ADVICE NO. 3

SUBMISSION ON BEHALF OF MR CHARLES PERKINS

(Advice dated 6 March 1989 from the Clerk of the Senate, Mr Harry Evans, to the Chair of the Committee of Privileges, Senator Giles)

Thank you for your letter of 2 March 1989 requesting my comments on the submission to the Committee on behalf of Mr Charles Perkins by Mr R.J. Ellicott, Q.C. and Professor J.E. Richardson.

There is a number of matters raised in this submission on which I think I can usefully comment.

The submission appears to be based upon a number of misconceptions about the nature of parliamentary privilege and the Parliamentary Privileges Act 1987.

There are two tributary misconceptions which may be briefly considered before the substantive issue which underpins the major part of the submission is discussed.

First, the submission contains the common fallacy that for there to be a "breach of privilege" there must be some identifiable privilege which is breached. Paragraph 9 complains that the Committee's letter "did not explain which specific privileges of the House were involved", while paragraph 47 assumes that "there is such a privilege" involving "conduct which is calculated to deter prospective witnesses", and paragraph 11 refers to "some other privilege" which is assumed to be relevant to matters raised by the Committee. The misconception here is that there is a privilege for each possible breach of privilege. This erroneous notion, which has bedevilled discussion of parliamentary privilege for years, is dealt with at pp xii and 89 to 91 of the Report of the Select Committee of the House of Commons on Parliamentary Privilege, HC 34, 1967, and at pp 4-7 of the submission by the Department of the Senate to the Joint Select Committee on Parliamentary Privilege, 1982.

There is a small number of definite privileges, or legal immunities, adhering to the Houses of the Parliament, their committees and members, under section 49 of the constitution and the Parliamentary Privileges Act, and there is the power to punish contempts which also adheres to the Houses under that section and is recognized in the Act. The power is essentially a discretionary power to punish any act as a contempt: Erskine May's Parliamentary Practice, 20th ed, 1983, p. 143. It has been statutorily circumscribed by section 4 of the Act, which declares the essential element of contempts in terms of improper interference with the Houses, but that section merely states what has always been taken to be the basis of the power to punish contempts. The power of the Houses to treat matters as contempts is not linked to any particular privilege or immunity. Some contempts may be referred to as "breaches of privilege" because conceptually they may be regarded as violations of a particular immunity, and that is the source of the misconception.

Secondly, the submission assumes that subsection 12(2) of the Parliamentary Privileges Act contains the "privilege" which is in issue. This is referred to in paragraphs 10, 11 and 47. This also is a misconception.

Subsection 12(2) of the Act provides that certain conduct in relation to parliamentary witnesses constitutes a criminal offence which may be prosecuted through the courts, as distinct from a contempt of Parliament which may be dealt with by the House concerned. The existence of that criminal offence does not prevent the same conduct or similar conduct being dealt with as a contempt. Section 5 and subsection 12(3) of the Act make that abundantly clear. The analogy in the ordinary law is the overlap between the criminal offence of attempting to pervert the course of justice and contempt of court. Paragraphs (10) and (11) of resolution 6 of the Privilege Resolutions passed by the Senate on 25 February 1988 do not exhaust this category of contempts, as the first sentence of the resolution explicitly states. The apparent assumption in the submission that if conduct does not fall within section 12 of the Act it is not an offence is erroneous.

I now turn to the fundamental misconception which underlies the major theme of the submission. The essence of the submission is that an act which is lawful and proper cannot be a contempt. Thus at paragraphs 18 and 19 it is stated that a statutory authority is entitled to discipline its members and staff and that it follows that such disciplinary action cannot constitute a contempt within the meaning of section 4 of the Parliamentary Privileges Act. At paragraphs 34 and 35 a similar reasoning is adopted. At paragraph 78. it is stated that such disciplinary action would be lawful and proper. At paragraph 90 it is stated that it would be proper for the Aboriginal Development Commission to censure its chairman. It is to be noted that the questions of legality and propriety are gradually amalgamated in these paragraphs, a point to which I will return.

Contrary to the submission, it is the very nature of contempt of Parliament, and, indeed, of contempt of court, that an act which is otherwise lawful and proper may be a contempt.

In relation to contempt of Parliament, even the bringing of legal proceedings, which is not only lawful but the right of every citizen, has been treated as a contempt where it constituted interference with witnesses: Erskine May, pp. 164, 166. Legal proceedings unconnected with proceedings in Parliament but commenced or pursued in retaliation for parliamentary proceedings would be regarded as involving a contempt: see reports of the House of Commons Committee of Privileges, HC 246, 1974; HC 233, 1981-82.

In relation to contempt of court (or attempting to pervert the course of justice), "the exercise of a legal right or the threat of exercising it does not excuse interfering with the administration of justice by deterring a witness from giving the evidence which he wishes to give" (R v Kellett (1976) 1 QB 372 at 391).

In establishing whether a contempt has been committed, the matters to be examined are the tendency, effect and intention of the act in question, not the lawfulness of the act or whether there is otherwise a legal right to perform the act. The question of whether the Aboriginal Development Commission had the right or duty to discipline or censure its members or staff is therefore irrelevant.

The. submission appears to misinterpret the significance of the word "improper" in section 4 of the Parliamentary Privileges Act. The section provides that, to constitute an offence, conduct must amount to improper interference. It cannot be assumed, as the submission appears to assume, that "improper" there means "unlawful" or "improper in some other context". An act which may be otherwise perfectly lawful and proper may nevertheless be a contempt. It may be lawful and proper for an employer to dismiss an employee, or for a landlord to evict a tenant, or for a statutory body to discipline its members and staff, but if any of those acts is done for the purpose of punishing a witness because of the witness' evidence it thereby constitutes a contempt of Parliament, or, for that matter, a contempt of court. (See Lane v Registrar of Supreme Court of NSW, (1981) 55 ALJR 529 at 534. For dismissal of an employee, see report of the House of Commons Committee of Privileges, HC 274, 1975-76.)

The word "improper" in section 4 of the Act is to distinguish acts which may be regarded as interference but which may be regarded as proper because of their intention and effect; for example, *urging* (but not threatening) a witness to correct evidence which is false (cf R v Kellett, (1976) 1 QB 372 at 386-8).

There are other matters raised by the submission to which I should briefly refer. Paragraph 48 of the submission is as follows:

> 48. It is submitted that, as a matter of law, a mere resolution cannot itself constitute a breach of any privilege of the Senate or a Senate Committee. A breach of privilege cannot occur in the abstract. Our perusal of May and Odgers has not revealed any proceedings for breach of privilege except in relation to identified persons. In the absence of any evidence of the application of the resolution to an identified person, or that any particular person has been deterred as a result of the resolution from giving .evidence, it is submitted that no breach of privilege can exist. At most the resolution is a mere statement of intention on the part of the Commission which has no operative effect and upon which the Commission has not acted.

With the very greatest respect to the very learned authors of the submission, I must say that every statement in this paragraph is demonstrably wrong.

First, it is clear that a "mere" resolution can constitute a contempt of Parliament, and, for that matter, a contempt of court and many other offences. "Although thoughts are free, the uttering of them is another matter. Speaking or writing is an act [as is passing a resolution] ... almost any crime can be committed by mere words" (Glanville Williams, Criminal Law: The General Part, 2nd ed, 1961, p. 2). The obvious and relevant example of the mere uttering of words being a contempt is a threatening or intimidatory statement made in relation to witnesses.

Secondly, the fact that the authorities do not reveal any precedent of an act being treated as a contempt does not prevent that act being so treated: Erskine May, p. 143. In any event, there are relevant precedents: threats to unnamed members of Parliament would be held to

be a contempt (reports of the Committee of Privileges of the House of Commons, HC 581, 1970-71; HC 50, 1971-72; HC 634, 1974-75; HC 564, 1983-4), and it is suggested that the same principle applies to witnesses.

Thirdly, it is obvious, apart from any precedents, that an act may be a contempt without application to any particular person. A person who utters a threat against anybody who may appear as a witness in a particular matter clearly is guilty of a serious contempt of Parliament in the case of a parliamentary inquiry and a serious contempt of court in the case of legal proceedings, notwithstanding that the threat is not made against any particular person.

Fourthly, it is not necessary that any particular person has been actually influenced in order to establish a contempt. The tendency or likelihood of the act to produce a result is important: Erskine May, p. 143; this is also made clear by the language of section 4 of the Parliamentary Privileges Act, which refers to an act which "amounts, or is intended or likely to amount, to an improper interference" with a House, committee or member. As for contempt of court, "possibility, not probability, (and not actual effect) was the foundation of the principle that nothing should be said or done to interfere with the administration of justice" (Wellby v Still, (1892) 8 TLR 202 at col. 2).

Fifthly, a "mere statement of intention" can of course be a contempt regardless of whether it is acted upon. The general threat to witnesses, already cited as an example, or, indeed, any threat to witnesses, would be a contempt regardless of whether it were ever carried out.

At paragraphs 47, 51, 52, 82, 83 and 92 the submission makes assertions concerning the intention of actions of the Aboriginal Development Commission. The question of the intention with which those actions were taken is a question of fact and not a question of law. The foregoing has suggested that the intention with which an act is done is often crucial in determining whether an act constitutes a contempt, and some contempts, by their nature, require a certain intention as an essential element. An assertion that an act was done with a certain intention, however, is not conclusive.

Because the question of intention is likely to be of importance in the Committee's consideration of the matters before it, it may be helpful if I make the following observations.

For a contempt of Parliament to be established, it is not necessarily required to prove a culpable intention on the part of a person who has performed a particular act; as has already been noted, the effect or tendency of the act may be sufficient to constitute the offence. The same consideration applies to contempt of court, or at least contempt of court constituted by a publication (R v Odhams Press Limited and others ex parte Attorney-General (1957) 1 QB 73 at 80; Lane v Registrar of Supreme Court of NSW (1981) 55 ALJR 529 at 534; Registrar of Supreme Court v McPherson and others (1980) 1 NSWLR 688 at 696).

The Parliamentary Privileges Act 1987 and the privilege resolutions passed by the Senate on 25 February 1988 leave open the question of whether a particular intention needs to be established to prove a contempt. Section 4 of the Act, defining the essential element of contempts, refers to an act "likely to amount" to improper interference. Resolution 6 of the resolutions, specifying matters which may be treated as contempts, indicates that a culpable intention is an element of some of the contempts specified, in paragraphs (5), (7) and 12(c) for example, while others may be read as strict liability offences, as in paragraphs (9) and (16). Resolution 3, whereby the Senate declares the matters which will be taken into account in determining whether a contempt has been committed, refers in paragraph (c)(i) to the state of mind of the person who committed an act. The resolutions are not framed so as to be binding. Theoretically, therefore, it is open to the Committee and the Senate to treat particular contempts or even all contempts as strict liability offences, or to decide that different states of mind and intentions are elements of different contempts.

If the Committee, in considering the matters currently before it, comes to the conclusion that a certain intention is necessary to constitute a certain type of contempt, I think it would be helpful in dealing with future cases if the Committee were to indicate that belief and make any observations which it thinks appropriate concerning the place of intention in contempts, for the guidance of the Senate and future committees.

Nothing I have said here makes any judgement of the facts of the matters before the Committee, but goes only to issues of principle.

Please let me know if the Committee requires any elaboration of these matters or any further assistance.