ADVICE NO. 7

REFERENCE CONCERNING ALLEGED HARASSMENT OF WITNESS

On 18 October 1990 the Senate referred the following matter to the Committee of Privileges:

> Having regard to the report of the Standing Committee on Environment, Recreation and the Arts presented on 17 October 1990, whether an attempt was made improperly to influence a witness in respect of the witness's evidence, or to penalise a witness in respect of the witness's evidence, and whether any contempt was committed.

The report of the Standing Committee on Environment, Recreation and the Arts referred to in the reference described what it called the harassment of a witness who had appeared before the Committee. The harassment alleged was constituted by a letter and attached documents sent by one Mr C. Turner to one Mr G. Jones, the latter having given evidence to the Committee. One of the attached documents referred to that evidence.

The matter which is the subject of this reference is not the usual sort of alleged interference with witnesses; indeed, it is most unusual, and raises some significant issues of principle. This note is concerned with those issues of principle, and not with finding the facts of the case, which are for the Committee of Privileges to find.

The case

If the facts are as interpreted by the report of the Standing Committee, Mr Turner sent to Mr Jones a letter containing an implied threat that if Mr Jones did not withdraw from a contest for an office in the Australian Drug Free Powerlifting Federation, Mr Turner would publish, apparently to members of that organisation, certain documents containing certain allegations against Mr Jones. One of those documents contains the allegation that Mr Jones gave false evidence to the Standing Committee. The essence of the case, therefore, if the facts are as alleged, is that a person has threatened another person who has given evidence before a committee with the publication of an allegation that that evidence was false, in order to influence the person who gave the evidence in relation to another matter, namely, an election to an office in an association.

Interference with witnesses

Improper interference with witnesses is one of the well known categories of contempt of Parliament, and also one of the well known categories of contempt of court. There are two principal types of improper interference with witnesses: improperly influencing a witness in respect of evidence given or to be given (including inducing a person to refrain from giving evidence), and penalising or injuring a person because of evidence given. These two forms of interference with witnesses are reflected in the Senate's resolution of 25 February 1988 which declares matters which may be treated as contempts, including interference with witnesses, in the following terms:

Interference with witnesses

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

It is clear that this terminology, while reflecting the principal types of interference with witnesses, may not necessarily cover all the possible types of such interference. This is reflected in the preamble to the Senate's resolution, which indicates that the terms of the resolution do not derogate from the Senate's power to determine that particular acts constitute contempts. The preamble also makes it clear that attempts to perform the proscribed acts may also be treated as contempts.

The category of contempts generally described as improper interference with witnesses clearly covers a wide area of conduct and catches any dealings with witnesses which may be regarded as improperly influencing them.

The British House of Commons version of the Senate resolution, passed in the year 1700, employs the terminology of "tampering with witnesses":

> That if it shall appear, that any Person hath tampered with any Witnesses, in respect of their Evidence to be given to this House, or any Committee thereof; or, directly or indirectly endeavoured to deter or hinder any Person from appearing, or giving Evidence; the same is declared to be a high Crime and Misdemeanor: And this House will proceed with the utmost Severity against such Offenders. (CJ 400)

This terminology has been interpreted as covering any sort of improper interference with witnesses, including penalising or injuring witnesses on account of their evidence. Because of a point referred to later in this note, it is interesting to see that in 1733 the House of Commons resolved that it was a contempt to "call any Person to account, or to pass a Censure upon him, for Evidence given by such Person before this House, or any Committee thereof " (CJ 146). A Select Committee on Witnesses observed that the contempt could be constituted by "any interference with a witness's freedom" (HC 84, 1934-35, p. v).

It is of some significance that the law of contempt of court followed in its development that of contempt of Parliament in relation to interference with witnesses after they have given evidence. It was not until 1963 that it was definitely decided, by a reversal of a decision of a lower tribunal, that inflicting a penalty or injury on a witness, with the purpose of punishing the witness because of the witness's evidence, is a contempt of court (*Attorney-General v Butterworth and Others*, 1963 1QB 696). In coming to its decision in that case, the court was greatly influenced by the fact that such conduct had long been treated by the Houses of Parliament as a contempt of Parliament, and the Parliament seemed to have assumed that similar conduct in relation to courts would be treated as contempt of court. In this case there was also an element of a witness being called to account and

censured because of the witness's evidence. The judgment in the case has been followed in other common law jurisdictions, including Australia.

The fact that it was only relatively recently that the courts were called upon to determine whether penalising a witness constitutes a contempt, and that the courts in this area followed the lead of the Parliament, is a reminder that the categories of contempts, including that category designated as interfering with witnesses, are not closed or exhaustively defined, and that many different kinds of conduct may fall within those categories.

It is important to note that the contempt of interference with witnesses may be constituted by conduct which is otherwise lawful, and improper interference is not the equivalent of unlawful interference. These points were discussed in the advice of the Committee of Privileges dated 6 March 1989, relating to the subject of the Committee's 18th Report.

Does the alleged conduct constitute improper interference?

The primary question of principle which arises in relation to this matter is whether the conduct alleged to have been engaged in by Mr Turner amounts to improper interference with a witness. The Standing Committee on Environment, Recreation and the Arts thought that the alleged conduct fell under the heading of penalising a witness, and quoted paragraph (11) of the Senate's resolution. It is not difficult, however, to see a flaw in that connection: the facts of the case as alleged do not disclose any purpose on the part of Mr Turner of penalising or injuring Mr Jones because of, or on account of, the latter's evidence. The purpose was apparently to influence Mr Jones in relation to a matter, the election in the association, not connected with the giving of evidence or the evidence given by Mr Jones. It is to be noted that the Standing Committee's report refers to "harassment" of a witness, and the use of this terminology suggests that the Committee may have thought that there was some difficulty in regarding the alleged conduct as penalising a witness. The reference to the Committee of Privileges refers to both elements of improper interference, and employs the terminology of both paragraphs of the Senate's resolution. It is equally as easy, however, to detect the flaw in regarding the alleged conduct as an attempt improperly to influence a witness in respect of the witness's evidence: Mr Turner's presumed purpose was not to influence Mr Jones *in respect of* Mr Jones' evidence, but to influence him in respect of the unconnected matter, namely, the association election. The apparent threat to publish a claim that Mr Jones' evidence was false may be seen as calling a witness to account for the witness's evidence, but the alleged conduct does not readily fall within that subsidiary category of improper influence. The difficulty is that Mr Jones' evidence as such was apparently not Mr Turner's target.

It is clear, therefore, that the alleged conduct which is the subject of the reference to the Committee is not similar to the usual kinds of interferences with witnesses, and is not adequately described by the various formulations of the types of improper interference, including the formulations in the Senate's resolution which are reflected in the reference to the Committee.

Precedents

Any precedents of conduct such as that alleged on the part of Mr Turner being treated as either contempt of Parliament or contempt of court would have persuasive value in considering this case. A diligent search, however, has disclosed no cases of contempt of Parliament or contempt of court

involving facts similar to the alleged facts of the case under consideration. The cases of calling a witness to account for the witness's evidence provide the closest analogy.

It therefore appears that the Committee of Privileges, assuming that the facts are found to be as alleged in the Standing Committee's report, has to consider whether the alleged conduct constitutes improper interference with a witness, having regard only to the issue of principle which underlies that category of contempt. This, in effect, is what the court did in *Attorney-General v Butterworth*, albeit with the aid of the parliamentary precedents reflecting the long-established view of Parliament. The Committee will be wary of falling into the same trap as the lower tribunal in that case, of finding that conduct does not constitute a contempt merely because it does not fall within the established formulations and precedents.

In considering the issue of principle, the Committee will no doubt have regard to section 4 of the *Parliamentary Privileges Act 1987*, which declares the essential elements of contempts, and, in effect, the rationale of treating any acts as contempts:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

The question of principle

The rationale of treating certain kinds of conduct towards witnesses as contempt is that that conduct hinders parliamentary inquiry (in relation to contempt of court, the administration of justice by the courts) by deterring witnesses, including any future witnesses, from giving evidence or from giving truthful evidence. The rationale of treating as a contempt conduct intended to penalise witnesses because of their evidence was stated by Lord Denning in *Attorney-General v Butterworth*:

> How can we expect a witness to give his evidence freely and frankly, as he ought to do, if he is liable, as soon as the case is over, to be punished for it by those who dislike the evidence he has given?..... If this sort of thing could be done in a single case with impunity, the news of it would soon get round. Witnesses in other cases would be unwilling to come forward to give evidence, or, if they did come forward, they would hesitate to speak the truth, for fear of the consequences (at 719).

It may be thought that this rationale applies with equal force to *any* attack upon a witness in relation to the witness's evidence, regardless of whether the purpose of the attack is to penalise the witness because of that evidence. In effect, the conduct alleged to have been engaged in the present case amounts to using a witness's evidence as a weapon against the witness in relation to a matter not connected with the witness's evidence. It may be thought that such conduct is likely to have the same effect, of deterring witnesses in future, as imposing a penalty on a witness because of the witness's evidence.

It may be regarded as significant that the use to which the witness's evidence was to be put was to take the form of the publication of a claim that the witness's evidence was false. In *Attorney-General v Butterworth*, Lord Denning made the assumption: "Let us accept that he [the victimised witness]

has honestly given his evidence" (at 719). Similarly, the *Witnesses (Public Inquiries) Protection Act 1892*, which resulted from the most notorious case of penalising of a parliamentary witness, protects witnesses against any penalty or injury in respect of evidence "unless such evidence was given in bad faith". The use of these expressions has given rise to a question as to whether it is a contempt to take otherwise lawful action against a witness in consequence of evidence which the witness has given knowing it to be false. This question has not been resolved. The United Kingdom Law Commission, in recommending the codification of the law relating to offences against the administration of justice, recommended an exemption for otherwise lawful conduct towards a witness in consequence of evidence where the witness knew that the evidence was false or was reckless whether it was false. The Commission recommended:

> Mere belief in its falsity by the person taking or threatening reprisals will not suffice for this exception. (Report No. 96: *Criminal Law: Offences Relating to Interference with the Course of Justice*, 1979, cmd 213, p. 66.)

This seems to contemplate that it should be a defence to a prosecution for interference with a witness to establish that the witness's evidence was false.

It may well be concluded, however, that this notion is contrary to the whole rationale of protecting witnesses from improper interference. If a witness's evidence is known to be false the duty of a person possessing that knowledge is to inform the relevant authority (the committee which took the evidence in the case of a parliamentary inquiry), and to threaten to publish that knowledge as a means of influencing the witness's behaviour in relation to another matter constitutes improper conduct towards the witness, and, in effect, improper interference with the witness. If the threat is based upon a mere assertion that evidence was false, the case for treating such conduct as improper interference may be much stronger, but it may be concluded that the nature of the conduct is not altered if it is established that the witness did in fact knowingly give false evidence. The threat may be regarded as improper regardless of whether it is based on actual knowledge of the falsity of the evidence.

In support of this contention, I return to the point that improper interference with a witness may be constituted by conduct which is otherwise lawful, and that improper interference is not equivalent to unlawful interference, the point which was made in the advice of 6 March 1989. The leading judgment establishing that principle in relation to contempt of court is *R v Kellett*, 1976 1QB 372. In that judgment a distinction was drawn which elucidates the significance of the word "improper" in the phrase "improper interference with witnesses". It was said (at 388) that it would not be a contempt (or its criminal equivalent, attempting to pervert the course of justice) for a person to try to persuade a witness to change false evidence. Threatening a witness to achieve that end, however, would be a different matter: "however proper the end the means must not be improper". It would seem to follow from this that using a witness's evidence as a means of attacking the witness, including by threatening to publish a claim that the evidence was false, may be regarded as improper interference with a witness regardless of whether the evidence actually was false.

The alleged threat if based on actual knowledge may also be regarded as an aggravation of a primary contempt of concealing the fact that false evidence has been given, and as therefore doubly hindering the conduct of parliamentary inquiries.

Having regard to these considerations, the Committee of Privileges may consider that the conduct alleged, if found to have been committed, falls within the category of improper interference with witnesses notwithstanding the absence of exact precedents.

It is emphasised again that this discussion of the issues of principle is based on an assumption as to the facts. It is for the Committee of Privileges to establish the facts. The facts include the acts done and the intention with which those acts were done. The matter of the intention with which acts are done as distinct from the tendency or effect of those acts was discussed in the advice of 6 March 1989. It is also for the Committee to determine the significance of intention in a particular case, and, having regard to all the circumstances, how particular acts should be judged.