

CHAPTER 2 – *PARLIAMENTARY PRIVILEGES ACT 1987 AND THE SENATE PRIVILEGE RESOLUTIONS*

Passage of Parliamentary Privileges Act and Senate Privilege Resolutions

2.1 The passage of the *Parliamentary Privileges Act 1987*, and the agreement by the Senate on 25 February 1988 to a series of eleven privilege resolutions, represented a watershed in the history of privilege matters in the Senate. The passage of the Act was designed to confirm what had always been assumed to be the scope of freedom of speech in Parliament. The necessity for the declaratory enactment derived from unusual judicial interpretations, by two judges of the Supreme Court of New South Wales, of the position concerning the use of proceedings in Parliament during court proceedings. Unlike previous judgments on the question, the two judgments indicated that words spoken in parliamentary proceedings could be used against a person in subsequent court proceedings. Problems with some judicial interpretations of the Parliamentary Privileges Act have continued to the present day, as will become apparent in later chapters.

2.2 While the need to make a corrective declaration provided the impetus for the passage of the Act, the opportunity was also taken to bring into effect changes to the law partly based on recommendations of the Joint Select Committee on Parliamentary Privilege,¹ tabled in the Senate and the House of Representatives in October 1984, which required legislation for their operation. The proposal to appoint the joint committee was initiated in the House of Representatives in March 1982, in order to review, and report whether any changes were desirable in respect of:

- the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the Members and the committees of each House;
- the procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined; and
- the penalties that may be imposed for breach of parliamentary privilege.²

The Senate agreed to the proposal on 29 April 1982.³

2.3 The committee had not reported by the time both Houses of Parliament were dissolved in February 1983, but was re-established early in the new Parliament.⁴ Despite the change of government which had occurred following the March 1983 election, the chairman and deputy chairman of the committee, the latter of whom was by then Attorney-General, remained in those positions for the duration of the inquiry.

1 Joint Select Committee on Parliamentary Privilege, *Final report*, PP 219/1984.

2 House *Votes and Proceedings*, 1980-83, pp. 805-6.

3 *Journals of the Senate*, 1980-83, p. 884.

4 House *Votes and Proceedings*, 1983, pp. 52-3; *Journals of the Senate*, 1983, pp. 63-4.

The wide-ranging report of the committee concluded, as its primary recommendation, that the exercise of Parliament's penal jurisdiction should be retained in Parliament. It further recommended that, other than the abolition of defamatory contempts and the removal of each House's power to expel its members, no substantive changes be made to the law of contempt. It also recommended that each House codify its own proceedings, for the general information of persons who might be affected by contempt proceedings or by being named by members of either House.⁵

2.4 The report set out the matters which required changes by parliamentary enactment under section 49 of the Constitution, or by amendments to the standing orders of each House, and changes to be implemented by special resolutions.

2.5 No action was taken on the recommendations of the joint committee until 1986, when the need to declare the privileges of Parliament became imperative as a result of the decisions made in the New South Wales courts, referred to above,⁶ which impinged upon what had previously been regarded by all legislatures as the scope and protections of privilege. Wide consultations were held both within Australia and with overseas Parliaments, resulting in the introduction of the Parliamentary Privileges Bill in the Senate by the President of the Senate,⁷ the first occasion in the Commonwealth Parliament on which a bill had been introduced by a presiding officer. Following its passage through the Senate, the Bill was introduced in the House of Representatives by the Attorney-General, supported in debate by the Speaker.⁸ The Bill secured passage through the House in the first half of 1987,⁹ and came into operation on 20 May of that year.

2.6 At the same time as the bill was being debated, a series of eleven draft privilege resolutions was tabled in both Houses. These resolutions were intended to be complementary to the *Parliamentary Privileges Act 1987* and were also partly based on recommendations in the report of the joint committee. After significant discussion and negotiation, they were ultimately the subject of debate in the Senate and were agreed to with modifications on 25 February 1988.¹⁰ The House of Representatives has not as yet considered or adopted most of them, although in August 1997 it adopted, with some minor amendments, the right-of-reply procedure established by Senate resolution 5,¹¹ and subsequently modified the guidelines under which the House of Representatives Committee of Privileges operates.

5 Report, op. cit. pp. 1-19.

6 paragraph 2.1.

7 *Journals of the Senate*, 1986-87, p. 1250.

8 *House Votes and Proceedings*, 1986-87, p. 1525.

9 *House Votes and Proceedings*, 1986-87, p. 1627.

10 *Journals of the Senate*, 1988, p. 536.

11 *House Votes and Proceedings*, 27 August 1997, pp. 1868-70; 26 November 1997, p. 2513; 7 October 2003, p. 1206; See chapter 3.

2.7 In essence, most of the Senate privilege resolutions codified already-existing practices. By the time of their adoption, the Senate had had extensive experience in committee work, which not merely required standardised procedures but also, as in ensuing years, had generated most of the matters giving rise to possible contempts of the Senate. Several new features of these resolutions, however, have ensured that the Committee of Privileges has performed something of an exploratory and a pathfinding role. For this reason, over the past eighteen years it has developed informal methods of interpreting and adding to a general understanding of privilege. In its reports on most of the specific matters which it has considered, it has adopted the practice of making comments on the general principles of privilege, and this present report, like its predecessors, summarises the matters and themes canvassed in individual reports.

2.8 The Act, resolutions and the explanatory statements relating to each are at Appendices A and B to this report, together with a summary of each of the committee's reports to the Senate (Appendix G).

Summary and discussion of privilege resolutions

Raising matters of privilege

2.9 While, as indicated above, many of the resolutions codified and gave guidance on already-existing practices, they also established a new process for raising matters of privilege. Most other parliaments insist that privilege matters be raised at the first opportunity, a practice which gives little time for reflection and can be arbitrary in what may or may not be referred. Resolution 7, however, ensures that matters need not be raised at the first opportunity; the President of the Senate is not required to make any determination as to whether a *prima facie* case exists; and the matters are normally first raised in writing with the President by a senator, thereby removing them from the more heated and public arena of the Senate chamber. The resolution provides that the President must make an early determination as to whether a matter of privilege should have precedence over other business, and must communicate the decision to the senator raising the matter. If the President determines that a matter should have precedence, the President must report that decision to the Senate as well as to the senator concerned. The President's decision to give precedence gives the senator raising the matter a right to give notice of motion to refer the matter to the Committee of Privileges, and such a motion has precedence over all other business on the day for which the notice is given. The President has given such precedence on 63 occasions, although in respect of one matter no further action was taken by the senator raising the matter, or any other senator, to refer it to the committee.¹² On one occasion, a notice of motion to refer a matter relating to the alleged failure of a senator to provide a statement of certain interests to the Registrar of Senators' Interests was withdrawn following an apology from the senator concerned.¹³ One further contempt matter was referred to the committee following the

12 *Odgers' Australian Senate Practice*, 11th edition, p. 646.

13 *Journals of the Senate*, 2005, p. 610.

President's tabling of certain documents.¹⁴ In respect of two other matters to which the President gave precedence,¹⁵ the Senate determined that they should not be referred to the committee.¹⁶ In both cases, the issue was determined by a division.

2.10 The President has reported three times to the Senate that precedence has been refused to matters raised,¹⁷ but is not obliged to report all such decisions to the Senate. If the President determines that a matter should not have precedence a senator is not precluded from taking other action, but so far senators appear to have been satisfied with the President's decisions.

2.11 Cases of possible contempt frequently arise from proceedings of Senate committees. Such committees are obliged to adhere to strict procedures to protect the integrity of their operations and to ensure the protection of witnesses.¹⁸ Nevertheless, on occasions a committee may become aware that its proceedings have been disclosed in an unauthorised manner, that it has been misled, or that witnesses have been improperly influenced, threatened or penalised because of the evidence they gave, or intended to give, to the committee. In such a situation, the committee makes its own investigations and may report the facts and its conclusions to the Senate, while usually at the same time raising the matter with the President. If the committee recommends that the matter be referred to the Committee of Privileges, it is usual for the chair of the originating committee to give notice of motion to that effect, although it is open to another senator to so move, regardless of the views of the committee as a whole.¹⁹

Criteria for determining contempt

2.12 In making a decision as to whether a matter which a senator has raised should have precedence, the President is bound under resolution 4 to have regard to two criteria only:

- the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and

14 Senate Committee of Privileges, *72nd report*, PP 117/1998.

15 *Journals of the Senate*, 25 March 1998, pp. 3449-50, and 5 September 2005, pp. 997-98.

16 *ibid.*, 26 March 1998, pp. 3462-3, and 7 September 2005, p. 1050.

17 *Odgers' Australian Senate Practice*, 11th edition, Appendix 4, pp. 643-649; and Supplement, Updates to 30 June 2005, p. 10.

18 See resolution 1, Appendix B.

19 Standing Order 81, Procedural Order 3, *Standing Orders and Other Orders of the Senate*, November 2004, pp. 55, 120.

- the existence of any remedy other than that power for any act which may be held to be a contempt.

2.13 In determining whether the matter should be referred to the Committee of Privileges, and ultimately whether a contempt has been committed, the Senate is required by resolution 3 to take into account the same criteria as the President, but additionally must take into account whether a person who committed any act which may be held to be a contempt knowingly committed that act, or had any reasonable excuse for the commission of that act.

2.14 The Committee of Privileges is similarly required by resolution 3 to take all three criteria into account when inquiring into any matter referred to it.

Committee of Privileges proceedings

2.15 The Committee of Privileges is bound under resolution 1 to observe the normal procedures of Senate committees for the protection of witnesses. These include inviting witnesses to make submissions or produce documents in the first instance, unless there are exceptional circumstances; giving witnesses reasonable notice to appear before it and opportunity to comment on adverse evidence; and other, similar protections.²⁰ However, these protections are supplemented and where necessary overridden by the special provisions of resolution 2 when the committee is considering any matter which may involve or give rise to any allegations of a contempt. Further details of the committee's proceedings are given in Chapter 5.

Matters constituting contempts

2.16 All matters which the committee has been required to consider have come within the ambit of the matters constituting contempts set out in resolution 6 of the resolutions. The full text of resolution 6 can be found at Appendix B; in brief, the matters which the Senate may treat as constituting contempts include:

- interference with the Senate
- improper influence of senators
- senators seeking benefits, etc
- molestation of senators
- disturbance of the Senate
- service of writs in the Senate precincts
- false reports of proceedings

20 See Appendix B.

- disobedience of Senate or Senate committee orders
- obstruction of Senate or Senate committee orders
- interference with witnesses
- molestation of witnesses
- offences by witnesses (such as failure to produce documents)
- unauthorised disclosure of evidence or proceedings.

2.17 As the preamble to resolution 6 makes clear, the list is not exhaustive but is intended as a general guide to persons that acts coming within the prohibitions specified under the resolution may be treated by the Senate as contempts. The committee is satisfied from its experience that the matters raised in that resolution give firm guidance to persons the subject of contempt references, to senators and Senate committees, and to the Committee of Privileges itself. The committee has not found it difficult to categorise any of the matters before it under one or more of the resolution 6 provisions, and has not had to deal with all the indicative categories.

Findings of and punishments for contempt

2.18 The final resolution relating to consideration of contempt matters concerns the treatment of persons who have been found to be in contempt of the Senate. In practice, action arising in the Senate following a finding of contempt has been generated by the chair of the Committee of Privileges. If the committee has determined that a contempt has been committed or that a penalty should be imposed, the chair is required to give seven days' notice of a motion for the Senate to determine a contempt or impose a penalty. Since the passage of the Parliamentary Privileges Act and Senate privilege resolutions, the committee has found contempt by persons in only nine cases,²¹ recommending a penalty in respect of one of those cases,²² and the requisite notice has been given. In other matters it found that contempts had been committed²³ but, because it was unable to discover the source of the contempt, the seven days' notice was not required or given.

Right of reply

2.19 A further resolution which involves the Privileges Committee concerns the protection of persons referred to in the Senate. This resolution, the only resolution which was the subject of some controversy at the time of its adoption, enables a

21 Senate Committee of Privileges 21st report, PP 461/1989; 42nd report, PP 85/1993; 67th report, PP 141/1997; 72nd report, PP 117/1998; 74th report, PP 180/1998 (one matter); 84th report, PP 35/2000; 85th report, PP 36/2000; 99th report, PP 177/2001; and 100th report, PP 195/2001.

22 Senate Committee of Privileges, 99th report, op. cit.

23 Senate Committee of Privileges 50th report, PP 322/1994; 54th report, PP 133/1995; 74th report, PP 180/1998 (three matters); 112th report, PP 11/2003.

person who has been referred to in the Senate in a way in which the person regards as adverse to seek a right of reply in the same forum. Details of its operation are discussed in the next chapter.

2.20 While the right-of-reply procedure is helpful to persons who consider themselves maligned by comments made in the Senate, ultimately the responsibility for minimising hurt to a person lies with individual senators. While privilege is a necessary instrument of a free and functioning parliament, the most important guardians of that privilege are the legislators. To this end the committee draws attention to a further resolution (resolution 9), which enjoins all senators to exercise their valuable right of freedom of speech in a responsible manner.

Other resolutions

2.21 The two remaining resolutions, although mechanical in nature, are significant in that they recognise the particular relationship between the Senate and the courts on the one hand, and the Senate and the House of Representatives on the other. Briefly, Resolution 10 declares that leave of the Senate is not required to admit into evidence before courts or tribunals reports of evidence of proceedings in the Senate or its committees, although paragraph (3) of the resolution provides that the Senate should be notified of any such admission. Resolution 11 empowers the committee to confer with the Committee of Privileges in the House of Representatives, although the respective committees have not as yet found the need to do so.

