberations is stated in paragraph 28 of the report:

"The Committee believe that it was incumbent on it to determine the merits of the competing claims of Mr Faris and Mr Stewart in respect of the status of that report."

The Committee's report appears to make two findings of fact (both of which are incorrect) concerning this object:

- (a) The process of drafting this report was completed on 4 July 1990 (paragraph 18); and
- (b) The report was not completed on 30 June 1990 (paragraph 19).

I note that:

- (i) Although the report picked up the words of Mr Faris' letter of 30 January 1990 (paragraph 20) and spoke thereafter of "the proposed report", the opening words of that letter quoted in paragraph 24 - "Although prepared before July 1 ..." contradict the Committee's findings in paragraphs 18 and 19;
- (ii) The Committee's report neither summarises nor analyses the evidence upon which the two findings of fact were based; and
- (iii) The Committee's process of reasoning concerning these two findings of fact, is not exposed in the report.

16 It should be noted that Justice Stewart offered the Committee the following suggestion

Evidence of these facts is available from me, Mr Robberds QC and Mr Le Grand.

If the Committee wishes to obtain this evidence it might consider it appropriate also to obtain evidence on the matters referred to in the qualifying statement published with its report. (page 2)

17 The Committee tabled this letter and informed the Parliament that it had invited Justice Stewart to appear at a hearing to be held by the Committee for the purpose of discussing the matters in his letter and other matters the Committee considered were relevant to its evaluation.

18 The Committee held an *in camera* hearing with Justice Stewart on 11 March 1991. As noted in paragraph 3.71 of the majority report, the transcript of this hearing was published by the Committee on 18 November 1991

19 The evidence given by Justice Stewart confirms that there are aspects of the Committee's 1990 Ark report which are completely unsatisfactory. We particularly draw attention to Justice Stewart's cogent and compelling rebuttal of each reason offered to the Committee as to why the first Operation Ark report prepared by the Authority was not forwarded.

20 Despite clearly conflicting evidence before the Committee, the Committee appears determined to ignore the need to resolve the matter. For the matter to be resolved, the Committee should allow Mr Robberds and Mr Le Grand to give their version of events. Their evidence would presumably contradict the findings of the Committee's 1990 Ark report and support Justice Stewart's evidence. As indicated above, Mr Faris has also been denied the opportunity of putting his case.

21 It is apparent that former members of the Authority may have been denied natural justice in that the majority of the Committee made findings in the Committee's 1990 Ark report which can be said to reflect adversely on former members who have not been afforded an opportunity to put evidence to the Committee before or since those findings were made on these matters.

22 An extract from the transcript of the hearing with Justice Stewart illustrates that Mr Melham MP realised that the Committee would need to address this question in its evaluation report.

Mr MELHAM - ... let us suppose that we as a committee, for instance, did not want to adjudicate further in this matter. I am interested in preserving your position, so to speak, and doing justice to you and your view. Do you see any benefit in our reporting in a way that just preserves your position without further adjudicating on the matter?

CHAIRMAN - Could you clarify that question? I think it is a helpful one, which Mr O'Keefe also raised. When you say 'adjudicating' are you talking about questions of fact as to whether it was completed, et cetera, et cetera, or between the two reports?

Mr MELHAM - Between the two reports, and even the questions of fact. I am just wondering how much----

CHAIRMAN - I see those as being two separate questions.

Mr MELHAM - You can discuss these further in my absence. I am just wondering what benefit there really is in the end, in our----

Mr Justice Stewart - The benefit is that at the moment there is a public document that has been placed before the Parliament and that impugns my integrity.

Mr MELHAM - I appreciate that. I know what you are saying.

Mr Justice Stewart - And Le Grand's.

Mr MELHAM - I appreciate that. What I want to do is restore or preserve your position. I do not want you or Le Grand impugned, in the----

Mr Justice Stewart - Neither do I want Leckie or Cusack or anyone else impugned. They----

Mr MELHAM - You hold different views.

Mr Justice Stewart - I must say that their attitudes were fairly hard to understand on occasion, but without going into that, if they took a different view of the law, well, they took a different view of the law. But I say that they are wrong. What I would want would be some sort of statement; in fact, the majority report on the last occasion did adjudicate, it seems to me. That is where I expressed my disappointment earlier, at not being called before that report went forward.

Mr MELHAM - I accept what you are saying and I am trying to, in effect, as I say----

Mr Justice Stewart - What you are trying to do, with great respect, is in effect what politicians often do - some sort of compromise.

Mr MELHAM - I know that it cannot be a compromise, but again, as I say, I accept that you say that the majority report took a view that it should not have, probably. I am, basically, trying to retrieve the situation without further adjudication. Is that an option? Is there a way of doing that?

Mr Justice Stewart - I really have not tried to think that one through. All I want is for some statement to be made that there is no impugning of my integrity or Mr Le Grand's or

anyone else's integrity, because all these things were done in the utmost good faith - in the lawyer's saying, *uberrimae fidei*. (page 22-24)

23 Notwithstanding that evidence, Mr Melham is now an author of the majority report, and refuses to rectify or correct what Justice Stewart describes in response to Mr Melham in the evidence which is quoted above, as findings 'impugning his integrity'.

***In Camera* Evidence in the Qualifying Statement to the Committee's 1990 Ark Report**

24 Since the tabling of the Committee's 1990 Ark report and the Qualifying Statement, Government members of the Committee and the Government have consistently asserted, incorrectly, that the authors of the Qualifying Statement did not have the right to publish evidence given to the Committee *in camera*, and that publication of that material had compromised the security of the Authority and is contrary to Standing Orders.

25 It was also suggested by the Government members of the Committee, and particularly Mr Melham MP, that it was a 'cheap political trick' to use the evidence in the Qualifying Statement.

26 It should be stressed that the members of the Committee who prepared the Qualifying Statement did so in accordance with the Standing Orders and ensured compliance with the *Parliamentary Privileges Act 1987*.

27 Clearly Mr Melham did not understand the Standing Orders of the Senate as they applied when the Committee's Ark report was tabled, or as they are now. The Senate Standing Orders, as they relate to the publication of *in camera* evidence allows for a Committee to publish and refer to such evidence (as this Committee has done in all its reports) or for a dissenting Senator to refer to such evidence.

28 Mr Melham and others apparently also want minority

members of Parliamentary Committees (invariably the non-government members) to be prevented from publishing evidence, which may be of very considerable importance, purely on the basis that it had been received *in camera*.

29 A decision that a committee will receive evidence *in camera* is one for a committee as a whole to take. If the majority of a committee **alone** is to resolve whether such evidence can subsequently be published, then the majority of a committee are in a position to censor minority reports and prevent publication of evidence which is in the public interest.

30 Such a situation would also necessarily prevent information that did not please the government of the day from being published by a Committee and being made available to the Parliament and the people.

31 It should be stressed that the material released in the Qualifying Statement to the Committee's 1990 Ark report related to administrative matters only; it was not operational in any sense, and therefore not operationally sensitive.

32 We wish to draw attention to a further matter in this regard. On 8 November 1990, a member of the Committee, Mr Neil O'Keefe MP, told the House of Representatives

Senator Vanstone and Senator Crichton-Browne breached the trust to the point-I do not mind telling the Parliament this-that about two or three weeks ago, or it might be a bit longer than that, the new Chairman of the NCA, Justice Phillips, met with the NCA parliamentary Joint Committee. It was his first meeting with the Joint Committee. He said that he had observed the relationships that had developed over the years. He had seen the difficulties about the disclosure of sensitive information and the fact that politicians seem to want to rush into the Parliament and blab information through these processes. This led to a very difficult relationship between the NCA and the Parliamentary Joint Committee. He said that he had noticed the shift that had

taken place since Mr Faris had taken up his chairmanship, and he took at face value the fact that we on the Committee were anxious to keep the new trend going. The most important words were that he saw no reason why the parliamentary Joint Committee and the NCA could not get much closer together, including the detailed access to the information that we may think we want.

It was the most generous and, quite frankly, astonishing position for him to take as a new chairman, and much more generous than I had expected. It showed that finally the parliamentary Joint Committee had won the confidence of the NCA on the very issue around which relationships operate, that is, professionally and responsibly dealing with sensitive information about these matters.

Having reached that point, how do we get to a stage when last week Justice Phillips had to say informally to the Committee that he did not see any way that the NCA could deal with the Committee other than on the transcript and totally publicly? In other words, five years of work went down the drain in two weeks of work by two people who were either absolute novices at the game and have blown it with their need to see their names in print or part of a broader strategy aimed at discrediting the NCA in some way and dragging it into disrepute without foundation. (H of R Hansard, 8 November 1990, pp. 3215-6)

33 As a result of this incorrect and untrue statement, Mr Justice Phillips within hours of Mr O'Keefe's statement to the House of Representatives contradicted Mr O'Keefe in a statement to the media. Justice Phillips was moved to say that at his first meeting with the Committee he had told the Committee that 'we could come to an accommodation, whereby they received all the information they needed and that no members of the Authority would be embarrassed in answering questions about operational matters. I still maintain that belief and have never indicated any qualification or change of it to the Committee.'

34 Following Justice Phillips' public disclaimer, Mr O'Keefe returned to the House of Representatives on 8 November 1990 and apologised to the House for misleading it and for making an untrue statement. He said

In my speech this morning on the motion moved by the honourable member for Kooyong (Mr Peacock), I expressed my grave concerns about the effect on the long term relationship between the National Crime Authority (NCA) and the Parliamentary Joint Committee on the National Crime Authority caused by the actions of Senators Vanstone and Crichton-Browne in releasing confidential in camera evidence in breach of the terms under which the Committee agreed to report on Operation Ark.

In that speech, I incorrectly interpreted remarks made by Justice Phillips, the new Chairman of the NCA, at a meeting last week and have, in fact, misled the House about the nature of those remarks. Justice Phillips did not imply that the NCA would now find itself unable to work with the Committee and he did not imply or suggest that there could not be the usual exchange of information between the Parliamentary Committee and the NCA. He did say that on some of the matters at present in dispute within the Committee he did not wish the NCA to become a political football and wished those matters to be resolved between the Parliament and the politicians.

My own perceptions of the seriousness of the situation caused me to infer remarks to Justice Phillips which were not true, and I wish to immediately correct the record for him and the Parliament on this aspect. I stand by all the other comments I made about the effects of the actions of the Liberal senators I have named. (H of R Hansard, 8 November 1990, p. 3631)

35 The statement by Mr O'Keefe attributed motives to Senators Vanstone and Crichton-Browne which were untrue and unacceptable. The fact that the Chairman of the Authority, Justice Phillips, was forced to issue a statement correcting Mr O'Keefe's

statement was not only unprecedented but indicated that Mr O'Keefe's statement was a matter of considerable embarrassment to Justice Phillips and the Authority.

36 We finally note that a matter currently under consideration by the Senate Committee of Privileges was referred to that Committee by the Senate following tabling of the Committee's 1990 Ark report and Qualifying Statement. This matter raises the possibility that senior members of the Authority were in contempt of the Parliament by giving false or misleading evidence to the Committee and that the Authority interfered with a former member of the Authority, Mr Le Grand, in relation to the evidence he might give to the Committee. The Senate Committee of Privileges has been asked to conduct its inquiry as follows

Having regard to the report of the Joint Committee on the National Crime Authority presented on 17 October 1990:

- (a) whether there was improper interference with a person in respect of evidence to be given before that Committee;
- (b) whether false or misleading evidence was given to that Committee in respect of directions given by the National Crime Authority or its officers to a person, affecting evidence to be given before the Committee; and
- (c) whether contempts were committed in relation to those matters.

37 It is the publication of evidence relating to these matters in the Qualifying Statement that some government members of the Committee complain of. Without the publication of that evidence in the Qualifying Statement, the Parliament would not have had the opportunity to examine this matter of concern.

Senator N.A. Crichton-Browne

Senator A.E. Vanstone

Rt. Hon I.McC. Sinclair MP

P.A. Filing MP