



**Joint Standing Committee on the  
Anti-Corruption Commission**

**CONFIDENTIALITY AND  
ACCOUNTABILITY: PARLIAMENTARY  
SUPERVISION OF ANTI-CORRUPTION  
AND/OR LAW ENFORCEMENT  
AGENCIES IN AUSTRALIA**

**First Report**  
In the Thirty-Fifth Parliament

**1997**

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**First Report**  
In the Thirty-Fifth Parliament

Presented by  
**The Hon. Derrick Tomlinson, MLC and Mr W. Thomas, MLA**  
Laid on the Table of the Legislative Council and the Legislative Assembly on,  
23 October 1997

ORDERED TO BE PRINTED

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## COMMITTEE MEMBERS

<b>Chairman</b>	Hon. Derrick Tomlinson, MLC
<b>Deputy Chairman</b>	Mr W. Thomas, MLA
<b>Members</b>	Mr R. Bloffwitch, MLA Dr E. Constable, MLA Hon. J. Cowdell, MLC Hon. M. Montgomery, MLC Hon. N. Griffiths, MLC Mr M. Trenorden, MLA

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*Joint Standing Committee on the Anti-Corruption Commission***TERMS OF REFERENCE**

On Wednesday 18 June 1997 the Legislative Assembly established the Joint Standing Committee on the Anti-Corruption Commission.

- (1) That a Joint Standing Committee of the Legislative Assembly and the Legislative Council be appointed —
  - (a) to monitor and review the performance of the functions of the Anti-Corruption Commission established under the Anti-Corruption Commission Act 1988;
  - (b) to consider and report to Parliament on issues affecting the prevention and detection of “corrupt conduct”, “criminal conduct”, “criminal involvement” and “serious improper conduct” as defined in section 3 of the Anti-Corruption Commission Act 1988. Conduct of any of these kinds is referred to in this resolution as “official corruption”;
  - (c) to monitor the effectiveness or otherwise of official corruption prevention programs;
  - (d) to examine such annual and other reports as the Joint Standing Committee thinks fit of the Anti-Corruption Commission and all public sector offices, agencies and authorities for any matter which appears in, or arises out of, any such report and is relevant to the terms of reference of the Joint Standing Committee;
  - (e) in connection with the activities of the Anti-Corruption Commission and the official corruption prevention programs of all public sector offices, agencies and authorities, to consider and report to Parliament on means by which duplication of effort may be avoided and mutually beneficial co-operation between the Anti-Corruption Commission and those agencies and authorities may be encouraged;
  - (f) to assess the framework for public sector accountability from time to time in order to make recommendations to Parliament for the improvement of that framework for the purpose of reducing the likelihood of official corruption; and
  - (g) to report to Parliament as to whether any changes should be made to relevant legislation.

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- (2) The Joint Standing Committee shall not -
    - (a) investigate a matter relating to particular information received by the Anti-Corruption Commission or particular conduct or involvement considered by the Anti-Corruption Commission;
    - (b) reconsider a decision made or action taken by the Anti-Corruption Commission in the performance of its functions in relation to particular information received or particular conduct or involvement considered by the Anti-Corruption Commission; or
    - (c) have access to detailed operational information or become involved in operational matters.
  - (3) The Joint Standing Committee consist of 8 members, of whom -
    - (a) 4 shall be members of the Legislative Assembly; and
    - (b) 4 shall be members of the Legislative Council.
  - (4) No Minister of the Crown or Parliamentary Secretary to a Minister of the Crown be eligible to be a member of the Joint Standing Committee.
  - (5) A quorum for a meeting of the Joint Standing Committee be 5 members, each House of Parliament being represented by at least one member.
  - (6) The Joint Standing Committee have power to send for persons, papers and records, to adjourn from time to time and from place to place, and, except as hereinafter provided, to sit on any day and at any time and to report from time to time.
  - (7) The Joint Standing Committee not sit while either House of Parliament is actually sitting unless leave is granted by that House.
  - (8) A report of the Joint Standing Committee be presented to each House of Parliament by a member of the Joint Standing Committee nominated by it for that purpose.
  - (9) In respect of matters not provided for in this resolution, the Standing Orders of the Legislative Assembly relating to select committees be followed as far as they can be applied.

## **CHAIRMAN'S FOREWORD**

The Joint Standing Committee on the Anti-Corruption Commission was established by resolution of both Houses of Parliament. Its terms of reference require it to monitor the performance of the Commission and to report to Parliament. The Committee is not a "second court" established to review particular decisions or actions of the Commission. Neither is it to intrude into current investigations. Both the Act and the Committee's terms of reference expressly deny access to detailed operational information. The Commission is an independent investigative body.

Because it has such extensive powers, the Commission is accountable to Parliament. The Joint Standing Committee is the agent of that accountability. As such, it has to be confident it is properly informed about the performance of the Commission. However, the non-disclosure provisions in the Anti-Corruption Commission Act might make that difficult. Only the Commission may decide what it might disclose.

Such tension between confidentiality and accountability is not peculiar to the Anti-Corruption Commission. In Queensland, the Parliamentary Criminal Justice Committee has experienced a similar problem. So too have the Commonwealth Parliamentary Joint Committee on the National Crime Authority and the New South Wales Parliamentary Committee on the Independent Commission Against Corruption.

This Report is an account of meetings the Committee had with those bodies. We learned that there are several possible ways of resolving problems about the accountability of agencies bound by strict confidentiality provisions. They are considered in this Report. At this stage, the Committee is unwilling to recommend a preferred approach. We have yet to work through procedures with which we and the Anti-Corruption Commission will be comfortable and which will enable proper accounting to Parliament.

The Committee will continue to consult its counterparts in other States and the Commonwealth. As a result of our meeting with the Parliamentary Criminal Justice Committee in Queensland we have agreed to annual meetings of like committees.

HON. DERRICK TOMLINSON, MLC  
CHAIRMAN

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## TABLE OF CONTENTS

	<i>Page No.</i>
<b>COMMITTEE MEMBERS</b>	i
<b>TERMS OF REFERENCE</b>	ii
<b>CHAIRMAN’S FOREWORD</b>	iv
<b>1. INTRODUCTION</b>	1
<b>2. SPECIALIST ANTI-CORRUPTION AND/OR LAW ENFORCEMENT AGENCIES AND PARLIAMENTARY OVERSIGHT COMMITTEES IN AUSTRALIA</b>	1
Introduction	1
Western Australia	2
The nature of the relationship between specialist agencies and oversight committees	4
<b>3. OUTLINE OF THE POWERS AND FUNCTIONS OF THE SPECIALIST AGENCIES AND COMMITTEES IN THE JURISDICTIONS TO WHICH THE COMMITTEE TRAVELLED</b>	5
The Criminal Justice Commission and the Parliamentary Criminal Justice Committee	5
The National Crime Authority and the Parliamentary Joint Committee on the National Crime Authority	8
The Independent Commission Against Corruption and the Committee on the Independent Commission Against Corruption	10
The Police Integrity Commission and the Committee on the Ombudsman and the Police Integrity Commission	12
The Australian Federal Police	14
<b>4. CONFIDENTIALITY AND ACCOUNTABILITY – GENERAL COMMENTS</b>	16



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## Table of Contents cont'd

		<i>Page No.</i>
<b>5.</b>	<b>OTHER THEMES RAISED IN THE MEETINGS</b>	17
	The development of education programmes and the prevention of corruption	18
	Complaints regarding the activities of an agency or the conduct of its officers	19
	<i>Queensland</i>	19
	<i>New South Wales</i>	20
	<i>Commonwealth</i>	21
	The coercive powers exercised by specialist anti-corruption and/or law enforcement agencies	21
	Public vs private hearings during investigations	22
	Parliamentary oversight committee involvement in determining an agency's budget	24
	Parliamentary oversight committee involvement in the selection and removal of the Chairman and other members of an agency	24
	Public hearings by parliamentary oversight committees	25
	Secondment of police officers from within an agency's jurisdiction	26
	The question of whether parliamentary oversight committees should be established by statute or parliamentary resolution	26
<b>6.</b>	<b>CONCLUSION</b>	27
<b>7.</b>	<b>TABLE OF STATUTES</b>	28
<b>8.</b>	<b>REFERENCES</b>	29
<b>9.</b>	<b>APPENDIX ONE - ITINERARY AND RECORD OF MEETINGS</b>	31

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## 1. INTRODUCTION

Over the week beginning 1 September 1997, the Joint Standing Committee on the Anti-Corruption Commission (the Committee) met with a number of its counterparts in other Australian jurisdictions, namely the Parliamentary Criminal Justice Committee in Queensland, the Parliamentary Joint Committee on the National Crime Authority in the Australian Capital Territory and the Committee on the Independent Commission Against Corruption in New South Wales. It also met with the following specialist anti-corruption and/or law enforcement agencies: the Criminal Justice Commission in Queensland; the Independent Commission Against Corruption and the Police Integrity Commission in New South Wales; and the Australian Federal Police in their Melbourne office.<sup>1</sup>

The main purpose of the meetings was to examine the nature of the relationship between parliamentary oversight committees and these specialist agencies. In particular, the Committee wanted to look at how oversight committees and the agencies they supervised dealt with the tension between confidentiality requirements relating to current operational material and the need for such committees to be sufficiently well informed to ensure that an agency is properly accountable.

The Report begins by making some general comments about specialist anti-corruption and/or law enforcement agencies and parliamentary oversight committees in Australia. This section also includes some background information on the Committee and the Anti-Corruption Commission in Western Australia. Following this is an outline of the functions and powers of the agencies and oversight committees with which the Committee met. In this section the material is structured in a way which reflects the main theme underlying the Committee's meetings with these organisations: the tension between confidentiality and accountability. A number of other themes were also raised during the course of the meetings and the Report concludes with a discussion of these.

## 2. SPECIALIST ANTI-CORRUPTION AND/OR LAW ENFORCEMENT AGENCIES AND PARLIAMENTARY OVERSIGHT COMMITTEES IN AUSTRALIA

### Introduction

Since the early 1980s a number of specialist anti-corruption and/or law enforcement agencies have been established both nationally and in the States. These agencies are either standing royal commissions or are able to exercise the powers of a royal commission. As Ransley (1994: 23-24) explains these powers are very broad:

The central statutory power given to Australian commissions enables them to require the production of documentary and non-documentary evidence including the attendance and sworn testimony of witnesses ... Sanctions for non-compliance with summonses are created, including penalties, the issuing of warrants, and contempt offences ... In addition, commissions are given wide procedural freedom, enabling them to inquire as they see fit, generally not bound by the rules of evidence and procedure applying in Courts ... Thus, commissions may adopt inquisitorial processes aimed at

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<sup>1</sup> An *Itinerary and Record of Meetings* is provided in Appendix One to this Report.

discovering the truth of a situation, rather than adversarial court processes designed to force the prosecution to establish its case. It is this procedural flexibility which enables commissions to uncover and receive evidence not available in the usual court system, but which also creates the potential for lack of fairness to affected individuals.

The primary reason for the creation of these specialist agencies was the failure of traditional law enforcement bodies using conventional law enforcement methods to effectively tackle serious corruption and criminal activity.

As such agencies would be inquiring into conduct within government, they were designed to be independent from the executive arm of government. It is important that these agencies be relatively independent so they can do their job without political interference or the threat of that. It is also essential, as these agencies are able to exercise very great powers, that they be publicly accountable and not completely autonomous.

To this end, in all Australian jurisdictions where such agencies have been created, various accountability mechanisms have been put in place. These may include such mechanisms as the appointment of part-time commissioners to represent the community and to bring a range of experience to an agency's deliberations; operational review committees, which in some ways perform a similar function to part-time commissioners; independent inspectors or commissioners to audit and oversee an agency's operations; and judicial review of an agency's decisions. The most common and important public accountability mechanism adopted, however, has been the creation of parliamentary committees entrusted with the task of monitoring, reviewing and reporting to Parliament the activities of these agencies.

### **Western Australia**

In 1996 amendments were made to the *Official Corruption Commission Act 1988* (the OCC Act) and the powers and functions of the Western Australian Official Corruption Commission (OCC) were expanded. The amending Act renamed the OCC the Anti-Corruption Commission (ACC) and the OCC Act became the *Anti-Corruption Commission Act 1988* (the ACC Act).

The OCC was originally created in response to concerns raised about official corruption in Western Australia during the 1980s. The Late Hon. Andrew Mensaros, MLA introduced the Official Corruption Commission Bill 1988 as a private member's Bill into the Legislative Assembly in May 1988. With some amendments, the Bill received the support of Parliament and the OCC came into being in August 1989. When it was first established, the OCC was a small body whose role was to receive complaints about official corruption and then pass them on to other agencies for investigation and any further action.

The ACC has evolved out of a number of reviews of the OCC over a period of years. These reviews included the reports of two Legislative Assembly Select Committees established in 1991 and 1992 respectively to inquire into the OCC Act,<sup>2</sup> and the effectiveness of existing anti-corruption mechanisms in Western Australia was also considered in the 1992 Report of the Western Australian Royal Commission into Commercial Activities of Government and other Matters (the

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<sup>2</sup>

The Legislative Assembly Select Committee on the Official Corruption Act and the Legislative Assembly Select Committee on the Official Corruption Recommendations.

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WA Royal Commission) and Report No. 2 of the Commission on Government (COG) handed down in 1995.

The outcome of this process has seen the strengthening of provisions in Western Australia for combatting corruption within the public sector. The ACC, while it is a much smaller organisation than some of its counterparts in the eastern States, is intended to be a more robust organisation than the OCC. The changes made include the following –

- the definition of public officer under the Act now includes members of Parliament, Ministers and Parliamentary Secretaries;
- the jurisdiction of the ACC has been expanded to allow it to investigate allegations of corrupt conduct, criminal conduct, criminal involvement and serious improper conduct by police officers and other public officers and former public officers, and extends to private individuals involved in such activities;
- whereas the previous Commission was limited to receiving complaints about official corruption and conducting preliminary inquiries before deciding whether the matter should be further dealt with by another agency, the ACC is able to conduct its own investigations and, where it considers it necessary, the Commission may appoint a special investigator who exercises the powers of a royal commissioner;
- the ACC has been designed to be independent of the Police Service: the Police Commissioner is no longer a member of the panel which selects members of the Commission and the ACC is able to employ its own investigators;
- the compulsory reporting requirements, which require principal officers of public sector agencies to report to the ACC instances of conduct or involvement within their agency to which the ACC Act may apply, were amended consistent with other changes to the Act.

In line with the recommendations of the Legislative Assembly Select Committee on the OCC Act in particular, but also those made by the WA Royal Commission and COG, a Joint Parliamentary Committee was established earlier this year to oversee the operation of the ACC. The Select Committee (1992: 12) recommended that –

A Joint Parliamentary Committee be established to monitor the performance of the Commission and to consider and report to Parliament on issues affecting the prevention and detection of official corruption in the public sector. The Joint Parliamentary Standing Committee should not be empowered to involve itself in operational matters of the Commission or have access to detailed operational information. The Standing Committee should monitor all public sector agencies to assess the effectiveness of agency corruption prevention programs. The Standing Committee should also address areas of overlap between the Commission and the other bodies with responsibility in the anti-corruption area to avoid unnecessary duplication and encourage cooperation between such bodies where it is mutually beneficial.

The terms of reference of the Committee, reproduced at the front of this Report, reflect this recommendation.

### **The nature of the relationship between specialist agencies and oversight committees**

Oversight committees perform a dual function: on the one hand they are the main avenue through which specialist anti-corruption and/or law enforcement agencies are made accountable; on the other they exist to ensure the independence of the agencies they oversee. To this end, such committees are usually made up of members of Parliament who are not also members of the executive. Under the Committee's terms of reference, for instance, "no Minister of the Crown or Parliamentary Secretary to a Minister of the Crown" is eligible to be a member of the Committee. These committees are also designed to reflect the balance of forces in the Parliament that creates them. In Western Australia, apart from being drawn in equal numbers from both Houses of the State Parliament, the Committee is bipartisan and membership is drawn from independent members of Parliament, the Liberal Party, the National Party and the Labor Party.

The convention that membership of such committees be bipartisan seeks to ensure that partisan interests are moderated and the oversight of such agencies is not coloured by partisan interests. The establishment of such committees also represents a belief in the institution of Parliament and a commitment to the idea of responsible government. Through the oversight of a parliamentary committee the relevant agency is made accountable to the people through their representatives in the Parliament.

The WA Royal Commission recommended that a number of agencies responsible for maintaining the integrity of Western Australia's public sector be reconstituted as "independent parliamentary agencies". To be included among these agencies was a Commissioner for the Investigation of Corrupt and Improper Conduct. It further recommended that these agencies be subject to parliamentary oversight through the Parliament's committee system. The following comments made by the WA Royal Commission (1992: 5.5.4) regarding the operation of such committees highlights their dual role –

As important as the independence and integrity of the offices themselves is the reassurance that should be provided to the public that the significant functions they perform are being discharged fully and effectively and, to the extent that those functions involve the scrutiny and review of the activities of government, their reports and recommendations are heeded. The appropriate body to provide that reassurance, as also to secure the independence we consider so vital, is the Parliament itself. The protection of the public interest requires an open, deliberate and visible commitment to the support of these agencies. In our view, it is the Parliament which should make that commitment.

The ideal relationship between these specialist agencies and the parliamentary committees established to oversee them may be characterised as a mutual one insofar as they working towards a common goal: effectively combatting corruption in the public sector and/or serious crime. Mutuality should not, however, imply interdependence. The agency and its oversight committee have two quite different jobs to do and their functions and powers reflect these different tasks. An oversight committee's task is to ensure that the agency it oversees properly performs its functions, while the agency itself relies on the committee to ensure it remains free of political interference and unwarranted criticism so it can get on with the job of investigating the matters that come before it. It is for this reason that the oversight committees established in Australia are, by the instruments that created them, prevented from involving themselves in the investigation of particular complaints or allegations or from reconsidering decisions made by an agency.

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### **3. OUTLINE OF THE POWERS AND FUNCTIONS OF THE SPECIALIST AGENCIES AND COMMITTEES IN THE JURISDICTIONS TO WHICH THE COMMITTEE TRAVELLED**

As was noted in the introduction to this Report, the main theme addressed during the Committee's meetings with these various organisations related to the potential for tension to arise between parliamentary oversight committees and the agencies they oversee. This tension is the result of the difficulty of reconciling the confidentiality requirements associated with current investigations undertaken by these agencies and the monitoring and review function entrusted to their oversight committees. The following outlines of the functions and powers of the agencies and the parliamentary oversight committees in the jurisdictions to which the Committee travelled reflect this theme.

#### **The Criminal Justice Commission and the Parliamentary Criminal Justice Committee**

The Criminal Justice Commission (CJC) is a large organisation established under the *Criminal Justice Act 1989* (the CJC Act). It employs some 250 people and is entrusted with fulfilling a broad range of criminal justice functions. In the CJC's last Annual Report the CJC (1996: 5) summarised its functions as follows –

The CJC is charged with monitoring, reviewing, coordinating and initiating reform of the administration of criminal justice in Queensland and fulfilling those criminal justice functions that cannot appropriately or effectively be carried out by the Queensland Police Service or other agencies of the State.

More specifically, these functions involve the CJC in a large range of activities from investigating official misconduct and organised and major crime, to determining disciplinary charges of official conduct, collecting and analysing intelligence, developing programmes to prevent corruption and protecting witnesses.

It should be noted that the Queensland Cabinet recently endorsed a proposal to establish a Crime Commission (Queensland Government 1997: 1). Concern regarding the investigation of paedophilia and child abuse prompted calls for such a Commission. In addition to being responsible for investigating paedophilia and child abuse, the Commission, if established, will take over from the CJC responsibility for investigating organised and major crime (Queensland Government: 6).

At the apex of the CJC sits a Chairperson who is assisted by four part-time Commissioners. The part-time Commissioners fulfill what is seen as a crucial accountability role. They are drawn from throughout the Queensland community and only one need be a lawyer. As such, the Commissioners are able to bring to the deliberations of the Commission a wide range of experience.

Under the CJC Act provision is made for a Parliamentary Committee, the Parliamentary Criminal Justice Committee (PCJC), to oversee the activities of the CJC. The functions of the Committee are set out in section 118(1) of the Act as follows –

- 
- (a) to monitor and review the discharge of the functions of the commission as a whole and of the official misconduct division in particular;
  - (b) to report to the Legislative Assembly, with such comments as it thinks fit, on any matters pertinent to the commission, the discharge of the commission's functions or the exercise of the powers of the commission, a commissioner, or of the officers of the commission, to which the attention of the Assembly should, in the committee's opinion, be directed;
  - (c) to examine the annual report and other reports of the commission and report to the Legislative Assembly on any matter appearing in or arising out of any such report;
  - (d) to report on any matter pertinent to its functions that is referred to it by the Legislative Assembly;
  - (e) to participate in the constitution of the commission and the removal from office of a commissioner as prescribed;
  - (f) at a time appropriate allow tabling of its report under this paragraph in the Legislative Assembly by which it was appointed, being a time near to the expiry of three years from its appointment –
    - (i) to review the activities of the commission during such three years; and
    - (ii) to report to the Legislative Assembly and to the Minister as to further action that should be taken in relation to this Act or the functions, powers and operations of the commission.

The powers of the Committee include the power to call for persons, documents and other things and to examine witnesses on oath. Section 118(2) further provides that the Committee has such powers as –

- (a) are necessary to enable or assist the committee in the proper discharge of its functions;
- (b) are conferred on it by the Legislative Assembly with a view to the proper discharge by the committee of its functions.

Of its functions, the most important in general terms is the requirement that the Committee “monitor and review the discharge of the functions of the Commission”. The PCJC has put in place certain procedures through which it performs this function. These include –

- holding regular committee meetings;
- receiving bi-monthly reports from the CJC in relation to its activities and the discharge of its functions;
- holding bi-monthly, in-camera meetings with the CJC;
- receiving complaints against the CJC;
- conducting audits of various registers held by the CJC;
- conducting inquiries into the actions of the CJC and/or its officers, matters involving the CJC, and issues arising from reports of the CJC as and when those matters arise; and

- 
- seeking independent advice from experienced legal Counsel, academics and persons with particular skills and expertise with respect to various matters concerning the CJC (PCJC 1997: 9).

The PCJC has expressed concern that its monitor and review function cannot be fully discharged under the present Act because of the confidentiality provisions contained within it. Section 27(2) of the CJC Act provides –

Notwithstanding any other provision of this Act, if the Commission is of the opinion that information is such that confidentiality should be strictly maintained in relation to it—

- (a) the Commission need not make a report on the matter to which the information is relevant; or
- (b) if the Commission makes a report on that matter it need not disclose that information or refer to it in the report.

Under this provision the PCJC (1997: 40) notes that it is possible that the Commission may withhold information from it and could do so without informing the Committee. As such, section 27(2) may be a barrier to the CJC being properly accountable.

The PCJC has made extensive recommendations regarding its capacity to oversee the CJC. In particular, it has recommended amendments to section 27(2) of the CJC Act. The PCJC has not suggested removing the Commission's ability to withhold confidential information, and indeed recognises the need for current operational material to remain confidential. The recommended amendments, however, would require, if implemented, that the Commission inform the PCJC when it has withheld information, that a decision to withhold information only be made if it is supported by a majority of the members (Commissioners) of the Commission, and that reasons for withholding information be provided. In addition, the CJC would be required to keep a register in relation to such matters so that once they were finalised the Committee could audit them (PCJC 1997: 43-44).

The PCJC has further recommended it be given the power to appoint a Parliamentary Commissioner who would exercise “wide powers to investigate a range of matters on the Committee's behalf as and when the Committee deems it appropriate and/or necessary”, and who would report back to the PCJC (PCJC 1997: 114). In support of this recommendation the PCJC (1997: 117) has argued –

Effective oversight of the CJC requires the power to examine detailed and sensitive information including, in appropriate circumstances, current operational material. Having the power to appoint a Parliamentary Commissioner would rectify what the Committee sees as a major gap in the current accountability arrangements in that the Committee is restricted in the material it is provided and can otherwise access.<sup>3</sup>

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<sup>3</sup> On 7 October 1997 the Criminal Justice Legislation Amendment Bill 1997 was introduced into the Queensland Parliament. The purpose of the Bill is to improve the accountability of the CJC. The changes contained in the Bill include provision for the creation of an office of Parliamentary Commissioner responsible to the PCJC (clause 41). The amending Bill also provides for the PCJC to be given the power to direct the CJC to undertake an investigation (clause 41) and to issue guidelines to the CJC (clause 40). The Bill does not provide for the PCJC to have the power to direct the CJC to discontinue an investigation or involve itself in an existing investigation.



It should also be noted that section 132 of the CJC Act provides, among other things, that where the PCJC receives confidential information certain obligations are placed upon its members not to disclose that information.

In the CJC's 1996 Annual Report the CJC was careful to stress the need for the Commission to remain independent, while at the same time being accountable. The central role played by the PCJC in ensuring both the independence and accountability of the CJC was acknowledged in the Report –

... the PCJC is our direct link to Parliament and, ultimately, to the people of Queensland (CJC 1996: 6).

Having said this, in the Committee's meeting with the CJC the Chairman, Mr Frank Clair, expressed the view that the accountability system had not always worked as well as it could. The Chairman referred to the disquiet the PCJC had expressed about the use of section 27(2). He believed this disquiet was largely unfounded. In his recollection section 27(2) had only been relied on two or three times over the previous eighteen months. In briefly reciting the history of the relationship between the CJC and the PCJC the Chairman noted that, while in the past the relationship had been difficult, the CJC had developed a reasonably good working relationship with the present Committee.

The Chairman went on to make the point that parliamentary oversight of the CJC in the way envisioned by Fitzgerald could only work if the parliamentary committee given this task was completely bipartisan. The Chairman was also of the view that it was essential, if the system was to work effectively, that the CJC and the PCJC understand that they shared a common purpose and that each recognise the important though distinct role each performed in fulfilling that purpose.

### **The National Crime Authority and the Parliamentary Joint Committee on the National Crime Authority**

The National Crime Authority (NCA) was established in 1984. It is a national body whose main function is to investigate and prevent organised crime. In undertaking this function the NCA will, in many cases, work cooperatively with other law enforcement agencies in Australia.

Part III of the *National Crime Authority Act 1984* (the NCA Act) makes provision for a Parliamentary Joint Committee to oversee the NCA. In addition, section 8 of the Act provides for an Inter-Governmental Committee (IGC), the principal function of which is to refer matters to the NCA for investigation, though the IGC also performs an oversight role.

In relation to the Parliamentary Joint Committee on the NCA (PJCNCA) section 54 of the NCA Act provides that –

All matters relating to the powers and proceedings of the Committee shall be determined by resolution of both houses of Parliament.

In May 1996 such a resolution was passed giving to the Joint Committee, or any subcommittee of the Committee, the power to send for persons, papers and records. It further provides that the

Joint Committee, or any subcommittee, “must 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” (PCJC 1997: 76).

Section 55(1) of the NCA Act provides for the Joint Committee to undertake the following duties –

- (a) to monitor and 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.

In undertaking these duties similar restrictions to those applying to other oversight committees in Australia are placed on the Joint Committee. Section 55(2) of the Act states –

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.

In the submission made by the NCA to the Joint Committee during the Joint Committee’s evaluation of the NCA in 1991, the NCA outlined the following mechanisms through which it was made accountable –

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 (PJCNA 1991: 107 - footnotes omitted).

The Joint Committee, in this evaluation of the NCA, made the following comment on the issue of accountability –

... 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 (PJCNA 1991: 108-109).

The PCJC (1997: 77-78) notes that in the past the Joint Committee had suggested the correct balance had not been achieved. In its First Report the Joint Committee made the point that it and the NCA had different conceptions of where the balance lay and, from the Joint Committee's perspective, it was not kept sufficiently well informed by the NCA to properly undertake its duties under section 55(1) of the NCA Act.

The Joint Committee's recommendations to amend the Act, designed to ensure that it was kept properly informed, were not implemented, even though the Joint Committee had reached the conclusion that –

... 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 (quoted in PCJC 1997: 78).

Subsequent arrangements between the Joint Committee and the Authority, however, provided the basis for the Joint Committee to continue its work.

Reaching the appropriate balance remains a concern for the present Joint Committee. In the Committee's meeting with the Joint Committee, one member repeated the conclusion made in the Joint Committee's First Report: unless there were changes to the present arrangements whereby the NCA reports on its activities to the Joint Committee, then there was little point in the Joint Committee continuing to exist.

### **The Independent Commission Against Corruption and the Committee on the Independent Commission Against Corruption**

The Independent Commission Against Corruption (ICAC) was established by the *Independent Commission Against Corruption Act 1988* (the ICAC Act). In addition to investigating "corrupt conduct", the ICAC is also charged with promoting and implementing corruption prevention strategies. With the establishment of the Police Integrity Commission in 1996 responsibility for investigating corruption in the NSW Police Service has been removed from the ICAC.<sup>4</sup>

Under Part 7 of the ICAC Act a Parliamentary Joint Committee, to be called the Committee on the Independent Commission Against Corruption, is established to monitor and review how the ICAC performs its functions. Provision for an Operations Review Committee (ORC) is made under Part 6 of the Act. The ORC is charged with advising the ICAC on whether to continue or discontinue an investigation and any other matters which may be referred to it by the Commissioner.

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The Police Integrity Commission is discussed further at pages 12-14 of this Report in the section entitled *The Police Integrity Commission and the Committee on the Ombudsman and the Police Integrity Commission*.

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The ICAC's principal functions, which are set out in sections 12-14 of the Act, were summarised by the ICAC in the Committee's meeting with it as follows –

- Investigating and reporting on corrupt conduct.
- Prevention – examining laws, practices and procedures of public authorities and officials.
- Education, advice and dissemination of information in relation to corrupt conduct.

In describing corrupt conduct in one of its corporate brochures the ICAC (1996) states –

The key notion is the misuse of public office. Commonly it involves the dishonest or biased use of power or position resulting in one person being advantaged over another.<sup>5</sup>

As with the other agencies with which the Committee met, the ICAC is aware that if it is to maintain its independence it needs to be fully accountable. The two accountability mechanisms most thoroughly discussed at the meeting with the ICAC were the Joint Committee and the ORC.

The functions of the Joint Committee are set out in section 64(1) of the ICAC Act as follows –

- (a) to monitor and review the exercise by the Commission of its functions,
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- (c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
- (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission,
- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

Under section 64(2) the Joint Committee is not authorised –

- (a) to investigate a matter relating to particular conduct, or
- (b) to reconsider a decision to investigate, not to investigate or discontinue investigation of a particular complaint, or
- (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

In taking evidence the Joint Committee is empowered by section 69 to send for persons, papers and records, but evidence must be taken in public, subject to section 70, which allows that evidence may be taken in private where it relates to “a secret or confidential matter”. The PCJC (1997: 82) notes that the Joint Committee meets every six months with the ICAC Commissioner.

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The general nature of corrupt conduct is set out in detail in section 8 of the ICAC Act.

As required by section 69(2), these hearings are held in public. At these hearings questions on notice are put to the Commissioner.

Comments in the PCJC Report on Accountability (1997: 81-82) suggest the Joint Committee's access to information regarding complaints received by ICAC is limited. The PCJC refers to the conclusions of one commentator who recommends that the ORC report to the Joint Committee, so allowing the Joint Committee "to gain an appreciation of complaints received by ICAC".

The ORC consists of eight members: the Commissioner and Assistant Commissioner; the Commissioner of Police; and five other persons, four of whom are appointed to represent community views and who come from a variety of backgrounds. As such, the ORC plays an accountability role not dissimilar to that performed by the part-time Commissioners appointed to assist the Chairman of the CJC.

The functions of the ORC are set out as follows in section 59 of the Act –

- (a) to advise the Commissioner whether the Commission should investigate a complaint made under this Act or discontinue an investigation of such a complaint,
- (b) to advise the Commissioner on such other matters as the Commissioner may from time to time refer to the Committee.

The Commissioner is required to consult with the Joint Committee at least once every three months, though meetings are held more frequently than this. The ORC itself is not required to report, but information sent to the ORC is subject to audit and the ORC is discussed in the ICAC's Annual Reports. In formal terms the ORC is only an advisory body and the ICAC is not obliged to follow recommendations made by it. In practice, however, the Committee was advised by the ICAC that the ORC's recommendations are always accepted.

Under the ICAC Act there is a clear separation of responsibilities between the ORC and the Joint Committee. The Joint Committee has the general responsibility, through its monitor and review function, of ensuring that the ICAC effectively and properly undertakes its functions under the Act, whereas the ORC has a much more specific and hands on role to play in determining which matters are investigated and when such investigations should be discontinued.

### **The Police Integrity Commission and the Committee on the Ombudsman and the Police Integrity Commission**

In 1996 the Royal Commission into the New South Wales Police Service (the Wood Royal Commission) issued an interim report in which the Commission recommended that a Police Corruption Commission be established to investigate police corruption and take over outstanding matters from the Royal Commission. The NSW Parliament subsequently provided for such a body, though, rather than calling it the Police Corruption Commission, it was named the Police Integrity Commission (PIC). The Act establishing the Commission, the *Police Integrity Commission Act 1996* (the PIC Act), makes provision for an Inspector to audit the operations of the Commission and a Parliamentary Joint Committee, the Committee on the Ombudsman and the Police Integrity Commission, to oversee the Commission and the Inspector.

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The principal functions of the Inspector are contained in section 89(1) of the Act and are as follows –

- (a) to audit the operations of the PIC for the purpose of monitoring compliance with the law of the State;
- (b) to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of the PIC or officers of the PIC; and
- (c) to assess the effectiveness and appropriateness of the procedures of the PIC relating to the legality or propriety of its activities.

The Inspector is completely independent of the Commission and may exercise the functions of the Office on his or her own initiative, in response to a complaint, a reference by the Ombudsman, the ICAC, the NSW Crime Commission, the Joint Committee or any other agency (section 89(2)). The powers granted the Inspector to carry out these functions are very extensive. Under section 90 the Inspector –

- (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and
- (e) may investigate and assess complaints about the Commission or officers of the Commission, and
- (f) may refer matters relating to the Commission or officers of the Commission to other agencies for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

The Inspector is also granted the power to hold inquiries, and, in doing so, he or she may exercise "the powers, authorities, protections and immunities" of a Royal Commissioner (section 91). Section 93 further provides that –

The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of its functions. ...

The functions of the Joint Committee as provided for in section 95(1) of the Act are as follows –

- (a) to monitor and review the exercise by the PIC and the Inspector of their functions,

- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter pertaining to the PIC or the Inspector or connected with their functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- (c) to examine each annual report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing, or arising out of, any such report,
- (d) to examine trends and changes in police corruption and practices and methods relating to police corruption, and report to both Houses of Parliament any changes which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament and report to both Houses on that question.

As was the case with all other Parliamentary Committees the Committee spoke to, the Joint Committee is prohibited from involvement in operational matters: it cannot itself undertake any investigation into corrupt conduct, nor can it reconsider any decisions by the Commission regarding particular investigations (section 95(2)).

At the meeting the Committee had with the PIC, the central concern these specialist agencies have with giving confidential information to oversight committees was expressed with some clarity. That concern relates to the possibility that the agenda of such committees may become political. This was described as “the essential problem”.

The provision for an Inspector to oversee the PIC’s activities, like the recommendation of the PCJC that it be given the power to appoint a Parliamentary Commissioner, represents one way in which sensitive information relating to current operational matters can be examined so as to ensure the proper accountability of an agency without compromising the confidentiality of such material.

The point was also made to the Committee that protocols need to be carefully developed regarding the provision of information by the agency to the oversight committee.

The PCJC (1997: 92) notes that the Wood Royal Commission, in recommending in its Interim Report that a body like the PIC be established, did not further recommend that the PIC be subject to the oversight of a parliamentary committee. Such oversight was, however, provided for in the PIC Act as the NSW Parliament concluded that the Commission and the Inspector should be directly accountable to Parliament.

### **The Australian Federal Police**

The Australian Federal Police (AFP) is a Commonwealth law enforcement agency established under the *Australian Federal Police Act 1979* (the AFP Act). The AFP was created to serve the Commonwealth’s law enforcement requirements, which include community policing in the ACT and some other Australian territories. The main office of the AFP is in Canberra, but it has regional offices in every State and Territory and a number of posts overseas.

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Under section 13(2) of the AFP Act the Minister may issue directions to the AFP. In the ministerial directive dated 30 April 1995, the interests of the Commonwealth in law enforcement were listed as follows –

- enforcing Commonwealth laws and protecting the integrity of Commonwealth government programs;
- effectively contributing to international efforts to counteract and prevent criminal activity, including encouraging cooperation in law enforcement in the region and extensive involvement in and encouragement of the international network of mutual assistance and extradition relationships;
- jointly with the States and Territories protecting the integrity of national economic and social institutions and the environment, and ensuring that there is a rational response where criminal activity impinges on national security and/or is of a transjurisdictional character and beyond the capacity of State law enforcement agencies to deal with effectively alone, or is such that a leadership role for the Commonwealth is desirable;
- promoting, jointly with States and Territories, efficient resource management to contain public expenditure of law enforcement in all jurisdictions while maximising effectiveness; and
- improving the safety of communities and individuals through the promotion and support for the development of broadly common standards for law enforcement and crime prevention across all Australian jurisdictions (AFP 1996: 99-100).

The AFP is not subject to oversight by a Parliamentary Committee; but, as the outline above indicates, the AFP does play a role in policing throughout Australia. The AFP also has a range of internal security mechanisms to deal with corruption within the AFP and complaints against the AFP. These include the Internal Investigation Division (IID) and the Internal Security and Audit Division (ISAD).

The IID was established by the *Complaints (Australian Federal Police) Act 1981*. The IID's principal function is to investigate complaints made against members of the AFP.

The ISAD was established by the AFP in 1990. It performs a broader anti-corruption role than the IID, being “responsible for developing corruption prevention strategies, monitoring their implementation and investigating allegations of corruption and serious criminal activity on the part of AFP personnel” (AFP 1996: 42).

The Commonwealth Ombudsman also has a role to play in relation to complaints made against the AFP as she is able to review investigations of the IID. The Ombudsman also has the power in certain circumstances to undertake her own investigations following an IID investigation (ALRC 1996: 72-73).<sup>6</sup>

The purpose of the Committee's meeting with the AFP was not to directly discuss confidentiality or accountability concerns *per se*; rather it provided an opportunity for the Committee to gain an

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<sup>6</sup> The Australian Law Reform Commission (ALRC) has recently reviewed the complaints and disciplinary systems of the AFP and the NCA. This review and its recommendations are briefly discussed at page 21 of this Report in the section entitled *Complaints regarding the activities of an agency or the conduct of its officers*.



overview of anti-corruption mechanisms employed by the police. Given the AFP's own anti-corruption programmes and the cooperative work it engages in with other Australian police forces, the AFP was able to give the Committee a very useful general briefing on these matters. Mr Nigel Hadgkiss, General Manager, Southern Region of the AFP and the principal officer with whom the Committee met, began his career as a police officer in Hong Kong and, since coming to Australia, has developed extensive experience in investigating corruption and serious crime. As such, Mr Hadgkiss was also able to provide the Committee with valuable background information drawn from this experience.

The matters discussed with the AFP are dealt with further in the concluding comments of this Report on other themes raised during the course of the Committee's meetings.

#### **4. CONFIDENTIALITY AND ACCOUNTABILITY – GENERAL COMMENTS**

A common theme expressed at the meetings was that a degree of tension existed between specialist anti-corruption and/or law enforcement agencies and their oversight committees. This was in spite of the fact that there are significant differences in detail between the accountability models outlined above and the capacity of each oversight committee to perform its monitoring and reviewing function. Invariably the agencies are wary of giving 'confidential' information to the committees relating to current investigations, whereas the committees expressed the view that they were unable to properly fulfill their primary function without having some access to such information.

While the ACC is in many significant respects different from the anti-corruption bodies established elsewhere in Australia, many of the elements that have given rise to these problems in other jurisdictions are present here. The Committee is, of course, made up of politicians and the perception will be, regardless of whether it is a justified one, that at some time the Committee, or parts of it, may allow a political agenda to become dominant. And, as in other Australian jurisdictions, confidentiality provisions in the ACC Act may make it difficult for the Committee to properly perform its oversight function.

In part, recognition of the potential for this tension to develop, or experience of it in practice, has led to a number of accountability models being adopted or recommended which interpose between a committee and the agency it monitors and reviews another body responsible for detailed oversight of the agency's operations. Examples of bodies which perform, or would perform, a function like this include the PIC Inspector and the proposal by the PCJC that it be given the power to appoint a Parliamentary Commissioner to oversee the CJC's operations. Such bodies may allow for what might be called operational accountability to exist without compromising the agency's interest in keeping current operational material confidential.

This, of course, is not the only reason for establishing such bodies. There are a number of constraints on parliamentary oversight committees which can make it difficult for them to fulfil their oversight role. In particular, limited time and resources may inhibit the capacity of a committee to monitor and review the agency it oversees. Committee members necessarily have a number of demands placed on their time and such committees are usually supported by a relatively small staff. The establishment of intermediate bodies, such as the PIC Inspector or the Parliamentary Commissioner proposed by the PCJC, may go some way to overcoming these

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constraints, and may enhance the work of an oversight committee by providing continuous and detailed scrutiny of an agency.

A further difficulty experienced by some of the committees the Committee met with relates to the degree of support they receive from the Parliaments that created them. The PCJC, for instance, has noted that over the years a significant number of its recommendations have not been implemented (PCJC 1996; PCJC 1997: 23-26).<sup>7</sup> The Joint Committee on the NCA has also expressed concern about its recommendations not having been implemented in the past (PJCNA 1997: 3).

One factor important to the success of the parliamentary committee oversight model is the recognition by both the agency and the committee that, while they have a common goal, they have quite distinct jobs to do. It is apparent from the discussions the Committee had with other oversight committees and the agencies they oversee that the demarcation between the respective roles of the agency and the committee needs to be clearly provided for and clearly understood.

On a more practical level, as was indicated in the Committee's meeting with the PIC, the development of clear protocols for the provision of information by the agency to its parliamentary oversight committee may go some way to taking the heat out of the difficult situations that will inevitably arise regarding the provision of information about particular investigations.

## **5. OTHER THEMES RAISED IN THE MEETINGS**

Apart from the very valuable information the Committee gathered regarding the tension between confidentiality and accountability, a number of other themes were raised in the meetings. These included –

- the development of education programmes and the prevention of corruption;
- complaints regarding the activities of an agency or the conduct of its officers;
- the coercive powers exercised by specialist anti-corruption and/or law enforcement agencies;
- public vs private hearings during investigations;
- parliamentary oversight committee involvement in determining an agency's budget;
- parliamentary oversight committee involvement in the selection and removal of the Chairman and other members of an agency;
- public hearings by oversight committees;
- secondment of police officers from within an agency's jurisdiction; and

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The Criminal Justice Legislation Amendment Bill 1997, however, does include amendments designed to implement a number of the recommendations made by the PCJC with respect to the accountability of the CJC.

- the question of whether parliamentary oversight committees should be established by statute or parliamentary resolution.

### **The development of education programmes and the prevention of corruption**

The Committee gained an appreciation of the importance of developing education programmes and preventing corruption from those agencies such as the CJC and ICAC which are responsible for undertaking these tasks. The Committee was particularly interested in this theme as, under its terms of reference, the Committee is required to consider the effectiveness of corruption prevention programmes throughout the public sector, as well as to consider and report on how effectively all government agencies, and not just those specifically responsible for integrity within the public sector, address the prevention of corruption. As such, the Committee's role extends well beyond oversight of the ACC to overseeing the mechanisms and programmes that exist in Western Australia for the prevention of corruption.

It should be noted that, while the prevention of corruption is a function assigned to the CJC and ICAC, the ACC in Western Australia is primarily an investigative body; it is not responsible for corruption prevention or education in the broad sense in which these functions are undertaken by the CJC and ICAC.

In the Committee's meeting with the CJC, the CJC emphasised the importance of its corruption prevention programmes. The Chairman expressed the strong view that a reactive, investigative body was not sufficient in itself to fight corruption. Investigation and prosecution go a significant way to achieving this, but in the end the prevention of corruption needed to be the primary goal. It was a point the Chairman also made in the CJC's Annual Report (1996:1) –

The Commission's role as 'watchdog' is well balanced by its positive role as 'reformer and educator' on criminal justice issues. Amongst other things, it must continually reinforce the value of prevention—both corruption prevention and crime prevention generally. The Commission has a crucial role to play in this regard because effective prevention measures require a long-term view and governments are always tempted to look to short-term results.

The Chairman described the way in which the functions of investigating, prosecuting and preventing corrupt conduct were combined in the CJC as a "near perfect" blend.

The importance of corruption prevention was also stressed in the meeting the Committee had with the ICAC, as was the importance of the ICAC's education programmes. The ICAC referred to a "synergy" between investigation, prevention and education. In ICAC's experience investigation was only the first step in dealing with corruption in the public sector. The goal of the ICAC was to make the NSW public sector as ethical as it could possibly be and to do this all three elements: investigation; prevention; and education, had to be employed. Prosecutions arising from investigations were important, but ICAC did not want the measure of its success to be the number of successful prosecutions resulting from its investigations. For the ICAC, the purpose of investigation went well beyond prosecution. The information gained from investigations is used to identify patterns of corruption and areas where it was likely to occur. This information is then used in developing prevention programmes; the essence of prevention being the improvement of practices in the public sector so as to minimise opportunities for corruption within it.

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The Committee was also shown an impressive range of educational material developed by the ICAC. This material is aimed at teaching the public and the public sector about corruption and its impact, and developing a culture in the public sector that does not tolerate corruption. The point was made to the Committee that, as time went on, education was becoming increasingly important to the task of maintaining and enhancing the gains already made in creating an ethical public sector in NSW.

In explaining the importance of prevention and education to the task of fighting corruption the CJC and ICAC both noted that systemic and cultural change was the key to success. The same point was made in the meeting the Committee had with the AFP. All three organisations thought it was absolutely essential that cultural patterns which are conducive to corruption be identified and strategies developed to alter these patterns.

### **Complaints regarding the activities of an agency or the conduct of its officers**

One aspect of accountability which has been touched on earlier in this Report is the question of how complaints made to a parliamentary oversight committee against the agency it oversees or its officers are best dealt with. In some of the meetings the Committee had with other oversight committees it was noted that unsolicited complaints are something which the Committee can expect to receive. These may be made directly to the Committee or they may be passed on to it by other sources such as Members of Parliament who have received a complaint from one of their constituents.

The following comments outline how such complaints are dealt with in the jurisdictions to which the Committee travelled. In some cases recommendations have been made as to how the existing procedures can be improved and these are also noted.

#### ***Queensland***

In Queensland the PCJC has very occasionally received complaints alleging misconduct or, even more rarely, criminal misconduct by officers of the Commission, but the complaints most frequently received relate to administrative matters. The PCJC (1997: 11) summarised these administrative matters as –

- delay occasioned by the CJC in investigating a matter;
- improper or inappropriate investigation methods used by the CJC;
- the CJC's failure to consider all relevant facts and material in making a determination; and
- bias in the CJC's final determination.

As part of its general monitor and review function, the PCJC has determined that it will accept complaints against the CJC and its officers and it has developed procedures for dealing with them.

Where a complaint is received by the Committee, if it is not “frivolous, vexatious or clearly unfounded”, the Chairman will send it on to the CJC with an accompanying request that the CJC report back to the Committee on the action it has taken with respect to the complaint. Upon receipt of a report the complaint and the report are further considered by the Committee. Actions taken at this stage may see the Committee seek additional information, or a final response may be sent to the complainant (PCJC 1997: 11-12).

Some concern has been expressed by the PCJC regarding the lack of a statutory basis for dealing with complaints it receives and the fact that it must rely on the CJC to investigate and report on such complaints. The PCJC (1997: 53-54) concluded that –

The independence of the Committee’s investigation into these complaints is of paramount importance. Therefore, the Committee believes that not only should the Criminal Justice Act be amended to provide the PCJC with a statutory basis upon which the Committee receives and considers such complaints, but also that that structure should allow it to appoint such investigators and make such inquiries as it sees fit.

With respect to complaints received by the CJC, arrangements are in place for the CJC to report on such complaints to the PCJC. The process for dealing with complaints is outlined in the CJC’s most recent Annual Report –

When a complaint occurs, it is examined by a senior Crown Prosecutor, nominated by the Director of Public Prosecutions, and a senior police officer, nominated by the Commissioner of the QPS [Queensland Police Service]. Their report is given to the Director of Public Prosecutions, who advises the CJC and the Attorney-General of the result of the investigation and recommendations of the Director of Public Prosecutions (CJC 1996: 87).

The CJC advises the PCJC of complaints against one of its officers at the time that such complaints are referred to the Director of Public Prosecutions (CJC 1996: 87 and see further the discussion in PCJC 1997: 55-60).

In its last report the PCJC recommended that the PCJC be given the power to appoint a Parliamentary Commissioner. Included in the activities which would be undertaken by the Commissioner is the following one relating to complaints against the CJC –

Investigating complex complaints against the CJC or its officers which may require access to current operational files to which the Committee is denied access (PCJC 1997: 117).<sup>8</sup>

### ***New South Wales***

The Committee received less detailed information regarding unsolicited complaints the Joint Committee on the ICAC receives against the ICAC or its officers. Like, however, complaints received by the PCJC, the Joint Committee sends such complaints on to the ICAC for it to report on. The Joint Committee then takes appropriate action upon receipt of the report. The Committee understands that the existing procedures are presently under review.

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As has been noted, the Criminal Justice Legislation Amendment Bill 1997 provides for the creation of a Parliamentary Commissioner as recommended by the PCJC. The Bill includes in the Commissioner’s functions the investigation of such complaints (clause 41).

In relation to the PIC, statutory provision is made for complaints against the PIC or its officers to be dealt with by the Inspector. As noted above, one of the principal functions of the Inspector is to –

deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of PIC or officers of the PIC (the PIC Act, section 89(1)(b)).

### ***Commonwealth***

The Joint Committee on the NCA has also dealt with unsolicited complaints against the NCA and its officers. As outlined in its Annual Report (PJCNCA 1997: 4-5), the Joint Committee's approach to such complaints has varied over the years since the Committee was created. While the Joint Committee sees this function as falling within its responsibilities as outlined in the NCA Act, it has found it difficult to develop a consistent approach in dealing with such complaints given the lack of clear provision in the Act either for the Committee to undertake this role or for a more extensive complaints mechanism.

Like the PCJC in Queensland and the Joint Committee on the ICAC in New South Wales, the present Joint Committee on the NCA will accept such complaints and pass them on to the NCA with a request for "a detailed brief in relation to the matters in the complaint" (PJCNCA 1997: 5). The Joint Committee notes –

It remains beyond the Committee's capacities to conduct complaints investigations, not least because of the constraints on its access to sensitive NCA operational material (PJCNCA 1997: 5).

Concerns over the adequacy of the complaints and disciplinary processes in place with respect not only to the NCA but also the AFP prompted an Australian Law Reform Commission (ALRC) review of these processes. The ALRC Report is entitled *Integrity: but not by trust alone*. Noting the importance of adequate complaints and disciplinary processes to ensuring that agencies are both accountable and able to effectively enforce the law, the ALRC (1996: 7) concluded –

a new approach is necessary for complaints and disciplinary processes for the AFP and the NCA to ensure that this balance between accountability and effectiveness is properly maintained. The Commission is recommending a single and comprehensive framework of accountability to replace the present fragmented systems.

To this end, the Commission recommended that a new body be established called the National Integrity and Investigations Commission to deal with complaints against the NCA and the AFP and to act as an external anti-corruption agency for the NCA and the AFP (ALRC 1996: 8-9).

### **The coercive powers exercised by specialist anti-corruption and/or law enforcement agencies**

The specialist agencies created in Australia to deal with serious corruption and/or crime are generally able to exercise significant coercive powers. These powers, as has been noted, are usually associated with royal commissions and they allow these agencies, among other things, to enter property and seize or copy material; compel witnesses to give evidence before the agency and for confidentiality and secrecy provisions often applying to public officers to be overridden; and to use listening devices and other forms of technology to gather information and evidence.

In some cases these powers may only be exercised upon a warrant being issued following an application to the appropriate court. In others, however, they may be exercised on the agency's own authority.

In the Committee's meetings with some of these agencies, and also in its meeting with the AFP, the point was made that the special powers granted these agencies were both a necessary and effective means of investigating the types of illegal activity the agencies were created to combat and of collecting the evidence required to successfully prosecute those involved in such activities. In addition, it was clear from the comments made to the Committee that the use of sophisticated methods of collecting and analysing intelligence was a very important part of the work of these agencies.

### **Public vs private hearings during investigations**

The agencies with which the Committee met, the ICAC and the PIC in New South Wales and the CJC in Queensland, may, in conducting investigations, exercise extensive coercive powers like those outlined above, and may also, under the statutes they administer, hold hearings in public or in private during those investigations.<sup>9</sup>

The extent to which these agencies use either public or private hearings depends to a large extent on the degree to which they depart from the royal commission model in which the origins of such agencies may be found. As was noted in the introductory comments to this Report, the primary purpose of a royal commission is to find out the truth about the matters it is established to investigate. The various powers of royal commissions and the inquisitorial procedures employed by royal commissions are designed to achieve this primary purpose, and public hearings are typically an important part of the inquiry process undertaken by royal commissions. Some of these specialist agencies, however, are created for the more limited purpose of investigating serious corruption and/or crime with a view to gathering evidence which may be used in subsequent prosecutions. In this case, for reasons set out below, the rationale for holding public hearings is less apparent.

Of the ICAC, the PIC and the CJC, the ICAC conforms most closely to the royal commission model. As has been noted, the ICAC is designed to conduct wide ranging inquiries in a way which allows not only particular instances of corruption to be investigated, but which also allows the identification of patterns of corruption or practices which may promote or permit corruption to occur, and which includes the development of strategies and programmes to prevent corruption. Assembling evidence which may be used to secure prosecutions is not one of the ICAC's "principal functions" under the ICAC Act (section 13); rather it is one of the "other functions" the Commission performs (section 14(1)(a)). Consistent with this, the ICAC, as its comments to the Committee indicated, has not primarily sought the prosecution of individuals involved in corruption, but rather it has tried to change the systems in which they work. The ICAC's principal functions and the manner in which the ICAC conducts investigations reflects the view that –

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<sup>9</sup> The relevant sections are section 31 in the ICAC Act, section 33 in the PIC Act and section 90 in the CJC Act. It should be noted that, while the CJC may hold hearings in private, the general rule under section 90 is that hearings are to be held in public. The Criminal Justice Legislation Amendment Bill 1997, however, reverses this general rule providing instead that investigative hearings are to be closed to the public unless the Commission orders otherwise (clause 34).

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The vast majority of corruption arises from weak people operating within weak systems. As a result, much of the solution to corruption lies in systemic reform and not in criminal prosecution or traditional law reform (Sturgess 1994: 113).

The ICAC considers public hearings to be an integral part of this process. Not only are public hearings seen to contribute to the accountability of the ICAC, but they are also seen to perform an important role in corruption prevention and education. As Rozenes (1995: 72) has said –

The ICAC defends its public hearings as they expose corruption to public view thereby alerting the public to the extent of these practices; they enlist support for anti-corruption measures; and they act as a powerful disincentive to those involved.

Similarly, in the Committee's meeting with the AFP, the Committee was told that the use of public hearings by the Wood Royal Commission was important to securing public confidence in and support for the work of the Commission.

While the recently created PIC has, like a royal commission, extensive coercive powers, it is less a standing royal commission than an agency designed for the specific purpose of investigating corruption in the NSW Police Service and collecting evidence which may be used to prosecute police officers involved in corruption. As was said by the Wood Royal Commission (1996: 94 footnotes omitted) in recommending that a body like the PIC be established –

The principal function of the PCC [Police Corruption Commission as the PIC was originally to be called] should be the detection and investigation of serious police corruption. It should not be of the genus of a standing Royal Commission, whose primary function is to establish the facts of a matter under review through the exercise of inquisitorial powers. For bodies of the nature of standing Royal Commissions, 'securing convictions is a secondary aim'. A key function of the PCC must be to assemble admissible evidence when investigations reveal criminal conduct, and to furnish such evidence to the Director of Public Prosecutions.

The CJC is an organisation which combines a focus on prosecutions with a broader focus, like the ICAC, on prevention. Sturgess (1994: 115) notes, however, that the CJC, conducts its "inquisitorial work entirely in private, and in this very important respect, the CJC has departed from the royal commission model".

For the PIC and the CJC, where the primary purpose of an investigation is to gather evidence which may be used to prosecute individuals who have engaged in serious corruption or crime, the use of private hearings offers the advantage over public hearings that they are less likely to prejudice any subsequent trial. Rozenes (1995: 72) makes the following point in relation to the exercise by the NCA and the New South Wales Crime Commission of their inquisitorial powers, which is also relevant to the investigative work of the PIC and the CJC, –

[these inquisitorial powers] are exercised at the investigation stage and therefore secrecy is essential particularly in the interests of a fair trial. Whatever information has been obtained or revealed during the investigation, only admissible evidence should be presented at a subsequent trial.

Rozenes (1995: 72) goes on to note that the ICAC's use of public hearings has been criticised because of the effect such hearings may have on a subsequent trial.



Concern has also been expressed about the potential for individuals subject to investigation through a process of public hearings like that employed by the ICAC to have their reputations seriously damaged, even where they are innocent (Rozenes 1995: 72). The potential for such “collateral damage” has been acknowledged by Ian Temby, a retired Commissioner of the ICAC (Sturgess 1994: 117). For the ICAC, however, given the broad purposes for which it undertakes investigations, the benefits of public hearings outweigh their costs.

### **Parliamentary oversight committee involvement in determining an agency’s budget**

The Committee did not meet with any parliamentary oversight committee which had a significant role to play in determining the budget of the agency it supervised. The question of whether the PCJC in Queensland should play such a role was a theme raised in the meeting the Committee had with the CJC and it is also discussed in the material provided to the Committee by the PCJC.

The CJC’s budget bid is made directly to the Cabinet Budget Office and the PCJC plays no role in the process of determining or approving the CJC’s budget (PCJC 1997: 68). In the PCJC’s Report on Accountability (1997: 68-69), however, the PCJC puts forward the following arguments in favour of it having such a role –

- In Queensland the Auditor General’s and the Ombudsman’s budgets are developed in consultation with the Public Accounts Committee and the Legal, Constitutional and Administrative Committee respectively. The Committee argues that, as the CJC is, like the Auditor-General and the Ombudsman, “an independent body directly accountable or the Parliament”, the CJC should be put on the same footing vis a vis its budget.
- Concern is also expressed by the PCJC over the potential for the Executive to use its control over the CJC’s budget in a way which may reduce the CJC’s independence.
- The PCJC argues further that there would be practical benefits in the PCJC performing such a role. In particular, it referred to the 1996/97 budget process in which the Chairman of the CJC publicly raised concern over the CJC’s financial capacity to continue an investigation into police corruption. The PCJC commented on the appropriateness of current investigations being made public in this way, noting that if the Committee were involved in the budget process such matters could be kept confidential, while still allowing that they be considered in determining the CJC’s budget.

### **Parliamentary oversight committee involvement in the selection and removal of the Chairman and other members of an agency**

In both Queensland and New South Wales there is statutory provision for the parliamentary oversight committees to be involved in the selection of commissioners to the agencies they oversee. The PCJC in Queensland is also given a role in the removal of a CJC commissioner.

One of the functions of the PCJC is to “participate in the constitution of the commission and the removal of a commissioner as prescribed” (section 118(1)(e) of the CJC Act).

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Under sections 11 and 12 of the CJC Act the Minister, before advising the Governor to appoint a Chairperson or other members of the Commission, is required to consult with the Parliamentary Committee and is prevented from appointing a person to the Commission without the support of the Committee. Support may be constituted by a majority on the Committee where that majority does not consist of members of the governing party or parties.

With respect to removal, section 14(7)(g) provides that the office of Commissioner becomes vacant if the Commissioner –

is removed from office by the Governor upon the address of the Legislative Assembly approved by the Assembly consequent upon a recommendation of the parliamentary committee ...

The same provisions regarding a majority recommendation to select a Commissioner apply to a majority recommendation to remove a Commissioner.

In New South Wales the Joint Committee on the ICAC is given the power to veto the appointment of a person as a Commissioner (section 64A of the ICAC Act). Under this provision the Minister is required to refer a proposal to appoint to the Joint Committee and the Committee is given 14 days to veto the appointment. This period may be extended by 30 days where the Joint Committee notifies the Minister before the initial 14 day period is complete that it requires more time to consider the proposed appointment.

### **Public hearings by parliamentary oversight committees**

All the parliamentary oversight committees with which the Committee met have held public hearings in reviewing the agencies they oversee. In general terms, such hearings provide an opportunity for members of the public to be informed about an agency's activities and to observe the manner in which such agencies are reviewed.

In New South Wales the Joint Committee on the ICAC meets every six months with the ICAC Commissioner. These hearings, as noted in the outlines above, are held in public, subject to section 70 of the ICAC Act, which allows that evidence may be taken in private where it relates to "a secret or confidential matter".

The Joint Committee overseeing the NCA has also recently started to hold public briefings. At such briefings the practice has been to have representatives of the NCA outline the NCA's current programme of activity after which questions from the Committee are taken. At two briefings held in Melbourne in October 1996, evidence on "matters of a sensitive or confidential nature" was taken *in camera* following the initial public briefing. The Joint Committee commented in its last Annual Report that there was "a most helpful exchange of information and views" at these briefings (PJCNA 1997: 3).

As noted in the CJC's last Annual Report (1996: 6), the PCJC is "empowered to hold public hearings on issues related to the activities of the CJC", and public hearings have been held from time to time by the PCJC. Confidential matters, of course, are addressed in private hearings before the PCJC.

### **Secondment of police officers from within an agency's jurisdiction**

Of the agencies the Committee met with only the CJC made extensive use of police officers from within its own jurisdiction in conducting investigations. Included in its staff are 92 police officers seconded from the Queensland Police Service. The CJC saw great benefits in using the police force in this way. These benefits included police officers losing their suspicion of the CJC, developing a commitment to a corruption free police force and gaining valuable experience in using a multi-disciplinary approach to law enforcement. In the CJC's experience many officers who had worked for it wished to return to the CJC. One area of concern, however, related to what happened to officers once they finished working for the CJC. It was noted that working for the CJC, while rewarding in itself, was not necessarily an advantage to an officer in terms of the development of his or her career. This was something the CJC was seeking to remedy.

In New South Wales, except for two NSW police officers seconded to it, ICAC employed investigators independent from the NSW Police Service. The NSW officers seconded to ICAC were seconded for quite particular reasons, including facilitating arrests where that was required.

Generally speaking, when the Committee raised this matter, except for the comments made in its meeting with the CJC, some concern was expressed about using members of the police service from within an agency's jurisdiction to conduct investigations. This concern arose from the fact that a significant percentage of the complaints such officers would be investigating would relate to the police force from which they came. In Queensland, for instance, of the complaints received by the CJC, around 70% related to the Queensland Police Service, and ICAC informed the Committee that, when it was responsible for investigating police corruption, some 25-30% of complaints made to it related to the NSW Police Service. Consequently, in many cases police officers would be investigating their colleagues and where a culture conducive to corruption existed this could seriously complicate their work. On the other hand, the CJC clearly sees the extensive secondment of police officers to the CJC as one means of changing those elements of police culture which may support corrupt practices.

### **The question of whether parliamentary oversight committees should be established by statute or parliamentary resolution**

In relation to this question the PCJC, in its most recent report, made the following comment regarding the establishment of the Joint Standing Committee on the Anti-Corruption Commission –

the overseeing Parliamentary Committee is created by resolution of the Parliament rather than by legislation. In practice, this may enable the Government of the day to ensure the abolition of this Committee simply by another resolution as opposed to amendment in the legislation which would allow more public scrutiny and debate (PCJC 1997: 85).

The Western Australian Legislative Assembly Select Committee on the Official Corruption Recommendations specifically recommended, however, that the establishment of a parliamentary oversight committee in Western Australia should be by resolution of Parliament. The Select Committee (1992: 5) concluded –

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For ease of implementation and to facilitate any required changes to its terms of reference or powers as its role evolves, it was considered that creation by resolution was more appropriate.

## **6. CONCLUSION**

Through the Committee's discussions with some of its counterparts and various specialist agencies in other Australian jurisdictions, and the material those organisations have provided, the Committee has been able to gain an enormous amount of practical information about the dynamics of the relationships that have developed between parliamentary oversight committees and the agencies they oversee. The insights gained should prove an invaluable resource in terms of the relationship the Committee is in the process of forming with the ACC. Moreover, the common themes which ran through the discussions the Committee had have provided it with an appreciation of a number of issues which it will need to consider over the coming months and years. The Committee was also given an insight into the methods employed by these specialist agencies and the benefit of their many years of experience in combatting serious corruption and crime which will enable it to better understand the task before both it and the ACC.

**7. TABLE OF STATUTES**

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Anti-Corruption Commission Act 1988 (WA)

Australian Federal Police Act 1979 (Cth)

Complaints (Australian Federal Police) Act 1981 (Cth)

Criminal Justice Act 1989 (Qld)

Independent Commission Against Corruption Act 1988 (NSW)

National Crime Authority Act 1984 (Cth)

Official Corruption Commission Act 1988 (WA)

Police Integrity Commission Act 1996 (NSW)

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## APPENDIX ONE

### ITINERARY AND RECORD OF MEETINGS

The Committee travelled to Brisbane, Melbourne, Canberra and Sydney and was briefed by representatives from the following organisations –

Date	Organisation / Representatives																
1/9/97	<p style="text-align: center;"><b>Criminal Justice Commission, Brisbane</b></p> <table border="0"> <tr> <td>Frank Clair</td> <td>Chairman</td> </tr> <tr> <td>Graham Brighton</td> <td>Executive Director</td> </tr> <tr> <td>David Brereton</td> <td>Director of Research and Coordination Division</td> </tr> <tr> <td>Bob Hailstone</td> <td>Director of the Corruption Prevention Division</td> </tr> <tr> <td>Michael Barnes</td> <td>Chief Officer, Complaints Section of the Official Misconduct Division</td> </tr> </table>	Frank Clair	Chairman	Graham Brighton	Executive Director	David Brereton	Director of Research and Coordination Division	Bob Hailstone	Director of the Corruption Prevention Division	Michael Barnes	Chief Officer, Complaints Section of the Official Misconduct Division						
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2/9/97	<p style="text-align: center;"><b>Australian Federal Police, Melbourne</b></p> <table border="0"> <tr> <td>Nigel Hadgkiss</td> <td>General Manager of the Southern Region</td> </tr> </table>	Nigel Hadgkiss	General Manager of the Southern Region														
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3/9/97	<p style="text-align: center;"><b>Parliamentary Joint Committee on the National Crime Authority, Canberra</b></p> <table border="0"> <tr> <td>John Bamford, MP</td> <td>Chairman</td> </tr> <tr> <td>Senator Stephen Conroy</td> <td>Member</td> </tr> <tr> <td>Paul Filing, MP</td> <td>Member</td> </tr> <tr> <td>Senator Natasha Stott Despoja</td> <td>Member</td> </tr> <tr> <td>Andrea West, MP</td> <td>Member</td> </tr> <tr> <td>Warren Truss, MP</td> <td>Member</td> </tr> </table>	John Bamford, MP	Chairman	Senator Stephen Conroy	Member	Paul Filing, MP	Member	Senator Natasha Stott Despoja	Member	Andrea West, MP	Member	Warren Truss, MP	Member				
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