

## 36TH REPORT OF THE SENATE COMMITTEE OF PRIVILEGES

On 25 June 1992, the Senate Committee of Privileges tabled its 36th Report, entitled *Possible improper interference with a witness and possible misleading evidence before the National Crime Authority Committee*. That report contains various recommendations, two of which are of particular interest to the Committee. They are:

3. That care should be taken, during passage through the Parliament of legislation which may include provisions comparable to those which have caused concern, to resolve any conflict between provisions which lay down guidelines for accountability of bodies to the Parliament and obligations to protect confidential information and privacy. [paragraph 3.26 of the Report]
4. That it might be appropriate for the Senate Standing Committee for the Scrutiny of Bills to draw such provisions to the attention of members of the Parliament. [paragraph 3.27 of the Report]

Before dealing with the recommendations themselves, it is useful to set out briefly the background to the recommendations and, in particular, to refer to the provisions that have 'caused concern'. Section 51 of the *National Crime Authority Act 1984* is a secrecy provision. It provides:

### Secrecy

51.(1) This section applies to:

- (a) a member of the Authority; and
  - (b) a member of the staff of the Authority.
- (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act

or otherwise in connection with the performance of his duties under this Act, and either while he is or after he ceases to be a person to whom this section applies:

- (a) makes a record of any information; or
- (b) divulges or communicates to any person any information;

being information acquired by him by reason of, or in the course of, the performance of his duties under this Act, is guilty of an offence punishable on summary conviction by a fine not exceeding \$5,000 or imprisonment for a period not exceeding 1 year, or both.

(3) A person to whom this section applies shall not be required to reproduce in any court any document that has come into his custody or control in the course of, or by reason of, the performance of his duties under this Act, or to divulge or communicate to a court a matter or thing that has come to his notice in the performance of his duties under this Act, except where the Authority, or a member or acting member in his official capacity, is a party to the relevant proceeding or it is necessary to do so:

- (a) for the purpose of carrying into effect the provisions of this Act; or
  - (b) for the purposes of a prosecution instituted as a result of an investigation carried out by the Authority in the performance of its functions.
- (4) In this section:

"court" includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

"member of the staff of the Authority" means:

- (a) a person referred to in the definition of "member of the staff of the Authority" in subsection 4(1); or

- (b) a person who assists, or performs services for or on behalf of, a legal practitioner appointed under section 50 in the performance of the legal practitioner's duties as counsel to the Authority;

"produce" includes permit access to, and "production" has a corresponding meaning.

Section 55 of the National Crime Authority Act deals with the duties of the *Parliamentary Joint Committee on the National Crime Authority*. It provides:

#### Duties of the Committee

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

- (a) to monitor and to review the performance by the Authority of its functions;
  - (b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;
  - (c) to examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of, any such annual report;
  - (d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority; and
  - (e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.
- (2) Nothing in this part authorises 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.

It has been suggested that there is a conflict between the two provisions. The Privileges Committee referred to that conflict at paragraph 3.19 of its Report:

It may be noted that the question of the [Parliamentary Joint Committee's] powers under the Act had been a source of conflict between the PJC on the one hand and the Authority on the other since the inception of the Authority under the chairmanship of Mr Justice Stewart. Where the blame lies for the difficulties which have arisen is not clear. Indeed, it may be that the Parliament should share the blame for not making its intentions absolutely clear. Whatever the case, the PJC had cause, even in its first report, presented in 1985, to advise both Houses of the Parliament of the difficulties in establishing an acceptable working relationship between the two bodies. Evidence was given during the hearing that the pattern established by the earlier Authority was continued by the Chairman and members appointed from 1 July 1989.

Given this background, it is clear that provisions of the kind referred to in recommendation 3 might come within paragraph 1(a)(i) of the Committee's terms of reference, as possibly trespassing unduly on personal rights and liberties. It may also be readily accepted that there ought not to be any possibility of conflict in legislation between secrecy provisions and provisions relating to the accountability of public bodies to the Parliament.

Having considered the Privileges Committee's recommendations, the Committee has decided to raise the issue with the First Parliamentary Counsel, as the Committee considers that it may be expedient for the First Parliamentary Counsel to issue a Drafting Instruction on this point. Such a Drafting Instruction could state that if a secrecy provision along the lines of section 51 of the National Crime Authority Act is to be included in a Bill, the provision should specify not only the circumstances in which confidential information might be divulged to a court (see subsection 51(3)

of that Act) but also the circumstances in which such information might be divulged to a House of Parliament or a Committee thereof. The Committee believes that such an action would then overcome the difficulties of interpretation adverted to in paragraph 3.22 of the Privileges Committee report.

The Committee informs the Senate that it has reached this conclusion without endorsing the view that the meaning and scope of sections 51 and 55 of the National Crime Authority Act is unclear. However, bearing in mind the difficulties that continue to arise in this area, the Committee believes that it would assist all concerned if a mechanism such as that suggested above were put in place in order to avoid further problems in the future.

A handwritten signature in black ink, appearing to read 'Barney Cooney', with a large, sweeping flourish above the name.

Barney Cooney  
(Chairman)