**APPENDIX H**

## ADVICES FROM THE CLERK OF THE SENATE SEPTEMBER 2002 – NOVEMBER 2004

**ADVICE NO. 33**

## PARLIAMENTARY PRIVILEGE — DOCUMENTS PROTECTED FROM COMPULSORY PRODUCTION — FURTHER US JUDGMENT

There has recently been a further judgment in the American courts about documents protected by parliamentary privilege from compulsory process for production.

In this case, a group of litigants sought to compel several members of Congress to produce documents from their offices relevant to an action about campaign financing legislation.

The court refused to order the production of documents in the terms sought, on the basis that it would be inconsistent with the parliamentary privilege to require the members to identify and separate from protected documents the non-protected documents which would be compelled, because this would impose a burden of the kind which the privilege is construed to avoid.

The judgment follows others, including that in the tobacco corporation case (*Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408). The latter, in addition to confirming that members may not be compelled to produce documents within the sphere of their legislative activities, indicated that it would be inconsistent with the privilege to authorise wide-ranging searches of members' files containing protected material.

The additional element in the recent judgment is that, even when it is known or conceded that an order will turn up non-protected documents, members may not be required to search their files simply on that basis.

If that principle were followed in Australia, and applied in criminal investigations, the Senate, following the judgment in *Crane v Gething,* could reasonably have declined to authorise the examination of Senator Crane's documents and returned them to him, and Senator Harris could have required the return of all his documents without separating the protected and non-protected documents.

This gives added point to the contention that it is not proper for searches under warrant of senators' offices simply to sweep up all documents in the offices without regard to their relevance to the investigation or their privileged status, and impose on the senators the task of identifying and separating the protected documents.

Attached is a copy of the judgment, which is very brief.

**ADVICE NO. 34**

## PARLIAMENTARY PRIVILEGE — EXECUTION OF SEARCH WARRANTS DRAFT GUIDELINES

Thank you for your letter of 4 December 2003, in which the Committee of Privileges seeks my comments on the draft guidelines for the execution of search warrants provided to the President by the Attorney-General and the Minister for Justice and Customs.

The draft guidelines appear to have been significantly amended since I last saw them, and they also take into account comments made on earlier drafts.

In analysing the draft guidelines, it should be recognised that they are to be interpreted and applied by police officers in the process of executing search warrants and conducting searches. The draft guidelines therefore cannot be lengthy or complex. They are not an exercise in legal drafting or law codification.

The draft guidelines are basically sound. They cover all of the essential points, and appropriately preserve the rights of senators who may be subjected to warranted searches.

The following changes, however, would improve the drafting of the guidelines.

Paragraph 4.1, third dot point: It is not clear why "confidential material" is referred to here. Parliamentary privilege and confidentiality are two different issues, and the guidelines are intended to cover parliamentary privilege. The expression "confidential material" should be replaced by "material covered by parliamentary privilege", in accordance with the expression used elsewhere in the guidelines.

Paragraph 5.6, subparagraph (a): "in Parliament" should be "in Parliament House".

Paragraph 5.11, third dot point: Perhaps the Presiding Officer and Clerk of the relevant House should be added to the list of examples of neutral third parties who might be asked to hold material until a process for determining its status is begun or a claim of parliamentary privilege is abandoned. It may be thought that the Presiding Officer and Clerk are not sufficiently neutral, in that they may be expected to favour unduly the affected member, but the member and the police could well agree on their acting as the neutral third party.

Paragraph 5.11, fourth dot point: The phrase "the Presiding Officer of the relevant House" should be "the relevant House". The Presiding Officer of the relevant House cannot make a ruling on the status of material; the ruling has to be made either by a court (if the judgment of French J is not followed) or by the relevant House (if that judgment is followed).

Paragraph 5.11, after fourth dot point: For complete clarity, there should be a new fifth dot point here, along the following lines:

- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the neutral third party until the disposition of the items is determined in accordance with the ruling.

It may be thought that this goes without saying, but it should be included for completeness.

With these changes I think that the draft guidelines will be appropriate.

I would be pleased to provide the committee with any further assistance in relation to this matter which the committee may require.

**ADVICE NO. 35**

This note is to acquaint the committee with two matters of interest, and to suggest a possible course of action in relation to one.

**United Kingdom Corruption Bill**

The committee would be aware that there has been considerable publicity and concern in the United Kingdom in recent years about corruption of members of Parliament. Due to defects in the statutory law, it was discovered that members of Parliament could be prosecuted only for a common law offence of corruption. There arose a quite mistaken perception that parliamentary privilege was a barrier to the successful prosecution of members for corruption, and a view that the law of parliamentary privilege should be modified accordingly. A joint committee on parliamentary privilege gave credence to this view, notwithstanding attempts to dissuade them of it. The Home Office prepared a draft Corruption Bill, which included a provision that parliamentary privilege would be waived to allow proceedings in Parliament to be used against any person in a prosecution for a corruption offence. This bill was referred to another joint committee.

I made a submission to the joint committee, pointing out that the perception that parliamentary privilege was a problem was mistaken, and that it would be extremely unwise to undermine the fundamental constitutional principle of parliamentary immunity, not least because this would indirectly undermine that principle in other jurisdictions which gained their parliamentary privilege law by reference to the United Kingdom. This submission was supported by others, including the recently retired Clerk of the House of Commons.

In its report, the joint committee recommended that the provision be narrowed so as to permit the use of parliamentary proceedings to prosecute only the accused member and any co-accused. This is still a highly unsatisfactory and unnecessary erosion of parliamentary immunity.

Attachment 1 is an extract from *Odgers' Australian Senate Practice,* 10th ed, 2001, which sets out the principle involved and refers to two supporting cases, one American and one British. Attachment 2 shows the provision in the draft bill, attachment 3 is my submission to the joint committee, and attachment 4 shows the joint committee's report on the relevant provision and the recommended substitute provision.

I have expressed to my British counterpart the hope that members of the House of Commons will have sufficient independence and regard for a basic constitutional principle to reject the proposed provision.

The Privileges Committee may wish to consider the possibility of writing to its British counterpart to express concern about the proposed provision.

**Answers to questions on notice: privilege of publication**

Attachment 5 is a brief paper on a gap in the protection by parliamentary privilege of the process of asking and answering questions on notice. All stages of the asking and answering of such questions are protected, but the gap is that the general publication of answers is not protected until they appear in the next sitting's Hansard, which may be after many weeks where questions are answered in a long adjournment.

The paper suggests a simple amendment of the standing orders to close this gap.

The paper has been circulated to the Procedure Committee by the President, with a suggestion that the matter can wait until that committee has sufficient business to hold a meeting, but if members of that committee consider that the matter should be dealt with more expeditiously, this will be arranged.

Likewise, if the Privileges Committee considers that the matter should be dealt with more expeditiously, I will suggest to the President that this be done.

**ADVICE NO. 36**

## PARLIAMENTARY PRIVILEGE—EXECUTION OF SEARCH WARRANTS DRAFT GUIDELINES

Today I attended a meeting with officers of the Attorney-General's Department and the Australian Federal Police (AFP) at which we discussed a proposed memorandum of understanding between yourself, the Speaker, the Attorney-General and the Minister for Justice and Customs to agree to the proposed AFP guidelines for execution of search warrants where parliamentary privilege may be involved.

An amended version of the guidelines was presented at the meeting. All of the amendments which were endorsed by the Senate Privileges Committee have been incorporated, with the exception of the suggestion that the Presiding Officer and Clerk of the relevant House could be added to the list of examples of neutral third parties who might be asked to hold material until a process for determining its status is conducted. The guidelines do not preclude anyone acting as a neutral third party, but the AFP is reluctant to expand the list of possible examples beyond the indication in the guidelines that the warrant issuing authority or another agreed third party may perform this role. I indicated that, as this was merely a suggestion and did not substantively affect the operation of the guidelines, you and the Privileges Committee would probably not insist on the amendment. The other amendments, which have all been made, are of greater significance.

Attached is a copy of the draft memorandum of understanding. It will be noted that it provides for the guidelines to be changed by the AFP, but only after consultation with yourself and the Speaker. As the guidelines are issued by the AFP to bind their officers and may need to be changed in accordance with operational exigencies or emerging legal requirements, I think that this provision is appropriate. There is a remote possibility that the guidelines might be changed, even after that consultation, in a way which is not approved by yourself or the Speaker. Because of that possibility, I suggested that the memorandum include a revocation clause whereby the Presiding Officers could revoke their agreement to the guidelines. This suggestion was accepted. The only other amendment of the draft memorandum is that the "promulgation" referred to in section 3 will be carried out by tabling in each House.

I think that, with these amendments, the proposed memorandum is appropriate for signature. It will be provided for that purpose in the next few weeks.

I am sending a copy of this note to the Privileges Committee in case the committee wishes to make any further comment on the guidelines or the proposed memorandum.

**ADVICE NO. 37**

## REFERENCE TO PARLIAMENTARY PROCEEDINGS IN DEFAMATION SUITS — COURT DECISIONS

The committee may be interested to hear of two recent court decisions relating to the question of whether parliamentary proceedings may be referred to, and, if so, to what effect, in the course of defamation proceedings relating to statements made outside parliamentary proceedings.

It is clear that the repetition outside of parliamentary proceedings of statements made in the course of those proceedings is not protected by parliamentary privilege. The question which arises is whether reference may be made to statements in parliamentary proceedings (protected statements) to establish the meaning or effect of statements made outside parliamentary proceedings (unprotected statements) to support a defamation action.

Such a course clearly involves using parliamentary proceedings to further a legal action against a person, and is therefore prohibited by the law of parliamentary privilege. The wording of section 16 of the *Parliamentary Privileges Act 1987* clearly prevents such a course, as it prohibits reference to parliamentary proceedings by way of, or for the purpose of,

> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

These provisions simply codify the pre-existing law of parliamentary privilege, and various judicial decisions have recognised that that is all the Act does.

While this may be crystal clear to us, certain judges do not find it so. The problem appears to arise from a deeply-ingrained view in the legal system that the law of defamation is a fundamental law, and that the right to sue for defamation is the most fundamental human right, and every other law must give way to it. There have been three cases in which courts have held that use may be made of protected statements to support an action in respect of unprotected statements. *Laurance v Katter* (1996) involved federal parliamentary proceedings but state defamation law, and was adjudicated by Queensland Supreme Court judges, two of whom appeared to hold that the Parliamentary Privileges Act had to be either read down or held invalid to allow the defamation law precedence; the case was settled before a final determination. *Beitzel v Crabb* (1992) was a Victorian case in which parliamentary statements were used to prove the defamatory meaning of unprotected statements; and *Buchanan v Jennings* (2002) was a New Zealand case to the same effect. The approach of the judges in these cases was expressly repudiated by others in other defamation cases in which the law was correctly applied, for example by the full South Australian Supreme Court in *Rann v Olsen* (2000).

The latest news is that the New Zealand case was taken to the Privy Council on appeal, and the appeal was dismissed earlier this month. The Judicial Committee of the Privy Council did not see that reference to a protected statement to further a defamation action involves using

parliamentary proceedings against a person in a manner prohibited by parliamentary privilege. Its judgment boiled down to nothing more than a reiteration of the principle that an unprotected statement is unprotected. Having gone to the highest court of appeal of the country, the New Zealand Parliament has nowhere else to go except to change the statutory law.

The other recent case occurred in Queensland, and is more complex because of the peculiar circumstances. The case involved a member of the nursing staff of a hospital, Ms Erglis, suing some of her colleagues (the nurses) and the state for statements made in a letter and apparently circulated by the nurses. Those statements responded to statements made by Ms Erglis to Opposition members who raised the content of her statements in the Legislative Assembly. The responsible minister read out in the Assembly and tabled a copy of the nurses' letter. The relationship between this copy and other circulated copies is not clear. The state applied to strike out part of the ground for Ms Erglis' action, which is that the tabling of the letter compounded the defamation by the nurses. The basis of the application was that parliamentary privilege attached to the tabling of the nurses' letter and its publication by the Legislative Assembly. There was also an argument that the letter was prepared for the minister to table, although there appears to be no evidence of this. A further difficulty is that some copies of the letter as circulated appear to be different from the tabled copy.

The application to strike out that part of the ground of action was successful, but Ms Erglis appealed to the Supreme Court sitting as the Court of Appeal, and her appeal was upheld earlier this month by a majority of two to one. In upholding the appeal the majority simply restored the ground of Ms Erglis' action, and did not of course adjudicate on its merits. The majority judgment, however, endorses the erroneous notion that reference may be made to parliamentary proceedings, the tabling of the letter, to further the action against the unprotected statements, in the letter as circulated. It goes further than the New Zealand judgment in allowing the parliamentary proceedings to be regarded as adding to the damage of the original publication.

The minority judge correctly held that referring to the minister's act of tabling the letter in Parliament for the purpose of furthering the defamation action necessarily involves questioning and impeaching the parliamentary proceedings, and that one consequence of the majority's finding would be:

> the potential detrimental effect on the willingness of citizens to provide possibly important and possibly defamatory information to members of Parliament … A Member of Parliament who is exposing a source of information to the risk of increased damages by merely publishing verbatim the information given, thus enabling civil proceedings to occur of the kind brought here … may be able to avoid that consequence to her or his informants by adding comment and observation from other asserted or actual sources and thus providing a bowdlerized or fragmented version of the information given … it will [then] be difficult for any person to tender the relevant Hansard extract without it being held that the plaintiff is requiring the court to examine what the Member said and the extent to which it was a republication.

In other words, freedom of communication to Parliament and freedom of speech in Parliament are both infringed. Furthermore, the reasoning of the majority judgment collapses as soon as it is extended to the slightest variation of the facts. It also involves the absurdity of recognising the immunity of parliamentary proceedings when they are a primary publication, but allowing them to be questioned when they are merely a republication. The judgment represents a failure to apply properly the general principle of parliamentary privilege to the facts of the case.

It is not known whether the Queensland government will now apply to the High Court, or wait for the action to progress to see how the offending ground of Ms Erglis' action fares in the court proceedings. That part of the action may fail. The latter course, however, is dangerous, as an unfavourable result in the defamation action would be more difficult to overturn in the long run.

The judgment is another bad precedent weighing in the scales against the sound precedents, and it is to be hoped that it will not stand.

Further developments in this case will be awaited with interest, and I will keep the committee informed.

**ADVICE NO. 38**

## DRAFT NATIONAL DEFAMATION LAW

Thank you for your letter of 12 August 2004, in which the committee seeks comments on the parliamentary privilege implications of the revised outline of a possible national defamation law, provided to the committee by the Attorney-General.

There are two provisions in the draft law which relate to the law of parliamentary privilege: the proposed statutory absolute privilege in respect of parliamentary proceedings (clause 12 of the draft law); and the defence of fair report (clause 15 of the draft law).

### Parliamentary proceedings

This provision would provide a statutory defence to a defamation action that the contested publication occurred in the course of parliamentary proceedings, and also covers certain other transactions. The privilege giving rise to the defence is stated to be absolute, that is, the defence is not lost if the defendant makes the publication from malice or some other improper motive. The definition of parliamentary proceedings covers proceedings in the Houses of the Commonwealth Parliament and their committees, and is virtually identical to the definition contained in section 16 of the *Parliamentary Privileges Act 1987*.

The proposed provision would therefore duplicate, but only in relation to defamation actions, the parliamentary privilege provided by section 49 of the Constitution and the Parliamentary Privileges Act. The privilege under section 49 and the Parliamentary Privileges Act, of course, has a much wider application than in the defamation law.

It would be conceptually more accurate to say that the proposed law would merely reflect, rather than duplicate, that aspect of parliamentary privilege: the privilege is conferred by section 49, explicated in the Act and reflected, in one aspect, in the draft law.

The question which first arises is why it is necessary to reflect that aspect of parliamentary privilege in the proposed defamation law. The answer, no doubt, is that the proposed law is intended to be a code, and the defence of parliamentary privilege is included for the sake of completeness. There is no harm in this, provided that there is no difference in language which would enable some future judicial finding that the Act and the defamation law are inconsistent or in conflict. Given the copying in the proposed law of the language of the Parliamentary Privileges Act, this problem should not arise.

I therefore see no difficulty with clause 12 of the proposed law.

### Fair report

Clause 15 of the proposed law would provide a defence to a defamation action of fair report of a range of public proceedings. Public proceedings are defined to include parliamentary proceedings within the meaning of clause 12. The outline of the proposed law refers to section 10 of the Parliamentary Privileges Act, which provides a similar defence.

In relation to this proposed provision a number of questions arise.

(1) The traditional formulation of this defence, including in the common law, refers to fair and accurate report. Section 10 of the Parliamentary Privileges Act uses that expression. The outline of the proposed law also uses that expression in describing the draft law. Clause 15 of the draft law, however, refers only to fair report. This disparity between the outline and the draft law requires some explanation.

(2) The proposed defence of fair report would apply to all parliamentary proceedings, including the proceedings of a parliamentary committee in private session. Section 10 of the Parliamentary Privileges Act explicitly excludes the defence in cases of publication of unauthorised reports of private meetings. In other words, any unauthorised publication of private committee proceedings is not protected under the Parliamentary Privileges Act but would be protected under the draft law.

It may be that the drafters of the proposed law would say that unauthorised publication of private committee proceedings is not a problem to be dealt with by the defamation law, that the appropriate course is to protect reports of all proceedings and to leave it to the House concerned to deal with any unauthorised disclosures. In order to establish the defence of fair report, however, the defendant in a defamation action would have to refer to the proceedings reported, and the law of parliamentary privilege, as explicated in section 16(4) of the Parliamentary Privileges Act, prevents the tendering of any evidence in a court about any private proceedings of a committee unless the committee has authorised the publication of the proceedings. The answer of the drafters of the proposed law may be that, in practice, their proposed defence would not be available in a case of unauthorised disclosure of private committee proceedings, so the effect would be the same as that of the Parliamentary Privileges Act. It would be better for the question to be completely clarified, and for the proposed provision to make the defence available only for reports of public or published proceedings. Perhaps the use of the expression "public proceedings" in the draft law is intended to convey this, but that interpretation is not available because of the way in which the expression is defined.

(3) Section 10 of the Parliamentary Privileges Act refers only to proceedings at a meeting of a House or a committee, not to parliamentary proceedings under the broad definition of that expression in both the Act and the proposed law. Clause 15 of the proposed law, however, would confer the defence in relation to all parliamentary proceedings. This would include, for example, a report of the preparation of a document for purposes of or incidental to parliamentary proceedings. So a journalist could have the defence for a fair report of a witness drawing up a submission to a parliamentary committee even before the submission is presented: the drawing up of the submission is a proceeding in Parliament, so a fair report of the drawing up of the submission would be protected. It might be thought that the use of the expression "public proceedings" in the draft law excludes this interpretation, but as already noted that expression is defined to include all parliamentary proceedings. In some way the clause needs to be narrowed to avoid this unwanted consequence. It has been suggested that section 10 of the Act is too narrow, in that it may exclude from the defence, for example, a report of a submission published by a committee which was published under a standing resolution of the committee but not at a meeting of the committee. Regardless of that kind of contention, the application of the proposed clause 15 would be too wide.

(4) The defence provided by section 10 of the Parliamentary Privileges Act is stated in the explanatory memorandum which accompanied the bill for the Act to be a qualified privilege for a fair and accurate report. The outline of the proposed defamation law also refers to that section as providing a qualified privilege. The description in the explanatory memorandum was based on a belief that the section did no more than make uniform across the country the common law defence of qualified privilege for a fair and accurate report in respect of Commonwealth parliamentary proceedings, that section 10 would therefore be interpreted as conferring a qualified privilege only, and that additional words would have to be added to the section in order to make privilege absolute. The section was based on the 1984 report of the Joint Select Committee on Parliamentary Privilege, which recommended qualified privilege only for a fair and accurate report.

The outline of the proposed defamation law, however, while referring to the common law privilege and that of section 10 as qualified, describes the proposed defence of fair report in clause 15 as "available, regardless of the defendant's motive in publishing the matter", that is, as absolute. The various statements in the outline of the draft law cannot all be correct. There is a contradiction in the outline. If section 10 of the Parliamentary Privileges Act confers only a qualified privilege, clause 15 must confer only a qualified privilege, but if clause 15 confers an absolute privilege, section 10 must also confer an absolute privilege. There is no difference in the language of the two provisions which would make one absolute and one qualified. This contradiction should be cleared up.

Unlike clause 12, clause 15 would in any event probably provide a very different defence from the equivalent provision in the Act. This may be thought to be of no consequence: a defendant can choose whichever defence is the most favourable. The difference between the provisions, however, is likely to cause difficulties when considered in conjunction with the matters set out above.

I hope that these observations are of some interest to the committee. I would be pleased to provide any elaboration of these points or any further information that the committee requires.

**ADVICE NO. 39**

## DRAFT NATIONAL DEFAMATION LAW (2)

Since I responded on 18 August 2004 to the committee's request for comments on the Draft National Defamation Law, the states and territories have issued a document called Model Defamation Provisions. The committee may be interested in some comparison between the parliamentary privilege clauses of the model and those of the draft national law.

Clause 31 of the model begins with a general defence of absolute privilege (subclause 31(1)). This effectively incorporates the *Parliamentary Privileges Act 1987* as well as any other pre-existing source of absolute privilege. It then specifically covers a publication occurring in the course of parliamentary proceedings (subclause 31(2)(a)). It applies to the proceedings of all parliaments and legislatures, domestic and foreign (clause 4). Parliamentary proceedings extend to words spoken and acts done in the course, or for the purposes, of parliamentary proceedings (subclause 31(3)). While this wording is slightly different from that of the *Parliamentary Privileges Act 1987*, the difference should cause no difficulties, and in any event the specification of parliamentary proceedings is subject to the general defence of absolute privilege contained in subclause 31(1).

The defence of fair report of parliamentary proceedings, in clause 33, mostly overcomes the questions which arise in relation to the equivalent provision in the draft national law. The following refers by number to the questions raised about the national draft.

(1) The model also refers to fair report, rather than fair and accurate report. It may be that the omission of any reference to accuracy is thought to make the defence less onerous for the defendant.

(2) The defence applies only to *public* parliamentary proceedings (clause 33(4)(a)), and therefore overcomes the problem relating to unauthorised reports of in camera proceedings. There may be a question about whether the defence would apply to evidence taken in camera by a committee and subsequently published by the committee or the house concerned, but I should think that such evidence would then be regarded as proceedings in public, because the publication would occur in the course of parliamentary proceedings. Section 10 of the Parliamentary Privileges Act lends itself more readily to that interpretation because it refers to proceedings at a parliamentary meeting. Perhaps this should be clarified in the model. The qualified defence of publication of a public document (clause 32) would certainly apply.

(3) Because the definition of proceedings already referred to applies only to the defence of absolute privilege in clause 31, the defence of fair report would be confined to actual parliamentary proceedings and would not extend to the "penumbra" of matters incidental. It is therefore limited in much the same way as section 10 of the Parliamentary Privileges Act is limited.

(4) It is clear that the defence of fair report would confer a qualified privilege only, by virtue of subclause 33(3).

On the whole, the parliamentary privilege provisions in the model are an improvement on those in the draft national law, subject to the clarification mentioned in (2).