ADVICES TO THE SENATE COMMITTEE OF PRIVILEGES FROM THE CLERK OF THE SENATE AND SENIOR COUNSEL

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ADVICES FROM SENIOR COUNSEL

From Mr Bret Walker, SC

From Mr T. Simos, QC

ADVICE NO. 1

PETITIONS : PRIVILEGE

The Committee of Privileges has asked for some background information on the matter referred to it by the Senate on 16 March 1988. The following observations may be useful to the Committee.

The Committee is required to consider "whether the circulation of a petition containing defamatory material for the purpose of gaining signatures and subsequent submission to the Senate is or ought to be privileged and how such issues should be determined and in what forum".

Preliminary Questions

There are two aspects of this reference which, it is suggested, may be very readily determined.

First, the question refers to a petition containing defamatory material. As was pointed out in the Senate in debate on the reference, this phrase adds nothing to the question, but apart from adding nothing it may be misleading. It is a common misconception that the purpose of privilege is to confer immunity against suit for defamation. On the contrary, it must be constantly kept in mind that the species of absolute privilege known as parliamentary privilege protects against suit or prosecution for any cause, civil or criminal, and against examination or question in a wide sense in court proceedings. In considering whether the circulation of a petition is or ought to be privileged, therefore, the Committee is considering whether there is or ought to be the same total immunity as is given to proceedings in Parliament, or some lesser immunity.

Secondly, the sub-question "how such issues should be determined and in what forum", the word "issues" presumably referring to the questions of whether the circulation of a petition is or ought to be privileged, would appear to have only one possible answer. The question of whether the circulation of a petition is privileged is a question of law which can be determined only by a court in a particular case; only the courts can say what the law is. The question of whether the circulation of a petition ought to be privileged can be determined only by Parliament and only by legislation, if it has not already done so by legislation. This is made clear by section 49 of the Constitution, which puts in place all the law on parliamentary privilege in force in respect of the British House of Commons in 1901, but which allows the Australian Parliament (i.e., the Queen and the two Houses) to alter that law.

As it admits of only one answer, it is not clear why this phrase was included in the reference to the Committee. There is a misconceived impression that a House of the Parliament can in some way declare its privileges by its individual actions, but it is clear that a legal immunity cannot as a matter of law be created in that way. This misconception arises because of the power of each House to punish contempts, and it is thought that by treating a particular act as a contempt a House recognises a privilege. This mistaken notion is analysed in some detail in the 1967 report of the House of Commons Select Committee on Parliamentary Privilege, at pp. 89-90. It needs only be said here that the question of whether an act is privileged, i.e., possesses a legal immunity, is quite distinct from the question of whether a particular act may be treated as a contempt. The mixing up of the two questions, which has bedevilled consideration of

parliamentary privilege for centuries, may have found its way into the reference before the Committee because the original motion, for which the reference was substituted by way of an amendment, would have asked the Committee to consider whether a contempt had been committed.

The circulation of a petition may be said to be privileged in the sense that it may be protected by the power of a House to treat any violation of the right to petition as a contempt. This, however, is a misuse of the word "privilege". In centuries past the British Houses could bring a privilege into existence simply by declaring it and then by punishing the violation of it as a contempt. That situation has long since passed in Britain, with the ordinary courts establishing their exclusive jurisdiction over interpretation of the law, and by virtue of section 49 of the Constitution it was never the situation in Australia, where "privilege" clearly means a legal immunity embodied in the law. The Australian Houses may treat such acts as threatening or bribing a petitioner as a contempt, but the question of whether a petition is legally actionable can be determined only in court. This is made abundantly clear by section 4 of the Parliamentary Privileges Act 1987 and by the criteria which the Senate has adopted for itself to determine whether a contempt has been committed. A contempt is thereby declared to be an improper interference with the exercise of the authority or functions of a House, a committee or its members. The bringing of legal proceedings in respect of a petition could not be regarded as an improper act, except in the circumstance, very difficult to identify, of legal proceedings being brought not in good faith but for the purpose of intimidation, which was the very circumstance seemingly alleged in the original motion in the Senate. The question of whether such a circumstance occurred was removed from the proposed reference by the amendment.

It is therefore suggested that the Committee should assume that it has been asked to determine whether there is or ought to be a legal immunity in respect of the circulation of a petition, and not whether particular acts in relation to petitions should be treated as contempts, which can really be decided only in particular cases of such acts.

The question before the Committee thus reduces itself to whether the circulation of a petition is or ought to be privileged (i.e., is or ought to be the subject of the legal immunity known as parliamentary privilege, or of some lesser immunity).

The reference also refers to the circulation of a petition "for the purpose of gaining signatures and subsequent submission to the Senate". This excludes the circulation or the publication of a petition for some purpose other than gaining signatures, and also excludes the circulation of a petition for some purpose other than eventual submission to the Senate. In other words, the Committee is looking at the normal process whereby a petition is prepared and submitted to the Senate. This is quite significant, as will appear on further analysis.

The question of the immunity attaching to the circulation of a petition is not one on which there are judgements of courts to indicate what the law is; the question has not been examined by the courts in Australia or in Britain so far as is known. If there were any significant judgements, their value might be questionable, depending on their tenor, because of the passage of the Parliamentary Privileges Act 1987, which significantly affected, or, on one view, clarified, the law relating to proceedings in Parliament.

Submission of a petition : **Parliamentary Privileges Act**

One of the intended purposes of the Parliamentary Privileges Act 1987 was to make it clear that the act of submitting a document to a House or a committee is absolutely privileged. Thus paragraph 16(2)(b) provides that, for the purpose of the application of the immunity contained in Article 9 of the Bill of Rights, "proceedings in Parliament" includes the presentation or submission of a document to a House or a committee. This was intended to cover petitions as well as written submissions presented to committees and any other method of placing a document before a House or a committee.

The effect of this paragraph is that the submission of a document is absolutely privileged regardless of whether or not the document is accepted by the House or committee. For example, if a person sends a written submission to a committee, and the committee, perhaps because of the submission's irrelevance, declines to accept it and sends it back to the person who submitted it, the person cannot be sued or prosecuted for the act of submitting it. Provided that the person does not do anything else with the document, such as publish it to somebody else, the immunity is complete. The Act was quite deliberately framed in this way. The rationale of this provision is that citizens should be protected in approaching a House or a committee and in seeking to lay matters before Parliament, even if the approach is not accepted.

Petitions, of course, unlike written submissions to a committee, are not forwarded directly to a House but are given to a member of the House with a request that they be presented. This does not make any difference to the matter; presentation by a member is simply the mechanism by which the document is submitted to the House. Petitions are also virtually made public in the process of presentation, but that is not a difference in principle so far as submission is concerned.

The question arises whether the preparation of a petition prior to its submission is absolutely privileged. Attention was drawn in the matter originally placed before the Senate to paragraph 16(2)(c) of the Act, which provides that the preparation of a document for purposes of or incidental to the transacting of the business of a House or a committee is also part of proceedings in Parliament. As the presentation of petitions is part of the business of a House, it might well be held that the preparation of a petition, that is, the process of drawing up a petition, is privileged by virtue of this paragraph. Apart from that possibility, it would seem that the preparation of a petition in that sense is an essential part of the submission of a petition, and is therefore absolutely privileged by virtue of paragraph 16(2)(b).

The Committee has asked that the question of the status of a petition "prepared for circulation" before the passage of the Act be considered. The Act deals explicitly only with the submission of a petition, and, as will be seen, deals only implicitly with the circulation of a petition.

The status of such acts such as submitting petitions was somewhat uncertain before the passage of the Act, and it was the purpose of the Act to settle such uncertainties to the maximum possible extent. There had always been a great deal of speculation about what the term "proceedings in Parliament" would be held to cover, because the phrase has not been subject to any significant judicial interpretation. It was thought that it would be held to cover such things as the preparation of material for use in Parliament, for example, by a member gathering information for a question or a speech (but not simply gathering information: Rivlin v Bilainkin, 1953 1 QBD 534), but

there was much uncertainty. A succession of committees of inquiry into parliamentary privilege, beginning with the 1967 House of Commons committee and culminating in the 1984 report of the joint select committee of the Australian Houses, recommended that the uncertainty be cleared up by a statutory definition of proceedings in Parliament. That definition has now been provided by the Act. The definition was framed to clear up the various uncertainties as far as possible, and to put in place what was always thought to be the law, rather than to make new law. Thus it was always thought that the submission of a document to a House or committee would be absolutely privileged, but in the absence of court judgements one could not be certain, and it was generally believed that the privilege would depend upon a document being accepted. The Act has settled that question in the manner already described.

Apart from the question of whether submitting a petition is a proceeding in Parliament, it appears that as a matter of common law the submission of a petition was immune from suit or prosecution for defamation (Lake v King, 1667 Saunders 131, a case which will be referred to again). The defamation statutes of three states (Queensland, Code, s 371, Tasmania, Defamation Act 1957, s 10, and Western Australia, Code, s 351) enacted this rule.

Does the Parliamentary Privileges Act say anything about the circulation of a petition? It has always been fairly clear, and the Act makes it clearer, that the separate publication of a document submitted to a House or a committee by the person submitting it is not privileged (the common law is set out in Erskine May's Parliamentary Practice, 20th ed., pp. 85-8). Thus if a witness forwards a written submission to a committee, even if the committee accepts the submission, a separate publication of the submission by its author is not privileged, and the author and publisher would be liable in any suit or prosecution for anything defamatory or unlawfully published in that separate publication. The publication of such a document attracts privilege only where the publication comes about by an order or authority for publication by the House or the committee concerned. This was well established before the passage of the Act, but is made abundantly clear by paragraph 16(2)(d) of the Act, which provides, inter alia, that the publication of a document by or pursuant to an order of a House or a committee and the document so published is a proceeding in Parliament.

A reading of the two provisions, paragraphs 16(2) (b) and (d), in conjunction therefore clearly discloses that where a document is submitted to a House or a committee the act of submission is absolutely privileged, and where such a document is ordered to be published by a House or a committee the publication of the document and the content of the document itself thereupon become absolutely privileged. It is therefore obvious that the separate publication of a petition by the petitioner, apart from its submission to a House and in the absence of an order for its publication by the House, is not absolutely privileged. It is also obvious that a person who publishes a document cannot attract privilege to that publication by subsequently turning the document into a submission or a petition to a House or committee. If it were otherwise, every newspaper or journal article could be made absolutely privileged simply by sending it to a House or a committee in the guise of a submission.

The Act thus provides, in the way in which it clarifies the law, a firm basis for concluding that the publication by a petitioner of a petition is not privileged. A modification of this could arise only if there is some special consideration attaching to the circulation of a petition for gaining signatures.

Circulation of a petition

This leads to the crucial question before the Committee: is the circulation (i.e., the publication) of a petition for the purpose of gaining signatures and subsequent submission to the Senate (rather than for some other purpose) privileged?

The answer to that question is: probably not. As far as is known, there are no judgements by Australian or British courts on that point. It is likely that the terms of the Parliamentary Privileges Act 1987 would significantly affect the way the courts would look at the matter, and there have certainly been no judgements interpreting the provisions of that Act. There is the very old case, already referred to, of Lake v King (1667 Saunders 131), the facts of which involved the publication of a petition, but the only conclusion which can properly be drawn from that rather confused case is that drawn by Erskine May's Parliamentary Practice, 20th ed., at p. 86, that the publication of a petition to members of the Parliament is not actionable. Such pre-19th century cases also have to be treated with caution because the Houses were then regarded as courts exercising exclusive jurisdiction over their own branches of the law.

One is therefore in the position of examining the arguments which may be put forward and which might sway a court if the question arose.

The principal argument in favour of the circulation of a petition for the purpose of gaining signatures having absolute privilege is that such circulation is an essential part of the preparation and submission of a petition to a House. This raises the obvious difficulty, which was referred to in debate in the Senate, that it would be open to a person to publish a document widely, the publication of which would otherwise be actionable or unlawful, simply by putting the document in the form of an intended petition to Parliament. The pretence of petitioning Parliament could thereby be used to drive a large hole through the civil and criminal law.

It might be reasoned in answer to this that privilege attaches to the circulation of a petition provided that the court is satisfied that it is a bona fide petition founded upon a genuine intention to petition Parliament, and not a document circulated under colour or pretence of a petition, and provided that the document is published to the extent necessary for gaining signatures and no further. This may sound like a form of qualified privilege, but it would amount to no more than a requirement that a petition must be a petition. A further line of reasoning may be that the circulation of a petition is privileged only where the persons to whom it is published have a legitimate common interest in receiving and signing it. This would be somewhat analogous to the interest and duty rule, to which further reference will be made, but for the purpose of narrowing the scope of absolute privilege rather than of establishing the conditions for qualified privilege.

Such proposed interpretations, however, would scarcely make the perceived difficulty any smaller. The courts would have great difficulty in determining the matter, but it is suggested that they would be most reluctant to give a petitioner the means of ignoring the law, and it is therefore likely that it would be held that absolute privilege does not attach to the circulation of a petition for the purpose of gaining signatures.

The question then arises, and the Committee has specifically asked that it be considered, whether qualified privilege would attach to the circulation of a petition, that is, a privilege which can be negatived by proof of ill will or other improper motive.

Again, it appears that the existing case law does not allow this question to be answered with any certainty. As far as is known, there are no judgements dealing with the question of a qualified privilege attaching to the circulation of a document intended to be submitted to a House or a committee. The Parliamentary Privileges Act deals with the question of qualified privilege only in relation to reports of parliamentary proceedings. Section 10 of the Act refers to fair and accurate reports of proceedings of the federal Houses and their committees. This is the context in which qualified privilege ancillary to absolute parliamentary privilege has usually arisen. It is, as it were, qualified privilege flowing from, and consequent on, absolute privilege. Any qualified privilege attaching to the circulation of a petition would be a qualified privilege precedent to the absolute privilege attaching to the submission of a document. As such, it would raise different and quite difficult questions than the normal sort of qualified privilege consequent on absolute privilege. A sort of antecedent privilege attaches to parliamentary proceedings, as under paragraphs 16(2)(c) and (d) of the Parliamentary Privileges Act (preparation and formulation of documents), and similarly to legal proceedings under a common law rule, but the acts in question do not take place in public, as does the collection of signatures for petitions in most instances.

Apart from the relationship of the circulation of a petition to the occasion of absolute privilege, the courts might be persuaded to apply to the circulation of petitions the rule relating to publication in the context of an interest or duty to publish and an interest or duty in the receipt of the publication. The rule might be applied in the manner of Braddock v Bevins (1948 1 KB 580), in which it was held that electors had a sufficient interest in hearing a defamatory statement about a member of Parliament. A reading of the authorities and cases on the interest and duty rule, however, indicates that the courts would probably be very reluctant to regard that rule as extending to the circulation of a petition, unless the petitioners had some special common interest in the subject of the petition.

There is some divergence between the states and territories in the statutory formulation and interpretation of the interest and duty rule, but the assessment of the previous paragraph appears to me to be valid even having regard to that divergence. Different findings on the circulation of petitions intended for the federal Houses in different states and territories would, of course, be highly undesirable. I think that if state or territory courts were called upon to decide the matter, they would be inclined to base their judgements entirely upon the federal law, that is, upon section 49 of the Constitution and the Parliamentary Privileges Act, section 10 of which could be taken as an indication that the federal Parliament did not intend that qualified privilege relating to its proceedings extend any further.

The major question which the Committee has to consider, therefore, is whether the circulation of a petition for the purpose of gaining signatures should attract absolute or qualified privilege.

Should the circulation of a petition be privileged?

As has already been suggested, this question can be determined only by legislation. As has also been suggested, it may be that the Parliament has already determined the question by enacting the

Parliamentary Privileges Act 1987. It has been submitted above that that Act makes it clear that the separate publication of a document submitted to a House or committee is not privileged, and the Act may be taken to mean that separate publication precedent to submission, as well as separate publication consequent on submission, is not privileged. If it were concluded that the circulation of a petition ought to be privileged, that decision would require legislation explicitly to that effect.

This paper will now go somewhat beyond providing background information and suggest some considerations which ought to be examined in answering this question, and will also respectfully suggest an answer which may be given.

It is submitted that in answering the question the Committee should return to first principles, and ask: what is the purpose of petitioning Parliament? In all the authoritative texts on parliamentary procedure, it is stated that it is the right of the subject, or, in modern terms, the citizen, to petition for the redress of grievances. The historic purpose of a petition is to disclose the grievances of the petitioners and to pray for remedy or relief. Thus in earlier times petitions set out the wrongs or oppressions from which the petitioners believed they had suffered and asked that those wrongs or oppressions be removed. Many if not most of the petitions in the old cases referred to in the authoritative texts are of this character. For example, the case which is cited by Erskine May as authority for the proposition that legal proceedings against petitioners is a contempt (Gee's case, 20th ed., p. 167) refers to a petition presented in 1696 by the hackney coachmen, alleging that they had been oppressed by the arbitrary actions of licensing commissioners.

An examination of the petitions now presented to the Houses quickly reveals that the character of petitions has been transformed. They are not now concerned with wrongs suffered by particular individuals and the relief or remedy for such wrongs, but with questions of public policy. They disclose grievances of citizens only in the sense that those citizens disagree with public policies, feel that their interests suffer because of those policies, and ask that the policies be changed. A petition in the original shape, disclosing a personal grievance and praying for relief, is now extremely rare. It is well known that petitions are circulated by political groups for the purpose of advancing the controversy on matters of policy. In other words, petitions have become part of, and a forum for, general political debate.

It may well appear to the Committee that it would be quite unjustified to extend absolute privilege to political debate outside Parliament, the absolute privilege belonging properly only to debate in Parliament. It may also appear that it would not be justified in granting any qualified privilege to this form of political debate outside the Houses, or in extending any qualified privilege which may already exist through the interest and duty rule.

Another observation which may be drawn from an examination of petitions presented nowadays is that it is virtually unknown to receive a petition defamatory of any person. This may be partly because in general political debate, such as is carried on through petitions and by other means, it is generally speaking not necessary to defame anybody, and most people engaging in political debate outside the Houses are careful not to do so. A secondary reason is that the rules of the Houses relating to petitions would probably prevent a defamatory petition from even being presented by a Senator. The Senate standing orders provide that, in order to be presented, a petition must be "respectful, decorous, and temperate in its language" (S.O. 88), and do not leave

much scope for defamation in petitions. Although the Committee does not have before it, except in so far as it may illustrate the general question referred to the Committee, the particular case which gave rise to the reference, it is very doubtful whether the particular petition originally in question could be regarded as defamatory. Having regard to these matters, the Committee may well ask whether it is necessary to provide any greater protection for the presentation of defamatory petitions, as the system of petitioning the Houses appears to be functioning in its modern form without defamatory petitions being presented.

It may be thought that the rules and power of the Houses provide an adequate remedy against defamatory petitions, should they be allowed and protected. In the list of acts punishable as contempts in Erskine May's Parliamentary Practice, 20th ed., at pp. 147-148, are various abuses of the right to petition, including the presentation of false, malicious or vexatious petitions, and no doubt the Australian Houses could similarly treat such acts as contempts. It may well be thought, however, that the power of the Houses to deal with petitioners after the event is no remedy where the circulation and presentation of a defamatory petition has already done great damage to individuals.

If the Committee did decide that some protection, or greater protection, should be given to circulation of petitions, it could be done, as has already been suggested, only by legislation, and it would be difficult, unless absolute privilege is to be conferred on any circulation of any intended petition, to draw the legislation so as to achieve only the desired end and not to give rise to unforeseen consequences. Such legislation could give rise to greater problems than the supposed problem that it would solve.

The Committee may well conclude, therefore, that the law should be left as it is at present.

A suggested solution

The foregoing discussion, particularly relating to the way in which the Parliamentary Privileges Act is framed, and how petitions have changed, suggests a solution which is now respectfully submitted to the Committee. It has been noted that the submission of a petition, regardless of whether or not the petition is accepted, is absolutely privileged. This means that an individual petitioner, and perhaps a group of petitioners with a common interest, who wish to complain of some injustice or oppression, may safely do so even where the petition contains defamatory matter, subject to the rules of the Senate relating to the presentation of petitions. It also means that a petitioner who wishes to defame some person in a petition dealing with a general political question may safely do so simply by presenting it as a sole petitioner and not circulating it for signatures, again subject to the rules of the Senate.

Perhaps, therefore, the Senate should explicitly recognise the difference between the old type of petition and the new, and overcome the problem, such as it is, of defamatory material in petitions, by making a rule that a Senator may not present a petition containing matter defamatory of any person unless the petition relates only to a personal grievance peculiar to a sole petitioner or to a group of petitioners having that grievance in common. This would mean that petitioners preparing petitions on general political questions would be less tempted to try to include defamatory matter in them, but a sole petitioner or a group of petitioners with a personal

grievance would still have the right to present a defamatory petition for the purpose of revealing that personal grievance.

This suggested step would be very easy to adopt, as it requires only a resolution or a new standing order of the Senate. It would not affect the rights of petitioners to any significant degree, and would preserve the existing law in what may well be regarded as the best balance between the rights of the Houses, of petitioners, and of other citizens.

ADVICE NO. 2

PARTICIPATION OF MEMBERS OF COMMITTEE OF PRIVILEGES IN CERTAIN INQUIRIES

(Advice dated 18 January 1989 from the Clerk of the Senate, Harry Evans to the Chair of the Senate Committee of Privileges, Senator Giles)

Thank you for your letter of 15 December 1988 in which you seek my views on whether it is appropriate that members of the Privileges Committee participate in inquiries into matters before the Committee.

The first point which must be made is that the question of whether individual members of the Committee should refrain from participation in certain inquiries, because they might be regarded as not bringing a completely impartial mind to the inquiries, is a question for the good judgement of the individual Senators themselves in the first instance, and of the Senate should the question be raised in the Senate. Having said that, I will make some observations which may be of assistance to the Senators in coming to their decisions.

There is no rule of the Senate relating to the participation in inquiries of Senators who may not be impartial or may not be seen to be impartial. Standing Order 292 provides that a Senator shall not sit on a select committee (this applies to all committees) who is personally interested in the inquiry, but it is clear that this rule relates to a Senator who is interested in an inquiry in the sense that, for example, a Senator who is a director of a company is personally interested in an inquiry into the affairs of the company, which is an entirely different matter, not relevant to the question referred to in your letter.

So far as I can ascertain, no comparable legislature has a rule concerning the participation in inquiries of members who may not be unbiased. It appears that in such legislatures any question of the disqualification of a member from participation in an inquiry is left to the judgement of the member. (I leave aside the House of Lords acting in its capacity as a court.)

The privileges committees of the British Houses perform functions similar to those of the Senate Committee of Privileges, and the question of partiality of members does not seem to have arisen in any public way in relation to those committees. In 1969 the Privileges Committee of the House of Commons had referred to it statements by a person to the effect that the chairman of a sub-committee should not participate in an inquiry into housing in her own town because she would be incapable of impartiality. The committee found that the statement could be construed as a contempt of the House but should not in fact be so construed in this case, by implication as not involving an obstruction of the committee's inquiry. Implicit in this finding was a view that it is improper to attribute partiality to a member in the conduct of an inquiry on the basis of the member's involvement in the subject matter of the inquiry. It may also be concluded that there was an implicit rejection of the view that a member's political interest in a subject prevented the member from conscientiously participating in an inquiry into that subject. (Report of the Committee of Privileges, HC 197 1968-69.)

Going to the Congress of the United States, we find that the United States Senate has a function, in the trial of impeachments, which may be regarded as closer to a judicial function than inquiries by committees of privileges, but has no rule preventing participation in trials of Senators who have expressed views on the matters at issue. While some Senators have disqualified themselves from participation, Senators who clearly had partisan views on the questions arising have participated in trials. (Congressional Quarterly Inc., Powers of Congress, 2nd ed, 1982, pp 166-7.)

It is suggested that there is very good reason for the absence of any rule relating to partial members participating in inquiries, and for legislatures not applying to themselves and their members the very strict rules which apply to judges and courts: such restrictions would be incompatible with the very nature and functions of an elected legislature. Members of elected legislatures in free states are expected to monitor constantly, and participate in discussion of, all matters of public interest and controversy. A strict application of such rules would result in almost all members of the legislature disqualifying themselves from virtually any inquiry. This applies with equal force to the "quasi-judicial" inquiries of committees of privileges as inquiries into other matters of public interest. A privileges inquiry begins with a motion in the House concerned and possibly debate on that motion. Such an inquiry is essentially the first step by a House to protect and preserve the integrity and safety of its own legislative processes. Every member of the House is by the nature of the exercise placed in an entirely different position from that of a judge before whom a prosecution or civil suit is brought.

In the case of the inquiry before the Senate Privileges Committee relating to Aboriginal affairs, for example, every member who has spoken, or who has listened to the debate, on related matters concerning Aboriginal affairs could be challenged for alleged partiality. This point is important because it is not the Committee of Privileges which makes decisions on privilege matters but the Senate on the report of the Committee of Privileges. If a matter arose for determination in the Senate, the members of the Privileges Committee which had made a finding and a recommendation on the matter could be enjoined not to participate in the decision by the Senate, and it would be doubtful whether there would be a quorum of Senators left whose impartiality could not be questioned.

I now turn to the matters concerning the particular Senators and the particular inquiries before the Committee.

The propriety of Senator Durack's participation in the inquiries relating to Aboriginal affairs is challenged on the basis that he signed a reservation attached to the report of November 1988 of Estimates Committee E. That reservation is to the effect that the conduct of the Board of the Aboriginal Development Commission since May 1988 has been highly questionable, as reflected in inter alia the removal of the General Manager of the Commission and the motion of no confidence in its Chairman. The Committee of Privileges is required to inquire whether there was any contempt of the Senate involving an improper interference with witnesses in those actions. In my view Senator Durack, in stating that those actions reflected questionable conduct on the part of the Commission, did not express any view on the question before the Privileges Committee. The letter of 12 December 1988 from Minter Ellison to the President states that it "appears that the Honourable Senator may have prejudged the matters into which the Committee has been charged by the Senate to enquire". This appears to me to be drawing an extremely long

bow, and, as I have said, would provide a basis for questioning the impartiality of virtually every Senator who has said anything in recent debate about Aboriginal affairs. The conclusion that the actions concerned reflected questionable conduct by the Commission could not, in my view, be reasonably regarded as prejudging the question as to whether those actions involved an improper interference with witnesses.

In relation to the participation of Senator Black and Senator Coates in the inquiry into the matter relating to the witness before the Standing Committee on Environment, Recreation and the Arts, I think that the indication by Senator Coates that he did not participate in the proceedings of the Standing Committee giving rise to this report, an indication to which you refer in your letter, avoids any potential problem so far as Senator Coates is concerned, and I think that a public statement to that effect would immediately remove any perception of a problem in relation to him.

Senator Black signed the Committee's report, which stated that "the Committee believes that a prima facie case rests that Ms Howland has been subject to harassment as a result of giving evidence". This might be regarded as providing a stronger basis for the non-participation of Senator Black in the inquiry than the objection to Senator Durack. I would point out, however, that a finding that there is a prima facie case may well be regarded as not preventing the Senator making a totally impartial final judgement after a hearing of all of the evidence. The finding of a prima facie case is just that, and does not involve a concluded view. Under the old procedures of the Senate, prior to the adoption of the new procedures in February 1988, the President was required to find a prima facie case before giving precedence to a motion to refer a matter to the Privileges Committee. Such a finding by the President, implicit or explicit, was not regarded as preventing the President from presiding over or participating by voting in subsequent proceedings. Even under the new procedures, the President in granting a matter precedence, and the whole Senate in deciding to refer the matter to the Privileges Committee, may be regarded as having formed a preliminary view of the matter in question. I therefore suggest that the conclusion should not be readily reached that a finding of a prima facie case prevents a Senator from participating in a full hearing of the matter.

In presenting the report of the Standing Committee, Senator Black made the following statement:

> "The wording of the note received by Ms Howland telling her to look for new accommodation, together with other information provided to the Committee by Ms Howland, and detailed in the report, leads the Committee to believe that the eviction of Ms Howland was a direct consequence of her giving evidence to the Committee. It is, in the Committee's view, a clear case of a witness suffering harassment as a result of giving evidence to a parliamentary committee. The Committee believes that it should be treated by the Senate with the utmost seriousness and that prompt action is required if the progress of the Committee's inquiry into drugs in sport is not to be impeded."

This statement may well be regarded as expressing a concluded view on the very question before the Committee, and therefore may be regarded as raising a more serious problem in relation to the participation of Senator Black in the inquiry. It may be that Senator Black's statement was intended to convey that, in the Standing Committee's view, the evidence in the

case clearly raised a question of the harassment of a witness, but the statement is certainly open to the other interpretation. I think that if Senator Black decides to continue to participate in the inquiry it would be advisable for him to make a statement to the effect that he has not formed a concluded view on the questions before the Privileges Committee and that he is bringing an open mind to the privileges inquiry.

This suggestion may be regarded as a somewhat generous view of the matter, but in this connection I would draw to your attention the report of the Select Committee on Allegations Concerning a Judge, Parliamentary Paper 271/1984, at page 3, where that committee reported a foreshadowed challenge to the membership of the committee of three members who served on the earlier Select Committee on the Conduct of a Judge and who had made findings on some matters before the second committee. The members concerned did not disqualify themselves, and the committee reported as follows:

> "Whilst not conceding the validity of the submission foreshadowed by Mr Hughes, the three members concerned considered whether they should disqualify themselves from sitting on the Committee, and concluded that they should not do so. They considered that their service on the previous Committee did not preclude them from making a proper and unbiased judgement on the matters before this Committee on the basis of the evidence to be heard by it, or that they had any sense of vested interest in maintaining their earlier decision."

It is suggested that the case for the Senators concerned not participating in that inquiry was very much stronger than the considerations applying to the members of the present Privileges Committee. It is significant that the counsel concerned did not pursue the foreshadowed submission and did not, so far as I am aware, subsequently question the Committee's report because of the participation of the Senators concerned. I suggest that this could well provide a significant precedent for the members of the Privileges Committee to consider.

In the last paragraph of your letter you indicate a concern about public perception of the three Senators continuing to participate in the relevant proceedings. I strongly recommend that, when the Senators have made their decisions as to their participation in the committee's inquiries, some form of public statement be made concerning their decisions and the reasons for their decisions. This may take the form of statements by the Senators concerned or a statement or report by the Committee. I consider that, if the Senators decide to participate in the inquiries, an appropriate statement should allay any adverse public perception.

Having made these observations, I again stress that the question of the participation of the Senators in the Committee's inquiries is one for the good judgement of the Senators.

I conclude with the advice that, in making their decisions, the Senators should be careful not to place future committees, not only Privileges Committees, the Senate and all members of the Senate in a difficult position by providing a precedent which would encourage future challenges to the participation of Senators in inquiries, by too ready an acceptance of the misleading analogy with the rules and practices of the courts.

(Advice dated 1February 1989 from the Clerk of the Senate, Harry Evans, to the Chair of the Senate Committee of Privileges, Senator Giles)

Thank you for your letter of 31 January 1989 conveying a request from the Committee of Privileges for advice on a submission by Sir James Killen contained in a letter dated 9 December 1988 from MacPhillamy, Cummins & Gibson.

Sir James submits, through the solicitors, that "there is a long established tradition in Parliamentary enquiries that no parliamentarian should sit on a committee in circumstances where it could be said that that parliamentarian may be biased against the person enquired into or have pre-judged any of the issues to be examined by Committee Members" and that "there are ample precedent for this in the House of Representatives when he stepped down from a Committee Enquiry relating to Mr Sommerville-Smith in 1959".

On the occasion referred to, Mr Killen (as he then was) asked the House of Representatives to discharge him from the Committee of Privileges during its inquiry into an allegation against Mr J. Somerville Smith (this appears to be the correct spelling of the name), on the basis that he had criticised the activities of Mr Somerville Smith in the House on an earlier occasion (Hansard, 7/4/59, p. 903, 8-9/5/58, pp. 1682-3.).

The particular circumstances of this case should be noted. The subject of Mr Killen's earlier criticism was very closely related to the subject of the complaint referred to the Privileges Committee. Both matters involved Mr Somerville Smith's public relations activities and the alleged involvement of members of the House in those activities. It is also significant that Mr Killen left the Committee only after he had been criticised in the House by an opposition member for sitting on the Committee (Hansard, 18/3/59, pp. 772-3). In his speech seeking his discharge from the Committee, Mr Killen stated that he had not been influenced by anything said in the House or by "any reckless requisition that had been served on this Parliament by any person outside". I am not aware of the matter referred to in the latter phrase.

There are other precedents which may be regarded as supporting Sir James' submission. For example, Mr Yates withdrew from the Committee of Privileges of the House when it inquired into a complaint involving defamation of members in a press article which was referred to the Committee on the motion of Mr Yates. (Hansard, 28/2/78, pp. 195, 228, 1/3/78, p. 306.)

These precedents, however, cannot be regarded as establishing any general rule or convention or "long established tradition", because for every such precedent there is a seemingly contrary precedent.

For example, to take another case in the House of Representatives, Mr Bryant in 1963 continued to serve on the Select Committee on the Grievances of the Yirrkala Aborigines, notwithstanding that he was acting for the Aboriginal people concerned in litigation which was stated to involve "precisely the same matters - the matters of the exclusion of land from an aboriginal reserve - which are to be the subject of inquiry by the select committee", and notwithstanding that the Minister for Territories (Mr Paul Hasluck, as he then was) strongly objected in the House to the presence of Mr Bryant on the Committee. (Hansard, 19/9/63, pp. 1176-9.) On that occasion the Minister asked the Speaker to rule on the matter, and the Speaker made a statement to the effect

that the Chair could not determine the question and it was a matter for decision by the member concerned, subject to any decision by the House. The Minister then stated that "this is not the sort of issue that the Government would force a vote in order to exclude a member" and that "we will certainly not move to unseat him", thereby reinforcing the view that such questions should be decided by the individual member concerned.

There are also different precedents in the Senate. For example, in 1971 Senator Wheeldon did not participate in the proceedings of the Committee of Privileges when it inquired into the unauthorised publication of a proposed report of the Select Committee on Drug Trafficking and Drug Abuse in Australia, on the basis that he was a member of that select committee. In the circumstances of this case, Senator Wheeldon may well be regarded as unduly scrupulous, because neither the select committee nor Senator Wheeldon had said anything about the unauthorised publication, and, so far as is known, the select committee had not considered the matter. Thus Senator Branson, who was also a member of the select committee, served on the Privileges Committee, stating that he did not think that it was necessary for him to withdraw from the inquiry unless something arose to alter that decision. (Report of the Committee of Privileges, 13/5/71, Parlt. Paper 163/171, p. 4.)

There is also the precedent of the Select Committee on Allegations Concerning a Judge, to which I referred in my letter of 18 January 1989.

The only conclusions which may be drawn from the precedents, therefore, are that questions concerning the service of members on a committee where they may be regarded as not entirely impartial should be decided by the individual members concerned, and that there is no general rule or convention which may be applied to all cases.

As I have suggested, members in making their decisions may well be influenced by the particular circumstances, which greatly differ from case to case.

ADVICE NO. 3

SUBMISSION ON BEHALF OF MR CHARLES PERKINS

(Advice dated 6 March 1989 from the Clerk of the Senate, Mr Harry Evans, to the Chair of the Committee of Privileges, Senator Giles)

Thank you for your letter of 2 March 1989 requesting my comments on the submission to the Committee on behalf of Mr Charles Perkins by Mr R.J. Ellicott, Q.C. and Professor J.E. Richardson.

There is a number of matters raised in this submission on which I think I can usefully comment.

The submission appears to be based upon a number of misconceptions about the nature of parliamentary privilege and the Parliamentary Privileges Act 1987.

There are two tributary misconceptions which may be briefly considered before the substantive issue which underpins the major part of the submission is discussed.

First, the submission contains the common fallacy that for there to be a "breach of privilege" there must be some identifiable privilege which is breached. Paragraph 9 complains that the Committee's letter "did not explain which specific privileges of the House were involved", while paragraph 47 assumes that "there is such a privilege" involving "conduct which is calculated to deter prospective witnesses", and paragraph 11 refers to "some other privilege" which is assumed to be relevant to matters raised by the Committee. The misconception here is that there is a privilege for each possible breach of privilege. This erroneous notion, which has bedevilled discussion of parliamentary privilege for years, is dealt with at pp xii and 89 to 91 of the Report of the Select Committee of the House of Commons on Parliamentary Privilege, HC 34, 1967, and at pp 4-7 of the submission by the Department of the Senate to the Joint Select Committee on Parliamentary Privilege, 1982.

There is a small number of definite privileges, or legal immunities, adhering to the Houses of the Parliament, their committees and members, under section 49 of the constitution and the Parliamentary Privileges Act, and there is the power to punish contempts which also adheres to the Houses under that section and is recognized in the Act. The power is essentially a discretionary power to punish any act as a contempt: Erskine May's Parliamentary Practice, 20th ed, 1983, p. 143. It has been statutorily circumscribed by section 4 of the Act, which declares the essential element of contempts in terms of improper interference with the Houses, but that section merely states what has always been taken to be the basis of the power to punish contempts. The power of the Houses to treat matters as contempts is not linked to any particular privilege or immunity. Some contempts may be referred to as "breaches of privilege" because conceptually they may be regarded as violations of a particular immunity, and that is the source of the misconception.

Secondly, the submission assumes that subsection 12(2) of the Parliamentary Privileges Act contains the "privilege" which is in issue. This is referred to in paragraphs 10, 11 and 47. This also is a misconception.

Subsection 12(2) of the Act provides that certain conduct in relation to parliamentary witnesses constitutes a criminal offence which may be prosecuted through the courts, as distinct from a contempt of Parliament which may be dealt with by the House concerned. The existence of that criminal offence does not prevent the same conduct or similar conduct being dealt with as a contempt. Section 5 and subsection 12(3) of the Act make that abundantly clear. The analogy in the ordinary law is the overlap between the criminal offence of attempting to pervert the course of justice and contempt of court. Paragraphs (10) and (11) of resolution 6 of the Privilege Resolutions passed by the Senate on 25 February 1988 do not exhaust this category of contempts, as the first sentence of the resolution explicitly states. The apparent assumption in the submission that if conduct does not fall within section 12 of the Act it is not an offence is erroneous.

I now turn to the fundamental misconception which underlies the major theme of the submission. The essence of the submission is that an act which is lawful and proper cannot be a contempt. Thus at paragraphs 18 and 19 it is stated that a statutory authority is entitled to discipline its members and staff and that it follows that such disciplinary action cannot constitute a contempt within the meaning of section 4 of the Parliamentary Privileges Act. At paragraphs 34 and 35 a similar reasoning is adopted. At paragraph 78. it is stated that such disciplinary action would be lawful and proper. At paragraph 90 it is stated that it would be proper for the Aboriginal Development Commission to censure its chairman. It is to be noted that the questions of legality and propriety are gradually amalgamated in these paragraphs, a point to which I will return.

Contrary to the submission, it is the very nature of contempt of Parliament, and, indeed, of contempt of court, that an act which is otherwise lawful and proper may be a contempt.

In relation to contempt of Parliament, even the bringing of legal proceedings, which is not only lawful but the right of every citizen, has been treated as a contempt where it constituted interference with witnesses: Erskine May, pp. 164, 166. Legal proceedings unconnected with proceedings in Parliament but commenced or pursued in retaliation for parliamentary proceedings would be regarded as involving a contempt: see reports of the House of Commons Committee of Privileges, HC 246, 1974; HC 233, 1981-82.

In relation to contempt of court (or attempting to pervert the course of justice), "the exercise of a legal right or the threat of exercising it does not excuse interfering with the administration of justice by deterring a witness from giving the evidence which he wishes to give" (R v Kellett (1976) 1 QB 372 at 391).

In establishing whether a contempt has been committed, the matters to be examined are the tendency, effect and intention of the act in question, not the lawfulness of the act or whether there is otherwise a legal right to perform the act. The question of whether the Aboriginal Development Commission had the right or duty to discipline or censure its members or staff is therefore irrelevant.

The. submission appears to misinterpret the significance of the word "improper" in section 4 of the Parliamentary Privileges Act. The section provides that, to constitute an offence, conduct must amount to improper interference. It cannot be assumed, as the submission appears to assume, that "improper" there means "unlawful" or "improper in some other context". An act which may be otherwise perfectly lawful and proper may nevertheless be a contempt. It may be lawful and proper for an employer to dismiss an employee, or for a landlord to evict a tenant, or for a statutory body to discipline its members and staff, but if any of those acts is done for the purpose of punishing a witness because of the witness' evidence it thereby constitutes a contempt of Parliament, or, for that matter, a contempt of court. (See Lane v Registrar of Supreme Court of NSW, (1981) 55 ALJR 529 at 534. For dismissal of an employee, see report of the House of Commons Committee of Privileges, HC 274, 1975-76.)

The word "improper" in section 4 of the Act is to distinguish acts which may be regarded as interference but which may be regarded as proper because of their intention and effect; for example, *urging* (but not threatening) a witness to correct evidence which is false (cf R v Kellett, (1976) 1 QB 372 at 386-8).

There are other matters raised by the submission to which I should briefly refer. Paragraph 48 of the submission is as follows:

> 48. It is submitted that, as a matter of law, a mere resolution cannot itself constitute a breach of any privilege of the Senate or a Senate Committee. A breach of privilege cannot occur in the abstract. Our perusal of May and Odgers has not revealed any proceedings for breach of privilege except in relation to identified persons. In the absence of any evidence of the application of the resolution to an identified person, or that any particular person has been deterred as a result of the resolution from giving .evidence, it is submitted that no breach of privilege can exist. At most the resolution is a mere statement of intention on the part of the Commission which has no operative effect and upon which the Commission has not acted.

With the very greatest respect to the very learned authors of the submission, I must say that every statement in this paragraph is demonstrably wrong.

First, it is clear that a "mere" resolution can constitute a contempt of Parliament, and, for that matter, a contempt of court and many other offences. "Although thoughts are free, the uttering of them is another matter. Speaking or writing is an act [as is passing a resolution] ... almost any crime can be committed by mere words" (Glanville Williams, Criminal Law: The General Part, 2nd ed, 1961, p. 2). The obvious and relevant example of the mere uttering of words being a contempt is a threatening or intimidatory statement made in relation to witnesses.

Secondly, the fact that the authorities do not reveal any precedent of an act being treated as a contempt does not prevent that act being so treated: Erskine May, p. 143. In any event, there are relevant precedents: threats to unnamed members of Parliament would be held to

be a contempt (reports of the Committee of Privileges of the House of Commons, HC 581, 1970-71; HC 50, 1971-72; HC 634, 1974-75; HC 564, 1983-4), and it is suggested that the same principle applies to witnesses.

Thirdly, it is obvious, apart from any precedents, that an act may be a contempt without application to any particular person. A person who utters a threat against anybody who may appear as a witness in a particular matter clearly is guilty of a serious contempt of Parliament in the case of a parliamentary inquiry and a serious contempt of court in the case of legal proceedings, notwithstanding that the threat is not made against any particular person.

Fourthly, it is not necessary that any particular person has been actually influenced in order to establish a contempt. The tendency or likelihood of the act to produce a result is important: Erskine May, p. 143; this is also made clear by the language of section 4 of the Parliamentary Privileges Act, which refers to an act which "amounts, or is intended or likely to amount, to an improper interference" with a House, committee or member. As for contempt of court, "possibility, not probability, (and not actual effect) was the foundation of the principle that nothing should be said or done to interfere with the administration of justice" (Wellby v Still, (1892) 8 TLR 202 at col. 2).

Fifthly, a "mere statement of intention" can of course be a contempt regardless of whether it is acted upon. The general threat to witnesses, already cited as an example, or, indeed, any threat to witnesses, would be a contempt regardless of whether it were ever carried out.

At paragraphs 47, 51, 52, 82, 83 and 92 the submission makes assertions concerning the intention of actions of the Aboriginal Development Commission. The question of the intention with which those actions were taken is a question of fact and not a question of law. The foregoing has suggested that the intention with which an act is done is often crucial in determining whether an act constitutes a contempt, and some contempts, by their nature, require a certain intention as an essential element. An assertion that an act was done with a certain intention, however, is not conclusive.

Because the question of intention is likely to be of importance in the Committee's consideration of the matters before it, it may be helpful if I make the following observations.

For a contempt of Parliament to be established, it is not necessarily required to prove a culpable intention on the part of a person who has performed a particular act; as has already been noted, the effect or tendency of the act may be sufficient to constitute the offence. The same consideration applies to contempt of court, or at least contempt of court constituted by a publication (R v Odhams Press Limited and others ex parte Attorney-General (1957) 1 QB 73 at 80; Lane v Registrar of Supreme Court of NSW (1981) 55 ALJR 529 at 534; Registrar of Supreme Court v McPherson and others (1980) 1 NSWLR 688 at 696).

The Parliamentary Privileges Act 1987 and the privilege resolutions passed by the Senate on 25 February 1988 leave open the question of whether a particular intention needs to be established to prove a contempt. Section 4 of the Act, defining the essential element of contempts, refers to an act "likely to amount" to improper interference. Resolution 6 of the resolutions, specifying matters which may be treated as contempts, indicates that a culpable intention is an element of some of the contempts specified, in paragraphs (5), (7) and 12(c) for example, while others may be read as strict liability offences, as in paragraphs (9) and (16). Resolution 3, whereby the Senate declares the matters which will be taken into account in determining whether a contempt has been committed, refers in paragraph (c)(i) to the state of mind of the person who committed an act. The resolutions are not framed so as to be binding. Theoretically, therefore, it is open to the Committee and the Senate to treat particular contempts or even all contempts as strict liability offences, or to decide that different states of mind and intentions are elements of different contempts.

If the Committee, in considering the matters currently before it, comes to the conclusion that a certain intention is necessary to constitute a certain type of contempt, I think it would be helpful in dealing with future cases if the Committee were to indicate that belief and make any observations which it thinks appropriate concerning the place of intention in contempts, for the guidance of the Senate and future committees.

Nothing I have said here makes any judgement of the facts of the matters before the Committee, but goes only to issues of principle.

Please let me know if the Committee requires any elaboration of these matters or any further assistance.

ADVICE NO. 4

SUBMISSION BY SECRETARY, DEPARTMENT OF COMMUNITY SERVICES AND HEALTH

(Advice dated 29 January 1990 from the Clerk of the Senate, Harry Evans, to the Chair of the Committee of Privileges, Senator Giles)

Thank you for your letter of 16 January 1990 requesting comments on matters raised in the submission to the Committee dated 20 December 1989 by Mr Stuart Hamilton, the Secretary of the Department of Community Services and Health.

I think that I can clarify the matters raised by Mr Hamilton.

He refers to two questions: the relationship between the references to committee documents in the Senate's Privilege Resolution 6, section 13 of the Parliamentary Privileges Act 1987, Senate standing order 308, and the notes sent by committees to witnesses; and the effect of those prescriptions on the practice of circulating submissions to interested parties.

First, there is the relationship between the various provisions.

Resolution 6 of the Senate's Privilege Resolutions is, as the preamble to the resolution indicates, a declaration by the Senate, for general guidance, of acts that may be treated by the Senate as contempts. As the preamble also makes clear, the resolution does not exhaust the categories of acts that may be treated as contempts, nor is it intended to be a definitive statement of particular acts which may constitute contempts. Paragraph (16) of the resolution indicates that the Senate may treat as a contempt the unauthorised disclosure of documents falling into any of three categories:

(a) documents prepared for submission and submitted to a committee where the Senate or the committee has directed that the document be treated as evidence taken in private session or as a document confidential to the committee;
(b) any report of oral evidence taken by a committee in private session; and
(c) any report of proceedings of a committee in private session.

Section 13 of the Parliamentary Privileges Act 1987 creates a criminal offence, which may be prosecuted in the courts, of the unauthorised disclosure of committee evidence and documents. This statutory provision provides a remedy, of prosecution and conviction in the courts, which is in addition to the remedy provided by the power of the Senate to treat matters as contempts. In other words, a person who makes an unauthorised disclosure of a protected committee document may be dealt with by the Senate for a contempt, and may also be prosecuted for the criminal offence if the disclosure falls within the statutory provision. The statutory provision, however, is narrower in scope than the Senate's power to deal with contempts, and is also narrower than the declaration contained in Resolution 6. The statutory provision applies only to documents falling into the following categories:

(a) documents prepared for submission and submitted to a committee and directed by the Senate or a committee to be treated as evidence taken in camera; and
(b) any report oforal evidence taken by a committee in camera.

This narrower scope of the statutory provision is quite deliberate. The rationale of the provision is to provide an additional remedy, for the protection of witnesses, against the unauthorised disclosure of in camera evidence and submissions, and it is not intended to cover the whole area of unauthorised disclosure of confidential committee documents.

Senate standing order 308 (new standing order 37) refers to evidence taken by a committee and documents presented to a committee. The standing order is a direction by the Senate that evidence taken by, and documents submitted to, a committee are not to be disclosed without authorisation. As with the statute, the standing order does not cover the whole area of unauthorised disclosures which may be treated as contempts; it is a direction particularly relating to committee procedures, as its location among the standing orders governing the procedures of committees indicates.

The relevant paragraph in the "Notes to Assist in the Preparation of Submissions" issued by the Senate Committee Secretariat is, in effect, a shorthand statement of the requirements imposed by all three prescriptions, the Senate's Privilege Resolution, the statutory provision and the standing order. As such, it appears to me to be accurate.

All of the prescriptions which attempt to give expression to the prohibition on unauthorised disclosure of committee documents must be understood to be subject to the following proviso. If a document submitted to a committee has been prepared for some other purpose and is published for that purpose, the unauthorised disclosure of it would, in most circumstances, not constitute a contempt, and could not constitute a criminal offence. Examples of such documents are articles published in journals, and papers prepared for circulation to some group of persons and so circulated, such as a paper of a learned society. The Senate's resolution and the statutory provisions attempt to give expression to this proviso by the use of the words "prepared for the purpose of submission, and submitted", but particular instances and particular documents may raise matters for interpretation in that regard.

It is important to note that the Privilege Resolution and the statutory provision turn on the Senate or a committee having made a direction that a particular document be treated as evidence taken in camera or as a document confidential to a committee. This form of words is used in both prescriptions because it is thought that for a disclosure to be treated as a contempt or as a criminal offence there should be a particular order by the Senate or a committee which is violated. In considering disclosures which may be treated as contempts, the Privileges Committee and the Senate may well have regard to implied orders or directions of the Senate or committees, but for the statutory criminal offence proof of a specific order would probably be required. In the absence of an order by a committee applying to documents submitted to it, the Senate's standing order applies. Committees should be aware, however, that to make the status of documents clear they should have on foot some order applying to the documents which they desire to remain confidential and the unauthorised disclosure of which they may wish to treat as an offence. This matter has been drawn to the attention of all Senate committee staff.

Secondly, there is the matter of the circulation of submissions.

I can only say that, in my view, the circulation of submissions as referred to particularly in the second and third paragraphs of Mr Hamilton's letter is contrary to the prescriptions of the Senate relating to unauthorised disclosure of committee documents, and that that kind of circulation of submissions to other interested bodies should not be undertaken without the authorisation of the committee concerned.

I think that it is a different matter where a submission by a department or government agency is circulated to officers of the department or agency, or a submission intended to express the views of the government is circulated to various government departments and agencies. Such circulation, it seems to me, amounts to circulation among the persons who are collectively the authors of the submission, and does not constitute an unauthorised disclosure. The same consideration applies to submissions made on behalf of societies or associations and circulated to their members.

The circulation of submissions to other parties simply on the basis that they have an interest in the subject matter, however, appears to me to fall within the Senate's prohibitions.

No doubt the problem may be solved by the authors of submissions seeking and obtaining the permission of the committees concerned for the circulation of submissions, and by committees authorising the publication of submissions where appropriate. Committees could give general authorities for persons making submissions to circulate them to other interested parties. I think that it is important, however, that committees retain control of the publication of submissions made to them, as the rules of the Senate require.

The main reason for this is that, as Mr Hamilton points out in the last paragraph of his letter, only publication by order of a committee confers absolute privilege on the publication of a submission.

I hope that these observations are of use to the Committee. I would be pleased to provide any elaboration, elucidation or additional information required by the Committee.

ADVICE NO. 5

STANDARD OF PROOF

(Advice dated 29 January 1990 from the Clerk of the Senate, Harry Evans, to the Chair of the Committee of Privileges, Senator Giles)

Thank you for your letter of 16 January 1990 seeking comments on the question of the standard of proof which should be adopted by the Committee in making findings on allegations of contempt.

I hope that the following observations may be of use to the Committee.

There is certainly no law or rule of the Senate which requires the Committee to adopt any particular standard of proof in making its findings. The standard of proof is a matter for the Committee to determine in the first instance.

It would appear that the options available to the Committee in relation to the standard of proof are as follows:

(a) to adopt the criminal standard of proof, proof beyond reasonable doubt;
(b) to adopt the civil standard of proof, proof on the balance of probabilities;
(c) to adopt some other standard formulated elsewhere or formulated by the Committee for the purpose;
(d) to vary the standard of proof in accordance with the gravity of the matter before the Committee and the facts to be found; or
(e) not to adhere to any stated standard of proof or to formulate a standard of proof, but simply to find facts proved or not proved according to the weight of the evidence.

The Committee should not, in my view, regard itself as obliged to choose between the criminal standard and the civil standard. I express this view particularly having regard to the history of the law of standards of proof in the courts, to which I will refer briefly.

If the Committee were to make a choice between the criminal and the civil standards of proof, or between some very strict standard like the criminal standard and some less strict standard like the civil standard, there are arguments which may be made on either side.

The contention most often made is that contempt proceedings may result in the infliction of penalties on persons found to have committed contempts, and therefore the criminal standard of proof should be required. According to this view, contempt proceedings are really criminal proceedings before a special tribunal.

The counter-argument is that the purpose of contempt proceedings is to protect the integrity of the processes of the Houses of the Parliament and their committees, and only secondarily to punish the perpetrators of contempts. The rationale of the power to deal with contempts, as is indicated by section 4 of the Parliamentary Privileges Act 1987, is to prevent improper obstruction of the Houses and their committees. Where the purpose of a penalty for contempt is

coercive, to prevent the continuance of an obstruction, this argument is all the more cogent. In effect, this view holds that it is unnecessarily restrictive that a House should have to have proof beyond reasonable doubt before it acts to protect the integrity of its processes.

That both of these views have some validity is demonstrated by the similar debate which has taken place in relation to contempt of court. The courts have exhibited a good deal of uncertainty as to whether the criminal standard or the civil standard of proof should apply in relation to contempt of court, and the matter appears not to be settled. The distinction between civil and criminal contempts has not necessarily elucidated the matter. A similar degree of uncertainty existed for some time in relation to whether proof of a criminal offence in civil proceedings is required to be beyond reasonable doubt.

The formulation of the two standards of proof and the exposition of them in the courts have largely been for the benefit of juries. In expounding the law, judges have been greatly influenced by a presumed tendency of juries to make findings based on "fanciful possibilities", and the need to clearly direct juries to have regard to the evidence and to make findings on the basis of the weight of the evidence.

Notwithstanding that the law seeks to clarify matters for juries, there have been great difficulties in the courts in the exposition of the standards of proof. Attempts by judges to explain what is meant by proof beyond reasonable doubt and proof on the balance of probabilities, and the difference between them, have often miscarried and led to successful appeals. The courts have been very uncertain about what juries should be told; failure to expound the standard of proof has led to the upholding of appeals; but it has also been held that a judge may omit any direction as to the standard of proof.

Although the High Court has stated that the difference between the criminal and the civil standards of proof "is no mere matter of words: it is a matter of critical substance", because of the confusion surrounding the matter some judges have sought to repudiate the whole basis of the two standards. A British law lord confessed that he had some difficulty in understanding how there could be two different standards, and a superior court judge said that he had never seen the difference between the two standards. The former, in a famous case, tried to ban the phrase "beyond reasonable doubt" from judicial usage. Another law lord suggested that there were various degrees of proof within the two standards, and a formulation of a standard varying in different situations was judicially suggested. Judges have sought to cut the Gordian Knot by referring to juries being "satisfied" as to the facts and feeling certain or sure as to their findings.

This history, I think, should caution the Committee against too readily accepting that it has to choose a particular judicially-expounded standard of proof.

The Committee of Privileges is not a jury. The greatest difference between the Committee and a jury is that the Committee explains its assessment of its evidence and gives its reasons for its findings. If the Committee states, in a report to the Senate, that facts have been proved or that it has come to conclusions on the basis of the evidence, such a report is no less likely to be accepted than one to the effect that the Committee has found matters proved beyond reasonable doubt. If the evidence provides grounds for the findings to be disputed, the disputation will not

be lessened by a statement by the Committee that it has treated itself as a jury and adopted the standard of absence of reasonable doubt.

In my view, the best course is probably for the Committee to adopt a combination of options (d) and (e); that is, to present the evidence, to explain its assessment of the evidence and to express its conclusions, without explicitly adhering to a particular standard of proof, while requiring more cogent evidence in proportion to the gravity of the matter in issue.

At first sight the suggestion of a variable standard of proof may seem bizarre, but, as I have already indicated, the courts have occasionally not thought it so, and practical examples illustrate that it is a supportable view. If the question before the Committee is whether a person has done an act which is technically a contempt but which caused no serious obstruction to the operations of the Senate or a committee, the Committee may well be more easily satisfied as to the facts than if it is considering an allegation of a very serious interference with the Senate or a committee.

I did not think it appropriate to cite the judgments to which I have referred, but this can be done if the Committee so requires.

I would also be pleased to provide any elaboration the Committee requires.

ADVICE NO. 6

REIMBURSEMENT OF LEGAL COSTS

(Advice dated 31 July 1989 from the Clerk of the Senate, Harry Evans, to the Chair of the Privileges Committee, Senator Giles)

Thank you for your letter of 21 July 1989 requesting advice on the reimbursement of the costs of representation of witnesses before the Privileges Committee.

I am not certain that I can offer anything worthy of the name of advice, but the following observations may be of some use to the Committee.

Paragraph (11) of the resolution of the Senate relating to the Privileges Committee does not provide any criteria for the Committee to consider in recommending to the President the reimbursement of costs, but provides criteria to which the President is to have regard in making a decision. The two elements of the criteria are:

(a) the President must be satisfied that a person would suffer hardship due to liability to pay costs; and

(b) the President may make reimbursement only of such costs as the President considers reasonable.

Thus the President must make a judgment of two matters: the likelihood of substantial hardship and the reasonableness of costs. The President may make a reimbursement of only part of costs even where those costs are regarded as reasonable, but may also reimburse only the reasonable part of costs which have an unreasonable dimension to them.

It would be rational for the Committee to have regard to these criteria in making its recommendation to the President, and to provide to the President not only the information to allow the President to make a judgment, but also to indicate its view as to whether the criteria are met.

ADVICE NO. 7

REFERENCE CONCERNING ALLEGED HARASSMENT OF WITNESS

On 18 October 1990 the Senate referred the following matter to the Committee of Privileges:

> Having regard to the report of the Standing Committee on Environment, Recreation and the Arts presented on 17 October 1990, whether an attempt was made improperly to influence a witness in respect of the witness's evidence, or to penalise a witness in respect of the witness's evidence, and whether any contempt was committed.

The report of the Standing Committee on Environment, Recreation and the Arts referred to in the reference described what it called the harassment of a witness who had appeared before the Committee. The harassment alleged was constituted by a letter and attached documents sent by one Mr C. Turner to one Mr G. Jones, the latter having given evidence to the Committee. One of the attached documents referred to that evidence.

The matter which is the subject of this reference is not the usual sort of alleged interference with witnesses; indeed, it is most unusual, and raises some significant issues of principle. This note is concerned with those issues of principle, and not with finding the facts of the case, which are for the Committee of Privileges to find.

The case

If the facts are as interpreted by the report of the Standing Committee, Mr Turner sent to Mr Jones a letter containing an implied threat that if Mr Jones did not withdraw from a contest for an office in the Australian Drug Free Powerlifting Federation, Mr Turner would publish, apparently to members of that organisation, certain documents containing certain allegations against Mr Jones. One of those documents contains the allegation that Mr Jones gave false evidence to the Standing Committee. The essence of the case, therefore, if the facts are as alleged, is that a person has threatened another person who has given evidence before a committee with the publication of an allegation that that evidence was false, in order to influence the person who gave the evidence in relation to another matter, namely, an election to an office in an association.

Interference with witnesses

Improper interference with witnesses is one of the well known categories of contempt of Parliament, and also one of the well known categories of contempt of court. There are two principal types of improper interference with witnesses: improperly influencing a witness in respect of evidence given or to be given (including inducing a person to refrain from giving evidence), and penalising or injuring a person because of evidence given. These two forms of interference with witnesses are reflected in the Senate's resolution of 25 February 1988 which declares matters which may be treated as contempts, including interference with witnesses, in the following terms:

Interference with witnesses

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

It is clear that this terminology, while reflecting the principal types of interference with witnesses, may not necessarily cover all the possible types of such interference. This is reflected in the preamble to the Senate's resolution, which indicates that the terms of the resolution do not derogate from the Senate's power to determine that particular acts constitute contempts. The preamble also makes it clear that attempts to perform the proscribed acts may also be treated as contempts.

The category of contempts generally described as improper interference with witnesses clearly covers a wide area of conduct and catches any dealings with witnesses which may be regarded as improperly influencing them.

The British House of Commons version of the Senate resolution, passed in the year 1700, employs the terminology of "tampering with witnesses":

> That if it shall appear, that any Person hath tampered with any Witnesses, in respect of their Evidence to be given to this House, or any Committee thereof; or, directly or indirectly endeavoured to deter or hinder any Person from appearing, or giving Evidence; the same is declared to be a high Crime and Misdemeanor: And this House will proceed with the utmost Severity against such Offenders. (CJ 400)

This terminology has been interpreted as covering any sort of improper interference with witnesses, including penalising or injuring witnesses on account of their evidence. Because of a point referred to later in this note, it is interesting to see that in 1733 the House of Commons resolved that it was a contempt to "call any Person to account, or to pass a Censure upon him, for Evidence given by such Person before this House, or any Committee thereof " (CJ 146). A Select Committee on Witnesses observed that the contempt could be constituted by "any interference with a witness's freedom" (HC 84, 1934-35, p. v).

It is of some significance that the law of contempt of court followed in its development that of contempt of Parliament in relation to interference with witnesses after they have given evidence. It was not until 1963 that it was definitely decided, by a reversal of a decision of a lower tribunal, that inflicting a penalty or injury on a witness, with the purpose of punishing the witness because of the witness's evidence, is a contempt of court (*Attorney-General v Butterworth and Others*, 1963 1QB 696). In coming to its decision in that case, the court was greatly influenced by the fact that such conduct had long been treated by the Houses of Parliament as a contempt of Parliament, and the Parliament seemed to have assumed that similar conduct in relation to courts would be treated as contempt of court. In this case there was also an element of a witness being called to account and

censured because of the witness's evidence. The judgment in the case has been followed in other common law jurisdictions, including Australia.

The fact that it was only relatively recently that the courts were called upon to determine whether penalising a witness constitutes a contempt, and that the courts in this area followed the lead of the Parliament, is a reminder that the categories of contempts, including that category designated as interfering with witnesses, are not closed or exhaustively defined, and that many different kinds of conduct may fall within those categories.

It is important to note that the contempt of interference with witnesses may be constituted by conduct which is otherwise lawful, and improper interference is not the equivalent of unlawful interference. These points were discussed in the advice of the Committee of Privileges dated 6 March 1989, relating to the subject of the Committee's 18th Report.

Does the alleged conduct constitute improper interference?

The primary question of principle which arises in relation to this matter is whether the conduct alleged to have been engaged in by Mr Turner amounts to improper interference with a witness. The Standing Committee on Environment, Recreation and the Arts thought that the alleged conduct fell under the heading of penalising a witness, and quoted paragraph (11) of the Senate's resolution. It is not difficult, however, to see a flaw in that connection: the facts of the case as alleged do not disclose any purpose on the part of Mr Turner of penalising or injuring Mr Jones because of, or on account of, the latter's evidence. The purpose was apparently to influence Mr Jones in relation to a matter, the election in the association, not connected with the giving of evidence or the evidence given by Mr Jones. It is to be noted that the Standing Committee's report refers to "harassment" of a witness, and the use of this terminology suggests that the Committee may have thought that there was some difficulty in regarding the alleged conduct as penalising a witness. The reference to the Committee of Privileges refers to both elements of improper interference, and employs the terminology of both paragraphs of the Senate's resolution. It is equally as easy, however, to detect the flaw in regarding the alleged conduct as an attempt improperly to influence a witness in respect of the witness's evidence: Mr Turner's presumed purpose was not to influence Mr Jones *in respect of* Mr Jones' evidence, but to influence him in respect of the unconnected matter, namely, the association election. The apparent threat to publish a claim that Mr Jones' evidence was false may be seen as calling a witness to account for the witness's evidence, but the alleged conduct does not readily fall within that subsidiary category of improper influence. The difficulty is that Mr Jones' evidence as such was apparently not Mr Turner's target.

It is clear, therefore, that the alleged conduct which is the subject of the reference to the Committee is not similar to the usual kinds of interferences with witnesses, and is not adequately described by the various formulations of the types of improper interference, including the formulations in the Senate's resolution which are reflected in the reference to the Committee.

Precedents

Any precedents of conduct such as that alleged on the part of Mr Turner being treated as either contempt of Parliament or contempt of court would have persuasive value in considering this case. A diligent search, however, has disclosed no cases of contempt of Parliament or contempt of court

involving facts similar to the alleged facts of the case under consideration. The cases of calling a witness to account for the witness's evidence provide the closest analogy.

It therefore appears that the Committee of Privileges, assuming that the facts are found to be as alleged in the Standing Committee's report, has to consider whether the alleged conduct constitutes improper interference with a witness, having regard only to the issue of principle which underlies that category of contempt. This, in effect, is what the court did in *Attorney-General v Butterworth*, albeit with the aid of the parliamentary precedents reflecting the long-established view of Parliament. The Committee will be wary of falling into the same trap as the lower tribunal in that case, of finding that conduct does not constitute a contempt merely because it does not fall within the established formulations and precedents.

In considering the issue of principle, the Committee will no doubt have regard to section 4 of the *Parliamentary Privileges Act 1987*, which declares the essential elements of contempts, and, in effect, the rationale of treating any acts as contempts:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

The question of principle

The rationale of treating certain kinds of conduct towards witnesses as contempt is that that conduct hinders parliamentary inquiry (in relation to contempt of court, the administration of justice by the courts) by deterring witnesses, including any future witnesses, from giving evidence or from giving truthful evidence. The rationale of treating as a contempt conduct intended to penalise witnesses because of their evidence was stated by Lord Denning in *Attorney-General v Butterworth*:

> How can we expect a witness to give his evidence freely and frankly, as he ought to do, if he is liable, as soon as the case is over, to be punished for it by those who dislike the evidence he has given?..... If this sort of thing could be done in a single case with impunity, the news of it would soon get round. Witnesses in other cases would be unwilling to come forward to give evidence, or, if they did come forward, they would hesitate to speak the truth, for fear of the consequences (at 719).

It may be thought that this rationale applies with equal force to *any* attack upon a witness in relation to the witness's evidence, regardless of whether the purpose of the attack is to penalise the witness because of that evidence. In effect, the conduct alleged to have been engaged in the present case amounts to using a witness's evidence as a weapon against the witness in relation to a matter not connected with the witness's evidence. It may be thought that such conduct is likely to have the same effect, of deterring witnesses in future, as imposing a penalty on a witness because of the witness's evidence.

It may be regarded as significant that the use to which the witness's evidence was to be put was to take the form of the publication of a claim that the witness's evidence was false. In *Attorney-General v Butterworth*, Lord Denning made the assumption: "Let us accept that he [the victimised witness]

has honestly given his evidence" (at 719). Similarly, the *Witnesses (Public Inquiries) Protection Act 1892*, which resulted from the most notorious case of penalising of a parliamentary witness, protects witnesses against any penalty or injury in respect of evidence "unless such evidence was given in bad faith". The use of these expressions has given rise to a question as to whether it is a contempt to take otherwise lawful action against a witness in consequence of evidence which the witness has given knowing it to be false. This question has not been resolved. The United Kingdom Law Commission, in recommending the codification of the law relating to offences against the administration of justice, recommended an exemption for otherwise lawful conduct towards a witness in consequence of evidence where the witness knew that the evidence was false or was reckless whether it was false. The Commission recommended:

> Mere belief in its falsity by the person taking or threatening reprisals will not suffice for this exception. (Report No. 96: *Criminal Law: Offences Relating to Interference with the Course of Justice*, 1979, cmd 213, p. 66.)

This seems to contemplate that it should be a defence to a prosecution for interference with a witness to establish that the witness's evidence was false.

It may well be concluded, however, that this notion is contrary to the whole rationale of protecting witnesses from improper interference. If a witness's evidence is known to be false the duty of a person possessing that knowledge is to inform the relevant authority (the committee which took the evidence in the case of a parliamentary inquiry), and to threaten to publish that knowledge as a means of influencing the witness's behaviour in relation to another matter constitutes improper conduct towards the witness, and, in effect, improper interference with the witness. If the threat is based upon a mere assertion that evidence was false, the case for treating such conduct as improper interference may be much stronger, but it may be concluded that the nature of the conduct is not altered if it is established that the witness did in fact knowingly give false evidence. The threat may be regarded as improper regardless of whether it is based on actual knowledge of the falsity of the evidence.

In support of this contention, I return to the point that improper interference with a witness may be constituted by conduct which is otherwise lawful, and that improper interference is not equivalent to unlawful interference, the point which was made in the advice of 6 March 1989. The leading judgment establishing that principle in relation to contempt of court is *R v Kellett*, 1976 1QB 372. In that judgment a distinction was drawn which elucidates the significance of the word "improper" in the phrase "improper interference with witnesses". It was said (at 388) that it would not be a contempt (or its criminal equivalent, attempting to pervert the course of justice) for a person to try to persuade a witness to change false evidence. Threatening a witness to achieve that end, however, would be a different matter: "however proper the end the means must not be improper". It would seem to follow from this that using a witness's evidence as a means of attacking the witness, including by threatening to publish a claim that the evidence was false, may be regarded as improper interference with a witness regardless of whether the evidence actually was false.

The alleged threat if based on actual knowledge may also be regarded as an aggravation of a primary contempt of concealing the fact that false evidence has been given, and as therefore doubly hindering the conduct of parliamentary inquiries.

Having regard to these considerations, the Committee of Privileges may consider that the conduct alleged, if found to have been committed, falls within the category of improper interference with witnesses notwithstanding the absence of exact precedents.

It is emphasised again that this discussion of the issues of principle is based on an assumption as to the facts. It is for the Committee of Privileges to establish the facts. The facts include the acts done and the intention with which those acts were done. The matter of the intention with which acts are done as distinct from the tendency or effect of those acts was discussed in the advice of 6 March 1989. It is also for the Committee to determine the significance of intention in a particular case, and, having regard to all the circumstances, how particular acts should be judged.

ADVICE NO. 8

CONTEMPT OF PARLIAMENT
MATTERS REFERRED TO THE COMMITTEE ON 12 NOVEMBER 1990
SUBMISSION BY MR M. LE GRAND

Thank you for your letter of 22 February 1991 in which you seek advice on matters arising from a submission to the Committee by Mr M. Le Grand, dated 11 February 1991, and relating to the matters referred by the Senate to the Committee on 12 November 1990.

You ask that I assume that the facts are as set out in the submission, and that I comment on any possible questions of contempt which might be disclosed by the information contained in the submission. The submission contains not only statements as to matters of fact but expressions of opinion on the significance of those matters of fact, particularly on page 31 and following pages of the submission. For the purposes of this advice I have ignored those expressions of opinion and looked only at the statements of matters of fact.

The reference given by the Senate to the Committee asks the Committee to consider:

(a) whether there was improper interference with a person in respect of evidence to be given before that Committee [the Parliamentary Joint Committee on the National Crime Authority];

(b) whether false or misleading evidence was given to that Committee in respect of directions given by the National Crime Authority or its officers to a person, affecting evidence to be given before the Committee; and

(c) whether contempts were committed in relation to those matters.

The matters of fact recounted in the submission raise two questions as to possible contempts of Parliament:

(a) whether the direction given by the then chairman of the National Crime Authority to Mr Le Grand on 6 December 1989, the direction given by the Authority to Mr Le Grand on 12 December 1989 and the arrangement entered into by the Authority and Mr Le Grand on 16 December 1989 relating to any evidence to be given by him to the Joint Committee constituted improper interference with a parliamentary witness; and

(b) whether answers given by officers of the Authority to questions asked at a hearing of the Joint Committee on 16 February 1990 constituted false or misleading evidence given before a parliamentary committee.

(a) The directions given to Mr Le Grand and the arrangement

On 6 December 1989 the chairman of the National Crime Authority sent to Mr Le Grand a direction in writing including the words "you are not to make any documents available to or have any

discussions with any committee or person outside the Authority without first consulting the Authority".

On 12 December 1989 there was communicated to Mr Le Grand a direction by the Authority including the words "Mr Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of, or in the course of, the performance of his duties under the NCA Act, unless specifically authorised to do so by the Authority".

At a meeting of the Authority on 16 December 1989 an arrangement was made whereby any request to Mr Le Grand by the Joint Committee for him to appear before the Committee would be referred to the Authority, which would decide if the request were appropriate. If the Authority decided that the request were appropriate, the Authority would agree to Mr Le Grand appearing before the Committee and to necessary documents being provided to him. If the Authority thought the request inappropriate it would seek advice and, if the advice supported that view, would refuse the Committee's request and if necessary have the matter determined by a court.

The question which arises in relation to these directions and the arrangement is whether they constituted a contempt of Parliament, in that they involved improper interference with a person in respect of evidence which may have been given before the Joint Committee.

Improper interference with witnesses is one of the well known categories of contempt of Parliament. It is referred to in the resolution of the Senate of 25 February 1988, relating to matters constituting contempts, in the following terms:

> A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

As the preamble to that resolution indicates, the terms of the resolution do not prevent the Senate from treating as a contempt similar conduct which does not fall within the terms of the resolution, in that the resolution does not derogate from the power of the Senate to determine that particular acts constitute contempts.

The contempt of improper interference with a witness may be constituted by "any interference with a witness's freedom" (Report of the Select Committee of the House of Commons on Witnesses, HC 84 1934-5, p. v).

Conduct falling within this category of contempts clearly meets the criterion specified in section 4 of the *Parliamentary Privileges Act 1987*, which prescribes the essential element of contempts:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

A preliminary question which arises in relation to the directions given to Mr Le Grand is whether they were intended to apply to any giving of evidence by him to the Joint Committee. The direction by the then chairman of the Authority forbade Mr Le Grand having any discussions "with any committee" without first consulting the Authority. Mr Le Grand's memorandum to the chairman of 1 December 1989, his discussion with the chairman on 12 December 1989, and the advice by Mr David Smith of 15 December 1989 all referred to the application of the directions to the giving of evidence before the Joint Committee. Neither the chairman of the Authority nor the Authority made any disclaimer to the effect that the instructions were not intended to apply to the giving of evidence before the Joint Committee. The arrangement of 16 December 1989 explicitly referred to the giving of evidence before the Joint Committee. It may therefore be concluded that both instructions and the arrangement were made with the intention that they apply to the giving of evidence before the Joint Committee.

The question which arises, then, is whether the directions and the arrangement constituted an improper interference with a parliamentary witness.

The Authority may have thought that the directions and the arrangement were lawful, notwithstanding the advice of Mr David Smith: this conclusion may be drawn from the discussion summarised at page 26 of the submission. The fact that the Authority thought that its actions were lawful, however, does not settle the question of whether the actions constituted improper interference with a witness. Even if it were concluded that the actions of the Authority were otherwise lawful, those actions in their application to the giving of evidence before the Joint Committee could be held to constitute improper interference with a witness.

Improper interference with witnesses is not equivalent to unlawful interference with witnesses. An interference with a witness may be improper and therefore a contempt even where the conduct constituting the interference is otherwise lawful. Thus the bringing of legal proceedings, which is not only lawful but the right of every citizen, has been treated as a contempt of Parliament where it constituted interference with witnesses (Erskine May's *Parliamentary Practice*, 21st ed., 1989, p. 132). The taking of legal proceedings against members or witnesses because of their contributions to proceedings in Parliament is capable of constituting a contempt (Reports of the House of Commons Committee of Privileges, HC 246 1974, HC 233 1981-2). As with contempt of court, "the exercise of a legal right or the threat of exercising it does not excuse interfering with the administration of justice [or the conduct of parliamentary inquiries] by deterring a witness from giving the evidence which he wishes to give" (*R v Kellett* (1976) 1 QB 372 at 391). This point is referred to in more detail in the advice dated 6 March 1989 to the Committee of Privileges, which was published in the 18th Report of the Committee in June 1989.

The significance of the word "improper" in the expression "improper interference with a witness" was also discussed in the advice of 6 March 1989 and in the advice to the Committee dated 13 November 1990 relating to the matter referred by the Senate to the Committee on 18 October 1990. The use of that word (and it has the same significance in section 4 of the Parliamentary Privileges Act) is intended to exclude actions which might be regarded as interference but which by their nature assist rather than hinder a parliamentary inquiry, for example, attempting to persuade (but not by threats or other improper means) a witness to change false evidence. In relation to contempt of court, this principle was discussed in *R. v Kellett* (1976) 1 QB 372 at 388.

As the advice of 13 November 1990 also indicated, the contempt of improper interference with witnesses covers a wide area of conduct and catches any dealings with witnesses which may be regarded as limiting their freedom to give evidence, deterring them from giving evidence, or improperly influencing them in relation to their evidence.

The question, therefore, may be posed in the following form: Did the directions to Mr Le Grand and the arrangement made with him by the Authority leave him completely free to give evidence before the Joint Committee, or did they limit that freedom, and did they have a tendency to influence him, by deterring him from giving evidence or otherwise?

It could be concluded that the directions given to Mr Le Grand constituted an improper interference with a witness, and therefore a contempt of Parliament, because the directions were intended or likely to have the effect of deterring Mr Le Grand from giving evidence before the Joint Committee, and were an "interference with a witness's freedom" to give evidence.

At pages 37 and 38 of the submission Mr Le Grand discusses the question of whether the arrangement between the Authority and him was in substitution for, or in addition to, the directions already given to him. He makes the point that the directions were not withdrawn. This question may be regarded as not particularly relevant to the Privileges Committee's inquiry, because the reference from the Senate would appear to require the Committee to determine whether there was any improper interference in the past. Moreover, the terms of the arrangement may be regarded as not significantly different from the directions, in that Mr Le Grand was still required to seek the approval of the Authority before giving any evidence before the Joint Committee.

The submission by Mr Le Grand stresses that he submitted to the arrangement with the Authority only under threat of legal action which he regarded as potentially very damaging to him: see pages 26 and 27 of the submission. This threat may also be regarded as not particularly relevant to the question of whether his freedom as a witness was restricted, but it does reinforce the view that the whole purpose of the arrangement was to restrict his freedom as a witness.

A consideration of this matter is assisted by the very relevant precedent established by the Committee in its 18th Report of June 1989. The case which was the subject of that report involved a direction by the Aboriginal Development Commission to the effect that no public statements were to be made by members of the Commission without the prior approval of the Board of Commissioners, and a direction to the effect that documents were not to be submitted to any parliamentary committee without prior approval of the Commission.

In relation to the first-mentioned direction, the Committee concluded that it was not made with any intention of interfering with witnesses proposing to give evidence to a Senate committee. In relation to the second-mentioned direction, the Committee observed that the resolution of the Commission "in the context of contempt of Parliament, would clearly represent an interference with a witness". The Committee found, however, on a consideration of all the circumstances of the case, that the Commission did not intend that the direction interfere with a witness, that an explanation and apology tendered by the Commission should be accepted, and that no contempt had been committed. Thus the Committee's finding rested largely upon an assessment of the intention with which the act concerned was done, and that assessment was based on the particular facts of the case.

This report may be regarded as confirming the principle that to require a witness to seek the permission of some other person or body before giving evidence is an interference with the witness.

The absence of a particular intention does not prevent a finding that a contempt has been committed. This matter is also referred to in the advice of 6 March 1989 to the Committee. The intention with which an act was done may be of less importance in determining whether a contempt was committed than the nature of the act itself. Thus in its 21st Report, presented in December 1989, the Committee found that a contempt had been committed by the adverse treatment of a person, because that treatment was partially in consequence of the person's having given evidence to a Senate committee.

(b) The answers to questions asked in proceedings of the Joint Committee

At the hearing of the Joint Committee on 16 February 1990, Senator Hill asked officers of the Authority whether Mr Le Grand had "ever been directed not to give evidence to this Committee or in any way been restricted on the evidence that he should give to this Committee", and received an unambiguous answer in the negative. He further asked whether that was "the view of the Authority as a whole", and received an affirmative answer.

The question which arises in relation to these answers is whether they constituted false or misleading evidence and whether the giving of the answers therefore amounted to a contempt.

The giving of false or misleading evidence to a House of the Parliament or a committee is also one of the well known categories of contempt, and is referred to in the resolution of the Senate of 25 February 1988 in the following terms:

> A witness before the Senate or a committee shall not:
>
> (a) .....
>
> (b) .....
>
> (c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

Such conduct also falls within the test applied by section 4 of the Parliamentary Privileges Act.

It is to be noted that the offence extends to the giving of misleading evidence as well as the giving of false evidence. Misleading evidence is evidence intended or likely to give a false impression of the facts. The inclusion of the word "misleading" in the Senate's resolution was not strictly necessary, as the contempt of giving false evidence has long been regarded as extending to any misleading of a house or a committee. For the contempts of "wilfully suppressing the truth" and misleading a committee, the British House of Commons has imprisoned witnesses and expelled a member. The findings of the House in the latter case, in 1947, made it clear that misleading a committee is the equivalent of giving false evidence (HCJ 1828 122, 1947 22).

It may be concluded that the answers given to the questions were misleading in failing to refer to the directions given to Mr Le Grand and the arrangement relating to any evidence to be given by him. Those directions and arrangement could well be regarded as falling within the phrase contained in the question, "in any way.... restricted on the evidence that he should give to this Committee".

Even if the directions and the arrangement are regarded as not falling within the terms of the question, however, it may be argued that the failure to mention the directions to Mr Le Grand and the arrangement gave a misleading impression of the situation in relation to him, and left that misleading impression in the minds of the Joint Committee. It may be contended that a fully truthful answer would have indicated that directions had been given and the arrangement made, but were not regarded by the officers concerned as falling within the terms of the question. Such an answer would have allowed the Joint Committee to inquire further as to the nature of the directions and the arrangement.

Regardless of this contention, any claim that the answers to the questions were technically truthful in the terms of the questions may well be seen as disingenuous. It has been noted that an instruction to a witness not to give evidence without the approval of another person or body is an "interference with a witness's freedom", or, in the terms of the question, a "restriction" on the witness. It would be surprising if officers of the National Crime Authority had any different interpretation of the matter, and therefore also surprising if they did not know that their answers were misleading.

The facts disclosed by the submission, of course, establish that the officers who gave the evidence on 16 February 1990 were aware of the directions given to Mr Le Grand and the arrangement made on 16 December 1989.

In relation to this matter the Committee of Privileges has also established a relevant recent precedent which casts considerable light upon the contempt of giving false or misleading evidence. In its 15th Report, presented in March 1989, the Committee inquired into an allegation that false or misleading evidence had been given before a Senate committee. In this case, as the Committee noted, the answers given by the witness were technically correct, but by his failure to refer to a significant matter members of the committee were left with a false impression as to the facts. The Privileges Committee found that there was no intention on the part of the witness to mislead the committee, and an apology tendered by the witness was accepted. This case demonstrates that withholding relevant information may constitute giving misleading evidence. As with the contempt of interference with witnesses, the intention with which the act was done may or may not be vital in determining whether a contempt was committed.

Conclusion

As you requested, this discussion is based upon an assumption that the facts are as set out in Mr Le Grand's submission, and without the benefit of any other facts or circumstances which may be disclosed by further inquiry.

Whether the Committees draws the conclusions which are suggested here will depend upon its assessment of all the facts and circumstances disclosed by its inquiry.

ADVICE NO. 9

SUBMISSION - IN CAMERA EVIDENCE

Your letter of 8 March 1991 seeks advice on submissions made to the Privileges Committee which contain in camera evidence given to another committee, the other committee having not authorised this disclosure of its evidence so far as you know.

In normal circumstances a person making a submission to a committee would be enjoined not to disclose in the submission the in camera evidence of another committee without the permission of the other committee. Such a course would normally be contrary to the proscription contained in standing order 37:

> **Disclosure of evidence and documents**
>
> **37.** The evidence taken by a committee and documents presented to it which have not been reported to the Senate, shall not, unless authorised by the Senate or the committee, be disclosed to any person other than a member or officer of the committee.

In the circumstances of the Privileges Committee's current inquiry, however, I think that the proper conclusion is that the Senate, by charging the Privileges Committee with responsibility for investigating a matter directly related to the proceedings of another committee, has authorised witnesses before the Privileges Committee to disclose relevant evidence of the other committee in submissions or evidence and has authorised the Privileges Committee to have access to relevant evidence of the other committee.

In these matters, however, one should not rest upon interpretations, however correct. To maintain the proper courtesies and comity between two committees, I suggest that the Privileges Committee write to the other committee and seek the other committee's concurrence with the examination of the committee's in camera evidence by the Privileges Committee, in so far as that evidence is relevant to the Privileges Committee's inquiry. If the Privileges Committee wishes to further disclose any of the in camera evidence of the other committee, the concurrence of the other committee for that disclosure should also be sought. Any lack of concurrence on the part of the other committee which the Privileges Committee regards as impeding the inquiry could be reported to, and determined by, the Senate.

ADVICE NO. 10

LETTER FROM MR P.M. LE GRAND

I refer to your letter of 1 November 1991 requesting advice on the points made in a letter of the same date from Mr P.M. Le Grand concerning his future appearance before the Privileges Committee.

Mr Le Grand has requested that he be summoned to appear before the Committee. The bases for this request are set out in points 1 to 3 of his letter. He appears to believe that if he is summoned he will be less at risk of prosecution in respect of his giving evidence. Point 4 of his letter appears to indicate that he has received some advice to the effect that if he is summoned this will remove any risk of prosecution; this would appear to follow from the statement that indemnification from prosecution is not necessary if he is summoned. He has not disclosed this advice, and therefore it is not possible to comment upon it, but his view seems to be partly based upon the opinions which have been given by the Solicitor-General in relation to the application of the secrecy provisions of the National Crime Authority Act to inquiries by parliamentary committees; he refers to the opinions given by the Solicitor-General and by me on that subject (he does not refer to the conflicting opinions which have been given by the Attorney-General's Department on the matter of secrecy provisions).

It should be noted, however, that the opinions of the Solicitor-General and of the Attorney-General's Department fall far short of claiming that a person may be prosecuted under the secrecy provisions for giving evidence to a parliamentary committee. The Solicitor-General avoids that question altogether, while one of the opinions of the Attorney-General's Department concedes that a person "probably" cannot be prosecuted for giving evidence to a parliamentary committee. As I have suggested in other advices, that avoidance and that concession arise because the law of parliamentary privilege, so recently and unambiguously declared in section 16 of the *Parliamentary Privileges Act 1987*, makes it abundantly clear that under no circumstances can a person be prosecuted for giving such evidence. (*See* opinion of the Solicitor-General, 20 August 1990, p 5 para 5; opinion of the Attorney-General's Department, 15 April 1991, p 3 para 6; my comments on those opinions, 28 August 1990, pp 2-3, 28 May 1991, pp 2-3; also my comments of 3 June 1991, p 2, on the Attorney-General's Department opinion of 14 May 1990.)

Even if one adopts the Solicitor-General's view, therefore, one cannot conclude that Mr Le Grand is in any substantial danger of prosecution for giving evidence to the Committee. Moreover, if one were to conclude that there is some possibility of a parliamentary witness being prosecuted for giving evidence, there is no basis I know of for concluding that the summoning of the witness reduces the risk. Certainly the opinions of the Solicitor-General do not provide any such basis. The advice which Mr Le Grand has received, and which he does not disclose, may contain some argument for such a view, but I cannot see what it could possibly be. If the giving of evidence before a parliamentary committee can constitute a criminal offence, the question of whether the witness is under summons would appear to be immaterial.

If I may go beyond commenting on the points which Mr Le Grand has made, and presume to advise the Committee as to its course of action, I think that Mr Le Grand's letter does not pose any serious difficulty for the Committee. Mr Le Grand would feel safer if he were summoned to appear, and presumably is reluctant to appear without a summons. The Committee could summon him to appear

while making it clear that the Committee does not necessarily accept his reasons for that action. The fact that a witness, however mistakenly, feels safer if summoned and is reluctant to appear without a summons is, in my view, a sufficient basis for the Committee to determine that the issue of a summons is warranted in the circumstances, within the terms of Privilege Resolution No. 1, paragraph (1).

ADVICE NO. 11

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 founds 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.

ADVICE NO. 12

ALLEGED INTIMIDATION OF WITNESSES - MATTER REFERRED TO THE COMMITTEE ON 2 APRIL 1992

Thank you for your letter of 3 April 1992 requesting my comments on any possible questions of contempt arising from the report of the Standing Committee on Community Affairs on the alleged intimidation of witnesses presented to the Senate on 2 April 1992, and from the matters arising from that report and referred by the Senate to the Privileges Committee on the same day.

As with previous advices provided to the Committee, the following observations make no judgement as to the facts of the case. It is for the Committee to find those facts. It is particularly necessary that I emphasise this point because the facts as disclosed by the report of the Standing Committee are not entirely clear. The facts of the case include acts done, the effect or tendency of those acts and the intentions with which those acts were done.

The Issues

The allegation which arises from the report of the Standing Committee is that a threat was made of legal action in respect of a complaint which was contained in a letter to the Pharmacy Board of New South Wales from persons who were subsequently witnesses before the Standing Committee and at least one of whom, as part of his evidence to the Standing Committee, submitted to the Standing Committee the letter to the Pharmacy Board.

For the purposes of this analysis it is assumed, as the Standing Committee has assumed in its report, that the submission of a document to a committee is the equivalent of giving evidence to a committee, as sections 3(2) and 16 of the *Parliamentary Privileges Act 1987* and the Privilege Resolutions of the Senate clearly contemplate.

The principal issue which arises from this allegation is that witnesses who gave evidence to a committee may have been threatened with legal action, and that threat may have been made on account of their giving evidence, in any or all of the following senses:

(a) the threatened legal action had as its object the document submitted to the committee;

(b) the threat of legal action was possible only because of the submission of the document to the committee;

(c) the threat of legal action was occasioned, or partly occasioned, by the submission of the document or the giving of other evidence to the committee;

(d) the threat of legal action was made with the intention of influencing the witnesses in respect of their evidence.

A subsidiary issue which arises from the facts in so far as they are revealed by the Standing Committee's report is that threats of legal action may have been made against persons who were

technically not witnesses before the Standing Committee, in that they had not in any way provided evidence to the Standing Committee, but that those threats may have had an effect or tended to have an effect, or may have been intended to have an effect, on persons who *were* witnesses, or may have affected potential future witnesses. Depending on the facts which the Privileges Committee finds, that possibility may need to be considered. The following analysis is applicable to that circumstance, but to avoid complicating the advice I will not refer to it further.

The Relevant Contempt

The relevant contempt is that of improper interference with witnesses set out in paragraphs (10) and (11) of the Senate's Privilege Resolution no. 6:

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

The preamble of the resolution indicates that its language is not exhaustive of the categories of contempts, and that attempts to do the proscribed acts may be treated as contempts.

Relevant Principles

In earlier advices to the Privileges Committee the relevant principles, applying in respect of both contempt of Parliament and contempt of court, in relation to interference with witnesses were set out. It may be useful to summarise briefly those principles.

> **Lawfulness not relevant.** Actions which are otherwise lawful may be contempts because of their effect, tendency or intention; in particular, actions taken in respect of witnesses may constitute the contempt of improper interference with witnesses because they have the effect or tendency of penalising witnesses or deterring them from giving evidence, and if done with that intention clearly constitute contempt. The otherwise lawful act of threatening or taking legal action may constitute a contempt where it has that effect, tendency or intention.
>
> **Ability to carry out threat not relevant.** A threat of action may constitute a contempt even where the ability to carry out the threat is lacking, because the threat may have the requisite effect, tendency or intention. In particular, a threat of legal action may be a contempt even where the legal action could not succeed as a matter of law because of parliamentary or other privilege. In relation to a threat of legal action made against witnesses, even where the witnesses are legally protected against a successful action the threat may have the effect, or tend to have the effect, of penalising them because of their evidence or of deterring witnesses from giving evidence. In this connection it must be borne in mind that a threat of legal action which is not carried out and which is not capable of being carried out may put the person who is the subject of it to great trouble and expense. Indeed, a threat of legal action may be made against a person, particularly by a client with a long purse, with no intention of ever

taking the action to court but with the object of punishing that person by inflicting trouble and great legal expense upon them.

Legal action may not be directed to privileged occasion. The threat of legal action may be a contempt even where it is not formally directed to the privileged occasion, for example, the giving of evidence, but to some other occasion, when the privileged occasion is the real target of the threat. Legal action may be threatened or taken against witnesses in respect of something other than the giving of evidence to a committee, but the threat may be actually directed to the giving of evidence, and therefore constitute a contempt by penalising the witnesses or deterring them from giving evidence.

An act may be only partly in consequence of the privileged occasion. An act may constitute a contempt where it is only partly in consequence of the relevant privileged occasion. The threatening or taking of action against a witness may constitute a contempt where it is only partly in consequence of the giving of evidence by that witness.

Effect or tendency may be sufficient. It may be sufficient to constitute a contempt that an act has the requisite effect or tendency without any intention to have that effect or tendency. The threatening or taking of action against witnesses may be a contempt where it has the effect or tendency of penalising witnesses in consequence of the witnesses' evidence or of deterring witnesses from giving evidence, even where the threat or action was not made or taken with that intention.

Precedents

The precedents illustrating these principles in relation to both contempt of Parliament and contempt of court were referred to in the earlier advices. A brief reference to some of the most relevant precedents may be useful.

Lawfulness not relevant. In addition to other precedents referred to, the Privileges Committee referred to this principle in its 17th Report at paragraph 24 and its 18th Report at paragraph 35.

Legal action unable to succeed. The principle that a legal action which is unable as a matter of law to succeed may nonetheless constitute a contempt was referred to in a 1982 report of the Privileges Committee of the British House of Commons. The Committee noted that an empty threat could still be a contempt (HC 233, 1981-2).

Legal action not directed to privileged occasion. A case of legal action not formally directed to the privileged occasion was also considered by the Privileges Committee of the House of Commons in 1974. The Committee diligently inquired to discover whether a speech by a member in the House was a factor in a threat of legal action against the member (HC 246, 1974).

Action partly in consequence of privileged occasion. The Senate Committee of Privileges, in its 21st Report, dealt with a case in which action was taken against a witness partly in

consequence of the evidence given by the witness to a committee (paragraph 53 of that report particularly refers).

Effect or tendency may be sufficient. The Privileges Committee of the British House of Commons considered in 1989 a case in which action was taken against a petitioner on a private bill (such petitioners are regarded as witnesses). The action was held by the Committee to constitute a contempt because it had the effect of putting pressure on the petitioner even though those who took that action did not necessarily have that intention. The Committee found that "his [the witness's] superiors acted in such a way as might reasonably have deterred him and hence endangered Parliament's right to hear evidence from witnesses, even if that was not the intention ..." (HC 502, 1988-9).

Application of the Principles

The potential application of these principles to the matters now before the Privileges Committee may be considered in relation to the four possible ways in which the alleged threat of legal action against the witnesses may have been in consequence of their giving evidence to the Standing Committee.

(a) **The document submitted to the committee was the object of the threatened action.** This is neither a necessary nor a sufficient condition for the Committee to find that a contempt has been committed. A witness who submits to a committee a document which has previously been published elsewhere cannot be protected *as a witness* against legal action in respect of the earlier publication of the document. There must be something else to connect the threatened or actual legal action with the submission of the document to the committee. In the present case, if the threatened legal action were in respect of the provision of the letter to the Pharmacy Board, and there was no connection between the threat of legal action and the submission of the letter to the committee, the Privileges Committee could find that no contempt had been committed. The fact that the document is the object of the threatened action, however, assumes significance in conjunction with other facts.

(b) **The threat of legal action was possible only because of the submission of the document to the committee.** A contempt could be found if the connection between the threat of legal action and the submission of the document to the committee is that the threat was possible only because of that submission of the document. This may be so in the present case. It is stated in the report of the Standing Committee on Community Affairs that the letter to the Pharmacy Board had not been published by the Board. It is possible that those allegedly making the threat of legal action came to know of the letter by some other means, but it would appear that the existence of the letter was known only because of its submission to the Standing Committee and its publication by the Standing Committee. Significantly, it appears that the alleged threat was made only after the publication of the document by the Standing Committee. In these circumstances the alleged threat could be held to be a contempt on the basis that it could have the effect or tendency of penalising the witnesses because of their giving evidence or deterring witnesses from giving evidence.

(c) **The threat of legal action was occasioned or partly occasioned by the submission of the document or the giving of other evidence to the committee.** The threatening or taking of legal action which is occasioned or partly occasioned by the giving of evidence to a committee may clearly be held to be a contempt. In the present case, if the Committee of Privileges found that the alleged threat of legal action was occasioned or partly occasioned by the submission of the letter to the committee, particularly if the alleged threat would not have been made but for that submission of the letter, or by the giving of other evidence to the committee, the Committee could well find that a contempt had been committed because the effect or tendency of the threat to penalise or deter witnesses is obvious in that circumstance.

(d) **The alleged threat of legal action was made with the intention of penalising or deterring witnesses.** This would be the clearest case where a contempt could be found. A threat to witnesses made with the intention of penalising them for their evidence or deterring them from giving evidence could clearly constitute a contempt. If the Committee found that the alleged threat of legal action in respect of the letter was made with that intention the Committee could well find that a contempt had been committed. The Committee has discussed the question of intention in its recent reports.

It is emphasised again that the conclusions which the Committee reaches will depend on the facts found by the Committee, and that the facts are for the Committee to establish. The foregoing may be of some use to the Committee in relation to the facts which need to be found, in particular:

- was a threat of legal action made against witnesses
- was the threatened legal action directed at the document submitted to the committee
- was the threat of legal action made possible only by the submission of the document to the committee
- was the threat of legal action occasioned or partly occasioned by the submission of the document or the giving of other evidence to the committee
- was the threat of legal action made with the intention of penalising witnesses or of influencing witnesses in relation to the giving of evidence?

I hope that these observations may be of some help to the Committee. Please let me know if I can provide any elucidation or elaboration of them or any further assistance.

ADVICE NO. 13

Thank you for your letter of 27 May 1992 in which you seek advice on the effect of paragraph (10) of Privilege Resolution No. 2.

That paragraph provides:

> As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.

I think that the correct interpretation of this paragraph is that it requires the Privileges Committee to make its proposed findings known and afford all reasonable opportunity to make submissions to the Committee on those findings to persons who are *adversely* effected by those findings. There would be no need for the Committee to make its proposed findings available to a person who is referred to but not in an adverse way. The concept of adverse reference to a person or adverse finding, however, should be interpreted broadly, and the proposed findings should be made available to anybody who could reasonably be regarded as adversely affected by the findings.

The basis for this interpretation is the rationale of Privilege Resolution No. 2 as expounded in the explanatory notes which were presented when the resolutions were moved in the Senate. The procedures set out in Resolution No. 2, as the explanatory notes explain, were in substitution for the criminal trial model for Privileges Committee inquiries proposed by the Joint Select Committee on Parliamentary Privilege. The Joint Select Committee proposed that rights analogous to the rights of an accused person in a criminal trial be conferred upon persons "against whom the complaint has been made" in Privileges Committee inquiries, including the right to make submissions to the Committee "at the conclusion of the evidence". The explanatory notes pointed out that the criminal trial model was inappropriate in that the Privileges Committee combines the functions of an investigatory body as well as those of a tribunal to hear the evidence and make determinations. The resolution was therefore cast in terms of conferring rights upon all persons involved in an inquiry, who may or may not turn out to be "the accused". Paragraph (10) of the resolution was intended to replace the provision for the right of the "accused" to make final submissions to the Committee.

The procedures in Resolution No. 2, and the particular procedure contained in paragraph (10), therefore, are designed for the protection of persons against whom adverse findings may be made.

I do not think that the right conferred by paragraph (10) should be confined to occasions when the Committee proposes to make a finding that a contempt has been committed by a person. I think that the history outlined above supports the interpretation that paragraph (10) should be applied whenever the Committee is proposing to make a finding adverse to a person in broad sense. Thus a person whose conduct is criticised should be afforded the right contained in paragraph (10), even though a finding that a contempt has been committed is not made against that person. The rationale

of this interpretation is that an adverse finding against a person or criticism of their conduct can be just as damaging to them as a finding that a contempt has been committed.

Please let me know if I can provide any clarification of this advice or any further assistance.

ADVICE NO. 14

SUBCOMMITTEES

Thank you for your letter of 22 March 1994, in which the Committee requests advice in relation to the establishment of subcommittees to hear evidence and make findings for the Committee.

(a) Whether subcommittees could or should be set up

Undoubtedly the Senate could empower the Committee to establish subcommittees.

The normal empowering provision enables a committee to appoint subcommittees and to refer to the subcommittees any matters which the committee is empowered to consider. This provision, however, is adapted to committees which simply inquire into general matters of public interest referred to them by the Senate and make recommendations concerning those matters.

Because of the special responsibility of the Privileges Committee, of performing the Senate's judicial function, such a provision would hardly suffice. It would be necessary for any order of the Senate explicitly to empower the Committee to delegate the hearing of evidence and the making of findings to subcommittees, and to specify how the findings of subcommittees are to be conveyed to the Senate. It would also be necessary to provide for the application to subcommittees of the rules applying to the full Committee under Privilege Resolution No 2. These provisions would be necessary not only to make clear how subcommittees are to operate but to avoid challenges to the delegation of matters to subcommittees.

As to whether subcommittees *should* be established, I will turn to that question at the conclusion of this advice.

(b) What process should be followed in relation to deliberations and findings of a subcommittee?

It would be appropriate for the empowering resolution of the Senate to provide that the findings of a subcommittee should be conveyed directly to the Senate without modification by the full Committee. Without such a provision, senators who had not heard the evidence would be participating in making the findings, and this would undoubtedly lead to discontent and challenges on the part of persons and their counsel involved in inquiries, as it would be seen as violating the principle of judgment being given only by the tribunal hearing the evidence. It may be that the full Committee would be given responsibility for ensuring that subcommittees follow the processes required by the Senate, so that a person involved in an inquiry could appeal to the full Committee from a subcommittee, as it were, on a question of process, but it would be seen to be anomalous to have the full Committee reviewing the findings of a subcommittee. Just as the courts, however, have difficulty in disentangling questions of law and questions of fact, questions of process and questions of the appropriateness of findings would probably tend to become intermixed.

Provided that the Senate specified how the delegation to subcommittees should work, I think that it would be as immune from legal challenge as the delegation by the Senate to the full Committee. (It is interesting to note that the United States Supreme Court recently upheld the right of the United

States Senate to delegate to a committee the hearing of evidence and the making of findings in impeachment cases, notwithstanding that the United States Constitution says that the Senate should try cases of impeachment.) It would also be immune from internal challenge on procedural grounds.

Given that it can be done, there is the question of whether it should be done, which you ask in your letter.

The subdelegation of the hearing of evidence and the making of findings by the Committee to a subcommittee, even if explicitly authorised and governed by a Senate resolution, would probably be seen as an abridgment of due process in dealing with contempt cases. It would also add to the complexity of the procedures, and, as has been suggested, would provide further grounds for challenges to the conduct of inquiries and the making of findings. The full Committee might be drawn into regularly rehearing cases to satisfy complaints about the conduct of inquiries by subcommittees. In effect, parties to inquiries could seek regularly to exercise their right of appeal to the full Committee.

There could also be a perception of a loss of deliberative capacity on the part of the Committee. There has always been great reluctance to reduce the size of juries in criminal cases from 12 or to allow majority verdicts because it is believed that a jury of 12 has superior deliberative capacity than a lesser number. Similarly a full Committee of seven could be seen as having superior deliberative capacity to a subcommittee of three or four, and is more likely to inspire confidence than its processes and findings.

You mentioned the possibility of a subcommittee of five. Although it is open to the objection of loss of deliberative capacity, the Committee may, as I understand it has in the past, hear evidence and make findings with only five of its members participating without formally forming a subcommittee.

I feel that this advice is not of great assistance to the Committee in overcoming the problem it faces, but it is a difficult problem.

Please let me know if I can provide any further assistance.

If required I could draft an order of the Senate to empower the formation of subcommittees by the Committee.

ADVICE NO. 15

PARLIAMENTARY PRIVILEGES AMENDMENT (ENFORCEMENT OF LAWFUL ORDERS) BILL 1994

The Committee has draw to my attention the advertisement in which the Committee invites submissions on this bill, which was referred to the Committee by the Senate on 12 May 1994.

I will make some observations in relation to the bill which I hope will be of some use to the Committee.

It would be unfair and possibly misleading not to reveal to the Committee that I had some part in framing the concept and form of the bill. What I say about it may therefore be viewed in the light of that information.

Concept of the bill

The bill should be regarded as one of major constitutional significance, as it would affect the balance between the three branches of government.

In all countries which have inherited the so-called "Westminster" or cabinet system of government, there has been an enormous shift of power away from the elected legislature in favour of the ministry. The ministry has come to control the parliament, or at least the lower house, a reversal of the supposed advantage of the system whereby the legislature controlled the ministry. This power shift has gone further in Australia than any other comparable country. In Australia it can be said that the prime minister controls the lower house. This development has removed from the system a major safeguard against corruption and misgovernment, as ministers are able to legislate by decree and avoid any legislative inquiries into their activities. Upper houses not under government control are able to impose occasional restraints on imperial ministers and premiers, but are subject to vilification and attack for their pains. Some correction to this dangerous situation has occurred because the third branch of government, the judiciary, has moved to fill the safeguard vacuum, has expanded its own powers and has, through constitutional interpretation and judicial review, sought to impose constraints on the otherwise absolute powers of ministers.

The formal powers of the legislature are very great. In common with most comparable legislatures, the Australian Houses possess not only the power to legislate but the power to coerce any person in the jurisdiction (with a possible exception which will be mentioned), particularly for the purpose of compelling the giving of evidence and the production of documents in the course of parliamentary inquiries. It is now thought to be virtually politically impossible, however, for the Houses to exercise those powers to the full. In particular, notwithstanding that the coercive powers were statutorily confirmed and codified as recently as 1987, it is thought to be difficult if not impossible for the Houses to exercise those powers by the imposition of penalties. In practical terms it is only upper houses not under government control which could even attempt to exercise those powers, and in doing so they would be open to attack by ministers and premiers who see themselves as the sole legitimate repositories of power. The fact that the exercise of the powers is only ever contemplated by the political opponents of the ruling party is, strangely, seen as in some way proving the illegitimacy of such exercise, although it is perfectly in accordance with foundation constitutional

theory and earlier practice. In short, elected legislatures no longer have the authority for the exercise of those powers, although that constitutional theory would lead us to believe that an elected assembly, above all bodies, should possess that requisite authority, and certainly possessed it in the past.

The effect is that ministers are largely unrestrained in their conduct and are often able to withhold information which may allow that conduct to be judged.

In this situation, the solution which is being turned to in all comparable countries is for the legislature to enlist the aid of the judiciary in restoring the constitutional safeguards and in imposing some constraint on the otherwise absolute and arbitrary executive. In one form or another, whether as bills of rights or other constitutional safeguards or as expanded provisions for judicial review, this solution is being promoted around the world. Unelected judges are being asked to substitute their authority for the lack of authority of elected legislatures. This may well be seen as a thoroughly unhealthy development (as it was regarded by the late Professor Gordon Reid), but it is an unavoidable reality of modern states.

The bill under consideration represents another attempt to resort to that solution. It is a monument to the constitutional drift which has taken place. The implicit foundation of the bill is that, while ministers may defy elected houses of the legislature, they will not dare to disobey the orders of a judge. Recent history supports this belief, but the question of how and why this has come about may well be contemplated. One hundred years ago the courts deferred to claims of executive immunity, while the ministry would not have dared to defy the orders of an elected house of parliament. In formal terms, as one of the framers of the American Constitution pointed out, the judiciary is by far the weakest branch, but it is steadily becoming in practice the strongest, and this bill would contribute to, as well as seek to take advantage of, that development.

Other Jurisdictions

So far as is known, no comparable jurisdiction with a cabinet system of government has progressed as far as Australia in codifying the law of parliamentary privilege, much less gone down the route proposed by the bill of seeking to have the courts enforce the lawful orders of the houses of parliament, although the United Kingdom Parliament as early as 1892 legislated to provide for the criminal prosecution of the offence of tampering with parliamentary witnesses.

The explanatory memorandum accompanying the bill states it would put the Australian Houses in the same position as the Houses of the Congress of the United States, which have an inherent power to compel evidence and to punish contempts, but which have legislated to allow the courts to impose penalties for contempts and to enforce subpoenas. The US Houses do possess an inherent constitutional power to compel evidence and to punish contempts, and this power has been upheld by the Supreme Court, subject to some constitutional limitations which are not of particular relevance here (*Quinn v. United States* 1955 349 U.S. 155 at 160-1; *Groppi v. Leslie* 1972 404 U.S. 496; *Eastland v. US Servicemen's Fund* 1975 421 U.S. 491). As early as 1857, however, the Congress legislated to provide for the criminal prosecution and punishment by the courts of refusal to cooperate with congressional inquiries. There is also a 1978 statute providing for the enforcement by the courts of the subpoenas of Senate committees. These enactments do not remove the inherent power of the Houses to enforce their orders by their own coercive processes, even in relation to the

same offences, and the Supreme Court has so held (*Jurney v. MacCracken* 1935 294 U.S. 125). As a constitutional power, it could not be taken away except by amendment to the Constitution.

In so enlisting the aid of the courts to enforce their orders, the US Houses acted from a position of greater strength than the legislatures of cabinet-system countries. The Congress at least still legislates and conducts inquiries freely and fearlessly, and the reason usually given for the legislation is that it allows heavier penalties than the Houses may impose and avoids the clogging of their proceedings with contempt cases. Cabinet-system legislatures, having largely given the legislative power away to the ministry, and having largely allowed their powers to inquire to fall into disuse if not desuetude, are in a much weaker position. Conferring on the courts the power to deal with contempts could well be seen as a further step down the road to legislative impotence. My view is that, in seeking to enlist the aid of the courts, the Houses should do nothing in derogation of their existing formal powers. Even if those powers remain formal and unused, their existence at least prevents the de jure wholesale transfer of power to the judicial branch.

Judicial review under the 1987 Act

It may be that, if they were to pass the bill, the Australian Houses would be going no further, so far as judicial review is concerned, than they have already gone by enacting the *Parliamentary Privileges Act 1987*.

Section 4 of that Act provides, in effect, a definition of contempt of parliament, in essence improper interference with the Houses, their committees and members in the exercise and performance of their authority and functions. If a House were to impose a penalty for contempt, it would clearly be open to the person convicted of the contempt to seek judicial review under section 4. The courts would then be called upon to determine whether the offence of which the plaintiff was convicted amounted to improper interference within the meaning of the section. In making that determination, the courts may well be led to determine wider issues. They would probably determine, if the question arose, the extent of any constitutional limitations on the powers of the Houses, and they may even determine questions of public interest immunity in relation to parliamentary inquiries. In the absence of any such litigation under section 4, one cannot be certain on this matter. The courts might not go that far, but, as has been noted, they have not been backward in filling the safeguards vacuum in recent times, and may well take it upon themselves to determine any outstanding questions raised.

The bill, therefore, may simply provide a faster and more certain method of getting before the courts questions which the courts may have been able to determine under the 1987 Act in any event.

Features of the Bill

It may be useful to the Committee to draw attention to the significant features of the bill.

The following aspects will be apparent to the Committee and are therefore summarised briefly.

(1) By creating a criminal offence and a defence to a prosecution for that offence, the bill would place the issues with which it proposes to deal clearly in the realm of the

judicial function, and probably avoid any challenge on the basis that it confers a non-judicial function on the judicial branch.

(2) By having offences prosecuted before the Federal Court, the bill would ensure that the matters to be determined would come before a superior court, and would avoid any requirement for committal proceedings or a jury trial.

(3) The bill would make use of the contempt jurisdiction of the Court as a means of enforcing lawful orders. Some observations have already been made about the significance of such a provision.

(4) The provisions in subclauses 11A(7) and (8) for determining the question of public interest immunity are as near as possible to the current common law relating to public interest immunity in court proceedings, in so far as the Court would be required to balance competing public interests, and to determine issues by examining evidence or documents in question. Those imbued with the British ideal of parliamentary sovereignty may be offended by the notion of a court determining the extent of the public interest in the free conduct of parliamentary inquiries, but Australia does not have parliamentary sovereignty, and the provisions would not involve any new principle of judicial interpretation and review. There is no difference in principle from the High Court determining whether a parliamentary remedy is proportionate to the evil which it is designed to cure.

(5) As has already been noted, the provision for avoidance of double jeopardy in subclause 11A(11) places a greater restriction on the Australian Houses than is placed upon the US Houses in the American law. Having selected the criminal jurisdiction to resolve a matter, a House would not be able to deal with the same matter under its contempt jurisdiction.

(6) The Houses would appropriately have full control over any proceedings under the bill.

There is one aspect of the bill which may not be readily apparent. By referring to *lawful* orders of the Houses and committees, the bill would signal to the Court that the Court would be expected to determine, if they arose, outstanding questions of law in relation to the powers of the Houses. These questions have not hitherto been adjudicated. Two of these questions may be of particular significance. It is not known whether the power of the Houses to compel evidence and punish contempts is subject to a constitutional limitation in relation to the members of other houses, including state and territory houses. This was the subject of an advice to the Senate Select Committee on the Functions, Powers and Operations of the Australian Loan Council, which advice was published in the Interim Report of that Committee in March 1993. It is presumed that, even if members of one federal House are not subject to the contempt jurisdiction of the other federal House, members of both Houses are not beyond the reach of this kind of Commonwealth legislation.

It is also not decided whether the powers of the federal Houses are limited to subjects in respect of which the Commonwealth Parliament may legislate. The US Supreme Court found such a limitation

of the inquisitorial powers of the Houses of Congress (see *Quinn* and *Eastland*, cited above), and in a similar federal system it is quite likely that the High Court would find a similar limitation.

In this connection, it is to be noted that subclause 11A(6) refers to officers and ministers of the Commonwealth, but does not cover officers and ministers of the states or territories. This is not because state and territory officers are intended to be deprived of the benefit of the subclause, but because it has not been determined whether state and territory officers and ministers are, as a matter of law, amenable to the compulsive powers of the federal Houses. More significantly, it is not clear whether they may be subject to this kind of Commonwealth legislation. As a matter of practice, the federal Houses and their committees have never sought to compel officers or ministers of states or territories, in a tacit acceptance that their powers do not extend to those office-holders. As long as that practice is adhered to, the question will not arise. If subclause 11A(6) purported to cover state or territory officers, it would amount to a prejudgement of that question in favour of powers which the federal Houses have tacitly assumed they do not possess.

Merits of the bill

The conclusion which I would draw as to the merits of the bill are implicit in the forgoing: given that there is a shift of power and authority away from the legislature, a shift which would be difficult to reverse, it is probably legitimate for the legislature to seek to enlist the aid of the power and authority of the judiciary to reassert legislative control of the otherwise unchecked ministry. This should be done, however, without abridging the formal constitutional powers of the Houses, and the bill seeks to achieve this. If those powers are retained the shift need not be permanent; it is possible that integrity may be restored to representative assemblies in the future.

Please let me know if I can be of any further assistance to the Committee.

COMMENTS ON OTHER SUBMISSIONS

I have been provided with copies of the other two submissions made to the Committee on this bill.

There is a point arising from each submission on which I think I should comment.

The Hon P D Connolly QC

It is very surprising that Mr Connolly should suggest that the deletion of the word "lawful" from the phrase "lawful order" in the bill would make it clear that the legality of an order of a House or a committee is not a question for the Court. The Court would certainly not regard itself as bound by the bill to enforce an *unlawful* order, even if the Parliament were to direct it to enforce such an order. The Court would regard such a proposition as self-evidently absurd. This would be so even in the absence of section 4 of the *Parliamentary Privileges Act 1987*, which explicitly allows the courts to determine the lawfulness, in the terms of the section, of an order of a House in relation to a contempt. The word "lawful" may be regarded as unnecessary; its deletion would certainly not have the effect suggested by Mr Connolly.

Professor G McCarry

It is not entirely clear how Professor McCarry's alternative scheme, set out at page 3 of his submission, would work. Presumably a public servant in receipt of an order of a House or a committee would not be guilty of an offence unless the 14 day period had elapsed and a minister had not lodged a "claim for privilege". Presumably the "claim for privilege" would be determined by the Court. Even with provisions to this effect, the scheme would have three difficulties.

First, if the government decided to contest the lawfulness of an order of a House or a committee, as distinct from raising a "claim for privilege", the public servant in receipt of the order would be in no better position: he or she could still be convicted of an offence if the challenge to the lawfulness of the order was not successful.

Secondly, there is the possibility of a minister instructing a public servant not to obey an order and declining to raise a "claim for privilege". This action could be accompanied by the usual kinds of political attacks on the House or committee concerned, and the House concerned would then bear the responsibility, and possibly the odium, of proceeding with a prosecution.

Thirdly, by detaching the "claim for privilege" from a defence to a prosecution, the bill could be challenged on the basis that it would confer a non-judicial function on a judicial body.

I would be pleased to enlarge on these comments or on my submission should the Committee so require.

COMMENTS ON MR MORRIS' SUBMISSION

Further submissions to the Committee in relation to its inquiry into this bill have been provided, namely submissions numbers 6 to 8 inclusive.

There are several observations which should be made on the very lengthy submission no. 6 of Mr A J Morris. I am conscious, however, that it would not be helpful to the Committee to emulate the length of that submission, so I will confine these observations to the main points and keep them as brief as possible.

(1) Mr Morris repeatedly states that the powers of the Houses to compel compliance with their orders by punishing contempts is a judicial power (pp 13-14). This is technically not so; the power is a legislative and not a judicial power. This is most clearly demonstrated in the one major common law jurisdiction where there is no constitutional provision for the legislative contempt power. The United States Supreme Court has held that the Houses of the Congress possess that power, in the absence of any constitutional provision for it, precisely because it is a legislative power, inherent in a legislature (see the judgments cited in my submission of 20 June 1994). This does not lend any weight to the argument (p. 28) about whether the bill confers a judicial function, and the reference in the long title to the provisions of the bill as an alternative to the penal powers of the Houses does not affect the issue one way or the other: a judicial remedy can be an alternative to a legislative remedy.

(2) The argument about the Houses being "judges in their own cause" (p. 16) loses its force when it is appreciated that the courts are always judges in their own cause in relation to contempt of court, which is the equivalent of contempt of Parliament. The contempt powers of the courts and of the Houses are self-protective powers essential to enable those branches of government to perform their functions.

(3) There *is* an issue of whether the bill confers a judicial function (pp 24-38), and it has been framed so as to minimise (but it cannot exclude) the possibility of a successful challenge to its validity on the basis that it confers a non-judicial function.

(4) Mr Morris' solutions to this problem are not solutions at all:

- the use of "clearer criteria" would not affect the issue one way or the other, and in any case the question of whether a disclosure would be prejudicial to the defence or security of the Commonwealth (p. 39) is no more precise than the question of whether a disclosure would be contrary to the public interest: it merely limits the subject matter

- tying the provisions of the bill to public interest immunity as it applies to court proceedings (p. 40) would seek to incorporate an area of the common law too complex and subtle for precise statutory delineation and which can be changed by the courts at any time

- an independent commission (p. 42) would not work unless such a body were statutorily given the same powers to enforce orders as are possessed by the Houses and the courts, and therefore it would be, in effect, a new court.

(5) The argument about the expression "lawful order" (p. 44-7) appears to me to be based on the same misconception as the relevant part of the submission of the Hon. P D Connolly, on which I commented in my note of 27 June 1994. There is no way of preventing the courts considering the lawfulness of an order of a House or a committee, and as I pointed out the courts can and will do so even in the absence of this bill. In the submission of 20 June 1994 I referred to some of the questions of law which could arise. Mr Morris' complex drafting would create more problems in endeavouring to solve a problem which does not exist, or, more accurately, is not a problem at all.

(6) The reason for legislatures habitually using the expression "without reasonable excuse" (pp 47-9) is that it is virtually impossible to codify the law of reasonable excuse. Mr Morris is probably correct in suggesting that, in the absence of the phrase, the courts would read it into the bill in any case, but including it in the bill avoids any suggestion that it is excluded.

(7) There is a very good reason for not referring to state or territory public servants in subclause 11A(6) (p. 50). The states and territories would be alarmed by a provision suggesting that their public servants could be compelled to appear before, or provide documents to, a federal parliamentary inquiry. Senate committees never seek to summon state or territory public servants, but ask the relevant ministers to allow them to attend. If the matter were to be contested in the courts, it is possible that the courts would hold that the power of the federal

Houses to compel evidence does not extend to state or territory public servants, on the basis of a development of an existing legal doctrine associated with federalism. The bill does not contemplate that state or territory public servants are subject to the powers of the federal Houses, but would provide a means of determining that question should it ever be contested. This is not likely to happen because Senate committees act on the basis that they may not summon state or territory public servants.

(8) The extension of the provision in 11A(6) to other categories of persons (p. 51) would not be justified because the problem which 11A(6) seeks to overcome, namely that ministers in one House are not amenable to the orders of the other House, does not exist in relation to other persons.

(9) The bill asks the Court to consider only the question of disclosure of documents to a committee or a House, regardless of whether that results in general publication or limited disclosure (pp 52-3). To ask the Court to consider the treatment of a document by a House or a committee, as Mr Morris suggests, would entail the Court making orders as to how the House or committee is to treat a document in the future. For example, if the Court held that a document could be disclosed only if the relevant committee treated the document as in camera evidence, the Court would have to make an order to ensure that the committee or the relevant House did not publish the document in the future. This really would involve the Court in supervising the decisions of the legislature. And what would be the remedy for a breach of any order of the Court on the part of a House or a committee?

(10) Subclause 11A(9) is designed to cover any potential "gap" in relation to the subsequent publication of documents which is not covered by an order of the Court and its contempt jurisdiction (p. 55). If there were no gap it would not matter that there would be a criminal offence which could also be a contempt of court. It would not be desirable to limit the initiation of a prosecution for an offence under the subclause, because the wrongful publication of a document would be of concern mainly to the original possessor of the document. It should be noted that any offences under the Act or the bill, except offences under subclause 11A(4), could be prosecuted by any person by laying an information.

(11) Mr Morris unwittingly destroys his own argument about a government controlling the House of Representatives circumventing the orders of the Senate or a Senate committee (p. 57) by his use of the expression "procure the House of Representatives to make a similar order": such an order would not be the same order, merely a similar order, and therefore the Senate would not be prevented from initiating a prosecution in respect of its particular order. In any case, the House of Representatives could make orders only in relation to some joint action by the two Houses, and this is the circumstance covered by paragraph 11A(12)(c). Neither House could make a lawful order in relation to some action by the other House.

(12) It is not necessary to provide for the prosecution of breaches of orders of the Court (pp 57-8). The Court may deal with breaches of its orders either on its own motion or on the application of any person.

(13) Mr Morris' point about the Houses retaining their existing contempt powers (p. 61) is already covered by section 5 of the principal act.

(14) Mr Morris' drafting efforts, in unnecessarily seeking to overcome problems he perceives, would make the bill far too complex. If the Parliament is to legislate along the lines of the bill, this is an occasion for concise law.

There is one potential problem with the bill which I should mention. It is surprising that the Committee's learned submitters have not commented on it. In deciding to initiate a prosecution under the bill, a House would have to pass a resolution, that resolution would be open to debate, the debate could extend into a preliminary trial, a sort of legislative committal proceeding, and could complicate, if not prejudice, the subsequent conduct of the prosecution. If the bill were passed the Houses would have to adopt some procedures for obtaining independent advice on whether a prosecution could be commenced, and perhaps for limiting debate on the required resolution.

I would be pleased to enlarge on these comments or on my previous submissions at the Committee's forthcoming hearing.

COMMENTS ON MATTERS RAISED AT HEARING

There were a few points raised during the Committee's hearing on 18 August 1994 on which I think I should briefly comment. These comments may be useful to the Committee in compiling its report.

Evidence of Professor McCarry

(1) Under Professor McCarry's proposed scheme, which he significantly clarified during his evidence, if there is a "no contest" by the government to an order of a House or committee, the public servant is obliged to obey the order, and "anti-victimisation" provisions are Professor McCarry's solution to the problem that the government is the public servant's master (transcript, pp 47-8). The Parliamentary Privileges Act already contains "anti-victimisation" provisions, which make it a criminal offence to interfere with a witness. It is difficult to see how those provisions could be any stronger.

(2) As section 4 of the Parliamentary Privileges Act makes clear, the essence of a contempt of Parliament is that it involves an improper obstruction of a House, its committees or its members. It would therefore be very strange that disobedience of an order of a House could be prosecuted without a decision of the House (transcript, p. 50). A House would then have no opportunity to determine whether a particular act was an obstruction of the House, something which the House can best determine. In the exchange between Senator Childs and the professor (transcript, pp 51-3), Senator Childs was quite correct: under the professor's scheme there would be no opportunity for a House to debate and determine whether a prosecution should be initiated.

Evidence of Hon P D Connolly

(3) Not only would the omission of the word "lawful" not be sufficient to prevent the court determining the lawfulness of an order (transcript, p. 55), but *nothing* can prevent a court from determining the lawfulness of an order which the court would be asked to enforce. An unlawful order is not an order at all, and if the question of lawfulness were raised in relation

to a particular order, nothing could prevent the court from determining the question of lawfulness, as that is the primary question which courts must determine. If the Parliament were to explicitly enact that the courts were to assume the lawfulness of an order, that really would be a usurpation of the judicial power. In any case, the Parliament, by enacting the *Parliamentary Privileges Act 1987*, has already explicitly empowered the courts to determine the lawfulness of any order of a House or a committee.

(4) The presence of the word "lawful" would *not* empower the courts to inquire into the internal proceedings of the Houses by which an order was made (transcript, pp 58-9). The current law, as Mr Connolly points out, is that the courts may not do so (subject to some constitutional considerations which apply in Australia but not in the United Kingdom). The presence of the word "lawful" would not alter that law or empower the judges to alter it; on the contrary, it would reinforce that law.

(5) Mr Connolly's reference to the Mabo judgment (transcript, p. 65) indicates that the "judicial activism" which he rejects is already with us and cannot be avoided; the bill would not add to it or subtract from it.

Evidence of Mr Morris

(6) Mr Morris says (transcript, p. 84) that I am "plainly wrong" in asserting that the contempt powers of the Houses are legislative powers and not judicial powers. On the contrary, it is Mr Morris who is wrong. Mr Morris' authority for asserting that I am wrong is "the High Court of Australia in the war crimes case". Mr Morris is referring to a comment in passing by Justice Deane in *Polyukhovich v the Commonwealth* 1991 172 CLR 501 at 626, to the effect that the power of each House to punish contempt under section 49 of the Constitution is an exception to the rule that the judicial power of the Commonwealth is vested exclusively in courts. Justice Deane's reference for this dictum is the judgment of the High Court in *R v Richards; ex parte Fitzpatrick and Brown* 1955 92 CLR 157. In its judgment in that case, however, the High Court did *not* say that the contempt power of the Houses is a judicial power; on the contrary, the Court noted that that power had traditionally been regarded as non-judicial. In delivering the judgment for the Court, Chief Justice Dixon said:

> there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection .... they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically , perhaps one might even say, scientifically , they belong to the judicial sphere. (at 167)

The Court found it unnecessary to determine this question because the powers are explicitly conferred by the terms of section 49 of the Constitution. The point in my submission was that in the one common law jurisdiction, the United States, where there is no equivalent of section 49 to allow the constitutional court to avoid having to determine the question, and where the court therefore had to determine whether the contempt power is exclusively judicial, the court did indeed find that the power is "not strictly judicial but ... belonging to the legislature", "something essential or, at any rate, proper for its protection" and "proper

incidents of the legislative function". The significance of this doctrinal point is that the powers of the Houses to deal with contempts are properly regarded not, as Mr Morris says, as anomalous, but as powers belonging to a legislature.

(7) In relation to the power of the Senate to summon state public servants, this is not simply a matter of convention (transcript, p. 85), but a question which goes to the *lawfulness* of a House's orders. It may be held that it is not *lawful* for the federal Houses to summon state ministers or public servants or to punish them for contempts, and therefore the bill does not refer to state public servants as that would be to prejudge that question of lawfulness.

Please let me know if I can be of any assistance to the Committee in the further conduct of its inquiry into this matter.

ADVICE NO. 16

MATTERS REFERRED TO THE COMMITTEE ON 23 AUGUST 1995

Thank you for your letter of 25 August 1995 in which the committee seeks advice on issues arising from the matters referred to the committee on 23 August 1995.

This advice refers to the issues of principle which arise from those matters, and not to the facts of the particular cases, which of course can be found only by the committee after inquiry.

The reference by the Senate on 23 August encompasses two matters: alleged threats of legal action against persons in respect of their provision of information to Senator O'Chee, and an alleged threat of legal proceedings against Senator O'Chee.

It is in relation to the first of these matters that the most significant issues arise.

Alleged threats to persons in respect of provision of information to a senator

The first matter referred to the committee asks the committee to determine whether threats of legal proceedings were made against persons in respect of the provision of information to Senator O'Chee in relation to matters raised in the Senate by Senator O'Chee, and whether contempts were committed in respect of that matter.

This matter gives rise to two issues:

(a) whether the immunity afforded by parliamentary privilege extends to the communication of information to senators by other persons; and

(b) whether the Senate may treat as a contempt any interference with such communication of information to senators by other persons.

The answer to question (a) does not necessarily determine the answer to question (b). If the communication of information to senators does not attract the immunity of parliamentary privilege it may still be lawful for the Senate to treat as a contempt any interference with such communication. If, however, the communication of information to senators *is* protected by parliamentary privilege, this probably determines the answer to question (b), in that there can then be little room for doubt that it is open to the Senate use its contempt jurisdiction to protect such communication.

The committee is required by its reference to determine only question (b), depending on the facts found, but in doing so may find it necessary to consider question (a).

(a) Parliamentary privilege and communications with senators

It has always been thought, in the absence of definitive judicial authority, that the immunity of parliamentary proceedings from any impeachment or question before any court or tribunal extends to matters which, while not part of the actual proceedings of the Senate or its committees, are closely connected with those proceedings. The kinds of examples usually cited include the "publication" by

a senator of information to a parliamentary officer or to a stenographer in the course of seeking advice on, or composing, a notice of motion or question to be used in the Senate or a committee; it is fairly certain that a senator would be protected by parliamentary privilege in making such "publications". It is possible to postulate many other circumstances in which the immunity applies or should apply.

This extended operation of the immunity is provided for in the *Parliamentary Privileges Act 1987* in the following terms:

> ‘proceedings in Parliament' means all words spoken and acts done in the course of, *or for purposes of or incidental to*, the transacting of the business of a House or of a committee [emphasis added].

This provision is regarded as a codification of the pre-existing law, not as an extension of the law, and the relevant section of the Act has been accepted in general as such by the Federal Court in *Amann Aviation v Commonwealth* 1988 19 FCR 223.

In relation to the Commonwealth Houses, therefore, the extended operation of the immunity is a matter of statutory interpretation. There has yet been no occasion for judicial construction of the relevant words of this provision.

The issue which arises is whether this extended operation of the immunity applies to communications of information to senators by other persons.

The answer to this question is likely to be determined by the circumstances of particular cases, and, in particular, by the closeness of the connection between the communication of the information to the senator and potential or actual proceedings in the Senate or a committee. For example, if a person provides information to a senator with an explicit request that the senator initiate some action in the Senate in relation to that information, such as an inquiry by the Senate, there is a much stronger basis for concluding that the communication of that information is protected by parliamentary privilege than if the person provides the information simply as a matter of political intelligence or gossip. Similarly, if a senator has requested the information for the purpose of using it in the Senate or a committee, there is a stronger basis for applying the immunity than if there is no evidence of any potential relationship between the information and parliamentary proceedings. If a senator has actually used the information in the course of parliamentary proceedings, that also provides a firmer basis for applying the immunity to the provision of the information than if no parliamentary use is made of the information. The courts would be likely to determine the question in particular cases by considering these kinds of factors.

In support of this suggestion, it is noted that in an old British case, *Rivlin v Bilainkin* 1953 1 QBD 534, it was held that the publication of information by a person to a member of Parliament did not give rise to an issue of parliamentary privilege because "the publication was not connected in any way with any proceedings of the House of Commons". Presumably if the publication *had* been connected with such proceedings a live issue of parliamentary privilege would have been present, and may have been determined by the nature of the connection.

If the committee decides to come to a view on question (a) in relation to the matters referred to it, its view, therefore, will probably be significantly informed by the particular facts found by the committee.

In matters of recent controversy, a ruling made by the President of the Western Australian Legislative Council has assumed some significance, and is relevant to this question. In the course of the ruling, the President stated:

> Whatever was done by members, ministers and others before the presentation of the Easton petition is not a proceeding in Parliament and is therefore open to non-parliamentary inquiry.

This sentence, however, elaborated on, and followed on from, the substance of the ruling, which was:

> Although the presentation of a petition is as much a proceeding in Parliament as a conference of managers, the preparation, including circulation, of a petition is not. (*Minutes of Proceedings of the Legislative Council*, 16 May 1995, p. 116)

This ruling is stated to be supported by the conclusions of the Senate Privileges Committee in its 11th Report in 1988. In that report the committee concluded that the circulation of a petition prior to its presentation probably would not be covered by parliamentary privilege. That conclusion, however, was largely based on the fact that the circulation of a petition is not essential to its presentation, as it is not necessary for a petition to bear more than one signature. It cannot be concluded that all dealings with a petition, before or after its presentation, would not be "for purposes of or incidental to" its presentation and therefore covered by the immunity attaching to the presentation itself. I do not interpret the sentence in the statement of the President of the Council as indicating that he concluded that no anterior dealing with a petition would attract the immunity. I do not think that such a conclusion could be drawn. It is fairly clear that, for example, the "publication" of a petition to a parliamentary officer prior to its presentation would attract parliamentary privilege, and a strong case can be made out that the immunity would also attach to other anterior dealings, such as seeking the advice of another member.

The provision of information to a member of Parliament may attract qualified privilege under the common law interest or duty doctrine, whereby the publication without improper motive of matter to a person is privileged if the provider and the recipient of the information have an interest or a duty in providing and receiving it (either one may have either an interest or a duty). Whether the qualified privilege applies would presumably depend on circumstances. The only significant judicial authority appears to be an old British case (*R. v Rule* 1937 2 KB 375). Whether qualified privilege is attracted is not of any particular significance for the issues before the committee.

(b) Interference with communications to a senator as a contempt

The substantive issue of principle before the committee is whether it would be lawful for the Senate to treat as a contempt interference with communication of information to senators by other persons.

It is well established that the taking or threatening of legal action can constitute a contempt of Parliament or a contempt of court if the effect or tendency is to interfere with the conduct of proceedings in Parliament or court proceedings. This question was dealt with in some detail in the advices to the committee dated 6 March 1989, 12 November 1990 and 28 February 1991, and the attention of the committee is drawn to the authorities cited in those advices. They also dealt with the question of whether a culpable intention is required to establish a contempt or whether the effect or tendency of an act is sufficient. The advice dated 10 April 1992 summarised the relevant principles and also considered the question of the connection between a threatened or actual legal action and its "target". All of those issues are relevant to the matters now referred to the committee, and their application to the cases in hand will depend on the facts found by the committee.

The new issue is whether the provision of information to a senator by another person can be the "target" of a contempt, in the sense that a contempt is committed by improper interference with such provision of information.

For the Commonwealth Houses this is clearly a question of statutory interpretation, turning on the application of section 4 of the *Parliamentary Privileges Act 1987*:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Unlike the statutory definition of "proceedings in Parliament", this provision does not merely give expression to the pre-existing law, but is thought to embody the rationale of the law which empowers the Houses to punish contempts. The provision limits the power to punish contempts which existed before the Act was passed.

There has been no judicial construction of the provision, so one can only reason from its terms and first principle.

It is clear that the provision of information to senators is often a vital part of their participation in Senate and committee proceedings, and that the suppression of such provision of information could severely hinder those proceedings. It is also clear, however, that information is often provided to senators without any connection, actual or potential, to parliamentary proceedings. The lawfulness of treating as a contempt any interference with the provision of information to a senator is therefore likely to depend on the circumstances, and in particular the closeness of any connection between the provision of information and actual or potential parliamentary proceedings. In a case where interference with the provision of information to a senator clearly had the effect or tendency of hindering the senator in the free performance of the senator's duties, it would be lawful to treat such interference as a contempt. (The attention of the committee is also drawn to the analysis in the previous advices of the significance of the word "improper" in section 4 of the Parliamentary Privileges Act.)

As with other aspects of contempt of Parliament, it is instructive to make comparison with the equivalents in relation to legal proceedings, contempt of court and its criminal law counterpart,

attempting to pervert the course of justice. If it can be a contempt of court or a perversion of the course of justice for a person to interfere with the provision of information to an actual or potential participant in actual or potential legal proceedings, this is strong ground for concluding that it is lawful for the Senate to treat interference with the provision of information to a senator as a contempt.

Fortunately, there is a recent judgment of the High Court which throws considerable light on this matter. In *R. v Rogerson* 1992 174 CLR 268 the High Court held that interference with the gathering of evidence by police can constitute a perversion of the course of justice even though such gathering of evidence is not part of the course of justice as such and even though no actual proceedings are contemplated by the police:

> The fact that police investigation stands outside the concept of the course of justice does not mean that, in appropriate circumstances, interference with a police investigation does not constitute an attempt or a conspiracy to pervert the course of justice .... it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency. (at 277)
>
> The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, *hindering of access to it, deflecting applications that would be made to it*, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions. (emphasis added, at 280)

To apply these principles to contempt of Parliament, interference with the provision of information to a senator "in appropriate circumstances" may constitute a contempt even though such provision of information is not part of proceedings in Parliament as such, and even though the senator does not contemplate use of the information in proceedings in the Senate or a committee.

It cannot be suggested that potential legal proceedings are entitled to a greater degree of protection than parliamentary proceedings: the provision of information to a senator may lead to inquiry and legislative action in relation to a matter of immense public interest. That is why proceedings in Parliament are protected by parliamentary privilege and why the Houses have the power to deal with interference with their proceedings.

It will be noted that the High Court appeared to consider that a culpable intention on the part of offenders towards potential legal proceedings is an essential element of the offence, at least where there are no proceedings actually on foot or necessarily contemplated. As the authorities cited in the previous advices make clear, in the actual presence or contemplation of proceedings a culpable intention may not be necessary for an offence to be constituted. It is suggested that these principles are equally applicable to contempt of Parliament. (In its report on contempt in 1987, the Australian

Law Reform Commission suggested that the offence of attempting to pervert the course of justice may not be constituted by any act in the absence of a culpable intention, and that an act may not be in contempt of court, as distinct from constituting the offence of attempting to pervert the course of justice, unless proceedings have actually commenced: Report No. 35, p. 103. This may or may not be correct, but it does not affect the foregoing analysis. If there are such distinctions between contempt of court and perversion of the course of justice, however, they may be of persuasive influence in consideration of contempts of Parliament.)

In two cases in the 1950s the British House of Commons potentially had occasions to consider alleged interference with the provision of information to a member in the context of contempt of Parliament. The circumstances of these cases, however, make them not particularly helpful.

The first case involved a letter from a somewhat eccentric (or, in the view of some, mad) vicar, a Cold War ally of the "Red Dean", to a member, who referred the letter to the bishop, who reproached the vicar. Initially this was received and regarded as a complaint against the member. Eventually the Speaker ruled that a motion concerning the matter could not have precedence because it was not raised at the earliest opportunity. A motion to refer the matter to the Privileges Committee was narrowly negatived, and at least some members in the majority seemed to have regarded themselves as bound to uphold the Speaker's "determination". Some members, however, may have been influenced by Mr Winston Churchill's assertion that the House should not "use its Privilege to protect a correspondent ... from some real or supposed injury ... Privilege was never instituted or intended for such a purpose. It is to protect us and those who have to deal with us, and not to protect the vast mass of the nation outside." (He also made much of the fact that a bishop has no power over a clergyman in a living in the Church of England.) (HC Debates, 1950-51, cc 675-688, 1297-1316, 1773-1779, 2491-2544)

In the second case, also involving ecclesiastics of a sort, a Deputy Assistant Chaplain General of the army was alleged to have threatened a subordinate army chaplain in consequence of the chaplain's provision of information to a member. The Committee of Privileges was able to point to the lack of precedents for treating as a contempt an attempt by one person to influence another in relation to communications with a member, but was also able to say that this was a matter for the responsible minister, because, as a matter of government regulation, members of the armed forced had a right to communicate with members and should not be subjected to any pressure or punishment on that account. (HC 112, 1954-55)

Erskine May's *Parliamentary Practice* makes too much out of these cases in claiming that "Although both Houses extend their protection to witnesses and others who solicit business in Parliament, no such protection is afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide information to Members, the question whether such information is subsequently used in proceedings in Parliament being immaterial." (21st ed., p. 133). The cases do not provide authority for this sweeping statement. They are of little persuasive value for any general conclusion. The expressions "those who have to deal with us" (Churchill) and "others who solicit business in Parliament" (May) indicate that the boundaries are not as clear cut as May makes out. May is confused on the significance of *Rivlin v Bilainkin*, citing it as if it had to do with qualified privilege (p. 133), when in fact the question of parliamentary privilege was at issue, and also mixes up the questions of the scope of the legal immunity and the extent of the contempt jurisdiction (p. 125).

A precedent in the House of Representatives is similarly unhelpful. This involved legal proceedings against a person in respect of the provision by the person to a member of a statutory declaration which the member used in debate. The report of the House Privileges Committee, having quoted May (although apparently without necessarily having been misled thereby) and observed the lack of precedent, made a finding that the legal proceedings did not amount to, and were not intended or likely to amount to, improper interference with the free performance by the member of his duties, without providing any analysis of the facts or reasons for the finding. It is not clear from the report whether the committee thought that interference with the provision of information to a member is ever capable of constituting a contempt. (PP 407/94)

I know of no relevant cases in other jurisdictions.

Significance of the facts

As the foregoing indicates, the facts as found by the committee will determine the application of the questions of principle and the ultimate findings of the committee.

Without purporting to make any judgment of the facts, which only the committee can make after inquiry, it is suggested that the significant questions to be asked about the facts are:

- Did any threats of legal proceedings which may have been made against persons have as their "target" the provision of information by those persons to Senator O'Chee?

- Was that provision of information connected with actual or potential proceedings in the Senate or a committee or with proceedings contemplated by Senator O'Chee, and, if so, what was the nature of that connection?

- Did any such threat of legal proceedings have the effect of interfering or tendency to interfere with the free performance by Senator O'Chee of his duties as a senator?

- Were any threats of legal proceedings made with the intention of influencing the use of the information so provided in actual, contemplated or potential proceedings in the Senate or a committee?

Alleged threat of legal action against a senator

The second matter referred to the committee asks the committee to determine whether a threat of legal proceedings was made against Senator O'Chee in respect of his activities as a senator and whether a contempt was thereby committed.

In relation to this matter little can be added to the analysis of the previous advices. The attention of the committee is particularly drawn to the consideration in those advices of the question of whether a senator's parliamentary activities are the real "target" of a threat of legal proceedings.

Here also the application of the issues of principle is dependent on the facts found by the committee.

Please let me know if I can provide any further assistance.

MATTERS REFERRED TO THE COMMITTEE ON 23 AUGUST 1995: PROVISION OF INFORMATION TO SENATORS

In the advice of 30 August 1995 I indicated that I did not know of any relevant cases in other jurisdictions, other than those mentioned in the advice.

I refrained from mentioning a recent American case because it was not in a superior court. I have since become aware that the original judgment has been upheld by the US Court of Appeals.

In this case (*Maddox v Williams*, decided 15 August 1995, not yet reported), it was held that members of Congress may not be compelled by subpoena to produce documents, or to answer questions concerning their acquisition of the documents, which were supplied to them by an informant and which are relevant to an inquiry being undertaken by a congressional committee of which they are members. This judgment indicates that the immunity of members' legislative activities from question elsewhere under article I, section 6, of the Constitution extends in appropriate circumstances to the provision of information to members by constituents.

ADVICE NO. 17

PROVISION OF INFORMATION TO SENATORS: MATTERS REFERRED TO THE COMMITTEE ON 23 AUGUST 1995: *GRASSBY* CASE

Your letter of 19 March 1996 requests advice on the judgment of Allen J of the Supreme Court of New South Wales in *Grassby* 1991 55 A Crim R 419 in the context of the advice to the Committee of 30 August 1995.

That advice referred to two issues:

(a) whether the immunity afforded by parliamentary privilege extends to the communication of information to senators by other persons; and

(b) whether the Senate may treat as a contempt any interference with such communication of information to senators by other persons.

The judgment of the Supreme Court could be relevant only to issue (a), that is, the scope of the legal immunity afforded by parliamentary privilege, although, as will be observed, the judgment mixes the two issues.

There are difficulties with the judgment which prevent it being regarded as an authority on any aspect of either of the two issues.

The New South Wales Parliament is unique in that it does not possess any equivalent of section 49 of the Constitution, that is, it has no constitutional or statutory provision conferring upon its Houses the powers and immunities known as parliamentary privilege and applying to all other Anglo-American legislatures. The powers and immunities of the New South Wales Houses depend on a common law doctrine that they are only such as are strictly necessary for the Houses to discharge their legislative functions. This doctrine has been expounded in a line of cases and recently confirmed. It is clear that the Houses do not possess the power to deal with contempts, which is one reason for saying that the judgment of Allen J cannot have any relevance to issue (b). The Houses possess an immunity of freedom of speech, but it is by no means clear that the scope of this immunity is the same as that of other legislatures, because it is not clear whether the Bill of Rights of 1689 applies in relation to proceedings of the New South Wales Houses or merely applies in New South Wales in relation to proceedings of the British Houses.

The judgment of Allen J does not clarify these matters. In referring to the immunity of freedom of speech of the New South Wales Houses, it is not clear whether he thought he was applying the common law doctrine of necessary immunities or expounding article 9 of the Bill of Rights. The references to effects on members and the discharge of their functions (at 429-30) suggest the former. The references to article 9 of the Bill of Rights do not explain whether it is taken to apply to the Houses or whether it is merely indicative of the content of the inherent immunity of freedom of speech generally. In referring to article 9 (at 432) Allen J cites a collection of judgments some of which are mutually contradictory and one of which was expressly repudiated by the *Parliamentary Privileges Act 1987* of the Commonwealth.

For all of these reasons the judgment cannot be taken to be an authoritative exposition of the immunity of freedom of speech in Parliament.

The judgment also mixes up issues (a) and (b) as if they were the same question, and this, as has been indicated, is particularly inappropriate in relation to the New South Wales Parliament. In this aspect the judgment relies heavily on the sweeping statement in Erskine May's *Parliamentary Practice* to which I referred in the previous advice and which, as suggested in that advice, is not justified by the cases on which it is purportedly based.

As was also indicated in that advice, the important issue is issue (b), and the vital question is the connection between information supplied to a member of Parliament and any parliamentary proceedings. In that respect the *Grassby* case was very easy to decide. Not only did Mr Maher, the state member to whom Mr Grassby supplied the offending document, not make use of it in any proceedings, but according to the evidence referred to in the judgment it was highly unlikely he would have done so. The judgment indicates that the case against Mr Grassby attached considerable significance to the lack of interest by Mr Maher in the document. In other words, there was not even a remote connection between the provision of the document to the member by Mr Grassby and any parliamentary proceedings actual or potential.

In different circumstances the matter may not be so easily decided, and a court may well come to a different conclusion. For example, if a member were to make a speech in a House or ask questions in a committee about an issue, and a person were to supply the member with information relevant to that issue, and the member were subsequently to use that information in proceedings in the House or the committee, there would be a much stronger case for concluding that the provision of the information to the member would be protected in both senses (a) and (b), that is, as a question of legal immunity and as a question of protection by exercise of the contempt jurisdiction. As indicated in the previous advice, the particular circumstances may well determine those questions.

The judgment in *Grassby* is therefore of little value. At most, it merely reinforces the basis of the judgment in *Rivlin v Bilainkin* to which the previous advice referred, that is, where there is no connection with proceedings in Parliament, the issue of parliamentary privilege does not arise.

You asked also about the Queensland case *Laurence v Katter*. I expect to be advised when judgment is handed down in this case.

Please let me know if I can be of any further assistance to the Committee.

***GRASSBY* CASE (2)**

There is another point which I should have mentioned in the note of 21 March 1996 on the judgment in the *Grassby* case.

In his judgment Allan J observed that the protection of qualified privilege is a very strong protection, which may be defeated only by proof of malice or other improper motive on the part

of a defendant. He considered this sufficient protection, and this was one reason for not extending the absolute protection of parliamentary privilege to the provision of a document to members.

The problem with this is that the kinds of persons who supply information about corruption or malfeasance to members of parliament, the kinds of persons commonly known as whistleblowers, are often persons who can be represented as having some improper motive. For example, an employee dismissed by an employer can be represented as motivated by a desire for revenge. In the tobacco corporation case, to which I referred in the note of 8 September 1995, the persons who supplied the documents to the members were former employees who were being pursued by the corporation for alleged theft of information, and they could well be said to have had an improper motive, but there was a legislative interest in investigating the material they supplied concerning the activities of tobacco companies. The fact that information is supplied by persons who may have improper motives does not make it unworthy of legislative action and therefore unworthy of protection.

ADVICE NO. 18

ALLEGED INTERFERENCE WITH POTENTIAL WITNESS

Thank you for your letter of 24 October 1997 in which the Committee of Privileges seeks comments on the matters referred by the Senate to the committee on 2 October 1997. I hope that the following observations will be of some assistance to the committee.

The committee has available to it the two advices provided to Senator Faulkner on 29 September 1997. The first of those advices was composed on the basis of a matter put to me by Senator Faulkner over the telephone on 27 September 1997 as a hypothetical case, or at least a case the factual content of which was unknown to me at the time. The second advice was provided after the actual case became known to me as a result of items in the press and questions and answers in the Senate on 29 September, and that advice was directed to the question whether any change was required by the actual case to the considerations of principle set out in the first advice. Both advices were directed to the questions of principle arising and did not purport to determine the facts of the case.

This note is also concerned with the issues of principle arising and does not purport to determine the facts.

Finding the facts is the task of the committee, and when the facts are found the application of principles to those facts can then be determined. In this case, the task of finding the facts resolves itself into finding exactly what transpired between the Attorney-General, any person acting on his behalf, and any other person on the one hand, and on the other hand the President or other officers of the Australian Law Reform Commission. When it is discovered exactly what transpired, the intention with which actions were taken can then be determined. Finding the intention with which acts were done is part of finding the facts. The task of finding intention in this case resolves itself into determining whether any acts were done for the purpose of influencing evidence which might be given before a parliamentary committee and whether that purpose was pursued by anything in the nature of a threat or inducement.

To turn to the issues of principle, the following considerations appear to be relevant.

Taking or threatening to take action with the purpose of, or with the tendency to, influence a witness in respect of the witness's evidence may be held to be a contempt even where the action is otherwise lawful or indeed explicitly authorised by law. This principle was referred to in previous advices to the committee and in previous reports of the committee, and requires no further elaboration. (I refer to the advices dated 6 March 1989, 13 November 1990, 28 February 1991 and 10 April 1992.)

It is necessary to emphasise, however, that the use of the word "improper" in the formulation of the offence of improper interference with witnesses, as in paragraph (10) of resolution 6 of the Senate's Privilege Resolutions, does not indicate that an act has to be improper in any other context in order to constitute improper interference with a witness. As the courts have explained in relation to interference with court witnesses, the use of the word "improper" in this formulation merely distinguishes a very small category of acts which may be regarded as interference but

which are not improper, such as seeking to persuade a witness to correct evidence which the witness knows to be false or to add material facts to evidence. It is necessary to stress this point because of a widespread misconception.

It is also necessary to stress that anything in the nature of a threat to a witness, that is, any indication that some action will be taken, or not taken, if a witness gives evidence, or gives evidence of a certain kind, constitutes improper interference even where the threatened action or non-action is lawful or explicitly authorised by law. This principle is established in relation to interference with court witnesses and in relation to interference with parliamentary witnesses by cases where the threatening or taking of legal action is held to be a contempt where the purpose or tendency is to interfere with a witness. The committee and the Senate have adopted this principle in past cases, most recently in the 67th report of the committee.

Interference with a witness may be constituted by interference with a *potential* witness, a person who may give evidence in the future but who has not been summoned or even invited to give evidence. This point has also been referred to in previous advice. (In relation to interference with court witnesses, this principle was clearly stated by the Supreme Court of Victoria in *R v Carroll* 1913 VLR 380.)

A particular variation of the principle that otherwise lawful action can constitute improper interference with a witness is provided by the circumstance of a person who has some lawful authority over another person and uses that lawful authority to influence that other person's evidence. Such a use of a lawful superior authority constitutes improper interference even though the other person is subordinate and subject to direction.

There are two exceptions to this principle. One is provided by the case of a minister, as part of a claim of public interest immunity, directing a public servant not to give evidence or not to give certain evidence. It is generally accepted that in this circumstance the public servant should not be liable to be dealt with for contempt. The Senate so declared in its resolution of 12 May 1994 referring the Parliamentary Privileges Amendment (Enforcement of Lawful Orders Bill) 1994 to the committee for examination. Secondly, it is accepted that ministers have the prerogative of determining government policy, of expounding the case for that policy and of directing public servants as to the policy to be put in the course of their evidence. This is recognised by paragraph (16) of resolution 1 of the Senate's Privilege Resolutions.

Apart from these exceptions, the use by a minister of the minister's lawful authority over a public official to influence that public official's evidence can be held to constitute an improper interference with a witness.

As with other aspects of this subject, considerable light is thrown on this principle by the approach of the courts to interference with witnesses before the courts. Past cases before the courts leave no doubt as to the correctness of the principle here stated. One case is particularly instructive. It came before the High Court in 1944 (*Watson v Collings and others,* 1944 70 CLR 51). In this case the Commonwealth was a party to an action by the plaintiff Watson, who claimed to have been duly appointed to a position in the Commonwealth Railways which was subsequently unlawfully filled by another person. The Minister for the Army sent to the Minister for the Interior, Senator Collings, a letter concerning the desirability of settling this action. The

letter referred to the fact that the term of appointment of the Commonwealth Railways Commissioner, one Mr Gahan, was about to expire, that Mr Gahan wished to be reappointed as Commissioner, and that "It would be unfortunate if Mr Gahan who I understand desires his reappointment to be considered by Cabinet were to give evidence not completely in accord with the case presented by the Commonwealth". This observation, as the court noted, was open to an entirely innocent interpretation, namely, that the possibility of Mr Gahan giving evidence contrary to the views of the Commonwealth reinforced the desirability of settling the case. Senator Collings, however, passed the letter to Mr Gahan. In that context, the letter could be taken to convey a hint that Cabinet's decision as to the renewal of Mr Gahan's appointment could be influenced by the evidence which he gave in the case. This was enough for the court to detect improper interference with a witness, and to warn sternly:

> No court can allow to pass without observation an act calculated to affect the testimony of a witness, or to embarrass him in giving evidence. Although in the result the transmission of the letter does not appear to have influenced Mr Gahan to disregard his duty as a witness, as he gave his evidence freely, independently and candidly, it is necessary to say that it is against the law for any person who has any authority or means of influence over a witness to use it for the purpose of affecting his evidence. And it is competent for this Court, in cases where other remedies appear inadequate or unavailing, to proceed on its own motion by calling on the party concerned to show cause why he should not be dealt with for contempt.

A significant aspect of this case was that the interference with the witness was constituted by the meaning that the letter had for Mr Gahan, not the meaning which either of the ministers intended or thought it to have. As a communication between the ministers, its intention could be regarded as innocent, but because of the meaning which it conveyed to Mr Gahan it was not.

Subsequent cases give no indication that the attitude of the courts has changed in regard to actions likely to influence witnesses.

As was indicated in previous advices, it would be a strange conclusion that parliamentary evidence is entitled to any lesser protection than evidence before the courts. The underlying rationale of the principles relating to improper interference with witnesses is the same in both contexts: the great public interest in ensuring that, in both forums, evidence is given freely, so that the courts and Parliament are not impeded in discovering the truth in any inquiry.

Please let me know if the committee wishes me to provide any further assistance in relation to this matter.

ADVICE NO. 19

PROVISION OF INFORMATION TO A SENATOR

Thank you for your letter of 30 October 1997, attaching submissions to the committee by the University of Queensland and Dr William De Maria, and inviting comments on the matters contained in the submissions relating to the reference to the committee on 4 September 1997.

The issues of principle

Previous advices referred to the question of the privilege which may attach to the provision of information to senators. Such provision of information may be privileged in two senses: it may be protected by the law of parliamentary privilege, as clarified by section 16 of the Parliamentary Privileges Act, in so far as the provision of information may be held to be "for purposes of or incidental to" the transaction of the business of a House or a committee; and such provision of information may be legitimately protected by the Senate's contempt jurisdiction, in that improper interference with the provision of information may be treated as a contempt. The advices indicated that the status of the provision of particular information would be apt to be determined by the relationship between such provision of information and proceedings in the Senate or in a committee. The nature of the connection between the provision of information and parliamentary proceedings would determine whether the provision of information was "for purposes of or incidental to" the proceedings.

It is clear that there are two possible polarised sets of circumstances and a range of possible circumstances in between. The provision of information to a senator may be so closely connected with proceedings in the Senate that it is obvious that the act of providing the information should be protected; on the other hand, the provision of information to a senator may be totally unrelated to any parliamentary proceedings actual or potential, so that there is no basis for protection of the provision of the information. Examples of these two ends of the spectrum may be readily postulated. A person may provide information to a senator on the basis that it relates to a matter of public interest, with a request that the senator initiate a Senate investigation of the matter, and the senator may subsequently incorporate the information in proceedings in the Senate as part of an application to the Senate for an investigation of the matter concerned. This would provide the strongest case for protection of the provision of the information in both senses. On the other hand, a person may provide a senator with information for the express purpose of publishing defamatory matter with parliamentary privilege in order to cause damage to persons the subject of the information, and the senator may refrain from any action in relation to the information. In this circumstance, it could readily be concluded that the provision of the information is not protected by parliamentary privilege in either sense. A range of circumstances may be postulated between these two extremes, and some circumstances may make a decision as to the protection which adheres to the provision of information extremely difficult.

Authorities

When the earlier advices were provided there were virtually no relevant authorities. Decisions of the Court of Queen's Bench in *Rivlin v Bilainkin,* of the Supreme Court of New South Wales in *Grassby,* of the President of the Western Australian Legislative Council in the Easton matter and

of the British House of Commons in two 1950s privilege matters were found to be unhelpful because of the circumstances of the cases. A judgment of the United States Court of Appeals in *Brown & Williamson Tobacco Corp v Williams* suggested that there exists an immunity of members against compulsory production of documents relating to their legislative activities and, therefore, that parliamentary privilege may extend to the provision of the documents to the members.

Some further light, but not a great deal, is thrown on the issue by the judgment of the Queensland Court of Appeal in *Rowley v O'Chee,* which was handed down on 4 November 1997. The court held that Senator O'Chee should not be compelled, at least until further investigation of the nature of the documents concerned, to produce documents which he states came into existence, or came into his possession, for purposes of, or incidental to, his raising of matters in the Senate. One of the three justices, perhaps two, appear to believe that an immunity from production of documents exists and extends to documents provided to the senator by other persons. One justice is doubtful whether the immunity extends beyond documents created by, or on behalf of, the senator. The judgment is not very helpful on the question of whether the provision of information to a senator is protected by parliamentary privilege, although it could be said that one justice appears to be of a mind to accept such a contention. The judgment is useful, however, in indicating that a close connection between information provided to a senator and the senator's use of the information in proceedings in Parliament, or at least the senator's intention to use the information in such proceedings, is crucial to determining relevant issues. Further judgments in this case may further clarify those issues.

The case in question

Available evidence before the committee in the case in question indicates that, if the facts are in accordance with that evidence, the case is well towards the non-protected end of the spectrum of possible circumstances. The case does not conform with the pattern of a clear relationship between the provision of information and proceedings such that the provision of information was "for purposes of or incidental to" the proceedings.

In relation to the purpose for which the information was provided, there is some evidence that it was provided for the purpose of bringing about a parliamentary investigation (this is Dr De Maria's explanation of his purpose), but there is also evidence that the purpose was simply to gain privileged publication of material known to be defamatory (the statement of Ms Vivienne Wynter that, in her conversation with Dr De Maria, he stated that his purpose was to obtain privileged publication of material to be included in a newspaper article). It could well be concluded that the purpose was not primarily to bring about parliamentary action or investigation.

More significant, however, is the position of Senator Woodley in the matter. If there is one thing which clearly emerges from the judgment of the Queensland Court of Appeal, it is that the actions of the senator in receipt of the information are crucial in determining the issue. It is clear from Senator Woodley's statement in his letter of 13 June 1997, which was tabled in the Senate on 18 June 1997, that he did not deliberately place before the Senate the document containing Dr De Maria's allegations against the University with the considered intention of achieving parliamentary attention to the allegations or a parliamentary inquiry. On the contrary, it could be concluded that the material was presented to the Senate by inadvertence or misadventure on

Senator Woodley's part. The circumstances could be regarded as close to those postulated by McPherson J A of the Queensland Court of Appeal in his characterisation of *Rivlin v Bilainkin* and *Grassby:* "It is not, I think, possible for an outsider to manufacture Parliamentary privilege for a document by the artifice of planting the document upon a Parliamentarian". The circumstances, of course, are different in that Senator Woodley *did* use the material in proceedings in the Senate, but, as his statement discloses, without a deliberate intention of doing so.

The combination of these circumstances, doubt about Dr De Maria's purpose and the lack of deliberate purpose on the part of the Senator Woodley, would lead to the conclusion that this is not a case strongly suggesting that parliamentary privilege attaches to the provision of the information.

The question of law

In determining whether the law of parliamentary privilege protects the provision of information to senators, a court would base its judgment on the circumstances of a particular case. If the court were well advised, the question would be determined only in relation to the particular circumstances, and the general question of whether such provision of information is ever protected would be left open. A court may well, however, determine the question of general principle on the basis of the particular case. This is what the Supreme Court of New South Wales did in the *Grassby* case, and what the Supreme Court of Queensland attempted to do in *Rowley v O'Chee.* The Court of Appeal of that state, in reviewing the latter judgment, kept to the question in issue, namely whether a senator should be compelled to produce documents relating to proceedings in the Senate.

There is much truth in the old adage that hard cases make bad law. The case before the committee is a hard case. If it were to come before a court, it is highly likely that the court would determine that the provision of information to Senator Woodley by Dr De Maria was not protected by parliamentary privilege, whatever other privilege may adhere to it. This conclusion could be reached even if the most favourable reasoning in the judgment of the Queensland Court of Appeal were adopted. It is also likely, unfortunately, that the court would go further, determine the general principle, and hold that the provision of information to a senator is not in any circumstance protected by parliamentary privilege. If the case were stronger, that is, closer to the other end of the spectrum of possible circumstances, contrary determinations might be made.

This leaves the evidentiary question of how the publication of the material to Senator Woodley by Dr De Maria is to be proved. In an action against Dr De Maria for the publication of the material to Senator Woodley, if the only evidence of the publication were Senator Woodley's speech in the Senate and his tabling of the documents in the Senate, the action should fail because those proceedings in Parliament cannot, under the law of parliamentary privilege as clarified by section 16 of the Parliamentary Privileges Act, be used to support an action against a person. This evidentiary question, however, is distinct from the question of whether the provision of the information was protected in the first place. The action could be successful on the basis of other evidence of the publication of the material to Senator Woodley by Dr De Maria. The Queensland Court of Appeal judgment is not helpful here because there is no suggestion of Senator Woodley being compelled to produce documents.

Protection by the contempt power

In relation to the possible protection, by the exercise of the Senate's contempt jurisdiction, of the provision of information to Senator Woodley, the case may also be seen as a hard case. The circumstances would appear not to provide a strong basis for extending that protection to the communication of the material to Senator Woodley.

The evidentiary question, however, is also significant here. It appears that the University's action against Dr De Maria is based solely on his publication of his allegations to Senator Woodley, and, more significantly, that the only evidence of that publication is Senator Woodley's speech and tabling of documents in the Senate. This makes the question of the protection of Dr De Maria's approach to Senator Woodley much more difficult. While it could be concluded that his communication with Senator Woodley should not be protected as such, it is another matter to accept a situation of proceedings in Parliament being used as evidence against a person in a disciplinary action. Such use of parliamentary proceedings would seem to be unlawful under the Parliamentary Privileges Act. It may be concluded, however, that, if the acts of Dr De Maria are not eligible for protection by the exercise of the contempt jurisdiction, the Senate should not intervene to overcome the probable evidentiary illegality.

The circumstances of the case are readily distinguishable from those referred to in the committee's 67th report, in respect of which the committee found, and the Senate determined, that a contempt had been committed. In that case, legal action was taken against a person solely on the basis of the person's provision of information to a senator. The provision of the information to the senator was closely connected with actions by the senator to have a matter of public interest raised in the Senate. The senator concerned clearly and deliberately incorporated the information into his submissions to the Senate. The circumstances, particularly the actions of the senator, therefore provided a firm basis for the Senate making a finding of contempt.

The consideration of the possible application of the contempt power leads to a reflection on the action of the University. If a person makes unsubstantiated allegations, the primary remedy is surely to refute the allegations. If the allegations are published in an actionable context, another remedy is to take civil action against that publication. It is not obvious why the University thinks that disciplinary proceedings against Dr De Maria are the appropriate method of dealing with his allegations. If the provision of information to Senator Woodley is part of a pattern of improper conduct on the part of Dr De Maria, there must be evidence of that conduct other than Senator Woodley's speech in the Senate. The whole approach of the University is open to question. The Senate, however, cannot instruct the University as to how it should conduct its affairs, but can only make a decision on whether to exercise its powers, given the particular circumstances.

I hope these observations are of some assistance to the committee. Please let me know if I can provide any further advice on this matter.

ADVICE NO. 20

EGAN V WILLIS AND CAHILL: AN ASSESSMENT

You asked for a note for the Privileges Committee on the implications of the High Court decision in *Egan v Willis and Cahill*.

The judgment of the court in this case is not directly applicable to the Senate, or indeed the Houses of the other state parliaments, because the New South Wales Houses, alone among all the Houses of Australia, do not possess a constitutional or statutory provision establishing their immunities and powers. They must rely on a body of common law about what powers are necessary or appropriate for a legislature.

The Legislative Council made an order for the production of documents and Mr Egan refused to produce the documents. The Council then suspended him from the sittings of the Council for a period, and had him escorted from the precincts. Mr Egan then brought the action in the New South Wales Supreme Court, which led to the judgments of the Court of Appeal and finally the High Court. Mr Egan sought a declaration as to the lawfulness of the Council's actions.

The Court of Appeal, then presided over by Chief Justice Gleeson, made a judgment very favourable to the powers of the Council (*Egan v Willis and Cahill* 1996 40 NSWLR 650). The court held that the Council has an inherent power to demand the production of documents and to impose a penalty on a minister for non-compliance. In so holding, the court developed the old British law about powers appropriate to "colonial" legislatures, while having regard to the United States law which holds that the power to enforce the production of documents is an inherent legislative power. The High Court was less expansive in its view of the powers of the Council. It held that it is among the functions of the Council to ask for the production of documents and that the particular sanction imposed was within its powers.

In this case no claim of public interest immunity was raised by Mr Egan, that is, there was no claim that the documents should be immune from production, in that their production would not be in the public interest, because they are the subject of legal professional privilege or on some other ground. The High Court therefore did not enter into the question of public interest immunity, but explicitly left it open.

Mr Egan now has another case against the Council before the New South Wales Supreme Court in which he is raising, in effect, a claim of public interest immunity on the ground of legal professional privilege. This case was also brought after the Council imposed a penalty of suspension upon him for refusal to produce documents. It will be interesting to see if Mr Egan can get the Supreme Court or the High Court to rule on the question of public interest immunity as it may apply to parliamentary demands for information.

Among the powers of the Senate under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*, which was passed pursuant to that section, are the powers to demand the production of documents and to punish defaults as contempts. It is significant that, in the United

States law, these powers are held to be inherent in a legislature. In the High Court judgment in *Egan,* however, Mr Justice Kirby signalled that he would like an opportunity to re-open the question of the constitutionality of the Houses' contempt powers, notwithstanding that their constitutionality has been thought to be settled long ago by both the clear words of the Constitution and an earlier judgment of the High Court.

In seeking to force the executive to provide information, the Senate has two kinds of remedies available to it, non-justiciable political remedies and justiciable legal remedies. An example of the first type of remedy would be the Senate refusing to consider any government legislation, or any government legislation in a particular portfolio, until information is produced in accordance with its requirements. Such action would not be justiciable. An example of a justiciable legal remedy would be the Senate imposing a penalty upon a government office-holder for refusal to supply information. The imposition of the penalty would be justiciable.

It is unlikely that a contest between the Senate and the executive over an executive refusal to supply information could be brought before the courts at any stage before the imposition of a penalty. If the Senate were to make an order for the production of documents or the attendance of a witness and issue a subpoena, the courts would not entertain any action to enforce compliance with the order or subpoena because there is no legal basis for such a judicial intervention. It is also unlikely that an application for a declaration as to the legality of the Senate's action would be entertained at that stage, and there would be no incentive on the part of the recipient of a subpoena to make an application. If the Senate were, however, to impose a penalty of fine or imprisonment for non-compliance, the legality of the penalty could be contested by the person on whom the penalty was imposed.

In such an action the principal legal issue, apart from the question of constitutionality which Mr Justice Kirby appears anxious to reconsider, would be whether the non-compliance amounted to improper obstruction of the Senate within the meaning of section 4 of the *Parliamentary Privileges Act 1987*, which provides for the imposition of penalties for such improper obstruction.

It is just possible that, in determining that issue, the court would determine any claim of the executive to public interest immunity, that is, any claim that disclosure of particular information is not in the public interest. I think it unlikely, however, that a court would get involved in this issue if it could be avoided. As in the *Egan* case, the court would probably determine only the question of power. A ruling in favour of the Senate's power would not necessarily have the effect of bringing about the production of the documents in dispute. The Senate would simply have to keep on imposing penalties, their lawfulness having been established, in the hope of enforcing compliance.

On the whole, the political remedies are likely to be more effective than a contest in the courts.

Other jurisdictions have not arrived at any better solutions. The Houses of the United States Congress, which operate independently of the executive, have not found a more satisfactory remedy, although they are usually successful in practice in extracting evidence from reluctant administrations. As noted above, the U.S. Houses possess inherent powers to require the attendance of witnesses, the giving of evidence and the production of documents, and to punish

contempts. They have also enacted a statutory criminal offence of refusal to give evidence. In relation to the Senate, there is also a provision for committee subpoenas to be enforced through the courts by civil process, but this provision does not apply to government officers. In serious cases of conflict between the Houses and the administration over the production of documents, administration officers are "cited" for contempt, but these matters usually end in some compromise and with documents handed over. The courts have not become involved in such disputes. When presented with an opportunity to determine a legislature-executive dispute and an executive claim of public interest immunity, a court backed away from doing so, with an indication that the matter should be settled politically and that nothing short of a prosecution for criminal contempt under the statute would make the court adjudicate (Australia has no such statute) (*US v House of Representatives* [sic], 1983 556 F Supp. 160). Contests between Congress and administration are still left to "the ebb and flow of political power" (Archibald Cox, quoted in Report of Senate Committee of Privileges, PP 215/1975, p. 47).

Please let me know if I can be of any further assistance in relation to this matter.

REASONABLY NECESSARY POWERS: PARLIAMENTARY INQUIRIES AND *EGAN V WILLIS AND CAHILL*

In all but one of the jurisdictions of Australia, the houses of the various parliaments, by constitutional or statutory prescription, subject to statutory alteration, possess the powers, privileges and immunities of the British House of Commons, either as at a particular date or for the time being.

The effect of these provisions is to confer upon the houses a set of immunities and powers which were acknowledged by the common law, and which in some instances were embodied in statute, before the maturity of the Australian parliaments. The principal immunity is the freedom of parliamentary proceedings from impeachment or question before any court or other tribunal (enacted in article 9 of the Bill of Rights, 1689), and the principal power is the power to conduct inquiries and, for that purpose, to compel the attendance of witnesses, the giving of evidence and the production of documents and to punish contempts.

The exception is New South Wales, which has no such constitutional or statutory provision. In that state the immunities and powers of the houses depend on a common law doctrine that they possess such immunities and powers as are reasonably necessary for the discharge of their legislative functions. This law, expounded in the context of subordinate colonial assemblies, has been developed with the change in the houses' status to that of legislatures of a state of an independent federation.[1] The effect of this doctrine is that the houses possess an immunity of their proceedings from impeachment or question seemingly virtually identical to the article 9, Bill of Rights immunity, but no general power to punish contempts, upon which the power to conduct inquiries may be regarded as ultimately dependent. The extent of their other powers is something of a grey area.

Ironically, it is one of the New South Wales houses, seemingly in the weakest position amongst Australian parliaments in relation to powers, which has taken the strongest action in the exercise of its powers, and thereby found itself in court for judicial determination of the lawfulness of its actions. The underlying problem is one common to all legislatures in the Anglo-American stream: in the exercise of their function of conducting inquiries, houses frequently need information from executive governments. What is the solution if governments refuse to hand over information required by a house? In legislatures following the so-called Westminster pattern, where the executive usually controls the lower house through a disciplined party majority, the question usually arises only in relation to upper houses, like the federal Senate or the New South Wales Legislative Council, which have non-government majorities and seek to exercise their powers independently (although, as will be seen, New South Wales once provided an exception also to this rule). In most jurisdictions, upper houses seeking information and governments reluctant to produce it have not pushed their respective claims to the boundaries; governments have usually produced the required information or some compromise has been reached. Where a significant disagreement has arisen, it has usually been regarded as a matter to be settled politically, which means in practice that the majority of the house concerned seeks to inflict maximum political damage on a recalcitrant government. Indeed, a few years ago when a senator

[1] The cases go back to *Kielley v Carson* (1842) 4 Moo PC 63; the principal modern case is *Armstrong v Budd* (1969) 71 SR (NSW) 386.

suggested that the political issue should be turned into a legal issue by statutory reference to the courts, the Senate Committee of Privileges unanimously rejected such a measure and insisted that such contests should continue to be pursued politically.[2] In New South Wales, however, the parties to a dispute *did* push their claims to the boundaries, and headed for the courts.

The majority of the Legislative Council would no doubt say that this was due to the stubbornness of the Treasurer, Mr Egan, a member of the Council, in flatly refusing to produce documents demanded by the Council. In relation to a number of matters of great political controversy, including some involving allegations of government malfeasance, the Council passed orders for the production of documents and Mr Egan refused to produce them on the basis that such orders were not within the powers of the Council. Finally, exasperated by his obduracy, the Council in 1996 suspended him from its sittings, and he was escorted from the parliamentary precincts by the Usher of the Black Rod. He then went to the New South Wales Supreme Court seeking a declaration that the Council had acted beyond its powers.

A significant feature of the case was that Mr Egan made no claim of privilege or public interest immunity, that is, no claim that he should be immune as a matter of law from producing the documents because of the nature of the documents or the effect of their disclosure. He did not claim, for example, that production of the documents would be contrary to the public interest because they were the subject of legal professional privilege or cabinet deliberations. Instead, the case focussed on the lawfulness of the Council's action in demanding the documents and in dealing with him for default.

In denying the power of the Council, Mr Egan relied on a gloss on the principles of responsible government, which, according to his interpretation, requires that the executive government be accountable to the lower house alone and have no responsibility to the upper house. This argument had the virtue of overcoming one of those political inconsistencies which haunt politicians from time to time. Mr Egan's party, when in opposition, and when the then government did not have a majority in the Legislative Assembly, made great use of orders for production of documents, and forced that government to disgorge mountains of documents about various embarrassing matters. That was different, said Mr Egan, because that was in the Assembly, to which the government is alone responsible.

This Egan doctrine of responsible government was given short shrift in the courts, and was not the determinant of the case. The courts focussed on the question of whether the Council has the power to act as it did.

The Court of Appeal, to which the case was removed by consent from the Supreme Court, delivered an answer most favourable to the Council and unfavourable to Mr Egan.[3] Applying the doctrine that the Council possesses the powers reasonably necessary for the exercise of its functions, the court held that the Council has the power to order the production of "State papers", and, by appropriate means, to enforce such an order. It was held that, while there is no general power to punish for contempt, the suspension of the Treasurer from the Council was an

[2] 49th Report of the Committee, PP 171/1994, in relation to the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994.
[3] *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

appropriate means of seeking to ensure compliance with the order. In ejecting Mr Egan right out of the building, however, the Council acted beyond its powers (this became known as the "footpath point"). Chief Justice Gleeson, in applying the doctrine of reasonable necessity, referred to the effect of the *Australia Acts 1986* in raising the status of the New South Wales houses above that of a colonial legislature, and adopted the reasoning of the American law that the power to compel evidence is necessary to a legislature.[4] While that law extended the power to the punishment of contempts, he limited it to self-protection and coercion. The other two Justices, Mahoney and Priestley JJ, while agreeing with this reasoning, noted that no question of privilege or public interest immunity was raised, and that such a question could arise for future determination.

Not satisfied with this judgment, Mr Egan appealed to the High Court. (It is remarkable that there has not been more political comment on the propriety of a minister spending so much of the taxpayers' money on seeking to establish that the government does not have to provide information to Parliament.)

While the High Court dismissed the appeal, its answers to the questions raised were less clear-cut and provided more hints of future trouble from the parliamentary perspective.[5]

The new Chief Justice of the High Court did not sit on the case, having participated in the judgment of the Court of Appeal. Justices Gaudron, Gummow and Hayne, while sounding a cautionary note about limits to the Court's jurisdiction in areas of executive/legislative conflict, were content to apply the reasonable necessity test and to find that the Council had not crossed the boundary between self-protection and coercion on the one hand and punishment on the other. They pointed out, however, that questions of privilege or public interest immunity were not raised by the case, and nor was the question of the power of the Council to coerce private citizens. These matters were explicitly not examined. This was in response to submissions by Mr Egan's counsel, who painted disturbing pictures of the Council ransacking cabinet documents and seizing the private correspondence of hapless citizens.

Justice McHugh agreed that the appeal should fail on the basis on which it was pursued, but considered that technically it should have been allowed, so as to require the Court of Appeal to make a narrower order. He considered that the power to suspend a member inheres in the Council and that Mr Egan's case should be dismissed on that ground alone. The court should not determine the power of the Council to require the production of documents by ministers, but if the reasonable necessity test is applied, he would find that the Council does not have that power. Such a power would extend to private citizens, and the Council does not have any power to compel private citizens. The Council can *ask* for information and can suspend a member for obstructing it in that regard.

Mr Justice Kirby noted that the case did not provide an opportunity to determine whether the powers of the federal houses under section 49 of the Constitution, long held to include the power to punish contempts,[6] should be reinterpreted and read down to exclude that power. One senses that he would like an opportunity to engage in this exercise. He accepted the established test of

[4] *McGrain v Daugherty* (1927) 273 US 135; *Quinn v US* (1955) 349 US 155.
[5] *Egan v Willis and Cahill* (1998) HC 71.
[6] *R. v Richards, ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

reasonable necessity, but not necessarily the old cases relating to it. He agreed that the reasoning of the United States cases in relation to the power of investigation is applicable to the Council, but that the Council has no implied power to punish contempts. He found no error in the Court of Appeal's judgment.

Justice Callinan also accepted the reasonable necessity test and found that the Council's action was reasonably necessary and not punitive, but also noted that there was no question of public interest immunity.

This judgment is not the end of the matter. In November 1998 Mr Egan again refused to produce documents to the Council, and was again suspended from its sittings. He is again going to the Supreme Court to seek a ruling on the Council's powers, but on this occasion his claim is that the documents in question are protected by legal professional privilege, and the Council does not have the power to compel the production of such documents. It will be interesting to see how the courts deal with this question.

So far, the judgments are relevant only to the New South Wales houses because of the different foundation on which their immunities and powers rest. There is plenty of material in the judgments, however, to concern the houses in the other jurisdictions. It may be that the courts will be able to determine questions of public interest immunity only in relation to the New South Wales houses, but it is difficult to see how any pronouncements on that subject could be prevented from flowing over into the other jurisdictions in one form or another. There is also the hint from Mr Justice Kirby that section 49 of the Commonwealth Constitution should be reinterpreted to exclude the contempt power, notwithstanding the long-established and recently reiterated American law that such a power is inherent in a legislature. Then there is the horror which seems to be aroused in judicial breasts at the idea of houses compelling evidence from private citizens, although that has also long been recognised as essential to the power to conduct inquiries.

That power is seldom exercised, in that witnesses, official or non-official, are seldom coerced, and most evidence is taken voluntarily. All houses will have to be cautious in any exercise of the power in the future. As parliamentary matters, like all matters in modern society, are drawn more frequently into litigation, it can safely be predicted that this case, and Mr Egan's next case, will not be the last. The possibility of a clash between legislatures and courts cannot be ruled out.

ADVICE NO. 21

EXECUTION OF SEARCH WARRANTS IN SENATORS' OFFICES

Thank you for your letter of 8 December 1998, in which the Committee of Privileges asks whether I have anything to add to the briefing note provided to the Procedure Committee on this subject.

That note was perhaps not as clear as it could have been in setting out the background to the suggestion contained in it, and I think that I should attempt to clarify that statement of the background.

Some information relating to a recent case should also be provided to the committee.

Parliamentary privilege and search warrants

The law of parliamentary privilege, as largely codified in section 16 of the *Parliamentary Privileges Act 1987,* is mainly a use immunity and not a rule about admissibility of evidence: it restricts the use to which evidence of parliamentary proceedings may be put in proceedings before a court or tribunal. The purpose of that restriction is to ensure that there is no questioning or impeachment of parliamentary proceedings before a court or tribunal.

Parliamentary privilege also encompasses what the United States courts have called a "testimonial privilege": it provides a basis for a lawful refusal to provide evidence at all, without going to the use to which the evidence may be put.

It has always been clear that there is such a "testimonial" element in parliamentary privilege which could be invoked in certain circumstances. For example, if a senator were to be asked to give evidence in court about the content of the senator's speech in the Senate, the senator could refuse to answer any questions about the speech on the basis that answering in itself would facilitate a questioning of proceedings in Parliament, regardless of the use to which the answers might be put.

What was not clear was whether this "testimonial" element applied to documentary evidence, such that a senator could lawfully resist compulsory processes for the production of documents on the basis that production of those documents would, or would tend to, infringe parliamentary privilege.

Indeed, over many years senators have been advised that they have no immunity against compulsory processes for the production of documents, and, if they felt that the use immunity of parliamentary privilege provided them with insufficient protection of their parliamentary activities, in that the mere disclosure of documents could damage those activities, they should not keep documents which would be accessible by such processes. An example is the harm which might be caused to persons who have provided information to a senator by the disclosure of the information regardless of whether the information is used in any subsequent legal proceedings. Would-be litigants might be able to use information obtained from a senator to target by litigation

a senator's informants, and law enforcement bodies might be able to use such documents to launch investigations or prosecutions against other persons for unrelated matters. The provision of information to senators could thereby be discouraged.

The Parliamentary Privileges Act statutorily enacts a part of the "testimonial privilege": it provides in subsection 16(4) that in camera parliamentary evidence is not to be admitted as evidence in a court or tribunal for any purpose.

There may be other circumstances in which parliamentary privilege may provide a basis for resisting the production of documents. It has recently been made clear by the United States courts that production of documents may be resisted where interference with legislative activities is involved regardless of the use to which the documentary evidence is to be put (the *Brown and Williamson* case). Having had this judgment drawn to its attention, the Queensland Court of Appeal appeared to accept that parliamentary privilege could provide a basis for resisting an order for discovery of documents, depending on the nature of the documents, (the *O'Chee* case).

It is significant that both of these judgments concerned documents provided to members of the legislature by others; the American judgment is explicit that such documents may be protected by parliamentary privilege, the Queensland judgment at least leaves open that possibility.

It may be thought that the distinction between use immunity and the "testimonial privilege" is not very significant in practical terms. If a senator is presented with a subpoena or an order for production of documents from a court or tribunal, the senator can contest the legality of the process in the courts, and it may not matter whether that contesting of the process is done on the basis of the use to which the material may be put or the general principle of non-interference with parliamentary activities.

Search warrants, however, are different. The execution of a search warrant means that documents immediately fall into the hands of those seeking them, the law enforcement authorities. In the absence of some process whereby the question of parliamentary privilege can be raised, the recipient of a warrant has no opportunity to raise the question of whether material should be produced to those seeking it.

For that reason, it may be considered that a special procedure should be put in place in respect of search warrants.

I hope that this is a clearer summary of the background to this matter.

Recent case: attitude of law enforcement bodies

In a recent case of the execution of a search warrant in the offices of a senator (which has become a matter of public knowledge), the Australian Federal Police, with the apparent concurrence of the Director of Public Prosecutions, suggested that, as part of the procedure for the search under warrant, any material the senator claimed to be protected by parliamentary privilege should be sealed and delivered to a court until the claim of parliamentary privilege could be determined.

In making this proposal, those law enforcement authorities appear to accept that parliamentary privilege may provide a shield against the seizure of material under search warrant, and that there should be some procedure for determining whether the shield applies in a particular case. It also appears that they are ready to adopt such a procedure.

No doubt they were influenced by the agreed procedure already applying to warranted searches of legal practitioners' offices, whereby material claimed to be the subject of legal professional privilege is to be sealed and delivered to a court. They appear to see no reason, however, why the same procedure should not apply to parliamentary materials.

The Committee may wish to take this into consideration when determining whether it should recommend the adoption of the kind of procedure referred to.

Please let me know if the Committee would like any further information on this matter.

ADVICE NO. 22

PARLIAMENTARY PRIVILEGE: *HAMILTON V AL FAYED*

Significant observations about the nature of parliamentary privilege were made by the Court of Appeal in the United Kingdom in two recent judgments in the case of *Hamilton v Al Fayed.* I thought that I should draw these observations to the attention of the committee.

The exposition of parliamentary privilege made by the Court of Appeal clarified several issues. These clarifications are in accordance with the understanding of parliamentary privilege at the federal level in Australia and are reflected in the *Parliamentary Privileges Act 1987*, but they refute misunderstandings which are raised from time to time, particularly by critics of parliamentary privilege, and it is valuable to have a judicial statement of them.

The judgments were given on appeal from judgments by two different Queen's Bench Division judges on different, but closely related, aspects of the case. They arose out of a defamation action brought by Mr Neil Hamilton, a former member of Parliament, against Mr Mohamed Al Fayed, a businessman, in respect of statements made by Mr Al Fayed to the effect that he had paid bribes to Mr Hamilton to influence Mr Hamilton's performance of his parliamentary duties. The Parliamentary Commissioner for Standards had inquired into Mr Al Fayed's allegations and reported to the House of Commons that Mr Hamilton had indeed taken money from Mr Al Fayed. Mr Hamilton was defeated at a general election before the House of Commons could deal with the Commissioner's report. Mr Al Fayed brought an action to have Mr Hamilton's defamation suit struck out on the basis that the allegations against Mr Hamilton had already been upheld by a parliamentary inquiry, and that to subject them to judicial proceedings would infringe parliamentary privilege. He appealed against a refusal to strike out the defamation action, and also against a ruling that he could not refer in his defence to the fact that another member had admitted receiving bribes from him. The Court of Appeal held that the defamation action could proceed, and references to the other member could be made, provided that parliamentary privilege, properly understood, was observed.

In so holding, the court made observations about the nature of parliamentary privilege which may be summarised as follows.

(1) An inquiry and report by a person or body acting on behalf of a House of the Parliament, such as the Parliamentary Commissioner for Standards, are part of proceedings in Parliament and therefore attract the protection of parliamentary privilege.

(2) There is nothing to prevent judicial proceedings involving the same facts and circumstances as have been examined in a parliamentary inquiry, provided that the parliamentary inquiry itself is not impeached or questioned.

(3) Judicial proceedings, however, may not be used as a vehicle for an attack upon parliamentary proceedings. The court did not elaborate on how this might occur, but

clearly in this instance Mr Hamilton cannot attack the findings of the Parliamentary Commissioner as part of his case.

(4) Parliamentary privilege is essentially a separation of powers safeguard: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the Houses of the Parliament. In particular, it prevents the courts passing judgment on parliamentary proceedings and therefore being in the position of criticising anything said or done in parliamentary proceedings. Parliamentary privilege does not prevent public criticism of parliamentary proceedings as such. (This lays to rest a persistent misunderstanding of parliamentary privilege which has reappeared in other court judgments and the writings of commentators.)

(5) Parliamentary proceedings may be referred to in judicial proceedings as part of background information to a case, but cannot be used probatively. (This is what section 16(3) of the *Parliamentary Privileges Act 1987* seeks to clarify.)

One of the judgments also referred to section 13 of the UK *Defamation Act 1996*. This provision was enacted when the previous UK government was in office and was designed to allow Mr Hamilton to pursue his defamation action. The provision allows individuals to waive the protection of parliamentary privilege so far as it applies to them in defamation suits. This was to prevent Mr Al Fayed claiming that he could not defend himself against Mr Hamilton's action because some evidence relating to Mr Hamilton's conduct was protected by parliamentary privilege and could not be used in the defence. On that basis, Mr Al Fayed was able to have the action stayed in accordance with the principle applied by the court in *Prebble v Television NZ Limited* 1994 3 NZLR 1. The hasty and ill-considered enactment of section 13 has been much criticised as a serious inroad on the principle that parliamentary privilege is for the protection of the parliamentary process in the public interest and does not belong to the members. The Joint Select Committee on Parliamentary Privilege, which recently reported, recommended that it be replaced by a provision allowing the House to grant a waiver, but it remains to be seen whether this proposal, which has also been regarded as objectionable in the past, will be adopted. The provision, however, was not central to the Court of Appeal's judgments.

The judgments will not be binding but will be persuasive in any future Australian consideration of the nature of parliamentary privilege, in particular in supporting section 16(3) of the *Parliamentary Privileges Act*.

ADVICE NO. 23

EGAN V CHADWICK AND OTHERS

On 25 November 1998 I provided the Committee with a note on the judgments of the New South Wales Court of Appeal and the High Court in the case of *Egan v Willis and Cahill* relating to the power of the Legislative Council of New South Wales to require the production of government documents. Subsequently the editors of the journal *Constitutional Law and Policy Review* asked for an article on the judgments. Attached is a copy of the article which will be published shortly and which may be of interest to the Committee.

The Court of Appeal has now delivered another judgment in a related case, *Egan v Chadwick and others* (judgment delivered 10 June 1999, not yet reported). Mr Egan again went to the Court in an attempt to establish that the powers of the Legislative Council do not allow it to require the production of documents claimed to be protected by legal professional privilege or documents the subject of a public interest immunity claim. The Court unanimously rejected this argument, and found that the Council has the power to require the production of such documents.

The Court, restrained by the judgment of the High Court in the earlier case, confined itself to the doctrine that the powers of the Legislative Council are such as are reasonably necessary for the performance of its functions. Chief Justice Spigelman stated the question before the Court:

> Is it reasonably necessary for the proper exercise of the functions of the Legislative Council of New South Wales, for its power to require production of documents to extend to documents which, at common law, would be protected from disclosure on the grounds of legal professional privilege or public interest immunity?

The Chief Justice, with whom Justice Meagher agreed, answered this question in the affirmative. The Chief Justice found that to restrict the powers of the Council in the manner suggested by Mr Egan would be an intrusion of the Court into matters which should be determined by the legislature itself. Having regard to the principle that ministers are responsible to the Council, access to legal advice provided to government is reasonably necessary for the Council to perform its functions, and it is for the Council to weigh any claim of public interest immunity.

The Chief Justice also found, however, that the principle of responsible government, which the law recognises but does not seek to enforce (a recognition which he illustrated by a comprehensive examination of earlier judgments), imposes one restriction upon the Council's powers. Because responsible government requires the collective responsibility of cabinet and the confidentiality of cabinet deliberations, the Council may not require the production of documents which record the deliberations of cabinet. It appears that this category of documents is much narrower than the category of "cabinet documents" which is often cited by governments as a protected class.

The other Justice, Justice Priestley, did not find even that restriction on the Council's powers. He made the telling point that government documents are generated at public expense for public benefit:

> Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.

Just as the courts examine documents for which protection is claimed to determine where the balance of public interest lies, so must the Legislative Council have this capacity. Cabinet documents yield to the principle of government accountability, of which he made a ringing declaration:

> …. notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no *legal right* to *absolute* secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.

As indicated in the previous note, all of this has limited direct relevance to the Senate because of the different law under which the Legislative Council operates, but it would be difficult, in the light of this judgment, for any court to find that the Senate, with the positive prescription of section 49 of the Constitution, has any lesser power.

It is possible for the High Court to reverse or modify this judgment on appeal, but this is unlikely.

The judgment of the Court does not compel Mr Egan to hand over the documents in dispute. As the Court found, it is for the Council to determine the remedy for any continuing refusal to produce the documents, and such a remedy must be political rather than legal. The judgment simply establishes that Mr Egan has no *legal* grounds for his refusal in respect of most of the documents, and it was on legal grounds that he chose to argue by going to the Court.

ADVICE NO. 24

You asked for a note on the following two recently-delivered judgments. I hope that these observations may be of some use to the Committee.

RANN V OLSEN

The full Supreme Court of South Australia, constituted by five justices, gave a judgment on 12 April 2000 in the long-running defamation case brought by Mr Rann against Mr Olsen.

Mr Olsen claimed that he cannot adequately defend himself against the suit brought by Mr Rann because the remarks which are the subject of the suit were in response to remarks made by Mr Rann before a federal parliamentary committee which are therefore protected by parliamentary privilege and cannot be impeached or questioned in the course of the court proceedings. On this basis Mr Olsen applied for a stay of the proceedings. Mr Rann, in response to this application, submitted that the *Parliamentary Privileges Act 1987* did not have the effect claimed and is invalid if it purports to have that effect.

The most significant aspect of the judgment is that the Court unanimously rejected the submission that the Parliamentary Privileges Act is invalid. There were two bases for this submission: that the Act unconstitutionally trespasses on the judicial power by restricting the evidence which could be placed before a court, and that the Act is contrary to the implied freedom of political communication found in the Constitution by the High Court in that it restricts questioning of words uttered in Parliament. These arguments have been mooted in academic discussion in recent times. The Court found no merit in these arguments. It was found that, even if the Act, contrary to the expressed parliamentary intention at the time of its passage, extended the protection of parliamentary privilege beyond the law as it was under section 49 of the Constitution before the passage of the Act, the Constitution does not prevent such an extension of parliamentary privilege. In limiting the evidence which may be placed before a court, the Act is not different in principle from other laws which have the same effect in pursuit of an overriding public interest. In restricting the impeachment of parliamentary proceedings in the courts, the Act does not infringe the implied freedom of political communication. The fact that the Court was unanimous on this point gives a strong indication that the Act would be found to be constitutional if challenged in the High Court.

The Court was not unanimous on the question of whether a stay of the defamation suit should be granted, but by a majority declined to grant a stay. All of the justices found that the Parliamentary Privileges Act would prevent the questioning in the court proceedings of Mr Rann's contribution to parliamentary proceedings, but differed on the extent to which this limitation would inhibit Mr Olsen's defences. In effect, they decided that the defamation action should be allowed to run its course and the trial judge should then be able to determine the actual effect of parliamentary privilege on Mr Olsen's case. The trial judge will be bound by the determinations of the Full Court.

ROWLEY V ARMSTRONG

A judgment was delivered, also on 12 April 2000, by a single judge of the Supreme Court of Queensland in the defamation suit of Mr Rowley against Mr Armstrong. This action was the subject of the 67th Report of the Privileges Committee in 1997. The Committee found that a contempt had been committed by the taking of the legal action against Mr Armstrong, because the action was taken primarily to punish him for giving information to a senator for the purpose of Senate proceedings. The Committee refrained from expressing any view on whether the provision of information to a senator is also protected against legal action so that a court would dismiss such an action, and recommended that the Senate allow the legal proceedings to take their course. The Senate adopted the report on 22 September 1997.

The occasion of the judgment was an application by Mr Armstrong that the suit should be struck out because of unreasonable delay in pursuing it and because of the finding of the Committee.

This application did not provide an appropriate vehicle for deciding whether the defamation action is prevented by parliamentary privilege in that the provision of information to a senator by Mr Armstrong was, in the words of the Parliamentary Privileges Act, "for purposes of or incidental to, the transacting of the business of a House or of a committee". It was not necessary for the judge to determine this question in deciding whether to strike out the defamation suit. The judge had to consider only whether the stated grounds provided sufficient basis for terminating the suit at this stage.

The judge, however, in declining to grant the application to strike out the suit, delivered his opinion that the provision of information to a senator is not protected by parliamentary privilege.

In coming to this conclusion, the judgment does not consider all of the relevant arguments. There is no consideration of whether the provision of information to a senator may be for the purposes of or incidental to parliamentary proceedings. The judge relied on only two authorities. The first is the statement in Erskine May's Parliamentary Practice that the provision of information to members is not protected. As was pointed out to the Committee, this sweeping statement has no basis except two inconclusive cases in the House of Commons which do not provide any grounds for such a general conclusion. The second authority cited by the judge is the judgment in *R. v Grassby* which, as was also pointed out to the Committee, relied largely on the statement in Erskine May, and which dealt with a case in which the communication with the member had no connection with any parliamentary proceedings whatsoever. The judge also quotes out of context a statement in *Hamilton v Al Fayed* without considering the full implications of that case.

The judgment is therefore an inadequate treatment of the subject.

The effect of the judgment is merely that Mr Rowley may pursue his action against Mr Armstrong, and, as the judge says, it will be "for the Court to determine the question of liability in circumstances of any claim of privilege which the defendant is entitled to raise". The judgment, therefore, does not finally determine the issue of whether Mr Armstrong was protected in his communication with the senator.

The difficulty is that this judgment may be taken to be authoritative unless and until another court gives adequate consideration to the question.

Please let me know if the Committee would like any further information about these matters.

ADVICE NO. 25

PARLIAMENTARY PRIVILEGE — *ROWLEY V ARMSTRONG* —JUDGMENT OF JONES J

Thank you for your letter of 12 May 2000, in which the committee seeks extended comment on the judgment of Jones J delivered on 12 April 2000 in *Rowley v Armstrong.*

It is difficult to comment further on the judgment because it is so thin, and much of the short compass which is devoted to the question of parliamentary privilege is occupied by quotations which have little or nothing to do with the question at issue. I hope, however, that the following further observations may be of some use to the committee.

The judgment was delivered on an application by Mr Armstrong to have the action against him by Mr Rowley struck out on the grounds of unreasonable delay and abuse of process. The latter ground was based on the finding by the committee that the action constituted a contempt of the Senate and on the argument that the communication between Mr Armstrong and Senator O'Chee which is the subject of the action was protected by parliamentary privilege. By the second ground, therefore, the court was asked to find whether there was abuse of process in the pursuit of the action. It was not necessary for Jones J to determine the question of parliamentary privilege in order to ascertain whether there was abuse of process. A finding that there was no abuse of process would have left the question of privilege to be determined in the subsequent course of the proceedings. Jones J, however, pronounced on the question of parliamentary privilege.

Given that he decided to do so, the question for determination was whether the communication between Mr Armstrong and Senator O'Chee was related to proceedings in the Senate to the extent that the communication could be said to be for purposes of, or incidental to, those proceedings. This question would turn on the character of the communication and its relationship with proceedings in the Senate. The judgment, however, does not consider the character of the communication or its relationship with Senate proceedings. Jones J manages to avoid any such consideration in the course of the judgment. He simply comes to a general conclusion that "an informant in making a communication to a parliamentary representative is not regarded as participating in 'proceedings in Parliament' and therefore the provisions of the *Parliamentary Privileges Act* do not apply", and he applies that general conclusion to the particular communication in question.

Contrary to the judgment, this general conclusion is not one which "follows clearly enough" from the matters cited by Jones J, a point to which I shall return. In any event, no such general conclusion can be drawn. Whether the provisions of the Parliamentary Privileges Act apply depends on whether the communication is for purposes of, or incidental to, parliamentary proceedings. The character of the particular communication and its relationship with proceedings has to be examined. No one has ever claimed that *any* communication with a member of Parliament is protected by parliamentary privilege. Jones J has not only determined a question unnecessarily but has mistaken the question to be determined.

The section of the judgment dealing with parliamentary privilege quotes the Parliamentary Privileges Act, and very nearly states correctly the question in issue (referring to "the position in

particular", but then failing to return to the particular position). It then diverts to the principle of "the Court's reluctance to interfere with the activities of the parliamentary and executive areas of governments". This issue is illustrated by a long quotation from *Criminal Justice Commission v Nationwide News Pty Ltd*. It is not clear whether this issue was raised by the applicant as an additional support for the application, but it has nothing to do with the case. The question of whether some parliamentary and executive activities are non-justiciable is irrelevant to the question of whether, as a matter of law, a particular communication with a member of Parliament is protected by parliamentary privilege. The judgment then leaves this issue without relating it to the case, and observes that the scope of parliamentary privilege and the Commonwealth and Queensland statutes have been examined in *Laurance v Katter* and *Rowley v O'Chee.* It is then stated that "it is not necessary to re-canvas the issues decided in each of those cases". It is left to the reader to puzzle over the relevance which those judgments were thought to have to the case, because no conclusion is drawn about their relevance.

The judgment then launches into a long quotation from *Rost v Edwards*. This quotation refers to ousting the jurisdiction of the courts, which has no relevance to the interpretation of the provision in the Parliamentary Privileges Act, and it then states that there is no exhaustive definition of proceedings in Parliament. The latter observation, in a British case, refers to the British situation in which there is no statutory equivalent of section 16 of the Parliamentary Privileges Act. It has nothing to do with the task of an Australian court of interpreting that Act. The judgment then baldly states the conclusion that "the defendant's act of communicating with the Senator was not 'a parliamentary proceeding' as that term is contemplated by the statute". That is not a difficult conclusion, but it either avoids or misunderstands the question in issue. The question is whether the communication was for purposes of, or incidental to, parliamentary proceedings, as contemplated by the statute.

The judgment then refers to article 9 of the Bill of Rights of 1689, unnecessarily, as that provision is encompassed and explicated by the Parliamentary Privileges Act. This is followed by a quotation from the judgment in *Hamilton v Al Fayed*, which simply states that parliamentary proceedings are protected in two different ways in court proceedings. Indeed they are, but the question is the relationship of Mr Armstrong's communication with proceedings in Parliament. The quotation adds nothing to that question, and the quoted judgment was not concerned with that issue.

The judgment then proceeds to one of only two relevant authorities which are cited. This is a passage in Erkine May's *Parliamentary Practice,* to which attention was drawn by Sir James Killen, junior counsel for Mr Rowley. This quotation contains the sweeping statement that no protection is afforded to informants of members of Parliament, regardless of whether information is subsequently used in parliamentary proceedings. There are several difficulties with this passage which are unperceived by Sir James Killen or Jones J. Even if it were an accurate summary of the law in the United Kingdom (which it is not, because the question in issue has not been adjudicated there), it would be of no help in interpreting the Australian statute. The passage is directed to the question of whether the House of Commons may protect members' informants by the exercise of its contempt jurisdiction. This is quite different from the question of whether a communication with a member is protected by parliamentary privilege as a matter of law, a distinction to which I shall return. Even as a statement of the House of Commons' exercise of its contempt jurisdiction, however, the passage is defective. It is based on two cases in the 1950s

involving communications with members. In one case the House declined to refer a matter of alleged interference with a communication with a member to the Privileges Committee. There were several relevant considerations, apart from an argument, advanced by Winston Churchill, that protection should not be extended to such communications. The Speaker had ruled that the matter could not have precedence because it was not raised at the earliest opportunity, and it was pointed out that the communicant, a clergyman, was merely rebuked by an ecclesiastical superior, a bishop, who had no power to interfere with the clergyman's political activities in any event. In the second case the Committee of Privileges was able to recommend that no action be taken, on the basis that members of the armed forces were involved and it was a matter of military discipline, because government regulations conferred a right on members of the armed forces to communicate with members of Parliament. The two cases cannot be regarded as determining for all time that the contempt jurisdiction will never be exercised to protect a communication with a member.

The judgment then provides a long quotation from Fleming's *Law of Torts* which states that absolute immunity is an aid to the efficient functioning of the legislature, the executive and the judiciary, but which throws no light on the point in question.

The judgment then proceeds to its only other authority, the finding of the Supreme Court of New South Wales in *R v Grassby,* which is quoted at great length. It was there held that the communication of a document to a member of Parliament was not protected by parliamentary privilege. There are several factors involved in this judgment which render it of little assistance. In the first place, it was concerned with the law of parliamentary privilege applying to the Houses of the Parliament of New South Wales, where there is no constitutional or statutory prescription of parliamentary privilege. The protection of the proceedings of the Houses in that state depends on a common law doctrine that the Houses, their committees and members have such protections as are reasonably necessary to allow them to perform their functions. The judgment therefore is of no help in interpreting the Commonwealth Parliamentary Privileges Act. The circumstances of the judgment are also significant. The case was one of an unsolicited communication to a member which had no connection whatsoever with any proceedings in Parliament, actual or potential. The judgment is therefore of little use in determining the position, under Commonwealth law, of a communication which has a very different relationship with proceedings in Parliament.

Jones J then quotes a long passage from the judgment in *O'Chee v Rowley*. The passage deals with some irrelevant points, such as whether an individual member of a House may waive the protection of privilege, and it has only one sentence which is remotely relevant: "The privilege under s.16(2) attaches when, but only when, a member of Parliament does some act with respect to documents for purposes of, or incidental to, the transacting of House business." This sentence should have suggested to Jones J the question to which he should have directed his attention, namely, whether the communication between Mr Armstrong and Senator O'Chee had a sufficiently close connection with proceedings in Parliament to attract the protection of the statute. On the contrary, the passage suggested to Jones J only that an informant is never protected in making a communication with a member.

The judgment then proceeds to dismiss with great brevity the significance of the Senate Privileges Committee determining that the action against Mr Armstrong was a contempt. The

question of whether the action was a contempt, however, was carefully distinguished by the committee from the question of whether Mr Armstrong's communication with Senator O'Chee was protected from legal action by parliamentary privilege. Jones J is not alive to that distinction. He says that the finding of the committee "does not in any way affect the rights of the plaintiff in this instance to pursue his claim and for the Court to determine the question of liability in circumstances of any claim of privilege which the defendant is entitled to raise". So the judgment comes back to the question which, as this sentence appears to suggest, can only be determined in the course of the proceedings on the action brought by Mr Rowley. Oblivious to his own suggestion in this sentence, however, Jones J has already determined the question which it was not necessary for him to determine.

While quoting passages which he thought supported his general conclusion (although most of them do not), Jones J ignored other passages which should have suggested to him that he should not be so ready to conclude that communications with a member of Parliament are never protected. He might have been cautioned by McPherson JA's acceptance in *O'Chee v Rowley* of the proposition that "threats of proceedings being taken against his informants had the effect of discouraging them from providing further information about Mr Rowley's activities, and so of restricting the senator's ability to pursue the subject in the House", and the same justice's reference to the American courts' acceptance of the principle that court processes are capable of having a "chilling" effect on legislative activity by hampering the ability of the legislature "to attract future confidential disclosures necessary for legislative purposes" (1997 150 ALR 199 at 212 and 214). That reference might have led Jones J to the conclusion, in the judgment cited by McPherson JA, that allowing legal processes to reach evidence "that Congress *had not prepared itself* [emphasis added] …. certainly would 'chill' any congressional inquiry; indeed, it would cripple it" (*Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408, at 417 and 419). He might also then have discovered that information-gathering for legislative purposes, including information-gathering from constituents, has been held to be protected (*United Transportation Union v Springfield Terminal Railway Co.,* 1990 132 FRD 4, and the order of 15 March 1989 made in that case).

Analysis of the judgment therefore leaves us simply with the finding that an informant is never protected in communicating with a member of Parliament, and with a collection of quotations which do not support such a conclusion.

I would be pleased to provide any future assistance to the committee in its examination of this matter.

ADVICE NO. 26

PROVISION OF INFORMATION TO SENATORS — ACTIONS BY MR ROWLEY

Thank you for your letter of 3 July 2000 in which the Privileges Committee seeks views on further steps which may be taken in relation to the actions brought by Mr Rowley against former Senator O'Chee and Mr Armstrong and the judgment of Jones J.

As you indicated that the committee will not be considering the matter until 17 August, I did not hasten to reply.

When there was still time for Mr Armstrong to lodge an appeal against the judgment of Jones J, the committee could have recommended to the Senate the funding of an appeal by Mr Armstrong. (It was, of course, not open to the Senate, not being a party to the proceedings, to appeal.) I think that the committee was correct in not pursuing this option. Mr Armstrong's action, to have Mr Rowley's action terminated on the ground of abuse of process, was not an appropriate vehicle to determine the parliamentary privilege question, and a determination of that question would not necessarily have resulted even from a successful appeal. There is also the traditional hostility of the law to the funding of legal proceedings by persons not parties to those proceedings; I am not sure whether this is still unlawful in Queensland under an old common law doctrine or some statutory substitute, but it would not be wise for the Senate to enter that arena in any event.

The only feasible step for the Senate to take would become possible if either of Mr Rowley's actions actually came to trial. In that event counsel instructed for the Senate could seek leave to appear as *amicus curiae* to assist the court on the parliamentary privilege question and to make submissions on the appropriate application of parliamentary privilege principles and the relevant statutory provision to the particular actions. This may result in appropriate findings by the court and reversal of Jones J's unsatisfactory judgment. The committee would be aware that there is precedent for such intervention in relevant cases. The committee could recommend this course to the Senate. Such a recommendation could be made and adopted in advance of any indication that Mr Rowley intends to bring the actions to trial.

The only other possible course of action is for the Parliament to legislate to repudiate Jones J's judgment. This would be inadvisable for several reasons. In the first place, the initiation of such legislation would appear to concede that the judgment is a feasible interpretation of the relevant law and might be upheld by a higher court. Such a concession should not be made, and the Senate should be confident in having the judgment overturned if the issue comes before a higher court. Secondly, any such legislation would attempt to spell out the meaning of "for purposes of or incidental to" parliamentary proceedings in the Parliamentary Privileges Act. It is neither possible nor desirable to do so. Any attempt to provide an all-inclusive statement of the content of that expression would rely either on some substitute general expression which would not advance the definition, or on a list of matters included in the expression which would involve the danger of excluding matters which ought to be covered. The Parliament ought to be able to rely on the courts to give appropriate application to the current words of the statute, which are as clear as they can be for the purpose.

It may be helpful to draw to the attention of the committee a judgment given on 25 July 2000 by another justice of the Supreme Court of Queensland, Helman J, in *Criminal Justice Commission and others v Dick.* In that judgment it was held that the conduct of an investigation and the preparation of a report by the Parliamentary Criminal Justice Commissioner, a statutory parliamentary official, for the Parliamentary Criminal Justice Committee of the Queensland Legislative Assembly, was a proceeding in Parliament and therefore not amenable to judicial review. In the light of a statutory provision in Queensland in virtually identical terms to section 16(2) of the *Parliamentary Privileges Act 1987,* declaring the preparation of a report under the authority of the House or a committee to be a proceeding in Parliament, it was hardly open to the court to make any other finding, but the judgment exhibits an understanding of parliamentary privilege which was absent from that of Jones J.

I would be pleased to provide the committee with any further information or assistance in relation to this matter.

ADVICE NO. 27

EVIDENCE FROM HOUSE MEMBERS OF JOINT COMMITTEE

Thank you for your letter of 17 August 2000, in which the Committee of Privileges seeks views on matters it should take into account when determining whether to hear evidence from House of Representatives members of the Joint Committee on Corporations and Securities.

I hope that the following observations may be of use to the committee.

Relevant rules of the Senate

It may be helpful if I begin by setting out the relevant rules of the Senate.

Standing order 178 provides that where the Senate or one of its committees requires the attendance of a member or officer of the House of Representatives, a message is sent by the Senate to the House asking that the House authorise its members or officers to give evidence. If the House authorises its members or officers to give evidence, they are not compelled to do so. The House of Representatives has a similar rule in relation to evidence by senators or officers of the Senate.

The standing orders are interpreted as not requiring a message to be sent for the purpose of members or officers of one House appearing by invitation before committees of the other. Members of the House of Representatives, including on one occasion the Speaker, have appeared by invitation before Senate committees without a message to the House or a House resolution authorising their appearance.

This informal procedure of appearance by invitation is used only in cases where members are offering their views on matters of policy or administration under inquiry by Senate committees. The procedure has not been used in cases where the conduct of individuals may be examined, adverse findings may be made against individuals or disputed matters of fact may be under inquiry. For such cases it is considered that the formal process of message and authorisation to appear should be employed.

Even where the formal message and authorisation process occurs, however, this does not set aside the rule that one House cannot inquire into, or judge, the conduct of a member of the other House, except where the conduct of a minister as a minister is under examination. This rule was referred to in rulings by President Sibraa on 17 May 1988 and 19 and 22 September 1994 and by President Reid on 23 October 1997. On the basis of the rule, President Sibraa declined to give precedence to matters of privilege because they would necessarily involve inquiry by the Senate into conduct of members of the House, and a reference to the Senate Privileges Committee on 27 October 1997 was explicitly framed so that the committee, in pursuing its inquiry, would not examine the conduct of any member of the House in that capacity.

If a member of the House appears before a Senate committee pursuant to an authorisation by the House after a message from the Senate, the committee must therefore refrain from putting any

questions to the member which would amount to inquiring into his or her conduct, and cannot make any findings about the conduct of the member.

Past cases

I now turn to the way in which the matter has been handled in past cases.

In previous cases where the Senate Committee of Privileges has examined unauthorised disclosures of the documents of joint committees, it has written to House members of those committees asking for any information in their possession on the matters under inquiry (these cases were reported in the 54th and 74th reports of the committee, there being two cases in the latter report). In another case the joint committee concerned had already asked its members whether they had disclosed the material in question (48th report). The committee did not go beyond this step of asking House members of the joint committees for relevant information.

It may be thought that simply by writing to the House members of the joint committees, the Privileges Committee was getting into the forbidden area of inquiry into conduct of House members. I do not think that this is so; I think that that step is consistent with the rules outlined above. If the House members, in their voluntary responses, had revealed anything which could have led to inquiry into their conduct or adverse findings about them, the committee would then have been obliged to refrain from any such inquiry or finding. In effect, the step of writing to the members was taken simply to discover whether they had any relevant evidence which could be considered by the Senate Privileges Committee in accordance with the rules.

Hearing oral evidence from House members, however, would involve a risk of inquiry into their conduct in the course of putting questions to them. Such questions might be limited to their knowledge of other persons' relevant activities or of relevant circumstances, but invariably questions would arise about their own relevant activities, and any such questions would probably amount to inquiry into their conduct.

In two cases in which the House of Representatives committee was directed by the House to inquire into unauthorised disclosures from joint committees, in 1986 and 1993, the House sent messages to the Senate asking the Senate to authorise senators to give evidence before the House Privileges Committee. The Senate duly authorised its senators to appear if they chose. In neither case did the possibility of inquiry into the senators' conduct or adverse findings against senators arise; in both cases the House Privileges Committee was not able to discover who made the unauthorised disclosures.

Implications for the current case

I now turn to the implications of the rules and precedents for the current case.

If the committee decides to hear oral evidence from House members of the Joint Committee on Corporations and Securities, the committee should recommend to the Senate that the Senate send a message to the House asking the House to authorise those members to appear. It would not be appropriate to adopt the process of informal appearance by invitation in an inquiry into an unauthorised disclosure.

If this step is taken, and House members appear before the committee, the committee would need to carefully frame any questions put to the members so as not to be in the position of inquiring into their conduct. The committee would also have to refrain from making any adverse findings about them. Questions could be put to the members about their knowledge of relevant circumstances or relevant activities of other persons (other than other House members). The committee would need to consider whether any such questions could usefully be put to the members.

If the committee requires any elucidation or elaboration of these points, or any other information, I would be pleased to respond.

ADVICE NO. 28

MCGLADE V HREOC AND LIGHTFOOT

The committee should be informed of a case in the Human Rights and Equal Opportunity Commission which appeared at first to raise a question of parliamentary privilege and which may yet do so.

Ms H. McGlade brought a complaint before the Commission on the basis that statements by Senator Lightfoot were in breach of the *Racial Discrimination Act 1975.* On first indications it appeared that Ms McGlade might be seeking to rely on statements made by Senator Lightfoot in the Senate to support her action, which would clearly be contrary to the law of parliamentary privilege. The attention of the Commission was drawn to this potential problem. Subsequently, Ms McGlade's action appeared to rely solely on a statement allegedly made by Senator Lightfoot outside the protected parliamentary forum in an interview with a journalist.

In January 1999 Commissioner Johnston dismissed Ms McGlade's complaint on the basis that it was misconceived within the meaning of the Act. In his reasons for dismissing the complaint, Commissioner Johnston indicated an awareness of parliamentary privilege, but referred to the fact that Senator Lightfoot made a statement by way of an apology in the Senate on 28 May 1997 as a reason for concluding that the complaint was misconceived. At the same time, he indicated that, because of parliamentary privilege, Ms McGlade could not question that statement.

The question arises whether Commissioner Johnston was entitled to use the statement in the Senate as a basis for dismissing the complaint. The committee would be aware that section 16(3) of the Parliamentary Privileges Act prevents anyone *relying on* the truth, motive, intention or good faith of proceedings in Parliament. A litigant cannot use proceedings in Parliament to defeat another litigant's action any more than that other litigant can rely on proceedings in Parliament to support the action. It may be contended that Commissioner Johnston was simply referring to the statement in the Senate as a background fact in making his determination under the statute, and not relying on it in the sense of the prohibition. It is a very arguable question.

Ms McGlade appealed against the Commissioner's decision, and as parliamentary privilege did not appear to be an issue in the appeal, the question was not pursued at that stage. On 18 October 2000 Justice Carr of the Federal Court upheld the appeal, set aside Commissioner Johnston's decision, and returned the matter to the Commission for further proceedings. The basis of this judgment was that Commissioner Johnston had erred in law by misinterpreting the meaning of "misconceived" in the Racial Discrimination Act.

The judgment incidentally referred, however, to an argument raised by Ms McGlade that Senator Lightfoot's statement in the Senate was an irrelevant factor which should not have been taken into consideration by Commissioner Johnston in making his decision. Justice Carr observed that the statement could be taken into account as a relevant factor.

This aspect of the judgment raises the possibility that Senator Lightfoot's statement in the Senate may again become an issue in the proceedings before the Commission, and it may again be necessary to remind the Commission of the law of parliamentary privilege.

I will monitor the progress of the case and keep the committee informed.

ADVICE NO. 29

EXECUTION OF SEARCH WARRANTS IN SENATORS' OFFICES

The Privileges Committee should be advised of recent developments relating to search warrants.

On 22 April 2001 an item appeared in the *Sunday Herald Sun* headed "MPs tipped off on raids". On the same day the *Sunday Telegraph* had an item headed "Raid rules for MPs: Police must give warning of searches". Copies of these items are attached. They refer to a checklist used by the Australian Federal Police (AFP) for searches of offices of members of the Parliament under search warrant and to "training" undertaken by the AFP with the Clerk of the Senate. The items were based on an answer provided by the AFP to an estimates question on notice asked at the estimates hearing of the Legal and Constitutional Legislation Committee on 19 February 2001. Attached is a copy of the answer. The reference in the answer to AFP officers being "instructed in parliamentary privilege by Mr Harry Evans of the Senate" refers to arrangements for AFP officers to participate in one of the seminars, modified for their particular interest, on the subject of parliamentary privilege provided by the Department of the Senate.

At the seminar, it appeared that AFP officers present were involved in the task of revising AFP guidelines for the execution of search warrants in the offices of members of the Parliament. After some discussion of the issues involved, it was agreed that there would be some value in Senate officers, relevant AFP officers and relevant Attorney-General's Department officers meeting to discuss the preparation of the revised guidelines.

The need for guidelines was referred to in the 75th Report of the Senate Privileges Committee in March 1999 on the execution of search warrants in senators' offices, and the committee recommended that guidelines be prepared for discussion between the Presiding Officers and the Attorney-General. The report of the House of Representatives Privileges Committee of November 2000 on the status of the records and correspondence of members also recommended such guidelines.

I met accordingly with AFP and Attorney-General's Department officers on 7 May 2001. The Deputy Clerk of the House of Representatives also attended.

The discussions proceeded on the basis that the judgment of Mr Justice French in *Crane v Gething* represents the law on the subject for the time being, that a claim of privilege by a member has to be determined by the House concerned, and that the guidelines should be drawn up on that basis.

The Attorney-General's Department officers indicated that the development of the revised guidelines would now proceed with expedition, but the guidelines would need to be cleared by the Attorney-General. I suggested that, when the guidelines had been cleared by the Attorney-General, they should be sent to the Privileges Committees of the two Houses for examination.

The AFP would prefer that officers executing search warrants be allowed to look at documents for which privilege was claimed to determine whether the documents were of interest to the

searchers. This could allow documents to be excluded from consideration and avoid the necessity of some person appointed by the House concerned examining the documents, as was done with the documents seized from Senator Crane. The AFP and Attorney-General's Department officers are concerned, as am I, about the possibility of members claiming privilege for large quantities of documents and police investigations and prosecution decisions being inordinately delayed while the documents are examined by some neutral third party. I indicated that it would probably not be acceptable to members for documents the subject of a claim of privilege to be examined by the searchers, but that as part of the guidelines perhaps members should be required to provide a general description of the nature of documents for which privilege is claimed as well as the basis of the claim. I added that the Privileges Committees would not, of course, be bound by this suggestion.

It was agreed that the discussions had assisted the officers in the process of revising the guidelines.

Attachment A: Article in the Sunday Telegraph 22 April 2001

Raid rules for MPs Police must give warning of searches -
EXCLUSIVE By national political writer SIMON KEANEY

POLITICIANS are being warned before police raid parliamentary offices so they can be prepared for the search, secret guidelines reveal.

An Australian Federal Police (AFP) checklist show MPs receive a range of special considerations when they are under investigation.

The checklist, obtained by The Sunday Telegraph, gives police specific "raiding instructions".

They include an order that AFP officers must give MPs time to get representation before the search.

MPs receive special treatment because police can be jailed for six months or fined $5OOO under the Parliamentary Privileges Act for impeding MPs in their duty.

"The proposed entry time . . . will allow the Member ready access to the Speaker of the House or the President of the Senate, his or her solicitors or any other party he or she wishes to consult in relation to the search," the checklist states.

"The usual practice should be followed of prior consultation with the presiding officer:; (Speaker or President) before conducting inquiries or executing any process in the Parliamentary precincts."

The offices of dozens of MPs have been raided in the past. Former MPs Ma1 Colston, Michael Cobb and Bob Woods were all raided over travel rorts allegations in 1997.

The special powers have been called upon by MPs several times in the past 12 months, including most recently after unproven allegations of a fight at Canberra's Holy Grail nightspot between three MPs.

The checklist also instructs officers not to execute search warrants before 5pm to minimise disruption to MPs.

"Execution at the close of the business day is less likely to interfere with the Member's parliamentary duties and hence reduce the likelihood of contempt of Parliament being raised as an issue," the checklist says.

Police have also been ordered to try to minimise publicity of the raid to avoid embarrassment for the MP.

One of the main reasons cited in the checklist for searches after 5pm was "to ensure minimal exposure - particularly to media attention - in the execution of the warrant".

But Griffith University criminologist Tim Prenzler said the AFP guidelines went too far.
While police do not publish figures on the number of raids conducted each year, Dr Prenzler said thousands of regular citizens were raided annually without any warning. "Politicians should be treated like any other citizen. A special immunity appears to be going too far," he said. "It could be protecting the guilty."

The AFP's entire head office investigations team completed training two weeks ago with the Clerk of the Senate, Harry Evans, on how to conduct raids without breaking the privileges law.

An appendix to the checklist says the special treatment is unlikely to be needed, if the MP is the chief suspect in a criminal matter.

Attachment B: Article in the Sunday Herald Sun (Melbourne) 22 April 2001, p. 18

MPs tipped off on raids

by Simon Kearney

POLITICIANS are warned before police raid parliamentary offices so they can be prepared for the search, secret guidelines reveal.

An Australian Federal Police checklist shows MPs receive a range of special considerations when they are under investigation.

The checklist gives police specific “raiding instructions".

They- include an order that AFP officers on the raid must give MPs time to obtain representation before the search.

“The proposed entry time ... will allow the member ready access to the Speaker of the House or the President of the Senate, his or her solicitors or any other party he or she wishes to consult in relation to the search,” the checklist states.

“The usual practice should be followed of prior consultation with the presiding officers (Speaker or President) before conducting inquiries or executing any process in the parliamentary precincts.”

The checklist, written by the AFP and presented to Parliament by AFP deputy commissioner Mick Keelty, also instructs officers not to execute search warrants before 5pm to minimise disruption to MPs.

“Execution at the close of the business day is less likely to interfere with the member’s parliamentary duties and hence reduce the likelihood of contempt of Parliament being raised as an issue,” the checklist says.

Police have also been ordered to try to minimise publicity of the raid to avoid embarrassment for the MP.

One of the main reasons cited in the checklist for searches after 5pm was “to ensure minimal exposure - particularly to media attention - in the execution of the warrant”.

MPs receive special treatment because police can be jailed for six months, or fined $5000 under the Parliamentary Privileges Act for impeding an MP in their duty.

The AFP has now called on the Clerk of the Senate, Harry Evans, to train officers on how to conduct raids without breaking the privileges law.

The special treatment during the search includes being able to make police photocopy documents the MP needs before they are seized.

MPs can also ask to have documents sealed to go before the Speaker to assess whether the police can have access to them.

The police must inform the presiding officers if they intend to carry out any raid in Parliament.

The offices of dozens of MPs have been raided in the past. Former MPs Mal Colston, Michael Cobb and Bob Woods were all raided over travel rorts allegations in 1997.

The special -powers have been called upon by MPs several times in the past 12 months, including most recently after unproven allegations of a fight at Canberra’s Holy Grail nightspot between three MPs.

The checklist is given to every member of the AFP's head office investigations team when they begin investigating alleged crimes from the AFP's home base in Canberra.

An appendix to the checklist says the special treatment is unlikely to be needed if the MP is the chief suspect in a criminal matter.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Bolkus asked the following question at the hearing of 19 February 2001.
Can the AFP provide any documents that might be available to officers doing the course or any notes that may be pertinent to this question [of parliamentary privilege]?

I am advised that the answer to the honourable Senator's question is as follows:

All investigators attached to the AFP's Head Office Investigations team are given an introductory package, which includes material on parliamentary privilege. The material is contained in a guideline and a checklist pertaining to the execution of search warrants and Members of Parliament. These extracts are attached. At the Additional Estimates hearing on 19 February 2001, Deputy Commissioner Keelty stated that federal agents attached to Head Office Investigations are instructed in parliamentary privilege by Mr Harry Evans of the Senate. In clarification, whilst such training was arranged with Mr Evans for 12 December 2000, it was postponed. Arrangements are currently being made to reschedule the training course.

EXTRACTS FROM THE EXECUTION OF SEARCH WARRANTS RELATING TO MEMBERS OF PARLIAMENT (A CHECK LIST)

1.5 Section 15 of the Parliamentary Privileges Act 1987 states that Police may exercise their ordinary powers within the Parliamentary precincts and the Team Leader should also have a good general knowledge of the workings of the Australian Parliament.[7]

2.2 AFP members should make themselves familiar with issues that may amount to an offence against Parliament or things that may render an item not seizable by virtue of statutory parliamentary privilege. These are mentioned in the 'Guidelines for execution of search warrants by the AFP on the Electorate offices of Members of Parliament'[8] (hereinafter referred to as 'the guidelines') and should be raised in the affidavit as having been given due consideration. The document attached at Annex 'A' includes guidelines on:

[7] Odgers Australian Senate Practice, 7th Edit 1995, edited by H Evans Clerk of the Senate and House of Representatives Practice 1997, edited by L. Barlin, Clerk of the House of Representatives, is a recommended reference

[8] As of July 1997 the 'guidelines' are in DRAFT FORM ONLY and are yet to be formally adopted. However, the procedures set out in the guidelines should be adhered to in the meantime.

- Issues of obstructing a Member of Parliament in the execution of their duty
- Parliamentary Privilege
- Claims of Privilege by the Member of Parliament
- Dealing with Confidential material

2.3 AFP Legal Counsel provided an opinion in February 1997 in respect to possible offences against the Parliamentary Privileges Act 1987. This Act imposes sanctions for offences against the House such as Contempt of Parliament. A summary of this opinion is attached at Annex 'B'.

2.4 The Deputy Director, DPP Perth has given an opinion relative to 'Search and seizure on the Electorate Office of a Member of Parliament – Parliamentary Privilege.' dated August 1995. The substance of this opinion should be considered in the course of obtaining and executing a search warrant relating to Members of Parliament. A summary of this opinion discussing Parliamentary Precincts and Parliamentary Privilege is attached at Annex 'C'.

2.5 Members should also be aware of the provisions of Section 13 of the Parliamentary Privileges Act 1987, which prohibits the unauthorised disclosure of certain evidence. This disclosure relates to such things as:

- A document prepared for the *purpose* of submission and submitted to a House or Committee which has been directed by a House or committee to be treated as evidence taken in camera.
- The same relates to a document containing a record of oral evidence under the same circumstances.

5.4 The following paragraph has been included in approved affidavits relative to a possible claim of privilege, namely:

'If in the course of the execution of the search warrant the member or any person in authority on his behalf claims Parliamentary Privilege I hereby undertaken to adopt the following procedure:
A. To inquire as to why privilege is claimed
B. Regardless of the answer supply the member with a copy of the document(s)
C. Seal the documents in containers in the presence of the member or interested party
D. Deliver the containers, intact, to a person mutually agreed between me and the member or interested party) such as the Clerk of the Court at……or a person of like office.[9]

[9] Tentative arrangements for the same should be made prior to the execution of the warrant without disclosing the individual subject of the warrant (although this may well be the issuing Judicial Officer in which case disclosure of the name will not be an issue).

E. Allow the documents to be so held by the independent party until such times as the Speaker of the House or President of the Senate determines what action is to be taken.

5.7 The following text has been included in an affidavit regarding the search of premises outside business hours, namely:

'The reasons I request to search the business premises outside normal business hours are as follows:
A. To insure the Members electorate office duties are not unduly hindered.
B. To ensure minimal exposure (particularly to media attention) in the execution of the warrant; and
C. The proposed entry time of around (insert relevant time) will allow the member ready access to the Speaker of the House/President of the Senate, his or her solicitors or any other party he or she wishes to consult in relation to the search.
6.1…..

- **It has been long established practice that the Presiding Officer has always been consulted in respect to matters within his or her jurisdiction. This includes intended investigations, arrests or the execution of process, including Section 3E warrants within the precincts of Parliament House. Checks should be conducted to insure the subject premises has not been declared by regulations as being part of Parliamentary precincts for the purpose of the Act. The 'Parliamentary precincts' is defined by section 4 of the Parliamentary Precincts Act 1988.**

9.1 Where possible and providing the integrity of the investigation is not compromised efforts should be made to execute the warrant when the Member is in attendance at the subject premises or can readily be called to attend without hindering Parliamentary duties…….

9.3 Execution at the close of the business day is less likely to interfere with the Member's Parliamentary duties and hence reduce the likelihood of contempt of Parliament being raised as an issue.

11.2 The Member should be given the opportunity to identify documents of a private nature relating to himself or constituents. The warrant holder will make a decision whether those documents are relevant to the investigation.

11.3 Members should be particularly alert to sensitive documentation such as that relating to Cabinet or a Parliamentary Committee. To this end it should be established at an early stage if any such documents are held by the Member and the relevance of them to the inquiry. In practice the Team Leader (at least) should have an appropriate security clearance (Top Secret is desirable).

11.5 The Member should be asked to identify any documentation which is seized but is required by him to continue the performance of his Parliamentary functions e.g.; Electorate office diaries, personal diaries etc: Steps should be taken to accommodate the Members needs through photocopying as soon as possible.

EXTRACTS FROM GUIDELINES FOR EXECUTION OF SEARCH WARRANTS BY THE AFP ON THE ELECTORATE OFFICES OF MEMBERS OF PARLIAMENT

Preliminary

4. When a search warrant is executed upon the electorate office of a Member of Parliament one or more of the following issues could arise:-

a) the execution of the search warrant might amount to an offence against a House, for example because its effect is to obstruct performance of the member's duties as a member;

b) the disclosure of something seized in reliance on the warrant, or exposed to the police in the course of search, might amount of an offence against a House;

c) a thing otherwise seizable under the warrant might not be seizable because it is not admissible by a court in that it attracts statutory parliamentary privilege – a related issue being the possibility of a statutory offence of unauthorised disclosure; or

d) the execution of the search warrant might involve seizure or exposure to the police in the course of search, or subsequent disclosure, of confidential material that does not attract parliamentary privilege and without entailing an offence against a House or any other offence.

6. It should be noted that material of the kind referred to in s16(3) of the Parliamentary Privileges Act 1987 is not liable to seizure under warrant. If it is possible that material sought may be within the category, the AFP should consult the relevant Presiding Officer or the chair of the relevant committee.

Claim of privilege

. In paragraphs 9(a) to 9(g) 'claim of privilege' means a claim that proposed action in purported reliance on a search warrant should not take place because it would be a breach of privilege, either because it would amount to an offence against a House or because the warrant does not authorise seizure of a thing that attracts privilege.

9. The purpose of paragraphs 9(a) to 9(g) is to suspend police action until there has been some consideration by or on behalf of

Parliament of the claim. While in due course a court might also need to rule on the matter, that aspect can be left to later proceedings, or if necessary to a person affected seeking injunctive relief.

a) if the member (or a person acting on his/her behalf) identifies anything to be seized where a claim of privilege is likely to be raised the following procedure should be followed:-

b) the member (or representative), if raising a likely claim, should be asked to indicate the basis for the claim;

c) the item should be secured to the satisfaction of the executing officer and the member (or representative). The member should have reasonable opportunity to take copies of any document or other record secured in this way. A schedule of the items so secured should be prepared and agreed by the parties;

d) the things so secured should be delivered into the safekeeping of a third party as agreed between the parties (eg. warrant issuing officer or Clerk of Court) pending the resolution of the claim of privilege;

e) the claim of privilege should be referred by the member for, or otherwise brought to, the attention of the Presiding Officer of the relevant House for the purpose of obtaining an indication either:-

> i. that there is no apparent basis for a privilege claim (in which event the item should be released to the AFP); or
>
> ii. that the matter should be further considered by the relevant House.

f) this does not prevent the member or any other person from pursuing the claim of privilege in any other way. However, the intention is to provide only a reasonable opportunity for the claim to be pursued and to allow release of the item to the AFP if the claim is not pursued; and
g) the AFP will notify the Attorney-General [in his/her capacity as First Law Officer and Minister responsible for the AFP] in any case where the execution of a search warrant on the electorate office of a member is likely to be the subject of a claim of privilege.

11. In relation to paragraphs 9(a) to 9(c), it is assumed that a claim of privilege should not be made merely to delay or frustrate access for bona fide criminal justice purposes to material when, while confidential in the sense described above, could not properly be the subject of a claim of privilege. However, in such cases a claim of public interest immunity might arise.

a) even if no claim of privilege is raised, the executing officer should take all reasonable steps to conduct the search and obtain seizable material without unnecessarily examining or removing third-party confidential material that might be in the electorate office;

b) if, in respect of any material proposed to be seized, the member indicates that public interest immunity will be claimed, the AFP, unless it needs urgent access to the material, should treat that material as under paragraphs 9(a) to 9(d) to enable a reasonable opportunity for the claim to be resolved; and

c) if the AFP needs access to the material urgently for the purposes of an investigation, it should ensure that the material is not disclosed more widely than necessary for those purposes.

13. Where any document/record or thing is seized by police pursuant to the warrant the executing officer should inform the member that the AFP will, to the extent possible, provide or facilitate access by the member to any document/record or thing seized under the warrant which is necessary for the performance of the member's duties as a member.

Parliament House

14. If a search under warrant is proposed in relation to the offices of a member in Parliament House these guidelines should be treated as applicable and:-

a) it should be determined at a senior level within the AFP (General Manager) that the need for the search warrant is clear, and that it relates to a sufficiently serious matter; and
b) the usual practice should be followed of prior consultation with the Presiding Officers before conducting enquiries or executing any process in the parliamentary precincts.

ANNEX 'B'

CONTEMPT OF PARLIAMENT

The contempt provisions relating to the commonwealth Parliament were substantially revised in 1987 with the introduction of the *Parliamentary Privileges Act* 1987 ('the Act'). Relevant to this issue are the provisions which enable a House of the Federal Parliament to impose sanctions on a person for 'an offence against the House'. Offences against the House include contempt by virtue of subsection 3(3) of the Act. The penalties for such an offence are set out at subsections 7(1) and 7(5) of the Act, being imprisonment not exceeding six months or a fine up to

$5,000 for a natural person or $25,000 in the case of a corporation.

Conduct which might amount to an offence is defined at section 4 of the Act as follows:

4. Essential element of offences

Conduct (including use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions or with the free performance by a member of the member's duties as a member. To constitute a 'contempt' the conduct must amount or be intended or likely to amount to an improper interference with the authority of functions of the House or the member's duties as a member. By including the term 'improper', the Act contemplates that not all interference with the free exercise of the Members duties is prohibited.

The Office of General Counsel has previously advised that a search warrant executed in respect of a criminal offence is unlikely to amount to an improper interference with the member's duties as a member, at least where the member is a suspect having regard to the fact that the member is not immune from arrest for a criminal offence. Accordingly, where police are acting lawfully, in good faith, and with due regard to the sensitivities involved the investigations are unlikely to amount to an offence. If circumstances are such that any there is any doubt, investigators should seek advice at the earliest opportunity.

ANNEX 'C'

SUMMARY OF OPINION BY ATTORNEY-GENERAL'S DEPARTMENT IN RESPECT TO PARLIAMENTARY PRIVILEGE - SEPTEMBER 1995

In this instance a Member of Parliament had complained that the execution of a search warrant was a breach of parliamentary privilege. The matter was referred to the Privileges Committee of the House of Representatives.

The following relevant issues arose from the opinion of the Office of General Counsel, Attorney-General's Department:

The Electorate Office of a member is not part of the parliamentary precincts.

A Crimes Act 1914 search warrant can be executed on the Electorate office of a Member of Parliament (this would apply equally to the Member's residence etc.)

The fundamental principle is that action in respect of a member will not constitute a breach of privilege or contempt of Parliament unless it is action that 'amounts or is intended or

likely to amount, to an improper interference with the free exercise by a House or Committee of its authority of functions or with the free performance by a member of the member's duties as a member (See Parliamentary Privileges Act, S.4).

It is well recognised that 'where a member of parliament is accused of a criminal offence, it has never been suggested that his status as a member places him in any different position as regards the law of arrest or trial from that of an ordinary citizen'[10]

A search warrant 'might be a breach of privilege if the effect of the execution of the warrant was to constitute an improper interference with the member's duties as a member. If the search was in respect of a criminal offence (at least if the member is the suspect) having regard to the fact the member is not immune from criminal prosecution it is unlikely to be deemed improper interference.

Temporary inconvenience suffered by the member's constituents, if that were proved, would not amount to an improper interference.

Exposure of confidential or sensitive material (NOT protected by the Parliamentary Privileges Act) during the course of a search warrant is not different to the possession of similar material by other persons.

[10] see Enid Campbell Parliamentary Privilege in Australia, p.60

ADVICE NO. 30

PARLIAMENTARY PRIVILEGE: MATTERS INCIDENTAL TO PROCEEDINGS: *NTEIU V THE COMMONWEALTH*

The Privileges Committee should be advised of a question of parliamentary privilege which arose in a case in the Federal Court in Melbourne which was heard in late April.

The case is *NTEIU v the Commonwealth and the Minister for Education,* and arises from a suit by a union, the National Tertiary Education Industrial Union, against the federal government. The union sought the production of various documents, and the Australian Government Solicitor on behalf of the Commonwealth claimed that some of the documents should not be produced because of parliamentary privilege. The documents in question consist of draft answers to estimates questions on notice, draft answers to anticipated oral questions at estimates hearings, material for answering a possible parliamentary question and an e-mail message between two officers concerning the updating of the contents of an estimates hearing brief and a possible parliamentary question brief.

The judge in the case, Justice Weinberg, invited the President of the Senate, through the Australian Government Solicitor, to consider whether representations should be made on the parliamentary privilege question.

There was not time for the President to consider separate representation or a detailed submission without inordinately disrupting the hearing of the case, but after consultation with the President the following communication was sent to the Australian Government Solicitor:

> The Senate view is that documents 18, 20, 21, 22, 23, 24 and 25 [the documents in question described above] are proceedings in Parliament within the meaning of subsection 16(2) of the *Parliamentary Privileges Act 1987,* in that they are matters done "for purposes of or incidental to, the transacting of the business of a House or of a committee". They are therefore subject to the restrictions on their use in legal proceedings as set out in subsection 16(3) of the Act.
>
> As the only possible purpose of the production of these documents would be to go behind and call into question proceedings in Parliament, the documents should not be required to be produced.

This letter was handed up to the judge. On the following day the judge accepted the claim of parliamentary privilege in respect of all of the documents except the e-mail message.

The hearing then continued on unrelated matters, with no sign of an appeal against the judge's determination.

ADVICE NO. 31

MATTER OF PRIVILEGE RAISED BY SENATOR TAMBLING

Thank you for your letter of 15 August 2001, in which the Committee of Privileges seeks advice on the precedents referred to in the statement by the President of the Senate of 6 August 2001 in relation to the matter of privilege raised by Senator Tambling.

There are no directly relevant Senate precedents of privilege cases involving extra-parliamentary bodies purporting to direct senators as to their votes or to penalise senators for not complying with such direction.

There have been several directly comparable cases in the United Kingdom. The first arose in 1947 when it was suggested that an extra-parliamentary body had attempted to influence a member. While finding nothing improper in the activities of that body, the Privileges Committee gave consideration to the boundary which should be drawn between legitimate political activity and improper influence of a member. The committee concluded that it is proper for a body to support and endorse a member, including by way of financial support, and to withdraw that support and endorsement on the basis of disagreement with the policies pursued by the member, but improper influence arose when a body purported to direct a member as to the performance of the member's duties or to inflict a penalty or detriment on a member in consequence of the member's performance of those duties. The committee declared that an extra-parliamentary body is not entitled to use support of a member, or the withdrawal of that support, "as an instrument by which it controls or seeks to control the conduct of a Member or to punish him for what he has done as a Member". The House of Commons by resolution endorsed the report of the committee and also passed a resolution declaring that a member's duty is to the member's constituents and that a member must not have any relationship with a body which limits the member's independence and freedom of action in Parliament.

The boundary drawn by the Committee of Privileges in this report has been reiterated in subsequent cases in which extra-parliamentary bodies purported to direct members or to withdraw support in retaliation for members' conduct in Parliament. Further cases occurred in 1971, 1975, 1977 and 1991. In each case the Privileges Committee, while reiterating the ruling principles, did not find it necessary to recommend further action by the House because of the circumstances of the case or remedial action by the offending body.

In these cases a purported direction to a member was regarded as a contempt in itself, quite apart from any threatened or actual withdrawal of support from a member in consequence of the member's performance of parliamentary functions. The rationale of treating the purported direction as an offence in itself was that, where a body has a relationship with a member which could be regarded as giving it some particular control or influence over the member, a purported direction in itself would be an interference with the free exercise by a member of the member's functions.

All of these cases involved professional associations or trade unions which support members of Parliament, rather than organs of political parties as such. The extra-parliamentary organs of

political parties as such appear not to purport to direct members as to how they are to vote on particular issues in comparable jurisdictions.

On 16 March 1951 in the House of Representatives a matter of privilege was raised in relation to an alleged direction by a Labor Party conference to members as to how they were to vote in the House. A resolution was passed declaring that such a purported direction would be a contempt, and asserting the freedom of members from such direction. This resolution seems to have been based on the 1947 House of Commons resolution, but unlike the latter was passed only by division on party lines. The matter was also referred to the Privileges Committee, but the committee had not reported when both Houses were dissolved a few days later, and the reference was not revived.

I know of no other comparable cases in any jurisdiction.

Attached are copies of the reports of the House of Commons Committee of Privileges and the transcript of the debate on the 1947 report.

Please let me know if the committee requires any further assistance in relation to this matter.

ADVICE NO. 32

PROPOSED ENGAGEMENT OF COUNSEL

Thank you for your letter of 27 March 2002, in which the committee seeks comments on the reference to the committee of 20 March 2002 relating to the proposed engagement of counsel to represent the Senate in proceedings involving parliamentary privilege affecting the Senate or senators.

I do not think that I can provide any observations which are not already apparent to the committee, but I hope that the following may be of some use.

Presumably this proposal would involve having a senior barrister in practice, knowledgeable in the law of parliamentary privilege, who would stand ready to represent the Senate as required in proceedings involving such questions of parliamentary privilege. Such a person would be actually engaged only when an occasion for representation arose, and would be remunerated only for time spent on those occasions.

The only difficulty with this proposal is that when an occasion arises, the designated barrister may be unavailable due to their other work. It would not be feasible to expect the designated barrister to give any kind of undertaking that other work would be put aside or reallocated when an occasion to represent the Senate arose. Even if such an arrangement were possible, it would involve ongoing cost which would not be justified given the rarity of the occasions. That the designated barrister may be unavailable when an occasion arises is simply a risk which would have to be taken. It may be possible to overcome this by designating two or more knowledgeable barristers who would be willing to undertake work for the Senate when needed.

The other problem is to find barristers knowledgeable in parliamentary privilege. There are, however, a few who have a proven track record in advocacy on parliamentary privilege. They could be selected on the basis of that track record.

In relation to cost implications, if the arrangement is on the basis stated, the cost implications would not be significant. The designation of one or more barristers in the manner proposed may reduce costs in the future because it may not be necessary to pay for time taken by other barristers to get “up to speed” on parliamentary privilege when occasions for their services arise. The occasions are rare, and, when they arise, some cost is unavoidable.

I would be pleased to provide any other information the committee may require.

ADVICE FROM MR BRET WALKER, SC

Rowley v. Armstrong

(Advice dated 30 June 2000 from Mr Bret Walker, SC to the Committee of Privileges)

I am asked to advise the Committee of Privileges about the interlocutory judgement of Jones J. of the Supreme Court of Queensland in the defamation action between Michael Rowley as plaintiff and David Armstrong as defendant. These proceedings were one of the subjects of the Committee's 67th Report delivered in September 1997 and adopted by the Senate on 22nd September 1997.

2. The applications decided by Jones J. involved three issues, only one of which is material for consideration by the Committee of Privileges. The two presently irrelevant issues involved the defendant's contention that the action should be struck out by reason of the plaintiff's want of prosecution, and the answering claim by the plaintiff that he should be permitted to take a fresh step in the action. Although the facts and law appropriate to these two issues were obviously critical to the judge's decision and reasoning, and are crucial as between the parties to the action, I make no further comment about them because they do not raise issues of the kind which would concern the Committee. However, their existence does serve to emphasize the interlocutory and arguably obiter nature of James J.'s conclusions about the third issue, which is of concern to the Committee.

3. That issue arose because the defendant contended that the action should be struck out on the ground that it was an abuse of process in light of his argument that the communication in question was to then Senator O'Chee and was protected by Parliamentary privilege so that pursuit of the action would amount to a contempt of the Senate.

4. On 12th April 2000, Jones J. delivered his reasons for dismissing the defendant's application, including on the ground that there was no abuse of process by reason of claimed Parliamentary privilege. The Committee has received a request from Mr. Armstrong, the unsuccessful defendant/applicant, for help in meeting the costs of a proposed appeal against this interlocutory decision. I note that the Committee's 67th Report concluded, at [2.49], by explicitly contemplating that the proceedings *Rowley v. Armstrong* would proceed to an *"outcome"*. The effect of the interlocutory decision by Jones J. is that the case can proceed. In practical terms, therefore, the result of his Honour's recent decision is to permit proceedings to continue which the Committee and the Senate contemplated would continue - albeit after a delay somewhat longer than I would have regarded as reasonable.

5. The Committee may well feel concerned about Jones J.'s approach to the issue which raised Parliamentary privilege, given that his Honour's reasoning both ignores as a matter of consideration and contradicts as a matter of conclusion the Committee's 67th Report. That Report adopted, at [2.2] and [2.4], views expressed by the Clerk of the Senate to the effect that the *Parliamentary Privileges Act 1987* rendered the protection of Parliamentary privilege available for some categories of "*communications of information to senators by other persons"*. By contrast, the Queensland judge has concluded, at [34], that it followed "*clearly enough"* from certain citations to which I will shortly turn *"that an informant in making a communication to a*

parliamentary representative is not regarded as participating in 'proceedings in Parliament' and therefore the provisions of the Parliamentary Privileges Act do not apply".

6. It must be stressed that the issue before Jones J. was whether the proceedings should be stopped in their tracks as an abuse of process. It was not an occasion when a final or binding conclusion on any issue of fact or law could be determined. Indeed, his Honour reflected that quality of the interlocutory application before him, when he immediately followed the conclusion I have quoted in 5 above by the comment, at [35], that this Committee's ruling upon the questions raised by Senator O'Chee did not in any way affect the need "*for the Court to determine the question of liability in circumstances of any claim of privilege which the defendant is entitled to raise" i*n a context which clearly contemplates that these matters are yet to be determined and will therefore be determined only in a final hearing, at the trial of the action.

7. Although there may be some ambiguity involved in his Honour's reference to *"privilege",* the better view is that all he has purported to do, or could do, was to decline to hold that the proceedings were an abuse of process, the abuse being constituted by the supposedly inevitable success of a Parliamentary privilege argument. In my opinion, rejection of the defendant's contention that the proceedings were an abuse of process certainly does not amount to a finding that the Parliamentary privilege argument is bound to fail. (I hold this view, notwithstanding the capacity in some cases, and in appropriate circumstances where e.g. the facts are virtually uncontested, for a court to determine matters of law - even difficult matters of law on a virtually final basis for the purposes of determining whether proceedings would be (technically) an abuse of process on the ground that they are bound to fail by reason of some critical issue of law. Clearly enough, Jones J. did not proceed to take that course.)

8. For these reasons, and quite apart from the defects of consideration and conclusion to which I will now turn, the interlocutory judgement of Jones J. in *Rowley v. Armstrong,* delivered on 12th April 2000, is unlikely to be regarded as adding anything appreciable to the jurisprudence of Parliamentary privilege.

9. As Jones J. correctly observed, at [19], the argument about Parliamentary privilege turned on the provisions of sec. 16 of the *Parliamentary Privileges Act.* That Act, by its long title, sets out *"to declare the powers, privileges and immunities of each House of the Parliament..."* a verbal formulation which is plainly designed to invoke the provisions of sec. 49 of the *Constitution.* The power of the Commonwealth Parliament to enact the provisions, especially those of sec. 16 to which I next turn, is well grounded in sec. 49 and can no doubt extend incidentally by means of placitum 51 (xxxix.). It is also clear that the purpose of sec. 5, and I advise its effect as well, is to ensure that the Parliament did not by its 1987 statute lose any of its Constitutional privileges, which were stipulated by sec. 49 to be those of the House of Commons in Westminster in 1901. In short, except by express provision, the Act does not detract from any of the House-of-Commons-equivalent privileges of the Senate.

10. At least, it is clear that this is the intended purpose of sec. 5 of the Act. I reserve, as not presently relevant, the fundamental question whether any legislation substantively or substantially affecting any of the privileges of the Senate can be enacted without thereby, and by that fact, removing the House-of-Commons equivalence. That argument, which turns on the phrase "*and until declared shall be ...*", in sec. 49 of the *Constitution,* awaits another day: cf. *R. v.*

Richards; ex parte Fitzpatrick and Browne (1955) 92 C.L.R.157 at 168. In any event, in my opinion the effect of sec. 5 of the Act is to give statutory force to the sec. 49 pre-declaration privileges, subject only to express provision "*otherwise"* in the Act.

11. It is necessary to note the unsatisfactory provisions of sub-sec. 16(1) of the Act before passing to the critical provisions of sub-sec. 16(2). Perhaps the opening words of sub-sec. 16(1) signal the uncertainty of its endeavour: in any event, its effect seems to be that Article 9 of the *Bill of Rights is* supposedly applied to the Parliament including its Houses and thus the Senate, but as such is to have the effect of the other provisions of sec. 16 "*in addition to any other operation"*. I suspect these provisions will have a troublesome application in future circumstances. Fortunately, I do not believe that sub-sec. 16(1) will have that effect in this case, because on any view Article 9 does not expressly address words or acts done *"for purposes of or incidental to"* the business of the Senate, and thus the terms of sub-secs. 16(2) and (3) govern the position. It is for these reasons that it becomes, in my opinion, inappropriate to focus the relevant enquiry upon the position in Westminster as at 1901.

12. The provisions of sub-sec. 16(2) of the Act pivot on the notion of *"the transacting of the business of a House..."*. This is the definitional framework within which the expression *"proceedings in Parliament" is* defined by sub-sec. 16(2). Its definition commences by the expression "*all words spoken and acts done in the course of*, *or for purposes of or incidental to, the transacting of the business of a House... "*. It is the words to which I have given emphasis in this quotation which determine the issue which will eventually be before the Supreme Court of Queensland at the final trial of the action in *Rowley v. Armstrong,* and which were fundamental to the interlocutory issue considered by Jones J.

13. The expressly non-exhaustive examples of words and acts within this definition of *"proceedings in Parliament"* include para. (c), viz. *"the preparation of a document for purposes of or incidental to the transacting of any such business"*. In my opinion, the antecedent of the demonstrative adjective *"such"* in that phrase includes the kind of business referred to in paras. (a) and (b) of sub-sec. 16(2), as well as the quintessentially Parliamentary business of debate on proposed legislation, questions, and statements by Members on matters of public importance.

14. As accepted by Jones J., and as found in the Committee's 67th Report, the communications by Mr. Armstrong to Senator O'Chee, for which Mr. Rowley now sues Mr. Armstrong in defamation, were made for the purpose of Senator O'Chee using that information "*in Senate proceedings"*. The proceedings in question included a question of a Minister representing a relevant Minister, a speech on the adjournment and a further question (see the 67th Report at [1.7] and [1.8]).

15. In my opinion, on the basis of this finding by the Committee, there is no doubt that the communication by Mr. Armstrong to Senator O'Chee must be treated by all courts in Australia as being "*proceedings in Parliament"* for the purposes of sub-sec. 16(3) of the Act.

16. I interpolate that the provisions and reasoning referred to in 11 and 12 above sufficiently demonstrate that the preposition "*in"* used in that phrase cannot be taken literally as meaning events occurring inside the Chamber of the Senate or in its traditional precincts. I further interpolate that there can be no doubt about the subjection of the Supreme Court of Queensland to

the provisions of sec. 49 of the *Constitution* and sec. 16 of the Act, given covering cl. 5 of the *Constitution Act* and sec. 109 of the *Constitution.*

17. In my opinion, the reasoning of Jones J. fails to engage with these critical matters of statutory interpretation. His Honour's approach can be mapped as follows. He starts by extracting the relevant provisions of sub-secs. 16(2) and (3) of the *Parliamentary Privileges Act* (at [19]). He irrelevantly refers to the judicial doctrine of reticence in relation to the activities of the other arms of government (at [21] and [22]). He briefly touches on the recent decisions of the Queensland Court of Appeal in *Laurance v. Katter* [2000] 1 Qd. R. 147 (decided in 1996) and *Rowley v. O'Chee* [2000] 1 Qd. R. 207 (decided in 1997), noting his view that it was *"not necessary to re-canvass the issues decided in each of those cases"* (at [23]).

18. It is regrettable that Jones J. passed over those authorities in this fashion, given the centrality of sub-sec. 16(3) of the Act to the former decision and the centrality of sub-sec. 16(2) of the Act to the latter decision - and the centrality of both those provisions to the question before his Honour. In *Laurance v. Katter,* over the powerful dissent of Fitzgerald P., which in my respectful opinion properly found and applied the law, Pincus J.A. held that sub-sec. 16(3) was unconstitutional in its claimed application to the defamation action considered in that case, and Davies J.A. more narrowly construed the Article 9 notion of impeaching or questioning Parliamentary proceedings than the learned President construed it. There was thus no majority for the non-application of the protection of the Act in relation to communications with a Senator for the purposes of the Senator participating in proceedings inside the Chamber. Unfortunately, Jones J. does not explain how, if at all, he applied any part of the split majority reasoning in *Laurence v. Katter* to support his own conclusion.

19. As to *Rowley v. O'Chee,* again over the powerful dissent of Fitzgerald P. on certain important aspects, the actual result of the reasoning and decision of McPherson J.A. and Moynihan J., to some extent also supported by the learned President, emphatically accepted the extension by sub-sec. 16(2) of the Act to cover communications broadly similar to those in question in the proceedings considered by Jones J. It is very difficult to understand how Jones J. felt able to confine his consideration of the matter to the quotation extracted, at [33], from McPherson J.A.'s reasoning at [2000] 1 Qd. R. 224.41 - 225.8. Moreover, it is obscure, to put it mildly, what *"the very issue"* was considered by Jones J. to be, which he thought was dealt with by that quoted extract - which deals in unexceptionable manner with two matters of substance, first the presently irrelevant matter of the sufficiency of evidence that a threatened breach of privilege interfered with the Senator's ability to pursue a subject in the House, and second the equally presently irrelevant matter of the privilege pertaining to Parliament rather than to the Senator or his informants.

20. To return to the map of Jones J.'s reasons. Following this unproductive reference to the authority noted in 17 - 19 above, his Honour turned to cite an English decision, viz. *Rost v. Edwards* [1990] 2 Q.B. 460 at 478, to no particular effect (at [24]). The passage quoted from that authority manifestly does not inform the interpretation of sub-sec. 16(2) of the Act, and does not draw definitional lines which may have been persuasive for the case before his Honour. It is, nonetheless, immediately following that citation where his Honour concluded that Mr. Armstrong's "*act of communicating with the Senator was not 'a parliamentary proceeding' as*

that term is contemplated by the statute .." (at [25]). It is simply not possible, to that point in his reasons, to descry how the authorities cited by him, or other reasoning, led to that conclusion.

21. The difficulty continued (at [27]), when his Honour described Article 9 of the *Bill of Rights* as the *"starting point"* and cited four decisions, three of which concerned Westminster and one of which concerned the Westminster equivalent in New Zealand, and none of which moved from the historical genesis in Article 9 to the present statutory expression in sub-sec. 16(2) of the Act. The quotation from the reasons of the Court of Appeal (of England and Wales) in *Hamilton v. Al Fayed* [1999] 1 W.L.R. 1569 at 1585H illustrates the difficulty in this part of Jones J.'s reasons, not least because the Court of Appeal, whose judgement was delivered by Lord Woolf M.R., cast some doubt (without any decision) on the authority of *Rost v. Edwards* - specifically on Popplewell J.'s approach to the definition of "*proceedings in Parliament"*.

22. And in *Hamilton v. Al Fayed* itself, it was decided that an inquiry and report by a Commissioner, who was not a Member of Parliament, amounted to proceedings in Parliament including for the purposes of Article 9. There is no exploration by Jones J. of how that expansive definition supported his conclusion. Of course, in my opinion, an English interpretation of Article 9 in an English case is not authority which has any particular usefulness in construing the special words of sub-see. 16(2) of the Act which very overtly extend beyond the words of Article 9.

23. Next, Jones J. quoted two passages from textbooks, the first from the 21st edition of *Erskine May,* at 133, commencing with the assertion that the protection of Parliamentary privilege was not *"afforded to informants ... who ... provide information to members"* (at [28]). It is very clear that this esteemed work of authority was not opining, and could not be taken as opining, on the meaning of the words in sub-sec. 16(2) of the Act which explicitly extended the definition of "*proceedings in Parliament",* being the critical phrase which provides the touchstone for the protection given by Parliamentary privilege. This first citation is therefore quite inadequate to support Jones J.'s conclusion.

24. The second textbook citation by Jones J. has nothing whatever to do with the issue before his Honour. It consists (at [29]) of anodyne generalizations about certain privileges, and neither constitutes authority nor persuasive opinion on the question before his Honour. I intend no disrespect to the late Professor Fleming, its author (the work being his famous *Law of Torts,* 7th edition), it being crystal clear that the passage could not have been written with anything like the provisions of sub-sec. 16(2) of the Act in mind.

25. Finally, in the set of "*references"* from which Jones J. said his conclusion followed *"clearly enough"* (at [34]), his Honour cited and quoted relatively extensively from the decision of Allen J. at first instance in the Supreme Court of New South Wales, R. *v. Grassby* (1991) 55 A. Crim. R. 419. This is a decision about the privileges of the Houses of the New South Wales Parliament, and is thus manifestly not an authority about sub-sec. 16(2) of the Act. Nothing in the reasons of Allen J. touches on the relevant statutory issue argued before Jones J. I am at a loss to understand how this was considered the precedent which warranted the most extensive quotation in his Honour's reasons.

26. For all these reasons, there are profound weaknesses in the reasoning of Jones J. In my opinion, for the same reasons, his Honour's conclusion on the ambit of Parliamentary proceedings

for the purpose of considering the question of Parliamentary privilege under the Act is fatally flawed, and of no weight whatever as an authority.

27. It is, sometimes, an appropriate response to a very weak judicial decision to ignore it, confident in the expectation that it will not affect the body of doctrine. I am tempted to this view in relation to *Rowley v. Armstrong.* However, in my opinion the egregious deficiencies in the decision should be addressed by an appellate court not least because the conclusion about sub-sec. 16(2) is so clearly wrong and even so may mislead in other proceedings.

28. On the hearing of an appeal, it is likely that proper doctrine would be upheld, by vindication e.g. of the reasoning adopted by the Committee in its 67th Report, being reasoning which accords with the Queensland Court of Appeal approach in *Rowley v. O'Chee.* This result would considerably strengthen the intended effect of sub-secs. 16(2) and (3), including lifting the chilling effect of uncertainty from would-be informants to Members of Parliament. On the other hand, the Court of Appeal may not regard the matter as one where the proceedings should have been dismissed as an abuse of process - but this is not a matter which I will further consider.

29. Finally, since the decision of Jones J. in *Rowley v. Armstrong* there has been delivered the very interesting decision of the Full Court of the Supreme Court of South Australia, sitting a bench of five, in *Rann v. Olsen* [2000] SASC 83. Nothing in the main reasons of their Honours (particularly those of Doyle C.J.) affects the conclusions I have reached and expressed above about *Rowley v. Armstrong.* The particular issue in *Rann v. Olsen* is sufficiently different from that in *Rowley v. Armstrong* to prevent its direct application in support of my opinion. Nonetheless, there is tangential support for my views in the South Australian authority, and no contradiction.

30. The issue generally is one which, in my opinion, would attract the interest of the High Court, were an unsuccessful party to an appeal to seek special leave to appeal further to the High Court, unless the decision turned on the mundane question of an abuse of process, as opposed to the law of Parliamentary privilege.

FIFTH FLOOR,
ST. JAMES' HALL.
28th June 2000 Bret Walker

P.S. Examination of the transcripts of the applications for special leave to appeal in the High Court with respect to *Laurence v. Katter* and *Rowley v. O'Chee* supports my prediction that the issue presented in this case will sufficiently interest members of the High Court, but also reveals that their Honour's hearing an application for special leave to appeal could well prefer the issue to be presented only after there is a set of full facts which have been either agreed or found at trial.

ADVICE FROM MR THEO SIMOS QC

ABORIGINAL DEVELOPMENT COMMISSION

MEMORANDUM

A. The Reference to the Committee of Privileges

1. On 3 November, 1988, the Senate referred the following matters to the Committee of Privileges:

   Whether any of the following actions constituted a contempt of the Senate in that they involved an improper interference with witnesses:

   (a) the resolution of the Aboriginal Development Commission of 23 May, 1988 relating to public statements by members or officers of the Commission;

   (b) the resolution of the Commission of 14 October, 1988 relating to the presentation of papers and submissions to parliamentary committees;

   (c) the resolution of no confidence in Mrs. S. McPherson passed by the Commission on 10 October, 1988; and

   (d) the transfer of Mr. M. O'Brien from the position of General Manager of the Commission.

   That, in inquiring into those matters, the Committee have regard to any relevant material, including the report of the Select Committee on the Administration of Aboriginal Affairs relating to the protection of witnesses.

   That, in inquiring into those matters, the Committee of Privileges have power to send for persons, papers and records, to move from place to place, and to meet notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and that a daily Hansard be published of such proceedings of the Committee as take place in public.

B. The Circumstances Leading to the Reference to the Committee of Privileges

1. The circumstances leading to the reference to the Committee of Privileges are described in the Report of the Senate Select Committee on the Administration of Aboriginal Affairs entitled Protection of Witnesses.

2. That Report referred to Section 12(2) of the Parliamentary Privileges Act, 1987, which makes it an offence to

   ... inflict any penalty or injury upon, or deprive of any benefit, another person on account of -(a) the giving or proposed giving of any evidence ...

3. The Report also referred to the motion of no confidence in Mrs. McPherson passed during the meeting of the Aboriginal Development Commission held on 10 to 14 October, 1988 and to the transfer of Mr. O'Brien to another position and stated that those events had raised the question of whether Mrs. McPherson and Mr. O'Brien had been penalised by the Commission for having given evidence to the Select Committee.

4. The Report also referred to the resolution of the Aboriginal Development Commission of 23 May, 1988 which was in the following terms:

> That no public statements are to be made by Commissioners or officers of the Commission without prior approval of the Board of Commissioners.

5. In respect of that resolution the Report expressed the view that the requirement for prior approval by the Board of Commissioners might be a reasonable requirement were it limited to statements by Commissioners and officers acting in an official capacity, but that it could also be interpreted as enabling the Board of Commissioners to interfere with the rights of individuals to appear before Parliament and its committees and consequently might constitute "... an improper interference with the free exercise by a House or committee of its authority or functions ...." (Parliamentary Privileges Act, 1987, s.4).

6. In this connection it appears that the Committee of Privileges has been satisfied that the resolution of 23 May, 1988 was intended to be limited to statements by Commissioners and officers acting in an official capacity, that is, purporting to speak on behalf of the Commission, and has determined that the passage of that resolution did not give rise to any contempt of the Senate (see below).

7. However, the Senate Select Committee in its Report concluded that whether or not the terms of the resolution of no confidence in Mrs. McPherson constituted a penalty or injury upon or to a witness in the terms of the Parliamentary Privileges Act, 1987, that resolution when read together with the resolution of 23 May, 1988 might constitute an attempt to interfere with Mrs. McPherson's right to appear as a witness before the Committee.

8. The Senate Select Committee concluded in its Report that the resolution of 23 May, 1988 and the resolution of no confidence and associated papers should be referred to the Privileges Committee for further investigation. The Select Committee further recommended that in considering the matter the Privileges Committee should take into account the resolution of the Aboriginal Development Commission of 20 October, 1988.

9. In relation to the transfer of Mr. O'Brien the Report of the Select Committee stated that concern had been raised that Mr. O'Brien's transfer might have been influenced in part by his appearance before the Select Committee.

10. The Select Committee also stated that there was no direct evidence to link the decision of the ADC Board concerning Mr. O'Brien's transfer with his appearance as a witness before the Committee.

11. Nevertheless the Select Committee was of the view that the unsatisfactory nature of the ADC's explanation of the transfer of Mr. O'Brien was such that it was not in a position to determine whether Mr. O'Brien's transfer was punitive and was influenced in part by his appearance before the Select Committee.

12. The Select Committee concluded in its Report that the transfer of Mr. O'Brien should be referred to the Privileges Committee for further investigation.

C. The Resolution of the Aboriginal Development Commission of 23 May, 1988 Relating to Public Statements by Members or Officers of the Commission

1. This resolution of the Aboriginal Development Commission was in the following terms:-

> "That no public statements are to be made by Commissioners or officers of the Commission without prior approval of the Board of Commissioners."

2. The Committee has investigated the circumstances relating to the passage of this resolution and, it appears, is satisfied that it should be read as limited to public statements purporting to be made in an official capacity or on behalf of the Commission.

3. Having regard to that matter, inter alia, the Committee has determined that the circumstances relating to the passage of the resolution of 23 May, 1988 do not give rise to any contempt of the Senate.

D. The Resolution of the Commission of 14 October, 1988 Relating to the Presentation of Papers and Submissions to Parliamentary Committees

1. This resolution of the Aboriginal Development Commission, which it appears was passed on 10 October, 1988, was in the following terms:-

> That papers and submissions of whatever kind shall not be presented to any Parliamentary Committee or other body without prior approval of the Commission.

2. In respect of this resolution, there is material before the Committee upon the basis of which it could conclude that the resolution was intended to be limited to papers and submissions purporting to be presented on behalf of the Commission.

3. If the Committee so concluded, it would then be open to the Committee to determine that this was a reasonable requirement which was not intended to interfere with the rights of individuals to appear before Parliament and its committees and therefore did not constitute "an improper interference with the free exercise by a House or committee of its authority or functions".

4. Such a conclusion, if reached by the Committee, would be consistent with the conclusion of the Committee in relation to the resolution of the Aboriginal Development Commission of 23 May, 1988 and would justify the Committee in determining that the circumstances

relating to the passage of the resolution of 10 October, 1988 did not give rise to any contempt of the Senate.

5. The existing conclusion of the Committee in relation to the resolution of 23 May, 1988 appears to recognise a distinction between public statements made by Commissioners or officers of the Commission in their official capacity or purporting to be made on behalf of the Commission, on the one hand, and such statements made by Commissioners or officers of the Commission in their private capacity, on the other hand. The Committee appears to have regarded it as reasonable and not constituting any contempt of the Senate for the Commission to take steps, such as the passing of the resolution of 23 May, 1988, to ensure that public statements made by members or officers of the Commission in their official capacity or purporting to be made on behalf of the Commission should not be made without prior approval of the Board of Commissioners. Different considerations, of course, would arise in relation to public statements made by members or officers of the Commission in their private capacity and not purporting to be made on behalf of the Commission. .

6. In relation to the resolution of the Aboriginal Development Commission of 10 October, 1988 the material before the Committee upon the basis of which it could conclude that that resolution was intended to be limited to papers and submissions purporting to be presented on behalf of the Commission includes, inter alia, the following:

   (a) The minutes of the meeting of the Aboriginal Development Commission of 10 October, 1988, which record, on pages 10-15, the discussions which preceded the passing of the resolution of 10 October, 1988.

   (b) Those discussions as recorded in the minutes appear to indicate a concern that a written submission dated 13 July, 1988, signed by Mr. O'Brien was lodged with the Senate Select Committee on the Administration of Aboriginal Affairs, the first sentence of which stated: "This submission is made by the Aboriginal Affairs Commission", without the submission first having been approved by members of the Commission.

   (c) This concern appears from the following passages, inter alia, contained in those minutes:

      (i) "A/g Commissioner Perkins stated his objection to the submission, in that it was from the Commission, not just from the General Manager. The first sentence said it is from the Commission, which should not have sent anything to the Committee without authorisation from the Board. It is unorthodox that the General Manager represents the Board before the Committee; the Chairman should have been present at the hearing, rather than being out of town, opening buildings. It appears that the General Manager went before the Committee with a paper prepared by the Chairman without the knowledge of the Board. The A/g Commissioner said that he did not receive a copy of the attachments to the paper presented to the Committee, and asked that he be provided with a total set."

(ii) "A/g Deputy Chairman Dodson stated that he did not like the way the submission was done, apparently over the top of Commissioners. He said that his concern was that, for such a large organisation as the ADC, something like the submission to the Committee could have been forwarded to the Commissioners so that they could have seen it before its presentation to the Committee. Even though it supposedly presented the sequence of events up to the point of the dismissal of the previous Commission, the way in which it was done was not correct.

There is still nothing in the submission as to the reason behind the decision of the previous Commissioners to put up the Alternative Strategy. The Commission cannot operate as an effective body if documentation and information is not forthcoming. We should operate in a co-operative environment, which is not happening when a submissions is put forward by the General Manager without the support of the Commission."

(iii) "A/g Commissioner Perkins said that neither the Chairman nor the General Manager communicates with him regarding what is being done, and queried why he is never consulted."

(iv) "A/g Commissioner O'Shane stated that he is very suspicious of what is going on in the Commission, as he feels that he is not receiving the information that should be forwarded. The Senate Select Committee should be informed that the Board is now in full support of ATSIC, a fact which has not been evidenced in any documentation regarding the Board's current standing."

(v) "A/g Commissioner Perkins moved that the Senate Select Committee be requested to return the submission and all its annexures as provided by the General Manager to the Committee, in order that those papers can be brought before the Commission, for approval by the Board, before re-submission to the Committee. A/g Commissioner Dodson Seconded the Motion. Motion Carried by a majority vote."

(vi) "The General Manager advised that ... The Committee asked for information and the Chairman approved the submission, which went to the Committee over his signature in the Chairman's absence. The matters covered in the submission were facts and events which occurred before this current Board took up their responsibilities. A/g Commissioner Yu stated that current Commissioners should have input as we are now the Board."

(vii) "A/g Commissioner Yu said that there is not enough communication with the Commissioners by Head Office; there is no reason why the telephone or fax machines cannot be used to keep Commissioners informed, and

request their help. The lack of communication is the basis of the problem, and the reason for the mistrust which has developed."

(viii) "A/g Commissioner Perkins stated that the General Manager should not have appeared before the Committee, the Chairman should have. The Commissioners should be notified, by phone, as to what is being planned before it happens, not after ....".

(ix) "A/g Commissioner Perkins advised that it is the policy of the ADC to give support to the concept of ATSIC and its early implementation. He said that the Chairman had, through press statements, said that the Commission had made a resolution that it did not support ATSIC."

(x) "The Chairman suggested that a Working Group come to the next Meeting with a draft of a submission to the Senate Select Committee, and that the document would be refined at the Meeting for submission."

(xi) "A/g Commissioner Perkins Moved that no submissions are to go to the Senate Select Committee without the full approval of the Board of Commissioners; A/g Commissioner Carroll Seconded the Motion. Motion Carried."

(d) The transcript of parts of the recorded discussion at the meeting of 10 October, 1988. That transcript is generally consistent with the minutes of the meeting and includes the following remarks, inter alia:

(i) "Charles Perkins: "That's what it says ... 'This submission is made by the Aboriginal Development Commission' ... You should never have sent anything forward under your own steam without authorisation from the authority of the Commissioners, regardless of the short time space or whatever. It should not have been done ... I find it most unbelievable that, that we should have had a representation or presentation before the Senate Committee, by this Commission without going through the Commissioners ... It appears that Mr. O'Brien went before the Committee on a paper prepared under the direction of the Chairperson without the knowledge of the rest of us Commissioners and it's not a paper done recalling the events in chronological order, it's more than that ... it's caused lots of repercussions all over the place and quite an embarrassment to all of us here. Secondly, it's the attachments that went with it ... I mean who's got them? I've never seen them. I received my paper some days after, but where are these attachments, are they with the Senate Committee?"

(ii) "? Terry O'Shane: "... I think that the Senate Select Committee should have been made fully aware of the resolution that we agreed in support of that. I could find no resolution by the previous board about anybody condemning in total the proposal, ATSIC and things like that. It hasn't been done ... that

was my immediate concern. In actual fact the real story, the full story was not going to be told to the Senate Select Committee...".

(iii) "Charles Perkins (to Mr. O'Brien): "You were in there for some time and I haven't seen the transcript." Mick O'Brien: "No, the transcript will be out, they said, middle of next week ...." Charles Perkins: "We don't know what Mick said on our behalf..." (underlining supplied). Charles Perkins (to Mr. Bailey): "... we're talking about what you and Mick gave in terms of those papers there, unauthorised by the Commissioners. And we'd like them back..." Charles Perkins: "... And what we have before that Senate Committee has got to be authorised by the Commissioners."

(iv) "Mick O'Brien: "The other thing Commissioners, between meetings the Chairman has the responsibility to make judgments about things that ... that's a responsibility. If the Chairman is happy with it, then I felt that it was probably a submission from the ADC. When I got to the Committee, they had Pat's letter and they put it to me whether or not I would be prepared to have it come forward from me as General Manager (underlining supplied). Before I had signed it, the Chairman had read it and was happy with it and authorised the despatch of it. And I said 'yes', I was happy to do that', because I didn't express any opinions of my own in there. Charles Perkins: "... Anyone should understand from that, that anything that has been done on behalf of the Commission (underlining supplied) we as individuals would like to have a look at in order to agree or disagree with it. We might disagree ....".

(e) The minutes of the meeting of 10 October, 1988 and the transcript of the recorded discussion at that meeting also indicate that a resolution was passed limiting General Delegation, which apparently stated, in effect, that between meetings, the General Manager could exercise the powers of the Commission and also giving certain powers to the Chairman. That resolution was as follows:-

> "This delegation is only exercisable by the Chairman in circumstances where there is not a General Manager of the Commission or no person is temporarily performing the duties of that office. The delegate, being the General Manager or Chairman, is not empowered to circulate ADC documents or pre-empt Commission views on policies and objectives until prior clearance is obtained from a majority of the 10 Commissioners" (underlining supplied).

It would be open to the Committee to consider that this resolution also indicated that the concern of members of the Commission was that the General Manager and the Chairman should not without prior clearance purport to act or make statements on behalf of the Commission, and that they were not concerned with the conduct of those officers in some private capacity.

(f) A further resolution was apparently also passed at the 62nd meeting on 10 October, 1988 relating to this matter in which it appears that the words "on behalf of the Commission" were expressly used. That resolution was in the following terms:

> "That the Deputy Chairman be responsible for co-ordinating the preparation of submissions to be made by the Commission to the Senate Select Committee on the Administration of Aboriginal Affairs and that the Commission again moves that no submission on behalf of the Aboriginal Development Commission is to go to that Committee without the approval of the Board of Commissioners. A minute embodying this resolution is to be immediately circulated to all staff...".

(g) The letter dated 19 July, 1988 from the Acting Deputy Manager, Mr. Dodson, to Mr. O'Brien in which Mr. Dodson states, inter alia, that: "It is quite unacceptable to me that the Submission states that it is made by the Aboriginal Development Commission... It was ... very misleading to represent the document as the Commission's Submission. You must have known that the material it deals with is most sensitive and warranted the clearance of the Commission as a whole ... I would like you to take all steps available to disassociate the present Submission from the Aboriginal Development Commission."

7. As stated above, the Committee may consider that this material indicates that the concern of the members of the Commission as expressed at the meeting of 10-14 October, 1988, was that no papers or submissions purporting to be on behalf of the Commission should be presented to any Parliamentary Committee or other body without prior approval of the Commission even though the resolution of 10 October, 1988 did not include the words "on behalf of the Commission".

8. If the Committee formed this view, it would seem to follow that the Committee would also conclude that the passing of the resolution of 10 October, 1988 did not involve any contempt of the Senate.

9. It is true that after the written submission of 13 July, 1988 stating: "This submission is made by the Aboriginal Development Commission" was lodged with the Senate Select Committee and before Mr. O'Brien gave evidence before the Select Committee on 19 July, 1988, the Select Committee had been informed by letter dated 18 July, 1988 from Mr. O'Brien "that the full Board of Commissioners have not cleared the submission". That letter however, went on to say that "The Commission's Chairman, Mrs. Shirley McPherson, has read the submission and authorised its release to the Committee in its present form".

10. The Committee may consider that even after receipt of that letter the Select Committee might have considered that the submission had the authority of Mrs. McPherson in her official capacity as Chairman of the Commission and, to that extent, was to be regarded as a submission on behalf of the Commission.

11. It is also true, as appears from the Hansard Report of the evidence given by Mr. O'Brien before the Select Committee on 19 July, 1988, that at the beginning of his evidence the Chairman of the Select Committee asked Mr. O'Brien (page 68): "Is this, in fact, a submission made by the Aboriginal Development Commission?" and that Mr. O'Brien replied: "To the extent that it has been formally cleared by the full Board of the Commission no, it is not ... The Chairman of the Commission, Mrs. Shirley McPherson, has carefully read the document and has authorised its submission to the Committee as a factual and objective account of those events. That is the status that it has." The Chairman then said to Mr. O'Brien: "It just may be that it would best be formally considered ... as a submission from you, that it is not the submission of the Aboriginal Development Commission, it is Mr. O'Brien's submission...". Mr. O'Brien replied: "I would be happy about that because it does not contain any of my personal opinions or views... I am quite happy for those to be provided to the Committee under my name as General Manager of the Commission" (underlining supplied). The Chairman later stated that the submission would be "incorporated in Hansard as a submission from Mr. O'Brien, who is the General Manager of the Aboriginal Development Commission, but it is his personal submission".

12. It appears from the minutes of the meeting of 10 October, 1988 that a copy of the Hansard of 19 July, 1988 was not available at that meeting although a copy of Mr. O'Brien's letter of 18 July, 1988 may have been.

13. The Committee may consider that the contents of that letter conveyed that the submission was in some sense a submission on behalf of the Commission, in that it stated that, although "the full Board of Commissioners have not cleared the submission", nevertheless "The Commission's Chairman, Mrs. Shirley McPherson, has read the submission and authorised its release to the Committee in its present form".

14. Be that as it may, the Committee may consider that the extracts from the minutes and from the transcript of the recorded discussion of the meeting of 10 October, 1988 set out above, indicate that the concern of the members of the Commission was with papers and submissions purporting to be written or made on behalf of the Commission, and that they were not concerned with papers or submissions written or made by the General Manager or the Chairman in some private capacity. The Committee may consider that the material reveals that the members of the Commission were concerned that the submission of 13 July, 1988, stating that it was the submission of the Aboriginal Development Commission, had been lodged without prior notice to them, and that even Mr. O'Brien's letter of 18 July, 1988 had not made it clear that it was not, to some extent, a submission on behalf of the Commission. The Committee may also consider that the whole of the relevant discussion at the meeting of 10 October, 1988 was directed to the position of the Commission as such, and made no mention, so it would appear, of any concept of Mr. O'Brien, or any other person, giving evidence in some private capacity. Notwithstanding that that was the ultimate basis upon which Mr. O'Brien's evidence was received by the Select Committee, that aspect of the matter does not appear to have received any attention at all at the meeting of 10 October, 1988.

15. The Committee may consider that the above matters support the correctness of the explanation of the resolution of 10 October, 1988 given by the Board of Commissioners to

the President of the Senate which was tabled in the Senate on 20 October, 1988. That explanation was by way of a resolution of the ADC as follows:-

> "In relation to the resolution passed at the 62nd Commission meeting concerning the presentation of papers and submissions, the Board of Commissioners wishes to inform the Senate that this resolution:
>
> 1. was not intended to in any way encroach upon or limit the powers of the Senate or any Parliamentary Committee;
> 2. was not intended to prevent or in any way affect the right of individuals to appear before the Senate or such Committees;
>
> 3. was a purely administrative mechanism designed to ensure that papers and submissions presented on behalf of the ADC contained information that was accurate and reflected the view of the Commission;
>
> and that the Board regrets any misunderstanding that may have occurred as a result of the passage of this resolution."

16. This explanation has been reiterated in effect in the submission to the Privileges Committee on behalf of certain Commissioners (not including Mr. Perkins) on page 22 where it is stated that "the resolution concerning the presentation of papers and submissions was concerned only with those presented or purported to be presented on behalf of the Commission".

17. The explanation was also reiterated in the submission dated 22 February, 1989 on behalf of Mr. Charles Perkins in paragraph 53 where it is set out in full and in paragraph 54 where it is stated that "Mr. Perkins stands by the explanation already given by the Commission, including the explanation in paragraph 2 of the resolution, that it was not intended to prevent or affect the rights of individuals to appear before Senate Committees".

18. Having regard to all these matters, and notwithstanding the submissions made to the Committee on behalf of Mrs. McPherson and Mr. O'Brien, it appears that there is ample material before the Committee upon the basis of which it could conclude that the resolution of 10 October, 1988 was intended to be limited to papers and submissions purporting to be presented on behalf of the Commission and that, accordingly, the passing of that resolution did not involve any contempt of the Senate.

E. The Transfer of Mr. O'Brien from his Position of General Manager of the Commission

1. The relevant resolution relating to Mr. O'Brien was apparently passed at the meeting No. 62 of the Aboriginal Development Commission held on 10-14 October, 1988 and was in the following terms:-

"In accordance with the Minister's S.11 Direction of 27 April, 1988 requiring the ADC to co-operate with the Minister and portfolio bodies in effecting the transition to ATSIC and pursuant to the Commission having set aside funds to facilitate the negotiation of a Treaty, the Commission directs that:

1. a temporary position is established equivalent to that at SES Level 3. This position will have responsibility for liaising with the ATSIC Task Force and generally overseeing the smooth transition to ATSIC as well as responsibility for managing and controlling all aspects of the treaty consultations as well as other duties as directed;

2. the current General Manager, Mr. M. O'Brien, be placed in the above created position forthwith;

3. Mr. Cedric Wyatt be transferred to the position of acting General Manager;

4. the decision to create a temporary SES Level 2 position taken at the Townsville meeting be revoked; that appropriate job statement for Level 3 position be drafted and that the Department of Industrial Relations be informed of this revocation and their approval sought for the new position as a matter of urgency."

2. According to the original submission of Mrs. McPherson and Mr. O'Brien to the Privileges Committee (pages 16 and following) this resolution was first produced by Mr. Perkins at the meeting of the Aboriginal Development Commission on 10 October, 1988 during an in-camera session at which "no record of discussions was taken and all staff vacated the room". The submission further states that: "Mr. Perkins produced from his briefcase a set of eight (8) typed motions and a number of photocopies. The motions related to the removal of the General Manager, the resignation of the Chairman, the restriction on the provision of material to Parliamentary Committees and the limiting of roles of the Chairman and General Manager. The Chairman saw the documents for the first time when Mr. Perkins produced them and she briefly read through them. The General Manager had at that time been excluded from the meeting with the rest of the staff ... The meeting first dealt with the removal of the General Manager. No specific reasons were given for this proposal to remove him from his position to a newly created position. It was indicated by Mr. Perkins that the new General Manager would be Mr. Cedric Wyatt ... The Chairman dissented from the motion with Commissioners Martin and O'Shane but the matter was carried purporting to remove Mr. O'Brien and replace him with Mr. Wyatt. The General Manager was asked to attend the in-camera session to discuss the motion as put. An account of the matters relating to his experiences is set out in a statement Attachment 32."

3. **Attachment 32** is a "**STATEMENT OF RELEVANT EVENTS FROM 7 OCTOBER - 14 OCTOBER, 1988**" by Mr. O'Brien including such knowledge as he had of the events relating to the passage of the resolution relating to his transfer from the position of General Manager. It does not appear from his statement that Mr. O'Brien was told of any particular

reasons for the resolution. Certainly, according to that statement, no reference was made to his having given evidence to the Select Committee and what was said, according to Mr. O'Brien, would appear to be consistent with the reasons for the transfer conveyed to the Chairman of the Select Committee (see below).

4. Mrs. McPherson's statement concerning the resolution transferring Mr. O'Brien is contained in Attachment 33 to the joint submission of Mrs. McPherson and Mr. O'Brien. It includes the following material some of which apparently relates to discussions when Mr. O'Brien was not present:

"A lengthy discussion followed where Charles Perkins and Peter Yu in particular, kept saying they couldn't 'trust him' he doesn't communicate with the Board (which is quite incorrect) in many cases he's 'pulled the wool over my eyes' and its time he went.

Mick O'Brien was called in and they explained what they wanted him to do - that is, vacate the General Manager's position and be in effect on 'special duties'. Mick O'Brien responded that he thought an Aboriginal officer would be more appropriate for the position they had in mind. During the discussion, Mr. Perkins said they had confidence in Mick O'Brien and he was being transferred because they wanted him for the new position. Mick O'Brien asked if he could have more time to consider their recommendation which they granted, namely the length of time it took to go through the other motions, about 2-2.5 hours ...

The following morning, Mick O'Brien was called back into another 'in-camera' session when he told the Board of Commissioners that it was obvious to all concerned that it was time for him to depart as General Manager of the ADC because the Board, on numerous occasions, expressed their concerns about his exercise of delegation and lack of rapport with Commissioners. All he asked was, would the Commissioners assist him to become on the unattached Public Service list at his SES Level 3. The Commissioners said no - the offer is as the resolution. Mick O'Brien said 'fine, it seems that I've no alternative than to say I won't accept your offer and will now need to seek advice as to my legal rights and entitlements and could you supply me with a copy of the reasons why I'm put on special duties in the same time as you gave me to decide about my future (i.e. 2 hours)....'."

5. According to Mrs. McPherson's statement some reasons were given for Mr. O'Brien's transfer but none relating to his having given evidence before the Select Committee, with the possible exception of the reference to his statement that "the Board, on numerous occasions, expressed their concerns about his exercise of delegation...". It is possible that Mr. O'Brien had intended to include in this description his appearance before the Select Committee. Nevertheless, this was not a matter raised by Mr. O'Brien and was not a reason stated by any of the Commissioners. In any event, as the material under paragraph D above indicates, the question of exercise of delegation in that context, only arose in connection with question of the presentation of papers and submissions to Parliamentary Committees and other bodies which the Committee may consider did not give rise to any contempt of the Senate.

6. On this material, it seems that it would be open to the Committee to find that the transfer of Mr. O'Brien from his position as General Manager was not relevantly related to his having given evidence before the Senate Select Committee and, accordingly, did not give rise to any contempt of the Senate.

7. The Committee may consider that the above material is consistent with the reasons for the transfer given by the Commission to the Chairman of the Select Committee in the Commission's letter of 20 October, 1988 which stated, inter alia, as follows:-

> "Members of the Board regard Mr. O'Brien as being the most suitably qualified ADC officer to discharge effectively the duties of the newly-created position. This placement was considered by Members of the Board as a show of confidence in Mr. O'Brien. (Minutes in preparation so relevant extract not provided.) In two separate meetings with Members of the Board, Mr. O'Brien was given the opportunity to respond to the proposal."

The submission on behalf of Mr. Perkins dated 22 February, 1989 stated in paragraph 61 that the above response by the Chairman was brought to the notice of individual members of the Commission on an informal basis and was not discussed at a formal Commission meeting.

8. At the very least the Committee might consider that, even if it had some doubt as to whether this explanation was a fully comprehensive and accurate statement of all of the reasons for the transfer of Mr. O'Brien, it could nevertheless be satisfied that those reasons did not relevantly include the fact that Mr. O'Brien gave evidence before the Select Committee.

9. In this connection it may be noted that the submission on behalf of Mr. Perkins states in paragraph 63 thereof that Mr. Perkins was of opinion that the reply should have been more comprehensive although accurate as far as it went. That submission then goes on in paragraphs 64 to 84 to give a more comprehensive account of the relevant circumstances, inter alia, referring (in paragraph 74), to the letter dated 19 July, 1988 from the acting Deputy Chairman, Mr. Dodson, to Mr. O'Brien complaining, inter alia, that "It was quite unacceptable ... that the Submission states that it 'is made by the Aboriginal Development Commission'" and that: "It was ... very misleading to represent the document as the Commission's Submission". These statements, the Committee may consider, indicate a concern with the fact that the submission in form purported to be on behalf of the Commission rather than any concern with the fact that ultimately Mr. O'Brien gave evidence in some private capacity. (See also the Submission on behalf of certain of the other Commissioners, especially at pages 7 to 12 and 23 to 25.) The Committee may also consider it relevant that, notwithstanding a specific invitation by the Committee to do so, as contained in the, letter dated 6 April, 1989 to the solicitors for Mrs. McPherson and Mr. O'Brien, Mr. O'Brien has not particularised any particular conversations or conduct on the part of any Commissioners which would result in a contrary view.

WENTWORTH CHAMBER.
2nd May, 1989 (signed) T. Simos, Q.C.

RE ABORIGINAL DEVELOPMENT COMMISSION

SUPPLEMENTARY MEMORANDUM

F. The Resolution of No Confidence in Mrs. McPherson Passed by the Commission on 10 October, 1988

1. This resolution of the Aboriginal Development Commission was in the following terms:-

> "The Commission hereby expresses its lack of confidence in the Chairman of the Commission in that:
>
> (a) the Chairman has lost the confidence of the Aboriginal Housing Associations in Queensland as evidenced by the passing of a motion of no confidence in the Chairman at the ADC Housing Conference in Rockhampton on 15-16 September, 1988;
>
> (b) the Chairman has persistently failed to communicate, (both verbally and in writing) with Commissioners on matters of importance affecting the Commission;
>
> (c) the Chairman gave directions for a submission to be tendered on behalf of the ADC to the Senate Select Committee on Aboriginal Affairs without clearance from the Commission; and
>
> (d) notwithstanding a motion passed by the Commission on 23 May, 1988, requiring Commissioners to notify the Commission prior to making public statements, the Chairman appeared before the Senate Committee on 2 September, 1988 and delivered a speech to the Young Labor Lawyers Conference without notifying the Commission;
>
> (e) the Chairman allowed the lodging of the explanatory notes 1988/89 with the Senate Estimates without having submitted them to the Commission for approval;
>
> and as a consequence the Commission hereby calls upon the Chairman to resign her position forthwith."

2. The Senate Select Committee expressed the view in its report entitled "Protection of Witnesses" that the resolution of no confidence taken together with the resolution of 23 May, 1988 may constitute an attempt to restrict Mrs. McPherson's right to appear as a witness before the Committee.

3. It appears from paragraphs 11 to 15 of that Report that the Select Committee had in mind the distinction between the making of statements (or the giving of evidence to Parliamentary committees) by Commissioners or officers acting in an official capacity on the one hand, and the rights of such persons as individuals (not acting in an official

capacity) to make such statements (or give such evidence) on the other hand. It also appears that the Select Committee may have had in mind that the resolution of 23 May, 1988 may have related to public statements by Commissioners or officers purporting to be made in an official capacity or on behalf of the Commission, whereas the evidence given by Mrs. McPherson to the Senate Select Committee was stated by her to be given as an individual.

4. Having regard to these matters, it might be said that Mrs. McPherson, in giving evidence to the Senate Select Committee as an individual, could not have been in breach of the requirement of the resolution of 23 May, 1988 which was limited to the making of public statements in an official capacity or on behalf of the Commission.'

5. On this view, the resolution of no confidence in Mrs. McPherson, insofar as it was, in part, stated to be based upon her having given evidence to the Senate Select Committee, might be seen to have been based, in part, upon her having given that evidence as an individual and to have constituted the infliction of a penalty or injury upon her as a consequence of her having given that evidence as an individual.

6. Put more directly and simply, on this view, the motion of no confidence in Mrs. McPherson might be seen to have inflicted a penalty or injury upon her, in part because she gave evidence as an individual, that is, in a private capacity, without notifying the Commission, as was, apparently, thought to be required by the resolution of 23 May, 1988

7. In this connection, however, it is necessary for the Committee to review the relevant facts relating to the passing of the resolution of no confidence, to ascertain what was the perception of those who passed the resolution as to what they were doing in this regard, and in particular, to ascertain whether they intended that the resolution should be, in part, the infliction of a penalty or injury upon Mrs. McPherson as a consequence of her having given evidence as a private individual without first notifying the Commission.

8. Upon the assumption that the members of the Commission who voted in favour of the motion of no confidence recognised that the resolution of 23 May, 1988 was limited to public statements purporting to have been made in an official capacity or on behalf of the Commission, paragraph (d) of the resolution of no confidence is explicable only upon the basis that they regarded Mrs. McPherson as having given her evidence in an official capacity. If that were so, the Committee might consider that the passing of the motion of no confidence did not involve any contempt of the Senate.

9. The Committee may consider that it is reasonable to assume that those who voted in favour of the motion of no confidence were aware that the resolution of 23 May, 1988 was intended to be limited to public statements made by Members or officers of the Commission in an official capacity or which statements purported to have been made on behalf of the Commission. The Committee may consider that such an assumption would be justified having regard to the general approach taken by or on behalf of the relevant Commissioners, not only in relation to the resolution of 23 May, 1988, but also in relation to the resolution relating to the presentation of papers and submissions to Parliamentary committees dealt with in section D of the Memorandum of 2 May, 1989.

10. The Committee may consider that what is less clear is whether those members of the Commission who voted in favour of the motion of no confidence regarded Mrs. McPherson as having given her evidence in some sense in an official capacity, so as to fall within the terms of the resolution of 23 May, 1988, rather than in a private capacity as was in fact the case.

11. If the relevant members of the Commission were aware that the resolution of 23 May, 1988 was intended to be limited to public statements made in an official capacity or purporting to be made on behalf of the Commission, but also knew that Mrs. McPherson gave her evidence to the Select Committee in a private capacity, the Committee might consider that, notwithstanding the reference to the resolution of 23 May, 1988, the motion was in part based upon the fact that Mrs. McPherson had given evidence in a private capacity without first notifying the Commission.

12. On this approach, the Committee would first need to consider whether a requirement that a Commissioner first notify the Commission before making a public statement in a private capacity to a Parliamentary committee would, prima facie constitute "an improper interference with the free exercise by a House or a committee of its authority or functions", perhaps upon the basis that such a requirement might have the effect of, at least, discouraging a prospective witness from giving such evidence.

13. If the Committee did form the view that a requirement of prior notification in relation to the giving of evidence in a private capacity to a Parliamentary committee did constitute, prima facie, such an improper interference, the Committee might consider it appropriate to determine, after a consideration of the relevant facts, whether any Commissioners who voted in favour of the motion of the no confidence did so, at least in part, upon the basis that Mrs. McPherson had given evidence in a private capacity to the Select Committee without first notifying the Commission and by reason thereof were also involved prima facie in a contempt of the Senate in relation to the imposition of a penalty (the no confidence motion) as a result of the giving of evidence.

14. If the Committee found this to be the prima facie position, the Committee might consider that, prima facie, a contempt of the Senate was involved. The Committee might consider that it should then determine whether those who committed the relevant act "knowingly committed that act".

15. Such a determination would seem to be required by resolution 3 of the resolutions relating to parliamentary privilege which were agreed to by the Senate on 25 February, 1988 and which "requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it ...

(c) whether a person who committed any act which may be held to be a contempt:

(i) knowingly committed that act...". (and see generally Resolution 3).

16. It remains to consider what material is available in relation to the passing of the no confidence motion which the Committee might consider could establish that the

Commissioners or any of them voted in favour of the no confidence motion, at least in part, upon the basis that Mrs. McPherson had given evidence to the Senate Select Committee in a private capacity without first notifying the Commission and that this had been done knowingly. This involves, inter alia, a consideration of the circumstances in which the resolution was passed as related by Mrs. McPherson and of the explanation thereof appearing in the submissions of certain of the Commissioners and of Mr. Perkins.

17. Mrs. McPherson's account of the passing of this resolution is contained in Attachment 33 (entitled "STATEMENT BY MRS. SHIRLEY ANNE McPHERSON") to the joint submission of Mrs. McPherson and Mr. O'Brien dated 2 December, 1988. In the body of the Joint Submission it is stated that this resolution was first produced by Mr. Perkins at the meeting of the Aboriginal Development Commission on 10 October, 1988 during an in-camera session at which "no record of discussions was taken and all staff vacated the room". The submission further states that: "Mr. Perkins produced from his briefcase a set of eight (8) typed motions and a number of photocopies. The motions related to the removal of the General Manager, the resignation of the Chairman, the restriction on the provision of material to Parliamentary Committees and the limiting of the roles of the Chairman and General Manager. The Chairman saw the documents for the first time when Mr. Perkins produced them. The General Manager had at that time been excluded from the meeting with the rest of the staff ... The motion calling for the resignation of the Chairman was discussed at length and the Chairman rebutted each of the reasons proffered in the motion of no-confidence and calling for her resignation. An account of the Chairman's experiences is set out in Attachment 33".

18. Attachment 33 includes the following material: "... I went through point by point and explained the circumstances behind each of their reasons why they had no confidence in me and that I should resign, I argued that their reasons were very weak and petty, particularly about the motion of no-confidence in me as Chairman, which was passed at the ADC Housing Conference held in Rockhampton... The Commissioners conceded that I may have some good points in the area of financial management but they believed that they couldn't 'trust me' particularly because of my appearance before the Senate Select Committee and they found that they couldn't tolerate the current situation any longer. I said that I'd consider the motion and let them know my decision... The Board then voted for the motion with two abstaining - Zona Martin and Getano Lui. Pat Dodson moved the resolution and Peter Yu seconded it. The following morning ... I informed the Commissioners that I wasn't going to resign and I felt I'd briefed the Commissioners fully the previous day over their list of accusations" (underlining supplied).

19. In relation to this account, the Committee may consider it relevant that the letter dated 6 April, 1989 from the Committee to the solicitors for Mrs. McPherson and Mr. O'Brien quoted a portion of that account, including the portion underlined in the preceding paragraph hereof, and inquired whether Mrs. McPherson could particularise any facts or circumstances, including conversations, which, in effect, might link the resolution of no confidence to the fact of Mrs. McPherson having given evidence to the Select Committee, and that, apparently, no such conversations or conduct of the Commissioners has been particularised.

20. So far as concerns the submissions made on behalf of Mr. Perkins and on behalf of certain of the other Commissioners, that of Mr. Perkins deals with the no confidence resolution in paragraphs 85 to 95 thereof.

21. These submissions, of course, speak for themselves, but their relevant substance can perhaps be stated in the following propositions:-

(a) "The reason given in paragraph (d) is that the Chairman disregarded a motion of the Commission dated 23 May, 1988 requiring Commissioners to notify the Commission before making public statements. The Committee of Privileges having decided that the resolution of 23 May, 1988 was not a breach of privilege, we submit a more limited privilege requiring only notification cannot amount to a breach of privilege ... to require the Chairman to notify the Commission of an appearance cannot constitute 'improper interference' within the meaning of section 4 of the Privileges Act."

[Comment: If the resolution of 23 May, 1988 is regarded as having been intended to be limited to public statements purporting to be made on behalf of the Commission, it had no relevant application to Mrs. McPherson in respect of her having given evidence to the Select Committee in her private capacity.

Further, if, as seems to be the position so far as this submission is concerned, the resolution of 23 May, 1988 is to be regarded as concerning a requirement of notification before giving evidence to a Parliamentary committee in a private capacity, the Committee may consider, as stated above, that such a requirement constitutes "an improper interference with the free exercise by a House or a committee of its authority or functions", upon the basis that such a requirement might have the effect of, at least, discouraging a prospective witness from giving evidence, and thus constitute a contempt of the Senate, contrary to the submission in paragraph 92 of the submission.]

(b) "... the passage of a resolution of itself only requiring notification cannot amount to a penalty or injury, or deprivation of benefit within the meaning of section 12(2) of the Privileges Act."

[Comment: The Committee may consider that in some circumstances such a resolution could amount to such a penalty or injury, for example, if such a resolution requiring (future) notification was first passed after a particular witness had given evidence before a Parliamentary committee without notifying the relevant body..

In any event, the subject of this part of the submission is not the passing of the resolution of 23 May, 1988 but the passing of the no confidence motion which, the Committee might consider did constitute such a penalty.]

(c) "... it is quite inconsistent with her fiduciary obligation for a statutory office holder, particularly the Chairman of a Commission, to appear in her official capacity and at the same time give evidence critical of the Commission as a private individual ... Irrespective of the reference to the motion of 23 May, 1988 the

Chairman had a duty to inform the Commission of an intention to appear before a Committee, such as the Select Committee, in relation to matters falling within the ambit of the Commission and directly involving herself as Chairman. This duty arises by virtue of the fiduciary relationship existing between the Commission and its Chairman and exists independently of any motion such as that of 23 May."

[Comment: Expressing a purely legal opinion, it is by no means clear that the conduct described, that is, appearing before a Select Committee to give evidence in a private capacity without first notifying your employer, would be held in law by the Courts to constitute a breach of the fiduciary duty owed by an employee to an employer.

Nevertheless, even on the assumption that such conduct did constitute a breach of such fiduciary duty, the Committee might consider that that did not justify conduct by the employer that would constitute a breach of parliamentary privilege. This is made clear in the letter dated 6 March, 1989 from the Clerk of the Senate to the Committee.]

22. In summary, the Committee may consider that notwithstanding the purported justifications for including paragraph (d) as a basis for the motion of no confidence, its inclusion did in fact constitute a contempt of the Senate in that the no confidence motion constituted the imposition of a penalty upon Mrs. McPherson, in part because she gave evidence to the Select Committee in a private capacity without first notifying the Commission.

23. The submission on behalf of certain of the other Commissioners, other than Mr. Perkins states, inter alia, as follows in relation to the no confidence motion (at page 21):-

> "We were not concerned to prevent Mrs. McPherson from making statements as an individual ... What we resented and what we believed was destructive was the Chairperson's insistence on speaking for us contrary to our authority ... It did not occur to us that we had the power, let alone the right, to prevent her speaking as a private person. We believed, however, that when she did so in public concerning ADC matters, we should at least be notified. We believe this to be reasonable and we consider that it is consistent both with our position and with the privileges of the Parliament."

24. As with the submission on behalf of Mr. Perkins, so the position is taken in this submission that there can be no objection to a resolution requiring notification to the Commission prior to the giving of evidence in a private capacity to a Parliamentary committee. That the Committee may consider that such a requirement may involve a breach of Parliamentary privilege has been dealt with above.

25. If the Committee, after further consideration, did determine that a breach of Parliamentary privilege was, or might have been involved in the passing of the no confidence motion, it would then have to consider, in accordance with Resolution 3 of the Resolutions concerning Parliamentary privilege agreed to by the Senate on 25 February, 1988, whether those responsible knowingly committed the relevant breach when they voted in favour of the resolution. Whether or not this were so would no doubt be relevant to what action, if any, the Committee wished to take in relation thereto.

26. In this connection both submissions express the view that the requirement of notification did not involve any contempt of the Senate so that if the Committee were to accept that that was the view of the relevant Commissioners, including Mr. Perkins, it might conclude that if there was any contempt of the Senate committed, it was not committed knowingly. If the Committee so determined, it would then presumably determine what further action, if any, should be taken.

27. To recapitulate, the Committee may consider that all relevant Commissioners, including Mr. Perkins, were aware that Mrs. McPherson had given evidence in her private capacity, but nevertheless took the view (contrary, apparently, to the fact) that the resolution of 23 May, 1988 required her, even in that circumstance, to first notify the Commission before giving evidence to the Select Committee and that her failure to do so was a legitimate reason, among others, to justify the passing of a no confidence motion in her. The Committee may consider that this conduct nevertheless involved a contempt of the Senate and would then have to determine whether to accept the submission on behalf of the relevant Commissioners that in effect they believed this was legitimate and did not involve any contempt of the Senate.

28. The Committee may consider that the precise issues which it considers have been relevantly raised have not been sufficiently or precisely addressed on behalf of the relevant Commissioners. If the Committee took this view it could ask for further submissions from the Commissioners on the relevant matters. Alternatively, the Committee might consider that it has sufficient material before it to enable preliminary findings to be made. This course would seem to be envisaged by paragraph (10) of resolution 2 of the resolutions agreed to by the Senate on 25 February, 1988, which is in the following terms:-

> "(10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate."

29. This provision notwithstanding, the Committee may consider that at an earlier stage in the proceedings, if it considers that a prima facie case of contempt of the Senate has been made out on the material before it, that prima facie case should be put to the affected persons before determining the findings contemplated by paragraph (10) of resolution 2. This would be so more especially, but not only, if, in arriving at its view as to a prima facie case, the Committee had rejected submissions put before it on behalf of affected persons, particularly if those submissions were or involved submissions of fact. In that connection, the Committee might consider it justified in proceeding in the same way as if an allegation of contempt had been made by another party even though it appears that no such allegation has been or is proposed to be made by either Mrs. McPherson or Mr. O'Brien in the present case (see their final submissions and covering letter dated 14 April, 1989). On that basis the Committee might consider it appropriate to follow the procedure

laid down in paragraph (2) of Resolution 2 of 25 February, 1988 which relates, inter alia, to an allegation of contempt which is in the following terms:-

"(2) The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:

(a) making written submission to the Committee;
(b) giving evidence before the Committee;
(c) having other evidence placed before the Committee; and
(d) having witnesses examined before the Committee."

30. To recapitulate again, the Committee may consider that the matter should now proceed as follows:

(a) (i) The Committee should consider whether or not it considers that a resolution purporting to impose a requirement of prior notification upon Commissioners or officers of the Commission prior to their making public statements by way of giving evidence in a private capacity to a parliamentary committee, would, prima facie, involve, or might involve, a contempt of the Senate in the circumstances of the present case, for the reasons set out above in paragraphs 12-15.

(ii) In this connection, although the Committee has already determined that the passage of the resolution of 23 May, 1988 did not involve any contempt, of the Senate, presumably upon the basis that it was intended to be "limited to public statements purporting to be made on behalf of the Commission, those who voted in favour of the resolution of no confidence would appear to have proceeded upon the basis that the resolution of 23 May 1988 was also applicable to the making public statements by way of giving evidence in a private capacity to the Senate Select Committee without prior notification to the Commission.

(b) If the Committee were to determine that the requirements of prior notification in the resolution of 23 May 1988, as it was understood by the relevant commissioners at the time of passing the no confidence resolution, did, prima facie, constitute a contempt of the Senate, the Committee might think that it should then consider whether or not the passage of the resolution of no confidence, to the extent to which it was based, in part, upon that understanding of the resolution of 23 May 1988, also, prima facie, involved or might involve, a contempt of the Senate, in that it involved the infliction of a penalty upon a witness who had given evidence before the Senate Select committee in a private capacity without prior notification to the Commission;

(c) If the Committee were to determine that the passage of the resolution of no confidence did, in that way, and to that extent, prima facie, involve those who voted in favour of it in a contempt of the Senate, the Committee might think that it should then go on to consider whether or not those persons who voted in favour

of the no confidence resolution did so knowingly, that is, knowingly that a contempt of the Senate was, or might be involved;

(d) The Committee might then think that it should then consider whether its prima facie views as to these matters should be conveyed to those who voted in favour of the resolution of no confidence (by way of notifying their solicitors) with a view to giving them an opportunity to respond to those prima facie views in such a manner as they wished, and as the Committee considered appropriate, perhaps even to the extent of evidence being given before the Committee, even at that stage;

(e) The Committee might think that it should then consider how to proceed further in the matter having regard, inter alia, to the question whether or not it was minded to accept any explanations which might be given by those concerned.

WENTWORTH CHAMBERS

3 May, 1989 (signed) T. Simos, Q.C.