

The Parliament of the Commonwealth of Australia

JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

FIRST REPORT

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NATIONAL CRIME AUTHORITY

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Senator Alan Missen (Vic) Deputy Chairman

Senate

Senator Nick Bolkus (SA)

Senator Rosemary Crowley (SA)

Senator Janine Haines (SA)

Senator Don Jessop (SA)

Secretary: Christopher Fogarty
Parliament House
Canberra

House of Representatives

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(Bendigo Vic)

Hon Peter Duncan MP
(Makin SA)

Mr Peter McGauran MP
(Gippsland Vic)

+Hon Michael MacKellar MP
(Warringah NSW)

*Mr John Spender QC MP
(North Sydney NSW)

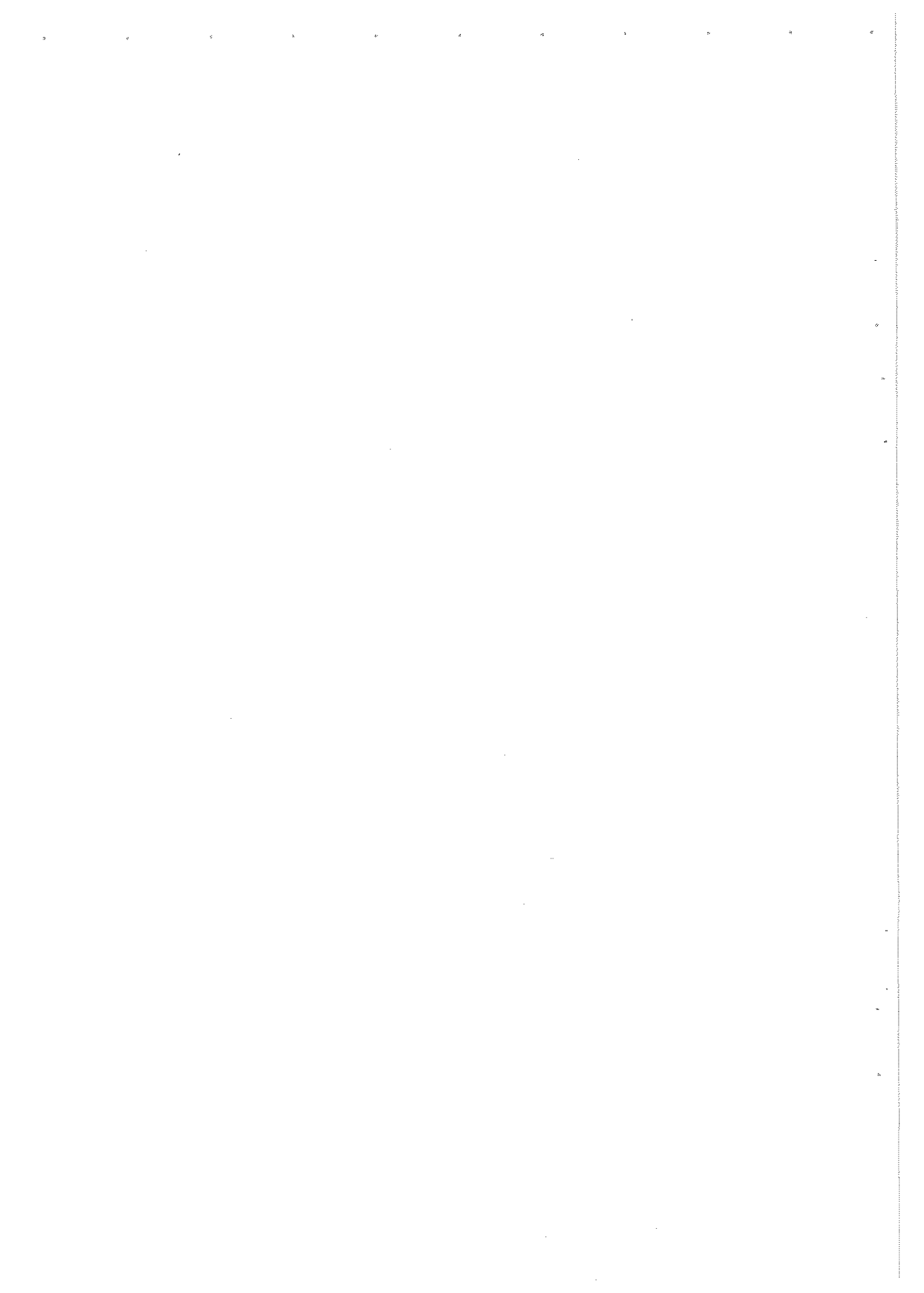
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+ appointed 15 October 1985



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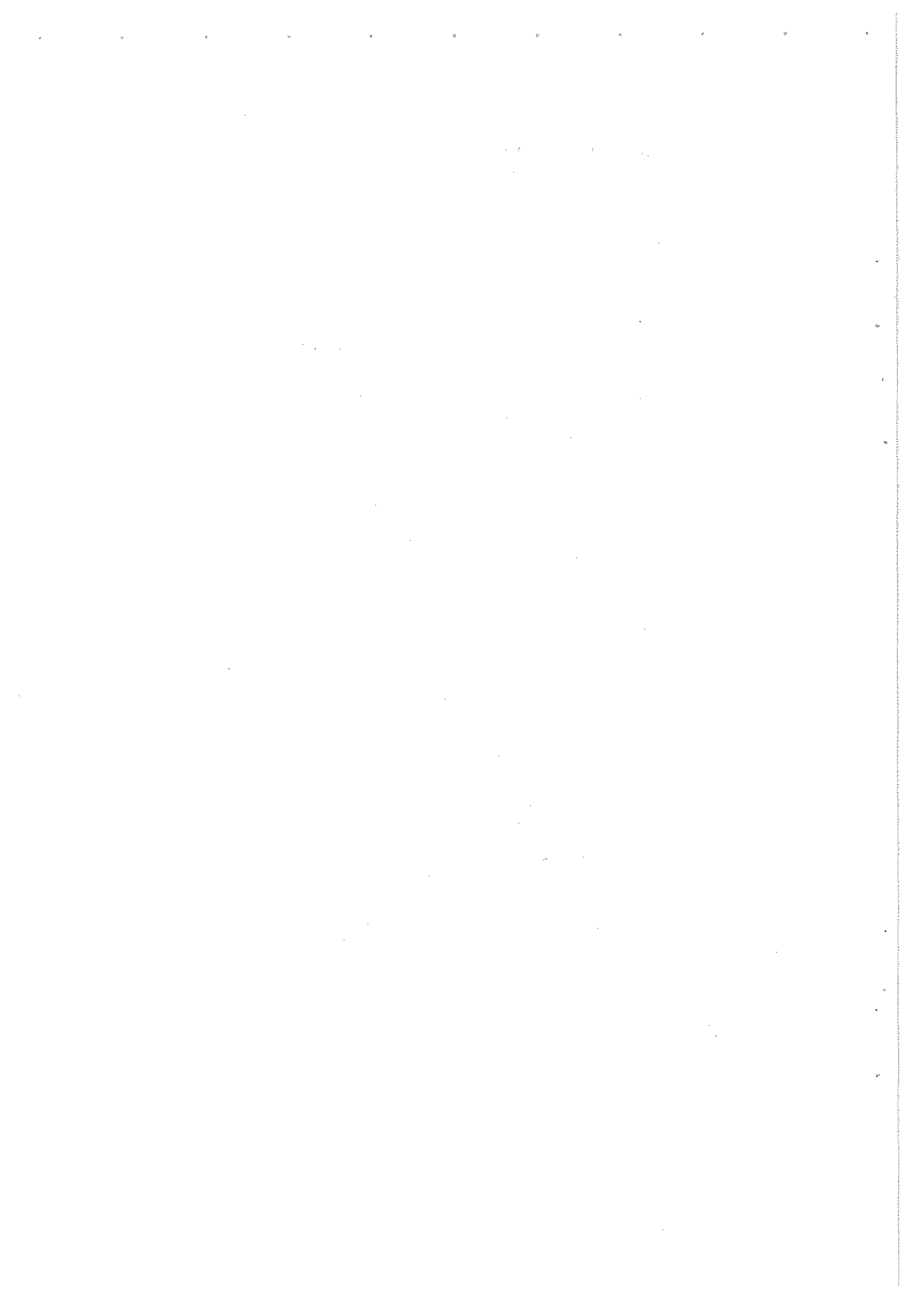


DUTIES OF THE COMMITTEE

The duties of the Committee are stated in s 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.



RESOLUTION OF BOTH HOUSES RELATING TO THE POWERS AND
PROCEEDINGS OF THE COMMITTEE

The following resolution relating to the powers and proceedings of the Committee was passed by both Houses.

That, in accordance with section 54 of the National Crime Authority Act 1984, matters relating to the powers and proceedings of the Parliamentary Joint Committee on the National Crime Authority shall be as follows:

- (a) That the Committee consist of 3 Members of the House of Representatives to be nominated by either the Prime Minister, the Leader of the House or the Government Whip, 1 Member of the House of Representatives to be nominated by either the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, 1 Member of the House of Representatives to be nominated by either the Leader of the National Party, the Deputy Leader of the National Party or the National Party Whip, two Senators to be nominated by the Leader of the Government in the Senate, 2 Senators to be nominated by the Leader of the Opposition in the Senate and 1 Senator to be nominated by any minority group or groups or independent Senator or independent Senators.
- (b) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.
- (c) That the committee elect a Government member as its chairman.
- (d) That the committee elect a deputy chairman who shall perform the duties of the chairman of the committee at any time when the chairman is not present at a meeting of the committee and at any time when the chairman and deputy chairman are not present at a meeting of the committee the members present shall elect another member to perform the duties of the chairman at that meeting.

- (e) That, in the event of an equality of voting, the chairman, or the deputy chairman when acting as chairman, have a casting vote.
- (f) That 4 members of the committee constitute a quorum of the committee.
- (g) That the committee have power to appoint sub-committees consisting of 3 or more of its members and to refer to such a sub-committee any matter which the committee is empowered to inquire into.
- (h) That the committee appoint a chairman of each sub-committee who shall have a casting vote only, and at any time when the Chairman of a sub-committee is not present at a meeting of the sub-committee the members of the sub-committee present shall elect another member of that sub-committee to perform the duties of the chairman at that meeting.
- (i) That the quorum of a sub-committee be a majority of the members of that sub-committee.
- (j) That members of the committee who are not members of a sub-committee may participate in the proceedings of that sub-committee but shall not vote, move any motion or be counted for the purpose of a quorum.
- (k) That the committee or any sub-committee have power to send for persons, papers and records.
- (l) That the committee or any sub-committee have power to move from place to place.
- (m) That a sub-committee have power to adjourn from time to time and to sit during any adjournment of the Senate or of the House of Representatives.
- (n) That a sub-committee have power to authorise publication of any evidence given before it and any document presented to it.
- (o) That the committee have leave to report from time to time.

- (p) That the committee or any sub-committee have power to consider and make use of the evidence and records of the committee appointed during the 33rd Parliament.
- (q) That, in carrying out its duties the committee, or any sub-committee, 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.
- (r) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

RECOMMENDATION

The National Crime Authority Act 1984 should 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 to the Chairman and Deputy Chairman of the Committee.

INTRODUCTION

1. The purpose of this first report of the Joint Committee on the National Crime Authority is to inform the Parliament of the serious situation which has developed with regard to the relationship between the National Crime Authority and the Committee charged by the Parliament with the responsibility for monitoring and reviewing the Authority's performance of its functions. The Committee does this in line with its duty under paragraph 55(1)(b) of the National Crime Authority Act 1984, which provides that one of the duties of the Committee is:

- (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.

2. In short, the Committee finds itself unable to fulfil its statutory duty to the Parliament because it does not have - and is not able to obtain from the National Crime Authority - sufficient information of substance to serve as a basis for the monitoring and review role required of it. This situation has arisen because of a fundamental difference of view between the Authority and the Committee as to the Authority's obligation to provide information which the Committee believes is necessary for it to carry out its statutory duty properly.

HISTORY OF THE COMMITTEE

3. Before discussing the impasse which has been reached between the Committee and the Authority, it is useful to set down the history of the evolution of the Committee.

4. The Parliamentary Joint Committee on the National Crime Authority is established under Part III (sections 53-55) of the National Crime Authority Act 1984. The National Crime Authority Bill 1983, on which the Act is based, had no provision for such a committee. Part III was enacted in the form of an

amendment to the Bill during the Committee stage in the Senate, proposed in effect jointly by the Australian Democrats and the Opposition. The amendment was opposed by the Government in the Senate but, once inserted, was accepted in the House of Representatives.

5. The idea for such a committee to act as a watchdog over the National Crime Authority originated with Mr F X Costigan QC, the Royal Commissioner into the Activities of the Federated Ship Painters and Dockers Union and his senior counsel, Mr D Meagher QC. During the inquiry by the Senate Standing Committee on Constitutional and Legal Affairs into the National Crime Authority Bill 1983,¹ Mr Costigan and Mr Meagher put forward the proposal for a parliamentary committee in preference to the Bill's provisions for judicial audit of the Authority and for the Ombudsman to have jurisdiction to look into complaints against the Authority by individuals. (It is important to note in this context that the Authority has since indicated to the Committee its opposition to both these methods of accountability.)

6. In evidence to the Constitutional and Legal Affairs Committee, Mr Costigan expressed the following view:

I think that you need a permanent committee of the Parliament. It may be a committee of the Senate or a Joint House committee on a permanent basis with an ability to monitor closely not the detail of everything that the Commission is doing but seeing enough of it to be able to express a view, have an input into the procedures the Authority is adopting and note any potential abuses that might be arising (Transcript, p. 78).

7. In the event, the majority of the Senate Committee were not persuaded of the value of a parliamentary committee as a means of monitoring the work of the National Crime Authority. However, as noted above, the Senate chose to disregard this view and amended the Bill to provide for such a committee.

8. The National Crime Authority Act was proclaimed on 1 July 1984 and the first Joint Committee on the National Crime Authority met, following the passage of the necessary resolutions of both Houses, on 18 October 1984. At

that meeting, Mr Alan Griffiths MP was elected Chairman and Senator Alan Missen was elected Deputy Chairman. However, in accordance with the operation of sub-section 53(4), the Committee ceased to function upon the dissolution of the House of Representatives on 26 October 1984 for the general election of 1 December 1984.

9. Following the passage of the necessary resolutions by both Houses when the Thirty-Fourth Parliament met after the election, the Committee held a meeting on 22 March 1985, at which Mr Griffiths was again elected Chairman. Subsequently, at its meeting of 5 June 1985, Senator Missen was again elected Deputy Chairman.

10. Between the time of its re-establishment in March and the date of this report, the Committee has met with the Chairman of the Authority, Mr Justice Stewart, and Authority members, Mr John Dwyer QC and Mr Max Bingham QC, on four occasions and has inspected the Authority's offices in Sydney and Melbourne.

11. However, as noted above, it has become apparent during this time that there is a fundamental difference of view between the Authority and the Committee as to the basis on which the relationship between the two bodies should operate and it is to this issue that this report must now turn.

RELATIONSHIP BETWEEN THE COMMITTEE AND THE AUTHORITY

Parliamentary perception of the Committee's role

12. The establishment of the National Crime Authority was a significant development in the area of law enforcement in this country. Although views differed as to the form which such a body should take and as to the powers it should possess, there was, following the revelations of a succession of Royal Commissions, wide support across the political spectrum for the establishment of a body to take the lead in the fight against organised crime. At the same time, there was concern that the Authority should not be left entirely to its own devices. It was considered essential that effective control mechanisms should be established to ensure the Authority's ultimate accountability. Having rejected

several alternatives, the mechanism adopted by the Parliament was a joint committee possessed of all the powers attaching to committees of the Parliament. In this way, the National Crime Authority, a creature of the Parliament, was to be accountable to the legislature.

13. It is perhaps indicative of the level of concern that the Authority should be properly accountable to the Parliament that the mechanism thus established is unique in the history of the Commonwealth Parliament. For the first time, a parliamentary committee has been charged by the Parliament with the task of overseeing one statutory authority in the performance of its functions. There is in the Parliament a strong expectation that this Committee, on behalf of the Parliament, should perform the role of watchdog over the Authority in the conduct of its activities.

14. This perception of the Committee's legitimate role was evidenced recently in the Senate by the response given by Senator Button, Government Leader in the Senate, to a question without notice by Senator Siddons². Senator Siddons had asked the Government Leader about the involvement of the National Crime Authority in the smashing of an alleged drug ring which had been reported in the media during the previous week. In his reply Senator Button said that the Authority's involvement was '... a matter which the Parliamentary Committee on the National Crime Authority would appropriately examine'.³

The Committee's duties

15. It will assist consideration of the issues under discussion to set down at this point the Committee's statutory duties. They are provided for in section 55 of the National Crime Authority Act 1984, which is in the following terms:

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.

The problem emerges

16. From the first, there was evidence of a difference of view between the Authority and the Committee as to the nature of the relationship between the two bodies and as to the extent of the Committee's powers to seek information. This difference has as its basis differing interpretations of section 55.

17. At the first meeting between the Authority and the Committee on 27 March 1985, the Authority called into question the right of the Committee to seek information regarding the transition from the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union ('the Costigan Royal Commission') to the Authority on the basis that it was not a matter related to 'relevant criminal activity' as defined in the Act and therefore did not fall within the operations of the Authority. Accordingly, it was outside the scope of the Committee's duties. In the event, the Authority provided information on this subject of a general nature in response to the Committee's inquiries.

18. The difference between the Authority and the Committee as to the Committee's power to seek information regarding the transition from the Costigan Royal Commission was the forerunner of a general tension which has developed between the two bodies as to the extent to which the Committee is entitled to expect from the Authority detailed information to assist it to monitor and review the Authority's performance of its functions. This broader issue arose for detailed discussion on 5 June when clear differences emerged as to the correct interpretation of section 55.

19. It was suggested on behalf of the Committee that it was difficult for the Committee to carry out the first of its *nominated* duties - to monitor and review the performance by the Authority of its functions - when it did not know, except in very general terms, what the Authority was doing. The references granted to the Authority are in such general terms and so lacking in identifying details that it is impossible for the Committee to determine the scope of the Authority's present inquiries or whether allegations referred to publicly are within its purview. The Authority appeared concerned that information which it released to the Committee would find its way into the public arena, thereby giving rise to the possibility of any or all of three serious consequences.

20. First, if it became public knowledge that a person was under investigation by the Authority and that person was subsequently charged, the chances of a fair jury trial would be considerably diminished. Secondly, reduced security with regard to the Authority's operations would carry a real possibility of danger to the lives of the Authority's investigators. Finally, the Authority referred to the possibility of jeopardising the success of its investigations.

21. As a result of these discussions, it was agreed that it would be useful if the Committee drafted guidelines for the future conduct of proceedings between the Authority and the Committee.

22. The differing views of the Committee's role and powers, highlighted by the disagreement over the Committee's right to seek detailed information about the transition from the Costigan Royal Commission to the Authority, led the Committee to conclude that it should seek counsel's opinion on the matter.

This opinion, obtained from Mr C M Maxwell of the Melbourne bar, served as the basis of the Committee's proposed guidelines. The Committee has found the opinion of considerable value and it will assist the Parliament in understanding the issues under discussion if the substance of the opinion is set down in this report.

The Maxwell opinion

23. The opinion notes that the primary question to be addressed is whether the Committee is under a duty and/or has the power to inquire. There is no general provision in Part III of the Act, or in sub-section 55(1) in particular, either directing or empowering the Committee to make inquiries as necessary in connection with the performance of its duties. This may be contrasted with sub-section 17(1) of the Public Works Committee Act 1969 which, after specifying the functions of that Committee, directs that 'for these purposes, [the Committee] shall do such things and make such inquiries as it thinks necessary'.

24. However, as the opinion points out, the absence of any express duty or power to inquire - disregarding for the moment the powers conferred on the Committee pursuant to section 54 - does not conclude the matter. Counsel suggests that, to give effect to the intention of Parliament, as reflected in the provisions of the Act and section 55 in particular, requires that sub-section 55(1) be read subject to an implied duty and/or power in the Committee to make such inquiries as it considers necessary for the proper discharge of its duties.

25. The duties imposed on the Committee by sub-section 55(1) would seem to be incapable of proper performance in the absence of a duty or power to make the necessary inquiries. Paragraph 55(1)(a) imposes the duty to monitor and to review the performance by the Authority of its functions. As counsel points out, there is nothing to suggest that this should be read otherwise than in accordance with the ordinary usage of the words 'monitor' (meaning 'maintain regular surveillance over') and 'review' (meaning 'to consider or evaluate critically'). It would be a strange result, it is suggested, if the Committee were to be confined in its monitoring and reviewing of the Authority's performance to the essentially passive role of receiving and considering only such information as

the Authority itself chose to provide. Such an interpretation, denying the Committee the authority to make its own inquiries, would render nugatory what would appear from sub-section 55(1) to be the clear intention of Parliament, that the Committee should be in a position to evaluate in an informed and independent way the performance of the Authority.

26. The same argument applies, with equal force, to the duties imposed on the Committee by paragraphs 55(1)(b) and 55(1)(d). The Parliament has imposed duties on the Committee and the Committee is responsible to the Parliament for their proper performance. Parliament must be taken to have intended that the Committee be adequately equipped for that purpose.

27. Counsel points out that, as a matter of statutory interpretation, if a statute is passed for the purpose of enabling (or in this case requiring) something to be done but omits to mention a step or procedure which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the courts are at liberty to infer that the statute by implication empowers that step to be taken or that procedure employed (see Craies on Statute Law (7th Edition) 1971, p. 111). The question is whether the legislature 'must not be considered by necessary implication to have empowered that to be done which was necessary in order to accomplish the ultimate object' (Cookson v Lee (1854) 23 LJ Ch 473, at 475 per Lord Cranworth LC).

28. It is to be noted also that section 15 AA of the Acts Interpretation Act 1901 directs that a construction that would promote the purpose or object underlying the Act in question is to be preferred to a construction that would not promote that purpose or object. As counsel concludes:

Applying that principle to this case it seems clear that the construction suggested, involving the implication of a duty or power to inquire, is more likely to promote the purpose or object of Part III of the Act, as elicited from section 55(1) in particular, than an interpretation which denies to the parliamentary committee that duty or power.

29. Counsel suggests that this conclusion is further reinforced when the functions of the Inter-Governmental Committee ('the IGC'), as set out in

sub-section 9(1), are considered. The relevant function for purposes of this discussion is contained in paragraph 9(1)(b): to 'monitor generally the work of the Authority'. As in the case of the parliamentary committee, no express power to make inquiries or request information in confidence is conferred but, counsel suggests, it is clear from sub-section 59(3)⁴ that the IGC is assumed to have the power to request the Authority to furnish information, both concerning specific matters relating to investigations and concerning the general conduct of the operations of the Authority. This assumed power would seem to be referable directly to the performance by the IGC of its monitoring function in paragraph 9(1)(b) and is, therefore, in counsel's view, directly analogous to the implied duty/power of this Committee to make inquiries.

30. Counsel points out that section 59, by contrast with section 55, deals in some detail with the capacity of Ministers and the Inter-Governmental Committee to request the Authority to furnish information concerning the Authority's operations and with the Authority's obligation to comply with such requests. Counsel suggests that it may be thought desirable for the relationship between the Authority and the Committee to be similarly made the subject of express provision, rather than relying on a process of implication of the kind discussed above. This is a matter to which the Committee has given detailed consideration, and it will be the subject of discussion later in this report.

31. Counsel then turns his attention to the resolutions passed by both Houses ('the joint resolution') relating to the powers and proceedings of the Committee (set out at pp. ix ff. above) and points out that the Committee is specifically empowered by paragraph (k) of the joint resolution to send for persons, papers and records. This power is possessed by the Houses of Parliament by virtue of section 49 of the Constitution and is delegated to parliamentary committees pursuant to House of Representatives Standing Order 334 and Senate Standing Order 302. The power is granted to a parliamentary committee to enable it to perform its duties and in turn to enable the Parliament to fulfil its functions, for example of deciding whether there should be remedial legislation (see eg paragraph 55(1)(d)).

32. As counsel notes, the power to send for persons, papers and records - in other words, to coerce the giving of information - is the traditional badge

of the investigative power of the Parliament and its committees. This form of inquiry and investigation exists independently of legislation and is extremely wide. The question of whether there are any limits on this power has been the subject of extensive academic debate but it seems to be agreed that the only practical limitation, if any, on the scope of the inquiry (other than where the Parliament itself imposes limits, such as those in sub-section 55(2)) is the limit on the power to compel an answer.

33. Counsel's conclusion is that the Committee is vested by virtue of paragraph (k) of the joint resolution with a general power to seek information in connection with the performance of its duties. This is further confirmed by paragraph (g) of the joint resolution which directs the Committee in carrying out its duties to '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'. Counsel's view is that such a directive indicates that the Parliament contemplated that the Committee would be seeking and obtaining from the Authority information relating in some detail to the performance of its functions, including in particular decisions made by the Authority in relation to the investigation of particular matters. He suggests that a similar inference may be drawn from the terms of sub-section 55(2) of the Act, where the prohibition on the Committee investigating a matter relating to a relevant criminal activity would appear to be premised on Parliament's contemplation that the Committee would be making inquiries of one kind or another.

34. Counsel then turns his attention to the effect of sub-section 55(2) upon the scope of the Committee's inquiries. It is his view that the purpose of this sub-section was to ensure that the Committee should not usurp or duplicate the functions of the Authority. It is for the Authority to investigate and for the Committee to monitor and review the way in which the Authority discharges that function of investigation. The Committee may inquire but may not do anything amounting to an investigation of its own.

35. Senator Durack's remarks during the debate in the Committee Stage lend support to this view. He said:

The purpose of the committee will not be to get into the details of particular cases. I think it could 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. Nevertheless, it will have the authority to monitor and review the performance and functions of the Authority; so it will have a wide brief.

Counsel then sets out a non-exhaustive list of the sorts of things about which the Committee could direct inquiries. Although the list is directed towards matters arising out of the transition from the Costigan Royal Commission to the Authority, it is pertinent to the Committee's power to seek information over the range of the Authority's functions. The matters listed are as follows:

- . the Authority's decision whether or not to investigate the matter, and the reasons for that decision;
- . whether or not a reference has been requested and/or given in relation to the matter, and the reasons therefor;
- . the particular kind of investigation or other action under section 11 upon which the Authority has resolved to embark;
- . the progress of such investigation or action;
- . the likely or actual outcome of such investigation or action;
- . the powers of the Authority under the Act being utilised for the purpose of such investigation or action;
- . the adequacy or otherwise of such powers.

36. It would not, however, be open to the Committee to require a detailed account of the conduct of any particular investigation, as that would tend towards an investigation by the Committee of that matter. Inquiries of the sort indicated above would not, in counsel's opinion, infringe paragraph 55(2)(b). The making of such inquiries could not of itself be a reconsideration of the Authority's findings. Decisions by the Authority whether or not and, if so, how

to investigate a particular matter are not decisions properly described as 'the findings of the Authority in relation to a particular investigation'. As counsel states, in its ordinary meaning this phrase must refer to the conclusions reached at the end of an investigation or of a stage of an investigation.

37. Counsel suggests that the purpose of paragraph 55(2)(b) is to prevent the Committee making its own judgment about what the findings in relation to a particular investigation should be or should have been. For the Committee to do so would be for it to adopt the role of investigator. Having regard to its duties, counsel suggests, it would seem to be quite proper for the Committee to inquire of the Authority what its findings were in relation to a particular investigation and to inquire into the process whereby the findings were arrived at. It would not, however, be within the Committee's legitimate role to call for the detailed evidence on the basis of which findings were made or to consider what findings it would have reached.

The Committee's position

38. It will be apparent that the opinion provided by counsel is a closely argued *consideration of the Committee's powers and duties*. Reassured by this endorsement of its own perception of the role intended for it by the Parliament, the Committee on 9 July wrote to the Authority setting down its views on the matter and suggesting the basis upon which the Committee believed the relationship between the two bodies should be conducted.

39. Having set down in abbreviated form the Committee's view of its powers, using counsel's opinion as the basis for this view, the letter came to the following conclusion:

7. The Committee takes the view that if it is to perform its statutory duties it will need to have access to more detailed information about the Authority's operations. Otherwise it will not be possible to make the critical evaluation or maintain the regular surveillance which are a necessary part of its duties to monitor and review the Authority's functions.

8. Guidelines governing the relationship between the Authority and the Committee will be based on this

presumption: that the Committee must make the final decision as to how much and what sort of information it needs to fulfil its duties under the Act. The Authority's genuine concern that disclosing certain information could jeopardise its investigations, endanger lives or damage reputations is acknowledged. The Committee, when necessary, will give undertakings to respect requests for confidentiality by the Authority which have a sound basis. This may require the Committee to be somewhat inhibited in the way it reports some matters to the Parliament. In such cases the Committee will have to rely upon a reputation for integrity built up over time, so that the Parliament, recognising the delicate interests involved, will be prepared to accept the Committee's judgment as to the Authority's performance.

9. There will no doubt be occasions when the Authority strongly resists divulging information in response to a Committee request, on the basis that to do so could jeopardise its investigations, endanger lives or harm reputations. If, in such instances, the Committee wishes to persist with its request, the Committee's view is that the Authority should agree to brief the Chairman and Deputy Chairman on the matter in question, so as to enable them to decide whether the Committee should press its request.

40. Another point of difference between the Committee and the Authority which arose at the outset and which, in a sense, epitomises the Authority's view of the relationship was the question of whether there should be a Hansard record of proceedings between the Authority and the Committee. The Authority strongly resisted the presence of Hansard on grounds of security and the Committee deferred to the Authority's wishes during the first meetings between the two bodies. However it soon became apparent to the Committee that a verbatim record was essential. Moreover, the Committee is firmly of the view that a Hansard record is a fundamental element in any parliamentary committee proceeding.

41. Because of the potential difficulty for the Committee arising out of the absence of a Hansard record, the Committee wrote a second letter to the Authority on 9 July. In that letter the Committee pointed to the need for an accurate record of meetings between the Committee and the Authority as being of vital importance if the Committee were to fulfil its duties under the Act effectively.

42. It was pointed out that the Parliamentary Reporting Staff has a sound record as regards security and that the Committee did not see this as a matter of concern. In addition, it was proposed that a system operate whereby the Authority could suggest that a particular subject matter was of such sensitivity that it should not be recorded in Hansard. If the Committee accepted this submission, the Hansard record would be interrupted for the duration of the discussion of that particular matter.

The Authority's response

43. Issues raised in these letters of 9 July were discussed between the Authority and the Committee on 15 August, the first occasion on which, at the Committee's instigation, a Hansard record was taken. Before proceeding to the agenda, Mr Justice Stewart made a statement to the Committee which raised what he referred to as 'some very fundamental and threshold points' (Transcript p. 1). He continued:

I would like at the outset to raise a matter by way of clarification as to the nature of today's discussions. Mr Bingham, Mr Dwyer and myself have come to what we believe should be a meeting between the Joint Committee and the Authority. Indeed, the letter from the Secretary of the Committee of 6 August, which forwarded an agenda for today - to which you, Mr Chairman, have just referred - refers to a meeting between the Committee and the Authority. We were concerned to notice, however, that unlike the agendas for the meetings held in Canberra on 27 March, in Melbourne on 11 April and in Sydney on 5 June, the agenda for today is headed "In Camera Hearing with Chairman and Members of the National Crime Authority". As far as we are concerned, we have come to a meeting - not a hearing - a meeting between two bodies acting in co-operation with one another. I might add that I have just been handed a document headed "Witness Information" - requiring full name, et cetera - which reinforces what I have just said (Transcript p. 1).

44. The judge stated that the Authority's concern about the issues was reinforced by the Committee's letter of 9 July regarding the taking of a Hansard

record, because that letter implied that the Committee proposed to take evidence from the Authority. He continued:

The Authority does not understand that it is at this meeting for the purpose of giving evidence. We suggest, with respect, that it is not appropriate for the Committee by itself to determine whether or not there should be a "Hansard" record taken of our meeting. While acknowledging the general usefulness of a "Hansard" record of Committee hearings, we have some concern about whether a "Hansard" record is appropriate to meetings of this kind because it may be destructive of the further development of a good working relationship between the Committee and the Authority (Transcript, p. 2).⁵

45. Mr Justice Stewart then raised a further matter of concern to the Authority, arising from the Committee's letter of 9 July on the subject of guidelines. Referring to that letter, his Honour stated: 'that letter suggests that this may not, in fact, be a meeting between the Committee and the Authority, but the Committee conducting an investigation into certain matters' (Transcript p. 2).

46. Mr Justice Stewart said that it was the Authority's clear understanding from earlier discussions that guidelines were to be mutually agreed following discussion of a draft. He continued:

The letter of 9 July is inconsistent with that understanding in that it seems to give directions to the Authority and claim a right vested in the Committee to make "the final decision as to how much and what information it needs to fulfil its duties under the Act". The Joint Committee's views as expressed in that letter caused the Authority considerable concern and, with respect, the Authority does not agree that the Committee has power to conduct inquiries of the kind proposed.

47. He then read to the Committee a letter from Mr P. Brazil, Secretary of the Attorney-General's Department, containing advice which the Authority had sought following consideration of the Committee's guidelines letter of 9 July.

The Brazil opinion

48. Mr Brazil quotes from the Authority's letter, from which it appears that the Authority sought advice on the following two questions:

- (1) The Committee asserts as a presumption on which guidelines will be based that it must make the final decision as to how much and what sort of information it needs to fulfil its duties under the Act. Your advice is sought as to whether the Committee can make such a final decision and as to the Committee's powers should the Authority hold a different view to that of the Committee.
- (2) The Committee also asserts power:
 - . to make such inquiries as it considers necessary for the proper discharge of its duties;
 - . to seek and obtain from the Authority information relating in some detail to the performance of its functions, including any particular decisions made by the Authority in relation to the investigation of particular matters.

The Committee's letter contemplates that it would, by inquiry, obtain detailed information concerning the Authority's investigations and operations.

Your advice is sought as to whether the Committee can inquire into any matter relating to relevant criminal activity and as to the limitations which sub-section 55(2) places on the Committee's powers to inquire into the Authority's operations.

49. With regard to the first question, Mr Brazil notes that section 54 of the National Crime Authority Act provides that all matters relating to the powers and proceedings of the Committee shall be determined by resolutions of both Houses of the Parliament and that the resolutions passed by each House in this regard give the Committee the usual power 'to send for persons, papers and records'. He further notes that sub-section 55(1) sets forth the Committee's duties, particularly, in paragraph (a), the duty to monitor and review the performance by the Authority of its functions. However, the powers, duties and functions thus confirmed are to be read subject to sub-section 55(2).

50. Noting that a parliamentary committee can exercise powers of inquiry only in relation to matters falling within the scope of the duties or functions conferred upon it, Mr Brazil continues:

It seems clear to me that the present Committee has not been given authority, either by resolutions of the Houses (assuming that were possible) or by legislation, to finally decide itself what are the limits of its powers of inquiry. As a matter of Parliamentary practice the appropriate course would be for the Committee to consider referring a dispute, if it persisted, to the two Houses which appointed the Committee ... Clearly, however, the Committee itself could not decide the limits of its own powers.

51. With regard to the second question, Mr Brazil writes in his letter of advice as follows:

"Relevant criminal activity" is defined for the purposes of the Act in section 4. Section 55(2) is an overriding provision to the effect that nothing in Part III authorises the Committee to investigate "a matter relating to" such an activity. The obvious reference is to functions the NCA has under the Act to investigate matters related to "a relevant criminal activity": see eg sections 11, 13 and 14.

One way in which the Parliamentary Committee would obviously depart from section 55(2) would be for itself to directly investigate a matter relating to a relevant criminal activity. In my view the Committee would also depart from section 55(2) if it sought or obtained from the NCA information relating to the operations of the NCA in investigating the relevant criminal activity, including for example any particular decisions made by the Authority in relation to the investigation of particular matters. It seems to me that this interpretation of the Act is confirmed by the parliamentary debate in the Senate, in which the provisions in question originated: See in particular the Senate Hansard of 6 June 1984 pages 2647, 2648, 2650, although there was also some apprehension expressed that in practice the Committee would seek details (p. 2651). However, my conclusion is based primarily on the text of the Act. It seems to me to be clear that an inquiry of the kind referred to by the Parliamentary Committee would necessarily involve investigating a matter relating to a relevant criminal activity.

In this connexion I have considered whether any contrary inference is to be drawn from what is expressed or implied in particular duties of the Committee contained in section 55(1)(a), (b) or (e). As I have pointed out, however, it is clear that section 55(2) has, and it is clear that it was intended to have, an overriding effect in relation to such duties. To conclude otherwise would be to give no effect to the commencing words of section 55(2), namely, "Nothing in this Part authorizes" etc. The same considerations apply in relation to any powers conferred by resolution under section 54.

52. In concluding his advice, Mr Brazil makes the following statement:

A question may be raised whether in these circumstances it will be practicable for the Committee effectively to "monitor" and "review" the performance of the Authority in accordance with section 55(1)(a). This is not a legal question and I do not think that this is a matter upon which it would be appropriate for this Department to express a view, one way or the other.

53. Having informed the Committee of the contents of Mr Brazil's advice, Mr Justice Stewart stated that, following its own consideration of the matter and confirmation of its views by Mr Brazil, the Authority believed that it could not properly reveal information to the Committee relating to any relevant criminal activity; that is, about any of its investigations. It was also suggested by the Authority that the secrecy provision of the National Crime Authority Act (section 51), which prevents members of the Authority from divulging information, except for the purposes of the Act, comes into conflict with the right of the Committee to obtain information. Because of the Authority's view of the limits placed on the amount of information it may divulge to the Committee, it has formed the view that to go beyond those limits would place it in breach of section 51.

54. He added that he and the other members of the Authority were conscious of the practical difficulties thereby created for the Committee and that they were anxious to find a solution on a co-operative basis and to continue to develop a good relationship with the Committee.

The disagreement in focus

55. The discussion which flowed from Mr Justice Stewart's statement, with its incorporated opinion from Mr Brazil, brought into sharp focus the fundamental differences between the Authority and the Committee as to the nature of the relationship between the two bodies.

56. During discussion of the issue of a 'Hansard' transcript, the Chairman of the Committee expressed the view that it was important that the discretion as to whether a 'Hansard' record should be taken of a particular part of proceedings be vested 'where it properly ought to be vested, and that is in the Chairman of the Parliamentary Committee' (Transcript p. 15). He suggested that if the Authority disagreed about the appropriateness of that in particular circumstances then it would be a matter of judgment on the Authority's part as to the extent to which they would feel able to discuss certain matters. The Chairman suggested that in almost all circumstances there would be a level of agreement about when Hansard should retire.

57. To this statement, Mr Justice Stewart made the following reply:

With respect, if I may say so, Mr Chairman, whilst I agree that any meeting must have a Chairman, that rather begs the question as to the role of the Committee and the role of the National Crime Authority, which is the main bone of contention. I would agree with my friend Mr Bingham that it really ought to be a consensual matter rather than the final decision of the Chairman or the Committee as to what occurs. That is the issue that is raised by Mr Brazil, in answering one of the questions that was posed, where the final decision as to the whole spectrum lies, not only as to what you are entitled to ask, what you are entitled to investigate, but the way it is done (Transcript p. 16).

58. The Chairman put in reply his '... own strong view ...' as follows:

... to adopt that position as a matter of practice would strike at the heart of the role of parliamentary committees and for my own part I would be firmly against it ... But for a chairman of a parliamentary committee to defer to the government body or agency which it is vested with monitoring, the decision as to,

for example, when "Hansard" will or will not be present or any number of other issues would seem to me to be almost farcical ... I, for one, would not be a party, as Chairman, to a situation where these meetings become very informal meetings and the Chairman conducted himself, or herself, in a way that was inconsistent with the role of parliamentary committees. I think that is a fairly fundamental question and one that I would wish to flag some resistance to (Transcript pp. 16/17).

The Committee's solution to the impasse

59. What emerges from these discussions is a clear delineation of views on two separate - although inter-connected - issues. One issue is the legal question of the extent to which, as a matter of statutory interpretation, the Authority can be required to provide information to enable the Committee to carry out its statutory duty to monitor and review the Authority's performance.

60. *The second is the perception of the nature of the relationship between a parliamentary committee, vested with all the traditional powers attaching to such committees, and a creature of the Parliament made subject by statute to the scrutiny of that committee. This is nowhere more clearly spelt out than in Mr Justice Stewart's calling into question the role of the Chairman of the parliamentary Committee in chairing meetings with the Authority, as he does in the quotation from the transcript at paragraph 57 above.*

61. The Committee is in no doubt about the genuine nature of the Authority's perception that to divulge information beyond the limits established by its interpretation of sub-section 55(2) would put it in breach of the Acts's secrecy provision. The Committee is also fully aware of the security implications which may arise from dissemination of information held by the Authority. Nevertheless, it is apparent that this Committee cannot fulfil the duty which the Parliament intended without considerably more information than has been formally provided to date. The interpretation of the Committee's powers favoured by the Authority effectively means that the Committee cannot discharge the duties vested in it by the Parliament. Indeed, it must be said that the approach of the Authority - whether or not justified by its own interpretation of the legislation - has been such as to make the television program 'Yes Minister' seem by comparison like an exercise in bureaucratic co-operation.

62. Accordingly, the Committee has formed the view that it must report this situation to the Parliament in order to seek an amendment to the legislation to ensure that the Committee is properly equipped to undertake the task intended by Parliament. The legislation governing the Committee's functions should be amended to make it clear that the Committee has a right of access to the full range of information held by the Authority so as to enable it to monitor and review the Authority's operations effectively.

63. When considering the range of issues facing it since its formation, the Committee has in most cases come to a common view. On this most significant issue the Committee has been quite firm in its unanimity.

64. In reaching this position the Committee is fortified by the views of Mr F X Costigan QC, Chief Commissioner S I (Mick) Miller of the Victoria Police and Commissioner A G Hunt of the South Australia Police. During appearances before the Committee all three stated that, were they in the place of the Authority, they could see no difficulty in briefing a parliamentary committee on the Authority's activities.

65. Although it is essential to establish such a right of access, the Committee wishes to make it quite clear that the exercise of that right would be treated judiciously. The Committee would see as non-controversial its seeking documents relating to a completed investigation in order to examine the process of investigation and thereby to determine the effectiveness or otherwise of the Authority's conduct of the matter. What must be made clear, however, is the right of the Parliament, through its Committee, to ensure adequate accountability by the Authority which it has created.

66. What the Committee is seeking from the Parliament is explicit statutory recognition of, or the removal of any statutory impediment to, the exercise of the full powers of inquiry vested in a joint parliamentary committee. Because of the delicate nature of the matters involved, the Committee is cognisant of its responsibility to ensure that the concerns of the Authority regarding security, reputations and safety are not offended. However, the Committee stresses that it must be the final arbiter on the extent to which

information permissible within the terms of an amendment to the legislation along the lines proposed below ought properly be provided, and in this context sees as its own responsibility the adoption of procedures consistent with this objective. The Committee wishes to emphasise that powers granted under an amendment to the Act would be seen by the Committee as reserve powers.

67. As noted by Mr Maxwell in his opinion, section 17 of the Public Works Committee Act 1969, after listing that Committee's functions, provides that '... for those purposes, [the Committee] shall do such things and make such inquiries as it thinks necessary'. The Committee is of the view that the National Crime Authority Act should be amended so as to make similar provision with regard to this Committee's performance of its duties, thereby giving it a full right of access to information about the Authority's operations, to be used only when and as the Committee thought necessary.

68. The Committee also notes that under sub-section 59(3) of the National Crime Authority Act the Authority is obliged, upon request by the Inter-Governmental Committee, to supply that Committee with information concerning a specific matter relating to one of its present or past investigations and also to inform it about the general conduct of its operations. This obligation is qualified by sub-section (5) which provides that the Authority is not to provide to the Inter-Governmental Committee any information the disclosure of which to members of the public could prejudice the safety or reputations of persons or the operations of law enforcement agencies. Where the Authority's findings in an investigation include such matter the Authority is to prepare a separate report thereon and furnish that report to the Commonwealth or State Minister by whom the relevant reference was made.

69. This provides a useful model for this Committee's performance of its duties. Where the Committee seeks information from the Authority and some of the information sought is of such a nature that its disclosure to the public could prejudice the safety or reputations of persons or the operations of law enforcement agencies, such information should be made the subject of a separate report to the Chairman and Deputy Chairman of the Committee.

70. Recommendation: The National Crime Authority Act 1984 should 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 to the Chairman and Deputy Chairman of the Committee.

CONCLUSION

71. The Committee has given the issues discussed in this report long and detailed consideration and has concluded that, unless section 55 of the National Crime Authority Act is amended along the lines proposed in this report, there is no point in retaining a parliamentary committee to act as a watchdog over the National Crime Authority. Indeed, in the absence of the necessary amendment, the retention of the Committee would be a charade, as it provides the appearance but not the substance of the Authority's accountability to Parliament.

72. The Committee wishes to make one concluding point. In recent correspondence to the Committee, Mr Justice Stewart said, among other things:

... it is gratifying to the Authority that although it and the Committee are in disagreement, at all times there has been, in the observation of the Members and myself, an atmosphere of genuine goodwill and courtesy exhibited at all times by yourself and each and every member of the Committee.

Although, as the report relates, the differences between the Authority and the Committee are fundamental, the Committee endorses Mr Justice Stewart's remarks as to the basis on which the discussions have been conducted by all parties.

Alan Griffiths
Chairman

Parliament House
Canberra
November 1985

ENDNOTES

1. See the Committee's report: Australia, Parliament, 'The National Crime Authority Bill 1983' report by Senate Standing Committee on Constitutional and Legal Affairs, Parliamentary Paper No 30/1984.
2. Senate, Hansard, 22 August 1985, p. 168.
3. In fact, the Committee took up the matter with the Authority in a letter of 9 September. In a reply on 11 October Mr Justice Stewart stated that the Committee would be 'well aware of the Authority's position with regard to revealing details of its operations' and said that in this case there was the 'further complication of the sub judice aspect'. His Honour continued:

The matter having become public, however, and the answer to Senator Siddons' question enabling the inference to be drawn that the Authority took no action on material passed to it by the Costigan Royal Commission, the Authority has taken the view that in this case it should make some response. Senator Siddons' first question was: Was the material on which the investigations and arrests were based, referred on to the National Crime Authority by the Costigan Royal Commission on the Activities of the Federated Ship Painters and Dockers Union? The answer to that question is: No.

The Authority does not feel at this stage that it can provide details of the material which was in fact referred to it by the Royal Commission, nor of the role it played in the arrests which were referred to in the question.

4. Section 59(3) provides as follows:
 - (3) Subject to sub-section (5), the Authority -
 - (a) shall, when requested by the Inter-Governmental Committee to furnish information to the Committee concerning a specific matter relating to an investigation that has been or is being conducted by the Authority, comply with the request; and
 - (b) shall when requested by the Inter-Governmental Committee to do so, and may at such other times as the Authority thinks appropriate, inform the Committee concerning the general conduct of the operations of the Authority.

5. In subsequent correspondence, dated 11 October 1985, Mr Justice Stewart stated that '... the Authority does not wish to press the point regarding the presence of Hansard at meetings between the Committee and the Authority'.

