

## DISSENTING REPORT BY SENATOR SID SPINDLER

### SECRECY PROVISIONS

While in general agreement with the conclusions of the majority's Report, I have serious reservations about aspects of the recommendations proposing amendments to the secrecy provisions of the National Crime Authority Act.

The Parliamentary Joint Committee on the National Crime Authority is charged by the NCA Act with the duty 'to monitor and to review the performance by the Authority of its functions' and 'to report to both Houses of the Parliament ...'.<sup>665</sup>

Ever since its inception the Committee has been confronted with interpretations of s.55(2)(a), s.55(2)(b) and s.51 of the NCA Act which have limited the NCA's provision of information to the Committee to an extent which must cast doubt on the Committee's capacity to carry out its supervisory duties.

High-level legal opinions obtained by the Committee differ on whether the relevant sections do in fact place these legal constraints on the information flow to the Committee.<sup>666</sup> It is common ground among those who gave evidence to the Committee on the issue that amendments are desirable to put the matter beyond doubt and to ensure that the Committee has access to the information it needs to fulfil its functions.<sup>667</sup>

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<sup>665.</sup> NCA Act, s.55(1)(a) and (b).

<sup>666.</sup> See the majority's Report, para. 7.6 for a list of the opinions.

<sup>667.</sup> See the quotations and references in paras. 7.7 and 7.8 of the majority's Report.

### Section 55 of the NCA Act

I share the general agreement among Committee members on the amendments proposed to s. 55(2)(b) to ensure that the understandable prohibition on investigating criminal activity or reconsidering the NCA's findings does not prevent the Committee from examining matters related to the NCA's investigations of a criminal activity or the way in which investigations are handled by the NCA.<sup>668</sup>

### Section 51 of the NCA Act

The majority Report adopts as its preferred option an amendment which provides the Committee with unrestricted access to information from the NCA.<sup>669</sup> As well, the Committee accepts the need for restrictions on the disclosure of certain types of information by the Committee or its members, in Parliament or otherwise. The Committee adopts the criteria for identifying such sensitive information set out in my Private Senator's Bill,<sup>670</sup> that is, information which, if disclosed, would:

- a) identify persons in a manner which would be prejudicial to the safety or legal rights of those persons;
- b) prejudice legal proceedings, whether or not those proceedings have commenced; or
- c) disclose the operational methods of the Authority in a manner prejudicial to the operations of the Authority.

The majority and I agree that an arbiter should resolve any dispute between the Committee and the Authority on whether a certain item

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<sup>668.</sup> See para. 7.29 of the majority's Report.

<sup>669.</sup> Majority Report, para. 7.37.

<sup>670.</sup> National Crime Authority (Duties and Powers of Parliamentary Joint Committee) Amendment Bill 1990. The Bill was introduced into the Senate on 21 December 1990.

of information falls within one or more of these categories. We differ as to who the arbiter should be. My Bill provides that a Judge of the Federal Court acting as a private arbiter (i.e. not as a judge of the Court) should determine whether or not a certain item of information held by the Committee falls within one the categories. The majority Report recommends (in part (c) of the recommendation in paragraph 7.56) that the Commonwealth Minister having portfolio responsibility for the Authority (at present the Attorney-General) be empowered to act as arbiter.

I dissent from part (c) of the recommendation in paragraph 7.56 of the majority Report.

I find the notion of the Attorney General (or any other Minister) acting as arbiter unacceptable, since the autonomy of the Committee in discharging its duty to report to Parliament could be severely limited by the political considerations which the majority Report admits (in paragraph 7.55) would enter into the decisions the Minister makes. In my view, the Committee should be limited in the information it may disclose only on the basis of the three categories set out in my Bill. To allow a Minister to determine on political grounds whether or not an item of information can be disclosed adds in effect a fourth category: 'information which is politically sensitive'.

To provide such an option for the Government of the day is contrary to the purpose of the Committee as an all-party general supervisory body as well as an avenue of redress for people who consider that they have been adversely affected by the exercise of the NCA's far-reaching powers.

This avenue of redress is given effective expression by the Committee's obligation to report directly to Parliament. To interpose a Minister's political judgement diminishes the Committee's function both to supervise the NCA's general performance and to act as a guardian of citizens' civil liberties.

The need for a non-political arbiter is not diminished by the majority's recommendation that the Inspector-General of Intelligence and Security have a role in resolving individual

complaints against the Authority.<sup>671</sup> I agree with this recommendation and do not see its implementation as diminishing the role of the Committee or the need for the Committee to have access to information from the Authority that may be sensitive.

The argument has been raised that the proposal to use a Judge as an arbiter represents an unacceptable limitation on the powers of Parliament and Parliamentarians and thus offends against the principle of separation of powers.<sup>672</sup> This argument might have some merit if it were proposed to give the Federal Court Judge far-reaching discretion.

However, the function proposed is merely the determination of whether a particular fact (i.e. the nature of the information) falls within the definitions legislated by Parliament. This function of interpreting legislation is one of the traditional tasks of the judiciary and hence does not encroach on the powers of Parliament or the principle of separation of powers.

The majority report then proceeds to offer a second option, if the recommended amendment to s.51, the Committee's first choice, is not 'fully acceptable to the Government'.<sup>673</sup>

This option accepts a limitation on the flow of information from the NCA to the Committee. Sensitive information is defined by using the categories set out in my Private Member's Bill. Under the option, the NCA is 'not obliged' to provide such information to the Committee.<sup>674</sup>

I reject this alternative as an unwarranted limitation on the Committee's capacity to discharge its statutory obligations.

The worst aspect of this option is that once again that 'the Common-

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<sup>671.</sup> Majority Report, para. 6.77.

<sup>672.</sup> See for example, Evidence, p. 1116 (Mr Peter Beattie); pp. 1389-90 (Victorian Council for Civil Liberties).

<sup>673.</sup> Majority Report, para. 7.57.

<sup>674.</sup> Majority Report, para. 7.59.

wealth Minister with portfolio responsibility' is to be the arbiter in any dispute on whether a particular item of information fits within the definition.<sup>675</sup>

It is somewhat difficult to see how a dispute can arise since by definition the Committee is not aware of the nature of the information which is being withheld.

Even if the nature of the information were known in general outline, the Committee's knowledge would obviously not be sufficient to enable it to argue its case in a dispute on which the Minister is to adjudicate.

It has been suggested that the Committee could argue its case in Parliament if it disagreed with the Minister's decision.<sup>676</sup> However, this is even less feasible. The Committee's knowledge would clearly be inadequate to question the decision and if by chance it acquired some knowledge about the information withheld, it would clearly defeat the public policy purpose of the provisions to disclose this information during a parliamentary debate.

In Summary, it is my view:

1. That the Joint Parliamentary Committee on the National Crime Authority must have access to the information it needs to carry out its statutory duties as defined in s.55, amended as proposed in the majority Report;
2. That the Committee and individual Committee members must be obliged by legislation not to disclose information obtained in camera from the NCA which in the opinion of the NCA would, if disclosed -
  - a) identify persons in a manner which would be prejudicial to the safety or legal rights of those persons;

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<sup>675.</sup> Majority Report, para. 7.60.

<sup>676.</sup> Majority Report, para. 7.55.

- b) prejudice legal proceedings, whether or not those proceedings have commenced; or
  - c) disclose the operational methods of the Authority in a manner prejudicial to the operations of the Authority;
3. That in the event of a dispute between the NCA and the Committee on what the Committee may disclose, a Judge of the Federal Court act as an arbiter to determine whether the information would fall into any of the categories identified; and
  4. That, in the event the (unsatisfactory) option is chosen to prevent the Committee from receiving information which falls into the three exemptions, it is desirable that disputes be resolved by a Judge of the Federal Court, acting as a private arbiter, rather than a Minister.

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