

CHAPTER 1 – PRIVILEGE 1901-1987

Meaning of privilege¹

1.1 The privileges of Parliament are immunities from the operation of certain laws conferred in order to ensure that the duties of members as representatives of their constituents may be carried out without fear of intimidation or punishment, and without improper impediment.

1.2 For example, members of Parliament when speaking in the Parliament, and witnesses appearing before parliamentary committees, are immune from suit or prosecution under the laws of defamation. While such freedom has given rise to some degree of disquiet in the community, it is generally agreed that the necessity for freedom of speech in Parliament and its committees outweighs any countervailing danger of unfairness in the misuse or abuse of the freedom.

1.3 As a submission by the Department of the Senate to the Joint Select Committee on Parliamentary Privilege pointed out, a further confusion has arisen between the immunities of the Houses of Parliament and their members on the one hand, and the powers of the Houses, particularly the power to punish contempts, on the other. The submission goes on to explain the distinction in the following terms:

The power of the Houses in respect of contempts is a power to deal with acts which are regarded by the Houses as offences against the Houses. That power is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law (*Transcript of Evidence, 3 August 1982, pp. 14-15*).²

1.4 In other words, when a House of the Parliament is constrained to examine, and perhaps punish persons for, acts which impede the proper operation of that House, it performs a function similar to that of a court to protect the integrity of its proceedings. It is appropriate that the Parliament, the primary law making body, should have the powers to protect its proceedings.

Scope of the report

1.5 The Joint Select Committee on Parliamentary Privilege reported to both Houses in 1984³ recommending changes to the law of parliamentary privilege. Certain of these changes were given legislative effect through the passage of the

1 This attenuated definition of privilege is based on a more detailed definition given in the four previous reports.

2 Senate Committee of Privileges, *35th report*, PP 467/1991, pp. ix-x.

3 PP 219/84.

Parliamentary Privileges Act 1987; other non-legislative changes were effected by the passage of the Senate Privilege Resolutions in February 1988.

1.6 The workload of the Senate Committee of Privileges, which was established in 1966, increased significantly since this codification of the law and practice of privilege. In order to place the activities of the Committee of Privileges in the context of parliamentary privilege generally, this chapter describes the operation of privilege from 1901 to 1965, before the establishment of the committee. It then describes the work of the committee from its establishment in 1966 to 1987, before the introduction of the Privileges Act and resolutions. Discussion of the Act and resolutions and of all cases considered by the committee following the passage of the Act and resolutions form the subject-matter of later chapters.

Privilege 1901-1965

1.7 In the first sixty-five years of the Senate, 17 cases of privilege were raised. They included reflections upon the Senate and senators, unauthorised disclosure of evidence given to a Senate committee, and alleged bribery or intimidation of senators. In all but two cases, the matter was resolved on the floor of the chamber: the related motion was withdrawn, negatived or ruled out of order, or no action was taken.

1.8 In one case, conducted in the chamber, the Senate concluded that a grave breach of privilege had been committed. This was in relation to the sending of an intimidatory telegram from the secretary of the Linesmen's Union, Mr McCarthy, to the President of the Senate on 14 March 1917. Mr McCarthy intimated that, if the Senate persisted in delaying the passage of the supply bills, his members would go on strike. The matter was raised in the Senate on 15 March and debated on the following day. The *Journals* recorded the outcome of the debate as follows:

[I]n view of the fact that no such attempt to influence the deliberations of the Senate had occurred before, the Senate is of the opinion that the said McCarthy in forwarding the telegram was ignorant of, and did not appreciate, the seriousness of the offence he was committing, and therefore deems it sufficient to affirm that the telegram in question, both in its terms and purpose, constitutes an offence, and that, if repeated, other action will be taken.⁴

1.9 This approach has been the template for the relatively tolerant approach taken by the Senate and its Privileges Committee towards persons who are not, and could not reasonably be expected to be, familiar with Senate operations.

1.10 The second case involved the only instance of committee examination of possible contempt before 1971. This occurred early in the life of the Senate, when in 1904 a select committee was appointed to investigate the matter of the alleged harassment of Senator Lt-Col John Neild by Major-General Hutton. Although the committee concluded that Major-General Hutton had recommended that the senator be

4 *Journals of the Senate*, 1917, p. 562.

placed on the retired list of the military forces partly in consequence of speeches delivered in the Senate, and had attempted to interfere with Senator Neild in the discharge of his duties as a senator, the committee concluded that the Major-General's actions did not amount to intimidation.⁵ This report represents the general approach which has subsequently been followed by the Senate and the Committee of Privileges in dealing with possible intimidation of senators, the 1904 committee probably taking the view that senators are capable of looking after themselves.

House of Representatives Committee of Privileges

1.11 On 7 March 1944 in the House of Representatives, Prime Minister Curtin moved a motion to adopt a new standing order, 322A,⁶ which provided for the appointment at the commencement of each Parliament of a seven-member committee of privileges. The motion was agreed to, members were appointed and the newly-formed committee received its first reference on the same day: 'That the matter of Privilege, brought before this House on 25th February by the Honourable Member for Barker regarding the opening by censors of letters addressed to Members of this House, be referred to the Committee of Privileges for enquiry and report'.⁷

1.12 The *Hansard* record does not indicate why this particular matter should have necessitated the formation of a standing committee to deal with it; nor did the committee recommend further action on the matter referred.

1.13 Several matters were referred to the House of Representatives Privileges Committee in the next twenty years, including most markedly the cases of Mr Fitzpatrick and Mr Browne in 1955, leading ultimately to their imprisonment — the only time in the history of the Australian Parliament that such action has occurred.

1.14 Still the Senate did not follow suit, and indeed appears not to have considered the establishment of a comparable committee until 1965, following another privilege case in the House of Representatives. Eight Australian newspapers had published an advertisement copied from an official photograph showing the Leader of the Opposition, Mr Arthur Calwell, at the table of the House, but with the addition of words advertising a motor vehicle issuing from his mouth. Mr Calwell raised the matter in the House on 18 August 1965 and it was duly referred to the Committee of Privileges.⁸ While the committee found a contempt, it did not recommend further action. However, the House recorded a censure and reprimand against the offending newspapers and ordered that they print the resolution.⁹

5 *Journals of the Senate*, 1904, p. 564.

6 Now 325. *House of Representatives Standing and Sessional Orders* as at 16 September 2002.

7 *House Votes and Proceedings*, 1944, p. 80.

8 *House Votes and Proceedings*, 1964-66, p. 347.

9 *House Votes and Proceedings*, 1964-66, pp. 373, 386.

The establishment of the Senate Committee of Privileges

1.15 Whether the reference of this matter inspired action in the Senate is uncertain, although the Senate committee was first proposed by Senator George Branson on 26 August 1965, after the reference to the House of Representatives committee but before it reported. The following exchange took place during question time:

Senator BRANSON — My question, with due respect, is addressed to you, Mr President. Will you, Sir, give consideration to the setting up of a permanent standing committee to consist of seven senators to be appointed at the commencement of each Parliament to inquire into and report upon complaints of breach of privilege which may be referred to it by the Senate? I believe that this is done in the House of Representatives at the commencement of each Parliament. By this means it would be possible for the Senate to deal speedily with any questions of privilege.

The PRESIDENT — The honourable senator's question is interesting and has considerable merit. Fortunately, we have not had to worry about a Privileges Committee in the past. The question requires a good deal of thought and consideration. I shall be pleased to refer it to the Standing Orders Committee.¹⁰

1.16 The Standing Orders Committee duly considered the matter, along with a number of other procedural matters including rules for parliamentary questions and the appointment of committees on a duration-of-Parliament rather than a sessional basis. In recommending the committee's establishment, along with changes to other procedures, the report echoed Senator Branson's justification of a privileges committee, noting that the advantage of a standing committee was that the Senate 'would be in a position to deal speedily with any Question of Privilege which might arise'.¹¹

1.17 The recommendation to establish a privileges committee was regarded as so uncontentious that it was agreed to without debate on 2 December 1965,¹² with all the changes to Standing Orders to come into effect as at 1 January 1966. Thus the Committee of Privileges came into being, on paper at least, on that date. It preceded by nearly five years the establishment of a comprehensive legislative and general purpose standing committee and estimates committee system but followed at a considerable distance the Standing Committee on Regulations and Ordinances, established in 1932.

1.18 In the measured way characteristic of the Senate's approach to the question of privilege, it took more than a year to appoint members of the committee. This occurred on 5 April 1967, soon after the 50th session of the Parliament began.¹³ The

10 Senate *Hansard*, 26 August 1965, p. 128.

11 *Journals of the Senate*, 1964-66, p. 674.

12 *Journals of the Senate*, 1964-66, p. 427.

13 *Journals of the Senate*, 1967-68, p. 50.

members were Senators Branson, Cant, Cormack, Drake-Brockman, Morris, Poke, and Wheeldon, who between them had nearly half a century of parliamentary experience.

Reports 1971-1987

Unauthorised disclosure of committee report

1.19 The Committee of Privileges ‘stood ready’ to receive references for a further four years. It was not until 4 May 1971 that the committee received its first reference. Not surprisingly, given the increased use of Senate committees during the 1960s, culminating in the establishment of the comprehensive committee system in 1970, this reference concerned the premature publication of a report of a select committee. The chairman, Senator Drake-Brockman, tabled the Privileges Committee report in the Senate on 13 May 1971.¹⁴ Several features of the report are noteworthy, in that many of the issues have been raised in later proceedings.

1.20 At the commencement of the committee’s inquiry, one member, Senator Wheeldon, disqualified himself from proceedings on the ground that he was a member of the select committee which had reported the premature release to the Senate. In contrast, a second member of that committee, Senator Branson, did not do so. The question whether members of committees which have referred matters to the Privileges Committee should disqualify themselves from participation on the Privileges Committee has been considered by the committee several times since, and will be discussed further in Chapter 5.

1.21 In 1971, the Committee of Privileges made no attempt to establish who might have given the material to the offending newspapers: the editor and publisher of the newspapers concerned were regarded as culpable and the offence as a strict liability offence. In all subsequent cases, the committee has considered itself bound to attempt to find the source of the improper disclosure, and has recommended that any committees the documents or proceedings of which have been improperly disclosed should themselves investigate the source before making a decision to refer a matter to the committee.¹⁵

14 Senate Committee of Privileges, *1st report*, PP 163/1971, *Journals of the Senate*, 1971, pp. 605-6.

15 See Senate Committee of Privileges, *20th report*, PP 461/1989. The Senate adopted this recommendation in 1996, following consideration of a further Committee of Privileges report. Continuing Order No. 3, *Standing Orders and Other Orders of the Senate*, November 2004, p. 120. See also Senate Committee of Privileges, *122nd report*, PP 137/2005 which recommended that committees take a more rigorous approach to unauthorised disclosures to ensure that only the more serious cases were referred to the Committee of Privileges. This recommendation, after being scrutinised by the Procedure Committee, was adopted by the Senate on 6 October 2005, *Journals of the Senate*, 2005, pp. 1200-1202. See also paragraphs 5.36 to 5.41.

1.22 In this first inquiry, no public evidence was taken and the only point at issue was the contrition of the offenders. By contrast, in a case of unauthorised disclosure undertaken by the committee in 1984, almost all evidence was taken in, or made, public and all witnesses at hearings held by the committee were sworn. These procedures, as refined by privilege resolution 2, have been followed since.

1.23 In its 1971 report, the committee asserted that the Senate had the power to commit to prison, to fine, to reprimand or admonish or to otherwise withdraw facilities held by courtesy of the Senate in and around its precincts. One element of this assertion was challenged during the 1984 case, that is, the Senate's power to fine. As a result, the committee recommended that the power to fine be clarified by legislation;¹⁶ this was achieved by the passage of the Parliamentary Privileges Act in 1987.

1.24 Despite the apologies by the editor and publisher of the relevant newspapers, the 1971 committee recommended that they be reprimanded before the Bar of the Senate and that any further breach be met with a heavy penalty. The committee has recommended that penalties be imposed only once since 1971,¹⁷ despite several findings of contempt having been made. In addition it has recommended penalties if certain conditions are subsequently met.¹⁸ In some cases the committee has not recommended any penalty because the persons or organisations against whom a finding of contempt has been made have apologised.¹⁹

1.25 The 1971 report was adopted on the same day it was tabled,²⁰ and the persons concerned attended at the Bar of the Senate for reprimand by the President the following day.²¹ Present procedures require seven days' notice before a motion may be moved to determine that a person has committed a contempt or to impose a penalty for contempt,²² and the only further reprimand was delivered in writing as the committee had recommended.²³

Claims of executive privilege

1.26 The next matter on which the committee reported occurred in 1975, at the height of controversy between the Senate and the executive. The question whether the then government had been involved in improper loan dealings was the subject of

16 See paragraph 1.38.

17 Senate Committee of Privileges, *99th report*, PP 177/2001.

18 Senate Committee of Privileges, *8th report*, PP 239/1985; *54th report*, PP 133/1995 and *99th report*, PP 177/2001.

19 Senate Committee of Privileges, *6th report*, PP 137/1981; *42nd report*, PP 85/1993; *72nd report*, PP 117/1998.

20 *Journals of the Senate*, 1971, p. 606.

21 *Journals of the Senate*, 1971, p. 612.

22 Standing Order 82.

23 Senate Committee of Privileges, *99th report*, PP 177/2001.

much debate throughout the year, and contributed to the dismissal of the government by the Governor-General on 11 November 1975.

1.27 In July of that year, both Houses of the Parliament held special sittings to examine the issue. The Senate summoned several public servants, including the departmental heads of Treasury, the Attorney-General's Department and the Department of Minerals and Energy, together with the Solicitor-General, to appear at the bar of the Senate and answer questions relating to the matter. All attended at the bar in response to the Senate's summonses, but all public servants refused to answer any questions of substance, citing instructions from their respective ministers, and referring to a letter from the Prime Minister, read to the Senate by the President, claiming crown privilege in respect of the matters.²⁴ The Solicitor-General, while noting that he was not subject to any ministerial instructions, observed:

The Crown has claimed its privilege. As one of its Law Officers, I may not consistently with my constitutional duty intentionally act in opposition to its claim.²⁵

1.28 It was clear that the Senate did not wish the public officials to be punished for the actions of government ministers — a view which has been a feature of Senate concerns and actions subsequently. Consequently, the question before the Senate became whether the claims made by the Prime Minister, the Treasurer and ministerial colleagues had any legitimacy, and it was this question which was referred to the Committee of Privileges on 17 July 1975.

1.29 The committee report, tabled by the Chairman, Senator Button, on 7 October 1975, is unique. It is the only one of the 124 Privileges Committee reports which consists of a majority and a dissenting report on party lines; it also features five addenda, composed by five of the seven members singly or in various combinations. The government members found that no breach of privilege was involved, while the minority opposition senators concluded that claims of executive privilege were misconceived, although they recommended that no action should be taken by the Senate.

1.30 While the reports, majority and minority, reflected the political exigencies of the time, one feature of the reports, and of the proceedings leading to their publication, which has characterised the operations of the Privileges Committee over the nearly forty years of its existence, is that there was no acrimony within the committee, and each of the reports was balanced and carefully argued.

1.31 Within a week of tabling, the Privileges Committee reports were overtaken by events, with the Senate's withholding of supply taking precedence on the political agenda. As a result, the reports were not debated in the few weeks before both Houses of the Parliament were dissolved on 11 November 1975. In February 1977, the author

24 Senate *Hansard*, 15 July 1975, pp. 2727-31.

25 Senate Committee of Privileges, *2nd report*, PP 215/1975.

of the dissenting report, Senator the Hon. Reginald Wright, by then a government senator, moved a motion for the adoption of the dissenting report.²⁶ The Parliament was prorogued before the motion could be debated and the report was not again considered.

Security measures at Parliament House

1.32 During the years between 1975 and 1984, privilege matters were sporadic. In the Senate, privilege cases have never been concerned with the dignity of senators as such and, as the 1904 case illustrates, the Senate has generally taken a robust attitude towards what might constitute an improper interference with a senator. Nevertheless, matters to do with the proper functioning of the Senate and the possible obstruction of senators in the performance of their duties were the subject of several committee inquiries. One concerned security in Parliament House. In 1978 the committee considered the establishment of reasonably stringent security measures and concluded that no question of privilege was involved in their implementation.²⁷

Unparliamentary language used in debate

1.33 The next report of the committee concerned the quoting of unparliamentary language in debate. The committee concluded that the question of the incorporation in *Hansard* of words which would not be permitted in debate was not a matter of privilege and recommended that the Senate consider asking the Standing Orders Committee to examine the matter.²⁸

Detention and harassment of senators

1.34 The committee's following report, tabled in June 1981, concerned the imprisonment of Senator Georges, a senator for Queensland. While the committee concluded that Senator Georges' imprisonment did not attract the privilege of freedom from arrest, it made recommendations, agreed to by all Australian governments, concerning notification to the Senate of the imprisonment of senators.²⁹ A refinement of the procedures, to cover proceedings on the arrest of senators, was recommended by the same committee in relation to the same senator on 5 December 1986,³⁰ and has similarly been followed by Commonwealth and state authorities.

1.35 The last matter of this nature considered by the committee during this period concerned the harassment of a senator by phone calls. Calls were traced to the home of the staff member of another senator. In its report, tabled on 11 June 1981, the committee found that a contempt had occurred but, in view of an apology made by the

26 Senate *Notice Paper*, 15 February 1977, p. 3701.

27 Senate Committee of Privileges, *3rd report*, PP 22/1978.

28 Senate Committee of Privileges, *4th report*, PP 214/1979.

29 Senate Committee of Privileges, *5th report*, PP 273/1979.

30 Senate Committee of Privileges, *10th report*, PP 433/1986.

staff member concerned, did not recommend any action except the adoption of the report.³¹

Improper disclosure of in camera evidence and of proposed amendment to bill

1.36 The reference which revolutionised the Senate's approach to privilege and which led at least in part to the procedures which the Committee of Privileges now follows occurred in June 1984.³² This matter, which involved the unauthorised publication of in camera evidence received by the Senate Select Committee on the Conduct of a Judge, constituted one of the most serious matters of privilege ever to arise in the Senate, and its ramifications were considerable.

1.37 Briefly, a serving magistrate in the New South Wales courts gave in camera evidence to the select committee that was subsequently published by the now defunct *National Times*. The matter was referred by the Senate on the motion of the chairman of the select committee, Senator Tate. The *National Times* repeated its act of publishing in camera proceedings after being notified of the referral of the first matter. Consequently, these publications were themselves referred to the Privileges Committee, on the motion of its chairman, Senator Childs. Newspaper articles questioning the actions of a member of the select committee were referred to the Privileges Committee on the same day, on the motion of the member concerned, but were not pursued.

1.38 The Privileges Committee examination of the improper publication was exhaustive, initially involving taking sworn evidence, most of which was publicly presented, from among others members and staff of the select committee, and the magistrate, as to the possible source of the disclosure. In giving both written and oral evidence to the committee, Senator Tate declared that the publication had the potential to impede the inquiry in the future and also that there was potential immediate damage to the select committee's work.

1.39 At a further public hearing, the Privileges Committee took evidence from the editor, publisher and author of the articles. The structure of that hearing was not dissimilar to court proceedings, with counsel representing the witnesses. The only prohibition was on cross-examination.

1.40 The committee found that a serious contempt had been committed by the editor, publisher and author of the articles. It was not able, however, to discover the source of the disclosure and thus whether the disclosure was deliberate or inadvertent. The committee's report was tabled on 17 October 1984, and was adopted without debate a week later.

1.41 The committee decided to report separately on the question of penalties arising from its conclusions after it gave the opportunity for further submissions by

31 Senate Committee of Privilege, *6th report*, PP 137/1981.

32 Senate Committee of Privileges, *7th report*, PP 298/1984.

the persons affected by its findings. An election then intervened, and it was not until February 1985 that the committee had the opportunity to consider the question of penalty. The committee, with membership identical to that in the previous Parliament, held further hearings to receive submissions from counsel appearing on behalf of the newspaper. It recommended that the publishers be placed on what in effect was a good behaviour bond for the life of the Parliament. The committee also suggested that, as the Senate's 1971 assertion of its power to impose fines was under challenge, legislation be introduced to put the power to impose a fine beyond doubt.³³ The report was again unanimous, but the Senate did not consider it between its tabling on 23 May 1985 and the simultaneous dissolution of both Houses more than two years later. However, the power to fine was declared in the Parliamentary Privileges Act in 1987, in accordance with the committee's recommendation.

1.42 The last privilege case reported by the committee before the passage of the Parliamentary Privileges Act and the Senate's privilege resolutions of 1988 involved the improper disclosure and misrepresentation by a departmental officer of an amendment prepared by a member of the Australian Democrats in the Senate. While in its report, tabled on 16 September 1985, the committee recommended that the matter be not further pursued, it was critical of the actions of the officer.³⁴ The committee has followed this precedent, of being critical of what it has regarded as inappropriate behaviour by persons the subject of references to it without finding a contempt, in several of its reports since.

33 Senate Committee of Privileges, *8th report*, PP 239/1985.

34 Senate Committee of Privileges, *9th report*, PP 506/1985.