



**POSSIBLE IMPROPER INTERFERENCE**

**WITH WITNESSES**

**BEFORE THE**

**COMMUNITY AFFAIRS COMMITTEE**

**(37TH REPORT)**

**MEMBERS OF THE COMMITTEE**

Senator Patricia Giles (Western Australia) *Chair*  
Senator Baden Teague (South Australia) *Deputy Chairman*  
Senator John Coates (Tasmania)  
Senator Barney Cooney (Victoria)  
Senator John Herron (Queensland)  
Senator Janet Powell (Victoria)

The Senate  
Parliament House  
CANBERRA ACT 2600

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## REPORT

### Introduction

1. On 2 April 1992 the following matter was referred to the Committee of Privileges on the motion of the Chairperson of the Senate Standing Committee on Community Affairs, Senator Zakharov:

Having regard to the report by the Standing Committee on Community Affairs on the alleged intimidation of witnesses in relation to the Committee's inquiry into the implementation of pharmaceutical restructuring measures, presented to the Senate on 2 April 1992:

- (a) whether there was any improper interference with witnesses in respect of evidence before that Committee; and
  - (b) whether any contempt was committed in relation to that matter.
2. A statement made by the President of the Senate, informing the Senate that precedence had been given to a notice of motion to refer the matter, is at Appendix A to this report.

### Background

3. On 2 April a report of the Community Affairs Committee, entitled *Alleged Intimidation of Witnesses - Implementation of Pharmaceutical Restructuring Measures Inquiry*, was tabled in the Senate. The report drew to the attention of the Senate complaints which had been made to the secretary to the Committee about a solicitor who allegedly had intimidated a person or persons because of evidence given to the Committee in respect of its inquiry into the implementation of pharmaceutical restructuring measures.
4. That Committee having examined the matter, including a response from the solicitor concerned denying any knowledge of any such action and requesting information on the matter, concluded that there might have been grounds for considering that the persons concerned had been subjected to intimidation. The Committee therefore recommended that the matter be referred to the Committee of Privileges.
5. Following the President's statement on the matter, Senator Zakharov gave a notice of motion to give effect to the Committee's recommendation. The matter was referred to this Committee on Senator Zakharov's motion, without debate.

### Action taken by Committee of Privileges

6. As is customary, the Committee of Privileges wrote to the Clerk of the Senate seeking his comments on any possible questions of contempt arising from the Community Affairs Committee's report and the Committee of Privileges' terms of reference. The correspondence between the Committee and the Clerk is at Appendix B, and the Committee draws the Senate's attention to the Clerk's advice in that it sets out in detail the principles that the Committee would consider if the evidence were such as require it to do so. For the reasons which follow, however, the Committee has not considered it necessary to pursue that course.
7. Also in accordance with its normal practice, on 7 May 1992 the Committee of Privileges wrote to the following persons, who were identified in the Community Affairs Committee's report as the persons who might have been able to shed some light on the particular matters referred, inviting them to make any written submissions by 5 June 1992:
  - Mr John Murphy, a pharmacist in Port Macquarie, New South Wales, who had made a submission to the Community Affairs Committee and appeared before that Committee on 6 September 1991;
  - Mr Kevin Baker, another pharmacist from Port Macquarie, who appeared with Mr John Murphy before the Committee on 6 September and who had also made a submission to the Committee;
  - Mr Andrew Walmsley, a solicitor who made a submission on behalf of other pharmacists from Port Macquarie;
  - Mr Mark Plunkett, one such pharmacist, who subsequently advised the Community Affairs Committee that he had been telephoned by the solicitor the subject of the matters before this Committee, who, he claimed,

threatened and warned me of the possibility of legal action being taken against me because of our complaint. I found this action extraordinary and of a threatening nature; and
  - The solicitor who, it was claimed, had made the intimidatory telephone call(s).
8. On 21 May 1992 the solicitor concerned wrote to the secretary to the Committee of Privileges seeking further details of the matters which had been referred. On 27 May this Committee responded to the solicitor, pointing out

that the purpose of its invitation of 7 May was to elicit information necessary to enable it to determine how it should proceed further, and advised him that it was awaiting responses by the persons mentioned in paragraph 7, above, to its original invitation. The solicitor responded to the Committee on the same day, expressing his concern "about the allegations which have been made against me"; pointing out that he could not fully prepare his submission until such time as he had "the particulars I have requested from you", and stating that

I have not nor has any partner of my Firm threatened or intimidated any pharmacist in Port Macquarie in respect of this matter.

9. The solicitor also indicated that the clients on whose behalf he had been acting had instructed him that

they also have not intimidated or threatened any pharmacist in Port Macquarie in respect of this matter.

10. No other person responded in any way to the Committee's invitation. Following a meeting to consider the matter, on 25 June the Chair of the Committee wrote again to Messrs Murphy, Baker, Walmsley and Plunkett in the following terms:

You will recall that on 7 May 1992 I wrote to you on behalf of the Committee of Privileges inviting you to make a written submission, by 5 June 1992, in respect of the following matter which was referred by the Senate on 2 April 1992:

Having regard to the report by the Standing Committee on Community Affairs on the alleged intimidation of witnesses in relation to the Committee's inquiry into the implementation of pharmaceutical restructuring measures, presented to the Senate on 2 April 1992:

- (a) whether there was any improper interference with witnesses in respect of evidence before that Committee; and
- (b) whether any contempt was committed in relation to that matter.

The Committee is concerned that, although the matters raised in the terms of reference are potentially very serious, involving assertions made to a Committee about three persons and reported by that Committee to the Senate, it has heard nothing from you in response to its original letter.

Should you intend to respond to the Committee's invitation of 7 May, the Committee expects a response as soon as possible, but in any event no later than Monday, 3 August 1992, so that it will have the opportunity to meet to consider the matter and subsequently to report to the Senate in the budget sittings.

11. In addition the Committee wrote to the solicitor who was the subject of the allegations advising him that it had not received a response from any other persons and would thus be unable to take the matter further until August. Before the letters were sent, the secretary rang Messrs Walmsley, Murphy, Plunkett and Baker, advising them of the imminent despatch.
12. Garrett and Walmsley, Solicitors, responded to the Chair's letter in the terms at Appendix C. No responses were received from Messrs Murphy and Baker.

#### **Comment**

13. It may be noted from the above account that this Committee has deliberately avoided mentioning the names of the person or persons about whom possible allegations of contempt might have been formulated, in order to protect their good name and privacy as much as possible, whereas the others involved, and their respective roles in the inquiry before the Community Affairs Committee, are identified. It may be noted further that, despite the attempts by this Committee, and despite the willingness of two of the people involved to detail their accusations to the Community Affairs Committee, this Committee has not been able to elicit a substantive response from any of them.
14. This is the first time since the Committee began undertaking inquiries under the Privilege Resolutions of 25 February 1988 that its invitations to make written submissions have not been responded to by persons who might possibly have been intimidated or interfered with because of their appearance as witnesses before a committee. It may be that the people who made the assertions to the Community Affairs Committee believed that, if they did not wish to take any further action, this would be the end of the matter. As in other matters brought before this Committee, it is clear that persons appearing before or making submissions to parliamentary committees do not necessarily appreciate the implications of giving evidence to a committee, and the possible consequences of making statements and assertions. It must be understood that individuals giving evidence, whether written or oral - particularly if the evidence may involve casting aspersions on other persons - must be prepared to have that evidence tested by the relevant committee and, as in this case, the Committee of Privileges.
15. The Committee points out to everyone involved in matters of contempt that the primary purpose of proceedings of this nature is to protect witnesses before parliamentary committees. As the Committee has mentioned in several previous reports, it and the Senate regard the question of possible interference with witnesses very seriously, and the matter must be pursued regardless of the wishes of those raising such questions. In the present case, the Committee of Privileges has been required to deal with assertions made by witnesses before another Senate Committee, involving at the least the reputation of other people and potentially a finding by the Senate that an offence of such seriousness had been committed that those other people might ultimately have been imprisoned as a result of the Committee's and the



Senate's deliberations. The witnesses making the assertions have refused when pressed to substantiate their claims.

16. That the assertions made to the Community Affairs Committee were of such gravity as to require this Committee to examine the matter is, in the Committee's view, beyond dispute. On the evidence before that Committee, it had no choice but to refer the matter for consideration by the Senate. Also, as his statement indicates, it was the duty of the President of the Senate to accord the matters raised in the report, and by the Chair of that Committee, the precedence clearly required by standing order 81.
17. It would be a matter of concern if, in cases of this nature, a Senate committee had been used to pursue an agenda of insinuation and accusation. This Committee is not in a position so to conclude, but emphasises to all witnesses appearing before committees that they must advert to the likelihood that, regardless of their motives, the integrity of committee processes might well demand that matters go further than they intended. While the protection afforded by the Privilege Resolutions is advised to all witnesses, the Committee of Privileges considers that it might be useful if other parliamentary committees were to stress to potential witnesses that evidence given before those committees under the absolute privilege necessary for the functioning of Parliament carries with it a duty of care in the giving of such evidence.
18. As the comments in paragraphs 14-17 indicate, the Committee regards the matter before it very seriously. In the present case it does not propose to do more than report its disquiet to the Senate about a possible abuse of process. It takes the opportunity, however, to warn anyone who might contemplate raising a matter affecting other persons without being prepared to substantiate a claim before the Committee of Privileges that the Committee is in a position to recommend that the Senate declare that any abuse of process deriving from the giving of evidence before parliamentary committees will not be tolerated, and that the Senate take action accordingly.

#### **Finding**

19. It follows from the above that no findings of contempt can or should be made against the solicitor the subject of the assertions or his clients. The Committee has written to the solicitor concerned indicating that should he or his clients wish their names to be publicised it would be happy to do so in the Senate before the report is adopted.

**Patricia Giles**  
Chair

## STANDING COMMITTEE ON COMMUNITY AFFAIRS

## MATTER OF PRIVILEGE

## Statement by Mr President

The Chairperson of the Standing Committee on Community Affairs, Senator Zakharov, has written to me and formally raised as a matter of privilege under standing order 81 the alleged intimidation of witnesses which is the subject of the report which the Committee has just presented. The essence of the matters raised in the report is that certain witnesses have been threatened in consequence of evidence given before the Committee. The Committee has recommended that the matter be referred to the Privileges Committee, and Senator Zakharov has asked that I give precedence to a motion to refer the matter to the Privileges Committee.

Under standing order 81 and the Privilege Resolutions of the Senate, I am required to consider whether a motion to refer the matter to the Privileges Committee should have precedence over all other business, having regard to the following criteria:

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

2.

Having considered the report of the Committee, I believe that the matters raised by the Committee clearly are capable of being regarded to the Senate as meeting the criterion in paragraph (a), and that there is no other readily-available remedy. The Senate has always taken extremely seriously any suggestion of improper interference with witnesses, and has invariably referred such matters to the Privileges Committee.

I therefore determine that a motion to refer the matter to the Privileges Committee may have precedence over all other business.

Pursuant to paragraph (7) of standing order 81, a motion may be moved immediately to refer the matter to the Privileges Committee.



Appendix B

AUSTRALIAN SENATE  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

da/p/1246

PARLIAMENT HOUSE  
CANBERRA, A.C.T. 2600

3 April 1992

Mr Harry Evans  
Clerk of the Senate  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Mr Evans

As you know, yesterday the Committee received a reference, following a report from the Senate Standing Committee on Community Affairs on the alleged intimidation of witnesses, arising from that Committee's inquiry into the implementation of pharmaceutical restructuring measures.

Owing to the three-week adjournment of the Senate, the Committee will be unable to meet to consider the matter until late April. In the meantime, however, I should appreciate your comments on any possible questions of contempt arising from the report and the Committee's terms of reference.

Yours sincerely

A handwritten signature in cursive script that reads 'Patricia Giles'.

Patricia Giles  
Chair



AUSTRALIAN SENATE

OFFICE OF THE CLERK OF THE SENATE

PARLIAMENT HOUSE  
CANBERRA, A.C.T. 2600  
TEL. (06) 277 3350  
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dh/1257

10 April 1992

Senator P.J. Giles  
Chair  
Committee of Privileges  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Giles

**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.

### 3.

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

6.

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.

Yours sincerely



(Harry Evans)

**GARRETT  
&  
WALMSLEY**

**S O L I C I T O R S**

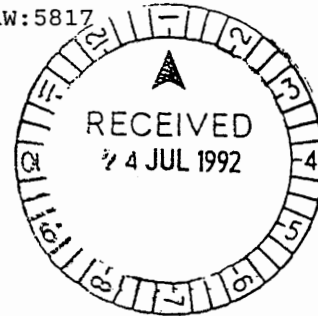
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18 July 1992

OUR REF: AW:5817

YOUR REF:

Senator Patricia Giles  
Committee of Privileges  
Australian Senate  
Parliament House  
CANBERRA ACT 2600



Dear Sir,

Re: Report by Standing Committee on Community Affairs  
into the Implementation of Pharmaceutical Restructuring  
Measures presented to the Senate on 2 April, 1992

We refer to your letter of the 7th May, 1992 and the 25th June, 1992. The writer is not prepared to make any submission to the Committee concerning the above matter.

We have discussed the matter with Mr Mark Plunkett and we are instructed that he is not prepared to make any submission to the Committee.

We referred the matter to Mr J. Murphy and advise we have not received any further instructions from him.

If you require any further information do not hesitate to contact our Mr Walmsley.

Yours faithfully,  
GARRETT & WALMSLEY

A handwritten signature in dark ink, appearing to be "AW", written over the typed name "GARRETT &amp; WALMSLEY".

A1707/48