

**GOVERNMENT RESPONSE
TO THE RECOMMENDATIONS FROM THE
3RD EVALUATION OF THE NATIONAL CRIME AUTHORITY
BY THE
PARLIAMENTARY JOINT COMMITTEE ON THE NATIONAL CRIME
AUTHORITY**

The Report from the 3rd Evaluation of the National Crime Authority by the Parliamentary Joint Committee on the National Crime Authority was tabled on 6 April 1998. The Report makes 30 recommendations relating to the role, function and composition of the National Crime Authority; the reference system; powers and penalties; accountability and parliamentary supervision; and complaints.

The Government wishes to thank the members of the Parliamentary Joint Committee for conducting the evaluation of the National Crime Authority. Both the Government and the Parliamentary Joint Committee are confident in the ongoing capability of the National Crime Authority to continue its role in the fight against organised crime.

While acknowledging the work of the Parliamentary Joint Committee and agreeing with many of its recommendations, the Government is of the belief that some of the issues raised by the Parliamentary Joint Committee can be achieved by means other than those proposed. However, the Government will pursue a number of amendments to *National Crime Authority Act 1984* where this is necessary to implement the agreed recommendations. This will result in a more effective and efficient National Crime Authority.

The recommendations made by the Parliamentary Joint Committee on the National Crime Authority, together with the Government's response to each recommendation, are set out below:

Recommendation 1: That the National Crime Authority commence regular reporting on a comprehensive range of performance measures so that the Parliamentary Joint Committee and the community will be better able to assess its performance. (para. 1.129)

The Government is progressing arrangements for improved accountability for Commonwealth departments and agencies generally. It has introduced an accrual budgeting framework and requires government departments and agencies to report on performance indicators and output/outcome measures. All departments and agencies, including the National Crime Authority, have developed performance indicators and output/outcome measures in preparation for this year's budget.

Recommendation 2: That the National Crime Authority's base funding be urgently increased to ensure its ability to work with maximum effectiveness across the full range of organised crime activity. (para. 1.182)

The Government is committed to an effective national approach to dealing with organised crime and will continue to support Commonwealth law enforcement agencies appropriately. National Crime Authority funding is a matter for the Government to consider in the budget context. This Government has adopted a supportive approach to the performance of the National Crime Authority. Funds appropriated for the National Crime Authority have included substantial amounts to

cover specific projects. Budgets for agencies such as the National Crime Authority generally now comprise one off elements for specific work covering a number of years as well as recurrent funding.

Recommendation 3: That a clear statement of the role of the National Crime Authority be included in the statute as an objects clause. (para. 2.119)

The Government agrees with the Parliamentary Joint Committee that the National Crime Authority's role can be further clarified, but this can be done adequately without introduction of an objects clause into the National Crime Authority Act as suggested. The National Crime Authority's role can be expressed in the National Crime Authority Act with clarity and certainty by amendment to existing provisions in the context of the matters raised by the Parliamentary Joint Committee in their report.

Recommendation 4: That the area of inquiry of the National Crime Authority reflect that its role is to counter criminal activity which is systematic and complex and which may, but not necessarily, be trans-or multi-jurisdictional. Where the area of inquiry involves intra-state investigations, such inquiry should only proceed by mutual agreement with the relevant State or Territory and on a fully funded basis. (para. 2.124)

While the National Crime Authority's role is to counter criminal activity that is systematic and may be multi-jurisdictional, there should be delineation between State or Territory police investigations and investigations carried out by the National Crime Authority. The National Crime Authority was established as a national agency and where it undertakes investigations within one State or Territory, it does so because that investigation has national significance. It is appropriate that the Commonwealth fund such investigations. It should also be noted that the States and Territories make a significant contribution through the secondment of staff.

Recommendation 5: That the statute be amended to provide that the Inter-Governmental Committee may refer matters for special investigation by the Authority which are framed in broad terms as to the characteristics of the criminality to be investigated. (para. 3.107)

The framing of references in broader terms is consistent with the decision of the Federal Court that references may be valid without specifying the offenders, the particular conduct, transactions or the time frame. As the High Court refused leave to appeal from that decision, it is neither necessary nor appropriate to make substantial changes to the provisions of the Act dealing with references.

The reference model is not intended to be used as a basis for a general investigative power. It is the framework under which the National Crime Authority can use the special powers that are not available to police forces with general investigative powers. Each reference, therefore, requires some factual basis to justify the use of the National Crime Authority's special powers to enable the Inter-Governmental Committee to make a decision regarding the use of those powers. There is, however, a problem with current time constraints and it is proposed that the National Crime Authority Act be amended to allow the National Crime Authority to investigate related activity occurring after the date of the reference.

Recommendation 6: That, as a check and accountability measure within the system of broadly framed references, the National Crime Authority must first form the opinion that there is a reason to believe that ordinary investigative methods are unlikely to work before it can invoke its special powers. This incorporation of the 'reason to believe' test into the references scheme is subject to the adequacy of the balances for enhanced scrutiny contained in this report. (para. 3.107)

A "reason to believe" test is not required, because under the National Crime Authority Act as it stands, the Inter-Governmental Committee must consider, before approving a reference, whether ordinary police methods of investigation into the matter are likely to be effective. Such a test would only be necessary if references were not to be the means of instigating a special investigation. Given the response to recommendation 5, the incorporation of a "reason to believe" test, is unnecessary and could leave the Authority open to costly legal claims of dubious merit.

Recommendation 7: That the National Crime Authority itself, not a Director of Public Prosecutions, should make the decision about whether to indemnify a witness who claims self-incrimination. To protect against improper use of this power, each such decision must be referred immediately for examination by the Inspector General of the National Crime Authority. (para. 4.72)

The Government does not agree with the specific recommendation that the National Crime Authority itself not the Director of Public Prosecution should make indemnification decisions. It is not appropriate that a discretionary power to undertake not to prosecute be given to a law enforcement agency. However, the Government agrees with the Parliamentary Joint Committee that the current arrangements allow witnesses to frustrate the investigation process by refusing to cooperate, including asserting that self incrimination means they cannot answer questions.

The Government believes that there is an alternative solution to the problem identified by the Parliamentary Joint Committee. Amendments will be sought to the sections of the National Crime Authority Act, which provide for undertakings as to use of incriminating evidence. The proposed amendments will provide automatic immunity from use of self incriminating evidence against the witness. The effect would be that, where a person claimed the privilege, they would still be required to give the evidence but it could not be used in a criminal proceeding or a proceeding for the imposition of a penalty. However, any evidence identified as a result of that answer (derivative use) would be permitted. The provisions will be consistent with those in the *Australian Securities and Investments Commission Act 1989*.

Recommendation 8: That no privilege against self-incrimination should attach to summonsed documents. (para. 4.72)

The Government supports this recommendation and will seek to clarify this provision because the law has changed fundamentally since the introduction of the Act. The privilege against self-incrimination applies to statements made by the person claiming privilege. It also applies to documents that the person is required to produce, but only so far as the documents equate with testimonial evidence. Consistent with the common law, the privilege against self-incrimination would not apply to the fact of the existence of the documents (but immunity would apply to their contents).
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Recommendation 9: That the application of client legal privilege be clarified. (para. 4.92)

The Government agrees with this recommendation. Subsection 30(3) of the National Crime Authority Act, which preserves legal professional privilege in relation to questions or requests for documents made to a legal practitioner at a hearing, requires clarification in accordance with the law on legal professional privilege. It is unnecessary to establish expressly all the circumstances in which legal professional privilege applies. The provisions need only state that the provisions of the Act do not affect the law relating to legal professional privilege.

It is also proposed to seek repeal of paragraph 29B(2)(e)(i) of the National Crime Authority Act, which provides an exception to the prohibition on disclosure under section 29B for a legal practitioner. This exception is in addition to a legal professional privilege exception and an exception for the purpose of obtaining legal representation. Its scope is uncertain and it is anomalous to provide such an exception only to legal practitioners. A duty arising from a professional relationship such as a contractual or fiduciary obligation of good faith may arise in any professional relationship but no exemption is provided in relation to other professions.

Recommendation 10: That the National Crime Authority should be empowered to issue search warrants in narrowly defined circumstances. Any decision made by the Authority in relation to an application for a search warrant should be notified to the Inspector-General of the National Crime Authority as soon as practicable. (para. 4.106)

The view of the Government is that to allow the National Crime Authority to issue its own search warrants is not appropriate or necessary. It does however, support consideration of a broader approach to the issuing of search warrants (such as the issuing of warrants by magistrates). Any extension of the power of the National Crime Authority in relation to search warrants that extends beyond the powers of police under the *Crimes Act 1914* is not supported.

The Government will also seek to amend the *National Crime Authority Act 1984* so that search warrants (and arrest warrants under section 31) include an express stipulation of 'reasonable force'. The Senate Standing Committee on Regulations and Ordinances has expressed concern about the absence of this stipulation in arrest warrants.

Recommendation 11: That the penalties for the offence of money laundering be increased. (para. 4.119)

The Government understands the concern of the Parliamentary Joint Committee that the Courts are issuing some manifestly inadequate penalties for the offence of money laundering but it believes that the determination of appropriate penalty is a matter for the Courts. The Commonwealth money laundering offence in the *Proceeds of Crime Act 1987* provides for a penalty of \$200,000 or imprisonment not exceeding 20 years or both, for a person who engages in money laundering of greater amounts than \$200,000. The Government believes such penalties are sufficient.

Recommendation 12: That the penalties for non-compliance with the *National Crime Authority Act 1984* be increased. (para. 4.123)

It is proposed to seek amendments to the Act so that: failure to attend when required to do so; failure to attend from day to day; refusing or failing to take an oath or affirmation; refusing to answer a question; refusing or failing to produce a document or thing; and contempt will have the same penalty as lying under oath. The Act currently provides a fine of up to \$22,000 or 5 years imprisonment for making false or misleading statements or, if heard summarily, \$2,200 or imprisonment for one year. Any failure to comply with the requirements of the Act delays the hearing process but, in the absence of greater penalties, there is no incentive to comply.

In addition to increasing the penalties for the offences listed, the Government also proposes seeking amendments to the Act to give the National Crime Authority a contempt regime. This regime, which would be broadly based on the New South Wales *Independent Commission Against Corruption Act 1988*, would enable the National Crime Authority to apply to a Court to have the Court deal with the contempt as if it were contempt of Court. This amendment will further support the effective and efficient operations of the National Crime Authority.

Recommendation 13: That, pending the passage of the Commonwealth Criminal Code and as a matter of general guidance of what is considered acceptable, the meaning of 'reasonable excuse' under sections 30(1) and 30(2) of the *National Crime Authority Act 1984* should be defined in the Act. (para. 4.125)

The Government will seek to amend the Act so that Chapter 2 of the *Criminal Code*, which deals with criminal responsibility and contains comprehensive general defences, applies to offences under the Act. The Government will also seek to remove the 'reasonable excuse' defence from the offences in the Act, as the Code will require the proof of any mental element for offences as well as providing appropriate defences.

Recommendation 14: That, given the substantial amendment of the *National Crime Authority Act 1984* required to implement the Parliamentary Joint Committee's recommendations in this report, the Government should rewrite the Act to ensure that Parliament's intentions are expressed in clear and unambiguous terms. (para. 4.143)

The Parliamentary Joint Committee's recommendations do not affect the greater part of the National Crime Authority Act. However, in accordance with the Government's policy on statute repair, the Act will be examined during the drafting process of the proposed amendments to ensure that its contents are expressed in clear and unambiguous terms.

Recommendation 15: That, without restricting the manner in which the Authority may regulate the conduct of proceedings at a hearing under section 25 of the *National Crime Authority Act 1984*, where the presiding member has permitted a person to attend a hearing who is not a member of the National Crime Authority's staff, witnesses should be so advised and be able to comment. (para. 4.154)

The Government will seek to have this provision amended as recommended, but not so as to give the witness grounds to refuse the presence of the individual.

Recommendation 16: That the Chairperson of the National Crime Authority should not also be chair of the Commonwealth Law Enforcement Board. (para. 5.46)

The Government intends to initiate a re-examination of this arrangement in the context of the broader issue of Commonwealth law enforcement coordination.

Recommendation 17: That the Standing Committee on Organised Crime and Criminal Intelligence be recognised in the statute as an advisory body to the National Crime Authority. (para. 5.52)

Government is considering, in consultation with the States and Territories, the role and functions of the Standing Committee on Organised Crime and Criminal Intelligence (SCOCCI). It is not appropriate that a body such as SCOCCI, which advises a ministerial committee, be recognised in the National Crime Authority Act.

Recommendation 18: That sections 51 and 55 of the *National Crime Authority Act 1984* be amended to clarify that the Parliamentary Joint Committee on the National Crime Authority has access to all information held by the Authority which is not of a sensitive nature. (Para. 5.103)

The Government does not agree with this recommendation. It feels that if an appropriate complaints mechanism is created, there is arguably less reason to give the Parliamentary Joint Committee wider access to information. However, the Government does agree that the Parliamentary Joint Committee could be provided with a greater degree of information provided operational sensitivities are protected. Amendments will therefore be proposed to allow the Parliamentary Joint Committee access to information on completed operations and to Ombudsman reports referred to it by the Minister.

Recommendation 19: That an Office of Inspector-General of the National Crime Authority be created, subject to the direction and oversight of the Parliamentary Joint Committee on the National Crime Authority, to investigate any aspect of the Authority's operations as may be required. (para. 5.103)

The Government does not agree with the concept of creating an Inspector General of the National Crime Authority to be subjected to the direction and oversight of the Parliamentary Joint Committee. The National Crime Authority is already under the direction and oversight of the Minister and the Inter Governmental Committee. The notion that a Parliamentary Joint Committee supervises a statutory office would be inappropriate in our system of government. No other Parliamentary Committee has such a role.

Furthermore, the Ombudsman has the role of auditing the interception activities of the AFP and the National Crime Authority under the *Telecommunications (Interception) Act 1979*. The audit and complaints investigation functions would complement each other, as they do with the AFP.

The Ombudsman would not be subject to the direction or oversight of the PJC in relation to the investigation of specific complaints, but the PJC would have access to such Ombudsman reports as referred to it by the Minister.

Recommendation 20: That the Minister be required to table the annual report of the National Crime Authority within 15 sitting days of its receipt. (para. 5.108)

Currently the Minister must table the annual report within 15 sitting days of its receipt. The inter-governmental nature of the National Crime Authority requires that the report be circulated to members of the Inter-governmental Committee for comment before it is provided to the Minister. This process naturally takes some time but it is essential given the nature of the National Crime Authority.

Recommendation 21: That the Inspector-General of Intelligence and Security be designated as the Inspector-General of the National Crime Authority and be given responsibility for overseeing the operations of the National Crime Authority in respect of complaints made against the actions of all its officers, including seconded police. (para. 6.57)

The Government does not agree with the concept of an Inspector General of the National Crime Authority. However, the Government does agree that what has existed to date is an unsatisfactory system, with complaints to Ministers, the Parliamentary Joint Committee and police complaint bodies, none of which deals with the totality of the issue. The Government supports the establishment of specific procedures for the investigation of complaints against the National Crime Authority but considers that the Ombudsman should undertake this function.

That office already has jurisdiction in relation to the Australian Federal Police seconded to the Authority. It is also consistent with the systems of complaints against police in the States and Territories and will facilitate consistent processes for dealing with officers the subject of complaints. Some concern has been expressed that the statutory role of the police commissioners responsible for officers seconded to the Authority may not be adequately recognised. It is proposed that in respect of those officers, the Ombudsman be given jurisdiction to examine complaints against the National Crime Authority, with home jurisdictions to determine appropriate disciplinary action.

Recommendation 22: That the proposed Inspector-General of the National Crime Authority present details on the outcome of the examination of complaints in relation to the National Crime Authority in an annual report to Parliament. (para. 6.57)

As outlined in Recommendation 21, the Government intends setting up a complaint mechanism utilising the office of the Ombudsman. The ordinary requirements in relation to reporting by the Ombudsman should apply.

Recommendation 23: That the Chairperson of the National Crime Authority be a judge. (para. 7.26)

The Government notes that under the National Crime Authority Act, a judge may be appointed as Chairperson. None of the powers of Members or the Chair are judicial. The National Crime Authority is an investigatory body, not an adjudicatory body. The

Parliamentary Joint Committee recommendation arises from its view that the powers of the Chairperson of the National Crime Authority should be expanded, but the Government does not agree that there should be a significant increase in those powers. A requirement that a judge chair the National Crime Authority would significantly reduce the number of possible candidates with other qualifications necessary to the position including demonstrated management skills. No change should be made to the current qualifications for the Chairperson.

Recommendation 24: That the provisions of the *National Crime Authority Act 1984* in relation to the qualifications of Authority Members be retained. (para. 7.26)

The Government agrees with the recommendation. This provides more flexibility for the appointment of persons with necessary skills.

Recommendation 25: That the term of membership of the National Crime Authority be four years, with the option for renewal for a maximum of another four years, subject to satisfactory performance. (para. 7.47)

The Government proposes to seek amendments to extend the potential maximum term(s) to a total period of 6 years. This will provide some greater flexibility balanced against the safeguard of terms being capped.

Recommendation 26: That subject to demonstrating appropriate aptitudes and qualities, a Member should be capable of appointment as Chairperson of the National Crime Authority for four years, subject to the aggregate term not exceeding eight years. (para. 7.47)

Under the National Crime Authority Act, there is currently no barrier to a member being appointed as Chairperson, provided that the member is qualified. The Government agrees that it should be possible for a member to be appointed as Chairperson. The aggregate term should be for no more than six years (see recommendation 25). Legislative amendments to achieve this will be proposed.

Recommendation 27: That the Government present a submission to the Remuneration Tribunal for a review of the remuneration of the Chairperson and Members of the National Crime Authority in recognition of the substantial changes in their responsibilities arising from the implementation of the recommendations contained in this report. (para. 7.47)

The Government does not believe the changes it proposes are sufficient to warrant a submission to the Remuneration Tribunal at this time.

Recommendation 28: That the statute be amended to provide for the appointment of a number of part-time members, who would each serve a term not exceeding eight years. (para. 7.50)

The Government agrees with the need to increase the number of persons who are able to exercise powers under the Act. However, the Government does not agree that there is a need for part-time members who would differ from the full-time members only in relation to the nature of their appointment. To enable the National Crime Authority to operate effectively and efficiently, there should be a number of persons who are

specifically empowered to conduct hearings on behalf of the National Crime Authority. It is, therefore, proposed to seek amendments to the Act to allow for the appointment of an unlimited number of hearing officers whose only function would be to conduct hearings for the National Crime Authority. Such hearing officers would have all the powers, privileges and immunities of the full-time members of the National Crime Authority when they conduct a hearing, but no other function or role. Hearing officers would increase the investigative capacity of the National Crime Authority and open appointments to qualified persons who could not otherwise accept a full-time appointment.

The Governor-General on the recommendation of the Inter-Governmental Committee would appoint the hearing officers for a maximum period of six years. A number of minor administrative amendments governing leave and conflict of interest will be required.

Recommendation 29: That attention should be paid to the geographical distribution of National Crime Authority members, with particular reference to Western Australia. (para. 7.51)

It is current practice in considering appointments to take account of geographical distribution. The appointment of part-time members should allow for their strategic allocation to ensure that the National Crime Authority maintains an effective national presence.

Recommendation 30: That the National Crime Authority should employ a small core of staff investigators to complement the existing system of seconded police officers, the emphasis and priorities of this core being a matter for discussion with SCOC CI having regard to the Authority's needs for investigative personnel and the availability of seconded officers. (para. 7.91)

This is a management issue to be considered in the context of managing and allocating resources to effectively achieve the National Crime Authority's outcomes. There are complex issues involved in this recommendation, especially those regarding the possibility for corruption, which the Parliamentary Joint Committee in its report acknowledges.