ADVICE NO. 17

PROVISION OF INFORMATION TO SENATORS: MATTERS REFERRED TO THE COMMITTEE ON 23 AUGUST 1995: *GRASSBY* CASE

Your letter of 19 March 1996 requests advice on the judgment of Allen J of the Supreme Court of New South Wales in *Grassby* 1991 55 A Crim R 419 in the context of the advice to the Committee of 30 August 1995.

That advice referred to two issues:

(a) whether the immunity afforded by parliamentary privilege extends to the communication of information to senators by other persons; and

(b) whether the Senate may treat as a contempt any interference with such communication of information to senators by other persons.

The judgment of the Supreme Court could be relevant only to issue (a), that is, the scope of the legal immunity afforded by parliamentary privilege, although, as will be observed, the judgment mixes the two issues.

There are difficulties with the judgment which prevent it being regarded as an authority on any aspect of either of the two issues.

The New South Wales Parliament is unique in that it does not possess any equivalent of section 49 of the Constitution, that is, it has no constitutional or statutory provision conferring upon its Houses the powers and immunities known as parliamentary privilege and applying to all other Anglo-American legislatures. The powers and immunities of the New South Wales Houses depend on a common law doctrine that they are only such as are strictly necessary for the Houses to discharge their legislative functions. This doctrine has been expounded in a line of cases and recently confirmed. It is clear that the Houses do not possess the power to deal with contempts, which is one reason for saying that the judgment of Allen J cannot have any relevance to issue (b). The Houses possess an immunity of freedom of speech, but it is by no means clear that the scope of this immunity is the same as that of other legislatures, because it is not clear whether the Bill of Rights of 1689 applies in relation to proceedings of the New South Wales Houses or merely applies in New South Wales in relation to proceedings of the British Houses.

The judgment of Allen J does not clarify these matters. In referring to the immunity of freedom of speech of the New South Wales Houses, it is not clear whether he thought he was applying the common law doctrine of necessary immunities or expounding article 9 of the Bill of Rights. The references to effects on members and the discharge of their functions (at 429-30) suggest the former. The references to article 9 of the Bill of Rights do not explain whether it is taken to apply to the Houses or whether it is merely indicative of the content of the inherent immunity of freedom of speech generally. In referring to article 9 (at 432) Allen J cites a collection of judgments some of which are mutually contradictory and one of which was expressly repudiated by the *Parliamentary Privileges Act 1987* of the Commonwealth.

For all of these reasons the judgment cannot be taken to be an authoritative exposition of the immunity of freedom of speech in Parliament.

The judgment also mixes up issues (a) and (b) as if they were the same question, and this, as has been indicated, is particularly inappropriate in relation to the New South Wales Parliament. In this aspect the judgment relies heavily on the sweeping statement in Erskine May's *Parliamentary Practice* to which I referred in the previous advice and which, as suggested in that advice, is not justified by the cases on which it is purportedly based.

As was also indicated in that advice, the important issue is issue (b), and the vital question is the connection between information supplied to a member of Parliament and any parliamentary proceedings. In that respect the *Grassby* case was very easy to decide. Not only did Mr Maher, the state member to whom Mr Grassby supplied the offending document, not make use of it in any proceedings, but according to the evidence referred to in the judgment it was highly unlikely he would have done so. The judgment indicates that the case against Mr Grassby attached considerable significance to the lack of interest by Mr Maher in the document. In other words, there was not even a remote connection between the provision of the document to the member by Mr Grassby and any parliamentary proceedings actual or potential.

In different circumstances the matter may not be so easily decided, and a court may well come to a different conclusion. For example, if a member were to make a speech in a House or ask questions in a committee about an issue, and a person were to supply the member with information relevant to that issue, and the member were subsequently to use that information in proceedings in the House or the committee, there would be a much stronger case for concluding that the provision of the information to the member would be protected in both senses (a) and (b), that is, as a question of legal immunity and as a question of protection by exercise of the contempt jurisdiction. As indicated in the previous advice, the particular circumstances may well determine those questions.

The judgment in *Grassby* is therefore of little value. At most, it merely reinforces the basis of the judgment in *Rivlin v Bilainkin* to which the previous advice referred, that is, where there is no connection with proceedings in Parliament, the issue of parliamentary privilege does not arise.

You asked also about the Queensland case *Laurence v Katter*. I expect to be advised when judgment is handed down in this case.

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

***GRASSBY* CASE (2)**

There is another point which I should have mentioned in the note of 21 March 1996 on the judgment in the *Grassby* case.

In his judgment Allan J observed that the protection of qualified privilege is a very strong protection, which may be defeated only by proof of malice or other improper motive on the part

of a defendant. He considered this sufficient protection, and this was one reason for not extending the absolute protection of parliamentary privilege to the provision of a document to members.

The problem with this is that the kinds of persons who supply information about corruption or malfeasance to members of parliament, the kinds of persons commonly known as whistleblowers, are often persons who can be represented as having some improper motive. For example, an employee dismissed by an employer can be represented as motivated by a desire for revenge. In the tobacco corporation case, to which I referred in the note of 8 September 1995, the persons who supplied the documents to the members were former employees who were being pursued by the corporation for alleged theft of information, and they could well be said to have had an improper motive, but there was a legislative interest in investigating the material they supplied concerning the activities of tobacco companies. The fact that information is supplied by persons who may have improper motives does not make it unworthy of legislative action and therefore unworthy of protection.