

CHAPTER 3 – PRIVILEGE 1988-2005 – RIGHT-OF-REPLY MATTERS

Introduction

3.1 Privilege resolution 5 enables a person who has been referred to in the Senate in a way in which the person regards as adverse to seek a right of reply in the same forum. This resolution was regarded at the time of its creation as the most unusual of all the privilege resolutions, and the Senate was the first legislature in the world to introduce the procedure. As a result, it attracted the most controversy and concern during the debate on the resolutions, resulting in a cross-party vote in the Senate chamber.¹ Concerns expressed at the time included the possible vexatious use of the procedure, the philosophical difficulties involved in allowing unelected persons the same access as senators to the absolute privilege of the Senate, and the possibility that permitting a response might imply some criticism of the senators who were the subject of the response. By a majority of two to one, however, the Senate considered that the procedure should be adopted and in the event none of these fears has been realised.

3.2 Since the Senate adopted the procedure in 1988, only 45 responses have been recommended for publication, with another six not proceeded with because the person concerned chose not to pursue the matter further after the committee had made contact. The committee has refused a right of reply three times. In accordance with the requirement of paragraph (2) of the resolution, it reported on the first refusal in the 76th report,² and on the two further refusals in its 107th report.³

3.3 The committee has continued to devote a separate chapter to right of reply matters because, there has continued to be significant interest in how the procedure works, even though the procedure has not been used with any great frequency. This present chapter again describes the process, and also confirms the committee's earlier evaluations of its effectiveness.

Method of operation

3.4 The method of operation is simple. If a senator when speaking in or using the procedures of the Senate, whether directly or through tabling or incorporation of material, refers to a person by name, or in such a way as to be readily identified, in a manner that the person regards as adverse, that person may make a submission in writing to the President of the Senate, seeking the incorporation of an appropriate response in the parliamentary record. If the President is satisfied that the subject of the submission is not so obviously trivial, frivolous, vexatious or offensive as to make it inappropriate for consideration by the Committee of Privileges, and that it is

1 *Journals of the Senate*, 1988, p. 536.

2 Senate Committee of Privileges, 76th report, PP 126/1999, paragraph 3.15; 107th report, PP 345/2002, paragraphs 3.14-15.

3 107th report, PP 345/2002.

practicable for the committee to consider it, the President must refer the submission to the committee.

3.5 The committee in turn must make a decision as to whether or not to consider the submission; if it decides not to consider it, it must report that decision to the Senate.⁴ Having decided to consider the submission, the committee must meet in private; it may confer with the person concerned or with the senator who referred to the person; and it must not itself publish a submission or its proceedings in relation to the submission, but may present minutes of its proceedings and all or part of the submission to the Senate, recommending that it be published by the Senate or incorporated in *Hansard*.

3.6 The Committee of Privileges is enjoined by the Senate resolution not to consider or judge the truth of either the comment of the senator, or comments in the response. This element of the resolution accords with the duty of senators to present petitions to either House of Parliament for redress of a grievance. A senator is obliged to present the petition but this action does not indicate any view on the merits of its content.

3.7 Because the committee does not judge the truth of the original comments or the proposed response, and makes no finding of wrongdoing on the part of a senator, the only role of the committee is to ensure that a response channel is available.

This addresses early concerns that the resolution raised philosophical difficulties about allowing unelected persons the same access as senators to absolute privilege and that the procedure entailed implicit criticism of senators. Neither of these concerns has become an issue.⁵

3.8 The provision has also been essential in preventing the committee from becoming embroiled in exchanges between senators and persons alleging they have been mentioned adversely in Senate proceedings. As long as the response is succinct and relevant and does not contain material which, for example, would reflect adversely on either a senator or any other person, the committee is likely to recommend a response.

3.9 In interpreting these requirements the committee has been guided by the criteria governing senators' personal explanations and claims of misrepresentation. Some degree of editing or amending of submissions may be involved, although the committee has committed itself to allowing as much as possible of the person's response to be published, subject to the resolution 5 requirements. In the interests of early redress of a person's perceived grievances, if the committee proposes any changes to the text of a response it normally confers with the person concerned by telephone, and makes, suggests or receives any changes to the person's submission by

4 See paragraphs 3.12 to 3.15 below.

5 Senator Robert Ray, "The Right of Reply in the Australian Senate", *The Parliamentarian*, 2004/Issue Three, p. 234.

telephone or facsimile. It advises the senator that it proposes to table a right-of-reply report in the Senate, but does not otherwise confer with the senator.

Reports 1988-2005

3.10 The most interesting feature of the operation of the right-of-reply procedure in the Senate has been that, contrary to the initial fears, the committee has not been swamped with such cases. At the time of its 35th report in December 1991, the committee had received only 18 submissions and had reported to the Senate on 14 occasions. This present report reiterates some of the features referred to in the 35th report, as that report contained the blueprint for the committee's future operations.

3.11 Two of the reports recommended responses from persons not named in the Senate but who regarded themselves as referred to in such a way as to be readily identified. The four submissions which were not pursued to finality are summarised as follows.

3.12 In two of the cases, despite the committee's having communicated with the persons seeking a response, the persons concerned did not proceed with the matter. This led the committee to report to the Senate at that time as follows:

The committee has decided that, in matters of this kind, if no response to the committee's inquiries is received within three months, it should consider the matter closed and report accordingly to the Senate, in general terms, in due course. The committee does not consider it appropriate that matters such as these should be kept "on ice" indefinitely, to be resurrected at a time suitable to the complainant, and makes this report to place on notice its intentions in this regard. In this context, it may be noted that the committee itself, in dealing with matters of this nature, has a policy of dealing with them as expeditiously as possible, within the constraints imposed by the Senate's sitting patterns and the terms of the resolution.⁶

3.13 This restriction has been slightly modified to accommodate exceptional circumstances where the persons could not reasonably have responded within the timeframe. As a corollary, the committee has also decided that the three month rule should generally apply to persons who seek a right of reply in the first instance, again, unless there are exceptional circumstances.

3.14 The third case involved a right of reply which, before the committee had an opportunity to consider it, was incorporated directly into *Hansard*. Under those circumstances, since the remedy sought had already been obtained, the committee did not proceed with the reference and so advised the person.

3.15 The final case involved the naming of a person in documents tabled in the Senate. The committee found that the remedy sought had been given in later tabled documents and advised the person accordingly. The person chose not to pursue the

6 Senate Committee of Privileges, 35th report, paragraph 17, PP 467/1991.

matter. One feature of this matter was that the person had become aware of the initial tabling some considerable time after the tabling had occurred. The committee noted that special circumstances would need to exist before it would consider a submission at such a distance from the original naming in the Senate, but did not consider it appropriate to exclude consideration of a submission solely on the ground of the lapse of time.

3.16 In the period covered by the 62nd report, the committee recommended that eight further responses be incorporated in *Hansard* and, following a reference of another matter to it, wrote to the person concerned. The committee did not hear from that person and regarded the matter as having concluded.

3.17 The 76th report covered six submissions, five of which the committee recommended for incorporation, and one which, under paragraph 5(2) of the Privilege Resolutions, the committee refused to consider, for reasons outlined in paragraph 3.15 of that report. An interesting feature of one of the right of reply reports was that the response involved an overseas visitor who, to the committee's knowledge, was neither a citizen nor a resident of Australia.

3.18 The 107th report covered twelve right-of-reply responses and two refusals by the committee to permit a response. Further details are contained in paragraphs 3.13 to 3.15 of that report.

3.19 This present report covers a further seven reports, none of which is appreciably different in kind from previous reports. One interesting outcome, however, which has never been demanded or expected by either the Committee of Privileges or resolutions is that, following the tabling of a report in the Senate, the senator to whom the response was directed apologised for the aspersions cast against one of the persons.⁷

Types of responses

3.20 The responses which the committee has recommended for incorporation since the passage of privilege resolution 5 have come from a wide range of persons, including a former premier and former senators, the chairman of an Australian airline, the president of the Returned and Services League of Australia, the chairman of the Advertising Standards Council, representatives of refugee associations, public servants, statutory office holders, private citizens, local government representatives, scientists, academics and educationists, on their own behalf and on behalf of the institutions for which they work, and the spouse and staff of senators. The matters which they have addressed have been matters raised substantively by senators on their own behalf or representing their constituents.

7 *Senate Committee of Privileges, 110th report*, PP 601/2002. And see also *Senate Hansard*, 12 December 2002, p. 8147.

3.21 There has been no appreciable change in the kind of individual wishing to respond to an adverse mention since the inception of the right-of-reply procedure; nor, broadly speaking, in the kind of matter to which he or she has sought to respond. While the resolution formally does not permit responses by corporations, the committee has had no difficulty in dealing with institutions because invariably any adverse comment about an organisation or institution necessarily involves persons within them, and the committee has effectively dealt with responses under the existing resolution 5 provisions.

3.22 In all cases the Senate has adopted the committee's recommendation that a response be incorporated in *Hansard*. The effectiveness of the right-of-reply procedure has been enhanced by the immediate publication of responses in hard copy and electronically, as soon as the report is tabled.

Analysis

3.23 While it is difficult for the committee to evaluate precise reasons for the relatively few users of the provision, several features have, in the committee's view, influenced the limited use of the procedure.

- It is not well known. On recommending a right of reply the committee releases a report, the response is incorporated in *Hansard* and placed on the Internet. Except for the occasional high profile response, it is rare for the media to disseminate what is in fact news of a relatively uncontroversial procedure which in all cases is recommended unanimously by the committee.
- Many of the matters arising in the Senate involving adverse comment tend to be by senators on behalf of constituents at times such as the adjournment or during discussion of matters of public interest, when media interest in Senate proceedings is minimal. Generally, persons seeking a response are likely to be affected within their own community rather than nation-wide, and their concern is more to have their response disseminated at the local rather than at the national level.
- It has been the experience of committee members that, on the whole, adverse comment within each chamber is relatively rare, and tends to be directed primarily at persons within the same arena, or alternatively at persons who choose other mechanisms for asserting a right of reply.
- Furthermore, the most likely sources of adverse comments against individuals are proceedings of committees, which have their own detailed procedures to afford a person adversely named or referred to, usually by witnesses in those proceedings, a right of reply.

3.24 Given the small numbers of persons availing themselves of the right-of-reply procedure, the question arises whether the procedure is worth pursuing. The committee continues to believe that the procedure is both desirable and successful. In its dealings with persons who have perceived themselves to be adversely affected by comment made in the Senate, the committee has found in most cases that the persons

have been concerned, not with vengeance or apology, but rather to ensure that their voice is heard or views are put in the same forum as the original comments were made.

3.25 Another concern of persons seeking a right of reply has been the swift redress of their perceived grievance. As a result, the committee's approach has been to change only minimally, if at all, the person's words; to consult with the person, as required by the privilege resolution if any change is to be made, at the earliest opportunity, usually by telephone; and to report to the Senate as briskly as possible. Thirty-three (or 73 per cent) of the committee's right-of-reply reports have been completed within one month, and twelve (27 per cent) within one week. While the average time taken for all right-of-reply reports has been just over a month, this has included delays brought about by the committee's not meeting during parliamentary adjournments or recesses, and by the time taken to negotiate with the persons affected. In one case, at the end of a sitting period, when the committee was anxious to ensure that a right-of-reply was availed of with minimal delay, the committee received and considered a submission in the morning and tabled a report, immediately adopted by the Senate, later that same day.⁸

Conclusion

3.26 When the procedure was originally established committee members, like other senators, were wary that it could be misused. For the reasons stated above, this has not occurred and the committee emphasises the basic simplicity of the process. The right-of-reply procedure is usually quick, cheap, and effective for the purpose of enabling persons to put their side of the story. The procedure is available to all, regardless of either skill or financial capacity. The committee suggests that this alternative procedure should be examined by all who are contemplating changes to defamation law. It emphasises that a primary reason for the success of the process is that the committee makes no judgment as to the truth or otherwise of the assertion made by either the senator concerned or the responders. This feature is vital, as otherwise the process would be bogged down endlessly by claim and counter-claim involving the committee in an inappropriate adjudicative function. The opportunity can be, and has been, taken for both parties to carry the matter further in the chamber and by another rejoinder. This has not distorted the right-of-reply process and, as with most claims of misrepresentation made by one senator against another, has usually died down after another exchange.

3.27 Having taken the lead in this matter, the committee is pleased to note that most Australasian legislatures have now adopted a right-of-reply procedure in some

8 Senate Committee of Privileges, *97th report*, PP 131/2001.

form, and that the British Commonwealth Parliamentary Association Study Group on Parliament and the Media has included a recommendation that other legislatures follow the Senate's lead in providing such a right of reply.⁹

9 *The Parliamentarian*, 2004/Issue Three, p. 219.

