

## **Parliamentary Privilege and Statutory Secrecy Provisions\***

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A question which arose in proceedings in the Senate during 1991, perhaps the most important question from the parliamentary perspective, was that relating to the effect on parliamentary privilege of general statutory secrecy provisions.

This question arises from provisions in statutes which prohibit in general terms the disclosure of various categories of information. At the federal level in Australia, and no doubt in most other jurisdictions, there are many statutory provisions, here generically designated as secrecy provisions, which prevent the disclosure of information thought to require special protection from disclosure. Usually these provisions create criminal offences for the disclosure of information obtained under the statute by officers who have access to that information in the course of duties performed in accordance with the statute.

The question which arose is whether statutory provisions of this type prevent the disclosure of information covered by the provisions to a house of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry.

The position which has always been adhered to by the Senate's advisers, and, it can be said, by the Senate itself in practice, is that such provisions have no effect on the powers of the houses and their committees to conduct inquiries, and that general

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secrecy provisions do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees. The basis of this view is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a house or a committee. That law was made crystal clear at the federal level by the *Parliamentary Privileges Act 1987*, which declares that the submission of a document or the giving of evidence to a house or a committee is part of proceedings in Parliament and attracts the wide immunity from all impeachment and question which is also clarified by the Act. It is also a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words. This principle is very clearly applicable to the federal houses, because section 49 of the Constitution establishes the law of parliamentary privilege and makes it clear that that law can be altered only by a statutory declaration by the Parliament. These principles were set out in 1985 in a joint opinion of the then Attorney-General and the then Solicitor-General:

Whatever may be the constitutional position, it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away ... In the case of the Parliament of the Commonwealth, s. 49 of the Constitution requires an express declaration.<sup>1</sup>

These principles were called into question by advice given to the executive government by its legal advisers late in 1990. The context of the advice was the operations of the Parliamentary Joint Committee on the National Crime Authority. The *National Crime Authority Act 1984* establishes a National Crime Authority with power to inquire into matters relating to organised crime. The Act also establishes a Joint Parliamentary Committee to oversee the authority on behalf of the Parliament. The provisions establishing the committee were not initiated by the government, but were inserted into the Act by an amendment made in the Senate. In the part of the Act establishing the committee there is a provision which limits the powers of inquiry of the committee, by providing that the committee is not to investigate a particular criminal activity or to reconsider the findings of the authority in relation to a particular investigation. In another part of the Act there is a general secrecy provision, making it an offence for officers of the authority to disclose information obtained in the course of their duties except in accordance with those duties. During a phase in which the authority was apparently not disposed to cooperate with the joint committee, members of the authority were claiming that the general secrecy provision prevented them providing information to the committee. They claimed that they could be prosecuted for providing information to the committee contrary to that provision, and at one stage they were even seeking from the executive government immunities from prosecution under the section.

The committee sought advice from the Senate Department, which staffs the committee, on this question. The advice was that the secrecy provision has nothing to do with the provision of information to the committee. Apart from the principles

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<sup>1</sup> Quoted in the report by the Senate Standing Committee on Constitutional and Legal Affairs, *Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments*, 30 May 1985, Parliamentary Paper no. 235/1985, p. 2.

already enunciated, there are additional reasons for that advice. The general secrecy provision contains nothing to indicate that it has any application to the committee, and is not placed in the part of the Act dealing with the committee. Moreover, the provision allows the disclosure of information in accordance with the duty of officers, and it could readily be concluded that officers have a duty to cooperate with the committee which is statutorily charged with the task of overseeing the activities of the authority.<sup>2</sup>

Notwithstanding the cogency of these arguments, the government and its legal advisers came to the support of the authority. An opinion of the Solicitor-General was obtained. This opinion asserted that the secrecy provision does indeed prevent the provision of information to the committee. The opinion did not make it clear exactly how the secrecy provision operates in relation to the committee's inquiries. It appeared to contemplate that the secrecy provision has no application while the committee is operating within its statutory charter, but that should the committee stray outside its statutory bounds the secrecy provision operates in some way to stop the committee's inquiries.<sup>3</sup>

The great weakness of this argument is revealed by the question: If an officer of the authority gives information to the committee, can the officer then be prosecuted under the secrecy provision? In the opinion, and in the subsequent government opinions to which reference will be made, this question was carefully avoided. The government's advisers stopped short of claiming that a person could be prosecuted for presenting information to a parliamentary committee. Such a claim could not be maintained in the face of the law of parliamentary privilege, but if a prosecution could not be undertaken, how could the secrecy provision operate? As has been indicated, the secrecy provision, like most of the provisions so classified, works by creating a criminal offence for the disclosure of information. If there is no offence for disclosing information to a parliamentary committee, the provision does not operate in relation to such a committee. In all the subsequent arguments, this difficulty was not tackled by the government's advisers. It was also pointed out that if the joint committee strayed outside its statutory terms of reference, the legal remedy would be to restrain it directly, not to invoke the secrecy provision in some unspecified way. The Solicitor-General's advice appeared to contemplate that the remedy for a committee going beyond its terms of reference was that its proceedings would be deprived of the protection of parliamentary privilege. This is analogous to saying if the Parliament passes a bill which is later found to be beyond its constitutional powers, its proceedings on the bill would be retrospectively stripped of their privileged status. Alternatively, if the presentation of evidence to the committee contrary to the secrecy provision remains privileged, does this mean that the provision cannot be enforced against an officer who gives such evidence voluntarily, but operates only to restrain the committee where an officer objects to giving such evidence?

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<sup>2</sup> Advice to the Joint Committee on the National Crime Authority by the Clerk of the Senate, 13 May 1990. This and the other advices referred to were tabled in the Senate on 9 September 1991. The various advices are available in a volume attached to the explanatory memorandum to the bill referred to in note 12. The opinion referred to in this note is at p. 1.

<sup>3</sup> Opinion of the Solicitor-General, 20 August 1990, p. 28.

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These difficulties with the Solicitor-General's opinion were pointed out in a further advice to the joint committee. It was also pointed out, perhaps somewhat unkindly, that the Solicitor-General had been shown to be wrong in an earlier opinion. In 1986 the Senate had disallowed certain export control orders, but the government had continued to enforce the orders, supported by an opinion of the Solicitor-General to the effect that the disallowance had not been valid. The basis of this claim was a very restrictive reading of the statutory disallowance powers. When the matter was brought before the Federal Court, however, the court upheld the parliamentary view and found that the disallowance had been effective.<sup>4</sup>

In spite of all these considerations, the government expressed an intention of adhering to the advice of the Solicitor-General.<sup>5</sup> The reaction in the Senate to this was that one of the Senate members of the joint committee introduced a bill to amend the National Crime Authority Act to make it clear that the secrecy provision has no application to inquiries by the committee.<sup>6</sup>

In the advice to the committee it was pointed out that there are many general secrecy provisions in federal statutes, and the apprehension was expressed that if the Solicitor-General's opinion were to go unchallenged all of these provisions could be invoked to prevent inquiries by the houses and their committees into a wide range of information collected by government and its agencies. It was also pointed out that not only secrecy provisions could be so invoked: once the principle that parliamentary privilege is not affected by a statute except by express words is abandoned, there is no end to the provisions which may be interpreted as inhibiting the powers of the houses and their committees.

This apprehension soon proved to be only too well founded. Early in 1991 another government opinion, composed in the Attorney-General's Department, was presented to the Senate.<sup>7</sup> This opinion contended that another general statutory secrecy provision inhibited the provision of information to a parliamentary committee. This opinion had the value of demonstrating the danger to the houses inherent in the line being taken by the government, and in exposing the weaknesses of that line. The opinion conceded that a person 'probably' could not be prosecuted for giving information to a parliamentary committee contrary to the secrecy provision, without explaining how, if there could be no prosecution, the provision could operate. The opinion made plain a view that secrecy provisions are simply an excuse for officers who do not wish to answer questions before committees, but cannot be enforced if information is voluntarily provided. The opinion also contained an amusing statement to the effect that if the parliamentary argument were correct the houses and their committees would have greater powers than even ministers to gain access to information. A commentary on the opinion<sup>8</sup> pointed out that the line taken by the government's

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<sup>4</sup> Comments on the Solicitor-General's opinion by the Clerk of the Senate, 28 August 1990, p. 35. *Thomas Borthwick & Sons (Pacific) Ltd. v Kerin and Others* (1989) 87 ALR 527; the opinion of the Solicitor-General was tabled in the Senate on 16 December 1988.

<sup>5</sup> Letter from the Acting Attorney-General to the Chairman of the Committee [undated], p. 40.

<sup>6</sup> National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990, Senator Crichton-Browne, introduced 8 November 1990.

<sup>7</sup> Attorney-General's Department Opinion, 15 April 1991, p. 41.

<sup>8</sup> Comments on that opinion by the Clerk of the Senate, 28 May 1991, p. 45.

advisers appeared to be based on a reluctance to concede that mere houses of the Parliament and parliamentary committees are constitutionally more powerful than ministers and public servants.

Before there was time for the dispute to progress much further, yet another opinion of the Attorney-General's Department was produced in the Senate.<sup>9</sup> This opinion related to yet another statutory secrecy provision, but, to the amazement of those who had been following the argument, came to the opposite conclusion. Contrary to the other government opinions, it asserted that the Senate could require the disclosure of information to one of its committees notwithstanding that that information was covered by a secrecy provision. This opinion was produced by the responsible minister as if it represented the government's view, apparently without any realisation that the government's advisers had contradicted themselves.

All of the opinions and advices were then drawn to the attention of the Senate, and the government was called upon to determine exactly where it stood on the question. In due course a second opinion of the Solicitor-General was produced.<sup>10</sup> This opinion conceded that a general statutory secrecy provision does not apply to inquiries by the houses or their committees unless the provision in question is so framed as to have such an application. The opinion contended that a secrecy provision could apply to parliamentary inquiries by force not only of express words in the provision but by a 'necessary implication' drawn from the statute. It was just such a 'necessary implication' which was found by the Solicitor-General in the National Crime Authority Act to give the secrecy provision in that Act an application to inquiries by the joint committee.

In a final clerky commentary on this opinion,<sup>11</sup> it was pointed out that the doctrine of 'necessary implication' still posed a residual threat to the powers and immunities of the houses and their committees, because the government's legal advisers could always find 'necessary implications', invisible to mere mortals, when there was a desire to invoke a particular secrecy provision to inhibit a parliamentary inquiry. This is well illustrated by the 'necessary implication' drawn from the National Crime Authority Act, which would certainly not be drawn by any conscientious reader of the statute not blessed with the saving grace of being a government law officer. The opinion also posed another danger: it contained a suggestion to the effect that perhaps the statutory secrecy provisions should be fixed up so that their application to parliamentary inquiries is clear; as the Solicitor-General delicately put it, the provisions should be 'clarified'. The final commentary drew attention to the danger in that suggestion in the following terms:

I need not say that this appears to be an attempt to achieve by alteration of the law that which cannot be achieved by tortured interpretation of it, and that any attempt to enact such 'clarifying' legislation should be closely scrutinised. The assumption underlying the Solicitor-General's

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<sup>9</sup> Attorney-General's Department Opinion, 14 May 1990, p. 50. This opinion was thus given much earlier than the other government opinions, but was tabled later. Comments on that opinion by the Clerk of the Senate, 3 June 1991, p. 53.

<sup>10</sup> Opinion of the Solicitor-General, 12 August 1991, p. 65.

<sup>11</sup> Comments on that opinion by the Clerk of the Senate, 19 August 1991, p. 69.

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recommendation is that because some information has been thought in the past to require general statutory protection from disclosure (often, it should be said, without any justification other than a general desire for secrecy which is not in keeping with the spirit of more recent times), such information should also be protected from disclosure to parliamentary committees.

As an indication of lack of acceptance of the final government opinion, a private senator's bill was introduced into the Senate to declare, for the avoidance of doubt, that statutory provisions do not affect the law of parliamentary privilege except by express words.<sup>12</sup>

These residual questions have not been resolved. In the general pressure of legislative business the bill has not been brought on for debate, but all the relevant documents have been tabled in the Senate. There has been some discussion about clarifying the National Crime Authority Act and of a new spirit of cooperation between the National Crime Authority, now with a new head and a substantial change of staff, and its watchdog committee. Government departments and agencies appear to have accepted that general statutory secrecy provisions do not apply to the giving of evidence to parliamentary committees, and so far have not done looking for 'necessary implications'.

This episode and the conflict of advice demonstrates that the executive government instinctively seeks to curb the powers of Parliament, particularly the parliamentary power to inquire into executive government activities, and that parliamentary vigilance against such attempts is required. In this struggle between the wielders of power and the constitutionally established institutions of safeguard and oversight of that power, legal opinions are weapons. It cannot be assumed that the advice of government law officers provides impartial arbitration of the disputes which arise. Experience indicates that such advice, no doubt by coincidence, always turns out to support whatever view is taken by the government of the day. The houses must have access to their own advice, advice which is informed by the contrary spirit of upholding the parliamentary safeguard.

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<sup>12</sup> Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991, Senator Crichton-Browne, introduced 9 September 1991.