

STATEMENT BY MR FARIS

Thank you for your letter of 3 December 1991 in which you invite me to make comments on the statement dated 29 November 1991 provided to the Committee by Mr Peter Faris.

The matters raised in the statement by Mr Faris have been the subject of other advices to the Committee and to the Senate. I will therefore refer to those other advices and comment only briefly on the points in his statement.

Paragraph 1 of the statement says:

All decisions of the National Crime Authority (NCA) and its Members and advisers were made properly and legally in the course of carrying out the Authority's statutory duties. No decision constituted Contempt of Parliament and no Contempt was intended.

As was pointed out in the advice of 6 March 1989 to the Committee on the submission on behalf of Mr Charles Perkins, at pages 3-5, in the advice dated 13 November 1990 on the Committee's reference concerning alleged harassment of a witness, at page 8, and in the advice of 28 February 1991 on the submission to the Committee by Mr Le Grand, at pages 4-5, an action may be otherwise proper and lawful but may constitute a contempt of Parliament because it has the tendency or effect improperly to interfere with the operations of the Houses and their committees. (Such action may also constitute a contempt of court on the same rationale.) The answer to the question of whether the decisions of the National Crime Authority and its members were otherwise proper and lawful therefore does not determine the question of whether those decisions constitute contempts. Whether any decision constituted a contempt is therefore for the Committee to determine. Whether any contempt was intended is a matter of fact for the Committee to find.

Paragraph 3 of the statement is as follows:

The decisions were correct and are supported by the Legal Opinions (the Opinions) tabled in the Senate. The decisions were not Contempt because they were made in good faith in the carrying out of a statutory duty and in circumstances requiring the resolution of complex legal issues. The Opinions make it clear that a variety of legal views may be legitimately held as to the meaning and operation of complex sections of the NCA Act. The Joint Parliamentary Committee has recommended amending the Act to make matters clearer.

The fact that the National Crime Authority may have acted on the basis of legal opinions does not determine the question of whether the actions of the Authority constituted a contempt of Parliament. As with any other offence, the fact that the offender was advised that the actions were lawful is not relevant to the question of whether the actions constituted an offence.

It is clear from the submission by Mr Le Grand that the Authority had contrary advice available to it, particularly that of Mr David Smith, which was referred to in my advice of 28 February 1991 at page 4. The Authority chose to ignore part of the advice available to it. It may well be thought that, in dealing with a parliamentary committee, particularly a committee which has a statutory duty to inquire into its operations, a statutory authority would proceed cautiously where "a variety of legal

views may be legitimately held as to the meaning and operation of complex sections" of the relevant statute. One might well think that in those circumstances a statutory authority should disclose to the parliamentary committee the actions it has taken in relation to the presentation of evidence to the committee and the basis on which they have been taken.

The question of whether "the decisions were not Contempt because they were made in good faith in the carrying out of a statutory duty and in circumstances requiring the resolution of complex legal issues" is a question for the Committee to determine, first, whether the decisions were made in good faith, and secondly, whether that is a matter the Committee ought to take into account in determining whether a contempt was committed. The question of the weight to be given to the intention with which an act was done was also a subject of the advice of 6 March 1989, at pages 7-8.

At paragraph 4 of the statement Mr Faris states that he is not prepared to answer questions because he is "of the opinion that I am prohibited from doing so by Section 51 of the NCA Act", an opinion which is supported by "the Opinions". Mr Faris' opinion is supported by only some of the opinions given on this matter. The question of whether section 51 of the National Crime Authority Act has any application to inquiries by the National Crime Authority Committee and by parliamentary committees generally is the subject of the various opinions presented to the Senate and collected in the volume which is available to the Privileges Committee.

The Solicitor-General believes that section 51 of the Act has some application to inquiries by the National Crime Authority Committee, notwithstanding that the section does not explicitly apply to such inquiries, notwithstanding that another section of the Act contains explicit limitations of such inquiries, and notwithstanding that, as he concedes, the powers and immunities of the Houses of the Parliament and their committees are not affected by a statutory provision unless the provision clearly has that effect. He finds this view upon a reading into the section of a "necessary implication" that the power of parliamentary inquiry is restricted by the section. I simply refer the Committee to the other advices I have given, and reiterate that I am firmly of the view that section 51 has no application to any inquiry by the National Crime Authority Committee, and that this is the only rational and tenable conclusion, based on the principle that the Parliament is not to be taken to have legislated away the powers and immunities of the Houses except by express declaration.

Regardless of that matter, section 51 cannot be interpreted as preventing a House of the Parliament, through one of its committees, from investigating the question of whether a witness before the National Crime Authority Committee was improperly restricted in giving evidence before that Committee and whether the Committee was given false or misleading evidence about that matter. If Mr Faris' view is correct, it would seem that section 51 not only prevents the National Crime Authority giving certain evidence to the Committee, but would allow the Authority to place what may be regarded as restrictions on witnesses in respect of the evidence which they are to give to the Committee, without informing the Committee of those restrictions, and to give evidence to the Committee which may be regarded as concealing from it the imposition of those restrictions, and also prevents either House of the Parliament from inquiring into the imposition of those restrictions or the giving of that evidence which concealed the restrictions. On that view, section 51 is a vastly more powerful provision than even the Solicitor-General appears to contemplate. I do not believe that it is a view that can be supported.

Paragraph 5 of the statement indicates Mr Faris' opinion "that the [Privileges] Committee has no power to compel my attendance or answer to questions". Technically, the Committee does not have the power to compel Mr Faris' attendance or his answer to questions: it is the Senate which has that power. The Senate has empowered the Committee to require the attendance of witnesses and to examine those witnesses. In the event of a refusal by a witness to attend or to answer questions, the Committee can only report such refusal to the Senate, which may then judge the refusal to constitute a contempt and punish the contempt. It is not clear whether Mr Faris is maintaining that the Senate does not have the power to punish contempts. I would be very surprised if, in the face of section 49 of the Constitution, sections 4 and 7 of the *Parliamentary Privileges Act 1987* and the law, as found, for example, by the High Court in *R v Richards: ex parte Fitzpatrick and Browne* 1955 92 CLR 157, Mr Faris were seriously to maintain such a proposition.

In paragraph 6 of the statement, Mr Faris indicates that he is of the opinion "that the procedures of the Committee deny me natural justice". I would also be surprised if Mr Faris were seriously to maintain that proposition, particularly having regard to the fact that, as the Committee is well aware, the procedures contained in Privilege Resolution no. 2, governing the proceedings of the Committee, provide for witnesses appearing before the Committee greater procedural safeguards than are provided for witnesses in court proceedings and safeguards equal to those provided for accused persons in criminal proceedings.

I have no other comment on Mr Faris' statement, except to observe that, as I understand it, the Committee at this stage is offering Mr Faris the opportunity to give evidence on the matters before it. Mr Faris' stated intention of seeking a ruling from the Committee and applying to the High Court would therefore appear to be premature.

I hope that these comments will be of some use to the Committee. Please let me know if the Committee would like me to provide any further material.