

## Procedural Information Bulletin No. 3

*9 April 1985*

### COMMITTAL PROCEEDINGS IN NSW LOCAL COURT — APPEARANCE OF COUNSEL FOR MR PRESIDENT

During the committal proceedings in respect of charges against Mr Justice Murphy in the New South Wales Local Court in Sydney, counsel for Mr President appeared to draw the attention of the court to potential infringement of parliamentary privilege.

#### The Principle

The matter in issue was the limitation which the law of parliamentary privilege imposes upon the use of parliamentary committee evidence in court proceedings.

It is well known that article 9 of the Bill of Rights of 1688, which applies to the Houses of the Australian Parliament by virtue of section 49 of the Constitution, provides that proceedings in Parliament may not be "impeached or questioned" in any court. It is also well known, as a matter of principle, that evidence given by a witness or documents submitted to a parliamentary committee are part of proceedings in Parliament as much as proceedings in the Houses.

What is not so well known, however, is that this privilege or immunity not only prevents parliamentary proceedings from being the subject of civil or criminal action, but prevents those proceedings from being referred to before courts in such a way that they are questioned in a wide sense. What has been said or done in the course of parliamentary proceedings may not be commented upon, used to draw inferences or conclusions, analysed or made the basis of cross-examination or submission. This principle is a matter of law which holds good regardless of any action taken by the House concerned to prevent any violation of it. As a matter of law, it cannot be waived or suspended by resolution of the House concerned any more than any other law can be waived or suspended by mere resolution. The principal court case in which the meaning of article 9 of the Bill of Rights was explored was *Church of Scientology of California v Johnson-Smith* (1972) 1 QB 522.

It is possible for evidence of proceedings in Parliament to be adduced in courts for a legitimate purpose. Such evidence may be used to prove material facts, such as the fact that a statement was made in Parliament at a particular time, so long as there is no questioning or impeaching of the proceedings. For example, a person being sued for defamatory matter contained in a press report of what happened in Parliament might need to adduce Hansard in order to establish that the press report was a fair and accurate report of the proceedings in Parliament.

An entirely different question, which somewhat confuses discussion of this use, is whether evidence of proceedings in Parliament may be given before a court without the permission of the Houses concerned. The British and Australian Houses have adopted the practice of granting permission for evidence of their proceedings to be adduced in court, subject to the proper observance of the law as to the use of that evidence. The question of whether this permission is necessary has been raised in a number of court cases, particularly in Australia. The courts have indicated that they believe that they can allow evidence of parliamentary proceedings to be admitted without permission. This does not mean, however, that such evidence may be used for all purposes (*Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1). The Privileges Committee of the House of Commons has recommended that the practice of granting permission for such evidence to be given should be abolished, because courts take care to ensure that such evidence is not admitted contrary to the principle contained in the Bill of Rights.

### Appearance of Counsel

In the committal proceedings against Mr Justice Murphy, much of the evidence heard is the same evidence as was given before the two Senate select committees which inquired into the judge's conduct. There is nothing to prevent witnesses giving before a court the same evidence as they gave before a parliamentary committee. It was realised, however, at the time when the prosecution of Mr Justice Murphy was announced, that there would be some danger of the evidence before the committees being referred to in an improper way in the court proceedings. For this reason some steps were taken to remind the Director of Public Prosecutions and the defence counsel of the law relating to the matter.

The danger appeared to be real and present when two witnesses were required to produce documents in the court proceedings, and produced documents including statements made to one of the committees. Mr President therefore arranged for counsel to appear before the court to draw the attention of the court to the potential problem.

Counsel duly appeared and was granted leave to represent Mr president in the proceedings. The counsel was also referred to as *amicus curiae*, or friend of the court, which was the capacity in which the British Attorney-General appeared in the

Scientology case. Mr President made a statement in the Senate on 25 March 1985, informing the Senate of the action he had taken. A copy of that statement is attached to this bulletin.

Counsel for Mr President made submissions to the court on the matter of parliamentary privilege, and in the course of the proceedings objected to a number of lines of questioning and a number of answers. The magistrate did not rule on the general question of parliamentary privilege, but his rulings on individual objections indicate that he generally accepted the statement of the law put to him by counsel for Mr President. Generally speaking, those individual rulings upheld the principle that evidence before the committees must not be made the subject of examination, and counsel for the defence was warned against trespassing into the forbidden area.

The magistrate did, however, admit a number of questions and answers which arguably should not have been admitted. These related to whether witnesses had read certain documents (by implication including their evidence before the committees) to see whether there were variations and to refresh their memories, the time taken by a witness in preparing his statement to one of the committees, the state and accuracy of his recollection at the time he was preparing his statement, whether any documents were used in preparing that statement, and the number of occasions on which evidence had been given.

In respect of these matters counsel for Mr President made a submission to the effect that the questions and answers should not be improperly used in addresses by counsel. The magistrate, while declining to reconsider his admission of the matters in question, conceded that perhaps they should not have been admitted and that the submissions put by counsel for Mr President were correct. He also indicated that in referring to those matters other counsel would have to keep within the proper limits.

#### Media Reports of the Proceedings

During the committal proceedings difficulties were caused by inaccurate media reports of the matters raised by counsel for Mr President, particularly news reports on ABC television. These reports gave a quite misleading impression of those parts of the proceedings relating to the parliamentary privilege question. Mr President made a statement on 28 March, expressing concern about these reports, and a copy of that statement is attached to this bulletin.

#### REFERRAL OF BILLS TO COMMITTEES — OPPOSITION STATEMENT

On 28 March the Leader of the Opposition in the Senate, Senator Chaney, made a statement giving an outline of a scheme to achieve better scrutiny of legislation by having more bills referred to the Legislative and General Purpose Standing

Committees. The scheme calls for a selection committee, consisting of Whips and a representative of chairmen, to recommend which bills should be referred to standing committees, for special procedures for dealing with the recommendations of that committee, and for the consideration of bills to be deferred until standing committees have reported upon them. Standing committees could recommend amendments to bills, and such recommendations would be considered when the bills are considered in committee of the whole.

Senator Chaney invited comment on the scheme, and indicated that he will be taking action to set it up after considering any suggestions.

The adoption of this scheme would involve some change to the way in which the Senate considers legislation and substantial change to the way in which the standing committees work.

## SENATE COMMITTEES

The PRESIDENT-I wish to inform the Senate of certain steps I have taken to protect the privilege of the Senate and its committees, as I did on 23 August 1983 when it was necessary to take similar steps in relation to the Royal Commission on Australia's Security and Intelligence Agencies. Under Article 9 of the Bill of Rights of 1688, as applied to the Senate by section 49 of the Constitution, proceedings in the Senate, including proceedings in Senate committees, may not be impeached or questioned in any court. This means that evidence given before a parliamentary committee may not be referred to in any court proceedings in such a way that that evidence is commented upon, used to draw inferences or conclusions, analysed or made the basis of examination or submission. This is a matter of law and the immunity cannot be waived by the Senate.

This afternoon two witnesses appearing before the New South Wales Local Court in the committal proceedings relating to Mr Justice Murphy were required to produce documents, and documents were produced, including statements made to the Senate Select Committee on the Conduct of a Judge. Because of the possibility of the evidence before that Committee and the Senate Select Committee on Allegations Concerning a Judge being referred to in a manner contrary to the immunity I have mentioned, I have arranged for counsel to appear in the court tomorrow to make a submission to draw the attention of the court to the limitations which the law imposes on the use of parliamentary evidence in court proceedings.

## SENATE COMMITTEES

Senator CHANEY (Western Australia-Leader of the Opposition) (8.02)-by leave-I move:

That the Senate take note of the statement.

I seek leave to continue my remarks later, Mr President. I do not seek, in any way, to debate it or to question what you have said, but I think at some time it may be a matter that the Senate would wish to discuss and that is my purpose in moving this motion.

Leave granted; debate adjourned.

## PARLIAMENTARY EVIDENCE

The PRESIDENT-On Monday 28 March 1985 I informed the Senate that I had made arrangements for counsel to appear in proceedings in the Local Court of New South Wales to ensure that the limitations imposed by the law upon the use which may be made of Parliamentary evidence were observed. Counsel has appeared accordingly and has taken the necessary action to seek to ensure the proper observance of those limitations. I am concerned, however, that there have been some inaccurate media reports of those proceedings in relation to matters raised by the Senate's counsel. In a report on the Australian Broadcasting Corporation's National program on 26 March 1985 it was stated that parliamentary privilege was being 'rewritten' in the proceedings. This conclusion appeared to be based on a further statement that questions in a certain form were being asked. The report was wrong in that a question in the form referred to was asked only once, was objected to by counsel for the Senate, was not answered and was not persisted with. The ABC officer responsible for the program was asked to make a correction, and it is a matter of concern to me that no correction has so far been made.

In the ABC National program on 27 March 1985 there was a report that a witness had been cross-examined on a statement he had prepared for a Senate committee. I am advised that that report also was inaccurate insofar as it suggested that the content of the statement had been examined. The Senate will appreciate that I do not want to say anything further because the proceedings are continuing, but senators should be assured that appropriate action is being taken to seek to ensure that there is no improper use of Senate committee evidence in the proceedings.

PARLIAMENTARY EVIDENCE

Senator CHANEY (Western Australia-Leader of the Opposition) (3.07)-by leave-I move:

That the Senate take note of the statement.

For reasons that are evident from your own statement, Mr President, I do not wish to debate this matter in any way, but on behalf of the Opposition I express a sharing of the concern that you have expressed about the failure to correct the report. I was very concerned when I saw the report to which the President has referred. I followed it up with the clerks and with the President and I was concerned that there appeared to be a second inaccuracy on the next day. The Opposition joins with you, Mr President, in believing that it is appropriate that there should be a correction where there has been an error and we hope that very great care will be taken in the media with this very difficult and delicate case to ensure that reports put to the public have a high degree of accuracy. I seek leave to continue my remarks later.

Leave granted; debate adjourned.