

DISSENTING REPORT

by Senator the Honourable Peter Durack, Q.C.

REPORT ON PETITIONS - COMMITTEE OF PRIVILEGES

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On 16 March Senator Chaney moved that the following question 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."

The petition which was allegedly suppressed had been prepared by a Mr R.M. Strickland of 28 Modillion Avenue, Shelley in the State of Western Australia and was in the following form:

"To the Honourable the President and Members of the Senate in Parliament assembled.

The Petition of the undersigned showeth that the standard of Australia's diplomatic representatives overseas is a matter of concern to all Australians.

Your Petitioners most humbly pray that the Senate, in Parliament assembled, should seek to have the appointment of Honourable Brian Burke as our Ambassador to Ireland deferred until such time as the charges presently pending against Mr Len Brush and Mr Robert Martin shall have been heard and concluded, and until matters arising therefrom shall have been answered to the satisfaction of both Houses of the Parliament of Western Australia.

And your Petitioners, as in duty bound, will ever pray."

After lengthy debate in the Senate, Senator Chaney's motion was amended to read that the following question be referred to the Committee of Privileges:

"..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 moving this amendment, Senator Collins made it clear that the alternative reference to the Privileges Committee "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). Senator Macklin said "I believe it would be very odd to go into a general inquiry without looking at that specific item." (Hansard p.830)

The Committee in attempting to deal with the reference from the Senate has been left in a curious and difficult position. The problem for the Committee has been clearly outlined by the Clerk of the Senate, Mr Harry Evans, in a briefing paper which the Committee requested from him.

In that paper he shows clearly that the original motion moved by Senator Chaney raises a question of conduct which may have constituted a contempt of Parliament, whereas the amended form of the motion raises an entirely different question e.g. whether the circulation of a petition (not its submission to the Senate) possesses some legal immunity in proceedings for defamation.

This question, as Mr Evans pointed out, can only be determined by a court on the facts of a particular case or as a general proposition of law by an Act of Parliament.

I might add that there were no grounds on the part of the Senate to assume that the actual petition allegedly suppressed was defamatory. The Clerk of the Senate specifically cautions against making that assumption.

The exercise on which this Committee has been asked to embark is an academic one and it would be easy for the Committee to report to the Senate that the reference it has been given is misconceived and a waste of the Committee's time. However in order to avoid such a damaging assumption about a vote of the Senate the Clerk has 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."

The Committee has accepted that task and has called for written submissions from the public and has received a number of them including a submission from Mr Strickland. However the Committee by a majority has decided not to hear oral evidence from Mr Strickland nor from anybody else on this point.

In my opinion the Committee was mistaken in conducting its inquiry in this way which has made it even more academic than it need have been.

Most of the submissions have come from Clerks of other Parliaments and the Law Council of Australia has made a useful contribution as well. The weight of these submissions is that no change in the current law should be made by which it is assumed that no legal immunity should attach to the process by which a petitioner obtains support for his petition from others. This process of course involves the publication of a document to at least one other person. As far as the law of defamation is concerned it does not matter if this is done publicly or privately.

In my opinion it would have been helpful to have obtained some evidence from Mr Strickland about the way in which he sought support from other people for his petition. In view of the fact that large numbers of persons these days prepare and/or sign petitions to the Senate, it is disappointing that more people did not come forward to assist the Committee on this question.

The body known as the Free Speech Committee presented a thoughtful and helpful report in which it stated:

"For the Parliament to be properly informed of the views of the people it is essential that circulating petitions enjoy the same protection as Parliamentary debates."

M: Strickland in his submission stated:

"There are a number of obstacles to be overcome by the individual or small group in order to draw up and circulate a petition to either House of the Parliament. Not the least of these is the Abuse of the Right of Petition, referred to by Senator Ray in the debate on 16 March, Hansard page 815. In Western Australia Section 361 of the Criminal Code further deters any person from publishing any false or scandalous defamatory matter touching the conduct of any member or members of either House of Parliament, with a term of imprisonment. This Section must give a large measure of protection to Members of Parliament.

There are practical problems connected with the circulation of a petition in order to obtain sufficient signatures to show significant public interest in the matter, without soliciting, or displaying the petition in a public place. If the petition contains politically sensitive material which may be considered offensive by a section of the community, then without some protection from legal action the task becomes impossible."

In my view it would have been most helpful to the Committee if the practical problems experienced by Mr Strickland had been made known to the Committee and it would have had the opportunity of fully testing the magnitude of them. Material of this kind and perhaps other material would have helped the Committee to give a more considered answer to the question it has addressed itself.

Although I am sympathetic to the view that the publication of defamatory matter generally should not be excused by the claim that it is intended to or has been presented to the Senate, I believe that there may well be circumstances in which a limited and largely private publication of a document in the form of a petition which is subsequently presented to the Senate should attract some legal immunity. There is clearly doubt whether it does so under the law of defamation in Australia.

Any such immunity should apply nationally and not just in this or that State and it is clearly a protection which should be given by the national Parliament and not left to be determined by courts on an ad hoc basis. In these circumstances it is my view that the Committee should recommend a further amendment to the Parliamentary Privileges Act 1987 to give some protection to people like Mr Strickland who can be easily deterred by the threat of legal proceedings from raising with the Senate matters about which they feel aggrieved or concerned. Standing Orders of the Senate can control the abuse of that right.

For these reasons, therefore, I do not agree with the finding of the majority report that, "the circulation of a petition containing defamatory matter should not be protected by parliamentary privilege" and that no change to the law is "warranted".

31 May 1988

A handwritten signature in black ink, appearing to be 'R. Jones' or similar, written in a cursive style.