

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

THE CIRCULATION OF PETITIONS

(11TH REPORT)

JUNE 1988



MEMBERS OF THE COMMITTEE

Senator Patricia Giles (Western Australia) Chair

Senator John Black (Queensland)

Senator Bruce Childs (New South Wales)

Senator John Coates (Tasmania)

Senator the Honourable Peter Durack, QC (Western Australia)

Senator Janet Powell (Victoria)

Senator Baden Teague (South Australia)

The Senate
Parliament House
CANBERRA



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INTRODUCTION

1. On 25 February 1988, the Senate agreed to eleven resolutions in relation to parliamentary privilege. Resolution 3 sets out criteria to be taken into account when determining matters relating to contempt. Resolution 4 sets out criteria to be taken into account by the President of the Senate in determining whether a motion arising from a matter of privilege should be given precedence of other business. Resolutions 3 and 4 are reproduced in Appendix 1 of this Report.
2. The President, Senator the Honourable Kerry Sibraa, announced on 15 March 1988 that Senator Chaney, Leader of the Opposition in the Senate, had raised with him, by letter, a matter of privilege. This was the first time that the President had been called upon to make a determination under the new resolution. In making his determination, pursuant to the procedures established on 25 February, the President stated:

The determination which I am required to make does not involve an assessment of the truth or merits of the matter raised, nor does it finally determine the matter. My decision is simply whether, having regard to the stated criteria, a motion concerning the matter should be given precedence so that the Senate is given an early opportunity to consider the matter. (Hansard, p. 706)

The President determined that the motion to refer the matter should have precedence.

3. Senator Chaney then gave notice that on the next day of sitting he would move:

That the following questions be referred to the Committee of Privileges: Whether a petition to the Senate was suppressed in consequence of a threat of legal proceedings by the Honourable Brian Burke,

and, if so, whether this constituted a contempt of Parliament. (Journals of the Senate, p. 545)

4. On 16 March, Senator Chaney moved this motion. During debate on the motion, Senators raised many issues in connection with the general question of the circulation and presentation of petitions, as well as matters specific to the questions raised by Senator Chaney. The discussions in the Senate on 15 and 16 March are at Appendix 2 to this Report.
5. Following extensive debate, Senator Collins moved the following amendment to the motion moved by Senator Chaney:

Leave out all words after 'Committee of Privileges', insert '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'.)

In speaking to his amendment, Senator Collins indicated that it removed personal references while allowing the Committee to look at the general issues of the matter. Further, Senator Collins went on to state 'that the removal of personal references would not preclude in any sense whatever the Committee, of its own motion, choosing to have brought before it people who may well be concerned with the case in point'. (Hansard, p. 826).

6. In responding to Senator Collins' amendment, Senator Chaney expressed his concern at the generality of the amendment and noted that all of the precedents concerning petitions relate to individual cases: 'the whole body of law on privilege had been, until our own legislation of last year, built up on an examination of particular cases'. (Hansard, p. 827).
7. The amended motion was agreed to by the Senate.

CONDUCT OF THE INQUIRY

8. The Committee first met on 18 March 1988. The Committee determined that, given the generality of the reference before it, it would proceed under Resolution 1, the general inquiry provision of the Resolutions agreed to by the Senate on 25 February, rather than the specific provisions relating to alleged contempt of the Senate. Resolution 1 is reproduced at Appendix 1. In order to carry out its inquiry, the Committee agreed to seek from the Senate additional powers. The motion conferring these powers was moved by the Chairman and was agreed to by the Senate on 24 March 1988. This resolution is also reproduced at Appendix 1.

SUBMISSIONS

9. The Committee decided to place advertisements in the national press seeking submissions from the public on the terms of the reference. These advertisements appeared on 25 and 26 March. In addition, the Committee wrote to the Clerks of all State Parliaments, State and Territory Bar Associations and Law Societies, civil liberties groups and individuals with an interest in parliamentary privilege. The Committee received 10 submissions (see Appendix 4).
10. The Committee also decided to write to the Clerk of the Senate, Mr Harry Evans, seeking background information on the matter referred to it. Following the expeditious receipt of his response, which is reproduced at Appendix 3, the Clerk was invited to attend a meeting of the Committee to discuss matters arising from his response with members of the Committee. The Committee wishes to thank the Clerk for his contribution to the Committee's inquiry, and acknowledges that the discussion which follows draws heavily on the Clerk's paper and the Committee's informal discussions with him.

11. The Committee received a submission from the person whose situation first directed the attention of the Senate to the general question referred to the Committee and noted that, during the course of debate, some speakers indicated that there was nothing to preclude the Committee, of its own motion, seeking to examine the particular case brought before the Senate.
12. After considering all the submissions received, however, a majority of the Committee concluded that, given the questions referred by the Senate, which concern matters of principle rather than the particularity of an individual case, it would not be appropriate to hear evidence from the person whose case gave rise to the reference, or from others. A minority of the Committee, bearing specifically in mind that 'the whole body of law on privilege had been ... built up on an examination of particular cases', (Hansard, p. 827) considered that evidence should have been taken (and see dissenting report).

ISSUES

13. The Committee decided to address the reference by turning its attention to two crucial questions, as follows:
 - (a) whether the circulation of a petition is privileged; and
 - (b) if not, whether such circulation should be privileged.

Subsidiary matters arising from the reference are:

- (c) the question of defamation which is of significance in determining a response to paragraph (b); and
- (d) the forum for the determination of questions (a) and (b).

(a Circulation of a petition: is this act covered by parliamentary privilege?

14. In considering the question whether the act of circulating a petition attracts parliamentary privilege, the Committee had regard to the passage of the Parliamentary Privileges Act 1987, noting that the actual submission of a petition to a House of the Parliament is protected under the Act whether or not a House of Parliament agrees to receive the petition. The question arises whether the acts preceding the submission of a petition, that is, the preparation and circulation of a document where a person or persons have an intention to submit it to a House of Parliament, attract a similar protection.

15. The Parliamentary Privileges Act does not explicitly deal with the circulation of petitions, and it would be for the courts to interpret the provisions of the Act and to decide whether the circulation of petitions is privileged. It may be argued that, under paragraph 16(2)(b) of the Act, the preparation of a petition (and thus circulation as part of that preparation) is an essential part of a submission of a petition and therefore absolutely privileged; and that since, under paragraph 16(2)(c), the presentation of a petition is part of the business of a House, the process of drawing up a petition, including the gaining of signatures, is therefore absolutely privileged.

16. Against this, however, it may also be argued that, while circulation of a petition is normally associated with, or incidental to, its submission to a House of Parliament, given the right of a single citizen to submit a grievance to the Parliament under absolute privilege its prior circulation to others is not a necessary pre-condition to its submission.

17. The Clerk of the Senate concludes, in his comprehensive and closely-argued paper, that it is unlikely that the courts would take the view that an absolute privilege attaches to the circulation of a petition for the purpose of gaining signatures, particularly as this would give a petitioner the means of ignoring the civil and criminal law. This conclusion is supported by the Law Council of Australia, and others who have addressed this element of the Committee's terms of reference.

18. The Clerk also addresses the question whether a qualified privilege might attach to the circulation of a petition. He points out that qualified privilege usually arises consequent upon, rather than antecedent to, absolute parliamentary privilege. While noting that a limited antecedent privilege attaches to parliamentary proceedings, as under paragraphs 16(2)(c) and (d) of the Parliamentary Privileges Act (preparation and formulation of documents), he points out that these acts, unlike the circulation of a petition, do not take place in public, and concludes that the courts would be unlikely to extend the privilege any further than the statute indicates.

19. The Clerk also makes the valid point that, even if the courts had taken a different view of the privilege attached to the circulation of petitions before the passage of the Parliamentary Privileges Act, the passage of that Act has clarified the issues to such an extent that the courts might well observe that, given the comprehensive nature of the Act, in the absence of a specific provision to grant some form of statutory protection to the circulation of petitions it was the intention of Parliament that the privilege should not so extend.

20. After considering the Clerk's explanation of the issues, and the views of the Law Council and others, the Committee therefore believes that the act of circulating a petition is not, and indeed never has been, privileged.

(b) and (c) Should the circulation of a petition, whether or not it contains defamatory matter, be privileged?

21. The Committee, in reaching the conclusion that the circulation of a petition should not be privileged, had regard to the following matters:

(i) The burden of the submissions received, as well as the concerns expressed in debate in the Senate when the matter was referred to the Committee, is that the protection afforded by Article 9 of the Bill of Rights should not be used to circumvent the normal protections afforded to persons who might be defamed by a petition purportedly circulated with an (unprovable) intention that the document be presented to a House of Parliament. Only the person whose case gave rise to the present reference, and the Free Speech Committee, disregarded this concern in their submissions.

As stated during debate:

I think it would be an appalling proposition if [a] person were prevented from taking the legal action that would, under any other circumstance, be available to him because I had topped and tailed garbage and nonsense and presented it in the correct form as a petition. (Senator Collins, Senate Hansard, 16 March 1988, p. 826.)

(ii) It may be that, under the general laws of defamation in Australia, a defence on the basis of the interest and duty principle would be available to persons who have a

clear common interest in the subject of a petition, and this, in the Committee's view, would provide, if it were available, adequate protection without placing a petitioner's rights above those of other citizens.

(iii) In considering the general question whether the circulation of petitions should attract some statutory form of privilege, the Committee draws attention to the nature and purpose of the petitions which are now submitted to the Senate. As the Minister for Home Affairs (Senator Ray) pointed out in debate (Senate Hansard, 16 March 1988, p. 817), the overwhelming majority of petitions received by the Senate is from citizens questioning a matter of public policy: only rarely are petitions presented in order to obtain relief from perceived personal injustices and wrongs. In these rare circumstances it is possible, albeit unlikely, that a citizen might be obliged, in making his or her case, to make accusations or statements which, under other circumstances, would be actionable. The Committee believes that, in such cases, difficulties would be overcome by that person alone signing a petition, the submission of which, as stated in paragraph 14, is specifically protected under the Parliamentary Privileges Act. Such a document would be examined before presentation under the Standing Orders of the Senate, which provide that a petition must be 'respectful, decorous and temperate in language' (Standing Order 88). It may be that the petition would be ruled out of order, under the Standing Order. In that case, the Senator who proposed to present the petition, or others, might consider the matter of such significance as to raise the issues contained in it by a different method. Even if the petition did not offend Standing Orders, it is always within the province of the Senate to refuse to receive it, thus preventing the

publication of a matter which, in the Senate's view, does not justify receipt. Again, the remedy for the individual citizen is the same - the Senator, or others, may take up the issue by different means. It may also be that a judgement was made by the Senate that the grievance was of such a serious nature that, in the particular circumstances of the case, a greater injustice would be done if the person were denied the right to make the grievance known under absolute privilege, and would therefore agree to receive the petition. The Committee considers, however, that it is most unlikely that any of these circumstances would arise.

22. The question whether the circulation of petitions should be accorded some privileged status should, in the Committee's view, be answered in the negative.

(d) In which forum should these matters be determined?

23. The general question as to the status of a petition circulated before submission to the Senate is a matter of law for the courts to determine. The Committee considers that the courts would be unlikely to conclude that the circulation of a petition would be covered by parliamentary privilege. If, therefore, despite the concerns about defamation expressed so widely in debate and in the submissions received, it were to be concluded that petitions should attract a privilege, Parliament itself would have to provide specifically for this by amendment to the Parliamentary Privileges Act.

24. The Committee emphasises, however, that the existing law does not inhibit the normal rights of citizens to bring their concerns to the attention of the Parliament and considers that, as there are sufficient mechanisms available to cover

rare cases such as described at sub-paragraph 21(iii), an extension of the privilege is not warranted. The dangers involved in changing the law to cover an almost inconceivable situation far outweigh any benefits which would accrue.

REPORT

25. The Committee reports to the Senate as follows:

- 1 That, while the question whether the circulation of a petition for the purpose of gaining signatures and subsequent submission to the Senate is privileged is a question of law for the courts to determine, the Committee believes that the circulation is not absolutely privileged and is probably not subject to any form of qualified privilege;
- 2 That, if the Parliament were to determine that the circulation of a petition should be privileged, absolutely or otherwise, a change to the law would therefore be required;
- 3 That, in the light of the dangers inherent in denying a citizen the right to pursue action in the courts to redress an attack on his or her character or reputation, the circulation of a petition containing defamatory matter should not be protected by parliamentary privilege; and
- 4 That the circulation of other petitions requires no special protection and therefore that no change to the present law is warranted.



Patricia Giles

Chair

June 1988