

**ALLEGED INTIMIDATION OF WITNESSES -
MATTER REFERRED TO THE COMMITTEE ON 2 APRIL 1992**

Thank you for your letter of 3 April 1992 requesting my comments on any possible questions of contempt arising from the report of the Standing Committee on Community Affairs on the alleged intimidation of witnesses presented to the Senate on 2 April 1992, and from the matters arising from that report and referred by the Senate to the Privileges Committee on the same day.

As with previous advices provided to the Committee, the following observations make no judgement as to the facts of the case. It is for the Committee to find those facts. It is particularly necessary that I emphasise this point because the facts as disclosed by the report of the Standing Committee are not entirely clear. The facts of the case include acts done, the effect or tendency of those acts and the intentions with which those acts were done.

The Issues

The allegation which arises from the report of the Standing Committee is that a threat was made of legal action in respect of a complaint which was contained in a letter to the Pharmacy Board of New South Wales from persons who were subsequently witnesses before the Standing Committee and at least one of whom, as part of his evidence to the Standing Committee, submitted to the Standing Committee the letter to the Pharmacy Board.

For the purposes of this analysis it is assumed, as the Standing Committee has assumed in its report, that the submission of a document to a committee is the equivalent of giving evidence to a committee, as sections 3(2) and 16 of the *Parliamentary Privileges Act 1987* and the Privilege Resolutions of the Senate clearly contemplate.

The principal issue which arises from this allegation is that witnesses who gave evidence to a committee may have been threatened with legal action, and that threat may have been made on account of their giving evidence, in any or all of the following senses:

- (a) the threatened legal action had as its object the document submitted to the committee;
- (b) the threat of legal action was possible only because of the submission of the document to the committee;
- (c) the threat of legal action was occasioned, or partly occasioned, by the submission of the document or the giving of other evidence to the committee;
- (d) the threat of legal action was made with the intention of influencing the witnesses in respect of their evidence.

A subsidiary issue which arises from the facts in so far as they are revealed by the Standing Committee's report is that threats of legal action may have been made against persons who were

technically not witnesses before the Standing Committee, in that they had not in any way provided evidence to the Standing Committee, but that those threats may have had an effect or tended to have an effect, or may have been intended to have an effect, on persons who *were* witnesses, or may have affected potential future witnesses. Depending on the facts which the Privileges Committee finds, that possibility may need to be considered. The following analysis is applicable to that circumstance, but to avoid complicating the advice I will not refer to it further.

The Relevant Contempt

The relevant contempt is that of improper interference with witnesses set out in paragraphs (10) and (11) of the Senate's Privilege Resolution no. 6:

- (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.
- (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.

The preamble of the resolution indicates that its language is not exhaustive of the categories of contempts, and that attempts to do the proscribed acts may be treated as contempts.

Relevant Principles

In earlier advices to the Privileges Committee the relevant principles, applying in respect of both contempt of Parliament and contempt of court, in relation to interference with witnesses were set out. It may be useful to summarise briefly those principles.

Lawfulness not relevant. Actions which are otherwise lawful may be contempts because of their effect, tendency or intention; in particular, actions taken in respect of witnesses may constitute the contempt of improper interference with witnesses because they have the effect or tendency of penalising witnesses or deterring them from giving evidence, and if done with that intention clearly constitute contempt. The otherwise lawful act of threatening or taking legal action may constitute a contempt where it has that effect, tendency or intention.

Ability to carry out threat not relevant. A threat of action may constitute a contempt even where the ability to carry out the threat is lacking, because the threat may have the requisite effect, tendency or intention. In particular, a threat of legal action may be a contempt even where the legal action could not succeed as a matter of law because of parliamentary or other privilege. In relation to a threat of legal action made against witnesses, even where the witnesses are legally protected against a successful action the threat may have the effect, or tend to have the effect, of penalising them because of their evidence or of deterring witnesses from giving evidence. In this connection it must be borne in mind that a threat of legal action which is not carried out and which is not capable of being carried out may put the person who is the subject of it to great trouble and expense. Indeed, a threat of legal action may be made against a person, particularly by a client with a long purse, with no intention of ever

taking the action to court but with the object of punishing that person by inflicting trouble and great legal expense upon them.

Legal action may not be directed to privileged occasion. The threat of legal action may be a contempt even where it is not formally directed to the privileged occasion, for example, the giving of evidence, but to some other occasion, when the privileged occasion is the real target of the threat. Legal action may be threatened or taken against witnesses in respect of something other than the giving of evidence to a committee, but the threat may be actually directed to the giving of evidence, and therefore constitute a contempt by penalising the witnesses or deterring them from giving evidence.

An act may be only partly in consequence of the privileged occasion. An act may constitute a contempt where it is only partly in consequence of the relevant privileged occasion. The threatening or taking of action against a witness may constitute a contempt where it is only partly in consequence of the giving of evidence by that witness.

Effect or tendency may be sufficient. It may be sufficient to constitute a contempt that an act has the requisite effect or tendency without any intention to have that effect or tendency. The threatening or taking of action against witnesses may be a contempt where it has the effect or tendency of penalising witnesses in consequence of the witnesses' evidence or of deterring witnesses from giving evidence, even where the threat or action was not made or taken with that intention.

Precedents

The precedents illustrating these principles in relation to both contempt of Parliament and contempt of court were referred to in the earlier advices. A brief reference to some of the most relevant precedents may be useful.

Lawfulness not relevant. In addition to other precedents referred to, the Privileges Committee referred to this principle in its 17th Report at paragraph 24 and its 18th Report at paragraph 35.

Legal action unable to succeed. The principle that a legal action which is unable as a matter of law to succeed may nonetheless constitute a contempt was referred to in a 1982 report of the Privileges Committee of the British House of Commons. The Committee noted that an empty threat could still be a contempt (HC 233, 1981-2).

Legal action not directed to privileged occasion. A case of legal action not formally directed to the privileged occasion was also considered by the Privileges Committee of the House of Commons in 1974. The Committee diligently inquired to discover whether a speech by a member in the House was a factor in a threat of legal action against the member (HC 246, 1974).

Action partly in consequence of privileged occasion. The Senate Committee of Privileges, in its 21st Report, dealt with a case in which action was taken against a witness partly in

consequence of the evidence given by the witness to a committee (paragraph 53 of that report particularly refers).

Effect or tendency may be sufficient. The Privileges Committee of the British House of Commons considered in 1989 a case in which action was taken against a petitioner on a private bill (such petitioners are regarded as witnesses). The action was held by the Committee to constitute a contempt because it had the effect of putting pressure on the petitioner even though those who took that action did not necessarily have that intention. The Committee found that "his [the witness's] superiors acted in such a way as might reasonably have deterred him and hence endangered Parliament's right to hear evidence from witnesses, even if that was not the intention ..." (HC 502, 1988-9).

Application of the Principles

The potential application of these principles to the matters now before the Privileges Committee may be considered in relation to the four possible ways in which the alleged threat of legal action against the witnesses may have been in consequence of their giving evidence to the Standing Committee.

- (a) The document submitted to the committee was the object of the threatened action.** This is neither a necessary nor a sufficient condition for the Committee to find that a contempt has been committed. A witness who submits to a committee a document which has previously been published elsewhere cannot be protected *as a witness* against legal action in respect of the earlier publication of the document. There must be something else to connect the threatened or actual legal action with the submission of the document to the committee. In the present case, if the threatened legal action were in respect of the provision of the letter to the Pharmacy Board, and there was no connection between the threat of legal action and the submission of the letter to the committee, the Privileges Committee could find that no contempt had been committed. The fact that the document is the object of the threatened action, however, assumes significance in conjunction with other facts.
- (b) The threat of legal action was possible only because of the submission of the document to the committee.** A contempt could be found if the connection between the threat of legal action and the submission of the document to the committee is that the threat was possible only because of that submission of the document. This may be so in the present case. It is stated in the report of the Standing Committee on Community Affairs that the letter to the Pharmacy Board had not been published by the Board. It is possible that those allegedly making the threat of legal action came to know of the letter by some other means, but it would appear that the existence of the letter was known only because of its submission to the Standing Committee and its publication by the Standing Committee. Significantly, it appears that the alleged threat was made only after the publication of the document by the Standing Committee. In these circumstances the alleged threat could be held to be a contempt on the basis that it could have the effect or tendency of penalising the witnesses because of their giving evidence or deterring witnesses from giving evidence.

- (c) **The threat of legal action was occasioned or partly occasioned by the submission of the document or the giving of other evidence to the committee.** The threatening or taking of legal action which is occasioned or partly occasioned by the giving of evidence to a committee may clearly be held to be a contempt. In the present case, if the Committee of Privileges found that the alleged threat of legal action was occasioned or partly occasioned by the submission of the letter to the committee, particularly if the alleged threat would not have been made but for that submission of the letter, or by the giving of other evidence to the committee, the Committee could well find that a contempt had been committed because the effect or tendency of the threat to penalise or deter witnesses is obvious in that circumstance.
- (d) **The alleged threat of legal action was made with the intention of penalising or deterring witnesses.** This would be the clearest case where a contempt could be found. A threat to witnesses made with the intention of penalising them for their evidence or deterring them from giving evidence could clearly constitute a contempt. If the Committee found that the alleged threat of legal action in respect of the letter was made with that intention the Committee could well find that a contempt had been committed. The Committee has discussed the question of intention in its recent reports.

It is emphasised again that the conclusions which the Committee reaches will depend on the facts found by the Committee, and that the facts are for the Committee to establish. The foregoing may be of some use to the Committee in relation to the facts which need to be found, in particular:

- was a threat of legal action made against witnesses
- was the threatened legal action directed at the document submitted to the committee
- was the threat of legal action made possible only by the submission of the document to the committee
- was the threat of legal action occasioned or partly occasioned by the submission of the document or the giving of other evidence to the committee
- was the threat of legal action made with the intention of penalising witnesses or of influencing witnesses in relation to the giving of evidence?

I hope that these observations may be of some help to the Committee. Please let me know if I can provide any elucidation or elaboration of them or any further assistance.