PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

36th Parliament

WHO IS TO GUARD THE GUARDS?[1]

AN EVALUATION OF THE

NATIONAL CRIME AUTHORITY

Report by the Parliamentary Joint Committee on the
National Crime Authority

November 1991

1. From the Latin 'Quis custodiet ipsos custodes?', Decimus Junius Juvenalis, *Satires*, VI, l. 347.

MEMBERSHIP OF THE
PARLIAMENTARY JOINT COMMITTEE ON THE
NATIONAL CRIME AUTHORITY

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Senator S. Spindler, Victoria, (Aust. Dem.)

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GLOSSARY

ABCI	Australian Bureau of Criminal Intelligence
ACS	Australian Customs Service
AFP	Australian Federal Police
Arthur Andersen report	*Arthur Andersen & Co, National Crime Authority: Strategic Organisational Review: Final Report*, July 1989
ASC	Australian Securities Commission
ASIO	Australian Security Intelligence Organization
ATO	Australian Taxation Office
Authority	National Crime Authority
CJC	Criminal Justice Commission (Queensland)
Corporate Plan	National Crime Authority, *Corporate Plan July 1991 - June 1994*
CTRA	Cash Transaction Reports Agency
DPP	Director of Public Prosecutions
Evidence	transcripts of hearings held by the Committee during the evaluation inquiry
First Report	Parliamentary Joint Committee on the National Crime Authority, *First Report*, November 1985
Future Directions	Justice J.H. Phillips, *Chairman's Proposals for Future Directions: A Submission to the Inter-Governmental Committee*, 15 November 1990
ICAC	Independent Commission Against Corruption (NSW)
IGC	Inter-Governmental Committee (established by section 8 of the NCA Act)
Initial Evaluation	The inquiry by the Parliamentary Joint Committee on the National Crime Authority which led to its report entitled *The National Crime Authority - An Initial Evaluation*, May 1988
NCA	National Crime Authority

PJC	Parliamentary Joint Committee on the National Crime Authority
SIU	Strategic Intelligence Unit (within the NCA)
Second Report	Parliamentary Joint Committee on the National Crime Authority, *Second Report*, November 1986
Third Report	Parliamentary Joint Committee on the National Crime Authority, *Third Report*, November 1989

DUTIES OF THE COMMITTEE

The duties of the Committee are set out in section 55 of the *National Crime Authority Act 1984*:

55. (1) The duties of the Committee are:

(a) to monitor and to review the performance by the Authority of its functions;

(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(c) to examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

(d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority; and

(e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

(2) 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.

CHAPTER 1

BACKGROUND TO THE INQUIRY

Decision to Commence the Present Evaluation

1.1 In mid-1990, the Committee decided to make a comprehensive evaluation of the Authority. Its decision was based on a number of factors:

- The Committee has a statutory duty 'to monitor and to review' the Authority and to report its findings to the Parliament.[1]
- The *Initial Evaluation* report, tabled in May 1988 by the Committee's predecessor, recommended that a comprehensive evaluation should be conducted seven years from the establishment of the Authority.[2] This recommendation was not opposed by the Government.[3]
- There were major concerns about the Authority's management, strategic direction and operations, including the concerns which had led to the Arthur Anderson report.[4]
- The NCA Act contained a provision that the Authority would cease to exist at the end of June 1989. This 'sunset' provision was repealed in June 1988.[5] The repeal did not, however, involve any public assessment of the continued need for the

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1. NCA Act, s. 55(1). Section 55 is set out in full on p. xiii above.

2. Parliamentary Joint Committee on the National Crime Authority, *The National Crime Authority - An Initial Evaluation*, May 1988, para. 4.31.

3. *Government Response to the Report of the Parliamentary Joint Committee on the National Crime Authority Entitled 'An Initial Evaluation'*, tabled in the House of Representatives on 3 November 1988 and in the Senate on 7 November 1988, p. 3.

4. Arthur Andersen & Co, *National Crime Authority: Strategic Organisational Review: Final Report*, July 1989. The reason for the report and its conclusions are set out in chapter 3 below.

5. *Crimes Legislation Amendment Act 1988*, s. 6.

Authority or of the provisions of the NCA Act.[6]

. A significant body of information has become available over the past few years.

Conduct of the Evaluation

1.2 In July 1990, the Committee placed advertisements in the following newspapers calling for written submissions: the Adelaide *Advertiser*, Melbourne *Age*, *Australian*, *Australian Financial Review*, *Canberra Times*, and *Sydney Morning Herald*. The Committee also wrote to interested parties and invited them to make submissions or meet with the Committee.

1.3 The Committee requested that written submissions address the following issues:

> (1) the constitution, role, functions and powers of the authority, and the need for a body such as the Authority, having regard to the activities of other Commonwealth and State law enforcement agencies;
>
> (2) the efficiency and effectiveness of the Authority;

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6. In repealing the sunset clause, the Government stated:

> The decision to continue the Authority beyond 30 June 1989 is a recognition of the valuable and innovative role which the Authority has played thus far in the fight against organised crime. In the last four years, the Authority has demonstrated the effectiveness of the task force approach in this fight. This approach uses teams of highly skilled lawyers, accountants and police investigators endowed with special powers beyond those available to police. The impact of the NCA has been felt in the areas of drug trafficking, white collar crime and the corruption of public officials. The other critical aspect of the NCA's operations is the support it enjoys from all States and the Northern Territory which participate in the Inter-Governmental Committee on the National Crime Authority chaired by the Commonwealth. (House of Representatives, *Hansard*, 24 February 1988, p. 627 (Hon. C. Holding, 2nd Reading Speech, Crimes Legislation Amendment Bill))

(3) accountability and parliamentary supervision of the Authority; and,

(4) the need for amendment of the *National Crime Authority Act 1984*.

The Committee received 56 submissions. The persons and organisations who made submissions are listed in Appendix 3.

1.4 Between November 1990 and October 1991, the Committee held a total of 12 public hearings in Adelaide, Brisbane, Canberra, Hobart, Melbourne and Sydney. A total of 64 individuals appeared to give evidence at these hearings. All were held in public with the exception of two short periods at the first hearing. Those who appeared are listed in Appendix 4.

1.5 The public hearing with the Authority held in Canberra on 29 July 1991 was the first occasion since its creation that the Authority has appeared before the Committee to give evidence in public. The hearing provided an increased opportunity for the Authority to respond in public to questions about its performance.

1.6 In addition to submissions and the evidence given at the hearings, the Committee has been able to draw on information provided by the Authority at the regular briefings it gives the Committee. The Authority responded in writing in July and August 1991 to questions from the Committee. The Committee also had discussions between June and September 1990 with:

- the Commissioner, the Secretary and the Director of Operations of the Independent Commission Against Corruption;
- the Director of the Cash Transaction Reports Agency;
- the Commissioner of the Australian Federal Police;
- officers from the Australian Taxation Office;
- the Chief Commissioner of the Victoria Police; and
- the Acting Commissioner and senior officers of the South Australia Police Department.

Changes at the Authority - Effect on the Evaluation

1.7 Since the Committee began its evaluation, important changes have occurred involving the Authority. These include:

- the appointment of a new Chairman, the Hon. Justice John H. Phillips from the Victorian Supreme Court, on 14 August 1990;[7]
- the preparation by Justice Phillips of *Chairman's Proposals for Future Directions: A Submission to the Inter-Governmental Committee*, 15 November 1990, which proposed a major reorientation in the direction and form of the Authority's work;[8]
- the endorsement of Future Directions on 23 November 1990 by the Inter-Governmental Committee of Commonwealth, State and Territory Ministers who monitor the work of the Authority;[9]
- the opening of newly-established Authority offices in Perth on 1 August 1991 and Adelaide on 2 August 1991;[10] and
- the publication on 1 August 1991 of the Authority's *Corporate Plan July 1991-June 1994*, which represented the culmination of a process that began with the Arthur Andersen report.

1.8 On 21 September 1990, the Hon. Michael Duffy MP, the Attorney-General and Chairman of the IGC, replied to the Committee's invitation to make a submission.[11] He told the

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7. On 11 November 1991, when preparation of this report was virtually complete, it was announced that Justice Phillips would be leaving the Authority to take up the position of Chief Justice of Victoria on 17 December 1991.

8. See Appendix 1 for the text of this 'Future Directions' submission.

9. See paras. 6.20 - 6.23 below for the composition and functions of the Inter-Governmental Committee (IGC).

10. On 21 August 1990, the Attorney-General announced that the Commonwealth Government had approved the establishment, during the next three years, of permanent Authority offices in Adelaide, Brisbane and Perth, to supplement existing permanent offices in Melbourne and Sydney: NCA submission, p. 9. The Authority had operated temporary offices in Perth (1985-87) and Adelaide (1989-91).

11. Letter from the Attorney-General to the Committee dated 21 September

Committee that the request for submissions had been discussed by the IGC at its meeting in Melbourne on 31 August:

> The IGC unanimously held the view that, in light of the very recent appointment of the Hon Mr Justice J H Phillips as Chairman of the NCA, it is most inappropriate for the PJC to be undertaking a review at this time. ... The IGC also agreed that neither the IGC members nor their respective agencies would be providing individual submissions to the PJC review. It was decided that the IGC would put in a joint submission after the November IGC meeting, which would reflect the IGC's consideration of the NCA Chairman's November report.

1.9 The Governments represented on the IGC did not make submissions. State and Federal agencies, however, did provide submissions and appeared before the Committee at hearings.[12]

1.10 The IGC's submission, dated April 1991, noted the IGC's August 1990 view that the timing of the Committee's evaluation was inappropriate:

> All members of the IGC still are of this view, and particularly now that the new Chairman of the NCA has announced plans for the future directions of the Authority which constitute significant adjustments of former arrangements and strategies. Conducting a 'root and branch' review prior to the implementation of these plans would seem to be of academic, historical interest only, and carries with it the real risk that the PJC's evaluation will therefore be based on irrelevant, dated material. A flawed evaluation is most likely to adversely affect the effectiveness of the NCA and wider law enforcement efforts.[13]

1990.

12. See Appendixes 3 and 4 for details.

13. pp. 1-2.

1.11 The Committee rejected the IGC's view, which conflicted with the Committee's statutory duty. The Committee recognised that there is no ideal time to exercise this duty, as changes will always be occurring at the Authority.[14] Moreover, as the Authority noted: 'it is in some respects essential to consider the past effectiveness and efficiency of an agency when considering its future role and activity'.[15]

1.12 Over half the submissions were received and one hearing was held before Future Directions, and the IGC's approval of it, were made public. Not all subsequent submissions and witnesses took Future Directions into consideration. The Committee recognised the need to take this into account in relying on the evidence it received.

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14. For example, see para. 5.82 below on the fact that the Authority's Corporate Plan is subject to annual review and updating.

15. NCA, Written Answers, July 1991, A2.

CHAPTER 2

OVERVIEW OF THE NATIONAL CRIME AUTHORITY

Creation of the Authority

2.1 The impetus for the Authority was generated in the late 1970s and early 1980s by widespread community and political concern about the impact of organised crime upon Australian society. A series of Royal Commissions conducted by Justices Moffitt, Woodward, Williams, Stewart and Mr Frank Costigan QC were instrumental in identifying the existence of organised crime in Australia.[16]

2.2 In its *Initial Evaluation* report, the Committee's predecessor[17] highlighted several reasons why existing law enforcement agencies were in the early 1980s believed to lack the capacity to deal with organised crime:[18]

- criminal investigation was traditionally reactive rather than proactive;
- organised crime was able to transcend administrative, jurisdictional and even national boundaries, while Australian law enforcement efforts were fragmented, with a failure to exchange information between agencies, or even within single

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16. See the discussion paper by the Hon. M.J. Young, Special Minister of State, and Senator the Hon. Gareth Evans, Attorney-General, *A National Crimes Commission?*, AGPS, Canberra, 1983, p. 3 for a list of the reports from these Royal Commissions and from other pertinent inquiries.

17. The Committee ceases to exist when the House of Representatives is dissolved for an election: NCA Act, s. 53(4). A new Committee is created at the beginning of each new Parliament. The Committee was initially created in 1984, and has been re-established by newly-elected Parliaments in 1985, 1987 and 1990.

18. Parliamentary Joint Committee on the National Crime Authority, *The National Crime Authority - An Initial Evaluation*, May 1988, para. 2.23.

agencies;

- police forces lacked the resources and specialist expertise, such as lawyers, accountants and computer specialists, needed to attack criminal syndicates; and
- police forces lacked the coercive powers needed to secure evidence and documents.

2.3 As a reflection of community concerns, governments in Australia began to consider the need for a new law enforcement agency at the national level, equipped with special powers, skills and resources, to lead the fight against organised crime. In December 1982, Parliament enacted the *National Crimes Commission Act 1982*. This Act was not brought into operation before the change of Government in March 1983. The in-coming Government decided to review the legislation.[19]

2.4 As part of the review a discussion paper was issued,[20] and a two-day national conference was held.[21] A National Crime Authority Bill was introduced into the Senate on 10 November 1983. On 17 November, the Bill was referred for examination to a Senate Committee, which tabled its report on 1 May 1984.[22] Many of the amendments recommended by the Committee were accepted by the Government.[23] Further amendments were made by the Senate, and

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19. The new Government argued that the legislation gave no role to and lacked the support of the States; had ill-defined functions; had insufficiently defined and limited powers; and lacked over-riding safeguards like oversight by the Ombudsman and regular judicial audits: Senate, *Hansard*, 10 November 1983, p. 2492 (Senator the Hon. Gareth Evans).

20. The Hon. M.J. Young, Special Minister of State, and Senator the Hon. Gareth Evans, Attorney-General, *A National Crimes Commission?*, AGPS, Canberra, 1983.

21. National Crimes Commission Conference, Parliament House, Canberra, 28-29 July 1983.

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

23. See Senate, *Hansard*, 10 May 1984, p. 1969 (Senator the Hon. Gareth Evans QC, Ministerial Statement): 'Of the total of 49 recommendations of

the legislation came into effect on 1 July 1984. The National Crime Authority created by the legislation was supported by the State and Northern Territory Governments, which all passed legislation to underpin the Commonwealth legislation.

Structure and Powers of the Authority

2.5 The following section gives a brief outline of the Authority's structure, functions and powers. It is intended for readers unfamiliar with these matters. Other readers may prefer to move directly to paragraph 2.17.

2.6 The Authority commenced operation in July 1984. At present it consists of a full-time Chairman and three full-time members. All are lawyers. The longest period that the NCA Act permits a Chairman or member to serve on the Authority is four years.[24] The Authority uses the services of police seconded to it from Federal, State and Territory police forces. It does not employ any police itself.[25]

2.7 The Authority is accountable in most respects to the Commonwealth Attorney-General. In some respects the Authority is also accountable to an Inter-Governmental Committee whose structure and functions are explained in paragraphs 6.20 - 6.23 below. The IGC provides a means for relevant State and Territory Ministers to participate in the supervision and monitoring of the Authority.

2.8 The functions of the Authority are limited to matters relating to 'relevant criminal activity'. Section 4 of the Act defines this as: 'any circumstances implying, or any allegations, that a relevant offence may have been, or may be being, committed against a law of the Commonwealth, of a State or of a Territory'.

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the Committee, 31 are supported wholly or without any significant change, and 8 are supported with some modifications'.

24. NCA Act, s. 37.

25. Evidence, p. 1683 (NCA).

2.9 To interpret this it is necessary to have regard to the meaning of the term 'relevant offence'. Section 4 also defines this term in a definition which takes up four-fifths of a page in the Act. In summary, a relevant offence is one which:

- is punishable by imprisonment for three or more years;
- involves two or more offenders and substantial planning and organisation;
- ordinarily involves sophisticated methods, and is committed in conjunction with other offences of a similar kind; and
- involves theft, fraud, tax evasion, currency violations, illegal drug dealings or gambling, obtaining financial benefit from vice engaged in by others, extortion, violence, bribery or corruption of public officials, bankruptcy and company violations, harbouring of criminals, forging of passports, armament dealings or illegal international trade in fauna, or that involves matters of the same general nature as one or more of the foregoing, or that is of any other prescribed kind.

2.10 The functions of the Authority are defined in section 11 of the NCA Act and are divided into two categories: general functions and special functions. The Authority may only use certain of its coercive powers in relation to its special functions. These powers include the ability to hold private hearings at which persons can be required to attend and give evidence and to require persons to provide documents to the Authority.

2.11 Special functions consist of the investigation of matters referred. References may be made in two ways. Under section 13, the Commonwealth Minister, after consulting the IGC, may refer a matter. Under section 14, the relevant State or Territory Minister may, after obtaining the approval of the IGC, also refer a matter.

2.12 Section 10 provides for the Authority to approach the IGC and request approval for a matter to be referred by a Minister or Ministers. The Authority has stated that it does not usually seek a special reference unless it considers that the special powers are

needed.[26] Since its establishment in July 1984, the Authority has sought references for 12 matters, all of which it has been given. A given matter may be investigated pursuant to both Commonwealth and State references where the alleged offences involve both Commonwealth and State laws.[27]

2.13 The general functions of the Authority are listed in subsection 11(1) of the NCA Act. As with special functions, all must relate to 'relevant criminal activity'. In summary, they are:

(a) to collect, analyse and disseminate to law enforcement agencies criminal intelligence;
(b) to investigate any subject of its own choosing;
(c) to seek or arrange for the establishment of investigative Task Forces of various kinds: Commonwealth, State, or Joint Commonwealth-State; and
(d) to coordinate investigations by Commonwealth Task Forces, and, with the concurrence of the States concerned, Joint Commonwealth/State or State Task Forces.

2.14 Section 17 of the NCA Act requires the Authority to work with other agencies:

> (1) In performing its functions under this Act, the Authority shall, so far as is practicable, work in co-operation with law enforcement agencies.
>
> (2) In performing its functions under this Act, the Authority may co-ordinate its activities with the activities of authorities and persons in other countries performing functions similar to functions of the

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26. NCA, *Annual Report 1989-90*, p. 24.

27. For example, Matter Ten, involving company law and fraud offences, is being carried out pursuant to Commonwealth Reference No. 9 (21 December 1989), Victorian Reference No. 4 and South Australian Reference No. 3 (both approved by the IGC on 9 March 1990): NCA, *Annual Report 1989-90*, p. 22.

Authority.

2.15 Subsection 12(3) of the NCA Act provides that the Authority may, as a result of performing its functions, make a recommendation to the Commonwealth Minister or relevant State Minister for reform of the law relating to relevant offences in the following areas: evidence and trial procedure; offences involving or relating to corporations; taxation, banking and financial frauds; reception by Australian courts of evidence obtained overseas as to relevant offences; and maintenance and preservation of taxation, banking and financial records. In addition, the subsection provides that the Authority may recommend reform of administrative practices, including those of courts in relation to trials of relevant offences.

2.16 In carrying out or coordinating an investigation under either its special or general functions, the Authority may obtain evidence that would be admissible in a prosecution for offences against relevant laws. When it does so, it must provide the evidence to the appropriate Attorney-General, prosecuting authority or other law enforcement agency. The Authority must similarly provide information to assist in the taking of appropriate civil remedy actions against offenders.

Statistical Profile of the Authority - 1984-91

2.17 The following tables and graphs set out statistics provided by the Authority, which provide a useful insight into its activities since 1984. The Committee cautions, however, against using the statistics in a simplistic way to make definitive conclusions about the Authority. The use of statistics to measure law enforcement agency performance is controversial. The Committee received many differing views on the issue.[28] The predominant view was that the

28. See for example Evidence, p. 656-57 (Police Association of NSW); p. 698 (NSW Bar Association); p. 818 (NSW Law Society); p. 1178 (Tasmania Police); p. 1280 (Assistant Commissioner Graham Sinclair); pp. 1500-01 (Mr Russell Hogg); p. 1679 (NCA); submission from Mr Paul Delianis, p. 2; submission from the IGC, p. 13. See also C. Corns, 'Evaluating the

Authority's worth should not be assessed, for example, primarily by statistics on arrest and conviction rates.

2.18 There has been some involvement of other law enforcement agencies with many of the Authority's investigations. In using the statistics, the difficulty of separating the Authority's contribution from that of other agencies needs to be kept in mind.[29]

TABLE 1: **AUTHORITY STAFFING**

As at 30 June	1984-5	1985-6	1986-7	1987-8	1988-9	1989-90	1990-1
Approved Average Staffing Level	134	226.5	258.7	266.4	283.5	296.1	302.2
Actual Staff	207	320	320	354	397	426	377

2.19 Seconded police are included in the 'actual staff' figures in the table. However, provision is not made for seconded police in calculating the 'approved average staffing level'. Therefore the numbers of police seconded to the Authority can be roughly estimated by assuming that the Authority was staffed to its approved level and subtracting the 'approved average staffing level' figure from the 'actual staff' figure for the corresponding year. At 30 June 1990, the 426 staff were based as follows: Sydney, 224; Melbourne, 158; and Adelaide, 44.[30]

2.20 Table 2 on the next page shows Authority expenditure and receipts from 1984 to 1991. The following comments relate to the

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National Crime Authority', *Law Institute Journal*, September 1991, p. 829.

29. cf. Evidence, p. 395, where Mr Henry Rogers, a member of the Authority's staff, told the Committee on 5 November 1990: 'There is a suspicion within the staff of the Authority that figures are being claimed as NCA successes that the NCA has had virtually nothing to do with'.

30. NCA, *Annual Report 1989-90*, p. 56.

Table:

. Dollar amounts show historic costs and receipts: they have not been adjusted for inflation.

. The 'revenue' item in Table 1 shows the amounts paid by the States and Northern Territory. Seven of the twelve Matters

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TABLE 2: **AUTHORITY EXPENDITURE AND REVENUE**

Year ending 30 June	Expenditure ($000)					Revenue ($000)	Total Outlays ($000)
	Salaries O/time	Adminis-trative	Plant and Equipment	Property	Total		
1985	2,431	3,381	-	-	5,812	-	5,812
1986	6,713	5,009	800	-	12,522	4	12,518
1987	8,204	6,781	242	-	15,227	694	14,533
1988	8,740	7,152	471	-	16,363	1,907	14,456
1989	10,390	9,096	1,515	-	21,010	5,735	15,275
1990	11,350	11,977	-	4,122	27,449	7,333	20,116
1991	12,214	12,573	-	4,272	29,059	6,654	22,405
Total	60,042	55,969	3,028	8,394	127,442	22,327	105,115

investigated by the Authority are subject to cost-sharing arrangements between the Commonwealth and one or more States or the Northern Territory.[31] For example, Authority Matter Number Ten, an investigation into alleged violations of company law and fraud offences, is being conducted under a

31. NCA, *Annual Report 1989-90*, pp. 63-64 states that cost-sharing arrangements apply to Matters One, Six to Ten, and Twelve. The basic cost-sharing formula is set out on p. 63, and is subject to negotiated variations for individual Matters.

cost-sharing arrangement between the Commonwealth, South Australia and Victoria.[32]

. Costs associated with the establishment and operation of the Authority's temporary office in Adelaide and with South Australian Reference No. 2[33] are fully reimbursed by the South Australian Government, rather than being subject to a cost-sharing agreement.[34] These costs between 1 January 1989 and 30 June 1991 totalled nearly $8.3 million.[35] The reimbursement is included in the 'revenue' figures.

. The Table does not show the full cost of the Authority to the taxpayer. Until 1989-90, property expenses were not charged to the Authority's appropriation. They were met from funds allocated to the Department of Administrative Services. Costs of monitoring the Authority by the IGC and this Committee are not included in the Table.

. In addition, the Table does not reflect the fact that the salaries of most police seconded to the Authority are met by their home forces.[36] These salaries costs are considerable. The Committee was told that in 1989-90 Victoria paid the Authority $1.174 million under cost-sharing agreements. It also bore the $1.181 million cost of the salaries of 40 Victoria Police officers

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32. NCA, *Annual Report 1989-90*, p. 64.

33. This reference was issued on 24 November 1988. It concerned allegations of bribery and corruption of, or by, police officers and other South Australian officers, illegal gambling, extortion and prostitution, drug offences, and murder or attempted murder: NCA, *Annual Report 1989-90*, p. 21.

34. NCA submission, p. 25.

35. Figure supplied to the Committee by the Authority.

36. The services of seconded police are used by the Authority pursuant to ss. 49 and 58 of the NCA Act. In performing services for the Authority, seconded police remain officers of their home force and retain the associated powers and liabilities: NCA submission, p. 41.

seconded to the Authority.[37]

. minor capital items (less than $250,000) are now included under 'administrative' expenditure; prior to 1990, they are shown under the 'plant and equipment' expenditure.

37. Evidence, p. 1257 (Assistant Commissioner Graham Sinclair).

TABLE 3: **STATISTICS RELATING TO ALL AUTHORITY INVESTIGATIONS**

	1984-85	1985-86	1986-87	1987-88	1988-89	1989-90	1990-91
Requests made for information (s.19A)	-	(3)[1]	8(9)[1]	1	7	137	-
Requests made for documents (s.19A)	-	(9)[1]	(21)[1]	3	-	3	-
Requirements to furnish information (s.20)	-	1	-	-	-	-	1
Requirements to produce documents (s.20)	-	-	-	-	-	1	1
Orders made under s.16(4HD) Income Tax Assessment Act for disclosure of information	-	-	-	-	-	7	-
Orders made under s.3D(7) Taxation Administration Act for disclosure of information	-	-	-	-	-	-	2
Approx total pages received from the ATO pursuant to s.16(4)(m) ITAA and s.3D(1) Taxation Admin Act	37000	67000	33000	20400	9970	6167	4363
Number of files created	344	739	489	300	205	276	118
Search warrants granted under s.22	-	-	-	7	19	66	-
Applications by telephone for search warrants (s.23)	-	-	-	-	-	-	-
Search warrants granted otherwise than under NCA Act	11	99	98	140	105	139	200
Warrants granted for telecommunications interceptions	-	15	15	21	45	35	28

Warrants granted authorising use of listening devices[2]	-	38	30	104	102	57	24
Public sittings	1	-	-	2	1	1	-

	1984-85	1985-86	1986-87	1987-88	1988-89	1989-90	1990-91
Orders granted authorising monitoring of financial institution accounts	-	-	-	-	-	8	-
Witnesses examined at s.28 hearings	100	236	237	336	159	144	171
Exhibits received in s.28 hearings	155	915	359	323	659	441	388
Approximate total pages	24000	83000	27000	22000	45041	19267	6065
Notices issued under s.29	-	190	265	499	378	418	381
Documents produced to NCA under s.29	-	942	936	1100	1410	1992	695
Approximate total pages	-	55000	68000	80000	43825	19374	11462
Documents seized under search warrant (pages)	700	550000	50000	213000	54820	14462[3]	12935
Approx total pages provided to NCA by other agencies	536000	762300	299000	339000	8700[3]	147250[3]	48851
Number of files created	5292	9066	6399	9467	5232	7902	2162
Witnesses protected (s.34)	-	2	5	9	5	10	5
Persons charged with breach of secrecy provision (s.51)	-	-	-	-	-	-	-
Applications for orders of review pursuant to AD(JR) Act[4]	-	-	-	3	-	-	-

1. The figures in brackets represent additional requests for information from agencies falling within the ambit of s.19A, but for which it was unnecessary formally to invoke its provisions.

2. Includes renewals of existing warrants.

3. Figure is understatement; unpaginated documents recorded as having only one page by the Authority's computerised registry system.

4. One not proceeded with. In addition, there were six applications to the Federal Court pursuant to s.32 of the Act in 1987/88.

TABLE 4: **TAXATION AND PROCEEDS OF CRIME RESULTS at 30 June 1991**

Matter No.	Understated/ undeclared income notified to ATO[38]	Material assistance given to ATO in issue of assessments	Assessments issued by ATO[39]	Proceeds of crime (amounts frozen or secured)[40]
One	4,105,000	several million[41]	2,955,000	
Two	6,860,000	-	4,454,841	10,000,000[42]
Three	-	-	3,544,754	7,200,000[43]
Four	1,185,000	14,700,000	5,096,531	
Five	4,400,000	-	-	
Six	5,000,000	-	542,421	
Seven	469,191	-	11,552,951	
Eight	607,121	-	4,855,198	2,802,000 +US$84,800
Twelve	-	-	14,000,000+	9,000,000

38. Notification of understated/undeclared income by the Authority to the Australian Taxation Office can and has led to the issue of taxation assessments. The figures shown in this column do not include matters where taxation assessments have later been issued by the ATO.

39. The figures in this table show the total assessments issued as at 30 June 1991 by the ATO. Where assessments previously issued as a result of Authority investigations have been amended or withdrawn by the ATO, only the latest figure (as at 30 June) is shown.

40. Includes the value of assets seized under the *Customs Act 1901* as well as under proceeds of crime legislation.

41. No assessment has been issued to date as a result of this information and precise figures cannot be provided at this time.

42. This amount is less than the $19.1m shown in the Authority's Annual Report for 1989-90, p. 33. The decrease resulted from a Commonwealth Director of Public Prosecutions decision to release certain property which was then sold, so as not to disadvantage a mortgagee.

43. This is the total value of orders obtained against Bruce Richard Cornwell and Barry Richard Bull, the two principals convicted as a result of investigations under Matter No. Three. The value of identified assets may not equal this amount.

Total	$22,626,312	$14,700,000 + several million	$47,001,696	$29,002,000 +US$84,800

2.21 The amounts listed in Table 4 under 'Assessments issued by ATO' are unlikely to be recovered in full. For example, in Matter Number Three, by late 1987 assessments had been issued against eight taxpayers for a total of $1,535,975.[44] Of this amount, $469,513 (30.6%) had been received by the ATO. Two of the taxpayers had paid in full. Two who still owed money to the ATO had no assets, and two others had no assets in Australia.[45]

2.22 Table 4 does not show the total amount actually recovered by the Commonwealth as a result of Authority activities. It is not possible to say whether the Authority 'pays its way' - that it recoups more than it costs to run. In any event, the Committee does not consider it appropriate that law enforcement bodies like the Authority should aim for full cost-recovery or be judged by this criterion.

2.23 The graph below shows the number of people charged as a result of Authority investigations. The Authority's December 1990 submission set out the types of charges involved. Fifty-four per cent of persons arrested were charged with drug-related offences. The next largest category was taxation and fraud offences, with twelve per cent of those arrested. Other categories were: theft and goods in custody, ten percent; firearms offences, eight per cent; passport and immigration offences, five per cent; bribery and secret commission offences, four percent; murder and serious assault, three per cent; and other offences, four per cent.[46]

44. National Crime Authority, *Operation Silo: Report of the Investigation*, AGPS, Canberra, 1987, p. 27.

45. ibid. The Report does not indicate if the two remaining taxpayers had sufficient assets to enable to ATO to recover the amounts assessed as owing.

46. NCA submission, p. 28. The submission notes that persons charged with more than one category of offence have been included in the figures for each relevant category.

CHAPTER 3

THE NATIONAL CRIME AUTHORITY FROM 1984 TO 1990

Introduction

3.1 Comments made during the present evaluation indicate that the priority and direction given to the Authority's activities tend to show the management style and approach of the individual Chairman of the Authority.

3.2 Royal Commissions typically bear the stamp of their heads. The same has been true of the Authority, which in some respects is a permanent Royal Commission. The priorities and the management style of the Authority have been stamped by the aims and personality of each Authority Chairman. Accordingly, the Committee considers it is useful to evaluate the Authority by the periods of office of its Chairman.

3.3 This chapter focuses on the first three Chairmen of the Authority, with the main focus being on the longest serving Chairman, the Hon. Justice Stewart. Chapter 5 deals with the chairmanship of the current Chairman, the Hon. Justice Phillips.

3.4 The first three Chairmen of the Authority were:

- the Hon. Justice Stewart - 1 July 1984 to 30 June 1989;
- Mr Peter Faris QC - 1 July 1989 to 12 February 1990; and
- Mr Julian Leckie (as Acting Chairman) - 12 February 1990 to 14 August 1990.

CHAIRMANSHIP OF JUSTICE STEWART

Committee - Authority Relations

3.5 Relations between the Committee and the Authority from the time of the Authority's establishment in 1984 were characterised by the Committee's difficulty in obtaining information the Committee regarded as adequate to enable it to properly carry out its work.

3.6 One example of this difficulty was the Authority's insistence that special procedures be adopted for the conduct of meetings between the two bodies, including objection to the taking of a Hansard record of proceedings.[47]

3.7 The Committee's *First Report*,[48] tabled in the Parliament on 29 November 1985, addressed the difference of opinion between the Committee and the Authority over information the Authority should provide to the Committee and, in particular, on application of section 55 of the NCA Act. The Report recommended that the NCA Act be amended to provide:

> (a) that the Parliamentary Joint Committee on the National Crime Authority should have the power to do such things and make such inquiries as it thinks necessary for the proper performance of its duties; and
>
> (b) that where information sought by the Committee is of such a nature that its disclosure to members of the public could prejudice the safety or reputations of persons or the operations of law enforcement agencies then it should be made the subject of a separate report

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47. The Committee gives an account of the differences with the Authority in its *First Report*, in the section 'Relationship Between the Committee and the Authority', particularly paras. 40-42 and paras. 56-58.

48. Parliamentary Joint Committee on the National Crime Authority, *First Report,* AGPS, Canberra, 1985.

> to the Chairman and Deputy Chairman of the Committee.[49]

3.8 Following the tabling of the *First Report*, the then Special Minister of State, the Hon. M.J. Young MP, - the Minister responsible for the Authority - convened a meeting between the Committee and the Authority on 1 May 1986 to allow both to address the difficulties discussed in the *First Report*. As a result one matter was agreed: that the Authority prepare a comprehensive briefing on its operations for the Committee. As preparation for this briefing the Committee produced a detailed 'matters of interest' document indicating the aspects of the operations of the Authority on which it sought information.[50]

3.9 The Government response to the Committee's *First Report* was tabled in the House of Representatives on 5 June 1986. The response noted discussions between the Committee and the Authority had taken place and that:

> As a result of these discussions, there has been clarification of the apparent differences between the Authority and the Committee. The Government is confident that these discussions will lead to the development of a sound relationship between the two bodies.[51]

3.10 The Committee's *Second Report* was tabled on 27 November 1986. It described the gradual improvement in the working relationship between the Committee and the Authority, including the commencement of regular briefing by the Authority. The Committee reported satisfaction with the amount of information provided by the Authority and observed: 'The resolution of the threshold problem to the qualified satisfaction of both bodies has

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49. *First Report*, p. xiii.

50. Parliamentary Joint Committee on the National Crime Authority, *Second Report*, AGPS, Canberra, 1986, para. 3.

51. Senate, *Hansard*, 13 June 1986, p. 4032.

allowed a more effective working relationship to develop'.[52]

3.11 The *Second Report* also stated:

> This relationship is characterised by a degree of mutual trust, a regular exchange of information and a willingness by each body to allow the other to discharge its statutory duties. At this stage, it is neither possible nor desirable for the Committee to make a definitive judgment as to the efficacy of the Authority's operations, however, it believes that its current relationship with the Authority will allow it to formulate such a judgment in due course.[53]

3.12 In relation to the changes and improvement to Committee-Authority relations and information provided by the Authority, the *Second Report* said:

> The Committee will also continue to meet regularly with the Authority. These joint meetings provide opportunities for the Committee to receive briefings on matters of interest raised by members. These matters, as indicated elsewhere in this Report, deal with a range of issues from organisational and administrative matters to a variety of operational aspects of the Authority's functions. The Committee will also continue to meet with other law enforcement agencies, Government officials and academics involved in, or observers of, the fight against organised crime. In this way the Committee will build up a reasonably complete overview of the effectiveness of the National Crime Authority. These activities will allow the Committee to make a substantial contribution to the evaluation process which must take place as the Authority's

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52. Parliamentary Joint Committee on the National Crime Authority, *Second Report*, AGPS, Canberra, 1986, para. 6.

53. *Second Report*, para. 7.

statutory time limit draws closer.[54]

3.13 The response by the Government to the *Second Report* was tabled in the Senate on 25 February 1987 and in the House of Representatives on the following day. The response noted the apparent improvement in the relationship between the Committee and the Authority following the May 1986 discussion between the Committee and the Authority. In relation to the Committee's observation about the evaluation of the Authority foreshadowed in the Report, the response noted:

> In reviewing the NCA's performance the Government will need to take into account a wide range of views, and acknowledges that the joint committee will have a particularly important contribution to make to this process.[55]

3.14 The Committee undertook an evaluation of the Authority in early 1988. *The National Crime Authority - An Initial Evaluation*[56] was tabled on 17 May 1988. The Initial Evaluation was made of the Authority's performance of its functions 'so that the Parliament may have the benefit of this Committee's knowledge and views when it comes to consider the legislation lifting the sunset clause'.[57]

3.15 The *Initial Evaluation* did not claim to be a comprehensive examination of the Authority's activities for two reasons: it had been in existence for little more than three and a half years, and the incomplete nature of the Authority's investigations and legal proceedings resulting from them would have made it premature to comment on the Authority's achievements in that area of activity.[58]

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54. *Second Report*, para. 41.

55. Senate, *Hansard*, 25 February 1987, p. 643.

56. The *Initial Evaluation* considered 22 written submissions and took evidence *in camera* on two days from a limited number of witnesses.

57. *Initial Evaluation*, para. 1.4.

58. *Initial Evaluation*, paras. 1.4 and 1.6.

3.16 The *Initial Evaluation* concentrated on the Authority's achievement of its initial objectives, and whether amendment of the NCA Act was required, or increased resources were required by the Authority, to enable it to meet its objectives.[59] The *Initial Evaluation* recommended that a comprehensive evaluation of the Authority's work, and of the success of the law enforcement strategy underpinning the establishment of the Authority be undertaken after the Authority had been in existence for seven years.[60]

3.17 The Committee's *Third Report* was tabled on 30 November 1989. The *Third Report* did not attempt to give an exhaustive account of the Authority's activities, nor set out to make further evaluation of the Authority's performance beyond that carried out in the *Initial Evaluation*.[61] The *Third Report* did address a number of criticisms about the Authority, including an examination of several specific cases arising from Authority investigations which had failed at the committal stage of proceedings.[62]

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59. *Initial Evaluation*, para. 1.7.

60. *Initial Evaluation*, para. 4.31. The Government Response to the *Initial Evaluation* noted this recommendation, and that such an evaluation would be '... consistent with the Joint Committee's function under the NCA legislation ...', *Government Response to the Report of the Parliamentary Joint Committee on the National Crime Authority Entitled 'An Initial Evaluation'*, tabled in the House of Representatives on 3 November 1988 and in the Senate on 7 November 1988, p. 3.

61. Parliamentary Joint Committee on the National Crime Authority, *Third Report*, AGPS, Canberra, 1989, para. 1.7.

62. *Third Report*, paras. 2.5 to 2.37. The Committee recommended (Senator Cooney dissenting) that the Authority be provided with a greater role in the choice of counsel by the DPP in relation to prosecutions arising from Authority investigations: *Third Report*, para. 2.13.

Criticisms of the Authority under Justice Stewart's Chairmanship

3.18 During Justice Stewart's chairmanship, the management and direction of the Authority was the subject of comment and criticism in relation to its administration and its capacity to effectively combat organised criminal activity. Elements of this comment and criticism were reflected in submissions and evidence to the present evaluation.

3.19 The principal comments and criticisms were:

- the Authority was excessively secret with intelligence it had gathered and did not share it with other law enforcement agencies;
- Authority investigations relied too heavily on teams led by lawyers rather than skilled police investigators;
- the Authority did not have a clear strategy for combating organised criminal activity;
- the Authority neglected its statutory functions of setting up and co-ordinating joint task forces with other agencies;
- the Authority neglected its role of promoting law reform and administrative change that would assist both it and other law enforcement agencies in combating organised crime;
- the Authority was excessively secret; and
- results of Authority activities were unsatisfactory, given the resources allocated to it.

∃ Investigation team structure

3.20 The principal criticism about the organisation of Authority investigation teams was that they were exclusively under the leadership of lawyers rather than police investigators. This criticism, which was repeated to the Committee during the present evaluation, was considered by the *Initial Evaluation* which recommended that:

> in the management of its investigative teams the Authority give greater recognition to the expertise of

experienced police officers and ensure that they have a greater involvement in the relevant investigations.[63]

3.21 In terms of the more general question of police involvement in the Authority the *Initial Evaluation* considered that the 'Authority would have better acceptance from police if one of the members of the Authority were to be a senior and respected serving or former police officer'.[64] The *Initial Evaluation* recommended that 'consideration be given to the appointment of a senior and respected serving or former police officer as a member of the Authority'.[65]

3.22 The Government's response to the *Initial Evaluation* recommendation noted that consultation with State and Territory Ministers was required to make appointments of members to the Authority: 'The Government will, therefore, bear in mind the Joint Committee's recommendation when considering future appointments to the Authority and has ... drawn the recommendation to the attention of the Inter-Governmental Committee'.[66] No senior police officer has since been appointed as a member of the Authority.[67]

3.23 A matter considered as a related issue to investigative team structure by the *Initial Evaluation* was identified by police associations; that police officers seconded to the Authority worked subject to the terms and conditions of their home force, with consequent differences in pay and conditions. This situation had resulted in 'friction and dissatisfaction'.[68] The *Initial Evaluation*

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63. *Initial Evaluation*, para. 4.15.

64. *Initial Evaluation*, para. 4.16.

65. *Initial Evaluation*, para. 4.17.

66. *Government Response to the Report of the Parliamentary Joint Committee on the National Crime Authority Entitled 'An Initial Evaluation'*, tabled in the House of Representatives on 3 November 1988 and in the Senate on 7 November 1988, p. 4.

67. See paras. 8.156 to 8.158 below for the present Committee's recommendation on this issue.

68. *Initial Evaluation*, para. 4.18.

recommended that police officers attached to the Authority be employed on contract rather than being seconded from their parent forces.[69]

∃ Intelligence gathering and distribution

3.24 According to critics, intelligence the Authority acquired through its investigations was either not shared with other agencies, or was not shared in a timely and effective way. So as to enhance the exchange of information and intelligence, Operations Conferences have been convened by the Authority on a regular basis for some years. They are attended by a wide range of law enforcement agencies from around Australia. These Conferences were, however, criticised by one police Commissioner for failing to facilitate the free flow of intelligence and information.[70] The perception was one of an Authority reluctant to share information.

3.25 The Authority's emphasis on direct investigation resulted in less attention to the other functions, particularly intelligence sharing, it was given by the NCA Act. Mr Graham Sinclair, an Assistant Commissioner of the Victoria Police and the Director of Investigations for the Authority in 1989-90, said that the Authority's earlier concentration on an investigatory role had been to the detriment of the Authority's intelligence-gathering role.[71]

3.26 The *Initial Evaluation* observed that intelligence gathering and analysis was considered to have been a low priority in Authority activities at the time. The Authority's approach to intelligence gathering and distribution was described in this way:

> It established its own intelligence branch early in 1987 but intelligence gathering is still viewed as incidental to

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69. *Initial Evaluation*, para. 4.19.

70. Submissions from Commissioner Hunt of the South Australia Police, 12 October 1990, p. 2 and 4 February 1991, p. 4. For similar criticism see Evidence, p. 506 (Police Federation of Australia and New Zealand).

71. Evidence, p. 1255.

> the Authority's investigative functions rather than as an end in itself. It appears that in the near future, at any rate, the Authority will continue to rely on the Australian Bureau of Criminal Intelligence (ABCI) and, to a lesser extent, on other law enforcement agencies, for intelligence gathering. It also makes use of the ABCI for the dissemination of intelligence which has come into its possession but which is not relevant to its current investigations.[72]

∃ Development of a defined strategy

3.27 A central aspect of the Authority's role which has attracted comment has been the extent to which it fulfils its charter of combating organised crime. To a number of critics of the Authority, this issue is defined by how the Authority has developed its role following the repeal of the 'sunset clause' in the NCA Act in 1988.[73]

3.28 The Authority's submission to the present evaluation stated that the July 1989 Arthur Andersen report, discussed below in paragraphs 3.50 to 3.52, 'identified the absence of a clearly articulated and communicated vision of the NCA's direction and role as one of the major causes of the organisation's difficulties'.[74] In comments to the present evaluation, Justice Vincent described his perception of the Authority as an organisation that had 'proceeded in a relatively directionless fashion' in its early years.[75]

3.29 Following the Authority's establishment in 1984, the Authority focused on direct investigation of major figures and

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72. *Initial Evaluation*, para. 3.21. See paras. 5.38 to 5.41 below for the increased emphasis the Authority has given to intelligence matters since 1988.

73. The Committee analyses the development of the Authority's strategy under Justice Phillips in chapter 5 below.

74. NCA submission, p. 10.

75. Evidence, p. 372.

syndicates believed to be involved in drug importation and distribution. These included matters taken over by the Authority from the Costigan Royal Commission.[76]

3.30 A criticism of this focus was that direct investigation was a misconception of the Authority's real role in the fight against organised crime. Mr Frank Costigan QC has consistently put such a view.[77] In evidence taken during the course of the present evaluation in November 1990, which echoed views he put to the Committee in 1988, he said:

> It is really a question of how you see the role of the Crime Authority. I would see a lot of the investigation not being done by the Crime Authority at all but by law enforcement agencies and the Crime Authority exercising one of the roles it is given under the Act, to join task forces, and supervising and keeping its hand on what is going on and making itself available to collect additional evidence. I would see the Crime Authority very much in the intelligence area and particularly in the money laundering area where the skills that one learns as a lawyer and as a policeman, combined, can be very powerful.[78]

3.31 When the Authority was established in 1984, its investigation function was intended as its central role. Targeted investigations recognised what was seen as the Authority's primary statutory function. Moreover, the Authority's special investigations into drug related crime relied directly on references from Ministers with the approval of the IGC. It was always apparent that the Authority's focus at the time of Justice Stewart's chairmanship had the support of the State, Northern Territory and Federal Governments. Its focus also had the support in general terms of the

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76. An account of these matters is in the *Initial Evaluation*, paras. 3.26 to 3.29.

77. Evidence, p. 411.

78. Evidence, p. 434.

then Committee.[79]

3.32 The Authority's performance, and the *modus operandi* of the investigations during Justice Stewart's chairmanship until early 1988, were examined in detail in chapter 3 of the *Initial Evaluation*.

3.33 In relation to conduct of special investigations, the *Initial Evaluation* noted that:

> At present the Authority's investigations appear to divide fairly evenly between so-called 'white-collar' crimes such as corporate fraud and tax evasion on the one hand, and drug trafficking on the other, with a smattering of bribery, corruption, murder and other criminal activities on the side.[80]

3.34 Looking at general investigations, the *Initial Evaluation* noted that the seven investigations undertaken up to early 1988 by the Authority had similar characteristics: 'As is the case with its special investigations, the criminal activity at issue in the Authority's ordinary investigations ranges from corporate fraud to drug trafficking'.[81]

3.35 The *Initial Evaluation* concluded that the Authority would foreseeably be hampered in its ability to change the environment in which organised crime operates by two factors: the absence of its own stand-alone intelligence capacity, and the lack of a clear strategic overview of organised crime.[82]

3.36 These factors made it difficult, both for the Authority and for those monitoring the Authority's activities, to know whether the Authority was a success or a failure. When examining the necessity

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79. See for example, *Initial Evaluation*, para. 2.40; *Third Report*, para. 2.3.

80. *Initial Evaluation*, para. 3.10.

81. *Initial Evaluation*, para. 3.17.

82. *Initial Evaluation*, paras. 4.27 and 4.28.

for a stand-alone intelligence capacity, the *Initial Evaluation* noted:

> Given the thrust of the Royal Commission reports which led to the establishment of the Authority and the Authority's own belief that it has uncovered evidence of the existence in Australia of more highly structured criminal groups which have been operating for some time without interference from other law enforcement agencies, the lack of its own independent intelligence function may prove a weakness in the longer term.[83]

3.37 The *Initial Evaluation* also concluded that without a strategic overview of organised crime the Authority ran the risk of conducting individual investigations without a focus.

> It is not clear, however, that the Authority's present investigations form a coherent whole or that in structuring its investigations the Authority is looking beyond immediate success to the consequences of that success.[84]

∃ Task forces

3.38 The *Initial Evaluation* noted criticism by police and a police association of the apparent reluctance by the Authority to pursue its statutory power to arrange and coordinate joint task forces with other law enforcement agencies.[85]

3.39 The *Initial Evaluation* regarded the use of task forces by the Authority, pursuant to its statutory powers under paragraph 11(1)(c) of the Act, as of potential importance and observed that they

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83. *Initial Evaluation*, para. 4.27.

84. *Initial Evaluation*, para. 4.29.

85. *Initial Evaluation*, para. 4.22. The *Initial Evaluation* noted that the Northern Territory Police, the Australian Federal Police Association and Mr Vic Anderson had proposed to the Committee that greater consideration should be given to the use of task forces involving other agencies to conduct investigations on behalf of the Authority.

had been used by the Authority:

> only as an adjunct to its powers to conduct ordinary and special investigations. Thus, although the Authority speaks in its Annual Reports of 'separate task forces' administered, serviced and maintained by the Authority, in effect such task forces are simply the investigative teams used by the Authority in the allocation of its resources to particular investigations.[86]

3.40 The *Initial Evaluation* indicated how such forces could be employed:

> The Committee considers that at least two of the Authority's ordinary investigations could have been passed to police task forces co-ordinated by the Authority and that in the longer term it may be possible for the Authority to hive off aspects of its special investigations in this fashion. This course would relieve pressure on the Authority's own resources and it would also demonstrate a greater degree of confidence in the capacities of police forces than the Authority has hitherto manifested.[87]

3.41 The Government response to this finding by the Committee was to note that 'this matter is basically one for the Authority to determine in the context of its management and operational responsibilities.'[88]

∃ Law reform and educative functions

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86. *Initial Evaluation*, para. 3.20.

87. *Initial Evaluation*, para. 4.22.

88. *Government Response to the Report of the Parliamentary Joint Committee on the National Crime Authority Entitled 'An Initial Evaluation'*, tabled in the House of Representatives on 3 November 1988 and in the Senate on 7 November 1988, p. 5. The Committee discusses the proposed use of task forces under Justice Phillips' chairmanship in paras. 5.56 to 5.67.

3.42 The Authority's law reform function was not actively pursued in the opinion of several commentators. Disappointment was also expressed during the present evaluation that the Authority had not exercised leadership in recommending legislative change over the early years of the Authority's existence that would have assisted all law enforcement agencies.[89]

3.43 In its early years, the Authority regarded law reform and education as being a low priority compared to its investigative functions.[90] The *Initial Evaluation* observed:

> The Authority has therefore contented itself with being consulted by the Commonwealth Government in relation to proposed legislation such as the recently enacted *Proceeds of Crime Act* 1987 and with making its views known in appropriate quarters.[91]

3.44 In relation to the Authority's educative activities, the *Initial Evaluation* noted the Authority's advice that, whilst it had held public sittings, as provided for by section 60 of the NCA Act, on two occasions: 'Once again the Authority believes that other matters - specifically its investigative functions - have priority'.[92]

∃ The Authority and secrecy

3.45 It was argued by critics of the Authority during Justice Stewart's chairmanship, as now, that it was not possible to properly assess the Authority's effectiveness due to excessive secrecy. Submissions to the Initial Evaluation argued that the secrecy surrounding the Authority's operations made any sensible comment

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89. Evidence, pp. 524-25 (Police Federation of Australia and New Zealand).

90. *Initial Evaluation*, para. 3.24.

91. *Initial Evaluation*, para. 3.24.

92. *Initial Evaluation*, para. 3.25.

from the public difficult.[93]

3.46 The problem posed by the Authority's secrecy for any evaluation of its role and achievements was recognised by the *Initial Evaluation*. The *Initial Evaluation* recognised the statutory basis of the requirement for secrecy in Authority operations, but commented that the Authority 'has perhaps been over-zealous in its application of the secrecy provision in the Act, section 51'.[94] The *Initial Evaluation* also noted that the provisions of section 51 would need review if they hampered the proper release of intelligence information.[95] The issue of section 51 and intelligence information is dealt with in paragraphs 7.61 to 7.64 below.

∃ Unsatisfactory results

3.47 Since an early stage of its existence a criticism of the Authority is that it has failed to produce results that justify the resources allocated to it.

3.48 The measurement in quantitative terms of the results achieved by the Authority will always be a most difficult aspect of evaluation of the Authority. The *Initial Evaluation* noted: 'The success or failure of the Authority in meeting its objectives is not susceptible to evaluation in quantitative terms'.[96] It also observed

> At first sight statistics on numbers of persons charged, charges laid and convictions obtained may seem to provide a ready quantitative indicator of the Authority's effectiveness. However there are two objections to this method of evaluation. In the first place such statistics cannot provide an objective measure of the Authority's success or failure since it is impossible to set targets for

93. *Initial Evaluation,* para. 4.32.

94. *Initial Evaluation*, para. 4.33.

95. *Initial Evaluation*, para. 4.33.

96. *Initial Evaluation*, para. 4.1.

> prosecutions, charges or convictions against which performance may be assessed on any rational basis. ... Secondly, as the Williams, Stewart and Costigan Royal Commissions all stressed, in the area of organised crime it is the significance of the persons convicted rather than the mere number of convictions that is of importance.[97]

Assessment of Chairmanship of Justice Stewart

3.49 In general comment on the period of Justice Stewart's chairmanship, the *Third Report* noted that Justice Stewart's style of direction and management derived from his experience as a royal commissioner in three royal commissions. The *Third Report* said:

> Rather than standing back as a manager he was involved in the day to day running of the Authority's investigations. With the lifting of the 'sunset clause', however, there was a need for the organisational structure of the Authority and the role of the Chairman in particular to change to reflect the Authority's new status as a permanent body. Mr Justice Stewart had initiated a review of the Authority's organisational structure, management practices and support systems in November 1988 [the Arthur Anderson report] and the final report of this review was presented in July 1989 to the new Chairman, Mr Peter Faris, QC.[98]

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97. *Initial Evaluation*, paras. 4.4 - 4.5. See also, C. Corns, 'The National Crime Authority: An Evaluation', *Criminal Law Journal*, vol. 13(4), August 1989, pp. 241-43.

98. *Third Report*, para. 1.18.

Review of the Authority by Arthur Andersen & Co - 1989

3.50 Following expression of dissatisfaction by Authority staff about the Authority's management and administration in mid-1988, and a series of extended discussions between staff of the Authority on ways of addressing staff grievances, a management consultant, Arthur Andersen & Co, was commissioned in late 1988 to conduct a review of the Authority.

3.51 The terms of reference for the review were:

> (a) identify any significant inadequacies, or areas where improvements could be made, in the present working arrangements for conducting, managing and supporting investigations and related activities;
>
> (b) examine ways of eliminating any such inadequacies and/or making the necessary improvements; and
>
> (c) recommend the implementation of any necessary changes as quickly as possible.[99]

3.52 The Authority's submission to the present evaluation stated that the Arthur Anderson report, which was presented to the Authority in July 1989:

> identified the absence of a clearly articulated and communicated vision of the NCA's direction and role as one of the major causes of the organisation's difficulties. Many of the conclusions and recommendations expressed in the Report reflected this view.[100]

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99. NCA, *Annual Report 1988-89,* AGPS, Canberra, 1989, p. 57.

100. Submission, p. 10. The Committee refers to the fact that the Arthur Anderson report has not been made publicly available in paras. 7.84 - 7.87 below.

CHAIRMANSHIP OF MR FARIS QC

3.53 Mr Peter Faris QC, was appointed Chairman of the Authority from 1 July 1989. The Committee has not reported to the Parliament on the management and direction of the Authority during the period of Mr Faris's chairmanship, with the exception of the matters raised in its examination of the Authority's Operation 'Ark' investigation.[101]

3.54 The *Third Report* had noted the fact of Mr Faris's appointment and stated:

> Mr Faris has already indicated to the Committee that he proposes to take the Authority in new directions and that, unlike Mr Justice Stewart, he will not be involved in the day to day running of investigations. Instead he intends to take on an overall management role, with responsibility for the Authority's policies and procedures.[102]

3.55 Implementation of the change of management style foreshadowed by Mr Faris was only partly achieved by the time Mr Faris resigned from the chairmanship of the Authority.

3.56 Soon after taking up his appointment, Mr Faris described his aims for the Authority:

> As for the direction the Authority will take in the future, it is perhaps still too early for me to give a detailed plan of action. However, I can say with some confidence that the drug trade and white collar crime will be two key targets of the Authority's investigations...
>
> Regarding white collar crime, such as tax evasion, fraud

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101. Parliamentary Joint Committee on the National Crime Authority, *Operation Ark*, Canberra, 1990.

102. *Third Report,* para. 1.18.

> and insider trading, I hope that the Authority will be able to devote more of its resources to combating these activities. It can be argued that these sorts of crime pose almost as much of a threat to the social fabric as drug-related crime.[103]

3.57 Mr Faris's view of the Authority's role differed from Justice Stewart's to the extent that he saw the Authority having an overall coordinating role:

> The Authority's unique, national perspective also creates the opportunity to develop as coherent a picture of organised crime as is possible, given its inherently secretive nature. I see the Authority's role very much as a co-ordinator of the fight against organised crime. It is much too small an agency to attempt such a fight on its own. With the development of a better strategic intelligence function in the Authority, and through the use of the power to convene task forces..., I believe the Authority can make a valuable contribution to the efforts of all Australian law enforcement agencies working in this difficult area.[104]

3.58 Mr Faris proposed that the Authority's law reform and educative activities should be given greater emphasis, particularly given his belief that the Authority was 'well placed to spot inconsistencies and weaknesses in the law ... and to recommend appropriate changes to State and Federal governments'.[105]

3.59 Discussions between Mr Faris and the Committee were held in December 1989. By that time Mr Faris had acted to implement changes to the Authority's activities broadly in line with

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103. 'The Role of the National Crime Authority in Australian Law Enforcement', text of speech delivered at Queen's Inn, University of Melbourne, 8 August 1989, pp. 26-27.

104. ibid., p. 27, emphasis in original.

105. ibid.

his stated aims of changing the Authority's direction. A review of all current Authority investigations was undertaken.[106]

3.60 Mr Faris also detailed actions he had taken to change the Authority's focus, including the initiation of the following:

- greater intelligence sharing;
- proposal for a new reference to the Authority on money laundering by the IGC;
- establishment of a new task force with the Cash Transactions Reports Agency;
- allocation of an Authority officer part-time to law reform issues;
- proposal for establishment of offices in Perth, Brisbane and Adelaide;
- initiation and development of contact between the Authority and State, Federal and Territory Governments, police and other agencies, including Directors of Public Prosecutions; and
- change to the administrative structure of the Authority, making the Chairman responsible for the day to day administration, with members responsible for the conduct of investigations.[107]

3.61 Mr Faris's resignation in February 1990 resulted in considerable media comment.[108] At a meeting held on 16 February 1990, the Authority was unable to tell the Committee whether it had commenced an investigation into the matters which were the subject of comment or to provide any detail of inquiries it was making on the matter because of the secrecy provisions of the NCA Act.

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106. *In camera* Evidence by Mr Faris, 1 December 1989, p. 968.

107. ibid., pp. 1039-51.

108. See for example, 'NCA Chief "a victim of smear"', *Sunday Age*, 18 February 1990, p. 3. The Minister for Justice, Senator the Hon. Michael Tate, was reported as saying that Mr Faris had submitted his resignation on the grounds of ill health, after less than eight months in the job: see 'Urgent hunt for successor as ill-health forces NCA head to resign', *The Canberra Times*, 13 February 1990, p. 2.

3.62 The Authority told the Committee in July 1990 that the Authority had completed a report on the resignation of Mr Faris, which had been presented to the IGC, and that the Committee would need to approach the Attorney-General in his capacity as Chairman of the IGC for access to a copy.[109]

3.63 The Committee wrote to the Attorney-General on 7 August 1990 requesting a copy of the Authority's report to the IGC. The Committee advised the Attorney the basis of its request was that the Committee could not perform its statutory duty of monitoring the Authority, if it was unable to inform itself fully about an investigation into the circumstances of the resignation of the Authority Chairman.

3.64 The Attorney responded to the Committee on 19 September 1990. The Attorney advised:

> The IGC considered your request at its last meeting on 31 August 1990, in Melbourne. The report was prepared for the IGC and it is therefore a matter for IGC determination as to its circulation. As Chairman, I have been asked by the IGC to inform you of the following IGC resolution:
>
> > that the IGC was satisfied with the report into the resignation of Mr Faris presented by the NCA at the March 1990 IGC meeting, and considers the matter one within the IGC's jurisdiction and that the matter is now closed.[110]

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109. Letter from the Acting Chairman of the Authority to the Committee dated 19 July 1990.

110. Letter from the Attorney-General to the Committee dated 19 September 1990.

ADMINISTRATION OF THE ADELAIDE OFFICE OF THE AUTHORITY IN 1989

Introduction

3.65 The Adelaide office of the Authority was set up on 1 January 1989 for the purpose of conducting investigations under a special reference given to the Authority by the IGC at the request of the South Australian Government. The South Australian Government requested the reference - South Australian Reference No. 2 - in late 1988. Matters referred to the Authority for investigation included:

> bribery or corruption of or by police officers and other officers in South Australia; illegal gambling; extortion and prostitution; the cultivation, manufacture, preparation or supply of drugs of addiction, prohibited drugs or other narcotic substances; and murder and attempted murder, in so far as these matters relate to, or are connected with, a list of nominated persons.[111]

3.66 Mr Mark Le Grand was appointed as the Adelaide Member of the Authority for the period 1 January 1989 to 31 December 1989, with the principal task of overseeing and directing investigations under South Australian Reference No. 2.

3.67 The Authority conducted three principal investigations under the terms of South Australian Reference No. 2: Operation 'Hydra'; Operation 'Ark' and Operation 'Hound'. A report on Operation 'Hound' was made to the South Australian Government in December 1990 and tabled in the South Australian Parliament on 12 February 1991.[112] A report on Operation 'Hydra' was made to the

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111. National Crime Authority, *Operation Hydra: South Australian Reference No. 2*, February 1991, para. 1.1.

112. Operation 'Hound' inquired into allegations of illegal conduct on the part of South Australian Police officers in the withdrawal of charges for Road Traffic Act offences, and other criminal charges, together with an allegation of improper conduct against the current Crown Prosecutor. See

South Australian Government in February 1991 and tabled in the South Australian Parliament on 5 March 1991.[113]

3.68 Operation 'Ark' arose from 13 allegations that serving or former police officers were involved in or protecting drug trafficking. The allegations were received by South Australian Police officers during the February 1989 Operation 'Noah' phone-in.[114] The South Australian Police Commissioner was told of only one of the allegations. The Authority was not told of any of the allegations, although the Authority was investigating possible police corruption in South Australia at the time.[115] The 'Ark' investigation was into: whether there was any dishonesty or corruption in the failure to tell the Commissioner or the Authority of the allegations; and whether there was any failure to investigate the allegations adequately.[116]

3.69 The preparation in mid-1989 of the Authority's report on Operation 'Ark' for the South Australian Government is dealt with in the Committee's report *Operation Ark*, which was tabled in the Senate on 17 October 1990 and in the House of Representatives on

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National Crime Authority, *Operation Hound: South Australian Reference No. 2,* December 1990, para. 2.

113. Operation 'Hydra' was an investigation into the potential for blackmail in the operation of the vice industry in Adelaide in the late 1970s and early 1980s which was raised by a media program, and whether there was any evidence that any public official, particularly the South Australian Attorney-General, was being blackmailed by operators of vice establishments to ensure favourable treatment, or whether there was any evidence that the Attorney-General made an improper decision because of an association with known or suspected criminals: National Crime Authority, *Operation Hydra: South Australian Reference No. 2*, February 1991, para. 1.14.

114. Operation 'Noah' is an annual phone-in when the public can provide information anonymously to police about drug dealers and drug distribution.

115. See para. 3.65 above for the terms of South Australian Reference No. 2.

116. National Crime Authority, *South Australian Reference No. 2: First Report*, December 1989, para. 5.

the following day.[117] Matters examined by the *Operation Ark* Report related to a specific issue: whether a report on Operation 'Ark' prepared by the Authority was completed and despatched prior to the end of Justice Stewart's term as Chairman of the Authority on 30 June 1989.

3.70 Following the tabling of the Committee's *Operation Ark* report, Justice Stewart wrote to the Committee on 30 November 1990 claiming that two of the Committee's conclusions were factually incorrect. The Committee tabled Justice Stewart's letter in the Parliament on 21 February 1991 and announced at the time of tabling that it would deal with several questions regarding management of the Authority and the Adelaide office as part of the present evaluation.[118]

3.71 The Committee took evidence from Justice Stewart on 11 March 1991. This evidence was taken *in camera* and was published by the Committee on 18 November 1991.

3.72 The Committee took evidence about the administration during 1989 of the Authority's Adelaide office. This evidence centred on two issues: conflict over the management of the office which followed change of membership of the Authority at 1 July 1989, and the appropriateness of the terms of reference of South Australian Reference No. 2.

3.73 The Committee considered the following issues:

- whether a mechanism should exist to resolve disputes that arise between new and old members of the Authority;
- whether a 'new' Authority should be able to alter a decision of a previous Authority;
- whether it is appropriate for the expiry of the term of more than one member to coincide;

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117. Parliamentary Joint Committee on the National Crime Authority, *Operation Ark,* Canberra, 1990.

118. Senate, *Hansard,* 21 February 1991, p. 1070.

- where more than one member's term ends on the same day, whether some mechanism should exist for clarifying the powers of a new Authority over matters put in train by a previous Authority; and
- what mechanisms could be employed by the Authority during any changeover period of members to minimise discontinuity and uncertainty within the Authority.[119]

Change of Authority Membership - July 1989

3.74 One matter considered by the Committee was whether management problems in the Adelaide office could be attributed to the change of Authority membership that occurred on 1 July 1989. The Committee indicated reservations about the way this change was effected in its *Third Report.*[120]

3.75 On 30 June 1989 Justice Stewart, the Authority's first Chairman, and two other long-term members, Mr Peter Clark and Mr Lionel Robberds QC, retired. On 1 July 1989 the new membership of Mr Faris QC, Chairman and Mr Leckie and Mr Cusack QC commenced three-year terms of appointment. Mr Mark Le Grand continued as Adelaide member.

3.76 Two issues are raised by the change of membership: whether disputes and differences of views on operational matters between two successive 'Authorities' should be addressed; and whether a better way should be found for managing the change of Authority membership than that followed in 1989.

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119. cf. Senate, *Hansard*, 21 February 1991, p. 1070 (statement agreed to by the Committee).

120. *Third Report*, para. 1.18. See also Senate, *Hansard*, 25 May 1989, p. 2717, where a member of the Committee, Senator Hill, drew the Government's attention to the concern about the loss of continuity that was to occur on 30 June 1989. Media reports had also raised concerns; see for example, 'Confusion grows as NCA appointment deadline approaches', *The Age,* 5 May 1989, p. 5.

3.77 A re-examination of the conflicting claims about the preparation and completion of the Authority's Operation 'Ark' report would not assist the Committee's examination of how changeover of Authority membership might be better managed.

3.78 Previous Committees and the Authority have always strongly believed that the staggering of membership is important to the maintenance of continuity and ensuring experienced membership.

3.79 The Senate Standing Committee on Constitutional and Legal Affairs in its 1984 report on the clauses of the National Crime Authority Bill foresaw the possibility of problems occurring in management of the Authority where terms of membership did not overlap. It noted that:

> It is important for the effective operation of the Authority that there should be continuity of leadership and direction. This could be jeopardised where all three members' terms are congruent. The Committee favours a system whereby the members' terms are staggered, so as to ensure a significant overlap between the terms of experienced members and those of incoming members.[121]

The Senate Committee recommended that 'provision should be made upon the Authority's establishment to stagger the terms of office of members, so as to enable continuity of experience and leadership'.[122]

3.80 Justice Stewart indicated his views to the Committee's predecessor in June 1989 shortly before the end of his term as Chairman.

> One thing that ought to be made very clear, by some-

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121. Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, para. 7.9.

122. ibid., para. 7.10.

body, to the Government is that for the sake of reason do not appoint them all [ie, the replacement members] for three years. When their appointments finish on 30 June 1992, they are going to be in the same terrible position that Mr Faris now finds himself in, of trying to learn everything in five minutes and with no continuing assistance from members who have been here and know the ropes. We are giving him all the help we can but it is a fast learning curve. He is a fast learner; I know that; but he will have to be pretty fast. I would just flag that. If anybody has any influence about the place, and I am sure there is, that is something that really should be avoided if at all possible, and it is possible, obviously.

CHAIRMAN (Mr Peter Cleeland) - That has been recognised. People have spoken to Ministers and suggested that there are grave problems with what is occurring now and that it should not happen again.

Mr Justice Stewart - It should be staggered.

CHAIRMAN - There has to be continuity at the top levels of the organisation.

Mr Justice Stewart - I can tell you it is bad enough, Mr Chairman, when one member goes and you have to get the next member. Lionel Robberds has been with us for 18 months, and he is a fast learner, too, let me tell you, but it took him several months before he could really get a feel for what was happening and what his role was.[123]

3.81 Prior to the change from the 'old' Authority, chaired by Justice Stewart, to the 'new' Authority chaired by Mr Faris QC in July 1989 there was a period of some 2 months during which Mr Faris worked at the Authority in the position of special counsel so as

123. *In camera* Evidence, 2 June 1989, p. 943.

to familiarise himself with the Authority's program. Justice Stewart told the Committee about this arrangement:

> He was given a brief to be a sort of de facto counsel assisting and, as such, he had the full run of things. We made an office available to him in Melbourne and he came to Sydney and he went to Adelaide. Nothing was kept from him and we made every possible effort to make him comfortable and at home and give him every assistance.[124]

3.82 Justice Stewart also told the Committee:

> It just seems to me that a sensible arrangement would be to have the time staggered when people retire; so that with Mr Faris, for example, if my retirement had not been 30 June but had been brought forward to some time in April or May or something, I would have gone; he would have been the new Chairman. If Clark's time or somebody else's time had been staggered there would have been this continuity, which was something which we were concerned about. Robberds was concerned about it, I was concerned about it, and Clark was concerned about it. ...
>
> In point of fact, the way it was overcome was, as I say, in this rather unusual way to appoint Mr Faris as counsel assisting. That was the way that the Government saw fit to do it. But I think in future there ought to be some staggering of the period of retirement of the members so that there can be continuity. As I say, so far as we could we made everything available to Mr Faris; but he was not a member and he was not the Chairman.[125]

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124. Transcript of Evidence given by Justice Stewart, 11 March 1991, pp. 5-6.

125. Transcript of Evidence given by Justice Stewart, 11 March 1991, pp. 13-14.

3.83 In a written question to the Authority, the Committee asked it about the conflict over management of the Adelaide office that arose following the July 1989 change of membership:

> The Committee considers that a major cause of the problems encountered in and by the Adelaide Office was due to difficulties consequent on a change from an 'old' Authority under the Chairmanship of Justice Stewart to a 'new' Authority under Mr Faris QC in June 1989. Should there be administrative provisions governing the changeover from one Authority membership to another so as to ensure such transition does not lead to administrative confusion due to a change of policy or approach?

3.84 The Authority's written response was:

> The Authority concurs with the Committee's view that a major cause of the problems encountered in and by the Adelaide Office were difficulties consequent on a change from an old Authority under the Chairmanship of the Hon. Mr Justice Stewart to a new Authority under Mr Faris QC in June 1989. The Authority believes that such problems could be alleviated in the future by having the Chairman-elect begin work with the Authority three months before his term of office commences, and Members-elect six weeks before their terms of office commence. The question of what other action might be taken is not so easily answered and there are different views within the Authority (both Members and staff) on this aspect. One view is that there should be a complete changeover of membership at one time so as to enable the new Chairman to redirect the operations and policies of the Authority and to minimise differences between old and new guards; an opposing view holds that this has too disruptive an effect on the staff of the Authority who in fact perform

the work of the organisation.[126]

3.85 The Authority also gave the Committee its view on how disputes might be avoided in the future:

> The experience of the difficulties encountered between the Adelaide and National offices in 1989 has provided a number of lessons for senior management of the Authority. Ultimately however, personality differences played some role in this conflict and there is no way in which such problems can be completely avoided by structural or management practice solutions.[127]

3.86 Evidence to the Committee from Authority staff who worked in the Adelaide office in 1989, confirmed that the personality clash between Mr Le Grand and the other members of the Authority was sufficiently serious as to affect the work and efficiency of the office.[128] The Committee heard evidence from Mr Graham Sinclair, the Authority's Director of Investigations during the period covered by the changeover, that differences existed between the Adelaide office and the Authority head office before July 1989.[129]

3.87 The Committee accepts this view as the most feasible explanation of the reasons for the conflict over management of the Adelaide office in 1989. The fact that there was overlapping membership of the Authority during June-July 1989, and that Mr Faris had spent some two months with the Authority prior to taking up the position of Chairman, supports the conclusion that to some extent the differences between the Adelaide member and Mr Faris following the change of Authority membership in July 1989 was as described by the Authority - 'a clash of personalities'.[130]

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126. NCA, Written Answers, July 1991, C4.

127. ibid., C5.

128. See Evidence, pp. 1571-1580 (Mr Carl Mengler); pp. 1603-1626 (Mr David Smith).

129. Evidence, pp. 1276-78.

130. NCA, Written Answers, July 1991, C1(f).

3.88 Nevertheless, the comments made to the Committee by Justice Stewart and in the written answers provided to the Committee by the Authority indicate that achieving a changeover of Authority membership with least impact on the continuing investigations and the Authority's activities generally should be a high priority in the Government's administration of the Authority.

3.89 **The appointment of new members of the National Crime Authority is an important aspect of the Authority's administration. The Government should ensure that the terms of appointment of members allow for an overlap of membership and that a complete change of membership of the Authority at one time is avoided.**

Terms of Reference for South Australian Reference No. 2.

3.90 The Committee also heard evidence during the present evaluation that the administration of the Adelaide office in 1989 was affected by difficulties in the investigation of the matters raised by South Australian Reference No. 2. In particular, a difference of interpretation arose between Mr Le Grand on the one hand and the Chairman and the other members of the Authority on the other.

3.91 Inspector John Johnston, a Tasmania Police officer attached to the Authority's Adelaide office in 1989, told the Committee that the terms of South Australian Reference No. 2 had made it difficult for the office to produce a report within a reasonable time. This delay in pursuing the investigation led to media criticism in Adelaide during the early part of 1989.[131]

> That was one of the issues that the NCA was being criticised for: not having produced the report in time - and, of course, the investigators took that on board and were quite upset by that. But when you consider that the matters being investigated were up to 10 or 12 years

131. Evidence, p. 1208.

> old and to find the females who may have been prostitutes at that time, the 10 or 12 years before, most of whom of course did not use their real names in their occupation, and to then track them down to where they may be now and whatever identity they may have now is a very laborious task.[132]

3.92 Assistant Commissioner Graham Sinclair of the Victoria Police, who was the Authority Director of Investigations at the time that investigations under South Australian Reference No. 2 were being conducted, told the Committee:

> I believe that the reference that was originally constructed was perhaps not given the thought that it should have had. There were many names on that reference, in my view, that probably should not have been there. Some of the matters were old and at least one of the persons referred to was deceased. I think it had a very significant effect on the attitude of those who staff the office that they were given a task without any consultation with them. That was extremely difficult to tackle. I also think that the staff in that office did not perhaps bite the bullet on that issue as they should have, and did not take the matter back to the South Australian Government for clarification or amendment or whatever. They chose to veer off the reference and look at other issues that, whilst they may have been in the broader ambit of the reference, were not matters specific to the reference, to put it that way.[133]

3.93 The Committee asked Mr Sinclair how his description of the office choosing to 'veer off the terms of reference' affected the working of the Adelaide office:

> **Mr Filing** - So the problems arose in the office as a

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132. Evidence, pp. 1208-9.

133. Evidence, p. 1276.

result of not following the reference correctly, or let us say not sticking within the parameters of the reference?

Mr Sinclair - Yes, that is basically what I am trying to say too, that I think there was an attitude that they had to put a score on the board over there. I am talking about the very senior people. They had to put a score on the board, and following that reference slavishly was going to take them months if not years before anything was achieved, if anything was achieved.[134]

3.94 The Committee asked the Authority in a written question for its response to Mr Sinclair's account. The Authority told the Committee in its written response:

> Mr Sinclair was perhaps echoing the newly constituted Authority's views on the drafting of References, i.e. whether they should be broadly or narrowly construed. It is worth noting in this context that the problems arose because of the unusual nature of SA Reference No.2. It is so far the only Reference which was issued solely by a State Government with no parallel Commonwealth Reference. The office was therefore entirely funded by the State Government. The expectations of the South Australian Government and particularly of the local media as to what the Authority could and should seek to achieve were in hindsight perhaps somewhat different from what the legislation enabled the Authority to do in practice. The Reference was not broad enough to enable the Authority to take a wide-ranging view of corruption and indeed perform the role of a corruption commission such as the New South Wales ICAC.[135]

3.95 The Authority also stated:

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134. Evidence, pp. 1276-77.

135. NCA, Written Answers, July 1991, C2.

> Prior to the expiry on 30 June 1989 of the Hon. Mr Justice Stewart's term and the terms of Mr Clark and Mr Robberds QC, there had been some discussion about whether SA Reference No.2 ought to be widened. After Mr Faris took up his appointment however, the matter involving allegations about Mr Sumner and alleged blackmail by vice operators, became a matter of high priority and the question of widening the Reference was not pursued as the office began to reprioritise its work to give that matter greater importance. ... The Authority as newly constituted, with the exception of Mr Le Grand, took a different view of such matters as whether References should be construed broadly or narrowly.[136]

3.96 Having considered this advice from the Authority, the Committee asked the Authority what steps, if any, were taken prior to 1 July 1989 regarding the problem with the terms of reference.

3.97 The Authority wrote to the Committee and advised that on 26 May 1989 the Authority had authorised Mr Le Grand to discuss with the South Australian Attorney-General the question of whether the terms of reference needed to be amended, particularly 'so as to delete the need to refer to an underpinning list of names'.[137]

3.98 A process of re-drafting the terms of reference had progressed to the point where a draft of new terms of reference was circulated for discussion by Authority members on 5 June 1989. In the event, the membership and Chairmanship of the Authority changed on 1 July 1989 and apparently the question of re-drafting the terms of reference of South Australian Reference No. 2 was dropped.

3.99 The Authority advised the Committee that on 17/18 July

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136. NCA, Written Answers, July 1991, C1.

137. Attachment to a letter to the Committee from the Chairman of the National Crime Authority, 2 September 1991.

1989 the new Authority met and resolved that the Adelaide Office concentrate on investigation of matters within the ambit of South Australian Reference No. 2, and that while new terms of reference may be required or desirable, they would not be in the terms suggested in June 1989 by Mr Le Grand.[138]

3.100 The difficulties that developed in 1989 in the conduct of its investigations under South Australian Reference No. 2 were unusual to the extent that such a problem had not, to the Committee's knowledge, been previously encountered by the Authority.

3.101 The Authority's opinion on the causes of the difficulty it had in conducting the investigation - quoted in paragraph 3.94 - indicates that a reference drafted for a State office of the Authority, funded by the Government of the State in whose jurisdiction the reference was to be pursued was the most unsatisfactory factor in the process. As the Authority pointed out: ' The expectations of the South Australian Government and particularly of the local media as to what the Authority could and should seek to achieve were in hindsight perhaps somewhat different from what the legislation enabled the Authority to do in practice'.[139]

3.102 A second unsatisfactory element in the Reference was in its drafting. It is clear that a broadly worded reference involving a wide range of possible criminal activity, which also required investigation of the involvement of named people, made the completion the investigation a drawn out and difficult process.[140]

ACTING CHAIRMANSHIP OF MR LECKIE

3.103 Mr Leckie was appointed to the position of Acting Chair-

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138. ibid.

139. NCA, Written Answers, July 1991, C2.

140. The nature and extent of these difficulties, particularly in relation to allegations involving named prostitutes, is described in the Authority's Operation 'Hydra' report, paras. 1.35 - 1.37.

man of the Authority on Mr Faris's resignation on 12 February 1990. Mr Leckie held discussions with the Committee on several occasions during 1990 in his capacity as acting chairman. Mr Leckie's report on the Authority's activities in the Authority annual report for 1989-90 reflects the Committee's discussions with Mr Leckie and other Authority members. Those discussions essentially indicated that the changes to Authority management and direction initiated by Mr Faris and which are described earlier in this chapter, were implemented pending the appointment of Justice Phillips in August 1990.

CHAPTER 4

THE NEED FOR A NATIONAL CRIME AUTHORITY?

Views that the Authority should be Abolished

4.1 The Queensland Council of Civil Liberties told the Committee in November 1990: 'we consider that if the National Crime Authority is not prepared to make itself more accountable then it should simply be abolished'.[141] In November 1990 and again in February 1991 the Victorian Council for Civil Liberties also called for the abolition of the Authority in its present form.[142] It was highly critical of what it perceived as a lack of effective scrutiny of the Authority, the consequent dangers posed by the Authority's special powers to the rights and liberties of Australian citizens and the Authority's lack of success in prosecuting offenders.[143]

4.2 The South Australian Council for Civil Liberties made similar criticisms when its representative appeared before the Committee on 4 February 1991.[144] It argued that 'based on the available information, the retention of the NCA as an independent instrumentality is difficult to justify'.[145] The submission from the

141. Evidence, p. 537.

142. Evidence, pp. 341, 342, 347, 1384-85, 1388. See also Evidence, p. 822 where Mr John Marsden, Senior Vice-President of the NSW Law Society, expressed personal support for the Victorian Council's view on abolition, although he noted that the Law Society had not expressed a view on the issue.

143. Evidence, pp. 1436-40.

144. Evidence, pp. 932-34.

145. Evidence, p. 933.

New South Wales Council for Civil Liberties, dated January 1991, called 'for the repeal of the National Crime Authority Act on the basis that there is no information to assess the efficiency or effectiveness of the Authority'.[146]

4.3 Mr Henry Rogers, an employee of the Authority, gave evidence in an individual capacity on 5 November 1990. He pointed to what he regarded as the highly inefficient duplication among Federal law enforcement agencies. As a solution, he proposed that the Authority should be merged with the Australian Federal Police and other agencies to create a single Federal investigatory agency.[147] The submission, dated 20 December 1990, from Mr Michael Holmes, another Authority staff member, made a similar proposal.[148]

4.4 The Police Association of South Australia was highly critical of the Authority's record, and asserted that the Authority had 'failed' to achieve the objectives for which it was designed.[149] The Association told the Committee on 4 February 1991 that, in comparison to the situation when the decision was made to establish the Authority, police forces in Australia were now more proactive, more competent, better trained, had far less corrupt officers, and possessed somewhat greater powers.[150] The work of the Australian Bureau of Criminal Intelligence had 'changed the face of intelligence collection and assessment and inter-jurisdictional data exchange and cooperation'.[151] The ABCI was the appropriate body to assume the Authority's intelligence role.

To summarise, the Police Association of South Australia

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146. p. 1.

147. Evidence, pp. 397-98, 401. The agency envisaged would investigate federal offences and 'those major offences of organised crime which cut across State boarders'.

148. p. 29.

149. Evidence, p. 897.

150. Evidence, pp. 898-99.

151. Evidence, p. 898.

> believes that the criteria necessary for the setting up of the NCA can be easily and successfully met by State forces and believes that consideration should be given to disbanding the NCA in its present form.[152]

The Association also asserted that if the Authority were abolished, Authority resources could be distributed and duplication ended.[153]

4.5 The Police Association of New South Wales took a similar view: 'Most definitely the optimum result would be for the phasing out of the National Crime Authority and the distribution of its resources and powers to police forces of Australia'.[154] The Association referred to 'the enormous changes that the State and Federal police have undertaken internally in the past five years' as removing the need for the Authority.[155]

4.6 The submission from the Queensland Law Society, dated 27 September 1990, noted:

> Since the creation of the NCA there have been other legislative steps designed to inhibit and detect the operations of major organised crime, e.g. (by the Commonwealth) the tax file number system and the Cash Transaction Reports Agency and, (by the States) in the formation of permanent corruption inquiries. In all the circumstances there appears to be no persuasive case that the National Crime Authority has fulfilled its objectives or that it is operating as an efficient, effective and accountable investigatory body.

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152. Evidence, p. 899.

153. Evidence, p. 899. See also the submission from the Police Federation of Australia and New Zealand, dated 21 October 1990, p. 2: 'Since 1984 Police organisations have been and continue to be developed and legislatively encouraged in the investigation of large scale, and indeed all crime, to a stage that today there is little, if any, professional need for the NCA'.

154. Evidence, pp. 642-43.

155. Evidence, p. 655.

> On behalf of the Council of the Society it is submitted that serious consideration should be given to the need and desirability of the continued existence of such a permanent authority.[156]

Arguments that the Authority Should Continue

4.7 The majority of submissions and evidence expressed support for the continued existence of the Authority. For example, in his submission dated 7 November 1990, Mr R.F. Redlich QC stated that nothing that had happened since 1984 'has caused me to reconsider the view that I expressed ...[then] that the need for a National Crime Authority is beyond debate'. Although there was considerable criticism of the Authority's focus in the past and of some of its activities, there was wide support for the general reasons for which the Authority was established. For example, the Hon. Athol Moffitt CMG, QC, a former President of the New South Wales Court of Appeal, told the Committee:

> I agree the Authority has substantially failed to perform its intended purpose as a national body, but I strongly disagree with those who argue that in consequence it should be disbanded. On the contrary, some such body is essential. Planned corporate and planned tax crime, organised crime otherwise and institutional corruption extending across the nation, often with offshore connections, was and still is, in my view, so extensive it cannot be dealt with by conventional police methods.[157]

4.8 Mr Frank Costigan QC said in September 1990 that it was clear there was a need for a national body. However, the Authority had to alter its role: 'Quite frankly, unless the Authority is prepared to take that course, it cannot justify its continued existence and

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156. p. 4.

157. Evidence, p. 761.

should be abolished'.[158]

4.9 On 5 November 1990, the Hon. Justice Frank Vincent told the Committee he thought there was a need for a national body, but that the Authority had to re-focus its activities.[159] The Police Federation of Australia and New Zealand made a similar point on 21 November 1990: the Authority should not be abolished but it needed to have its emphasis changed and its direction clearly defined.[160]

4.10 The general view expressed in submissions and evidence on the issue was that organised crime, despite the efforts of the Authority and other law enforcement agencies, remains a major law enforcement problem in Australia. The Committee was not presented with any evidence that suggested organised crime would, in the foreseeable future, cease to be a priority of law enforcement efforts.

4.11 The Authority's submission, dated December 1990, argued for its continued existence on the following grounds:[161]

. the continuing problem of organised crime at the national level in Australia;
. the fact that conventional police work is directed towards individuals and individual crimes, rather than towards detecting patterns of illegal activity.
. police capacity, although greatly improved, was still

158. Frank Costigan QC, 'Anti-Corruption Authorities in Australia', text of an address to the Labor Lawyers' Conference in Brisbane on 22 September 1990, p. 16. See para. 5.90 below for an outline of what Mr Costigan thought the Authority's role should be.

159. Evidence, pp. 373, 376. See para. 5.91 below for Justice Vincent's views on how the Authority should alter its direction.

160. Evidence, pp. 497-98, 499.

161. p. 7. The submission noted that the reasons for its continued existence are much the same as those identified by the Royal Commissions which preceded its establishment: p. 44.

insufficient to deal with organised crime;

. the jurisdictional and statutory problems of the Australian federal system; and

. the coercive powers to compel the appearance of persons and production of documents which are needed to combat organised crime are not likely to be granted to other agencies.

4.12 The Authority further stated in its submission:

> The National Crime Authority believes it is positioned to act as a national partner and, on occasions, co-ordinator of law enforcement agency efforts against organised crime, and can offer unique services (resources and powers) to complement the work of its fellow agencies.[162]

4.13 The Authority conceded that although there was scope for debate about the precise role and functions of the Authority the experience of the past six years 'establishes beyond doubt the need for such a body in Australian law enforcement'.[163]

4.14 Strong support for the Authority was also expressed in the submission by the IGC, dated April 1991, which noted: 'The unanimity of purpose that led to the establishment of the NCA continues to exist'.[164] The IGC's submission stated:

> The IGC is of the view that the NCA remains the most effective national vehicle for countering organised crime that can be devised, given the division of responsibilities amongst the Australian jurisdictions and the need to balance effectiveness with accountability and regard to individual liberties.[165]

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162. p. 7.

163. NCA submission, p. 8.

164. p. 8.

165. pp. 8-9.

The submission also stated: 'The IGC agrees with the conclusion of a previous report of the PJC that the achievements and unique functions of the NCA justify the continuing support of parliaments and governments'.[166]

4.15 In the 17 September 1990 submission of the Western Australia Police, Commissioner Brian Bull said that from his force's perspective, there were 'no serious concerns' in relation to the constitution, role, functions and powers of the Authority:

> The need for the Authority as a National mechanism of investigation, inquiry and a disseminator of information and intelligence to agencies is endorsed in the recognition that law enforcement agencies would not singularly be resource capable of addressing this function.[167]

4.16 The submission from the Tasmania Police, dated 17 September 1990, stated:

> This submission is made on the basis that Tasmania Police is totally supportive of the concept of a National Crime Authority established for the purposes of combating organised crime where the existing circumstances are such that resources and powers of the conventional law enforcement agencies of this country are considered inadequate.[168]

The submission argued that the need for the Authority has been well recognised. It arose from the fragmented law enforcement structure brought on by a federal political structure; the need for an organisation to coordinate matters which cross State and national boundaries and are of national significance; the capability to operate

166. p. 3.

167. p. 1.

168. p. 1.

with resources not available to State police forces; and the ability to exercise coercive powers not available to traditional law enforcement agencies.[169]

4.17 The submission from the Australian Customs Service, made in September 1990, stated:

> It is the view of the Australian Customs Service that a body such as the Authority is in a position to make a positive contribution in the fight against criminal activity, particularly organised crime. The NCA activities are seen to be complimentary to those undertaken by the ACS in its law enforcement activities.[170]

4.18 The South Australian Police Commissioner, Mr David Hunt, told the Committee:

> I fully support the concept of an independent investigative body, adequately empowered and resourced, which has the unqualified backing of government and which is dedicated to the task of combating corruption and sophisticated criminal activity of an organised character. Accordingly, the NCA, a body which most closely approaches this ideal, has my full support.[171]

4.19 In general, Australia's divided and often fragmented system of jurisdictions and legislation was portrayed before the Committee as a major obstacle to combating organised criminal activity, which in Australia crosses boundaries and jurisdictions. Consequently, a body with a national focus like the Authority, was generally perceived as essential in overcoming this obstacle. State and Territory based law enforcement agencies were regarded as still lacking the capacity to deal with organised crime in Australia.

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169. p. 5.

170. p. 5.

171. Evidence, p. 956.

The Committee's View

4.20 A suggested alternative to the retention of the Authority would be to upgrade other agencies so that they could take over the functions of the Authority.[172] As examples, the Authority's function of collecting, analysing and disseminating intelligence might be transferred to an upgraded Australian Bureau of Criminal Intelligence;[173] and the Authority's functions relating to coordination of investigations and joint task forces might be taken over by an upgraded Australian Federal Police.[174] The Committee was told that the powers and abilities of police had improved considerably since 1984 when the Authority was established.[175] The upgrading required for police to take on the Authority's functions might well be less than it would have been in 1984.

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172. See the views of the South Australian and New South Wales Police Associations quoted in paras. 4.4 and 4.5 above. See also the comment made to the Committee by Mr Russell Hogg, a Sydney academic: 'Some of the things that the NCA has been doing, clearly the principal things it has been doing, probably could be done by other law enforcement agencies, if they were resourced the way the NCA is, to a degree, and through cooperative arrangements like joint task forces and so forth': Evidence, pp. 1505-06.

173. Evidence, pp. 646, 659 (Police Association of NSW). See paras. 5.44 - 5.46 on the role of the ABCI and the extent which its activities overlap with those of the Authority.

174. Evidence, pp. 391-92 (Mr Henry Rogers).

175. See the views of the Police Associations of South Australia and New South Wales set out in paras. 4.4 and 4.5 above. See also the submission from the Australian Federal Police Association, p. 3. The NCA submission, p. 7 commented:

> the capacity of police forces to combat organised crime has increased somewhat since 1984, through the provision of increased powers (to intercept telephone conversations and to gain limited access to tax records, for example), the recruitment of persons with accounting and legal skills, and through improvements in co-operation between agencies, for which the NCA believes it can claim some credit, and to which it intends to devote

4.21 The Committee was not given any detailed evidence that transferring Authority functions to other agencies would result in an net reduction in law enforcement costs or lead to overall increases in efficiency and effectiveness.

4.22 The Committee considers that the evaluation revealed broad-based support for the concept of the Authority and its continued existence as a nationally focused law enforcement agency, given the limits of the federal system and State-based law enforcement.

4.23 An advantage enjoyed by the Authority over traditional law enforcement agencies is its power to compel witnesses to appear and documents to be produced. The 1983 discussion paper noted: 'It is very doubtful that the community would be prepared at the present time to accord powers of this nature to the police'.[176] The Authority's December 1990 submission to the Committee stated: 'the coercive powers available to the NCA, which have been shown to be necessary to deal with organised crime, will on present indications not be made available to police forces'.[177]

4.24 The Committee accepts that these coercive powers are necessary in combating organised criminal activity.[178] At the same time, the Committee does not consider that such powers ought to be conferred on police forces generally. Civil liberties groups indicated

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increased resources.

176. The Hon. M.J. Young, Special Minister of State, and Senator the Hon. Gareth Evans, Attorney-General, *A National Crimes Commission?*, AGPS, Canberra, 1983, p. 6.

177. p. 7. Mr Lloyd Taylor, Secretary of the Police Association of NSW, told the Committee that, if history was any guide, there was still a reluctance to give the powers to the police. However, he also suggested that the public at large might support conferral of the powers on the police: Evidence, pp. 647-48.

178. See for example National Crime Authority, *Operation Silo: Report of the Investigation*, AGPS, Canberra, 1987, p. 6 for a description of the use of these powers in a particular investigation.

to the Committee that they were opposed to giving further coercive powers to police.[179]

4.25 The transfer of the Authority's functions to other agencies would, in the Committee's view, weaken the national effort against organised crime. The 1983 discussion paper stated: 'There is an argument that the body tasked with the attack on organised crime must be out of the mainstream free of other pressures upon its resources or calls upon its time'.[180] At present, there is considerable pressure on the resources of police forces. This pressure might well limit their ability to address organised crime adequately, if they were asked to take on the Authority's functions.

4.26 The evaluation received cogent evidence of major deficiencies in aspects of past Authority activities. However, the deficiencies identified by those arguing for abolition can, to the extent that they are real, be remedied by less drastic means than abolishing the Authority. Indeed, many of them have already been addressed by the Authority.

4.27 The Committee believes that the Australian federal system, with its complex political, administrative and legal frameworks, makes the Authority an essential part of Australian law enforcement. The Committee accepts that the reasons that led to the establishment of the Authority remain valid. The continuing presence of organised crime in Australia, able to use sophisticated methods and cross jurisdictional boundaries, convinces the Committee of the need for the Authority.

4.28 The Committee supports retention of the Authority. It recognises, however, that the Authority's role and functions should be critically evaluated.

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179. Evidence, p. 360 (Victorian Council for Civil Liberties); pp. 538-39, 564 (Queensland Council of Civil Liberties); p. 745 (NSW Council for Civil Liberties); p. 936 (South Australian Council for Civil Liberties).

180. The Hon. M.J. Young, Special Minister of State, and Senator the Hon. Gareth Evans, Attorney-General, *A National Crimes Commission?*, AGPS, Canberra, 1983, p. 6.

CHAPTER 5

FUTURE DIRECTIONS FOR THE NATIONAL CRIME AUTHORITY

Future Directions and the Corporate Plan

5.1 In November 1990, the Hon. Justice Phillips made public his Future Directions paper. The changes set out in the paper are reflected in the Authority's *Corporate Plan July 1991 - June 1994*, which it publicly released on 1 August 1991.[181] The Authority told the Committee in its submission: 'The Corporate Plan and the Future Directions are the NCA's best expression of what it perceives as its role in Australian law enforcement...'.[182]

5.2 The Authority's change of focus was prompted in part by the criticisms levelled at the Authority.[183] Justice Phillips told the Committee in July 1991, however, that the change in emphasis he had brought to the Authority was in no way a reflection on the work of his predecessor, Justice Stewart:

> His record stands for itself and, as a previously constituted committee of this sort found, he was responsible for putting some very desperate criminals behind bars. No-one can deny him that achievement. But circumstances changed, I felt. What was right for the early 1980s was not necessarily right for the

181. The NCA submission contains an earlier version of the main part of the Corporate Plan.

182. p. 18.

183. NCA Corporate Plan, p. 20.

1990s.[184]

5.3 The change of focus was adopted by the Authority without public consultation or consultation with the Committee.

5.4 Before considering the focus provided by Future Directions and the Corporate Plan, the Committee notes the fact that for the first time there is a Corporate Plan. Its existence provides a basis for more constructive, informed and open debate on what the Authority's objectives and strategies ought to be. Moreover, the performance indicators built into the Plan will make the task of the Committee and others easier when it comes to assessing the Authority's efficiency and effectiveness.

5.5 The Committee stresses, however, that Future Directions and the Corporate Plan cannot alter the NCA Act. The basic criterion by which the Authority must be examined is how well it carries out the functions given to it in the Act. In assessing Future Directions and the Corporate Plan, the key issue is how well they assist the Authority to carry out these functions.

The Authority's Mission Statement

5.6 The Corporate Plan contains the Authority's mission statement:

> The NCA's mission is to counteract organised criminal activity and reduce its impact on the Australian community, working in co-operation and partnership with other agencies.[185]

5.7 The NCA Act does not use the phrase 'organised crime'. Instead the Act relies on the expression 'relevant offence', a phrase whose meaning was explained in chapter 2. The Authority is able, within the Act's definition of that phrase, to select its strategies.

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184. Evidence, p. 1667.

185. p. 3.

Because of the breadth of the definition, the Authority has considerable latitude in doing so.

5.8 The Corporate Plan sets out the Authority's current working definition of organised crime:

> The establishment of the NCA in 1984 was prompted by concern within the community about the level and impact of *organised crime* - a term which is frequently used, but which is rarely defined to everyone's satisfaction. For the purpose of describing the broader criminal environment, the NCA defines *organised crime* as *a systematic and continuing conspiracy to commit serious offences.*[186]

5.9 The Authority told the Committee:

> The definition of 'relevant criminal activity' in the NCA Act provides a reasonable benchmark against which to assess the type of crime the NCA should be investigating. The definition is neither overly restrictive nor too prescriptive. It was clearly the intention of the Parliament when the NCA legislation was enacted that the organisation should be involved in counteracting organised crime; however, the difficulty lies in the interpretation of what priorities the NCA should pursue in selecting matters for investigation or intelligence assessment.[187]

5.10 The Committee recognises that there is no single definition of organised crime that is generally accepted.[188] The

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186. p. 5, italics in original.

187. NCA, Written Answers, July 1991, A6. In its submission, p. 9, the NCA stated: 'The term 'organised crime' does not appear in the Act; the definition of relevant criminal activity contained in the Act can be considered as the legislature's way of defining this problematical term'.

188. On the lack of agreement on a definition, see for example, C. Corns, 'The National Crime Authority: An Evaluation', *Criminal Law Journal*, vol.

Authority's definition is not the only one that it could adopt. However, the Committee considers that the Authority's definition is consistent with the NCA Act and is an acceptable definition for the Authority to base its objectives and strategies upon.

5.11 The following are the main strands in the Authority's new emphasis:

(a) a shift in the subject matter of its activities away from drug-related matters to serious white collar/corporate crime;
(b) a more balanced emphasis on the various functions given to the Authority by the NCA Act, rather than the emphasis given by the Authority to the investigative function in the past;
(c) a change in working methods, with coordination, cooperation and joint efforts replacing the more individual and isolated approach adopted by the Authority in the past; and
(d) a greater emphasis on accountability and being less secretive than in the past.

De-emphasising Drug-Related Matters

5.12 The Authority has substantially reduced the emphasis it gives to direct drug-related investigations.[189] Since the Authority's shift in focus, no drug-related references have been given to it. Justice Phillips told the Committee:

> although the NCA will continue to be involved in drug related inquiries, it will do that in a specialist way, concentrating on particular aspects of them like strategic intelligence, money laundering, the transfer of

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13(4), August 1989, p. 241. An attachment to the submission from the Australian Federal Police Association listed 10 different definitions of 'organised crime'. The Fitzgerald Report commented: 'an exhaustive definition of organized crime is both impossible and unnecessary': Queensland, *Report of a Commission of Inquiry Pursuant to Orders in Council Dated (i) 26 May 1987 (ii) 24 June 1987 (iii) 25 August 1988 (iv) 29 June 1989*, Government Printer, Queensland, 1989, p. 162.

189. Future Directions, p. 5.

> moneys internationally to support this criminal conduct, the identification of relevant law reform and the provision of ethnic officers as interpreters.[190]

5.13 Justice Phillips asserted that police services have greatly increased their expertise in the area of drug related inquiries.[191] He also commented that the shift in direction by the Authority away from drug investigations has improved the relationship between the Authority and other law enforcement agencies.[192]

5.14 Some witnesses regarded the Authority's justification for changing its emphasis as inadequate.[193] In addition, Inspector John

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190. Evidence, pp. 1667-68.

191. Evidence, p. 1667.

192. 'NCA's brave new face', *The Age*, 30 August 1991, p. 11.

193. Mr Carl Mengler, an Assistant Commissioner of the Queensland Police attached to the CJC who had previously worked at the Authority, criticised the Authority for handing back drug-related investigations to police forces:

> you told us you were going to show us the way in investigating traditional organised crime and it is out there and it is big. If anyone thinks for one moment it is not alive and well, they are kidding themselves. What have they done? They say, 'We are going to give it back to you'. For two, three, five or seven years - has it been going seven years? - they say, 'We are giving it back', effectively because it is too hard. Whether it is too hard or not, I do not know, but that is the perception of every police officer in this country at the moment. It is too hard for them and they will give it back. (Evidence, pp. 1594-95)

The submission from the Police Federation of Australia and New Zealand, dated 21 October 1990, stated (p. 5): 'Unfortunately from current activities and public statements, it seems that the NCA have now found that narcotics are either too hard or that for some reason the rivalry and contention in its investigation is to be avoided'. The Secretary of the Police Association of NSW, Mr Lloyd Taylor, told the Committee: 'I really cannot quite follow the emphasis changing from drug-related matters to fraud': Evidence, p. 648. The submission from the Australian Federal Police Association, p. 16 observed: 'In the Association's view the NCA's new focus

Johnston of the Tasmania Police suggested that the change of emphasis by the Authority might leave a void in the area of high level drug investigation.[194] He considered that if the change of emphasis were to remain, 'then there should be some review of resource allocation so that there is some remaining attention in that area'.[195]

5.15 Other evidence received by the Committee did not raise any problem of a potential void. The submission from the Australian Federal Police Association, dated 22 February 1991, suggested that police forces were adequately resourced and competent to carry out the type of direct, drug-related investigations in question.[196] The Police Association of South Australia expressed a similar view.[197]

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does not reflect a reduction in the incidence of drug related organised criminal activity ...'. Mr Ron Merkel QC of the Victorian Council for Civil Liberties asked:

> What justification can there be for moving away from what we have been hearing about for seven years - illegal drug dealings and organised crime? It has not solved the problem because it has achieved hardly any convictions. No-one believes for a minute that the problem has gone away. (Evidence, p. 1386)

194. Evidence, p. 1217. See also Evidence, p. 1317, where Detective Superintendent R.C. McAllan of the Victoria Police was asked if the NCA's change of emphasis would leave a gap. He responded:

> Yes and no. There will be a gap because the NCA was able to contribute things that a State could not do. And I do not know whether the State would readjust by establishing joint task forces and those sorts of things and in any case there would still be things not there that the NCA did have at its disposal. Yes, there will be a gap and it will be difficult to provide resources from the State police forces to fill that gap.

195. Evidence, p. 1217.

196. pp. 6, 14. See also Evidence, p. 1230 (Australian Federal Police Association).

197. Evidence, p. 921. See also Evidence, p. 663 where the Police Association of New South Wales gave a more tentative view.

The Committee notes that those police officers with drug-related expertise who have been seconded to the Authority take their expertise back to their home forces when they return.

5.16 The Committee **RECOMMENDS that the re-allocation of resources required by police forces to compensate for the Authority's changed emphasis be given urgent attention.**

The Emphasis on White-Collar Crime

5.17 The Authority's previous emphasis on drug-related crime has been replaced with an emphasis on serious white-collar crime. In Future Directions, Justice Phillips stated:

> I propose that in each State and Territory a Serious White Collar Crime Task Force be set up. Essentially, these task forces would be involved in investigations into the sort of activities in the corporate area which have caused so much adverse comment in recent years.[198]

The task forces would include representatives of other agencies.[199] Justice Phillips stated:

> task forces would be formed when a particular matter which apparently warranted investigation transcended State and Territory boundaries and thus posed jurisdictional problems for the agencies of those States and Territories. Alternatively, if a pattern of apparent offences, not necessarily connected, was occurring in various States and Territories so that a national rather than a State or Territory problem was indicated, then that was an appropriate matter for the formation of white collar task forces.[200]

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198. Future Directions, p. 4.

199. Evidence, p. 1657; Future Directions, p. 4.

200. Evidence, p. 1657.

5.18 Justice Phillips argued for the new emphasis by saying:

> It must be accepted that in the last decade there has not been a single body which was in fact responsible for combatting serious white collar corporate crime or perceived by the public to have such a role. That must change.[201]

5.19 Justice Phillips further argued that control of such activity was beyond the means of any one agency, State or Federal. The task was, however, within the capacity of a cohesive combination of existing agencies using joint task forces, and Justice Phillips proposed that the Authority could perform both coordinating and participatory roles in this area in partnership with existing agencies.[202]

5.20 The Victorian Council for Civil Liberties criticised the shift in emphasis by the Authority:

> It is difficult to identify any supposed vacuum that is about to be filled by the NCA's new direction. There is absolutely nothing in the NCA's past history that suggests that its officers have, or its structure has, an expertise or capacity which is lacking in other law enforcement agencies that will enable it to tackle corporate crime.[203]

5.21 In contrast, Mr Christopher Corns argued that one issue arising from the new emphasis:

> is how the new directions of the NCA will affect the role of conventional police forces in the investigation of organised crime. The Federal and State police forces are

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201. Future Directions, p. 4. See also Evidence, p. 1689 (NCA).

202. Future Directions, p. 4.

203. Evidence p. 1441.

> likely to welcome the expansion of the NCA into white-collar crime investigations. These types of investigations have historically proved problematic for police forces who have not possessed sufficient resources or skilled personnel to tackle highly sophisticated frauds particularly those of a multi-jurisdictional nature. For many police, white-collar crime, rather than drug trafficking, is precisely the type of offence that the NCA should be investigating, leaving police forces to investigate the more conventional crimes.[204]

5.22 Mr John Marsden of the New South Wales Law Society told the Committee he thought the new focus:

> certainly would be a step in the right direction and in achieving some reasonable result for the NCA, because our policing authorities do not have the resources, the skills or the expertise to chase white-collar criminals. They do not have the persons who are trained in that area. If that were to be part of the arm of the NCA, I think it could be of great value throughout the whole community.[205]

5.23 The new emphasis on money laundering and white collar crime was described in the submission from the IGC, dated April 1991, as 'a logical and necessary progression for a body charged with the task of investigating all forms of organised crime'.[206] At its November 1990 meeting, the IGC approved a reference to the Authority to investigate money laundering, a reference seen by the IGC as a broadening of the role of the Authority.[207]

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204. C. Corns, 'New directions for the NCA', *Legal Service Bulletin*, vol. 16(3), June 1991, p. 115.

205. Evidence, p. 824.

206. p. 9.

207. IGC submission, pp. 9-10.

5.24 The shift in focus to white collar and corporate crime was further demonstrated with the report at the end of August 1991 that the Authority would ask the Federal and State Governments to approve a special reference to investigate a multi-state corporate fraud matter. The investigation would also involve staff from the Western Australian Police Force and the Australian Securities Commission. The press report noted that the special reference had already secured support from State police.[208]

5.25 The Committee notes that the Authority appears to be doing two things in relation to white collar crime. One is investigating it as a distinct form of organised crime. The other is investigating white collar activities as a means of picking up the money trail created by other forms of organised crime.

5.26 The Committee acknowledges that following the money trail is as effective a way to reach the organisers behind, say, illegal drug importing as working up the chain from street drug dealers through wholesalers to the organisers.[209] Some have argued that it is a far more effective strategy.

5.27 The Committee notes that the mix of skills required by an agency to follow the money trail shares many elements with that required to pursue corporate crime generally. However, a number of witnesses expressed concern that this focus on corporate crime was taking the Authority into what 'is already an overcrowded field':[210] the Authority might duplicate the work of other agencies,[211] and

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208. 'NCA to seek reference for fraud inquiry', *The Age*, 30 August 1991.

209. On what is meant by 'following the money trail' see for example the extract from Mr Frank Costigan QC's 1983 Sir John Barry Memorial Lecture which was quoted in the second reading speech accompanying the introduction of the National Crime Authority Bill: Senate, *Hansard*, 10 November 1983, pp. 2492-93.

210. Evidence, p. 1388 (Victorian Council for Civil Liberties).

211. Evidence, pp. 809-10 (Mr Arthur King); p. 1559 (Mr R.E. Dixon); p. 1594 (Mr Carl Mengler); submissions from the Police Association of South Australia, p. 4; and the Australian Federal Police Association, pp. 15-16, which noted that the AFP is specifically tasked with investigation of major

compete with them for scarce expertise.[212]

5.28 Mr Bill Coad, the Director of the Cash Transaction Reports Agency, told the Committee that he thought there were important gaps between what the ASC was likely to do and what police forces did.[213] He thought the Authority was acting to fill these gaps, rather than duplicate the work of existing agencies.[214]

5.29 The Australian Securities Commission is the principal agency established by the Commonwealth and the States for the purpose of enforcing corporate regulations. The Authority intends the ASC to be a partner in many of the task forces under Future Directions.[215] The Committee therefore sought the ASC's views on Future Directions.

5.30 Mr Charles Williams, the Deputy Chairman of the ASC, told the Committee in March 1991 that the ASC had not suggested to Justice Phillips that his new emphasis was inappropriate.[216] Mr Williams saw cooperation between the ASC and the Authority as offering four main benefits in what he characterised as the ASC's campaign against corporate fraud. One benefit was training. Mr Williams told the Committee:

> we will be very pleased to collaborate in the setting up of educational facilities for enforcement people - a matter in which Mr Justice Phillips is very keenly interested and which we, as a new enforcement agency, badly

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fraud against the Commonwealth.

212. Evidence, pp. 614, 622 (Mr B. Partridge). See also Frank Costigan QC, 'Anti-Corruption Authorities in Australia', text of an address to the Labor Lawyers' Conference in Brisbane on 22 September 1990, pp. 6-7.

213. Evidence, p. 1473.

214. Evidence, pp. 1472-73.

215. Future Directions, pp. 4-5.

216. Evidence, p. 1487.

need.[217]

5.31 A second benefit was to investigate or to form bodies, task forces or working groups to examine 'unfocused matters' and provide broad overviews of areas of criminal activity.[218] Money laundering using corporations and securities markets was given by Mr Williams as an example of an area where cooperation with the Authority would be useful.[219] Mr Williams said:

> I believe the ASC, in the pursuit of individual matters, would be greatly advantaged by the ability to discern a pattern which has been investigated by others, as the NCA charter requires it to do.[220]

5.32 A third benefit was the provision by the Authority of an important link between the ASC and the police forces in Australia, and a forum for collaboration between them.[221] Mr Williams was asked by the Committee whether the Australian Federal Police could not do these things, rather than the Authority. He responded that he thought the Authority would be more useful in this role.[222]

5.33 The fourth benefit was a role as coordinator with overseas agencies. Mr Williams said:

> where there are foreign markets used [for improper corporate or securities activity], the availability of the resources of agencies with the appropriate connections with foreign enforcement agencies can be very valuable. In this respect both the NCA and the AFP are very important to us. ...

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217. Evidence, p. 1480.

218. Evidence, p. 1480.

219. Evidence, pp. 1480-81.

220. Evidence, p. 1489.

221. Evidence, p. 1482.

222. Evidence, p. 1488.

> The international side is something where I think the NCA can provide assistance. We have no formal links with any body external to Australia in relation to exchange of information. We may do one day but that is up to the Attorney-General's Department.[223]

5.34 The Committee considers that these benefits to the ASC from its relationship with the Authority are useful and appropriate. The Committee was concerned at the possibility of overlap and duplication between the Authority's work and that of the ASC. It asked Mr Williams if there was a formal memorandum of understanding between the two bodies, like the one about to be completed between the ASC and the Australian Federal Police. He responded:

> I think that the analogy is not perhaps an exact one, because the memorandum of understanding with the AFP is at an operational level in relation to the use of certain resources, where they are going to work, who is going to pay for them and so on. It is not a policy memorandum of understanding. That leads me to say that I am not sure, given that the responsibilities of our respective agencies are laid down by Parliament, that it would be for us to decide to sign a memorandum of understanding of our own volition.[224]

5.35 The Committee asked if a memorandum could be done on the basis of an operational understanding, covering liaison, coordination, and elimination of duplication.[225] Mr Williams replied:

> I think that, in fact, we are likely to get a de facto memorandum of understanding, in the sense that we will be talking through the consultative committee and

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223. Evidence, pp. 1481, 1483.

224. Evidence, p. 1486.

225. Evidence, p. 1486.

> at other levels and that we will agree on who is going to do what in particular areas. I cannot imagine a situation where, having decided to take action on a particular matter, we are going to stumble over the NCA dealing with the same matter, except perhaps as part of a general reference. But, as far as specifics are concerned, I cannot see it happening.[226]

5.36 The Committee proposes to keep the issue of possible overlap under review as part of its regular monitoring of Authority activities.

5.37 The Committee notes that since Mr Williams appeared before the Committee the ASC and the Authority have entered into a memorandum of understanding in relation to a particular investigation. Justice Phillips told the Committee on 29 July 1991 that the agreement was: 'to investigate a particularly grave white collar matter involving task forces in Western Australia, South Australia, Victoria and New South Wales. Certain police services will also be involved.'[227]

Emphasis on Other Functions - Intelligence

5.38 Section 11 of the NCA Act sets out the functions of the Authority. The first function listed is the collection, analysis and dissemination of criminal intelligence information. In December 1989, before Future Directions, the Authority decided to establish a Strategic Intelligence Unit and it commenced operation in Sydney in February 1990.[228] The IGC submission regarded the SIU as essential for the Authority, as it would be of assistance in developing long-term strategies.[229] The Authority presented its first major SIU assessment to the IGC at the IGC's November 1990 meeting. The

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226. Evidence, pp. 1486-87.

227. Evidence, p. 1657.

228. NCA, *Annual Report 1989-90*, p. 38.

229. p. 15.

IGC's submission stated: 'The IGC is impressed with the quality of the analysis presented, and believes that future assessments will not only contribute to the effectiveness of the NCA, but also benefit agencies receiving advice from the NCA'.[230]

5.39 Justice Phillips told the Committee he regarded as significant the order in which the Authority's functions were set out in the NCA Act.[231] The Committee notes that in the Authority's Corporate Plan, Objectives One and Two both deal with the Authority's intelligence function:

> **Objective One**
> Identify current and emerging trends and patterns in organised criminal activity and contribute to the effective targeting of individuals, companies and activities by investigative agencies.
>
> **Objective Two**
> Foster liaison and other initiatives which facilitate the effective development and exchange of information and intelligence on organised crime, both between Australian agencies and with overseas agencies.

The Action Strategies in the Plan give emphasis to the need to share intelligence with other agencies, and to develop strategic assessments of the organised criminal environment in Australia.

5.40 The Committee regards as appropriate the increased weight now given by the Authority to its intelligence activities. This, together with the Authority's readiness to share intelligence information with appropriate agencies, should answer the past criticisms levelled at the Authority.

5.41 The Committee sees the lead given by the Authority as important in helping break down the perceived reluctance of other

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230. p. 15.

231. Evidence, p. 1659.

Australian law enforcement agencies to share intelligence.[232] The following statement by Justice Phillips at the Committee's public hearing on 29 July 1991 indicated the process at work:

> I report that in November last an operational conference concerning a particular aspect of organised crime was organised and conducted by the National Crime Authority in Canberra. It was attended by representatives of every law enforcement agency in Australia, together with representatives of the FBI, Hong Kong and the United States drug agencies. It was an intensive conference, taking up 2½ days.
>
> I gave instructions before the conference that my staff were to make disclosure of our entire intelligence stocks concerning this particular aspect of organised crime. This was done in the opening session of that conference. I am pleased to report that this was followed by equally full disclosure by each of the other agencies represented. I was informed by a number of people that there had not previously been a conference where such a wide-ranging dissemination from such a large number of agencies had occurred. Care was taken to see that the results of this conference were translated into positive action. A working party was formed and has almost completed its work, which includes the establishment of a national database with respect to this particular area of organised crime.[233]

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232. On the reluctance to share intelligence, see for example Australia, Royal Commission of Inquiry into Drug Trafficking: Commissioner: The Hon. Mr Justice D.G. Stewart, *Report: February 1983*, AGPS, Canberra, 1983, pp. 522-26; and Australia, Office of the Special Prosecutor, *Annual Report 1982-83*, AGPS, Canberra, 1983, p. 48. The submission from Mr Michael Holmes, dated 20 December 1990, commented (p. 15): 'There continues to be a lack of true co-operation between Law Enforcement Agencies in Australia. There still is territorial jealousy and mistrust which inhibits the flow of information.'

233. The Committee was told in early October 1991 that this work was still continuing.

> Another conference, directed towards a different area of organised crime, will be held shortly.[234] All Australian law enforcement agencies and at least two from overseas have indicated an intention to send representatives. Again, I am sure there will be a full and complete dissemination between the agencies of their intelligence stocks.[235]

5.42 In relation to the Authority's new emphasis on intelligence functions, the submission from the Australian Federal Police Association, dated 22 February 1991, expressed concern at 'the real potential for duplication of effort, in particular with the established and recognised strategic intelligence capability of the AFP and the continually developing capacity of the ABCI'.[236]

5.43 The Committee notes this potential for unnecessary duplication has existed since the Authority was created. It has since increased, both because the Authority is now giving greater attention to its intelligence functions and because other agencies are doing likewise. For example, the Australian Federal Police Association told the Committee that the AFP has been developing its strategic intelligence capacity since 1986.[237] The Association questioned the wisdom of the Authority also developing this capacity in its Strategic Intelligence Unit, rather than relying on cooperation with other

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234. This conference took place in August 1991 in Canberra.

235. Evidence, pp. 1652-53.

236. p. 10. The submission from the Police Association of South Australia, dated 4 February 1991, also highlighted the risk of duplication (p. 4).

237. Submission, p. 10. See Senate, *Hansard*, 9 October 1991, p. 1662, where the Minister for Justice and Consumer Affairs, Senator the Hon. Michael Tate, stated that the Australian Federal Police's national intelligence division was compiling a report into allegations that Japanese businessmen were laundering the proceeds of overseas crime into Australian real estate and tourist developments. The Committee notes that the Authority was at the same time also doing a special investigation into the extent and avenues of money-laundering in Australia.

agencies and sharing of established capacities.[238] The submission from Mr Michael Holmes, dated 20 December 1990, suggested that the ABCI should be merged with the Authority in order to improve efficiency, effectiveness and coordination.[239]

5.44 The Australian Bureau of Criminal Intelligence was set up by agreement between the Commonwealth, the States and the Northern Territory in 1981. Its role is:

> to provide facilities for the collection, collation, analysis and dissemination of criminal intelligence of national interest with a view to providing such intelligence to the police forces of the Commonwealth, the States and the Northern Territory to enable them to combat organised crime in Australia and, in particular, to assist them to combat illicit drug trafficking.[240]

5.45 The ABCI is administered by a management committee which is comprised of all the Australian police commissioners. This meets twice a year and reports to the Australian Police Ministers' Council.

5.46 The ABCI's Annual Report 1989-90 describes the formation of a Strategic Intelligence Section within the Bureau. The aim of this Section is:

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238. Australian Federal Police Association submission, dated 22 February 1991, p. 10.

239. p. 22.

240. Australian Police Ministers' Council, *National Common Police Services Annual Report 1989-90*, AGPS, Canberra, 1991, p. 16. (The ABCI's annual reports are published as part of the National Common Police Services Annual Reports.) In evidence to the Committee, the ABCI's Director, Mr Keith Askew, said that the ABCI's client group had widened in more recent times to include Federal agencies such as Customs, Immigration, the Australian Quarantine Inspection Service and the National Parks and Wildlife Service, and State agencies such as the NSW Crime Commission, ICAC and the Queensland CJC: Evidence, p. 1701.

> to provide an integrated overview of criminal activity (especially organised crime) in terms of patterns and trends, for the purpose of providing intelligence which will identify law enforcement priorities and strategies for combating such criminal activity.[241]

The Annual Report also states:'Close liaison between the ABCI and the NCA is essential to avoid costly and counter productive duplication of effort'.[242]

5.47 The Senate Standing Committee on Constitutional and Legal Affairs, which reported on the NCA Bill in 1984, noted a suggestion that the ABCI could be subsumed by the Authority.[243] The then-Director of the ABCI expressed his concern about duplication of effort unless there was close cooperation with the Authority.[244] The Senate Committee recommended: 'The ABCI should not be subsumed within the Authority at this stage. The Committee strongly urges co-operation, consultation and, where provided under their respective charters, exchange of intelligence between the two bodies.'[245]

5.48 The Government's response stated that this recommendation 'was strongly supported by State Ministers'.[246] The NCA Act, subsection 12(2), provides: 'The Authority shall, in performing its functions, co-operate and consult with the Australian Bureau of Criminal Intelligence'.

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241. Australian Police Ministers' Council, *National Common Police Services Annual Report 1989-90*, AGPS, Canberra, 1991, p. 22. See also Evidence, pp. 1726-27.

242. p. 24.

243. Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, para. 3.12.

244. ibid., para. 3.13.

245. ibid., para. 3.14.

246. Senate, *Hansard*, 10 May 1984, p. 1972 (Senator the Hon. Gareth Evans QC, Ministerial Statement).

5.49 The committee sought the view of the ABCI's Director, Mr Keith Askew, at a public hearing on 7 October 1991. He said: 'I do not see too much conflict or overlap - duplication, if you like - between what the NCA are doing and what we are doing'.[247] Mr Askew said that working relations between the ABCI and the Authority were currently very good.[248] He commented:

> I think up until Mr Justice Phillips arrived on the scene, there was some reluctance on the part of the NCA to share data not only with the ABCI but generally. However, that has absolutely and totally changed.[249]

An electronic link joining the ABCI and Authority databases is due to come into operation in the near future.[250]

5.50 An ABCI Management Compliance and Efficiency Audit Review Committee reported on the ABCI in March 1990.[251] Mr Askew told the present Committee that the Review concluded that the ABCI should retain its present form, and not become part of the Authority or the Australian Federal Police.[252]

5.51 **The Committee RECOMMENDS that there be continuing review of the potential for duplication of intelligence functions between the Authority, the Australian**

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247. Evidence, p. 1704.

248. Evidence, p. 1705. In addition to the two-way passing of intelligence, the ABCI has hosted conferences for the NCA and the agencies cooperate on training: Evidence, pp. 1706, 1728, 1733.

249. Evidence, p. 1714.

250. Evidence, p. 1719. Various security features will operate to prevent access from one end of the link to the full database holdings at the other.

251. Australian Police Ministers' Council, *National Common Police Services Annual Report 1989-90*, AGPS, Canberra, 1991, p. 19. The Committee was chaired by the then Commissioner of the Tasmania Police, Mr Bill Horman. Its report has not been publicly released.

252. Evidence, pp. 1713-14.

Federal Police and the Australian Bureau of Criminal Intelligence.

Emphasis on Other Functions - Law Reform

5.52 Subsection 12(3) of the NCA Act, which empowers the Authority to make recommendations on reforms to administration and laws, was described in paragraph 2.15 above. Objective Four of the Authority's Corporate Plan reads:

> Identify and promote reform of those laws, regulations, administrative practices and other environmental factors which:
>
> . provide opportunities for or encourage organised criminal activity; or
> . hinder the effective investigation or prosecution of organised criminal activity.

5.53 The Authority's submission stated: 'The NCA has been trying to devote increased attention to its law reform function in recent years ...'.[253] The Authority has set up a law reform unit to look at law reform issues that emerge from NCA operations.[254] Justice Phillips told the Committee that part of the follow-up work for each of the intelligence conferences (described in paragraph 5.41 above) included the examination of issues for relevant law reform. In addition, he has undertaken that each year a public conference on a criminal justice theme will be organised by the Authority.[255] The first to be convened dealt with 'The Presentation of Complex Corporate Prosecutions to Juries'. It was held in Melbourne in July 1991, and was open to the public and the media. Justice Phillips told the Committee: 'In a closing session of the conference, concrete plans

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253. p. 30.

254. Senate, Estimates Committee E, *Hansard*, 5 September 1991, p. E76. The example given was the question of what powers police working outside their own jurisdiction should possess (e.g. a State policeman from Tasmania working in NSW).

255. Evidence, p. 1656.

were made for the translation of what we had learned during its proceedings into positive action'.[256]

5.54 The Committee supports the Authority's more vigorous pursuit of a law reform role. However, the Committee does not interpret the NCA Act as requiring the Authority to undertake law reform activities as specific, free-standing activities. In the Committee's view, the intention expressed in the Act is that the power to make recommendations on law reform is very much subordinate and ancillary to the Authority's principal functions, which are set out in section 11 of the Act.

5.55 The Committee notes the view of Mr Christopher Corns, who referred to criticism of the Authority in the past for not being sufficiently active in law reform: 'The NCA should not, however, be expected to act as a law reform agency. This was not the primary, or indeed secondary, reason for its establishment.'[257]

Cooperation and Coordination

5.56 The Authority's mission, as defined in its Corporate Plan, involves 'working in co-operation and partnership with other agencies'. This aspect was a key element in Justice Phillips' Future Directions paper, the opening sentences of which stated:

> Essentially, I envisage the Authority as a body which should act as a partner to the other law enforcement agencies. It should not be - or appear to be - a competitor. Rather, it should follow the roles of a co-ordinator and an agency offering complementary services to the other agencies. (emphasis in original)

5.57 The Committee has been told of a number of steps that the Authority has taken to improve cooperation and coordination. In

256. Evidence, p. 1655.

257. C. Corns, 'New directions for the NCA', *Legal Service Bulletin*, vol. 16(3), June 1991, p. 115.

Future Directions, Justice Phillips suggested that a Consultative Committee become the primary vehicle for the selection of references and inquiries and that it become an integral part of the twice yearly Police Commissioners' Conference.[258] The Consultative Committee was formed in January 1991.[259] It is comprised of the Chairman of the Authority, the police commissioners from the various forces in Australia, and representatives from the Australian Bureau of Criminal Intelligence, the Australian Securities Commission, and the Cash Transaction Reports Agency. Other agencies are invited to attend where necessary. The Consultative Committee is advisory only: the IGC retains ultimate responsibility for granting references to the Authority.[260]

5.58 In proposing the establishment of this Consultative Committee, Justice Phillips identified three particular advantages he considered would flow from it:

> Firstly, being a national body, its composition should help to identify references/inquiries of a national character and thus appropriate for the attention of the NCA. Secondly, its composition should ensure that duplication of effort is avoided. Thirdly, its composition should assist to remove the 'territorial' disputes and tensions which have occurred in the past.[261]

5.59 Justice Phillips told the Committee that the participants, including senior police, had indicated enthusiasm and support for the Consultative Committee.[262] The IGC also welcomed the establishment of the Consultative Committee to assist in identifying the need for investigations in particular areas.[263] The IGC accepted

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258. Future Directions, p. 1.

259. Evidence, p. 1651.

260. IGC submission, p. 11.

261. Future Directions, p. 2.

262. Evidence, pp. 1651-52.

263. IGC submission, p. 2.

that the Consultative Committee would be of great assistance to the IGC in determining the nature and extent of references, as well as monitoring the progress of existing ones.[264] The IGC, however, reaffirmed that the IGC should continue to bear 'ultimate responsibility for referring matters to the NCA for investigation'.[265]

5.60 The Committee sees benefit in having the Consultative Committee as a means of avoiding the poorly drafted references that have sometimes been given to the Authority by the IGC in the past.

5.61 The Australian Securities Commission's Deputy Chairman, Mr Charles Williams, is a member of the Consultative Committee. He told the Committee in March 1991 after the Consultative Committee's first meeting:

> the police commissioners who were present for that consultative committee meeting and for the other function that was taking place at that time in Adelaide, the police commissioners' conference, were unanimous that the level of cooperation and understanding between them all was far, far better than it had ever been before. I am not saying that that solely related to their cooperation with the NCA, but what I am saying is that the new consultative committee has started in a much better environment, even as between State police forces and the States and the Commonwealth police force than has ever existed before. So I think it is coming to birth under a favourable star and I detect a willingness to make it work.[266]

5.62 White-collar crime task forces are also being established under Future Directions. These have as a principal focus corporate crime and the use of corporate entities to disguise criminal activities or launder proceeds of crime. Future Directions proposed that such

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264. IGC submission, p. 11.

265. IGC submission, p. 11.

266. Evidence, pp. 1494-95.

task forces would be established in each State and Territory. On 29 July 1991, Justice Phillips reported to the Committee on progress in implementation of Future Directions. In the course of this, he said:

> It is with great pride that I furnish my next report in this segment. The National Crime Authority is currently pursuing an investigation into the alleged fraudulent evasion of certain statutory charges by companies and individuals. For this investigation the National Crime Authority has assembled a multi-agency task force which it coordinates and which involves agencies from every State and Territory in Australia except the Australian Capital Territory. Only the lack of relevant legislation in the Australian Capital Territory prevents agencies from it being included. This is the very first time in the history of law enforcement in Australia that such a national multi-agency task force has ever been formed and operated.[267]

5.63 As further evidence of the increased emphasis now being given by the Authority to coordination and cooperation, Justice Phillips told the Committee:

> In addition, the National Crime Authority is seeking to establish in each State and Territory a white collar crime liaison committee comprising representatives of relevant agencies to act as a single point of contact and as a coordinating mechanism for the investigation of white collar crime. I report that such committees have already been established in South Australia and Tasmania and are at an advanced stage of planning in Queensland, Western Australia and the Northern Territory.[268]

5.64 There is a possibility of the Authority duplicating the work

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267. Evidence, pp. 1656-57.

268. Evidence, p. 1658.

of specialist State crime-fighting agencies. Three of these agencies are the Independent Commission Against Corruption and the Crime Commission in New South Wales, and the Criminal Justice Commission in Queensland.

5.65 The Committee asked the Authority what steps it had taken to coordinate its activities with the activities of these three State bodies. The Authority responded:

> The Authority works closely with all three bodies. It has membership of the Management Committee of the NSW Crime Commission (the body which issues references to the Commission) and has worked closely with it since its inception. It also works closely with the CJC and the NSW ICAC ... The CJC will be a member of the White Collar Crime Liaison Committee in Queensland. The Authority will be considering at its regular meeting next week a proposal from the CJC that a Memorandum of Understanding be entered into. The Authority considers that the present level of coordination is satisfactory.[269]

5.66 All the evidence received by the Committee welcomed the increased emphasis by the Authority on cooperation and coordination.

5.67 There is a potential for overlap and duplication between mechanisms for cooperation and coordination.[270] However, the

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269. NCA, Written Answers, August 1991, Part 2, A1. The NCA submission, p. 17 also referred to NCA quarterly Operations Conferences attended by representatives of a large number of Commonwealth, State and Territory agencies with an interest in law enforcement: these conferences 'provide a forum for communicating to other law enforcement agencies a sufficient understanding of NCA activities to enable them to avoid as far as possible action which might cut across NCA operations, to exchange relevant information and intelligence, and to discuss matters of mutual concern' (p. 18). For criticism of the effectiveness of these Operational Conferences in the past see para. 3.24 above.

270. Other mechanisms for this purpose include:
    . the Australian Police Ministers' Council, which comprises the police

Committee has no evidence that this has in fact occurred. It mentions the possibility as one which the Committee and Ministers monitoring the Authority need to keep in mind.

Future Directions and Accountability

5.68 In his Introduction to the Corporate Plan, Justice Phillips stated:

> The mission statement,[271] objectives and strategies set out in this Plan will provide a framework for the development of future budgets, operational planning, performance appraisal and reporting to governments on the NCA's work. The question of how well the NCA is fulfilling its mission, and meeting its key objectives, is one of the most difficult to answer, but an attempt has been made in this Plan to grapple with the issues.

5.69 The Committee notes that role-definition assists the development of criteria against which to assess performance. This is true to some extent irrespective of the particular role which is defined: any role, once clearly defined, provides a basis for formulating objectives, strategies and performance measurement indicators.

5.70 However, the particular role adopted by the Authority in Future Directions and the Corporate Plan does have specific benefits for both assessing its efficiency and effectiveness and on other

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ministers of all States and Territories and the Minister for Justice;

- a related body, the Senior Officers' Group, which comprises the police commissioners of all States and Territories and several senior officials;
- the Law Enforcement Policy and Resources Committee, which is chaired by the Attorney-General and includes the heads of all federal law enforcement agencies; and
- the Heads of Commonwealth Operational Law Enforcement Agencies Committee, which discusses operational matters of mutual concern.

271. The Mission Statement is set out at para. 5.6 above.

aspects of its accountability. For example, one impact of Future Directions is to reduce the emphasis on the Authority's investigative role. This in turn can be expected to diminish the Authority's need to maintain such extensive secrecy about its activities. Coordinating, cooperative and law reform activities can be conducted in a more open manner than investigations.

5.71 Coordination and cooperation also of necessity involve a type of accountability. The Authority has no power to compel other agencies to work with it. It must convince them of the value and legitimacy of a cooperative or coordinated action. The use of the Consultative Committee on which many agencies are represented to recommend new references and inquiries similarly adds an element of this type of accountability.

5.72 The Australian Federal Police Association's submission regarded the open-ended references and inquiries conducted in the past by the Authority as one area in which it lacked adequate accountability, being free of 'the disciplines of cost and definite timeframes or competing emerging priorities'.[272] Under Future Directions, no more open-ended references or inquiries are to be started.[273] This, like the development of performance indicators, will improve the Authority's accountability.

5.73 Accompanying Future Directions and other changes is a clear awareness by the Authority of the need to be seen to be accountable. For example, Justice Phillips was quoted earlier this year as saying:

> I have said a number of times since my appointment and particularly since my new directions were approved, that any operational success we achieve will be either diminished or ignored as long as it can be said that the NCA is a secretive and unaccountable body.[274]

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272. p. 14.

273. Future Directions, p. 2.

274. Quoted in C. Mitchell, 'In open partnership', *Law Institute Journal*, March

5.74 While in these respects the new emphasis reduces the scope for criticism of the Authority's accountability, in one aspect the new emphasis may heighten concerns. The new emphasis involves greater attention to the intelligence-gathering role and greater openness in disseminating intelligence to other law enforcement agencies. This clearly increases privacy concerns.[275]

5.75 Overall, therefore, the adoption of Future Directions and other changes should reduce the basis of the current widespread public concern about the Authority's accountability. There is, however, a continuing need for Authority secrecy and its special powers, and hence for special measures to ensure the accountability of the Authority. The new emphasis has not been accompanied by any suggestion from the Authority, the IGC or the Attorney-General that the NCA Act should now be amended to remove those of the Authority's special powers which are of particular concern to civil libertarians.

5.76 On the contrary, the Authority still anticipates a need to rely on these powers. The Authority argues the fact that it has such powers is a reason for other agencies to cooperate with it.[276] Only time will reveal the extent which the powers are actually used in the future. Moreover, the Authority will still need to retain a large measure of secrecy vis-a-vis the public in relation to operational matters, albeit it is now more open with other law enforcement agencies.

5.77 As already noted, the Corporate Plan will help in assessing the Authority's efficiency and effectiveness in the future. Difficulties will however remain. In 1988, the *Initial Evaluation* observed:

> The Authority freely admits that it does not as yet have

1991, p. 122.

275. See paras. 6.83 - 6.84 below.

276. e.g. see NCA Corporate Plan, p. 5.

> an overall strategic view of organised crime in Australia. Its selection of targets to become the subject of references is not animated by some grand plan which will result in the progressive suppression of organised crime in this country.[277]

5.78 The Committee considers that this is still valid.[278] The mechanisms put in place under Justice Phillips avoid duplication of investigative effort. They also reinforce existing measures to ensure the Authority does not undertake matters able to be dealt with by other agencies. In other words, they identify what matters the Authority should not undertake. The measures do not, however, identify in a positive, rigorous way what targets the Authority should pursue.

5.79 Justice Phillips told the Committee on 29 July 1991:

> I report that the National Crime Authority has commissioned Dr Grant Wardlaw to design a course for the training of senior intelligence officers in strategic intelligence. The term 'strategic intelligence' is used in contradistinction to the term 'operational intelligence'. It connotes a broad overview of intelligence matters. This commissioning, together with the series of intelligence conferences I have described, is directed towards being able to give this Committee and, through it, the Australian Parliament and people an overview of organised crime in Australia.[279]

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277. para. 3.9.

278. e.g. see Evidence, p. 517 (Mr Chris Eaton, Police Federation of Australia and New Zealand): 'There has to be a strategic overview of crime in Australia, which does not exist at present, clearly. We have not seen the National Crime Authority provide, to my knowledge anyway, this Committee or any other jurisdiction, or any other government, a strategic overview of organised crime in this country.'

279. Evidence, p. 1659. See Grant Wardlaw, 'Conceptual Frameworks of Organised Crime - Useful Tools or Academic Irrelevancies?', paper delivered at the Australian Institute of Criminology Conference: *Organised*

5.80 The Committee comments that assessment of the Authority's target selection and impact on organised criminal activity will only be possible when this overview is available to provide a benchmark.[280] Without this overview, the Authority will not be able to demonstrate that in choosing to pursue target X rather than Y it has made the right choice - that X is more important in Australian organised crime than Y. An Authority investigation may result in the target suspect being convicted. The benchmark provides a way of assessing the impact of this conviction on organised criminal activity. It also provides a means of addressing the more

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Crime: 5-7 September 1989, Canberra. In this paper Dr Wardlaw noted the difficulty caused by lack of an agreed definition of organised crime, and how law enforcement agencies have proceeded without one (pp. 2-3). He commented:

> The difficulty with this attitude is that 'getting on with the job' necessarily involves either an idiosyncratic approach to the problem or little more than 'target-of-opportunity' enforcement, there being no strategic vision to guide the development and implementation of empirically-based strategies. The result is a running series of sniping attacks between one enforcement agency and another (especially between traditional police forces and new investigative agencies established primarily on the basis of the perceived need for novel means of combating organised crime), an emphasis on arrests for arrest's sake (primarily a response by investigative agencies to the absurd pressure they are placed under to 'prove' their worth), and an over-emphasis on enforcement strategies to the detriment of serious consideration of economic, political and social strategies designed to impact on the conditions which allow organised crime to develop and prosper. (p. 3)

Mr Russell Hogg, who teaches at Macquarie University, made a broadly similar argument to the Committee on 25 March 1991: Evidence, pp. 1499-1502, 1504-05.

280. cf. the conclusion in the *Initial Evaluation*, para. 4.3 that the lack of a statistical base made it impossible to say whether the work of the National Crime Authority had led to a discernible diminution in the extent of criminal activity.

general question of what inroads the Authority's activities have made on the level of organised criminal activity.

5.81 The question whether hard data such as numbers of arrests and conviction rates are a viable means of assessing Authority performance has been controversial.[281] Provision of such data for performance assessment will be difficult for many areas of Authority activity which receive increased emphasis under Future Directions. Objective measurement of activities such as intelligence gathering, coordination, cooperation, and law reform is not easy.[282] Even where clear results can be defined, it may be difficult to ascertain the Authority's contribution, given the Future Directions emphasis on acting in partnership. As the Corporate Plan states, much of the evaluation of the Authority must be qualitative, using quantitative measures where possible to assist in the assessment.[283]

5.82 The Committee has not tried to evaluate the performance measures set out in the Corporate Plan. The Committee sees this as a task for the future. It notes that the Authority will review and update the Plan towards the end of each financial year, so that at the beginning of each financial year there will be a revised Mission Statement, Objectives and Action Strategies for the Authority as a whole.[284]

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281. See footnote 13 in chapter 2 for references to some of the differing views.

282. The Authority pointed out in its *Annual Report 1989-90*, p. ix:

> It will be appreciated that, in terms of combatting organised crime, the benefits flowing from such activities as the Authority's cooperation with other agencies and the gathering and dissemination of relevant intelligence do not permit of any precise measurement. Similar considerations apply to research and proposals for operational and legal reform.

283. p. 7. See also Evidence, p. 1680, where Justice Phillips indicated that 'anecdotal material' such as reports of the views of media NCA-watchers will often form part of the material for assessment of the Authority's performance.

284. NCA, Corporate Plan, p. 22.

5.83 The Committee welcomes the fact that performance measures are now available. As data is supplied in annual reports and elsewhere in accord with the measures, the usefulness of individual measures will become more apparent. The Committee will be particularly interested in indicators that reveal:

- to what extent results achieved by the Authority could have been achieved in the absence of its special powers to compel the attendance of witnesses and the production of documents;[285] and
- the cost of an achieved result, not merely the fact that it has been achieved.[286]

5.84 The Committee noted the Australian Federal Police Association's criticism of the Authority's statement: 'It is likely that many

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285. The Australian Federal Police Association's submission, p. 6 refers to the Authority's special powers and states there is a requirement for 'some measure of their incremental investigative utility leading to the assembling of admissible evidence beyond that which could be obtained utilising conventional police investigative methods in the absence of such powers ...'.

286. The submission from the Australian Federal Police Association, p. 8 commented (in relation to the draft performance measures in the Authority's submission, not those in the Corporate Plan, which was not then complete):

> What is not evident are the requisite detailed performance indicators necessary to more properly measure efficiency, that is, the cost of producing these results. In this respect such detailed costings need to incorporate the major and ongoing contribution of the attachment of police officers, access to intelligence holdings including the AFP's established overseas liaison network, the additional secondment of AFP/State/Territory police officers to NCA joint task forces and the provision of telephone interception and witness protection services. In other words a detailed analysis of inputs and outputs.

of the performance indicators relating to its intelligence and investigative objectives will have to remain confidential...'.[287] The Association argued:

> It is difficult to see how such a position could be sustained and that performance indicators could not be devised to ensure the necessary protections, yet be available for external review and audit by appropriate authorities. The alternative is continuous self assessment of performance, a proposition unlikely to be publicly acceptable.[288]

5.85 The Committee accepts that providing information publicly against some performance indicators may be difficult. It asks the Authority to do as much as possible to devise publicly available performance indicators. The Committee considers that where this is not possible, it would be useful if the methodology of the assessments could be made available, without the actual data.

General Reaction to Future Directions

5.86 The Committee observes that Future Directions has received encouraging support from Australian law enforcement agencies. The new focus fits far better than the old with police views on how the Authority can best contribute to improving law enforcement. For example, Commissioner Hunt of the South Australian Police told the Committee on 4 February 1991:

> The role the National Crime Authority should play though, is one for which it was originally designated and that is to look at the national scene with complementary task forces and investigations being conducted by local law enforcement authorities in conjunction and in co-operation and full communication with and with the

287. The Authority's statement was made in its submission, p. 19.

288. Australian Federal Police Association submission, p. 8.

active assistance of one party to another.[289]

5.87 The submission from the Australian Federal Police Association, dated 22 February 1991, stated that a legitimate role did exist for the Authority but that its jurisdiction and role needed a more definitive framework:

> Consistent with these conclusions the Association recognises that the new [Future] Directions Paper issued by the current NCA Chairman contains the most promise, to date, of the NCA actually establishing itself as a truly cooperative and coordinating component of the national law enforcement machinery. In this respect the commitment of the Chairman to the NCA adopting a partnership role as opposed to a competitive one and the Paper's cooperation initiatives are laudable.[290]

5.88 The Police Association of New South Wales, which advocated abolition of the Authority, nonetheless conceded: 'The new Chairman, Justice Phillips, certainly appears to understand what is required of the National Crime Authority'.[291] The Association's Secretary, Mr Lloyd Taylor, commented on 30 January 1991: 'perhaps Justice Phillips can bring it back to what I think the police would like to see it doing: being a cooperative body rather than a

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289. Evidence, p. 984. See similarly the submissions from the Tasmania Police, the Western Australia Police Department and the Police Federation of Australia and New Zealand, all of which were written before Future Directions was adopted. The Chief Commissioner of the Victoria Police, Mr Kel Glare, was reported as responding to Future Directions by saying:

> I am absolutely delighted at the direction the NCA is going to take. I think it's what the NCA was originally set up for, and without wishing to criticise those who have preceded Mr Justice Phillips, I'm very keen on the proposal. ('Police welcome new direction for the NCA', *The Age*, 27 November 1990, p. 18.)

290. p. 2.

291. Evidence, p. 644.

competitive body which it appears to be now ...'.[292]

5.89 Mr Christopher Corns, a Melbourne academic, has observed that the shift in focus adopted by Justice Phillips 'signals a new strategic approach' to the task of targeting the principals, and their close associates, who are the architects of organised crime: 'This strategy involves analysing the economic and institutional systems and methods which have been used to facilitate money laundering and other abuses of business practices'.[293] Mr Corns also noted that this new strategy was very much in line with what was advocated by critics of the Authority's past focus, such as Mr Frank Costigan QC in his address to the 1990 Labor Lawyers Conference in Brisbane.

5.90 The view of Mr Costigan was that the Authority's role should be one of a coordinator and facilitator, acting as a conduit for Commonwealth-State, and inter-agency, cooperative activities:

> What the Crime Authority should be doing is really, in essence, quite simple. It should maintain good relations with all police forces and should have one liaison officer from each force available to it to maintain proper communication. That liaison officer should be able to bring to the Crime Authority matters which the local police force finds, for good reason, beyond its jurisdiction. The Crime Authority can then use its powers to assist the particular investigation, to collect material interstate and perhaps overseas, and when the material has thus been collected and analysed, give it back to the law enforcement agency who made the request, for that body to continue with its investigations and, in due course, if arrests are to be made, to make those arrests and to have the appropriate Director of Public Prosecutions take over the prosecution of the

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292. Evidence, p. 652.

293. C. Corns, 'New directions for the NCA', *Legal Service Bulletin*, vol. 16(3), June 1991, p. 113.

> matter. The Crime Authority can also be a very useful coordinating body when there are task forces to be set up which cross jurisdictions. In addition there are also some roles which it can perform which are appropriate to it and probably no other body. For example, for the Crime Authority to do an investigation into the techniques of money laundering in this country would be of inestimable value to the whole community.[294]

5.91 Justice Vincent indicated that his envisaged role for the Authority was formed during the debate in 1983 and 1984 leading to the Authority's establishment:

> what I envisaged as being the appropriate role of the Authority, whatever it was called, was to provide a reserve power to deal with those kinds of problems which were not appropriately dealt with by State or Federal police agencies within their own ambit. I envisaged that it should be accessible to those bodies as a specialised body of skilled individuals.
>
> ... It was also envisaged by me that the body would be able, in appropriate cases and where specific decisions were made by a monitoring agency, to exercise reserve powers - powers of interrogation, of investigation - which might need to be called on. One would not have anticipated that this would occur often, or that it was simply to be an adjunct to the ordinary investigative activities of the body, but that there was open to the community an avenue to protect itself in the relatively small variety of circumstances within which extra intrusions into civil liberties might be justified in order to deal with very difficult matters. ...

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294. Frank Costigan QC, 'Anti-Corruption Authorities in Australia', text of an address to the Labor Lawyers' Conference in Brisbane on 22 September 1990, pp. 14-15. The submission of the NSW Bar Association, 3 October 1990, p. 5 endorsed the Costigan paper's view of what functions the Authority should perform.

> The body could then additionally, and perhaps peripherally, exercise a monitoring control in order to develop a profile of criminal activity in Australia - to gain a general picture - so that much of the rhetoric to which we had been subjected could be placed into an appropriate perspective.[295]

5.92 Prior to the announcement of Future Directions, Mr Ron Merkel QC, President of the Victorian Council for Civil Liberties, described a body which he thought should replace the Authority:

> It would be, in effect, a supervising body, not with statutory power to direct State or Federal police, but with the power to try to coordinate their activities, try to take over from them the investigations that are just too big, too national or too international for them to handle within themselves. It should be a body that liaises with, supervises and works with the existing law enforcement agencies.[296]

This description fits the Authority under Future Directions more closely than the pre-1990 Authority.

Other Matters

5.93 A suggestion was made to the Committee that the NCA Act should be altered to enable the Authority to investigate matters such as serial murders or 'thrill' murders.[297] The Committee rejects this suggestion. It believes that police forces are capable of investigating such matters.

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295. Evidence, pp. 370-71.

296. Evidence, p. 352.

297. Submission from the Police Federation of Australia and New Zealand, p. 8: the definition of 'relevant offence' in the NCA Act 'should be extended to include any serious indictable offence that in the public interest warrants the exercise of special powers, such as serial or thrill murders as an example'. See also Evidence, p. 648 (Police Association of NSW).

5.94 Another suggestion was that the Authority be given an anti-corruption role in relation to the Commonwealth public service like that which the Independent Commission Against Corruption has in New South Wales.[298] The Committee notes that the NCA Act empowers the Authority to investigate serious official corruption.[299] The Committee does not consider it necessary to alter the Act to permit the Authority to investigate less serious corruption or to take on an educational role in combating such corruption.

Conclusions

5.95 Future Directions and the Corporate Plan set down clear directions for the Authority in its task of combating organised crime. The Committee regards this as valuable and consistent with the NCA Act. The changes adopted are important measures to:

- avoid excessive focus by the Authority on its investigative function, to the detriment of its intelligence and other functions under the NCA Act;
- improve the means by which targets for Authority investigations are selected;
- enable the Authority to cooperate and coordinate its activities with other law enforcement agencies, rather than operate in isolation;
- enable the Authority to play a significant role in helping other law enforcement agencies to work together on complex matters; and

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298. Evidence, pp. 723-24 (Mr John Hatton MP); submission from Mr Malcolm Mackellar, p. 1. In support of his argument, Mr Mackellar raised a specific complaint involving the Department of Immigration, Local Government and Ethnic Affairs. The Committee sought a response from the Department to this complaint. The Committee was satisfied by the response that the specific complaint was unfounded.

299. NCA Act, s. 4(1): the definition of 'relevant offence' includes bribery or corruption of or by a Commonwealth, State or Territory officer, provided some organisation, planning or series of offences is involved and the offence is punishable by imprisonment for a period of three or more years.

. improve the ability of the Committee and the public to assess how well the Authority is operating and what it is achieving.

5.96 The Committee has commented on some areas in which the Authority's work has the potential to result in overlap and duplication of law enforcement effort. It considers that careful attention and ongoing monitoring is required to ensure that this does not occur.

CHAPTER 6

ACCOUNTABILITY
ROLE OF THE COMMITTEE AND OTHER BODIES

ADEQUACY OF EXISTING ACCOUNTABILITY MECHANISMS

The Existing Mechanisms

6.1 The Authority's submission described its accountability as follows:

> The NCA is subject to a high level of monitoring and review. Decisions taken by the Authority are subject to review under the *Administrative Decisions (Judicial Review) Act 1977*. Section 32 of the National Crime Authority Act provides that applications may be made to the Federal Court for an order of review in respect of particular decisions. As a national body, the Authority is accountable to the constituent Governments and Parliaments through the Inter-Governmental Committee, to representatives of those Governments on that Committee and particularly to the Commonwealth Minister (the Attorney-General) chairing the Committee. The NCA's work is monitored both by the Inter-Governmental Committee and, of course, by the Parliamentary Joint Committee on the NCA, established by the Commonwealth Parliament expressly for that purpose. Further scrutiny of the NCA is provided through the Estimates and other Committees of the Commonwealth Parliament, and the NCA is of course accountable to the Courts. Finally, like other Commonwealth agencies, the NCA is subject to the

provisions of the *Freedom of Information Act 1982*.[300]

6.2 The Authority's submission added: 'Another form of accountability to which the NCA is subject is, of course, to the media'.[301] The Committee notes that Authority records relating to its interception of telecommunications are inspected at least twice a year by the Commonwealth Ombudsman.[302] As a further aspect of accountability, the Authority is audited by the Australian National Audit Office.

Lessons on Accountability from the Experience to Date

6.3 The adequacy of the accountability of the Authority since 1984 emerged as a major issue during the evaluation. In order to determine if changes to existing accountability mechanisms are needed, it is helpful to assess the validity of the criticisms of those mechanisms and the extent of any problems that have emerged since 1984.

6.4 When the creation of the Authority was being considered in 1983-84, it was argued that the special powers and degree of secrecy proposed for the Authority would require special measures to ensure that it remained properly accountable. This view was so widely accepted by those contributing to the current evaluation that the Committee saw no reason to question it.

6.5 Accordingly, the Committee evaluated the issue of accountability on the basis that some special measures were required. The issues for the Committee were the adequacy of the existing measures and the merits of various suggested improvements.

6.6 In assessing these matters, the Committee was conscious

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300. p. 35.

301. p. 37.

302. NCA, *Annual Report 1989-90*, p. 36.

that provision of information lies at the heart of accountability. But the objective of securing appropriate accountability has to be balanced against the need to meet other objectives, best served by some measure of secrecy. These include the need to ensure that premature publicity does not undermine the effectiveness of Authority investigations, and the need to safeguard individual privacy. The challenge is to achieve the correct balance when these objectives compete.

6.7 The Committee received differing views on the adequacy of the current position. The submission from Mr Paul Delianis, dated 16 August 1990, stated:

> For a number of years, in a management capacity, I was concerned with operations involving senior staff from the Authority. At all times I had total confidence in the integrity of these people and the extent of accountability of the Authority. I know of no reason to change.[303]

6.8 The submission from Mr Christopher Corns, dated 13 August 1990, stated:

> The NCA is clearly subject to a greater range of accountability mechanisms than any police force in Australia and possibly than any government department. ... Subject to the limited information available, I submit that the NCA is indeed adequately accountable. I have been surprised by the range and details of matters provided by the NCA to, inter alia, the PJC.[304]

6.9 In contrast, Mr Mark Findlay, the Director of the Institute of Criminology at Sydney University, compared the Authority and the general police. He concluded that the NCA was not subject to

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303. p. 3. Mr Delianis retired in 1987 as Deputy Commissioner of the Victoria Police.

304. p. 9. See similarly the submission from Mr Michael Holmes, p. 25.

several accountability mechanisms that apply to police forces.[305] He referred to the rank structure of a disciplined police service, the requirement on the police to report to external agencies such as Ombudsmen, Complaints Tribunals, Privacy Committees, Judicial Audits etc., and the potential intervention of police tribunals to investigate specific allegations of police indiscipline and excess. The Police Association of New South Wales made the same point, saying: 'On the accountability question, the National Crime Authority, we believe, certainly does not have the same accountability as other police'.[306]

6.10 The views of civil liberties groups that the Authority lacked adequate accountability were set out in paragraphs 4.1 and 4.2 above. Mr John Hatton, MP described the Authority as 'relatively unaccountable'.[307] The Queensland Law Society told the Committee: 'the secrecy surrounding the NCA has brought with it distrust, deserved or otherwise'.[308] The South Australian shadow Attorney-General, the Hon. K.T. Griffin MP, told the Committee at its Adelaide hearing on 4 February 1991: 'I come to the hearing out of a sense of frustration at the way the National Crime Authority appears to have been operating and its lack of public accountability'.[309]

6.11 The Committee has some strong concerns about the lack of Authority accountability which it considers later in this chapter and in the next chapter. Views such as those in paragraphs 6.9 and 6.10 have to be balanced, however, against the operation of the mechanisms described in paragraphs 6.1 and 6.2 above. The Authority, for example, has provided a large amount of pertinent information each year in its annual report, and its staff have

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305. Submission, p. 3.

306. Evidence, p. 644. See similarly, Evidence, p. 496 (Police Federation of Australia and New Zealand); p. 901 (Police Association of South Australia).

307. Evidence, p. 710.

308. Evidence, p. 577.

309. Evidence, p. 989.

answered questions before Senate Estimates Committees. The Law Society of New South Wales stated: 'The Annual Reports of the National Crime Authority appear to be comprehensive and of some value in understanding the claims for which the Authority itself contends'.[310]

6.12 In many cases, the information provided may not be very attention-getting in media terms, simply because the Authority's actions have been quite proper. For example, the Authority's submission points out that there have been few court challenges to Authority decisions and none had been successful until an August 1990 matter was resolved (in an out of court settlement) in favour of the applicant. This is despite the fact that the Authority's decisions are subject to review under the *Administrative Decisions (Judicial Review) Act 1977*. In addition, a person wishing to challenge a decision by the Authority that he or she must provide information to it may seek review of the decision in the courts pursuant to sections 32 and 32A of the NCA Act.

6.13 The Authority argues that this 'strong record in relation to judicial review, combined with the fact that there have been no criticisms of the Authority in this regard from either the IGC or the PJC, is a vindication of the fairness of its actions'.[311]

6.14 Investigations by the Authority have frequently led to charges being laid and subsequent court cases. The Committee is aware of only one case in which the court has criticised the actions of the Authority. This was in the comments of Magistrate J.S. Williams on 13 May 1988 in the committal stage of DPP v. Grassby and others. When the court proceedings involving Mr Grassby are concluded, the Committee may regard it as useful to evaluate the merits of this criticism.

6.15 Mr Andrew Male, an Adelaide journalist whose work has involved a critical watch over a long period on the Authority's

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310. Submission, 22 October 1990, p. 8.

311. NCA submission, p. 37. See similarly, Evidence, pp. 1675-76 (NCA).

activities, was asked by the Committee if he knew of any evidence to suggest that the Adelaide Office of the Authority had acted illegally, as opposed to ineffectively. He replied: 'I do not believe there is any evidence of illegal activity'.[312]

6.16 Material held by the Authority is subject to the access provisions of the *Freedom of Information Act 1982*. In the first six years of the Authority's existence (ie. to the end of June 1990) the Authority's annual reports show that it received a total of 33 requests for access under the FOI Act. A number of these related to material inherited from the Royal Commission to which the Authority was a successor.

6.17 The Committee itself has received only a very small number of credible complaints that the Authority may have unduly trespassed on individual rights and liberties. The Committee accepts that not all aggrieved persons will have approached the Committee. Some may have been unaware of its existence. Others may have assumed, from the media reports of the Committee's difficulties with the secrecy provision in the NCA Act, that the Committee was constrained by the terms of the NCA Act from dealing satisfactorily with the complaints.

6.18 The Committee also notes the comment by the Queensland Council of Civil Liberties that some are reluctant to raise grievances against bodies like the Authority.[313] To complain risks further publicity in a situation where one element of the initial grievance is that the individual has unfairly been linked publicly with an Authority investigation.

6.19 In addition to concern with individual rights and liberties, accountability involves the ability to assess whether the Authority has provided value for money by operating efficiently and effectively in ways not related to rights and liberties. The Committee accepts that in the past there have been grounds for concern on this aspect of

312. Evidence, p. 893.

313. Evidence, pp. 548-49.

accountability. At the same time it notes that particular criticisms of the Authority made to the Committee have been based on detailed information made public by the Authority. Freedom of Information requests could have been made to supplement this information.

ROLE OF THE INTER-GOVERNMENTAL COMMITTEE

Structure and Functions

6.20 One avenue of Authority accountability is to the IGC. The Minister administering the NCA Act is referred to in the Act as the 'Commonwealth Minister',[314] who at present is the Attorney-General. In addition, the Act establishes an Inter-Governmental Committee consisting of the Commonwealth Minister, and a Minister from each State and the Northern Territory.[315] The latter are nominated by their Premier or Chief Minister, and are usually either an Attorney-General or Police Minister. The Table on the following page shows the title of the Minister from each State and the Northern Territory who has been the member of the IGC as at 30 June each year since the Authority commenced operations in July 1984. At present, a Minister representing the Australian Capital Territory participates in the IGC as an observer. Commonwealth legislation to permit the Australian Capital Territory to become a full member of the IGC has been passed.[316] The necessary Australian Capital Territory legislation is expected to be passed before the end of 1991.[317]

6.21 The Authority reports in some respects directly to the Commonwealth Minister, in others to the IGC. Under section 9 of the NCA Act, the IGC is given the specific functions of:

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314. NCA Act, s. 4(1).

315. NCA Act, s. 8.

316. *Crimes Legislation Amendment Act (No. 2) 1991*, s. 36.

317. The National Crime Authority (Territory Provisions) Bill 1991 was introduced into the ACT Legislative Assembly on 12 September 1991.

recommending persons for appointment as Authority members; consulting with the Commonwealth Minister in relation to proposed Commonwealth references to the Authority; considering whether approval should be given for a reference proposed by a State or Territory; and receiving reports from the Authority.

6.22 In addition the IGC is required 'to monitor generally the work of the Authority'.[318] The Authority is required to provide the IGC, on request, with information about specific investigations and the general conduct of its operations.[319] The Authority told the Committee in December 1990:

> At the IGC's request, the NCA now provides quarterly Operational Reports to the IGC pursuant to section 59(3) of the Act. These reports include details of each matter

318. NCA Act, s. 9(1)(e).

319. NCA Act, s. 59(3)-(5).

TITLE OF THE STATE AND TERRITORY MINISTER ON THE INTER-GOVERNMENTAL COMMITTEE

as at 30 June

	1985	1986	1987	1988	1989	1990
NSW	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services
QLD	Minister for Justice & Attorney-General	Minister for Justice & Attorney-General	Deputy Premier & Minister for Police	Deputy Premier & Minister for Police	Minister for Police & Minister for Emergency Services & Adminis-trative Services	Minister for Police & Emergency services
SA	Attorney-General	Attorney-General	Attorney-General	Attorney-General & Minister for Corporate Affairs	Attorney-General & Minister for Corporate Affairs	Attorney-General & Minister for Corporate Affairs
TAS	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services
VIC	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services
WA	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services	Minister for Police & Emergency Services

NT	Chief Minister	Chief Minister	Chief Minister	Chief Minister	Chief Minister & Treasurer	Chief Minister & Treasurer

under investigation, financial details, and comprehensive statistical details.[320]

6.23 The IGC meets in private, but also transacts much of its business by correspondence, without meetings being necessary. The Chairman and members of the Authority attend virtually all IGC meetings, although they may occasionally be asked to withdraw during discussion of particular agenda items. The Authority told the Committee:

> As well as the granting of references, discussion at IGC meetings typically covers a wide range of topics, including amendments to the National Crime Authority Act, cost-sharing and secondment arrangements, resource questions and reports on investigations. ... The NCA views its relationship with the IGC as an effective one and does not see a need for any change to the nature of that relationship.[321]

Reasons for Creation of the IGC

6.24 The Government in 1983 considered that the Authority would only be effective with the participation and cooperation of the States and Northern Territory.[322] Extensive inter-governmental

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320. NCA submission, p. 36.

321. NCA submission, p. 36.

322. The 'Submission by the Attorney-General and the Acting Special Minister of State to the Standing Committee on Constitutional and Legal Affairs in relation to its reference concerning the National Crime Authority Bill and the National Crime Authority (Consequential Amendments) Bill 1983', para. 24 explained:

> However appropriate its blend of powers and safeguards in any other respect, the Crime Authority will not be effective without the participation and co-operation of Governments of the States and Northern Territory. The Commonwealth's constitutional power to authorize the Crime Authority to investigate, using coercive powers, offences against State laws is effectively non-existent.

discussions occurred between July and October 1983 to secure this participation and cooperation.[323] The Government took the view that 'State co-operation is only likely to be forthcoming on other than a grudging basis, in a wholehearted way, if the States feel that they are genuinely part of the operational role or the governing structure of the Authority'.[324]

6.25 The States initially advocated joint ministerial accountability for the Authority, as an alternative to the IGC.[325] The Commonwealth Government rejected this on the ground that 'when you have joint accountability you really cannot pin the responsibility

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In oral evidence to the Senate Committee, the Attorney-General, Senator the Hon. Gareth Evans QC, identified three relevant factors:

> One is the constitutional imperative. The second is the practical imperative - if you want to get on-the-ground co-operation from the States you have to give them a place in the sun in the institutional organisational machinery ... The third consideration is the political imperative, when it comes to the actual determination of whether or not a particular State is going to lend its assent to a proposed reference. You have three separate pressures operating and they are all combined to produce the particular model which, despite its Heath Robinson appearance to many people, including initially myself, is the only model which I believe satisfies the various pressures that are operating and produces those results. (Senate Standing Committee on Constitutional and Legal Affairs, Reference: National Crime Authority Legislation, *Hansard*, 15 February 1984, p. 281.)

323. The submission referred to in the previous footnote, para. 5 details the steps taken. The States were also consulted when the Government prepared its response to the 1984 Senate Committee report: Senate, *Hansard*, 10 May 1984, p. 1969 (Senator the Hon. Gareth Evans QC).

324. Senate, *Hansard*, 5 June 1984, p. 2551 (Senator the Hon. Gareth Evans QC).

325. Senate Standing Committee on Constitutional and Legal Affairs, Reference: National Crime Authority Legislation, *Hansard*, 15 February 1984, p. 278 (Senator the Hon. Gareth Evans QC).

on any particular government'.[326] The Government preferred a Commonwealth-created Authority accountable to a Commonwealth Minister and through that Minister to the Parliament.[327] The Government accepted some alteration to its preferred model. One step taken:

> to meet the reasonable requirements of the States was provision for an Inter-Governmental Committee to monitor generally the work of the Authority. ... The Committee will provide the States with a very effective window into the operations of the Authority.[328]

Operation of the IGC

6.26 Because the IGC issues no reports or public statements, the Committee cannot readily assess how well it has carried out its functions. In submissions and evidence the Committee received virtually no comment on the IGC's performance. It appeared that there was little public awareness of the existence of the IGC.

6.27 The Victorian Council for Civil Liberties commented that it saw the Committee, not the IGC or the Minister, as the body to which the Authority was accountable.[329] Assistant Commissioner Graham Sinclair of the Victoria Police made a similar point:

> I think the National Crime Authority needs to be seen to be accountable, and not just accountable to the IGC. In my view, the IGC is a body that has a greater vested interest in the National Crime Authority. I do not mean

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326. ibid.

327. ibid.

328. 'Submission by the Attorney-General and the Acting Special Minister of State to the Standing Committee on Constitutional and Legal Affairs in relation to its reference concerning the National Crime Authority Bill and the National Crime Authority (Consequential Amendments) Bill 1983', para. 26.

329. Evidence, p. 348.

> that disrespectfully. You are talking about relevant Ministers and so forth, some of whose staff are employed with the Authority from time to time. To me, this Committee stands much further away from any taint of vested interest in the Authority.[330]

6.28 In contrast, the submission from the IGC stated in relation to the Committee:

> The IGC is firmly of the view that the IGC itself provides a better line of responsibility to ensure both the protection of civil liberties and the effective oversight of the operational and functional activities of the NCA.[331]

6.29 This claim by the IGC is difficult to reconcile with the limited activities of the IGC. In the period July 1984 to October 1991, the IGC met on only 16 occasions. This suggests to the Committee that the IGC has taken only a very limited role in monitoring the Authority.

6.30 For example, in the 1989-90 financial year the IGC met only once.[332] Yet during this period the Authority was embroiled in major controversies, including those relating to the operation of its Adelaide office and the abrupt resignation of its Chairman.[333] The Committee is alarmed at the infrequent meetings of the body claiming to provide 'effective oversight' over the Authority. More adequate supervision by the IGC would have prevented the controversies arising in the first place.

6.31 Situations have arisen where the Authority has been publicly criticised or public concern has emerged over some aspect of its activities. The Committee considers that the IGC should have

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330. Evidence, p. 1285.

331. p. 3.

332. NCA, *Annual Report 1989-90*, p. 11. The meeting was in Darwin on 9 March 1990.

333. See paras. 3.61 and 3.65 to 3.102 above.

done more to make public its findings in relation to these matters, so as to provide some reassurance to the public about the Authority.

6.32 The Committee is not aware of any material that the IGC has received from the Authority that the IGC has made public, even with sensitive material removed. Yet the IGC has received, either on request or at the Authority's initiative, reports on many of the issues concerning the Authority which have caused public disquiet. Not all concerned operational matters: see for example the discussion on the Arthur Andersen report in paragraph 7.85 below.

6.33 The Committee considers that IGC should have paid greater regard to the need to maintain public confidence in the Authority, and to make public more of the material the IGC receives from the Authority.

6.34 As indicated in chapter 3, the Authority's history has not been problem-free. The IGC appears to have done little if anything to address the problems. As far as the Committee can determine, the IGC made no contribution to giving the Authority strategic direction.[334] Future Directions seems to have originated quite independently of the IGC. No management reviews have been initiated by the IGC. No formal assessments have been made by the IGC of the Authority's performance.

6.35 Subsection 61(6) of the NCA Act provides that the IGC may comment on the Authority's annual report, and any comments made are required to be tabled in the Parliament with the report. The Government explained in 1984 that this provision 'was suggested by State Ministers in discussion with Commonwealth Ministers and the Government sees no objection to it. It serves to

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334. For example, there is no evidence that the IGC acted on claims in the 1980s that the Authority was not following the strategy envisaged at its creation. One such claim was made by Mr Frank Costigan QC: 'NCA not doing its job, says Costigan', *Sydney Morning Herald*, 3 May 1988, p. 4. There is no evidence that the IGC addressed the question whether a different strategic direction for the Authority might have avoided the need for some of the specialist State bodies, including Royal Commissions, to deal with corruption and organised criminal activity.

underline the co-operative scheme of the Bill.'[335]

6.36 The IGC made comments amounting to less than a page on each of the first three annual reports of the Authority. Comments have not been made on subsequent annual reports. The lack of IGC comments strengthens the Committee's view that the IGC has not actively monitored the Authority.

6.37 There is no evidence that the IGC has taken a role in initiating the references given to the Authority: all proposals for references have come from elsewhere.[336] The IGC seems to have acted as no more than a rubber stamp. Criticisms of the way in which terms of reference have been drafted are noted in chapters 3 and 8. A more active IGC scrutiny might have removed the basis of these criticisms.

6.38 The NCA Act provides that the IGC 'shall, before approving a reference, consider whether ordinary police methods of investigation into the matter are likely to be effective'.[337] During Senate debate in 1984 on the wording of the provision the Attorney-General, Senator the Hon. Gareth Evans QC, stated his concern that:

> in taking into account the question of the adequacy of police resources, there be a genuine consideration of the

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335. Senate, *Hansard*, 6 June 1984, p. 2665 (Explanatory note on amendment moved by the Government).

336. NCA, *Annual Report 1989-90*, p. 6 states: 'From the time of its establishment in July 1984, the Authority has sought references in relation to twelve matters and has been granted references in relation to eleven ...'. The twelfth matter has since been referred.

337. s. 9(2). This provision arose from the need to secure State and Territory cooperation and 'the understandable concern of the State police forces and Ministers that their particular role in fighting organised crime be not downgraded; that their role be fully appreciated and understood, and that, where appropriate, the State police forces continue to play their traditional crime investigation role'. (Senate, *Hansard*, 6 June 1984, p. 2594 (Senator the Hon. Gareth Evans QC))

> possibility of effective police action, rather than merely formal consideration of it, and that there really be some close attention paid by the committee [ie. the IGC] to the possibility of getting there by police action rather than escalating it to the coercive action of the kind that is involved in the granting of a reference.[338]

6.39 It would seem that the IGC has not given the genuine consideration to the possibility of effective police action that Senator Evans hoped it would. Where more detailed consideration has occurred, it has apparently taken place outside the IGC. The Authority told the Committee:

> In relation to the first six matters referred to the NCA, the question of whether ordinary police methods were likely to be effective was not raised with the NCA. This was not surprising, as one reference was sought at the suggestion of a police force; another at the suggestion of a government and a police force; in three other cases, ordinary police methods had been shown to be ineffective; while in the remaining case, the matter was of such complexity that the question was susceptible to a ready answer had it been raised. The question was likewise not raised in relation to Matter Nine (the NCA's South Australian reference), again for reasons which are readily understandable (the reference involved, inter alia, alleged police corruption).
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> In the case of Matters Seven and Eight, however, the NCA did receive representations from relevant police forces that their investigative methods were adequate to the task, or to part of the task. In each case the matter was settled by negotiations with the Governments or police forces concerned, and the references granted. In only one case was the scope of the reference changed.[339]

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338. Senate, *Hansard*, 6 June 1984, p. 2594.

339. NCA submission, p. 7.

THE ROLE OF THE COMMITTEE

Introduction

6.40 Part III of the NCA Act, which provides for the role of the Committee, was inserted during the passage of the NCA Bill through the Senate in 1984. Part III replaced a provision for judicial audit. The submission to the Committee from the IGC advocated reversing this process: the Committee should be replaced by a judicial audit.[340] It is therefore useful to indicate briefly the features that in 1984 were envisaged for such an audit.

6.41 At intervals of not more than three years, the Attorney-General was to be required to appoint a judge of the Federal Court or a State or Territory Supreme Court to audit the Authority. The judge was to be required to examine the operations of the Authority and was given unrestricted right of access to Authority documents and records. The judge was to report to the relevant Minister whether, during the period covered by the report, the Authority had effectively performed its functions and had done anything contrary to law or trespassed unduly upon the rights and liberties of individuals. The judicial auditor was to be appointed only for the purpose of conducting the audit: the Bill did not confer any on-going complaint-investigation role on the judicial auditor.

6.42 The majority report of the Senate Committee which examined the NCA Bill in 1983-84 considered that neither a judicial audit nor a permanent parliamentary committee to oversee the Authority would provide effective accountability.[341] The Senate

340. p. 3.

341. Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, paras. 8.7 and 8.26. Senator Missen, in a dissent to the report, agreed with the rejection of judicial audit but supported the use of a parliamentary committee. Senator Chipp's dissent supported Senator Missen on the use of a parliamentary committee. The dissents by Senators Bolkus and Crowley supported judicial audit.

Committee preferred the ordinary methods of Parliamentary supervision coupled with speedy access to the courts. It was also influenced by the presence of a 5-year sunset clause in the Bill.[342]

6.43 In making its recommendation that the provision for judicial audit be deleted from the Bill, the Senate Committee referred to the evidence it received from senior lawyers who had worked with royal commissions into crime and corruption. Their experiences suggested that it would be a mammoth task for someone to examine the Authority's records and documents covering a three-year period and successfully determine if any individual rights or liberties had been unduly trespassed upon.[343] The Senate Committee commented:

> Even if undertaken successfully, it would be well after the event and of little consolation to those affected. A more immediate remedy for actual or apprehended illegality is required and recommended.[344]

6.44 In the light of the Senate Committee's view in 1984 on the limits to what a judicial auditor could accomplish, it is relevant to note the more recent experience of the Inspector-General of Intelligence and Security, who monitors the Australian intelligence and security agencies. On page 4 of his 1989-90 Annual Report he stated:

> As my main responsibility is to help Ministers ensure that the agencies act legally and with propriety, it is reasonable to expect me in my annual report to address this question. However, after a year as Inspector-General, I have concluded that it is simply not feasible to give an unequivocal assurance that the agencies are indeed acting totally legally and properly and that they do completely comply with Ministerial guidelines and directives. The reason I cannot give such an assurance

342. ibid., para. 8.25.

343. ibid., paras. 8.3 and 8.4.

344. ibid., para. 8.4.

is that I cannot be sure that I have seen everything of relevance in every agency. Indeed, I doubt that I or any other person in my Office could ever give such an unequivocal assurance.

Abolition of the Committee?

6.45 The *Sydney Morning Herald* editorial on 8 November 1990 referred to the Committee as:

> the primary watchdog established by Parliament to monitor the performance of the NCA. As Mr Lindsay correctly observes, the parliamentary committee is the only body capable of making the Authority publicly accountable.

6.46 Others have expressed similar views. The Hon. Justice Frank Vincent told the Committee:

> I regard the real protection which we have for civil liberties arises from the work of this Committee, because it is clear enough that we cannot have all of the kinds of investigations which the body conducts performed in public. We cannot even have all of the hearings conducted in public for a variety of reasons. Therefore there has to be a means by which those questions can be addressed, the real work of the Commission can be assessed, and the real exercise of its powers can be evaluated. You are the only people who can do that.[345]

6.47 Mr Frank Costigan QC told the Committee:

> I think the role of this Committee is crucial to the National Crime Authority. I think unless you have a parliamentary committee which is able to supervise the

345. Evidence, p. 377.

> Authority in a responsible way then the dangers of having a crime authority are very great.[346]

6.48 The New South Wales Council for Civil Liberties stated: 'It is the Council's policy that the NCA should only continue if there is effective parliamentary oversight of the National Crime Authority'.[347] The South Australian Council for Civil Liberties referred to the Committee as 'a principal safeguard built into the Act to ensure that the NCA did not abuse its extraordinary powers and position ...'.[348]

6.49 In contrast to these views, the submission from the IGC stated:

> the IGC is firmly of the view that the PJC should be abolished. The IGC supports the establishment of a Judicial Audit model to examine the operations of the NCA at regular intervals to determine whether the NCA has effectively performed its functions and whether it has acted contrary to law or trespassed unduly upon the rights and liberties of individuals. Some consideration may need to be given to the Judicial Audit being empowered to act as an ombudsman in relation to particular complaints against the NCA. The IGC believes that the Judicial Audit model, in conjunction with the direct Ministerial responsibility held by each of the members of the IGC, provides the most effective form of accountability for the NCA.[349]

6.50 The IGC submission failed to substantiate this proposal. The IGC acknowledged, by advocating a judicial auditor, that some special accountability mechanism is required for the Authority. One

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346. Evidence, p. 423.

347. Evidence, p. 747. See also Evidence, p. 348 for the Victorian Council for Civil Liberties' view on the importance of the Committee's role.

348. Evidence, p. 933.

349. pp. 18-19.

reason given for preferring the judicial audit to the Committee was that:

> The proposition that a Parliamentary Committee with extraordinary powers, but without direct responsibility or accountability, is in some way a greater protection for the civil liberties of the public than the principle of Ministerial responsibility (plus the Statutory provision for a judicial audit) has not been proved over the last six years.[350]

6.51 The IGC did not explain what is meant by the reference to 'extraordinary powers'. As is made clear in discussing sections 51 and 55 of the NCA Act in the next chapter, the Committee's work has been bedevilled since 1984 by its lack of power to acquire adequate information from the Authority (or, as some would argue, by the refusal of the Authority and Government to acknowledge that the NCA Act actually conferred such power).

6.52 The IGC notes that it is essential that those privy to sensitive NCA operational information 'are directly accountable for their actions to Government and the Parliament'.[351] This proposition can not be reconciled with the IGC's advocacy of a fully independent judicial auditor. Moreover, the inference is that Committee members using sensitive information are not accountable to Parliament for the use of that information. This inference is incorrect. Parliamentary Standing Orders and the *Parliamentary Privileges Act 1987* ensure that Committee members are accountable for their use of information.

6.53 Apart from parliamentary accountability, committees have ultimately to answer to the community. Mr Peter Beattie, Chairman of the Parliamentary Criminal Justice Committee of Queensland, told the Committee in relation to inappropriate committee use of sensitive information: 'the final arbiter to that is

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350. IGC submission, p. 5.

351. IGC submission, p. 6.

the community and the community's reaction. If we get it wrong then we wear the political consequences both individually and collectively.'[352]

6.54 The IGC submission states: 'The IGC considers that, as a matter of principle, it is not appropriate for the NCA to be accountable on an operational level to a body such as the PJC'.[353] Reference is also made to the need for discretion and restraint on the part of those entrusted with the task of monitoring the Authority's performance. The submission states: 'Unless there is evidence of significant breakdown in police administration or procedures, Governments would not involve themselves in the details of police investigations'.[354] It adds: 'it is of grave concern to the IGC that the PJC has in the past requested access to sensitive information held by the NCA'.[355]

6.55 The Committee has never sought information to which it is not entitled under the NCA Act.

6.56 On the advantages of judicial audit, the IGC submission stated:

> The proposal in the original draft NCA Bill for the NCA to be subject to a judicial audit provides both the semblance and substance of impartial review and accountability. There would not, nor could there be, criticism of the operations of the audit on the basis of political interest. This cannot be said without qualification for all of the activities of the PJC to date.[356]

The IGC failed to provide examples of such activities.

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352. Evidence, p. 1123.

353. p. 3.

354. pp. 5-6.

355. p. 7.

356. p. 6.

6.57 The IGC's proposal that the Committee should be abolished because it had acted on the basis of political interest[357] was not made in any other submission to the Committee, nor by any witness who appeared before it.[358]

6.58 The Committee rejects the IGC's proposition that the Committee should be abolished. The Committee does not consider that the IGC has advanced any cogent reasons to support this proposition.

6.59 In reaching this conclusion the Committee notes that special parliamentary committees have been established by the Queensland Parliament to monitor that State's Criminal Justice Commission, and the New South Wales Parliament to monitor the Independent Commission Against Corruption. The fact that other Parliaments in Australia have concluded that law enforcement agencies having special powers ought to be monitored by special

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357. In Parliament on 15 October 1991, the Attorney-General, the Hon. Michael Duffy MP, referred to problems that existed between the IGC, the Authority and this Committee: House of Representatives, *Hansard*, p. 1965. He referred also to the 25 July 1991 meeting between this Committee and the IGC and stated (p. 1966):

> However, in starting negotiations with what was a very difficult Committee in the sense of the independence of its members on both sides of the House - I will put it no stronger than that - I think the ante was raised when the abolition of the Committee was put forward by the Inter-Governmental committee. The atmosphere at the time was so bad - this was the view of all the State Attorneys on the Inter-Governmental committee as well as my own view - that the abolition of the Committee was put forward as a very serious and considered position. I would be very surprised if that matter is pushed any further. It arose, I think, because of all of the matters that I have mentioned. The atmosphere is now different.

358. The Police Association of South Australia indicated that the fact that the Committee consisted of politicians raised doubts as to its independence: Evidence, pp. 903-4, 906-7. Mr Frank Galbally also noted that such doubts might arise in the future: Evidence, p. 1309.

parliamentary committees reinforces the Committee's view that it should continue to have a role in monitoring the Authority.

Other Criticisms of the Committee's Performance

6.60 Although in the views put to the Committee there was a general acceptance that it had a significant role to play in ensuring the Authority's accountability, some criticisms did emerge of the performance of the Committee and its predecessors in previous Parliaments. Most criticisms related not to the Committees so much as to the secrecy provisions which had restricted the information that was provided to them, and hence hindered their activities. These provisions are considered in the next chapter.

6.61 The Queensland Council of Civil Liberties regarded what it saw as the frequent turnover in Committee membership as weakening the ability to scrutinise the Authority, although it recognised that there was no easy solution to this.[359] The Council also referred to the Committee's relative lack of resources leading to the result that it was overly dependent on the Authority itself as a source of information.[360] Both the Queensland Council and its Victorian counterpart considered that the Committee should have counsel assisting it in its work.[361]

6.62 The Committee does not see any need for counsel to assist it on a permanent basis. The Committee has access to funding to enable it to engage counsel for specific purposes, should the Committee consider this to be necessary. It has done so in relation to its current inquiry into the Authority's relationship with James McCartney Anderson.

6.63 The Committee received some criticism that the previous

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359. Evidence, pp. 549, 556, 559.

360. Evidence, p. 554.

361. Evidence, pp. 348, 1418 (Victorian Council for Civil Liberties); p. 562 (Queensland Council of Civil Liberties).

Committees had held too many of their hearings *in camera*.[362] The Committee has since October 1990 operated on the basis that all its hearings are to be in public unless there are compelling reasons to sit in private. Similarly, it authorises the publication of submissions received wherever possible. Almost all the evidence taken in the inquiry leading to this report has been taken in public and most submissions released to the public. It was during the course of this evaluation that the members of the Authority first appeared at a public hearing of the Committee. In contrast, the hearings for the Initial Evaluation in 1988 were held *in camera* and the submissions were not publicly released.[363]

6.64 The Committee will continue to receive briefings in private from the Authority. However, the Committee sees considerable merit in holding at least one public hearing each year with the Authority. An examination of the Authority's annual report could provide the focus for such a hearing.

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362. Evidence, pp. 1104-05 (Australian Federal Police Association); p. 1390 (Victorian Council for Civil Liberties). See also Evidence, pp. 1082 and 1088-90 where Mr Malcolm Kerr, MP, Chairman of the NSW Parliamentary Committee that oversees ICAC, explained the advantages of an oversight committee holding its hearings in public.

363. Twenty two submissions were received; hearings were held on two days and ten witnesses appeared, including four from the Authority: *Initial Evaluation*, appendixes 2 and 3.

MONITORING ROLES FOR OTHER AGENCIES

Resolving Individual Complaints against the Authority

6.65 It was suggested that, in addition to the Committee, other agencies should have a role in resolving individual complaints against the conduct of those working for the Authority. Suggestions included conferring jurisdiction on the Commonwealth Ombudsman, on a police complaints authority, creation of a position along the lines of the Inspector-General of Intelligence and Security, who monitors Australian intelligence and security agencies,[364] or creation of some other mechanism.[365] The submission from the Police Association of South Australia criticised the fact that: 'There is no provision for complaint to the Ombudsman, State or Federal, a Police Complaints Authority or the like'.[366]

6.66 There is no police complaints authority publicly identified as having jurisdiction over Authority police.[367] In practice, most

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364. The Inspector-General of Intelligence and Security has differing responsibilities in relation to each of Australia's five intelligence and security agencies. The IGIS has a complaint-investigating role in relation to some of the agencies, including the Australian Security Intelligence Organization. In addition, for each agency, the IGIS can inquire into the legality and propriety of its activities and the effectiveness and appropriateness of its procedures that are designed to ensure that it acts legally and with propriety. The IGIS has wide powers to obtain access to premises, compel production of documents, and require persons to attend and answer questions on oath.

365. For examples of discussion of the various alternatives, see Evidence, pp. 522-23 (Police Federation of Australia and New Zealand); pp. 806-07 (Mr Arthur King); p. 987 (Commissioner D.A. Hunt); pp. 1060-61 (Law Council of Australia); p. 1106 (Australian Federal Police Association); pp. 1289, 1299, 1309-10 (Mr Frank Galbally).

366. p. 4. See also Evidence, p. 662 (Police Association of NSW); pp. 1358-59 (Mr D. Berthelsen).

367. All police working for the Authority are on secondment from another police force. They retain the powers of arrest, pay and conditions they had as members of their home force. Equally, they are subject to whatever police complaints authority or mechanism exists in relation to officers of their home force. Thus, a complaint about the conduct of a member of the

complaints against Authority staff (including police) have been taken to the Authority, and dealt with by *ad hoc* mechanisms. The Committee's predecessor was told in 1988 that complaints received by the Authority had been referred to the officer's home force for investigation.[368] In 1989, the Authority's counsel[369] was used to investigate and report on an allegation relating to Authority staff in South Australia.[370] The Committee was told that more recently investigations into complaints have been conducted by officers from a force other than the one to which the officer subject to the complaint belongs.[371]

6.67 The Committee considers that the mechanism by which individual complaints against the Authority are investigated and resolved needs to be improved. The Committee lacks the time and the investigative staff necessary to deal adequately with individual complaints.[372] Moreover, the most effective way of dealing with some

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Australian Federal Police on secondment to the Authority can be made using the mechanism, including recourse to the Ombudsman, provided by the *Complaints (Australian Federal Police) Act 1981*. The fact that such jurisdiction exists appears not to be widely known. A person having a complaint against an 'NCA policeman' may well not know from which force the officer is seconded. Even if this is known, the complainant may be unaware of the police complaints mechanism applying to members of that force. The police complaints mechanisms do not cover Authority staff who are not seconded police.

368. *Initial Evaluation*, p. 70. All completed investigations at that time had found the complaints to be without merit.

369. Section 50 of the NCA Act provides that the Attorney-General may appoint a legal practitioner to assist the Authority as counsel, either generally or in relation to a particular matter or matters.

370. NCA Press Release, 28 July 1989, 'NCA Drug Inquiry'. The counsel was assisted by an Australian Federal Police officer and a Victorian Police officer, both on attachment to the Authority in Melbourne. Counsel found no evidence of impropriety by Authority staff.

371. Evidence, p. 1684 (NCA).

372. One complaint received by the Committee involved Mr Mehmed Skrijel. Having heard evidence from Mr Skrijel and others (Evidence, pp. 1356-82, 1627-45), the Committee referred the matter to the Attorney-General.

individual complaints would be for the investigator to visit the Authority and inspect all the relevant files. This mode of investigation is difficult for a Committee.

6.68 Justice Phillips told the Committee on 29 July 1991 that he favoured a system of inquiry outside the Authority for handling serious complaints. He said he had not given any particular thought to an appropriate vehicle 'but, in principle, I would support somebody or some organisation independent of the Authority handling them'.[373]

6.69 The agency to take on the complaint-investigation role could be:

- the Commonwealth Ombudsman;
- the Inspector-General of Intelligence and Security;
- a new agency, created specifically for the task; or
- provision could be made for a special investigator (e.g. a barrister) to be appointed for each complaint meriting detailed investigation.

6.70 The Committee does not think there will be sufficient numbers of complaints to justify setting up a new agency.

6.71 The use of a special investigator might resemble the Authority's use of its counsel in 1989 to investigate complaints,[374] modified to make the counsel fully independent of the Authority. The system for investigation of complaints against the Queensland Criminal Justice Commission is one model of how this might work.[375]

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373. Evidence, p. 1682. See similarly, Evidence, pp. 1696-97 (NCA).

374. See para. 6.66 above.

375. The system is described in Queensland, Criminal Justice Commission, *Submission on Monitoring of the Functions of the Criminal Justice Commission*, April 1991, p. 175 (submission made to the Queensland Parliamentary Criminal Justice Committee):

> The Commission recognised ... that there would be

6.72 The Committee does not favour such a system involving special investigators for the following reasons:

- it lacks the public profile and ease of public access of the Ombudsman or Inspector-General;
- it does not provide a ready mechanism for filtering complaints to determine which ones appear prime facie to warrant the appointment of an investigator; and
- one-off investigators do not have the chance to build up any expertise about the Authority.

6.73 A clause in the NCA Bill to confer jurisdiction on the Commonwealth Ombudsman over the Authority was deleted, despite Government objection, when the Bill was before the Senate in 1984. The Senate Committee which had examined the Bill recommended deletion.[376] A major reason for removing the Ombudsman's jurisdiction was that given by Senator the Hon. Don Chipp:

> Organised crime is of such dimensions and has such cohesion that smart, expensive lawyers could well use the Ombudsman's office to unduly hamper or harass inquiries ... Even if one goes to the stage of saying that

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> complaints against its officers in the course of performing their duties. With a view to accountability, the Commission was concerned to establish an independent mechanism to deal expeditiously with such complaints. To this end, discussions were had with the Attorney-General, the Director of Prosecutions and the Commissioner of Police, whereby such a mechanism was established. This involves an investigation by a Senior Crown Prosecutor, nominated by the Director of Prosecutions and a senior police officer or officers, nominated by the Commissioner of Police service. They report to the Chairman of the Commission, the Attorney-General and the Minister for Police and Emergency Services.

376. Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983*, AGPS, Canberra, 1984, para. 8.12. Senators Bolkus and Crowley dissented from the recommendation.

> the Ombudsman could not totally stop an inquiry, he could delay it to such an extent that would allow the criminal or criminals to get off the hook.[377]

The establishment of the Parliamentary Joint Committee was seen by Senator Chipp and the majority in the Senate as providing a better alternative than the Ombudsman.

6.74 The Committee disagrees with the view of the Senator Chipp. It notes the views of the then Ombudsman, Professor Jack Richardson, that the 1984 Senate Committee's recommendation was based on:

> some remarkably ill-informed views put to it by others, who have had nothing to do with my office, about the impact on the Authority's effectiveness should its actions be subject to review by the Ombudsman. ... I believe fears voiced before the Senate Committee that my office might have been used by sinister and powerful interests to obstruct legitimate investigation by the Authority are exposed as fanciful by the failure of the identical interests to achieve frustration of any Australian Federal Police investigation through complaint to me.[378]

6.75 The Police Federation of Australia and New Zealand told the Committee on 21 November 1990:

> we have come to recognise the value of having the Ombudsman in terms of the public acceptability and credibility of the organisation and in terms of the members' perception of their own organisational health too. So we would suggest that the Ombudsman should

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377. Senate, *Hansard*, 6 June 1984, p. 2646.

378. Commonwealth Ombudsman and Defence Force Ombudsman, *Annual Reports 1983-84*, p. 9.

have a role in oversighting the NCA.[379]

6.76 The Committee does not accept this suggestion. The Committee considers that the Inspector-General of Intelligence and Security would be more suitable to take on the role of investigating individual complaints against the Authority. The Committee notes that the Inspector-General will require extra resources to perform this additional function.

6.77 Accordingly, the Committee **RECOMMENDS that the Inspector-General of Intelligence and Security be given jurisdiction to investigate complaints against the Authority, its staff and those seconded to work for it.**

6.78 The Committee envisages that complaints could be taken directly to the Inspector-General. Provision would also be made for the Committee, the Attorney-General, the IGC or Ministers who are members of the IGC to refer complaints to the Inspector-General. Complaints brought to the Committee would only be referred to the Inspector-General where the Committee considered that the Committee itself could not readily resolve them.[380]

6.79 The Inspector-General would have a right of access to all Authority files, and to require persons to attend and answer questions on oath and to produce documents.[381] He would also have the power to refuse to take investigative action on any complaint that he deemed to be frivolous, vexatious or trivial.

6.80 In keeping with the Committee's role as general monitor of the Authority, provision should be made for the Inspector-General

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379. Evidence, p. 523. See also Evidence, p. 1106, where the Australian Federal Police Association stated: 'The Commonwealth Ombudsman is a most satisfactory avenue for accountability as far as we are concerned and we would recommend it to the National Crime Authority'.

380. The Committee's ability to investigate complaints fully will be affected by its access to information from the Authority - a matter addressed in the next chapter.

381. cf. *Inspector-General of Intelligence and Security Act 1986*, s. 18.

to notify the Committee of the general terms of each complaint made, and whether the Inspector-General considered that the complaint warranted investigation. In addition to informing the complainant of his conclusion, the Inspector-General should present a report to the Committee on each completed investigation. These reports should describe in general terms what steps the Inspector-General took in his investigations, the conclusions he reached and the basis for those conclusions. The reports should not, however, contain 'sensitive information'.[382]

The Privacy Commissioner

6.81 Unlike the Australian Federal Police, the Authority is expressly excluded from the coverage of the *Privacy Act 1988*.[383] When the Privacy Bill was being debated by the Senate this exclusion was questioned by Senator Haines. Responding for the Government, Senator the Hon. Michael Tate referred to the special status of the Authority in that it was underpinned by State and Territory as well as Commonwealth legislation. He also referred to:

> the Joint Parliamentary Committee on the National Crime Authority which provides a means and a process by which any abuse of the powers which it has can be exposed to democratically elected representatives. ... If we had a report from the Joint Parliamentary Committee on the National Crime Authority which indicated that that Authority might be brought within the purview of this sort of legislation, that might give material which would require a response and reflection and deliberation. But at this stage the Government, having not heard any real argument that the NCA ought to be brought within this privacy legislation, has determined that with the concurrence of the Parliament it ought to be excluded from the scope and ambit of the

382. See paras. 7.32, 7.46 and 7.59 below for the meaning of 'sensitive information'.

383. *Privacy Act 1988*, s. 7(1)(a)(iv).

legislation.[384]

6.82 In addition to a complaint-investigating role, the Privacy Commissioner has audit, compliance, advising and consulting roles in relation to agencies subject to his oversight. The Privacy Commissioner can grant requests from agencies for variations and waivers in relation to the operation of the Act.

6.83 The Committee is not aware of any specific cases in which it has been shown that the Authority has breached privacy principles. It notes the statement on page 43 of the Authority's 1989-90 Annual Report: 'notwithstanding its exempt status under the [Privacy] Act, the Authority applies procedures to ensure that the collection, use and security of information is strictly controlled'.

6.84 Some general privacy-related concerns were, however, put to the Committee by, amongst others, the Victorian Council for Civil Liberties.[385] These were based primarily on the large number of files created by the Authority and the number of documents seized by it or passed to it.[386] In addition, the Committee notes that the Authority's current commitment to a larger intelligence role and greater sharing of intelligence with other agencies increases privacy concerns.

6.85 The Privacy Commissioner, Mr Kevin O'Connor, told the Committee: 'The privacy issues raised by the VCCL, I feel, are significant'.[387] He noted the comments of Justice Phillips on the need for change to make the Authority more open and commented: 'One element of that change which I view as desirable should, I feel, be the adoption of an internal privacy code, the operation of which is

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384. Senate, *Hansard*, 22 November 1988, p. 2541.

385. Evidence, p. 353. See also Evidence, p. 561 (Queensland Council of Civil Liberties); p. 799 (Mr Arthur King); p. 1038 (NSW Council for Civil Liberties); pp. 1531-32 (Mr Mark Findlay).

386. The statistics set out in Table 3 in chapter 2 above give some indication of the Authority's document holdings.

387. Evidence, p. 1540.

subject to external monitoring'.[388] He explained:

> It seems to me that, in principle, it is not a highly desirable situation to have personal information in the hands of some Commonwealth law enforcement authorities which is subject to detailed regulation and another law enforcement authority in a very separate position.[389]

6.86 The Committee considers that the Authority should be subject to some external scrutiny to ensure that the Authority gives appropriate protection to privacy. In the Committee's opinion, there are two options are available:

- amend the Privacy Act to remove the Authority's present exemption from coverage, thereby placing the Authority in the same position as bodies such as the Australian Federal Police; or
- devise a special mechanism to cater for privacy concerns relating to the Authority.

6.87 The Privacy Commissioner expressed no preference between these options, telling the Committee:

> I am not averse to a model which might leave the Privacy Act as it is but strengthens the level of external scrutiny of the agency. That model seems to have been explored by the Government in relation to ASIO; and I would think that, if it is thought good enough for ASIO, it is probably hard to make a different case for the NCA.[390]

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388. Evidence, p. 1540.

389. Evidence, pp. 1544-45. See also Evidence, p. 1731, where the Director of the ABCI questioned why the Authority appeared to be the only law enforcement agency exempt from the operation of the Privacy Act.

390. Evidence, p. 1543.

6.88 The 'ASIO model' consists of ASIO-specific guidelines on record-keeping involving personal information.[391] These are to be drafted by the Attorney-General's Department in consultation with the Privacy Commissioner and the Inspector-General of Intelligence and Security. Adherence to the guidelines is to be monitored by the Inspector-General, having regard to general guidance on policy matters from the Privacy Commissioner. Although the model was adopted in 1989, the Committee was told in September 1991 that drafting of the guidelines was not yet complete.

6.89 The Committee accepts that the Privacy Act's requirements cannot be applied in full to a body such as the Authority. Some exemptions would have to be made.[392] If the Authority were made subject to the Privacy Act, the scope of these exemptions would have to be determined by the Privacy Commissioner.[393]

6.90 It appears to the Committee that, rather than make the Authority subject to the Privacy Act, the better solution is to adopt the 'ASIO model' - that is, for the Attorney-General's Department in consultation with the Privacy Commissioner to develop NCA-specific privacy guidelines.

6.91 The Committee would be able to comment on the adequacy of the guidelines. The Committee would use the guidelines

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391. See Evidence, p. 1542 where the Privacy Commissioner describes the model.

392. cf. Australian Federal Police, *Annual Report 1989-90*, AGPS, Canberra, 1990, pp. 89-90 on the difficulties caused by the Privacy Act for the AFP, and the fact that negotiations were continuing between the Privacy Commissioner and the AFP to resolve these difficulties. See also Privacy Commissioner, *Second Annual Report on the Operation of the Privacy Act: for the Period 1 July 1989 to 30 June 1990*, pp. 30-31 on the negotiations.

393. See Privacy Commissioner, *Second Annual Report on the Operation of the Privacy Act: for the Period 1 July 1989 to 30 June 1990*, pp. 18-19 for a description of the process by which an agency can apply to the Privacy Commissioner for a variation or waiver in relation to the operation of the Privacy Act to the agency concerned.

in carrying out its duty to monitor the Authority.[394] In dealing with complaints concerning privacy, the Inspector-General would assess whether the guidelines had been breached.

6.92 Accordingly, the Committee **RECOMMENDS that the Attorney-General's Department, in consultation with the Privacy Commissioner, develop specific privacy guidelines to cover the Authority's activities.**

Monitoring of Telecommunication Interception Activities

6.93 The Commonwealth Ombudsman was given a role in relation to the Authority under 1987 amendments to the *Telecommunications (Interception) Act 1979*. He is required to inspect at least twice a year the documents and records the Authority is obliged to keep under the Act. He is required to ascertain the extent to which the Authority has complied with provisions of the Act relating to the keeping and destruction of records and documents concerning telecommunications interceptions. The Ombudsman reports to the Attorney-General, as Minister administering the Act. This report is not made public. The Attorney-General is, however, required under the Act to report to the Parliament giving statistics on interceptions under the Act.

6.94 The Committee received no criticism of this method of scrutiny of the Authority. Accordingly, the Committee makes no recommendation that it be altered.

394. The Privacy Commissioner noted that the Committee might be the means of scrutiny of the Authority on privacy matters: Evidence, p. 1548.

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.
>
> (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.
>
> 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;
>
> (b) prejudice legal proceedings, whether or not those proceedings have commenced; or
>
> (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.

CHAPTER 8

OTHER MATTERS CONSIDERED BY THE COMMITTEE

Introduction

8.1 In this chapter the Committee considers certain proposals to amend the operation of the NCA Act. In section one, the Committee examines proposals to amend the special powers of the Authority. Section two of this chapter examines proposals to modify the existing procedure of granting references to the Authority for special investigations. In section three the Committee considers matters relating to the membership and staffing of the Authority.

SECTION ONE : THE SPECIAL POWERS OF THE AUTHORITY

Statutory Provisions

8.2 When granted a reference to pursue a special investigation, the Authority is able to exercise coercive powers. These coercive powers are not available to the Authority when exercising its general functions. The Authority's statutory powers to conduct private hearings and require persons to appear and/or produce documents are the most significant coercive powers available to the Authority under Act.[483]

8.3 Under section 28 of the Act the Authority can summons a

483. The Authority does possess other significant powers, such as the abilities to obtain search warrants and to seize passports under sections 22 and 24 of the NCA Act. The Committee's inquiry, however, did not receive substantial evidence on special powers other than those relating to the coercive powers under sections 28 and 29 of the NCA Act.

person to appear at a hearing to give evidence and/or produce documents. Subsequent failure to attend the hearing may render that person liable to prosecution. A witness who fails to attend or appear as required in the summons, or to continue to attend as required, or who refuses to take an oath or make an affirmation without reasonable excuse, or to produce documents or things as required, is guilty of an offence. If convicted the person will be liable to a fine not exceeding $1000 or six months imprisonment.[484]

Statutory Protections and Safeguards

8.4 A person appearing before the Authority is entitled to representation.[485] A person appearing is not required to answer any question or produce any document that may incriminate him/her. This protection can only be removed where the person has been given a grant of indemnity from either the Commonwealth DPP or the relevant State authority.[486]

8.5 Subsection 25(5) requires that the hearing be conducted in private. The issue of whether or not the Authority should hold its hearings in public is considered in chapter 7. Until that question is answered, the Committee considers that hearings will continue to be held in private. The remainder of this section considers issues relating to private hearings.

8.6 Under subsection 25(9) a Member may direct that:

* any evidence given;
* the contents of any document produced to the Authority;
* any information that might enable a person who has given evidence before the Authority to be identified; or
* the fact that any person has given or may be about to give evidence at a hearing;

shall not be published.

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484. Section 30 of the NCA Act.

485. See subsections 25(4) and 25(6) of the NCA Act.

486. A person under a grant of indemnity commits an offence under subsection 30(5) if he/she refuses to answer a question.

8.7 The Act requires that such a direction be given where publication might prejudice the safety or reputation of a person or prejudice the trial of a person who has been or may be charged with an offence.[487]

8.8 Under section 29 the Member may give notice in writing for a person to appear and produce documents. A failure to comply without reasonable grounds may result in a fine or imprisonment.

8.9 Controls over the Authority's conduct of hearings and demands for the production of documents are contained in sections 32 and 32A of the Act. A person dissatisfied with a decision of the Authority can apply to the Federal Court or Supreme Court of a State for review.[488] Decisions of the Authority are also subject to review under the *Administrative Decisions (Judicial Review) Act 1977*.

Proposed Amendments to the Authority's Special Powers

8.10 The following amendments to the Authority's special powers were proposed:

Procedural Amendments to Existing Powers.

* The issuing of a warrant under section 28
* Non-disclosure provisions in sections 28 and 29
* Allowing the Authority improved access to documents

Substantive Amendments to Existing Powers

* Removing the privilege against self incrimination
* The granting of indemnities under section 30
* Extension of special powers to general functions

Amendments to Create New Powers

* Granting a prosecutions function to the Authority

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487. See subsection 25(9) of the NCA Act.

488. See sections 32 and 32A of the NCA Act.

The Committee's View of Special Powers

8.11 The Committee considers that the Authority's special powers are of great significance. The Authority's possession of coercive powers, what use the Authority makes of them, and proposals to amend or enhance their effect, are issues of public concern.

Background to the Powers

8.12 The Royal Commissions of the 1970s drew government and public attention to the problems of organised crime in Australia. The eventual grant of special powers to the Authority was a direct result of Royal Commission conclusions that normal police investigative methods were not sufficient to bring organised criminals to justice.[489] The effectiveness of these Royal Commissions was partly attributed to their powers to summons witnesses and demand the production of documents.[490]

8.13 Consequently, the Authority was invested with a range of special powers - coercive in nature - which were intended to redress this weakness. Coercive powers that had been previously restricted to royal commissions were given to the Authority, a permanent law enforcement body. It was evident during the Committee's inquiry that the Authority's ability to use special powers remains the central and controversial distinction between the Authority and other

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489. Mr Michael Holmes, submission, p. 3. The South Australia Police Commissioner's 4 February 1991 submission to the Committee observed that at the time of the NCA's inception police departments were encountering difficulties in tackling organised crime. The submission identified two causes for this: lack of resources and lack of powers: p. 18. See the Authority's Annual Report, 1984-85, p. 6. See also the discussion paper by the Hon. M.J. Young, Special Minister of State, and Senator the Hon. Gareth Evans, Attorney-General, *A National Crimes Commission ?*, AGPS, Canberra, 1983, paras. 2.1 - 3.3.

490. Other factors included Commissions' use of specialist personnel with professional expertise and access to more sophisticated intelligence gathering systems: NCA Annual Report, 1984-85, p. 6.

permanent law enforcement agencies.[491]

8.14 A major debate that preceded the Authority's establishment concerned the need for special powers and whether or not such powers posed an unacceptable threat to civil rights.[492] The Committee is aware that special powers have remained the subject of controversy since the Authority's establishment in 1984.

8.15 The Committee notes that this debate has involved conflicting perspectives: those of civil liberties and those of law enforcement. Law enforcers took the view that the seriousness of organised crime demands the use of extraordinary measures. Under extreme conditions it was necessary to modify or abrogate certain rights and liberties for the greater good of the community. Law enforcers argued that special powers were essential to combat the threat posed to Australian society by organised crime. This argument drew much of its force from a widely held perception that organised crime had reached a crisis level, and unless stopped, threatened to undermine the foundations of Australia's democratic society.[493]

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491. The Authority has observed that sections 28 and 29 of the NCA Act 'are the two main additional powers which distinguish the Authority from police agencies': NCA, *Annual Report 1989-90*, p. 51. The Australian Federal Police Association submission stated that 'the only real need for the NCA, in its current form, is as a medium to gain access to coercive powers, and as an occasional coordinator of cross-jurisdictional joint investigations': p. 6. The Hon. Athol Moffitt CMG, QC told the Committee that the Authority was set to be an elite body up because, inter-alia, it could exercise special powers: Evidence, p. 766.

492. NCA, *Annual Report 1984-85*, p. 8. Also see the remarks of the Hon. Justice Vincent, Evidence, p. 369.

493. A leading proponent of this argument has been the Hon. Athol Moffitt CMG, QC. For example see Chapter One, 'A Society Under Challenge', in his book *A Quarter to Midnight*, Angus and Robertson, Sydney, 1985, pp. 3-24. In his 'Anti-Corruption Authorities in Australia', an address to the Labor Lawyers' Conference in Brisbane on September 22 1990, Mr Frank Costigan QC discussed the perception held in the 1970s and 1980s that organised crime posed a serious threat to Australian society: pp. 2-5.

8.16 Civil libertarians have disputed the extent of the threat of organised crime. They have also challenged the view that extreme situations necessitate qualifications upon civil rights and liberties. Further, Civil Liberties organisations argued that the nature of the powers granted to the Authority created a potential for the Authority to abuse or misuse its coercive powers, with grave consequences for the rights and liberties of Australian citizens.[494]

8.17 The Committee believes there is need to strike an appropriate balance between the public need to identify criminals and their activities and the public interest in protecting the rights and liberties of citizens.[495] The Committee also recognises the difficulty in attempting to strike an appropriate balance between these contending approaches.

8.18 The Committee bases its assessments on the principle that the Authority's special powers make it unlike other law enforcement agencies. This distinction carries added responsibilities - both in regard to the use of existing powers and to any suggested alterations to those powers. The Committee notes the concern of various civil liberties groups that there has been a gradual increase in the powers of police services in Australia and that giving further powers to the Authority only continues this trend.

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494. The South Australian Council for Civil Liberties noted that 'intense debate' centred upon the nature and extent of safeguards needed to govern the coercive powers contained in the NCA Bill (1983): Evidence, p. 936. See also the evidence of Mr John Marsden, Senior Vice-President, Law Society of New South Wales, Evidence, pp. 816-18.

495. The need to strike this balance was referred to during the inquiry. Dr Allan Perry, Vice-President of the South Australian Council for Civil Liberties said: 'To what extent, in a free society, should the basic rights of privacy, due process of law and the other associated civil liberties be allowed to frustrate its battle against organised crime and political corruption?': Evidence, p. 936. See also the views of the Hon. Justice Vincent, Evidence, p. 379.

Special Powers : The View of Law Enforcement Agencies

8.19 The Authority's coercive powers, not available to other police services, were viewed by law enforcement agencies as important weapons in the Authority's efforts to deal effectively with organised crime.[496]

8.20 The Australian Federal Police Association submission described the coercive powers contained in the NCA Act 'as an essential tool for successfully combating certain levels of organised criminal activity and pursuing individual targets'.[497]

8.21 Mr Graham Sinclair, an Assistant Commissioner of Victoria Police, said: 'The major benefit of a national body should be derived from the exercise of special powers of investigation, principally the power to summon witnesses to answer questions and to produce documents'.[498]

8.22 The Police Federation of Australia and New Zealand told the Committee: 'The situation is that we believe the National Crime Authority's main reason, in fact its sole reason, for existence is the access to coercive powers'.[499] The Federation further argued that the Authority's coercive powers were an essential element for the effective investigation of organised crime. One of the Authority's failings had been its use of normal police methods - investigations that could have been done by police forces themselves.[500]

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496. Mr Robert McAllan, a Detective Superintendent in the Victoria Police, said that one of the Authority's 'attractions' included 'coercive powers and the appropriate carriage of coercive powers': submission, p. 11. The South Australia Police Association submission, February 4 1991 noted that the department lacked the requisite special powers to investigate organised crime: p. 12. See also Mr R.E. Dixon, Evidence, p. 1558.

497. Submission, p. 2.

498. Evidence, p. 1255.

499. Evidence, p. 510.

500. Evidence, p. 510. Although the Police Federation of Australia and New Zealand submission contained criticisms of the Authority, it identified the primary value of the Authority to be its inquisitorial powers: p. 4.

8.23 The Australian Federal Police Association argued that the coercive powers of the Authority were not as strong as they should be and that existing restrictions on their use, such as the privilege against self incrimination, should be removed.[501]

8.24 Mr Henry Rogers, an employee of the Authority appearing in a private capacity, said that **if** the Parliament decided to continue with the Authority and wished it to be effective, then the Authority would have to be given greater powers. The Committee notes that despite this assessment Mr Rogers said: 'I personally do not believe that that is an appropriate way to go about things in our society'.[502]

Special Powers : The Concerns of Civil Liberties Groups

8.25 Submissions and evidence, especially from civil liberties groups, expressed serious concern over the Authority's ability to use special powers. The Authority's special powers were seen as a danger to citizens fundamental rights and liberties.[503] Civil liberties groups questioned the real need for the Authority, or any other permanent law enforcement body, to possess special powers. They also questioned the perception that the threat of organised crime was such that encroachment on liberties was needed to ensure the protection of society.[504]

8.26 The Queensland Law Society submission argued that extraordinary powers were usually given only to commissions of

501. Submission, p. 6.

502. Evidence, p. 401.

503. Dr Allan Perry, Vice President of the South Australian Council Civil of Liberties, Evidence, p. 932. See also the South Australian Council for Civil Liberties, submission, p. 1; Australian Civil Liberties Union submission, p. 1. The New South Wales Council for Civil Liberties submission, p. 1 was critical of the combination of excessive powers and a lack of effective scrutiny of the Authority.

504. South Australian Council for Civil Liberties, submission, p. 1. The Australian Civil Liberties Union expressed concern about the ability of permanent commissions to threaten civil liberties: submission, p. 1.

inquiry for specific purposes and for limited time frames. The Society submission observed:

> It is a concern of this society that to depart from the traditional use of Commissions of Inquiry for specific tasks and to create instead permanent investigatory bodies with powers similar to those normally enjoyed by specific Commissions of Inquiry is to remove many safe-guards. It is the submission of the Society that there is no fail safe mechanism that will ensure that a permanent Commission does not fall victim to the ills which were examined and identified in agencies of the Queensland Government by the Fitzgerald Commission of Inquiry.[505]

8.27 Mr Ron Merkel QC of the Victorian Council for Civil Liberties and Mr Terry O'Gorman of the Queensland Council of Civil Liberties both questioned the need for the Authority to be allowed even greater powers.

8.28 Mr O'Gorman said that when the establishment of the Authority was being debated in the early 1980s civil libertarians were aware that whenever greater powers were given to such a body they inevitably had a trickle down effect.[506] Mr O'Gorman argued that police forces would always seek extension of their powers: 'it is in the nature of the beast'. Mr O'Gorman stressed that when this occurs it was important to draw the line and that the Committee had to make some 'fairly significant deliberations'.[507]

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505. Submission, p. 3.

506. Evidence, pp. 538-539.

507. Evidence, p. 539. Mr O'Gorman told the Committee that police support for the Authority's special powers was not a surprise because police wanted these powers taken out of the 'so-called super crime class and brought down to your ordinary crime class': Evidence p. 564. The Committee notes that Mr Taylor, representing the New South Wales Police Association, stated that police would like the powers currently held by the Authority: Evidence, p. 643.

8.29 Mr O'Gorman said:

> Our simple position is that if you give police forces, whether it be the NCA or any other force, greater powers, and there is no way by which you can measure whether those greater powers are producing results, then the greater powers should either be taken away or there certainly should be no greater extension of those powers.[508]

8.30 Mr Merkel questioned the need to grant further powers to the Authority: 'no explanation has been given and no facts are put forward as to why these extensions of power are going to resolve any of the problems of the past'.[509]

8.31 It was also argued that special powers were no longer necessary, as police forces could now perform the Authority's role. The submission from the Australian Civil Liberties Union stated:

> Federal and State Police forces which now have more than adequate powers including access to bank records and to phone tapping facilities, to combat crime, including organized crime, are more likely to keep the balance between combatting crime and the protection of civil liberties than permanent crime Commissions.[510]

8.32 The Committee was told that the urgency of the organised crime threat had been overstated, and used to erode a range of civil rights and liberties. The Hon. Justice Frank Vincent stated:

> One of the problems which seems to me to arise out of the political rhetoric which was employed in the early 1980s was that it was slowly but surely going to produce an environment of such fear and apprehension in the

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508. Evidence, p. 539.

509. Evidence, p. 1396. See also Evidence, p. 356.

510. p. 1.

> community that our fundamental legal rights would seem to be less and less significant. There was such a war that it was necessary to act, as it were, in a wartime manner.[511]

8.33 His Honour went on to observe that over recent years civil liberties had been increasingly threatened by a gradual extension of police powers, the proliferation of investigative bodies and challenges to fundamental rights, including that of the privilege against self-incrimination: 'I regard all of that as manifesting a measure of subversion of our democratic process'.[512]

8.34 Mr Peter McClellan QC, appearing as a private citizen, told the Committee:

> From my point of view, I think what has probably happened is that there has been a perception that the conventional mechanisms have not worked efficiently, in some instances, and that the record of royal commissions is such that they are perceived to be a more effective way of getting to the heart of the problem.[513]

Mr McClellan observed that this perception had led to the establishment of special bodies with royal commission-type powers. A consequence had been the erosion of traditional protections.[514]

8.35 Civil liberties groups also raised the lack of knowledge about the exercise of such powers and deficiencies in accountability mechanisms needed to safeguard the interests of the community. Civil liberties groups argued that knowledge and effective accountability were indispensable - given the coercive nature of the

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511. Evidence, p. 378.

512. Evidence, p. 378.

513. Evidence, p. 669.

514. Evidence, p. 670.

Authority's powers. In the absence of adequate safeguards the Authority should be stripped of special powers.

8.36 Justice Vincent told the Committee that he had always been uneasy about the granting of such powers to a body not properly monitored or controlled and which 'could possess the capacity to subvert the democratic process in a variety of different ways'.[515]

PROCEDURAL AMENDMENTS

A Summons to Appear : The Issue of a Warrant

8.37 The Authority's submission argued that the punitive provision in subsection 30(11) of the NCA Act was not enough to secure the attendance of persons at hearings. The Authority observed that despite being served with summonses several witnesses had still failed to attend Authority hearings. The Authority proposed that the Act be amended to allow the issuing of a warrant where a person refuses to comply with a summons. The Authority proposed that the decision to issue a warrant would be a judicial decision and not an administrative one. The Authority referred to section 31 of the NCA Act as a possible model.[516]

8.38 Under the NCA Act a person sent to prison for not answering a section 28 summons cannot be brought before the Authority. The Authority's submission also proposed that section 28 be amended so that a person sent to jail for not answering a summons could be brought before the Authority.[517]

8.39 The South Australian Police Commissioner's submission, dated February 4 1991, addressed the situation where a person ignored a summons to appear at a hearing. Commissioner Hunt

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515. Evidence, p. 369.

516. Submission, p. 40.

517. Submission, p. 40.

observed that although this constituted an offence (in the absence of a reasonable excuse) and possible imposition of penalties: 'that person is no closer than before to attending a hearing'.[518]

8.40 The submission rejected the counter-argument that compelling a person to attend by issuing a warrant would achieve little because the person had had no intention of responding to the summons and answering questions. The submission said:

> Experience in criminal investigations demonstrates, however, that often, even the most unco-operative witness will subsequently answer some, if not all, questions, thereby providing information which may be of value. In any event, the issue of whether or not a person will answer questions or provide any information of value at a hearing will remain unresolved unless and until the person can be brought before the Authority.[519]

8.41 Commissioner Hunt argued that allowing the Authority to issue a warrant under the circumstances and conditions he described would be of assistance to the Authority effectively performing its functions.[520]

Non-Disclosure : Amendments to Sections 28 and 29

8.42 In May 1990 the Authority first suggested to the Commonwealth Attorney-General that certain amendments be made to sections 28 and 29 of the NCA Act. These amendments concerned the issue of disclosure. These amendments were raised during the inquiry.

8.43 The Authority proposed that section 28 of the NCA Act be amended to prevent a summonsed person disclosing the existence of the summons to appear or information about it, except for the

518. p. 16.

519. Submission, p. 16

520. ibid., p. 17.

purposes of complying with that summons.[521]

8.44 In respect of section 29, requiring the production of documents, the Authority proposed a similar amendment prohibiting disclosure of requests for documents. The Authority stressed the importance of this power in conducting white collar crime investigations and pursuing the proceeds of crime.[522]

> Section 29 does not include a non-disclosure provision, and it is now becoming apparent that some institutions such as banks are on occasion advising clients that the NCA has required the production of records relating to their banking transactions, thereby alerting targets and their associates of the NCA's interest in them. Some institutions consider that, in the absence of any non-disclosure provision in the Act, it is their duty to inform clients that confidential information relating to their affairs has been produced under compulsion of law, and that they have no protection if they do not do so.[523]

8.45 These proposals received support from the IGC. The IGC submission noted that when undertaking complex investigations the Authority often obtained documents from financial institutions. These institutions have indicated that they consider it to be their duty to disclose the existence of the Authority's activities to their clients, unless they have a clear legal obligation not to do so. Such a disclosure has the clear potential to damage the Authority's investigations.[524]

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521. Submission, p. 39. The Authority noted that numerous provisions of this type already exist in various Commonwealth and State Acts and that section 74 of the *Proceeds of Crime Act 1987* provided a model for the proposed amendment.

522. Submission, p. 39.

523. ibid., p. 40.

524. The IGC submission, p. 22 observed: 'This, of course, can result in the target of the investigation, or related parties, being 'tipped-off' about the NCA's activities and taking measures to conceal relevant evidence'.

8.46 The IGC submission stated:

> The proposed minor amendments to sections 28 and 29 would have the effect of deterring these financial institutions and other persons receiving process under these provisions from disclosing the NCA's interest in the affairs of the target, except in limited circumstances. Similar non-disclosure provisions are present in other Commonwealth legislation.[525]

Amendments to Sections 28 and 29 : The Committee's Conclusion

8.47 On the 12 September 1991 a Bill to amend the NCA Act was presented and read a first time in the House of Representatives. Included in the Bill were proposed amendments to sections 29 and 31 of the NCA Act. The Committee notes that these amendments substantially incorporate the proposals made by the Authority and the IGC.[526] The Committee, therefore, does not intend to make any further assessment of these proposals. The Committee notes, however, that the proposed amendments retain certain safeguards.[527]

The Authority's Access to Documents

8.48 Mr Bruce Partridge, formerly the Authority's Chief Financial Investigator,[528] made further criticisms of section 29 of the

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525. p. 22.

526. See sections 29A, 29B and the additional wording added to section 31 in the Bill (1991). See further the Explanatory Memorandum, pp. 1-2.

527. On the issue of disclosure see subsection 29A(2) and the exceptions under subsection 29B(2). The Committee notes that section 31 under the Bill requires judicial approval for the issuing of a warrant to secure a person's appearance at a hearing. This safeguard was also suggested to the Committee during it inquiry: Mr McClellan QC, Evidence, p. 679; Commissioner Hunt, Evidence, p. 965.

528. Mr Partridge was employed by the Authority between September 1985 and

NCA Act. His assessment was that the section did not allow the Authority sufficiently quick access to the documents or materials needed to chase the money trail in investigations. Mr Partridge observed that if the Authority wished to obtain documentation - from a bank, solicitor or accountant - it had to issue a notice and then allow 14 days for production. Following this, the documents would then spend two days going through the system before they can be assessed. The Authority would then re-contact the bank for the specific documents needed.[529] Mr Partridge said that this process could take a month and 'Naturally you get absolutely nowhere on a time basis for an investigation'.[530]

8.49 One remedy suggested by Mr Partridge was to allow the Authority to physically compel the immediate production of documents. Mr Partridge identified the Tax Act as an example of legislation which allowed unfettered access to documents.[531] Mr Partridge's alternative proposal was that the Authority could pay for the documents - for example as an ex gratia payment.[532]

8.50 Mr Partridge argued that the Future Directions emphasis on white collar crime would be frustrated unless section 29 was amended: 'There has to be some method of overcoming the time consuming method of getting documentation because you cannot do anything until you have the documents'.[533]

8.51 The Committee does not support the proposals put by Mr Partridge. The Committee refers Mr Partridge's views to the Authority for consideration.

July 1989: Evidence, p. 602.

529. Evidence, pp. 604-05.

530. Evidence, p. 605.

531. Evidence, p. 607.

532. Evidence, p. 607. Mr Partridge referred to his experience with the Woodward Royal Commission where the Commission paid for access to documents: Evidence, p. 605.

533. Evidence, p. 620.

SUBSTANTIVE AMENDMENTS

The Protection Against Self-Incrimination

8.52 It was proposed to the Committee that the privilege against self incrimination contained in the NCA Act either be removed or restricted. It was alleged that this would allow the Authority to investigate organised crime more efficiently.

8.53 The Tasmanian Police Force submission argued that people called before an Authority hearing should not have the protection of the right against self-incrimination. The Authority needed to be able to identify principals in large scale criminal activity through the hearing process. The Committee notes the Tasmanian Police Force submission's observation that there was no empirical evidence to establish the extent to which the Authority is hindered by the right of witnesses to refuse to answer questions.[534]

8.54 Mr Graham Sinclair, Assistant Commissioner of the Victoria Police, told the Committee: 'Experience to date has indicated that the NCA is not able to deliver maximum benefits because witnesses have the right to refuse to answer questions on the grounds that they may incriminate themselves'.[535]

8.55 Mr Sinclair was also critical of subsection 30(5) of the NCA Act. He observed that Directors of Public Prosecutions were reluctant to grant indemnities until they were aware of the value of the witness's proposed evidence. The witness was similarly reluctant to divulge important information before an indemnity is granted.[536] Mr Sinclair stated:

> Moreover, this provision [s.30(5)] cannot logically be

534. p. 5.

535. Evidence, p. 1255.

536. Evidence, p. 1255.

> used to require major targets to answer questions. Its value is also limited in regard to lesser witnesses who, whilst answering questions as required, may prefer the penalties of perjury to the potential retribution of their criminal colleagues.[537]

Mr Sinclair concluded that the Authority would be in a stronger position if it were empowered to require witnesses to answer questions.[538]

8.56 The Police Federation of Australia and New Zealand submission noted that taxation, customs and the New South Wales ICAC legislation conferred the power to compel answers irrespective of self-incrimination.The Committee was told that as other legislation had already qualified the privilege, the Authority should also be allowed to qualify the operation of the privilege.[539]

The Dual Mode

8.57 Assistant Commissioner Sinclair suggested that the National Crime Authority should be able to alternate between a royal commission mode and an investigative mode. Mr Sinclair proposed that the Authority be able to declare at the outset it was in royal commission mode and able to compel answers. Other than that it would be in an investigatory mode and subject to the traditional right against self-incrimination.[540] Mr Sinclair observed:

> As Moffitt points out - and many others have done, too - if you really want to attack the issues in respect to organised crime, the ones that have really successful are the royal commissions; and it is based on that ground of forcing people to answer questions.[541]

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537. Evidence, pp. 1255-56.

538. Evidence, p. 1256.

539. Submission, p. 6.

540. Evidence, p. 1274.

541. Evidence, p. 1274.

Continuing Safeguards

8.58 The importance of continuing to afford protection to witnesses was recognised in submissions and evidence that suggested modifications to the privilege. The Tasmania Police submission asserted that a balance between the public need to identify criminals and the public interest of protecting individual rights could be achieved in two ways. First, that incriminating answers given by witnesses at hearings could not be relied upon in subsequent legal proceedings. Second that the 'incriminating' questions be asked *in camera*.[542]

8.59 Mr Graham Sinclair agreed that where the Authority was able to compel answers those answers could not be used against the person in subsequent proceedings. Mr Sinclair took the view that if the Authority were granted this power then the Authority's ability to gather meaningful intelligence on organised crime in Australia would be improved. This would allow the Authority to gather intelligence in the way that former royal commissions had.[543]

8.60 The Police Federation of Australia and New Zealand suggested that such answers be given *in camera* and could not be subsequently used in legal proceedings involving the person. The Federation said that the ICAC legislation was the most successful and sensible current model.[544]

8.61 In his 1988 submission to the Committee Mr Frank Costigan QC argued that answers to any questions should not be used in subsequent criminal proceedings.[545] Mr Costigan considered, however, that the protection to answers not be given to documents and papers: 'I can see no basis for providing protection in the case of

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542. Submission, p. 5.

543. Evidence, p. 1255.

544. Evidence, pp. 526-27.

545. Evidence, p. 435v (1988 submission, p. 8).

documents'.[546]

Safeguards : The Granting of Indemnities

8.62 The proposals to qualify the privilege against self-incrimination also included consequent changes to the procedure of granting indemnities. The Authority has no independent power under the NCA Act to grant indemnities.[547]

8.63 The Hon. Athol Moffitt CMG, QC argued that the Authority's ability to override the privilege against self-incrimination could be made more workable by removing the existing requirements of government approvals and undertakings.[548] Mr Moffitt specifically identified the ability of royal commissioners to override the privilege as the principal reason why their inquiries were able to penetrate and reveal the operations of organised crime - where ordinary law enforcement agencies had failed to do so.[549]

8.64 Mr Moffitt observed that the indemnity procedure in the NCA Act was the result of a compromise which had taken into account civil liberties concerns:

> The compromise when the bill was framed was to place the exercise of the power under the control of Governments, under the undertaking system. In so doing, the utility of the power was almost entirely destroyed.[550]

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546. Evidence, p. 435v (1988 submission, p. 8).

547. Subsection 30(6) of the NCA Act. Upon recommendation from the Authority the Commonwealth Director of Public Prosecutions may grant protection to witnesses appearing before the Authority who might otherwise incriminate themselves in answering questions. Similar provisions exist in the State underpinning legislation in relation to offences against State laws, for example section 19 of the Victorian, New South Wales and South Australian Acts: NCA, *Annual Report 1989-90*, p. 35.

548. Submission, p. 3.

549. Submission, p. 23.

550. Submission, pp. 23-24.

8.65 Dr Allan Perry, Vice-President of the South Australian Council for Civil Liberties, argued that it would be 'functionally expeditious' for the Authority Chairman to be able to grant immunities. Dr Perry said that the existing process of going to the relevant Director of Public Prosecutions or Attorney-General was 'a particularly cumbersome and ineffective mechanism'.[551]

8.66 Dr Perry also argued that the Authority would benefit from this change. First, proceedings could continue without the lengthy disruption occasioned by getting the approval of perhaps seven different authorities before the testimony can continue. Second, this would to some extent remove the investigatory process from what Dr Perry referred to as 'partisan politics' within the different State and Commonwealth governments.[552] Dr Perry noted that any use of this power should only be under extraordinary circumstances and subject to close review and scrutiny.[553]

8.67 Dr Perry viewed the granting of indemnities by the Chairman as preferable to a situation where the privilege was removed without subsequent indemnity. He told the Committee:

> What we do object to is the situation where efforts are made to compel the testimony of witnesses in situations where immunity is not given. We see that as being inherently a great danger which will tend to distort and corrupt the process far more than it will lend itself to achieving the truth.[554]

551. Evidence, p. 942.

552. Evidence, p. 943.

553. Evidence, p. 944; p. 946.

554. Evidence, p. 942.

Submissions Supporting the Privilege

8.68 The Committee heard that any further erosion or qualification of the privilege against self incrimination would be an unacceptable violation of individual rights and liberties.

8.69 The Hon. Justice Frank Vincent opposed the suggestion that certain circumstances could require any qualification or erosion of this right, saying rights:

> are not absolute but there are some rights which the community has regarded as integral to the democratic process. There are points beyond which governments should not be permitted to go and this right against self-incrimination really represents one of those.[555]

8.70 Mr Ron Merkel QC, President of the Victorian Council for Civil Liberties, argued that although inroads have been made on this privilege such inroads should never be extended to essentially what are and will remain police and criminal investigations.[556] Mr Merkel told the Committee that the privilege against self-incrimination was a fundamental aspect of law in a free and democratic society:

> We would think that it is unthinkable that what really is a statutory police force could be given the power to dispense with that privilege. We think that would constitute one of the most serious erosions of freedom in a democratic society that one can think of.[557]

8.71 The South Australian Council for Civil Liberties submission also described the privilege against self incrimination as one of the most fundamental, but also most consistently attacked, of civil liberties. The submission rejected any further diminution of the right beyond the existing situation where indemnities are granted to

555. Evidence, p. 379.

556. Submission, p. 11.

557. Evidence, p. 362.

individuals.[558]

8.72 Mr Merkel did not agree that qualifications to the privilege that had occurred in other legislation, such as corporations law, justified similar measures in relation to criminal investigation:

> Corporations law allows private investigators to, in effect, require incrimination. Some aspects of the Royal Commission legislation at the Federal level empower a Royal Commission to override self incrimination. Aspects of trade practices law allow that. No doubt there are many other laws that permit it but there is one factor in common that all those laws have which the NCA does not. Those laws are to give a body charged with the general regulatory function in a particular area with the power and the interest of the community to find what went wrong, not to use it to get a conviction against an individual, but to use it to redress the wrongs of part of the economic system - trade practices, anti competitive conduct, corporations, conduct that is affecting the free market that we are entitled to expect in the securities industry.[559]

8.73 The South Australia Police submission said that experience in criminal investigations suggested that hostile witnesses were a most unreliable source of information and the pursuit of inquiries based on information supplied by such witnesses was often unproductive.[560] The submission stated: 'It is suggested that compelling witnesses to answer questions under threat of punishment would not significantly advance an investigation'.[561]

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558. pp. 4-5.

559. Evidence, pp. 1397-98.

560. Submission, p. 17.

561. Submission, p. 17.

Self-Incrimination : The Authority's View

8.74 In 1989, the then Chairman of the Authority, Mr Peter Faris QC, proposed that the privilege against self-incrimination be modified during Authority hearings:

> This privilege against self-incrimination can hinder the Authority's investigations. When one has regard to the scale of the criminal activity engaged in by persons investigated by the Authority and the huge illegal profits made by those persons, a strong case can be made that the act should be amended to remove this privilege.[562]

8.75 In July 1991, Justice Phillips told the Committee that the Authority as a whole did not have a view about the privilege against self-incrimination. Justice Phillips personal view was 'that the privilege against self-incrimination should not be removed'.[563]

Self-Incrimination : The Committee's View

8.76 The Committee considers that the privilege against self incrimination is a fundamental right in the operation of the judicial system. The Committee rejects the argument that the privilege has somehow lost its appropriateness or that 'the original justification for it has probably been eroded today and we may need to review whether or not it should be allowed to remain in the future'.[564]

8.77 The Committee notes that the conflicting perspectives on the privilege against self incrimination are fundamentally incompatible. Mr Henry Rogers, an Authority employee appearing privately, told the Committee: 'To make the Authority effective, if it is to

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562. 'The Role of the National Crime Authority in Australian Law Enforcement', text of a speech delivered at Queen's Inn, University of Melbourne, 8 August 1989, p. 9.

563. Evidence, p. 1677.

564. Evidence, p. 681 (Mr Peter McClellan QC).

continue as an Authority, you would have to get rid of the right against self-incrimination'.[565] Mr Rogers then acknowledged that this may not be desirable for civil liberties and the basic structure of Australian society. Mr Rogers observed that such powers were acceptable for royal commissions into specified matters but not for a permanent law enforcement body.[566]

8.78 The Committee contrasts the Authority's role in criminal investigations with the essentially civil role of other investigatory bodies which, under certain conditions, may override or qualify the privilege.[567]

8.79 The Committee recognises the privilege against self incrimination as a central safeguard in the criminal justice system. The Committee considers that improved effectiveness is not a ground for the removal of or qualification to the privilege.

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565. Evidence, p. 391.

566. Evidence, p. 391.

567. The ASC has recently sought to amend the operation of immunities it can grant when exercising its power to override the privilege against self incrimination (see subsection 68(3) of the ASC Act and subsection 597(12) of the Corporations Law). The submissions on this matter to the Joint Parliamentary Committee on Corporations and Securities inquiry into the ASC proposal indicate that even in non-criminal areas the abrogation of the privilege remains highly controversial. See, for example, the submission from the Professional Development Committee of the Young Lawyers' Section of the Law Institute of Victoria, pp. 2-3; p. 10.

    The legislature does have the power to abrogate the privilege, but there is a presumption that, in the absence of explicit intent, it does not intend to alter so important a principle of common law. See Gibbs CJ in Sorby v. The Commonwealth of Australia (1983) 46 ALR 237 at p. 241.

Indemnities : The Committee View

8.80 Commissioner Hunt, although supporting the value of indemnities, did not agree that the Chairman of the Authority should be given this responsibility. Commissioner Hunt considered the requirement that someone outside the Authority grant indemnities was a safeguard against possible allegations of corruption being levelled at the Chairman and the Authority.[568]

8.81 Mr O'Gorman also rejected the suggestion that the Authority Chairman be allowed to grant indemnities.[569]

8.82 Mr Peter McClellan QC rejected the proposal that the Authority should possess a discretion to override the privilege against self-incrimination: 'I certainly do not think it appropriate to vest that as a matter of discretion in the body which is doing the investigating'.[570]

8.83 The Committee rejects suggestions that the Chairman of the Authority be given the power to grant indemnities. The Committee is also opposed to the suggestion that Members of the Authority be given a discretion to override the privilege against self incrimination.

568. Evidence, p. 975.

569. Evidence, p. 540.

570. Evidence, p. 680.

PROPOSED NEW POWERS FOR THE AUTHORITY

The Power to Prosecute

8.84 Under the NCA Act the Authority has no power to conduct or direct prosecutions that result from its investigative work. The Authority liaises with the Commonwealth Director of Public Prosecutions. Officers of the DPP or barristers briefed by the DPP regularly appear to prosecute matters arising from the Authority's work. The Authority also liaises with the respective State prosecution bodies in matters that involve State laws.[571]

The Previous Committee's Position : Prosecutions Power

8.85 The 1989 *Third Report* considered the issue of the Authority having greater involvement in prosecutions. The Report acknowledged that the Authority was opposed to acquiring a prosecution function:

> Not only does the Authority not have any role in the conduct of prosecutions, it does not seek such a role. It recognises the importance of the principle that there should be a clear separation between investigative agencies such as the Authority and those agencies responsible for determining whether a prosecution should proceed.[572]

8.86 The *Third Report* also observed:

> Accordingly it is of the utmost importance that the decision to prosecute be taken by someone who has not been involved in the investigation, who has no preconceptions as to the guilt or innocence of the accused and who can make an impartial evaluation of the strengths and weaknesses of the evidence against

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571. NCA, *Annual Report 1989-90*, pp. 30-31.

572. *Third Report*, pp. 10-11, footnote omitted.

the accused.[573]

8.87 The *Third Report* nonetheless proposed a greater role for the Authority in the carriage of prosecutions arising out of its investigations. The Committee made the following recommendation:

> The Committee affirms the importance of the principle that there should be a clear separation between the functions of investigative agencies, such as the Authority, and those agencies responsible for determining whether a prosecution should proceed, such as the Federal and State Directors of Public Prosecutions. However the Committee does not believe that this principle would be eroded if, where the Authority and the prosecuting agency cannot agree on the selection of counsel to conduct the prosecution in a case arising out of an investigation undertaken by the Authority, the Authority were to be in a position to assist the relevant agency with the costs of briefing counsel upon whom both the Authority and the relevant agency could agree.[574]

8.88 The *Third Report* noted that this arrangement would still leave the decision whether to prosecute, and if so on what charges, as the sole responsibility of the relevant prosecuting agency.[575]

Arguments Supporting a Prosecution Power

8.89 The Tasmania Police submission argued that the Authority should be given the power to initiate prosecutions and assist the appropriate Director of Public Prosecutions in the carriage of those prosecutions. The submission proposed that the senior solicitor involved in an investigation would later become the briefing solicitor for the prosecuting counsel. This would allegedly lead to

573. *Third Report*, p. 11.

574. *Third Report*, p. 12.

575. *Third Report*, p. 12.

savings in both time and money. The submission argued that the Authority could then guarantee that matters seen to be important at least entered the judicial system. Additionally, the relevant Directors of Public Prosecutions would be better acquainted with both the prosecution and its significance in the fight against organised crime.[576]

8.90 Mr Michael Cashman, an Authority Legal Officer, suggested that the Authority be granted a prosecution power, despite the traditional opposition to combining investigative and prosecution functions. Mr Cashman's submission identified a range of alleged benefits that would result. First, the Authority would be able to make better use of its legal expertise. Mr Cashman argued that the lack of 'legal work' had led to a high turnover of qualified legal staff. Second, the Authority would also be able to secure greater control over prosecutions launched as a result of its investigations. Third, the establishment of a prosecution function would be cost effective in eliminating the double handling of briefs and the streamlining of prosecutions. Fourth, prosecutions resulting from Authority investigations should be conducted by people with expertise, specialisation and enthusiasm in those areas - attributes seen by Mr Cashman as absent in either State or Commonwealth Directors of Public Prosecutions.[577]

8.91 The Committee was told that it would be productive if the Authority had more involvement at the prosecutions stage. Mr William Horman, Commissioner of Tasmania Police, observed that royal commissions have addressed matters and then referred them to the Director of Public Prosecutions office or other special prosecutions office for prosecution: 'At times that has required an enormous amount of work that has already been done to virtually be redone'.[578] Although Mr Horman qualified his view by describing it as a 'perception', he suggested that the Authority lawyer could be of great assistance in the preparation of a matter going to court. The

576. Submission, p. 5.

577. Submission, pp. 4-5.

578. Evidence, pp. 1183-84.

Committee notes that Mr Horman did not suggest that the Authority lawyer should stand as the counsel prosecuting the matter.[579]

Arguments Against the Prosecution Power

8.92 The South Australian Council for Civil Liberties submission was opposed to giving the Authority a prosecution role. The submission argued that 'Combining the function of an investigator and prosecutor would remove an important safeguard in the prosecutory process'.[580] The decision to prosecute required an objective assessment of the evidence and cannot properly be undertaken by the person or agency which has pursued the investigation. The submission was concerned about abuses that might flow from a situation where the Authority could prosecute its own investigations:

> It would pursue the prosecution with the single-minded objective of conviction rather than as an officer of the Court attempting to find the truth and achieve justice. If the NCA were given the power to initiate prosecutions it might as well also be given the power of Judge and executioner and its transformation into a Court of Star Chamber will be complete.[581]

8.93 The Victorian Council for Civil Liberties told the Committee:

> No, we do not believe that a body that investigates criminal conduct should have the power to prosecute. We say that prosecution should be the independent decision of the directors of public prosecutions at State and Federal levels. We think that separation is vitally important.[582]

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579. Evidence, p. 1184.

580. Submission, p. 3.

581. Submission, p. 4.

582. Evidence, p. 352.

8.94 The ability of the Authority to act as both investigator and prosecutor was criticised as a violation of the principle of separating such functions.[583]

8.95 Mr Terry O'Gorman rejected the arguments in favour of a prosecutions power made by Mr Cashman and stated that the Queensland Council of Civil Liberties was 'absolutely opposed to the National Crime Authority being given the role to prosecute its own cases'. Mr O'Gorman further argued:

> The only current measure of supervision is the fact that prosecutions of National Crime Authority investigations are done by an independent body. If they were to be done by the same body, what little supervision exists of what the National Crime Authority does would go out the door.[584]

A Prosecution Role : The Authority View

8.96 The Committee notes that the Authority continues to oppose the exercise of a prosecutions role. In 1990 the Authority rejected the Third Report's recommendation regarding prosecutions. The Authority considered that the principle of separating investigative and prosecution functions would be eroded if the recommendation were put into effect.[585] In July 1991, Justice Phillips rejected proposals to grant a prosecution role to the Authority. Justice Phillips told the Committee that he saw this as an interference in the vital separation and division of functions in the Australian justice system and stated:

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583. Evidence, pp. 540-41.

584. Evidence, p. 540. Mr O'Gorman cited the Fitzgerald Report in Queensland and the 1981 report of the United Kingdom Royal Commission on Criminal Procedure as support for the separation of investigation and prosecution functions: Evidence, pp. 540-41.

585. NCA, *Annual Report 1989-90*, p. 13.

> I believe very strongly in the separation of functions in the criminal justice system. The NCA's function is primarily an investigative one. I think it is in the interests of justice that the NCA, having assembled admissible evidence, that that evidence is handed over to an entirely independent body, like the Director of Public Prosecutions for the Commonwealth or the State so they can make their own assessment of it and decide what charges are necessary. ... I would not want a prosecution section as long as I am chairman.[586]

Prosecutions : The Committee View

8.97 The Committee concludes that the Authority should not be granted a prosecution power. The Committee reached this conclusion on two grounds. First the principle of maintaining the separation of functions in the criminal justice system currently outweighs any potential benefits of giving the Authority a prosecutions function. Second, that the Authority has consistently opposed exercising a prosecution role.

Civil Confiscation

8.98 The Committee heard arguments that there was a need to substantially amend laws relating to the confiscation or freezing of assets regarded as the proceeds of criminal activity.[587] The Hon. Athol Moffitt CMG, QC's submission, for example, argued that to get at the capital base of organised crime it was essential to enhance the ability of authorities to pursue civil confiscation of assets.[588]

8.99 Mr Moffitt's proposal was that:

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586. Evidence, pp. 1670-71.

587. It was suggested to the Committee that the Proceeds of Crime Act be amended to reverse the onus of proof and oblige a person to explain the origin of certain income or possessions. See for example the Authority submission, p. 43.

588. Submission, p. 6.

> The NCA Act should be amended to make expressly clear that a relevant activity includes any money washing activity. Its powers should expressly extend to the assembly of evidence in aid of civil confiscation and allied proceedings.[589]

8.100 Mr Moffitt's second proposal was that the Authority should be given the power to recommend reforms relevant to confiscation proceedings and money laundering investigation.[590]

Civil Confiscation : The Committee View

8.101 The Committee does not intend to evaluate the specific reforms to legislation governing civil confiscation suggested by Mr Moffitt and others.[591] The Committee intends only to examine proposals that recommend direct changes or amendments to the functions or powers of the Authority under the NCA Act.

8.102 Apart from the requirement to gather admissible evidence and assist in civil matters, the Authority currently has no wider role under the NCA Act in this area of law. The Authority's investigatory role has been one of supporting and assisting other relevant agencies. The Authority has identified Operation Silo and Matter Eight as examples of Authority work that assisted in the identification and seizure of proceeds of crime.[592]

8.103 In the past the Authority has also been involved in proposals for relevant legislative reform, such as the Proceeds of

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589. Mr Moffitt proposed that subsections 11(1) and 12(2) be amended to make such powers and functions express: submission, p. 4.

590. Submission, p. 4. Mr Moffitt also noted that reform proposals by the Authority would be designed to counter the efforts of organised crime to avoid the effects of the legislation: submission, p. 7.

591. Also see the view of Commissioner Hunt: Evidence, pp. 973-74.

592. NCA, *Annual Report 1987-88*, pp. 25-26. See also NCA, *Annual Report 1989-90*, pp. 32-33.

Crime Act.[593]

8.104 In its submission the Authority referred to the importance of attacking the assets base of organised crime, notably the proceeds of crime. Although the Authority suggested certain amendments to the Proceeds of Crime Act 1987, the Authority did not request any extensions to its functions or powers in this area.[594]

The Enhancement of General Functions : Special Powers

8.105 The general functions of the Authority, such as intelligence gathering, do not attract the powers afforded 'special investigations'. The Hon. Athol Moffitt CMG, QC's submission to the Committee argued that because the Authority's compulsive powers only extended to special investigations the general functions were ineffective. Mr Moffitt proposed that the NCA Act be amended to allow the application of section 28 to general as well as special investigations.[595]

8.106 Mr Moffitt told the Committee that the section 28 power should be applied to subsection 11(1)(b) - which allows the Authority to inquire into any matter provided it is a relevant criminal activity - without the need for definition or government approval. Mr Moffitt argued that this would enhance the Authority's ability to conduct investigations.[596] Mr Moffitt argued that in so doing the Chairman of the Authority was still exercising the same power - 'only you are trusting him to decide where he needs to use it'.[597]

8.107 The Committee has not received arguments to support this extension of special powers to the Authority's exercise of general functions. Neither the Authority, law enforcement agencies or the

593. See NCA, *Annual Report 1985-86*, pp. 40-41.

594. p. 43.

595. Submission, pp. 1-3.

596. Evidence, pp. 768-69.

597. Evidence, p. 784.

IGC have suggested this extension of the Authority's powers.[598] The Committee considers that such an extension would inevitably create complex problems of accountability and supervision. The Committee also notes existing civil liberties concerns about the Authority's special powers. Any unrestricted extension of special powers to the Authority's general functions would constitute a clear risk to the public interest and civil rights.

8.108 The Committee therefore rejects any extension of the Authority's special powers to its general functions. The Committee considers that the NCA Act's present restriction of special powers to special references should be maintained.

SECTION TWO : REFERENCES AND SPECIAL INVESTIGATIONS

Introduction

8.109 The process by which matters are referred to the Authority was briefly set out in paragraph 2.11 above. The structure and role of the Consultative Committee created under Future Directions to assist with formulation of new references is described in paragraph 5.57.

8.110 The Committee considered proposals to reform the process of granting references to the Authority. Submissions and evidence identified two principal issues:

. the Authority's reliance upon references to conduct special investigations; and

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598. In its Annual Report for 1989-90, pp. 23-24 the Authority stated:

> The special powers conferred by the issue of a reference are not always necessary, particularly in the early stages of investigation, and the Authority does not seek a reference unless the special powers are clearly needed.

. the actual framing, or terms, of the references granted to the Authority.

Political Interference with References

8.111 One of the concerns raised in the debates surrounding the creation of the Authority and during the Committee's evaluation was that the Authority might be subject to political interference through the operation of the reference system. The perceived lack of independence of the Authority was identified as a cause for concern.[599]

8.112 The Hon. Athol Moffitt CMG, QC was critical of what he perceived as the Authority's lack of independence, which Mr Moffitt contrasted unfavourably with royal commissions:

> Royal commissions had proved to be politically unpredictable and, sitting in public, at times caused damage to political parties. The structure of the Authority conveniently minimises the chance of this happening. The wide powers of the Authority, similar to those of royal commissions can only be used to investigate subjects authorised and precisely defined by the political party or parties in government.[600]

8.113 Mr Moffitt argued that it is generally accepted that agencies dealing with organised crime and corruption needed to have wide discretion, a fair degree of independence from political direction and that the public needed to be kept informed of the agencies'

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599. Under the NCA Act, the Authority is unable to independently initiate its own special investigations. In 1984, the Senate Standing Committee on Constitutional and Legal Affairs raised the potential for political interference in the Authority's work where a reference might be withdrawn for political reasons. See *The National Crime Authority Bill 1983*, Canberra, AGPS, 1984, paras. 4.16-4.17.

600. Evidence, p. 762. Mr Moffitt also identified the 'extreme provisions designed to ensure absolute secrecy' as another problem in this regard: Evidence, p. 762.

activities.[601]

8.114 Mr Moffitt observed that an individual State, unlike the Commonwealth, could not initiate an inquiry. An individual State must secure the approval of three others first. Mr Moffitt argued that this could lead to problems where a single party was in government at both Federal and State levels.[602]

8.115 Mr Moffitt's submission also proposed that during the course of a special investigation the Authority should not be limited by the specific terms of the reference. He said that the Authority should be free to determine its own special investigations and 'exercise its compulsive powers on subjects of its own choosing, definition and redefinition... '.[603]

8.116 The submission from the South Australian Council for Civil Liberties also considered that the Authority's reliance on the IGC to grant or approve references seriously undermined the Authority's independence. Consequently, there existed a potential for political interference in the conduct of the Authority's investigations. The submission asserted that the Authority must be free to determine its own investigations so that its integrity can be protected.[604]

8.117 Dr Perry, Vice-President of the South Australian Council for Civil Liberties told the Committee:

> The issue of the NCA's independence arises also in the context of the existing Act, under which the NCA does not have the authority to independently undertake investigations. It may act only where reference is made by the Commonwealth or by a State with the approval of

601. Evidence, p. 762. The issue of accountability, including public accountability, is dealt with in chapter 7 of this report.

602. Submission, p. 22.

603. Evidence, p. 763.

604. p. 3.

> the Inter-Governmental Committee. This situation largely ensures that a matter which is politically embarrassing to a Commonwealth or State government may well not become a matter of NCA inquiry if a political party controls the majority of the relevant governments. The NCA must be free of this restriction on its independence and must be able to initiate investigations without the necessity for governmental references, as is the position in which the Independent Commission Against Crime operates. Otherwise its integrity will be consistently called into question and its operations will be an attractive target for partisan politics.[605]

8.118 Mr Frank Costigan QC's submission to the Initial Evaluation in 1988 argued that a structural problem flowed from the NCA Act's requirement to identify in advance of an investigation both the relevant criminal activity **and** the relevant offence. It was seriously restrictive, Mr Costigan asserted, for the IGC to know in advance what criminal activity or relevant offence it wants the Authority to investigate under its special powers before the IGC gives the Authority a reference.[606]

8.119 In his 1988 submission, Mr Costigan also argued that under the NCA Act, the IGC was unable to give the Authority references of sufficient width:

> It is not particularly useful to ask the Crime Authority to investigate whether Mr X has indulged in breaches of foreign exchange regulations or the Income Tax Assessment Act when a proper understanding of his activities will flow only from a general consideration of the area. Likewise, as Tony Fitzgerald has shown, an enquiry with broad terms of reference can certainly travel along unsuspected routes and can produce an overall picture

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605. Evidence, p. 935.

606. Evidence, p. 435s (1988 submission, p. 5).

> of institutional and public corruption which is not available to a body shackled by specific references.[607]

8.120 The NCA Act needed to be amended so that the Authority could seek, or be granted, references of a general nature in areas of criminal activity and not limit that search to known persons.[608]

8.121 In November 1990 Mr Costigan told the Committee:

> The fact is that if you are doing an investigation, you do not really know at the beginning of the investigation what the end is going to be and you get half-way down the track and you find that there is a bypath going off which suddenly becomes of immense interest because with your experience you realise that something very odd is happening and you decide to go down that path. I think the Authority ought to be free to do that any time provided it then reports back to this Committee what it is doing.[609]

8.122 One proposal put to the Committee by the Police Federation of Australia and New Zealand was to place a definition in the NCA Act of criminal or criminal organisation. Once the existence of a criminal or criminal organisation was ascertained, then the Authority could use its coercive powers to assist law enforcement agencies to prosecute.[610]

Political Interference : The Authority's View

8.123 The Committee notes that the Authority has rejected claims that it is subject to political interference. In a Public Bulletin issued on March 2 1990 the Authority stated:

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607. Evidence, p. 435t (1988 submission, p. 6).

608. Evidence, p. 435v (1988 submission, p. 8).

609. Evidence, p. 426.

610. Evidence, pp. 515-16.

> The Authority rejects any suggestion that it is subject to political control. There is a distinct difference between the exercise of ministerial and Parliamentary responsibil-ity for the Authority's work and 'political control'.
>
> While ministers can refer a matter to the NCA, it has been almost invariably the case that the NCA has exercised its right to seek references from State and Federal governments. Similarly the Authority made it clear in September 1984 that it would make public any attempt to thwart proper investigation by vetoing proposed references. It has never been necessary to take this step.[611]

8.124 The Committee notes, however, that Justice Phillips has criticised the Authority's past investigation involving allegations concerning the South Australian Attorney-General, the Hon. C.J. Sumner MP. Although Justice Phillips said the inquiry was worthwhile because 'such claims against a State's most senior law officer had to be investigated', the inquiry should have been done by a temporary body set up specifically for that purpose, such as a royal commission.[612]

8.125 Justice Phillips described the Authority's involvement in the inquiry as 'quite inappropriate' and: 'It was an inquiry that led to the NCA becoming a political football and there will be no more inquiries like that while I'm Chairman'.[613]

8.126 On the question of using of someone using the Authority to improperly inflict damage on someone's political career, Justice

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611. NCA, *Annual Report 1989-90*, p. 96.

612. Interview with Pilita Clark, *Sydney Morning Herald*, 30 March 1991.

613. ibid.

Phillips said that person would be 'shown the door'.[614] Although Justice Phillips conceded that the Authority Chairman did not have the right to veto references he did have the 'right of persuasion'.[615]

Political Interference : The Committee's View

8.127 The Committee has found no evidence of any political interference, either by the IGC or the Commonwealth Minister. The Committee notes that all references sought by the Authority have been granted.[616]

8.128 The Committee considers that the establishment of the Consultative Committee and its Secretariat further reduces any potential for inappropriate political interference in the granting of references and conduct of references.

8.129 The Committee notes the distinction between the views of the Hon. Athol Moffitt CMG, QC and Mr Frank Costigan QC. The conclusion reached by Mr Moffitt concentrated on the potential for political interference in the reference system. Mr Costigan, however, reached a different conclusion. Mr Costigan argued that the Authority's investigations would be more effective if it were able to independently define references.

8.130 Both views, the Committee notes, oppose the existing process requiring the Authority to seek or be granted a reference before initiating a special investigation. The most important consequence of permitting the Authority to independently determine references would be the removal of the existing restrictions on the use of special powers.

8.131 The Hon. Justice Frank Vincent told the Committee that he was opposed to the Authority possessing the ability to

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614. ibid.

615. ibid.

616. NCA, *Annual Report 1989-90*, p. 6. The 12th reference, concerning money laundering has since been granted to the Authority.

independently exercise its special powers. His Honour said these special powers should only be available on referral.[617]

8.132 The Committee agrees with this view and notes that the Authority was never intended to have unrestricted access to special powers. By making them available only in the course of a special investigation, reliant upon a reference, an important safeguard is maintained.[618] The Committee further stresses that the Authority's special powers are unique in law enforcement. These powers must therefore be exercised responsibly and subjected to adequate accountability. To grant the Authority the discretion to define its own special investigations would remove existing restrictions and mechanisms of accountability. The Committee rejects any suggestion that the Authority be permitted to independently initiate special references.

The Terms of References Granted to the Authority

8.133 The Committee recognises that the framing and contents of a reference may have a decisive effect upon the subsequent investigation. The terms of the reference must, therefore, be accurate and appropriate, so that the investigation's potential for success is maximised.

8.134 Mr R.E. Dixon, a former senior officer in the Australian Federal Police, contended that it was not possible to adequately evaluate the NCA against references granted which were inadequate, wrongly framed, or incorrectly identified. A consequence of these shortcomings was that the Authority's efficient operation

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617. Evidence, pp. 379-80. See further the views expressed by Mr Henry Rogers, Evidence, p. 399.

618. The Senate Standing Committee on Constitutional and Legal Affairs stated in 1984: 'However, the Committee cautions that coercive powers should only be exercisable against persons in those cases where a term of reference has been granted to the Authority with the concurrence of the Inter-Governmental Committee': *Report on the National Crime Authority Bill 1983*, AGPS, Canberra, 1984, para. 5.2.

was impaired.[619] Mr Dixon asserted: 'It is my view that those general and unspecific references which the NCA has been given militate against the efficiency of the NCA's operations and public support of the organisation'.[620]

8.135 The Committee heard other evidence opposed to wide or general references being granted to the Authority. On 3 July 1990, Commissioner McAulay of the Australian Federal Police criticised the references that were too widely drafted. Mr McAulay referred to a confidential operation where duplication and tensions between the Authority and other agencies had resulted from such a reference.[621]

8.136 The Police Federation of Australia and New Zealand submission observed: 'If a reference system is to be retained, it needs to be reworked into specific targets rather than their currently extremely wide form'.[622]

8.137 In response to a written question from the Committee, the Authority conceded that the wording of references issued by the IGC to the Authority had been a matter of 'considerable discussion and debate, mainly between legal advisers'.[623] The Authority also acknowledged that it was difficult to state with certainty whether the terms of a particular reference had struck the right balance between too broad or too narrow terms of reference. The application

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619. Submission, p. 1.

620. Submission, p. 1. Mr Dixon's submission also contained specific criticisms of certain types of references including those that were 'open investigations' into ethnic groups involvement in organised crime or 'types of crimes' which were too wide: submission, p. 2.

621. Meeting between the Committee and Mr McAulay, 3 July 1990, transcript, pp. 64-65; p. 73.

622. p. 4. The submission, p. 9 identified operation Iliad, passed to the NCA by the AFP, and said 'They [the Authority] have abused the reference and operated it purely as a mechanism for getting results, the type of results that the Authority was not set up to do'. Mr R.E. Dixon also identified problems with broadly drafted terms of reference: submission, p. 3.

623. NCA, Written Answers, July 1991, B5.

of time frames was identified as a possible solution to this problem. Earlier references issued to the Authority had perhaps been too broad as they tended to create undue expectations of what the Authority was capable of achieving, given its size. The Authority stated in conclusion: 'Experience since 1984 has enabled the Authority and governments to arrive at a form of words in most instances which strike the appropriate balance between flexibility and limitation'.[624]

8.138 The Committee notes that the shift in focus adopted by Justice Phillips is intended to avoid duplication with the efforts of other agencies. Responding to claims that the Authority's new emphasis on corporate/white collar crime would merely compete with existing police task forces and the ASC, Justice Phillips has said that the new structure of defining and identifying references was designed: 'to prevent duplication of effort, to inform everyone of what the others are doing and to stop the sort of territoriality problems which have occurred in the past'.[625]

Committee Conclusion : Terms of Reference

8.139 The Committee considers that Justice Phillips' reforms to the formulation of references go some way towards ensuring that future references will be appropriate and well defined. The Committee supports the establishment of a Consultative Committee and Secretariat. The Committee considers it is important that future references will be framed in terms that have support both from governments and law enforcement agencies. The direct involvement of law enforcement agencies in the identification and framing of possible inquiries must optimise support for the Authority's future investigations.

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624. NCA, Written Answers, July 1991, B5. The Committee notes that the Authority submission stated (p. 39) that the Authority had received a number of conflicting legal opinions concerning the validity of references and that some uncertainty remained in this regard. The submission stated that the Authority was considering seeking an amendment to subsections 13(2) and 14(2) to clarify this issue.

625. *The Age*, August 30, 1991.

SECTION THREE : AUTHORITY MEMBERSHIP AND STAFFING

The Position of Chairman

8.140 Mr O'Gorman told the Committee that the Queensland Council of Civil Liberties was opposed to the appointment of judges to the Authority. Mr O'Gorman's view was that the appointment of a judge allowed the Authority to escape deserved criticism because people were reluctant to criticise a judge.[626] The appointment of judges was also criticised by Mr Frank Costigan QC, Mr Barry O'Keefe QC, President of the NSW Bar Association, and Mr Ron Merkel QC, President of the Victorian Council for Civil Liberties.[627]

8.141 Justice Phillips told the Committee:

> If I may say so, the people advancing the view that it was inappropriate for a judge to hold my office did so without understanding just what it is I do and, perhaps more importantly, just what it is I do not do. I do not conduct hearings; I do not even issue any process under the National Crime Authority Act; nor am I directly involved in investigations. My role is one of policy formulation and administration. I believe I have been able to, I hope, scrupulously avoid any involvement in judicial conduct of the orthodox kind during my appointment. The fact is that the National Crime Authority Act specifically makes provision for a judge to be appointed. It is something that Parliament has considered and made a judgement upon.[628]

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626. Evidence, pp. 546-47.

627. See Evidence, p. 1349; p. 686; pp. 1414-15. See also the personal view of Mr Short, President of the Queensland Law Society, Evidence, p. 587.

628. Evidence, p. 1687.

8.142 In 1984, the Senate Standing Committee on Constitutional and Legal Affairs supported the appointment of a judge to preside over the Authority.[629] The Committee currently supports this view. The Committee also supports the existing requirement contained in subsection 7(9) of the NCA Act:

> A person shall not be appointed as Chairman unless: (a) he is or has been a Judge; or (b) he is enrolled as a legal practitioner, and has been so enrolled for not less than five years.

However, the Committee **RECOMMENDS that at an appropriate time in the future the appointment of Authority Chairman be formally reviewed.**

Judicial Appointments by the Authority to Conduct Inquiries

8.143 The Police Federation of Australia and New Zealand proposed that the Authority be allowed to appoint a judge to inquire into a specific reference, such as a particular public interest crime. The appointee would then be able to use the special powers of the Authority.[630]

8.144 The Committee does not support this proposal. Such an amendment would allow the Authority to independently set up ad-hoc inquiries of a quasi-judicial nature. The Committee considers this to be inconsistent with role designed for the Authority under the NCA Act.

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629. *Report on the National Crime Authority Bill 1983*, AGPS, Canberra, 1984, paras. 7.1-7.3.

630. The Police Federation of Australia and New Zealand submission, pp. 8-9 recommended that a new subsection 7(11) be drafted and amendments made to section 25 to include 'appointed judge'. For examples of powers under Part II, Division Three of the NCA Act, see subsections 39A and 45(5).

The Role of Lawyers in the Authority

8.145 The Committee considered criticisms that Authority investigations had relied too heavily on lawyers and that there was a corresponding need to give police a greater role in the Authority.

8.146 Mr Hunt, the South Australia Police Commissioner, observed: 'It is my impression that the management of investigations by solicitors at the operational level suffers due to a lack of management skills and experience especially as applied to an investigation'.[631] Mr Hunt proposed that experienced investigators be given the management of investigations.[632]

8.147 Mr Robert McAllan, a Detective Superintendent in the Victorian Police, stated: 'An investigation directed by a lawyer or an accountant is probably doomed'.[633] Although Mr McAllan supported the concept of multi-disciplinary investigations he saw the role of non-investigators, including lawyers and accountants, confined to a support role.[634]

8.148 The Committee notes that the submission from Mr Michael Holmes disagreed with view of Commissioner Hunt. Mr Holmes did not accept that lawyers involved were inexperienced in investigative work or that they made errors of judgement. Mr Holmes also disputed the view that only police were capable investigators.[635]

8.149 Although the 1988 Initial Evaluation supported a multi-disciplinary approach to investigations, it also considered criticisms

631. Submission, p. 3.

632. Submission, p. 3. See also Evidence, p. 960. Mr Robert McAllan's submission, pp. 7-8 outlined the requirements of investigations and concluded with the observation that 'lawyers should practise the law, ... and investigators should investigate'.

633. Submission, p. 8.

634. ibid., p. 9.

635. Submission, p. 20.

of lawyers acting as team leaders.[636] The *Initial Evaluation* stated:

> The Committee recommends that in the management of its investigative teams the Authority give greater recognition to the expertise of experienced police officers and ensure that they have a greater involvement in the relevant investigations.[637]

8.150 The Committee notes that the *Initial Evaluation* recommendation was not based upon a conclusion that lawyers were either unable to manage or contribute effectively to investigations. The *Initial Evaluation* found that the cause of difficulties lay elsewhere. The *Initial Evaluation* concluded that there was a need for greater consultation with police investigators in the management of investigations.[638]

8.151 The Committee supports the need for effective consultation with police in managing Authority investigations. The Committee notes that under Future Directions the Authority intends increasing its emphasis upon co-operation and co-ordination with police services and other law enforcement agencies.[639]

8.152 The Committee further considers that the processes implemented by Justice Phillips address past concerns that the Authority had failed to utilise the investigatory skills of police.

8.153 Justice Phillips has stressed the Authority's use of multi-agency task forces that use the skills of several disciplines in investigations. These include police, the Authority, accountants and representatives from relevant bodies such as the Australian

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636. para. 4.13.

637. para. 4.15.

638. para. 4.14.

639. Note the greater role of senior police in the Consultative Committee and Secretariat established under Future Directions. See Future Directions, pp. 1-3; see Evidence, pp. 1650-54.

Securities Commission and the Cash Transaction Reports Agency.[640] The Committee recognises the established value of multi-disciplinary approaches to investigation. The Committee notes Mr Holmes observation: 'The multi-disciplinary approach to investigations, where lawyers lead and co-ordinate investigations is utilized in the United States of America, Europe, and in England through the Serious Fraud Office'.[641]

8.154 The Committee, however, also recognises the importance of maintaining flexibility in managing multi-disciplinary, multi-agency investigations. The Committee notes the view of Justice Phillips that:

> In some States and Territories the task forces might be quite small; in others a larger group would be required. A leader might be a police officer, an NCA staff member, an ASC staff member or any other person deemed appropriate.[642]

8.155 The Committee supports this position. The Committee considers that it would be unduly restrictive to limit either team leadership or participation to one discipline, whether it be police, legal or financial.

Police as Members of the Authority

8.156 It was recommended to the Committee that the NCA Act be amended to allow the appointment of a police officer as an Authority Member. The Police Federation of Australia and New Zealand submission suggested that subsection 7(2) of the NCA Act be amended to include a retired or serving police officer.[643] The inclusion of a senior police officer in the Authority's membership was

640. Evidence, pp. 1652-53.

641. Submission, p. 20.

642. Future Directions, pp. 4-5.

643. p. 3; p. 8.

supported by Mr Horman, Commissioner of the Tasmania Police.[644] Commissioner Hunt also supported a greater role for senior police at the executive level.[645]

8.157 The *Initial Evaluation* stated: 'The Committee recommends that consideration be given to the appointment of a senior and respected serving or former police officer as a member of the Authority'.[646] The *Initial Evaluation* concluded that this would 'assure' police that someone was representing their views at the 'highest levels' in the Authority.[647]

8.158 The Committee restates it support for this view. The Committee **RECOMMENDS that consideration be given to appointing a senior police officer, either serving or retired, as a Member of the Authority.**

Director of Investigations

8.159 The Tasmania Police Force submission proposed that the current tenure provisions for the Director of Investigations should be changed from one year to three years. The submission also suggested that the future incumbent of this position should be a Deputy or Assistant Commissioner of substantive rank.[648]

8.160 The Committee notes that the Authority has already accepted this proposal. In March 1991 Mr Bill Horman, the Tasmania Police Commissioner, was appointed to the renamed position of Director of Criminal Justice and Investigations for a period of four years.

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644. Mr Horman suggested that this membership should be for a non-hearing purpose: submission, p. 2.

645. Mr Hunt described the Authority's decision to select Mr William Horman to work with the Authority as a step in the right direction: Evidence, p. 961.

646. para. 4.17.

647. para. 4.16.

648. p. 2.

The Authority's Employment of Investigators

8.161 The submission from Mr Michael Holmes proposed that the Authority be permitted to employ its own investigators. Mr Holmes stated: 'It is essential that the Authority maintain a strong independent investigative arm with seconded police and supplemented with its own investigative staff'.[649]

8.162 Justice Phillips told the Committee he had found no evidence to support a view that the loyalty of police seconded to the Authority remained with their home force. Justice Phillips rejected the suggestion that the Authority should employ its own investigators.[650] The Committee also rejects that the Authority be allowed to employ its own investigators.

Proposed Amendments to Subsection 12(4)

8.163 The submission from Mr Michael Holmes proposed that Authority staff should be granted the power to carry out arrests. Mr Holmes further argued that subsection 12(4) of the NCA Act be amended to allow non-police members of the Authority staff the same powers of investigation as police.[651]

8.164 The Committee rejects this proposal. To grant such powers to Authority staff would create a 'police' role for the Authority. This was not the intention under the NCA Act and is a role rejected by Justice Phillips and the Authority.[652]

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649. Submission, p. 9. Mr Holmes argued that police on secondment to the Authority had 'divided loyalties' and that the Authority would be better off with its own investigators with powers of investigation and arrest: submission, pp. 21-22.

650. Justice Phillips stated on this point 'All my experience has been to the contrary': Evidence, p. 1683.

651. Submission, p. 27.

652. Evidence, p. 1668. See also NCA submission, p. 42 and Future Directions, p. 1.

8.165 The Committee notes, however, the Authority's statement that subsection 12(4) does not effectively restrict the staff of the Authority in the way intended by Parliament.[653] The Authority referred to the South Australian Supreme Court decision in R v Carbone which considered the effect of subsection 12(4).[654] The case concerned two NSW Police Officers on secondment to the Authority. During an Authority investigation conducted in South Australia the officers questioned the appellant. On appeal it was argued that the officers had contravened 12(4) of the NCA Act. In considering the effect of section 12, the Chief Justice observed:

> It is not easy to understand the intention of those subsections. They appear to have been drafted upon the assumption that a police officer derives some power to interview persons from his capacity as a police officer. That, of course, is not so in South Australia nor, as far as I am aware, elsewhere in the country.[655]

8.166 The Committee **RECOMMENDS that the Attorney-General's Department consider the effect of section 12 of the NCA Act and address any ambiguities that may exist in subsection 12(4).**

Special Constables

8.167 Under the NCA Act the Authority can use the services of personnel seconded from Commonwealth, State and Territory bodies and law enforcement agencies.[656] The Authority noted:

> Because of the NCA's unique national jurisdiction, problems have continually arisen when NCA investi-

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653. Submission, p. 38.

654. (1989) 50 *South Australian State Reports* 495-502.

655. ibid., p. 499.

656. See sections 49 and 58 of the NCA Act.

> gators (that is, its seconded police officers) have been required to conduct investigations in other than their home State or the State in which they have been attached to the NCA.[657]

8.168 The Authority submission identified certain problems it had experienced in appointing Special Constables from State forces to the Australian Federal Police.[658] Because it was expected to effectively investigate relevant criminal activity at the national level, the Authority argued for reforms in this area.

8.169 The Authority submission noted certain difficulties would arise for any proposal for a full scale appointment of special constables in State and Commonwealth jurisdictions; different requirements for their appointments; the need for some if not all jurisdictions for personal appearance before each of the Police Commissioners; varying degrees of co-operation from each of the States and the Australian Federal Police; and the need to avoid disciplinary problems.[659]

8.170 The Authority stated that:

> More modest alternatives, such as the appointment of special constables as and when required or the appointment of a number of special constables when a matter is referred to the NCA, have the advantage of being more practical, but suffer from being only partial solutions to the underlying problem.[660]

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657. Submission, p. 41. In the latter situation they are usually sworn in as Special Constables under relevant Commonwealth and State laws. A Special Constable enjoys the same powers, authorities, advantages and immunities as a duly appointed constable by virtue of the common law or legislation.

658. p. 42.

659. p. 42.

660. NCA submission, p. 42.

8.171 Mr Graham Sinclair, Assistant Commissioner of Victoria Police, suggested that relevant legislation be amended to allow officers seconded to the Authority the same powers as members of the Australian Federal Police. Mr Sinclair told the Committee:

> if we sent police officers interstate they were really tourists, in the sense that they had no power in that State. Quite often, in order to execute warrants under Federal legislation, we would have to send a member of the AFP with the team. It may be that there was no AFP member who was part of the original investigating team.[661]

8.172 Mr Sinclair said that he was not aware of any operation that had been jeopardised because of this. Mr Sinclair did, however, indicate that a risk of an Authority operation being jeopardised existed.[662] Mr Sinclair said the situation had caused 'extremely difficult management problems' within both the Authority and the police component.[663]

8.173 The Committee notes that the Authority has not proposed a definite resolution to this problem. The Authority's submission stated:

> The NCA wishes to make it clear, however, that it has not at this stage given sufficient consideration to these matters to make recommendations on the wisdom or otherwise of such changes. Obviously, either change would require a great deal of thought and consultation, and while solving some problems, would create others

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661. Evidence, pp. 1263-64.

662. Evidence, p. 1265.

663. Mr Sinclair said that in the Melbourne Office of the Authority there had been a constant need to juggle AFP investigators so that Commonwealth related warrants could be executed by the various investigation teams: Evidence, p. 1264. See also Evidence, pp. 1265-66.

(not the least of which would be financial).[664]

8.174 The Committee does not support any changes to the current arrangements governing the secondment of police personnel to the Authority.

E.J. Lindsay, RFD, MP
Chairman

664. p. 42.

LIST OF RECOMMENDATIONS

The Committee recommends:

1. that the re-allocation of resources required by police forces to compensate for the Authority's changed emphasis be given urgent attention. (para. 5.16)

2. that there be continuing review of the potential for duplication of intelligence functions between the Authority, the Australian Federal Police and the Australian Bureau of Criminal Intelligence. (para. 5.51)

3. that the Inspector-General of Intelligence and Security be given jurisdiction to investigate complaints against the Authority, its staff and those seconded to work for it. (para. 6.77)

4. that the Attorney-General's Department, in consultation with the Privacy Commissioner, develop specific privacy guidelines to cover the Authority's activities. (para. 6.92)

5. (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
   (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. (para. 7.29)

6. 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. (para. 7.37)

7. 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 expressly apply to all forms of disclosure, not just disclosure in reports to the Parliament; and

   (b) that the Bill should expressly 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. (para. 7.56)

8. that the NCA Act be amended so as to confer a discretion on an Authority member to hold investigative hearings in public. (para. 7.111)

9. that at an appropriate time in the future the appointment of Authority Chairman be formally reviewed. (para. 8.142)

10. that consideration be given to appointing a senior police officer, either serving or retired, as a Member of the Authority. (para. 8.158)

11. that the Attorney-General's Department consider the effect of section 12 of the NCA Act and address any ambiguities that may exist in subsection 12(4). (para. 8.166)

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 if 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

DISSENTING REPORT BY SENATOR SID SPINDLER

SECRECY PROVISIONS

While in general agreement with the conclusions of the majority's Report, I have serious reservations about aspects of the recommendations proposing amendments to the secrecy provisions of the National Crime Authority Act.

The Parliamentary Joint Committee on the National Crime Authority is charged by the NCA Act with the duty 'to monitor and to review the performance by the Authority of its functions' and 'to report to both Houses of the Parliament ...'.[665]

Ever since its inception the Committee has been confronted with interpretations of s.55(2)(a), s.55(2)(b) and s.51 of the NCA Act which have limited the NCA's provision of information to the Committee to an extent which must cast doubt on the Committee's capacity to carry out its supervisory duties.

High-level legal opinions obtained by the Committee differ on whether the relevant sections do in fact place these legal constraints on the information flow to the Committee.[666] It is common ground among those who gave evidence to the Committee on the issue that amendments are desirable to put the matter beyond doubt and to ensure that the Committee has access to the information it needs to fulfil its functions.[667]

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665. NCA Act, s.55(1)(a) and (b).

666. See the majority's Report, para. 7.6 for a list of the opinions.

667. See the quotations and references in paras. 7.7 and 7.8 of the majority's Report.

Section 55 of the NCA Act

I share the general agreement among Committee members on the amendments proposed to s. 55(2)(b) to ensure that the understandable prohibition on investigating criminal activity or reconsidering the NCA's findings does not prevent the Committee from examining matters related to the NCA's investigations of a criminal activity or the way in which investigations are handled by the NCA.[668]

Section 51 of the NCA Act

The majority Report adopts as its preferred option an amendment which provides the Committee with unrestricted access to information from the NCA.[669] As well, the Committee accepts the need for restrictions on the disclosure of certain types of information by the Committee or its members, in Parliament or otherwise. The Committee adopts the criteria for identifying such sensitive information set out in my Private Senator's Bill;[670] that is, information which, if disclosed, would:

a) identify persons in a manner which would be prejudicial to the safety or legal rights of those persons;

b) prejudice legal proceedings, whether or not those proceedings have commenced; or

c) disclose the operational methods of the Authority in a manner prejudicial to the operations of the Authority.

The majority and I agree that an arbiter should resolve any dispute between the Committee and the Authority on whether a certain item

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668. See para. 7.29 of the majority's Report.

669. Majority Report, para. 7.37.

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

of information falls within one or more of these categories. We differ as to who the arbiter should be. My Bill provides that a Judge of the Federal Court acting as a private arbiter (i.e. not as a judge of the Court) should determine whether or not a certain item of information held by the Committee falls within one the categories. The majority Report recommends (in part (c) of the recommendation in paragraph 7.56) that the Commonwealth Minister having portfolio responsibility for the Authority (at present the Attorney-General) be empowered to act as arbiter.

I dissent from part (c) of the recommendation in paragraph 7.56 of the majority Report.

I find the notion of the Attorney General (or any other Minister) acting as arbiter unacceptable, since the autonomy of the Committee in discharging its duty to report to Parliament could be severely limited by the political considerations which the majority Report admits (in paragraph 7.55) would enter into the decisions the Minister makes. In my view, the Committee should be limited in the information it may disclose only on the basis of the three categories set out in my Bill. To allow a Minister to determine on political grounds whether or not an item of information can be disclosed adds in effect a fourth category: 'information which is politically sensitive'.

To provide such an option for the Government of the day is contrary to the purpose of the Committee as an all-party general supervisory body as well as an avenue of redress for people who consider that they have been adversely affected by the exercise of the NCA's far-reaching powers.

This avenue of redress is given effective expression by the Committee's obligation to report directly to Parliament. To interpose a Minister's political judgement diminishes the Committee's function both to supervise the NCA's general performance and to act as a guardian of citizens' civil liberties.

The need for a non-political arbiter is not diminished by the majority's recommendation that the Inspector-General of Intelligence and Security have a role in resolving individual

complaints against the Authority.[671] I agree with this recommendation and do not see its implementation as diminishing the role of the Committee or the need for the Committee to have access to information from the Authority that may be sensitive.

The argument has been raised that the proposal to use a Judge as an arbiter represents an unacceptable limitation on the powers of Parliament and Parliamentarians and thus offends against the principle of separation of powers.[672] This argument might have some merit if it were proposed to give the Federal Court Judge far-reaching discretion.

However, the function proposed is merely the determination of whether a particular fact (i.e. the nature of the information) falls within the definitions legislated by Parliament. This function of interpreting legislation is one of the traditional tasks of the judiciary and hence does not encroach on the powers of Parliament or the principle of separation of powers.

The majority report then proceeds to offer a second option, if the recommended amendment to s.51, the Committee's first choice, is not 'fully acceptable to the Government'.[673]

This option accepts a limitation on the flow of information from the NCA to the Committee. Sensitive information is defined by using the categories set out in my Private Member's Bill. Under the option, the NCA is 'not obliged' to provide such information to the Committee.[674]

I reject this alternative as an unwarranted limitation on the Committee's capacity to discharge its statutory obligations.

The worst aspect of this option is that once again that 'the Common-

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671. Majority Report, para. 6.77.

672. See for example, Evidence, p. 1116 (Mr Peter Beattie); pp. 1389-90 (Victorian Council for Civil Liberties).

673. Majority Report, para. 7.57.

674. Majority Report, para. 7.59.

wealth Minister with portfolio responsibility' is to be the arbiter in any dispute on whether a particular item of information fits within the definition.[675]

It is somewhat difficult to see how a dispute can arise since by definition the Committee is not aware of the nature of the information which is being withheld.

Even if the nature of the information were known in general outline, the Committee's knowledge would obviously not be sufficient to enable it to argue its case in a dispute on which the Minister is to adjudicate.

It has been suggested that the Committee could argue its case in Parliament if it disagreed with the Minister's decision.[676] However, this is even less feasible. The Committee's knowledge would clearly be inadequate to question the decision and if by chance it acquired some knowledge about the information withheld, it would clearly defeat the public policy purpose of the provisions to disclose this information during a parliamentary debate.

In Summary, it is my view:

1. That the Joint Parliamentary Committee on the National Crime Authority must have access to the information it needs to carry out its statutory duties as defined in s.55, amended as proposed in the majority Report;

2. That the Committee and individual Committee members must be obliged by legislation not to disclose information obtained in camera from the NCA which in the opinion of the NCA would, if disclosed -

    a) identify persons in a manner which would be prejudicial to the safety or legal rights of those persons;

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675. Majority Report, para. 7.60.

676. Majority Report, para. 7.55.

b) prejudice legal proceedings, whether or not those proceedings have commenced; or

c) disclose the operational methods of the Authority in a manner prejudicial to the operations of the Authority;

3. That in the event of a dispute between the NCA and the Committee on what the Committee may disclose, a Judge of the Federal Court act as an arbiter to determine whether the information would fall into any of the categories identified; and

4. That, in the event the (unsatisfactory) option is chosen to prevent the Committee from receiving information which falls into the three exemptions, it is desirable that disputes be resolved by a Judge of the Federal Court, acting as a private arbiter, rather than a Minister.

Sid Spindler
Australian Democrats
Senator for Victoria
Spokesperson for Attorney-General and Justice

APPENDIX 1

NATIONAL CRIME AUTHORITY

CHAIRMAN'S PROPOSALS FOR FUTURE DIRECTIONS

A SUBMISSION TO THE
INTER-GOVERNMENTAL COMMITTEE

OVERVIEW

Essentially, I envisage the Authority as a body which should act as a partner to the other law enforcement agencies. It should not be - or appear to be - a competitor. Rather, it should follow the roles of a co-ordinator and an agency offering complementary services to the other agencies. It must not act so as to give rise to it being perceived as a "ninth police force". It should follow an operational mode based on the successful multi-disciplinary task force format - teams composed of police, financial and intelligence advisers and lawyers - and develop that so as to attain expertise in co-ordinating multi-agency task forces. It must give high priority to collection, analysis and dissemination of relevant criminal information and intelligence together with recommendations for relevant law reform.

NEW REFERENCES/INQUIRIES

The Primary Selection Vehicle

I propose as the primary selection vehicle for references/inquiries a Consultative Committee which would become an integral part of the twice yearly Police Commissioners' Conference. This Committee would be advisory in nature and no member of it would have the right of veto. It would be composed of the State/Territory Commissioners of Police; the Commissioner of the Australian Federal Police; the Chairman, National Crime Authority; the Chairman, Australian Securities Commission or his representative and representatives of ABCI and CTRA.

(Representatives of ATO and Customs might attend from time to time upon invitation.) This Committee would be serviced by a Secretariat comprising a representative* from each State and Territory Police service, the AFP, the NCA and the CTRA.

These representatives would be assigned the task of identifying matters which might prove suitable for references/inquiries with NCA involvement. It would meet some six weeks to two months before the relevant Commissioners' Conference and prepare a shortlist of proposed references/inquiries and briefing papers for the consideration of the Consultative Committee. Criteria for the selection of such references/inquiries would include the circumstances that they cross jurisdictional boundaries or reflect offences of a like character being apparently committed in several States or Territories.

In my opinion, the advantages of this vehicle are as follows:

Firstly, being a national body, its composition should help to identify references/inquiries of a national character and thus appropriate for the attention of the NCA. Secondly, its composition should ensure that duplication of effort is avoided. Thirdly, its composition should assist to remove the "territorial" disputes and tensions which have occurred in the past.

References/inquiries would otherwise still come from Governments directly.

CONDUCT OF FUTURE REFERENCES/INQUIRIES

No more "open-ended" references or inquiries will be commenced. In future, references/inquiries will be both focussed and conducted according to time frames. Time frames will apply to both the preliminary work carried out in order to ascertain if the references/inquiries should be undertaken and to the references or investigations themselves. Those responsible for these matters

* In the Police services - at Assistant Commissioner (Crime) level.

will understand that ordinarily failure to complete work in a time frame will result in discontinuance of the matter and a report thereof to the Inter-Governmental Committee. However, if those responsible can demonstrate very exceptional circumstances (the onus being on them to do so) which circumstances would justify a limited extension to a time frame, then such an extension may be granted.

I referred earlier to multi-agency task forces. The NCA already has expertise in this method of operation but it must be developed and refined. It has recently assembled and is co-ordinating another such task force. This will work on an inquiry time-framed for 12 months. Its objective is to investigate whether certain licence fees have been fraudulently avoided and to assemble admissible evidence for the relevant prosecuting authorities. This investigation involves no fewer than four States and two Territories. The NCA hopes to learn from this investigation much which will be of application in others conducted in a like manner.

SPECIFIC PROPOSAL FOR A REFERENCE

I propose that the foreshadowed reference relating to an investigation of the methods of money laundering throughout Australia be approved. This inquiry would be time framed and would concentrate on the methods of money laundering. If particular criminal activity was uncovered in this process it would be handed forthwith to the relevant police service for investigation. This reference would be conducted by all Members other than the Chairman. There would be a need for some interstate travel for the conduct of hearings which would involve all States and Territories. Until the new State Offices are established in Perth (1991) and Brisbane (1992), existing State Offices would have to assume responsibility for other States and Territories.

SERIOUS WHITE COLLAR CORPORATE CRIME

It must be accepted that in the last decade there has not been a single body which was in fact responsible for combating serious white collar corporate crime or perceived by the public to have such a role. That must change. On the other hand, it must also be accepted that effective control of such white collar crime is beyond the capacity of any one agency Commonwealth or State. Because it usually transcends State boundaries, it requires for its control an organisation with a physical presence in all the States and Territories. The Government in this year's budget approved funding of $19 million over three years for NCA Regional Offices in Perth, Adelaide and Brisbane. Although the ASC has regional offices in each State and Territory, it is undertaking at least 16 extremely large corporate investigations. This will place a considerable strain on its investigative effort. The task is, however, within the capacity of a cohesive combination of existing agencies utilising joint task forces; allocation of clearly defined responsibilities and proper supervision and co-ordination. Within this concept I propose that the NCA perform both co-ordinating and participating roles in partnership with the existing agencies.

PROPOSAL

Because the joint task force concept has proved itself in Australia and in many jurisdictions overseas, I propose that in each State and Territory a Serious White Collar Crime Task Force be set up. Essentially, these task forces would be involved in investigations into the sort of activities in the corporate area which have caused so much adverse comment in recent years. Each Task Force would have a designated leader so identified for the public and the business community in each State and Territory. A typical task force would involve a police component (possibly from the State/Territory Fraud Squad); an NCA component; an ASC component; a CTRA component and retained lawyers and accountants as necessary. There is a clear need for flexibility. In some States and Territories the task forces might be quite small; in

others a larger group would be required. A leader might be a police officer, an NCA staff member, an ASC staff member or any other person deemed appropriate. As it is inevitable that their inquiries will transcend jurisdictional boundaries and as a national effort is required, I would propose that these task forces be co-ordinated and supervised by a small and cohesive group. This group would comprise the Chairman of the NCA; Commonwealth DPP; Chairman of the ASC or his nominee; Commissioner, AFP, and by rotation (perhaps each 12 months) a State/Territory Commissioner. This co-ordination group would, in turn, report to the IGC. If liaison with the Standing Committee of the Attorneys-General be needed, the Chairman of the IGC could perform this function.

If these proposals are implemented, a substantial reduction in direct drug-related references/inquiries will ensue. In those such references that continue, the NCA will perform a specialised role with emphasis on co-ordination and provision of complementary services to other agencies. Thus, there will be a change of direction from the earlier years of the Authority when the great expertise of a previous Chairman led to a degree of concentration on drug-related matters.

PROPOSAL FOR OTHER "PARTNERSHIP" ACTIVITIES

1) I propose that the NCA organise and provide a venue for an Annual Intelligence Dissemination and Operational Debriefing Conference to be attended by representatives of all the Police services, NCA, ASC, ATO, Customs, CTRA and ABCI.

   Representation from the Police services should include representatives from their intelligence sections. The Conference would have two components:

   (a) Intelligence Dissemination

   I envisage this component as providing a forum for a full and frank exchange of intelligence. I declare the Authority

to be fully committed to such an exchange.

6.

(b) Operational Debriefing

At this component the following questions would be posed. "With respect to operations against organised crime in the last 12 months - what went right? Why? What went wrong? Why?" The NCA would be responsible for the collation and distribution to the constituent agencies of material emerging from the Conference.

This conference should provide the basis for the Authority to provide a national overview of organised crime and to discharge its operational law reform role.

2) I propose that the NCA organise and provide a venue for an Annual Conference on a Criminal Justice Theme. From early 1992, over a dozen extremely large white collar prosecutions are likely to be commenced in superior courts before juries. Irrespective of whether convictions or acquittals result, the public will demand that the prosecutions are, and are seen to be, fairly and competently conducted. I propose a conference for July 1991: "The Presentation of Complex Corporate Prosecutions to Juries". (Date now fixed 22-24 July 1991). Mr Mark Weinberg QC, Commonwealth Director of Public Prosecutions, will be the opening keynote speaker. Other speakers will include Mr Allan Green QC, the English Director of Public Prosecutions, and Ms Barbara Mills QC, Director of the English Serious Fraud Office.

The Conference will be public and held at the Commonwealth court Complex, 9th Floor, 10 Queens Road, South Melbourne. It is intended that a courtroom appropriate for the 1990s will be designed and set up at that site. It will include the most advanced technology available. This Conference will be open to the media.

CURRENT REFERENCES/INQUIRIES

A review is already being conducted to identify non-viable references/inquiries.

7.

The resolution of the Inter-Governmental Committee on 9 March 1990 will be utilized. This resolution noted "... the current practice of the Authority to cease or scale down inquiries at what it considers is the appropriate point".

I commend these proposals to the Committee.

Mr Justice J.H. Phillips

15 November 1990

APPENDIX 3

Individuals and Organisations Who Made Written Submissions to the Committee

Mr J D Alford
Australian Civil Liberties Union
Australian Customs Service
Australian Federal Police Association
Australian Public Sector and Broadcasting Union
Mr D Berthelsen and Mr M Skrijel
Mr Michael Cashman
Mr Paul Delianis
Mr R E Dixon
Mr Warren Dowsett
Mr Mark Findlay
Prof. R W Harding
Mr Michael Holmes
Commissioner D A Hunt, South Australia Police
Inter-Governmental Committee on the National Crime Authority
Mr M J Kerr, MP
Mr Arthur King
Law Council of Australia
Law Institute of Victoria
Law Society of New South Wales
Mr Robert C McAllan
Mr Malcolm Mackellar
Mr Daribor S Maroevic
The Hon. A R Moffitt, CMG, QC
Mr Max Mueller
National Crime Authority

New South Wales Bar Association
New South Wales Council for Civil Liberties
North Belconnen Baptist Church (The Justice Group)
The Hon. Andrew Peacock, MP
Peoples' Law Options (Keneth Tang)
Police Association of South Australia
Police Federation of Australia and New Zealand
Queensland Law Society Inc
Mr R F Redlich, QC
Mr Thomas Roberts
Mr Henry A Rogers
South Australian Council for Civil Liberties
M J Stoessiger
Tasmania Police
Mr Ian Temby QC
Victorian Council for Civil Liberties
Victorian Human Rights Committee
Western Australia Police Department

Some of the above made more than one submission. In addition, the Committee received seven submissions which remain confidential.

APPENDIX 4

WITNESSES WHO APPEARED AT PUBLIC HEARINGS

MELBOURNE, 5 NOVEMBER 1990
Corns, Mr Christopher
Costigan, Mr Francis, QC
Rogers, Mr Henry Allen
Victorian Council for Civil Liberties
    Mr Ronald Merkel QC, President
    Mr Brian Andrew Keon-Cohen, Vice-President
    Mr Tony Pagone, Secretary
Vincent, Justice Frank

BRISBANE, 21 NOVEMBER 1990
Police Federation of Australia and New Zealand
    Mr Christopher John Eaton, Affiliate Member
    Mr Patrick David Law, Affiliate Member
    Mr Thomas Joseph Mahon, Affiliate Member
Queensland Council of Civil Liberties
    Mr Terence Patrick O'Gorman, President
Queensland Law Society
    Mr Peter John Short, President

SYDNEY, 30 JANUARY 1991
Foley, Mr Michael David
Hatton, Mr John Edward, MP
McClellan, Mr Peter David, QC
New South Wales Bar Association
    Mr Barry Stanley O'Keefe QC, President
Partridge, Mr Bruce Leonard
Police Association of New South Wales
    Mr Geoffrey Richard Green, Legal Secretary
    Mr Lloyd William Taylor, Secretary

SYDNEY, 31 JANUARY 1991
Cashman, Mr Michael Anthony,
King, Mr Arthur

Law Society of New South Wales
Mr John Robert Marsden, Vice-President
Moffitt, Hon. Athol CMG, QC
New South Wales Council for Civil Liberties
Ms Beverley Schurr, Committee Member

ADELAIDE, 4 FEBRUARY 1991
Griffin, Hon. Kenneth Trevor, MP
Mr Andrew Male
Police Association of South Australia
Mr Peter John Alexander, President
Mr Rodney Piers (Sam) Bass, Secretary
South Australia Police Department
Commissioner David Alexander Hunt
South Australian Council for Civil Liberties
Dr Allan Perry, Vice-President

CANBERRA, 22 FEBRUARY 1991
Australian Federal Police Association
Mr Jeff Brown, National Secretary
Mr Christopher John Eaton, National Executive Officer
Bar Association of Queensland
Mr Gary William Crooke QC, President
Independent Commission Against Corruption, Joint Parliamentary Committee on
Mr Malcolm Kerr MP, Chairman
Law Council of Australia
Mr Brian Donovan QC, Chairman, Criminal Law Section
Moffitt, Hon. Athol, CMG, QC
New South Wales Council for Civil Liberties
Ms Beverley Schurr, Committee Member
Parliamentary Criminal Justice Committee of Queensland
Mr Peter Douglas Beattie MP, Chairman
Hon. William Gunn MP, Deputy Chairman

HOBART, 25 FEBRUARY 1991
Australian Federal Police Association
Mr Christopher John Eaton, National Executive Officer
Johnston, Mr John

Police Association of Tasmania
Mr Keith James Morrow, General Secretary
Police Federation of Australia and New Zealand
Mr Robert William Page, Secretary
Tasmania Police
Commissioner William James Horman

MELBOURNE, 26 FEBRUARY 1991
Berthelsen, Mr David Ernest
Costigan, Mr Francis Xavier, QC
Galbally, Mr Francis Eugene
McAllan, Mr Robert Clarke
Sinclair, Mr Graham Irwin
Skrijel, Mr Mehmed
Victorian Council for Civil Liberties
Mr Ronald Merkel QC, President
Mr Brian Andrew Keon-Cohen, Vice President

SYDNEY, 25 MARCH 1991
Australian Securities Commission
Mr Charles Morrice Williams, Deputy Chairman
Cash Transaction Reports Agency
Mr William John Coad, Director
Findlay, Mr Mark James
Hogg, Mr Russell George
O'Connor, Kevin Patrick, Privacy Commissioner

CANBERRA, 10 MAY 1991
Dixon, Mr Richard Edward
Mengler, Mr John Carl
North Belconnen Baptist Church
Mrs Dinah Judith Atkinson, Member
Reverend Paul Charles Falconer, Pastor
Dr Ian Montague Foley, Member
Mr John Arthur Northage, Elder
Smith, Mr David William

CANBERRA, 29 JULY 1991

The National Crime Authority

Justice John Phillips, Chairman
Mr Greg Cusack QC, Member
Mr Malcolm Gray QC, Member
Mr Julian Leckie, Member
Mr Denis Lenihan, Chief Executive Officer

CANBERRA, 7 OCTOBER 1991

Australain Bureau of Criminal Intelligence

Mr Keith Askew, Director
Mr Alan Luther, Executive Officer