

Chapter 6

Matter of parliamentary privilege: Dr Gary Fettke

6.1 Concurrently with this inquiry, the committee has undertaken investigation of a matter of parliamentary privilege arising out of the committee's previous inquiry, *Medical complaints in Australia*, as required by Senate Privilege Resolution 1(18).

6.2 Dr Gary Fettke provided evidence to the previous inquiry, at the committee's public hearing in Sydney on 1 November 2016.

6.3 Shortly after Dr Fettke concluded his evidence to the committee, he was notified of a decision by the Tasmanian Board of the Medical Board of Australia (board) to caution him.

6.4 On 16 November 2016, the Australian Health Practitioner Regulation Agency (AHPRA) issued a media release about Dr Fettke's case.

6.5 Dr Fettke wrote to the committee in November 2016 and requested that the committee investigate whether AHPRA had breached parliamentary privilege because either:

- the timing of the caution was designed to intimidate or punish him for providing evidence to the committee; or
- the timing of the media release constituted bullying and harassment that resulted from him providing evidence to the committee.

6.6 Senate Privilege Resolution 1(18) provides:

Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.¹

6.7 It is also an offence to inflict any penalty or injury on a person on account of evidence given to the committee.²

6.8 The committee commenced its investigation of the matter during the previous inquiry by asking questions of Mr Fletcher at its public hearing on 22 November 2016 and in separate correspondence.

6.9 AHPRA advised the committee that there was no relationship between Dr Fettke's appearance before the committee and the timing of the notification.³

1 Senate Privilege Resolution 1(18).

2 *Parliamentary Privileges Act 1987* (Cth), s. 12(2).

6.10 AHPRA also advised the committee that it issued the media release to combat a 'level of misinformation' in the media about Dr Fettke's case.⁴

The committee's findings

6.11 To establish that a matter is a contempt of the Senate, the committee must be satisfied:

- a witness suffered a penalty;
- the penalty was incurred 'as a result of' the witness' participation in parliamentary proceedings;⁵
- there was a culpable intention on behalf of the perpetrator;⁶ and
- the committee has taken all reasonable steps to ascertain the facts of the matter.

6.12 The committee therefore sought to establish that Dr Fettke incurred a penalty and that the penalty was incurred 'as a result of' Dr Fettke's participation in parliamentary proceedings.

The notice—1 November 2016

6.13 The committee found the timing of issuing the notice of the board's decision to caution Dr Fettke to be of concern. AHPRA advised the committee that the issuing of the notice within hours of Dr Fettke giving evidence to the committee was coincidental. The committee's investigation revealed that the process of issuing the notice had been in train for some time. As noted in Chapter 4, Dr Fettke had become aware that the board was proposing to caution him approximately 12 weeks before he gave evidence to the committee and the board had made its decision to caution Dr Fettke 25 days before he gave evidence to the committee.

6.14 Consequently, the committee was not satisfied that it could establish a clear link between Dr Fettke's giving of evidence to the committee and the issuing of the notice.

6.15 However, from an administrative perspective, issuing the notice on the same day that a witness provided evidence to the committee seems either a remarkable coincidence or a remarkable oversight. AHPRA was aware of the committee's inquiry and the public hearing; a senior officer, Ms Kim Ayscough, Acting Chief Executive Officer and Executive Director, Regulatory Operations, appeared before the committee at the same hearing. A program for the committee's hearing, including

3 Mr Martin Fletcher, Chief Executive Officer, AHPRA, *Committee Hansard*, 22 November 2016, p. 4.

4 Mr Fletcher, *Committee Hansard*, 22 November 2016, p. 6.

5 Committee of Privileges, *Parliamentary privilege: Precedents, procedure and practice in Australian Senate 1966–2005*, 125th report, December 2005, p. 47.

6 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 88.

Dr Fettke's name, was provided to AHPRA on the day before the hearing. It is regrettable that no one in the organisation considered that sending the notice on the day of the hearing might risk giving the appearance that the notice was a penalty for providing evidence to the committee.

The media release—16 November 2016

6.16 In investigating AHPRA's decision to release a media statement on 16 November 2016 in relation to Dr Fettke's case, the committee examined AHPRA's policy on releasing information.

6.17 As noted above, AHPRA informed the committee that it issued the press release to combat what it considered to be a 'level of misinformation' in the media about Dr Fettke's case. Dr Fettke was contacted 52 minutes before the media release was issued.

6.18 The committee considers that, notwithstanding AHPRA's concerns around misinformation, providing a busy surgeon with under an hour to read the proposed media statement, obtain advice from lawyers and indemnity insurers and provide AHPRA with an informed response is unreasonable.

6.19 The committee considered whether the issuing of the press release was in response to Dr Fettke's evidence to the committee or to other public statements made by Dr Fettke. Ultimately, the committee was not satisfied that a sufficient causal link could be drawn between Dr Fettke's evidence to the committee and the media release to warrant referral of the the matter to the Senate Committee of Privileges. Instead, the committee resolved to inform the Senate of the potential breach of privilege through this report.

6.20 The committee has commented in this report on the length of time taken to consider and finalise the notification concerning Dr Fettke. The committee remains concerned that AHPRA's management of the notification concerning Dr Fettke falls short of the committee's expectations of the treatment of witnesses participating in a committee inquiry. The committee considers that at the commencement of the committee's inquiry into the medical complaints process, AHPRA should have considered the possibility that individuals involved in notifications under consideration may seek to contribute to the committee's inquiry. In particular, the committee considers that AHPRA should have taken steps to ensure care in its dealings with actual or potential witnesses to the inquiry.

6.21 The committee resolved to write to the President of the Senate to seek his assistance in reminding AHPRA and other Commonwealth agencies of the need for care when dealing with witnesses who have provided evidence to a Senate committee. The committee requests that the President write to the heads of all Commonwealth agencies and provide a copy of the letter to all Senate committees for publication on committee web pages.

Senator Rachel Siewert

Chair