ADVICE NO. 1

PETITIONS : PRIVILEGE

The Committee of Privileges has asked for some background information on the matter referred to it by the Senate on 16 March 1988. The following observations may be useful to the Committee.

The Committee is required to consider "whether the circulation of a petition containing defamatory material for the purpose of gaining signatures and subsequent submission to the Senate is or ought to be privileged and how such issues should be determined and in what forum".

Preliminary Questions

There are two aspects of this reference which, it is suggested, may be very readily determined.

First, the question refers to a petition containing defamatory material. As was pointed out in the Senate in debate on the reference, this phrase adds nothing to the question, but apart from adding nothing it may be misleading. It is a common misconception that the purpose of privilege is to confer immunity against suit for defamation. On the contrary, it must be constantly kept in mind that the species of absolute privilege known as parliamentary privilege protects against suit or prosecution for any cause, civil or criminal, and against examination or question in a wide sense in court proceedings. In considering whether the circulation of a petition is or ought to be privileged, therefore, the Committee is considering whether there is or ought to be the same total immunity as is given to proceedings in Parliament, or some lesser immunity.

Secondly, the sub-question "how such issues should be determined and in what forum", the word "issues" presumably referring to the questions of whether the circulation of a petition is or ought to be privileged, would appear to have only one possible answer. The question of whether the circulation of a petition is privileged is a question of law which can be determined only by a court in a particular case; only the courts can say what the law is. The question of whether the circulation of a petition ought to be privileged can be determined only by Parliament and only by legislation, if it has not already done so by legislation. This is made clear by section 49 of the Constitution, which puts in place all the law on parliamentary privilege in force in respect of the British House of Commons in 1901, but which allows the Australian Parliament (i.e., the Queen and the two Houses) to alter that law.

As it admits of only one answer, it is not clear why this phrase was included in the reference to the Committee. There is a misconceived impression that a House of the Parliament can in some way declare its privileges by its individual actions, but it is clear that a legal immunity cannot as a matter of law be created in that way. This misconception arises because of the power of each House to punish contempts, and it is thought that by treating a particular act as a contempt a House recognises a privilege. This mistaken notion is analysed in some detail in the 1967 report of the House of Commons Select Committee on Parliamentary Privilege, at pp. 89-90. It needs only be said here that the question of whether an act is privileged, i.e., possesses a legal immunity, is quite distinct from the question of whether a particular act may be treated as a contempt. The mixing up of the two questions, which has bedevilled consideration of

parliamentary privilege for centuries, may have found its way into the reference before the Committee because the original motion, for which the reference was substituted by way of an amendment, would have asked the Committee to consider whether a contempt had been committed.

The circulation of a petition may be said to be privileged in the sense that it may be protected by the power of a House to treat any violation of the right to petition as a contempt. This, however, is a misuse of the word "privilege". In centuries past the British Houses could bring a privilege into existence simply by declaring it and then by punishing the violation of it as a contempt. That situation has long since passed in Britain, with the ordinary courts establishing their exclusive jurisdiction over interpretation of the law, and by virtue of section 49 of the Constitution it was never the situation in Australia, where "privilege" clearly means a legal immunity embodied in the law. The Australian Houses may treat such acts as threatening or bribing a petitioner as a contempt, but the question of whether a petition is legally actionable can be determined only in court. This is made abundantly clear by section 4 of the Parliamentary Privileges Act 1987 and by the criteria which the Senate has adopted for itself to determine whether a contempt has been committed. A contempt is thereby declared to be an improper interference with the exercise of the authority or functions of a House, a committee or its members. The bringing of legal proceedings in respect of a petition could not be regarded as an improper act, except in the circumstance, very difficult to identify, of legal proceedings being brought not in good faith but for the purpose of intimidation, which was the very circumstance seemingly alleged in the original motion in the Senate. The question of whether such a circumstance occurred was removed from the proposed reference by the amendment.

It is therefore suggested that the Committee should assume that it has been asked to determine whether there is or ought to be a legal immunity in respect of the circulation of a petition, and not whether particular acts in relation to petitions should be treated as contempts, which can really be decided only in particular cases of such acts.

The question before the Committee thus reduces itself to whether the circulation of a petition is or ought to be privileged (i.e., is or ought to be the subject of the legal immunity known as parliamentary privilege, or of some lesser immunity).

The reference also refers to the circulation of a petition "for the purpose of gaining signatures and subsequent submission to the Senate". This excludes the circulation or the publication of a petition for some purpose other than gaining signatures, and also excludes the circulation of a petition for some purpose other than eventual submission to the Senate. In other words, the Committee is looking at the normal process whereby a petition is prepared and submitted to the Senate. This is quite significant, as will appear on further analysis.

The question of the immunity attaching to the circulation of a petition is not one on which there are judgements of courts to indicate what the law is; the question has not been examined by the courts in Australia or in Britain so far as is known. If there were any significant judgements, their value might be questionable, depending on their tenor, because of the passage of the Parliamentary Privileges Act 1987, which significantly affected, or, on one view, clarified, the law relating to proceedings in Parliament.

Submission of a petition : **Parliamentary Privileges Act**

One of the intended purposes of the Parliamentary Privileges Act 1987 was to make it clear that the act of submitting a document to a House or a committee is absolutely privileged. Thus paragraph 16(2)(b) provides that, for the purpose of the application of the immunity contained in Article 9 of the Bill of Rights, "proceedings in Parliament" includes the presentation or submission of a document to a House or a committee. This was intended to cover petitions as well as written submissions presented to committees and any other method of placing a document before a House or a committee.

The effect of this paragraph is that the submission of a document is absolutely privileged regardless of whether or not the document is accepted by the House or committee. For example, if a person sends a written submission to a committee, and the committee, perhaps because of the submission's irrelevance, declines to accept it and sends it back to the person who submitted it, the person cannot be sued or prosecuted for the act of submitting it. Provided that the person does not do anything else with the document, such as publish it to somebody else, the immunity is complete. The Act was quite deliberately framed in this way. The rationale of this provision is that citizens should be protected in approaching a House or a committee and in seeking to lay matters before Parliament, even if the approach is not accepted.

Petitions, of course, unlike written submissions to a committee, are not forwarded directly to a House but are given to a member of the House with a request that they be presented. This does not make any difference to the matter; presentation by a member is simply the mechanism by which the document is submitted to the House. Petitions are also virtually made public in the process of presentation, but that is not a difference in principle so far as submission is concerned.

The question arises whether the preparation of a petition prior to its submission is absolutely privileged. Attention was drawn in the matter originally placed before the Senate to paragraph 16(2)(c) of the Act, which provides that the preparation of a document for purposes of or incidental to the transacting of the business of a House or a committee is also part of proceedings in Parliament. As the presentation of petitions is part of the business of a House, it might well be held that the preparation of a petition, that is, the process of drawing up a petition, is privileged by virtue of this paragraph. Apart from that possibility, it would seem that the preparation of a petition in that sense is an essential part of the submission of a petition, and is therefore absolutely privileged by virtue of paragraph 16(2)(b).

The Committee has asked that the question of the status of a petition "prepared for circulation" before the passage of the Act be considered. The Act deals explicitly only with the submission of a petition, and, as will be seen, deals only implicitly with the circulation of a petition.

The status of such acts such as submitting petitions was somewhat uncertain before the passage of the Act, and it was the purpose of the Act to settle such uncertainties to the maximum possible extent. There had always been a great deal of speculation about what the term "proceedings in Parliament" would be held to cover, because the phrase has not been subject to any significant judicial interpretation. It was thought that it would be held to cover such things as the preparation of material for use in Parliament, for example, by a member gathering information for a question or a speech (but not simply gathering information: Rivlin v Bilainkin, 1953 1 QBD 534), but

there was much uncertainty. A succession of committees of inquiry into parliamentary privilege, beginning with the 1967 House of Commons committee and culminating in the 1984 report of the joint select committee of the Australian Houses, recommended that the uncertainty be cleared up by a statutory definition of proceedings in Parliament. That definition has now been provided by the Act. The definition was framed to clear up the various uncertainties as far as possible, and to put in place what was always thought to be the law, rather than to make new law. Thus it was always thought that the submission of a document to a House or committee would be absolutely privileged, but in the absence of court judgements one could not be certain, and it was generally believed that the privilege would depend upon a document being accepted. The Act has settled that question in the manner already described.

Apart from the question of whether submitting a petition is a proceeding in Parliament, it appears that as a matter of common law the submission of a petition was immune from suit or prosecution for defamation (Lake v King, 1667 Saunders 131, a case which will be referred to again). The defamation statutes of three states (Queensland, Code, s 371, Tasmania, Defamation Act 1957, s 10, and Western Australia, Code, s 351) enacted this rule.

Does the Parliamentary Privileges Act say anything about the circulation of a petition? It has always been fairly clear, and the Act makes it clearer, that the separate publication of a document submitted to a House or a committee by the person submitting it is not privileged (the common law is set out in Erskine May's Parliamentary Practice, 20th ed., pp. 85-8). Thus if a witness forwards a written submission to a committee, even if the committee accepts the submission, a separate publication of the submission by its author is not privileged, and the author and publisher would be liable in any suit or prosecution for anything defamatory or unlawfully published in that separate publication. The publication of such a document attracts privilege only where the publication comes about by an order or authority for publication by the House or the committee concerned. This was well established before the passage of the Act, but is made abundantly clear by paragraph 16(2)(d) of the Act, which provides, inter alia, that the publication of a document by or pursuant to an order of a House or a committee and the document so published is a proceeding in Parliament.

A reading of the two provisions, paragraphs 16(2) (b) and (d), in conjunction therefore clearly discloses that where a document is submitted to a House or a committee the act of submission is absolutely privileged, and where such a document is ordered to be published by a House or a committee the publication of the document and the content of the document itself thereupon become absolutely privileged. It is therefore obvious that the separate publication of a petition by the petitioner, apart from its submission to a House and in the absence of an order for its publication by the House, is not absolutely privileged. It is also obvious that a person who publishes a document cannot attract privilege to that publication by subsequently turning the document into a submission or a petition to a House or committee. If it were otherwise, every newspaper or journal article could be made absolutely privileged simply by sending it to a House or a committee in the guise of a submission.

The Act thus provides, in the way in which it clarifies the law, a firm basis for concluding that the publication by a petitioner of a petition is not privileged. A modification of this could arise only if there is some special consideration attaching to the circulation of a petition for gaining signatures.

Circulation of a petition

This leads to the crucial question before the Committee: is the circulation (i.e., the publication) of a petition for the purpose of gaining signatures and subsequent submission to the Senate (rather than for some other purpose) privileged?

The answer to that question is: probably not. As far as is known, there are no judgements by Australian or British courts on that point. It is likely that the terms of the Parliamentary Privileges Act 1987 would significantly affect the way the courts would look at the matter, and there have certainly been no judgements interpreting the provisions of that Act. There is the very old case, already referred to, of Lake v King (1667 Saunders 131), the facts of which involved the publication of a petition, but the only conclusion which can properly be drawn from that rather confused case is that drawn by Erskine May's Parliamentary Practice, 20th ed., at p. 86, that the publication of a petition to members of the Parliament is not actionable. Such pre-19th century cases also have to be treated with caution because the Houses were then regarded as courts exercising exclusive jurisdiction over their own branches of the law.

One is therefore in the position of examining the arguments which may be put forward and which might sway a court if the question arose.

The principal argument in favour of the circulation of a petition for the purpose of gaining signatures having absolute privilege is that such circulation is an essential part of the preparation and submission of a petition to a House. This raises the obvious difficulty, which was referred to in debate in the Senate, that it would be open to a person to publish a document widely, the publication of which would otherwise be actionable or unlawful, simply by putting the document in the form of an intended petition to Parliament. The pretence of petitioning Parliament could thereby be used to drive a large hole through the civil and criminal law.

It might be reasoned in answer to this that privilege attaches to the circulation of a petition provided that the court is satisfied that it is a bona fide petition founded upon a genuine intention to petition Parliament, and not a document circulated under colour or pretence of a petition, and provided that the document is published to the extent necessary for gaining signatures and no further. This may sound like a form of qualified privilege, but it would amount to no more than a requirement that a petition must be a petition. A further line of reasoning may be that the circulation of a petition is privileged only where the persons to whom it is published have a legitimate common interest in receiving and signing it. This would be somewhat analogous to the interest and duty rule, to which further reference will be made, but for the purpose of narrowing the scope of absolute privilege rather than of establishing the conditions for qualified privilege.

Such proposed interpretations, however, would scarcely make the perceived difficulty any smaller. The courts would have great difficulty in determining the matter, but it is suggested that they would be most reluctant to give a petitioner the means of ignoring the law, and it is therefore likely that it would be held that absolute privilege does not attach to the circulation of a petition for the purpose of gaining signatures.

The question then arises, and the Committee has specifically asked that it be considered, whether qualified privilege would attach to the circulation of a petition, that is, a privilege which can be negatived by proof of ill will or other improper motive.

Again, it appears that the existing case law does not allow this question to be answered with any certainty. As far as is known, there are no judgements dealing with the question of a qualified privilege attaching to the circulation of a document intended to be submitted to a House or a committee. The Parliamentary Privileges Act deals with the question of qualified privilege only in relation to reports of parliamentary proceedings. Section 10 of the Act refers to fair and accurate reports of proceedings of the federal Houses and their committees. This is the context in which qualified privilege ancillary to absolute parliamentary privilege has usually arisen. It is, as it were, qualified privilege flowing from, and consequent on, absolute privilege. Any qualified privilege attaching to the circulation of a petition would be a qualified privilege precedent to the absolute privilege attaching to the submission of a document. As such, it would raise different and quite difficult questions than the normal sort of qualified privilege consequent on absolute privilege. A sort of antecedent privilege attaches to parliamentary proceedings, as under paragraphs 16(2)(c) and (d) of the Parliamentary Privileges Act (preparation and formulation of documents), and similarly to legal proceedings under a common law rule, but the acts in question do not take place in public, as does the collection of signatures for petitions in most instances.

Apart from the relationship of the circulation of a petition to the occasion of absolute privilege, the courts might be persuaded to apply to the circulation of petitions the rule relating to publication in the context of an interest or duty to publish and an interest or duty in the receipt of the publication. The rule might be applied in the manner of Braddock v Bevins (1948 1 KB 580), in which it was held that electors had a sufficient interest in hearing a defamatory statement about a member of Parliament. A reading of the authorities and cases on the interest and duty rule, however, indicates that the courts would probably be very reluctant to regard that rule as extending to the circulation of a petition, unless the petitioners had some special common interest in the subject of the petition.

There is some divergence between the states and territories in the statutory formulation and interpretation of the interest and duty rule, but the assessment of the previous paragraph appears to me to be valid even having regard to that divergence. Different findings on the circulation of petitions intended for the federal Houses in different states and territories would, of course, be highly undesirable. I think that if state or territory courts were called upon to decide the matter, they would be inclined to base their judgements entirely upon the federal law, that is, upon section 49 of the Constitution and the Parliamentary Privileges Act, section 10 of which could be taken as an indication that the federal Parliament did not intend that qualified privilege relating to its proceedings extend any further.

The major question which the Committee has to consider, therefore, is whether the circulation of a petition for the purpose of gaining signatures should attract absolute or qualified privilege.

Should the circulation of a petition be privileged?

As has already been suggested, this question can be determined only by legislation. As has also been suggested, it may be that the Parliament has already determined the question by enacting the

Parliamentary Privileges Act 1987. It has been submitted above that that Act makes it clear that the separate publication of a document submitted to a House or committee is not privileged, and the Act may be taken to mean that separate publication precedent to submission, as well as separate publication consequent on submission, is not privileged. If it were concluded that the circulation of a petition ought to be privileged, that decision would require legislation explicitly to that effect.

This paper will now go somewhat beyond providing background information and suggest some considerations which ought to be examined in answering this question, and will also respectfully suggest an answer which may be given.

It is submitted that in answering the question the Committee should return to first principles, and ask: what is the purpose of petitioning Parliament? In all the authoritative texts on parliamentary procedure, it is stated that it is the right of the subject, or, in modern terms, the citizen, to petition for the redress of grievances. The historic purpose of a petition is to disclose the grievances of the petitioners and to pray for remedy or relief. Thus in earlier times petitions set out the wrongs or oppressions from which the petitioners believed they had suffered and asked that those wrongs or oppressions be removed. Many if not most of the petitions in the old cases referred to in the authoritative texts are of this character. For example, the case which is cited by Erskine May as authority for the proposition that legal proceedings against petitioners is a contempt (Gee's case, 20th ed., p. 167) refers to a petition presented in 1696 by the hackney coachmen, alleging that they had been oppressed by the arbitrary actions of licensing commissioners.

An examination of the petitions now presented to the Houses quickly reveals that the character of petitions has been transformed. They are not now concerned with wrongs suffered by particular individuals and the relief or remedy for such wrongs, but with questions of public policy. They disclose grievances of citizens only in the sense that those citizens disagree with public policies, feel that their interests suffer because of those policies, and ask that the policies be changed. A petition in the original shape, disclosing a personal grievance and praying for relief, is now extremely rare. It is well known that petitions are circulated by political groups for the purpose of advancing the controversy on matters of policy. In other words, petitions have become part of, and a forum for, general political debate.

It may well appear to the Committee that it would be quite unjustified to extend absolute privilege to political debate outside Parliament, the absolute privilege belonging properly only to debate in Parliament. It may also appear that it would not be justified in granting any qualified privilege to this form of political debate outside the Houses, or in extending any qualified privilege which may already exist through the interest and duty rule.

Another observation which may be drawn from an examination of petitions presented nowadays is that it is virtually unknown to receive a petition defamatory of any person. This may be partly because in general political debate, such as is carried on through petitions and by other means, it is generally speaking not necessary to defame anybody, and most people engaging in political debate outside the Houses are careful not to do so. A secondary reason is that the rules of the Houses relating to petitions would probably prevent a defamatory petition from even being presented by a Senator. The Senate standing orders provide that, in order to be presented, a petition must be "respectful, decorous, and temperate in its language" (S.O. 88), and do not leave

much scope for defamation in petitions. Although the Committee does not have before it, except in so far as it may illustrate the general question referred to the Committee, the particular case which gave rise to the reference, it is very doubtful whether the particular petition originally in question could be regarded as defamatory. Having regard to these matters, the Committee may well ask whether it is necessary to provide any greater protection for the presentation of defamatory petitions, as the system of petitioning the Houses appears to be functioning in its modern form without defamatory petitions being presented.

It may be thought that the rules and power of the Houses provide an adequate remedy against defamatory petitions, should they be allowed and protected. In the list of acts punishable as contempts in Erskine May's Parliamentary Practice, 20th ed., at pp. 147-148, are various abuses of the right to petition, including the presentation of false, malicious or vexatious petitions, and no doubt the Australian Houses could similarly treat such acts as contempts. It may well be thought, however, that the power of the Houses to deal with petitioners after the event is no remedy where the circulation and presentation of a defamatory petition has already done great damage to individuals.

If the Committee did decide that some protection, or greater protection, should be given to circulation of petitions, it could be done, as has already been suggested, only by legislation, and it would be difficult, unless absolute privilege is to be conferred on any circulation of any intended petition, to draw the legislation so as to achieve only the desired end and not to give rise to unforeseen consequences. Such legislation could give rise to greater problems than the supposed problem that it would solve.

The Committee may well conclude, therefore, that the law should be left as it is at present.

A suggested solution

The foregoing discussion, particularly relating to the way in which the Parliamentary Privileges Act is framed, and how petitions have changed, suggests a solution which is now respectfully submitted to the Committee. It has been noted that the submission of a petition, regardless of whether or not the petition is accepted, is absolutely privileged. This means that an individual petitioner, and perhaps a group of petitioners with a common interest, who wish to complain of some injustice or oppression, may safely do so even where the petition contains defamatory matter, subject to the rules of the Senate relating to the presentation of petitions. It also means that a petitioner who wishes to defame some person in a petition dealing with a general political question may safely do so simply by presenting it as a sole petitioner and not circulating it for signatures, again subject to the rules of the Senate.

Perhaps, therefore, the Senate should explicitly recognise the difference between the old type of petition and the new, and overcome the problem, such as it is, of defamatory material in petitions, by making a rule that a Senator may not present a petition containing matter defamatory of any person unless the petition relates only to a personal grievance peculiar to a sole petitioner or to a group of petitioners having that grievance in common. This would mean that petitioners preparing petitions on general political questions would be less tempted to try to include defamatory matter in them, but a sole petitioner or a group of petitioners with a personal

grievance would still have the right to present a defamatory petition for the purpose of revealing that personal grievance.

This suggested step would be very easy to adopt, as it requires only a resolution or a new standing order of the Senate. It would not affect the rights of petitioners to any significant degree, and would preserve the existing law in what may well be regarded as the best balance between the rights of the Houses, of petitioners, and of other citizens.