ADVICE NO. 15

PARLIAMENTARY PRIVILEGES AMENDMENT (ENFORCEMENT OF LAWFUL ORDERS) BILL 1994

The Committee has draw to my attention the advertisement in which the Committee invites submissions on this bill, which was referred to the Committee by the Senate on 12 May 1994.

I will make some observations in relation to the bill which I hope will be of some use to the Committee.

It would be unfair and possibly misleading not to reveal to the Committee that I had some part in framing the concept and form of the bill. What I say about it may therefore be viewed in the light of that information.

Concept of the bill

The bill should be regarded as one of major constitutional significance, as it would affect the balance between the three branches of government.

In all countries which have inherited the so-called "Westminster" or cabinet system of government, there has been an enormous shift of power away from the elected legislature in favour of the ministry. The ministry has come to control the parliament, or at least the lower house, a reversal of the supposed advantage of the system whereby the legislature controlled the ministry. This power shift has gone further in Australia than any other comparable country. In Australia it can be said that the prime minister controls the lower house. This development has removed from the system a major safeguard against corruption and misgovernment, as ministers are able to legislate by decree and avoid any legislative inquiries into their activities. Upper houses not under government control are able to impose occasional restraints on imperial ministers and premiers, but are subject to vilification and attack for their pains. Some correction to this dangerous situation has occurred because the third branch of government, the judiciary, has moved to fill the safeguard vacuum, has expanded its own powers and has, through constitutional interpretation and judicial review, sought to impose constraints on the otherwise absolute powers of ministers.

The formal powers of the legislature are very great. In common with most comparable legislatures, the Australian Houses possess not only the power to legislate but the power to coerce any person in the jurisdiction (with a possible exception which will be mentioned), particularly for the purpose of compelling the giving of evidence and the production of documents in the course of parliamentary inquiries. It is now thought to be virtually politically impossible, however, for the Houses to exercise those powers to the full. In particular, notwithstanding that the coercive powers were statutorily confirmed and codified as recently as 1987, it is thought to be difficult if not impossible for the Houses to exercise those powers by the imposition of penalties. In practical terms it is only upper houses not under government control which could even attempt to exercise those powers, and in doing so they would be open to attack by ministers and premiers who see themselves as the sole legitimate repositories of power. The fact that the exercise of the powers is only ever contemplated by the political opponents of the ruling party is, strangely, seen as in some way proving the illegitimacy of such exercise, although it is perfectly in accordance with foundation constitutional

theory and earlier practice. In short, elected legislatures no longer have the authority for the exercise of those powers, although that constitutional theory would lead us to believe that an elected assembly, above all bodies, should possess that requisite authority, and certainly possessed it in the past.

The effect is that ministers are largely unrestrained in their conduct and are often able to withhold information which may allow that conduct to be judged.

In this situation, the solution which is being turned to in all comparable countries is for the legislature to enlist the aid of the judiciary in restoring the constitutional safeguards and in imposing some constraint on the otherwise absolute and arbitrary executive. In one form or another, whether as bills of rights or other constitutional safeguards or as expanded provisions for judicial review, this solution is being promoted around the world. Unelected judges are being asked to substitute their authority for the lack of authority of elected legislatures. This may well be seen as a thoroughly unhealthy development (as it was regarded by the late Professor Gordon Reid), but it is an unavoidable reality of modern states.

The bill under consideration represents another attempt to resort to that solution. It is a monument to the constitutional drift which has taken place. The implicit foundation of the bill is that, while ministers may defy elected houses of the legislature, they will not dare to disobey the orders of a judge. Recent history supports this belief, but the question of how and why this has come about may well be contemplated. One hundred years ago the courts deferred to claims of executive immunity, while the ministry would not have dared to defy the orders of an elected house of parliament. In formal terms, as one of the framers of the American Constitution pointed out, the judiciary is by far the weakest branch, but it is steadily becoming in practice the strongest, and this bill would contribute to, as well as seek to take advantage of, that development.

Other Jurisdictions

So far as is known, no comparable jurisdiction with a cabinet system of government has progressed as far as Australia in codifying the law of parliamentary privilege, much less gone down the route proposed by the bill of seeking to have the courts enforce the lawful orders of the houses of parliament, although the United Kingdom Parliament as early as 1892 legislated to provide for the criminal prosecution of the offence of tampering with parliamentary witnesses.

The explanatory memorandum accompanying the bill states it would put the Australian Houses in the same position as the Houses of the Congress of the United States, which have an inherent power to compel evidence and to punish contempts, but which have legislated to allow the courts to impose penalties for contempts and to enforce subpoenas. The US Houses do possess an inherent constitutional power to compel evidence and to punish contempts, and this power has been upheld by the Supreme Court, subject to some constitutional limitations which are not of particular relevance here (*Quinn v. United States* 1955 349 U.S. 155 at 160-1; *Groppi v. Leslie* 1972 404 U.S. 496; *Eastland v. US Servicemen's Fund* 1975 421 U.S. 491). As early as 1857, however, the Congress legislated to provide for the criminal prosecution and punishment by the courts of refusal to cooperate with congressional inquiries. There is also a 1978 statute providing for the enforcement by the courts of the subpoenas of Senate committees. These enactments do not remove the inherent power of the Houses to enforce their orders by their own coercive processes, even in relation to the

same offences, and the Supreme Court has so held (*Jurney v. MacCracken* 1935 294 U.S. 125). As a constitutional power, it could not be taken away except by amendment to the Constitution.

In so enlisting the aid of the courts to enforce their orders, the US Houses acted from a position of greater strength than the legislatures of cabinet-system countries. The Congress at least still legislates and conducts inquiries freely and fearlessly, and the reason usually given for the legislation is that it allows heavier penalties than the Houses may impose and avoids the clogging of their proceedings with contempt cases. Cabinet-system legislatures, having largely given the legislative power away to the ministry, and having largely allowed their powers to inquire to fall into disuse if not desuetude, are in a much weaker position. Conferring on the courts the power to deal with contempts could well be seen as a further step down the road to legislative impotence. My view is that, in seeking to enlist the aid of the courts, the Houses should do nothing in derogation of their existing formal powers. Even if those powers remain formal and unused, their existence at least prevents the de jure wholesale transfer of power to the judicial branch.

Judicial review under the 1987 Act

It may be that, if they were to pass the bill, the Australian Houses would be going no further, so far as judicial review is concerned, than they have already gone by enacting the *Parliamentary Privileges Act 1987*.

Section 4 of that Act provides, in effect, a definition of contempt of parliament, in essence improper interference with the Houses, their committees and members in the exercise and performance of their authority and functions. If a House were to impose a penalty for contempt, it would clearly be open to the person convicted of the contempt to seek judicial review under section 4. The courts would then be called upon to determine whether the offence of which the plaintiff was convicted amounted to improper interference within the meaning of the section. In making that determination, the courts may well be led to determine wider issues. They would probably determine, if the question arose, the extent of any constitutional limitations on the powers of the Houses, and they may even determine questions of public interest immunity in relation to parliamentary inquiries. In the absence of any such litigation under section 4, one cannot be certain on this matter. The courts might not go that far, but, as has been noted, they have not been backward in filling the safeguards vacuum in recent times, and may well take it upon themselves to determine any outstanding questions raised.

The bill, therefore, may simply provide a faster and more certain method of getting before the courts questions which the courts may have been able to determine under the 1987 Act in any event.

Features of the Bill

It may be useful to the Committee to draw attention to the significant features of the bill.

The following aspects will be apparent to the Committee and are therefore summarised briefly.

(1) By creating a criminal offence and a defence to a prosecution for that offence, the bill would place the issues with which it proposes to deal clearly in the realm of the

judicial function, and probably avoid any challenge on the basis that it confers a non-judicial function on the judicial branch.

(2) By having offences prosecuted before the Federal Court, the bill would ensure that the matters to be determined would come before a superior court, and would avoid any requirement for committal proceedings or a jury trial.

(3) The bill would make use of the contempt jurisdiction of the Court as a means of enforcing lawful orders. Some observations have already been made about the significance of such a provision.

(4) The provisions in subclauses 11A(7) and (8) for determining the question of public interest immunity are as near as possible to the current common law relating to public interest immunity in court proceedings, in so far as the Court would be required to balance competing public interests, and to determine issues by examining evidence or documents in question. Those imbued with the British ideal of parliamentary sovereignty may be offended by the notion of a court determining the extent of the public interest in the free conduct of parliamentary inquiries, but Australia does not have parliamentary sovereignty, and the provisions would not involve any new principle of judicial interpretation and review. There is no difference in principle from the High Court determining whether a parliamentary remedy is proportionate to the evil which it is designed to cure.

(5) As has already been noted, the provision for avoidance of double jeopardy in subclause 11A(11) places a greater restriction on the Australian Houses than is placed upon the US Houses in the American law. Having selected the criminal jurisdiction to resolve a matter, a House would not be able to deal with the same matter under its contempt jurisdiction.

(6) The Houses would appropriately have full control over any proceedings under the bill.

There is one aspect of the bill which may not be readily apparent. By referring to *lawful* orders of the Houses and committees, the bill would signal to the Court that the Court would be expected to determine, if they arose, outstanding questions of law in relation to the powers of the Houses. These questions have not hitherto been adjudicated. Two of these questions may be of particular significance. It is not known whether the power of the Houses to compel evidence and punish contempts is subject to a constitutional limitation in relation to the members of other houses, including state and territory houses. This was the subject of an advice to the Senate Select Committee on the Functions, Powers and Operations of the Australian Loan Council, which advice was published in the Interim Report of that Committee in March 1993. It is presumed that, even if members of one federal House are not subject to the contempt jurisdiction of the other federal House, members of both Houses are not beyond the reach of this kind of Commonwealth legislation.

It is also not decided whether the powers of the federal Houses are limited to subjects in respect of which the Commonwealth Parliament may legislate. The US Supreme Court found such a limitation

of the inquisitorial powers of the Houses of Congress (see *Quinn* and *Eastland*, cited above), and in a similar federal system it is quite likely that the High Court would find a similar limitation.

In this connection, it is to be noted that subclause 11A(6) refers to officers and ministers of the Commonwealth, but does not cover officers and ministers of the states or territories. This is not because state and territory officers are intended to be deprived of the benefit of the subclause, but because it has not been determined whether state and territory officers and ministers are, as a matter of law, amenable to the compulsive powers of the federal Houses. More significantly, it is not clear whether they may be subject to this kind of Commonwealth legislation. As a matter of practice, the federal Houses and their committees have never sought to compel officers or ministers of states or territories, in a tacit acceptance that their powers do not extend to those office-holders. As long as that practice is adhered to, the question will not arise. If subclause 11A(6) purported to cover state or territory officers, it would amount to a prejudgement of that question in favour of powers which the federal Houses have tacitly assumed they do not possess.

Merits of the bill

The conclusion which I would draw as to the merits of the bill are implicit in the forgoing: given that there is a shift of power and authority away from the legislature, a shift which would be difficult to reverse, it is probably legitimate for the legislature to seek to enlist the aid of the power and authority of the judiciary to reassert legislative control of the otherwise unchecked ministry. This should be done, however, without abridging the formal constitutional powers of the Houses, and the bill seeks to achieve this. If those powers are retained the shift need not be permanent; it is possible that integrity may be restored to representative assemblies in the future.

Please let me know if I can be of any further assistance to the Committee.

COMMENTS ON OTHER SUBMISSIONS

I have been provided with copies of the other two submissions made to the Committee on this bill.

There is a point arising from each submission on which I think I should comment.

The Hon P D Connolly QC

It is very surprising that Mr Connolly should suggest that the deletion of the word "lawful" from the phrase "lawful order" in the bill would make it clear that the legality of an order of a House or a committee is not a question for the Court. The Court would certainly not regard itself as bound by the bill to enforce an *unlawful* order, even if the Parliament were to direct it to enforce such an order. The Court would regard such a proposition as self-evidently absurd. This would be so even in the absence of section 4 of the *Parliamentary Privileges Act 1987*, which explicitly allows the courts to determine the lawfulness, in the terms of the section, of an order of a House in relation to a contempt. The word "lawful" may be regarded as unnecessary; its deletion would certainly not have the effect suggested by Mr Connolly.

Professor G McCarry

It is not entirely clear how Professor McCarry's alternative scheme, set out at page 3 of his submission, would work. Presumably a public servant in receipt of an order of a House or a committee would not be guilty of an offence unless the 14 day period had elapsed and a minister had not lodged a "claim for privilege". Presumably the "claim for privilege" would be determined by the Court. Even with provisions to this effect, the scheme would have three difficulties.

First, if the government decided to contest the lawfulness of an order of a House or a committee, as distinct from raising a "claim for privilege", the public servant in receipt of the order would be in no better position: he or she could still be convicted of an offence if the challenge to the lawfulness of the order was not successful.

Secondly, there is the possibility of a minister instructing a public servant not to obey an order and declining to raise a "claim for privilege". This action could be accompanied by the usual kinds of political attacks on the House or committee concerned, and the House concerned would then bear the responsibility, and possibly the odium, of proceeding with a prosecution.

Thirdly, by detaching the "claim for privilege" from a defence to a prosecution, the bill could be challenged on the basis that it would confer a non-judicial function on a judicial body.

I would be pleased to enlarge on these comments or on my submission should the Committee so require.

COMMENTS ON MR MORRIS' SUBMISSION

Further submissions to the Committee in relation to its inquiry into this bill have been provided, namely submissions numbers 6 to 8 inclusive.

There are several observations which should be made on the very lengthy submission no. 6 of Mr A J Morris. I am conscious, however, that it would not be helpful to the Committee to emulate the length of that submission, so I will confine these observations to the main points and keep them as brief as possible.

(1) Mr Morris repeatedly states that the powers of the Houses to compel compliance with their orders by punishing contempts is a judicial power (pp 13-14). This is technically not so; the power is a legislative and not a judicial power. This is most clearly demonstrated in the one major common law jurisdiction where there is no constitutional provision for the legislative contempt power. The United States Supreme Court has held that the Houses of the Congress possess that power, in the absence of any constitutional provision for it, precisely because it is a legislative power, inherent in a legislature (see the judgments cited in my submission of 20 June 1994). This does not lend any weight to the argument (p. 28) about whether the bill confers a judicial function, and the reference in the long title to the provisions of the bill as an alternative to the penal powers of the Houses does not affect the issue one way or the other: a judicial remedy can be an alternative to a legislative remedy.

(2) The argument about the Houses being "judges in their own cause" (p. 16) loses its force when it is appreciated that the courts are always judges in their own cause in relation to contempt of court, which is the equivalent of contempt of Parliament. The contempt powers of the courts and of the Houses are self-protective powers essential to enable those branches of government to perform their functions.

(3) There *is* an issue of whether the bill confers a judicial function (pp 24-38), and it has been framed so as to minimise (but it cannot exclude) the possibility of a successful challenge to its validity on the basis that it confers a non-judicial function.

(4) Mr Morris' solutions to this problem are not solutions at all:

- the use of "clearer criteria" would not affect the issue one way or the other, and in any case the question of whether a disclosure would be prejudicial to the defence or security of the Commonwealth (p. 39) is no more precise than the question of whether a disclosure would be contrary to the public interest: it merely limits the subject matter

- tying the provisions of the bill to public interest immunity as it applies to court proceedings (p. 40) would seek to incorporate an area of the common law too complex and subtle for precise statutory delineation and which can be changed by the courts at any time

- an independent commission (p. 42) would not work unless such a body were statutorily given the same powers to enforce orders as are possessed by the Houses and the courts, and therefore it would be, in effect, a new court.

(5) The argument about the expression "lawful order" (p. 44-7) appears to me to be based on the same misconception as the relevant part of the submission of the Hon. P D Connolly, on which I commented in my note of 27 June 1994. There is no way of preventing the courts considering the lawfulness of an order of a House or a committee, and as I pointed out the courts can and will do so even in the absence of this bill. In the submission of 20 June 1994 I referred to some of the questions of law which could arise. Mr Morris' complex drafting would create more problems in endeavouring to solve a problem which does not exist, or, more accurately, is not a problem at all.

(6) The reason for legislatures habitually using the expression "without reasonable excuse" (pp 47-9) is that it is virtually impossible to codify the law of reasonable excuse. Mr Morris is probably correct in suggesting that, in the absence of the phrase, the courts would read it into the bill in any case, but including it in the bill avoids any suggestion that it is excluded.

(7) There is a very good reason for not referring to state or territory public servants in subclause 11A(6) (p. 50). The states and territories would be alarmed by a provision suggesting that their public servants could be compelled to appear before, or provide documents to, a federal parliamentary inquiry. Senate committees never seek to summon state or territory public servants, but ask the relevant ministers to allow them to attend. If the matter were to be contested in the courts, it is possible that the courts would hold that the power of the federal

Houses to compel evidence does not extend to state or territory public servants, on the basis of a development of an existing legal doctrine associated with federalism. The bill does not contemplate that state or territory public servants are subject to the powers of the federal Houses, but would provide a means of determining that question should it ever be contested. This is not likely to happen because Senate committees act on the basis that they may not summon state or territory public servants.

(8) The extension of the provision in 11A(6) to other categories of persons (p. 51) would not be justified because the problem which 11A(6) seeks to overcome, namely that ministers in one House are not amenable to the orders of the other House, does not exist in relation to other persons.

(9) The bill asks the Court to consider only the question of disclosure of documents to a committee or a House, regardless of whether that results in general publication or limited disclosure (pp 52-3). To ask the Court to consider the treatment of a document by a House or a committee, as Mr Morris suggests, would entail the Court making orders as to how the House or committee is to treat a document in the future. For example, if the Court held that a document could be disclosed only if the relevant committee treated the document as in camera evidence, the Court would have to make an order to ensure that the committee or the relevant House did not publish the document in the future. This really would involve the Court in supervising the decisions of the legislature. And what would be the remedy for a breach of any order of the Court on the part of a House or a committee?

(10) Subclause 11A(9) is designed to cover any potential "gap" in relation to the subsequent publication of documents which is not covered by an order of the Court and its contempt jurisdiction (p. 55). If there were no gap it would not matter that there would be a criminal offence which could also be a contempt of court. It would not be desirable to limit the initiation of a prosecution for an offence under the subclause, because the wrongful publication of a document would be of concern mainly to the original possessor of the document. It should be noted that any offences under the Act or the bill, except offences under subclause 11A(4), could be prosecuted by any person by laying an information.

(11) Mr Morris unwittingly destroys his own argument about a government controlling the House of Representatives circumventing the orders of the Senate or a Senate committee (p. 57) by his use of the expression "procure the House of Representatives to make a similar order": such an order would not be the same order, merely a similar order, and therefore the Senate would not be prevented from initiating a prosecution in respect of its particular order. In any case, the House of Representatives could make orders only in relation to some joint action by the two Houses, and this is the circumstance covered by paragraph 11A(12)(c). Neither House could make a lawful order in relation to some action by the other House.

(12) It is not necessary to provide for the prosecution of breaches of orders of the Court (pp 57-8). The Court may deal with breaches of its orders either on its own motion or on the application of any person.

(13) Mr Morris' point about the Houses retaining their existing contempt powers (p. 61) is already covered by section 5 of the principal act.

(14) Mr Morris' drafting efforts, in unnecessarily seeking to overcome problems he perceives, would make the bill far too complex. If the Parliament is to legislate along the lines of the bill, this is an occasion for concise law.

There is one potential problem with the bill which I should mention. It is surprising that the Committee's learned submitters have not commented on it. In deciding to initiate a prosecution under the bill, a House would have to pass a resolution, that resolution would be open to debate, the debate could extend into a preliminary trial, a sort of legislative committal proceeding, and could complicate, if not prejudice, the subsequent conduct of the prosecution. If the bill were passed the Houses would have to adopt some procedures for obtaining independent advice on whether a prosecution could be commenced, and perhaps for limiting debate on the required resolution.

I would be pleased to enlarge on these comments or on my previous submissions at the Committee's forthcoming hearing.

COMMENTS ON MATTERS RAISED AT HEARING

There were a few points raised during the Committee's hearing on 18 August 1994 on which I think I should briefly comment. These comments may be useful to the Committee in compiling its report.

Evidence of Professor McCarry

(1) Under Professor McCarry's proposed scheme, which he significantly clarified during his evidence, if there is a "no contest" by the government to an order of a House or committee, the public servant is obliged to obey the order, and "anti-victimisation" provisions are Professor McCarry's solution to the problem that the government is the public servant's master (transcript, pp 47-8). The Parliamentary Privileges Act already contains "anti-victimisation" provisions, which make it a criminal offence to interfere with a witness. It is difficult to see how those provisions could be any stronger.

(2) As section 4 of the Parliamentary Privileges Act makes clear, the essence of a contempt of Parliament is that it involves an improper obstruction of a House, its committees or its members. It would therefore be very strange that disobedience of an order of a House could be prosecuted without a decision of the House (transcript, p. 50). A House would then have no opportunity to determine whether a particular act was an obstruction of the House, something which the House can best determine. In the exchange between Senator Childs and the professor (transcript, pp 51-3), Senator Childs was quite correct: under the professor's scheme there would be no opportunity for a House to debate and determine whether a prosecution should be initiated.

Evidence of Hon P D Connolly

(3) Not only would the omission of the word "lawful" not be sufficient to prevent the court determining the lawfulness of an order (transcript, p. 55), but *nothing* can prevent a court from determining the lawfulness of an order which the court would be asked to enforce. An unlawful order is not an order at all, and if the question of lawfulness were raised in relation

to a particular order, nothing could prevent the court from determining the question of lawfulness, as that is the primary question which courts must determine. If the Parliament were to explicitly enact that the courts were to assume the lawfulness of an order, that really would be a usurpation of the judicial power. In any case, the Parliament, by enacting the *Parliamentary Privileges Act 1987*, has already explicitly empowered the courts to determine the lawfulness of any order of a House or a committee.

(4) The presence of the word "lawful" would *not* empower the courts to inquire into the internal proceedings of the Houses by which an order was made (transcript, pp 58-9). The current law, as Mr Connolly points out, is that the courts may not do so (subject to some constitutional considerations which apply in Australia but not in the United Kingdom). The presence of the word "lawful" would not alter that law or empower the judges to alter it; on the contrary, it would reinforce that law.

(5) Mr Connolly's reference to the Mabo judgment (transcript, p. 65) indicates that the "judicial activism" which he rejects is already with us and cannot be avoided; the bill would not add to it or subtract from it.

Evidence of Mr Morris

(6) Mr Morris says (transcript, p. 84) that I am "plainly wrong" in asserting that the contempt powers of the Houses are legislative powers and not judicial powers. On the contrary, it is Mr Morris who is wrong. Mr Morris' authority for asserting that I am wrong is "the High Court of Australia in the war crimes case". Mr Morris is referring to a comment in passing by Justice Deane in *Polyukhovich v the Commonwealth* 1991 172 CLR 501 at 626, to the effect that the power of each House to punish contempt under section 49 of the Constitution is an exception to the rule that the judicial power of the Commonwealth is vested exclusively in courts. Justice Deane's reference for this dictum is the judgment of the High Court in *R v Richards; ex parte Fitzpatrick and Brown* 1955 92 CLR 157. In its judgment in that case, however, the High Court did *not* say that the contempt power of the Houses is a judicial power; on the contrary, the Court noted that that power had traditionally been regarded as non-judicial. In delivering the judgment for the Court, Chief Justice Dixon said:

> there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection .... they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically , perhaps one might even say, scientifically , they belong to the judicial sphere. (at 167)

The Court found it unnecessary to determine this question because the powers are explicitly conferred by the terms of section 49 of the Constitution. The point in my submission was that in the one common law jurisdiction, the United States, where there is no equivalent of section 49 to allow the constitutional court to avoid having to determine the question, and where the court therefore had to determine whether the contempt power is exclusively judicial, the court did indeed find that the power is "not strictly judicial but ... belonging to the legislature", "something essential or, at any rate, proper for its protection" and "proper

incidents of the legislative function". The significance of this doctrinal point is that the powers of the Houses to deal with contempts are properly regarded not, as Mr Morris says, as anomalous, but as powers belonging to a legislature.

(7) In relation to the power of the Senate to summon state public servants, this is not simply a matter of convention (transcript, p. 85), but a question which goes to the *lawfulness* of a House's orders. It may be held that it is not *lawful* for the federal Houses to summon state ministers or public servants or to punish them for contempts, and therefore the bill does not refer to state public servants as that would be to prejudge that question of lawfulness.

Please let me know if I can be of any assistance to the Committee in the further conduct of its inquiry into this matter.