

CHAPTER 1

Procedural Issues

The reference

1.1 The Committee's terms of reference are in two parts. The first concerns a matter of privilege; the second is contingent on the first and concerns implications that arise from the Committee's consideration of the matter of privilege for the treatment of public information, protection of children and protection of whistleblowers.

1.2 Before proceeding to address the specific terms of the reference, the Committee has reported in this chapter on a number of procedural issues concerning the reference and the conduct of the inquiry.

The matter of privilege

1.3 The matter of privilege relates to whether any false or misleading evidence was given to four Senate inquiries, the Senate Select Committee on Public Interest Whistleblowing, the Senate Select Committee on Unresolved Whistleblower Cases, and the 63rd and 71st inquiries of the Committee of Privileges, and whether any contempt was committed in that regard.

1.4 This is the first time that a matter which may involve, or has given rise to any allegation of, contempt of the Senate has been referred to a committee other than the Committee of Privileges since that committee was established in 1966.

1.5 The Committee of Privileges has developed specialist expertise over the many years that it has investigated cases of possible contempt of the Senate. Its findings and recommendations have almost without exception been unanimous and have invariably been endorsed by the Senate.

1.6 No doubt for these reasons, there is an expectation that matters that may involve contempt of the Senate will be referred to the specialist Committee of Privileges. This expectation finds expression in the Privilege resolutions agreed to by the Senate in 1988. Among other things, the resolutions set out a process by which allegations raised by a Senator, or a Senate committee, are considered by the President and then may be referred to the Committee of Privileges.

1.7 The current reference, however, resulted from the Senate's agreeing to a motion moved by a Senator in the Senate chamber. There was no debate in the chamber which might have indicated the reason for this departure from precedent for dealing with matters that might involve contempt.

The Privilege Resolutions

1.8 Although there was a departure from precedent in the reference of this matter to a select committee, the Committee has nevertheless adhered to the provisions of the other Privilege Resolutions as far as possible in its conduct of the inquiry.

1.9 Privilege Resolution 3 in particular shaped the Committee's approach to the inquiry. The resolution reads as follows:

The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

- (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;
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
 - (i) knowingly committed that act, or
 - (ii) had any reasonable excuse for the commission of that act.

Precedent and practice

1.10 In considering possible matters of contempt, the Committee of Privileges not only takes into account the above resolution, but it has established that a finding of contempt requires that a finding of a culpable intention should be proved.¹ This Committee also has been guided by that principle.

1 See Committee of Privileges, *107th Report*, p.66 and Clerk of the Senate, *Correspondence*, 20 August 2004 (appended to this report)

False and misleading evidence

1.11 In Privilege Resolution 6, the Senate has declared, as a matter of guidance, that (among other things) the following may be treated as a contempt:

- (6) (12) A witness before a Senate committee shall not:
- (c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every particular.

1.12 The Committee of Privileges has inquired into several cases in which it has been alleged that the giving of false and misleading evidence may have amounted to contempt. In no case has it found that a contempt has been committed. In its 107th Report the Committee of Privileges reported that:

Fourteen of the committee's reports in the period 1988-2002 have related in whole or in part to whether false or misleading evidence was given to the Senate or a Senate committee. Given the scope for differing interpretations of the character of evidence, it is not surprising that the committee has been unable, to date, formally to find contempt on this ground.²

Power to compel evidence

1.13 Many of the persons and organisations that were in a position to assist the Committee's inquiry with submissions are, or were at the relevant times, office holders or public servants of the Queensland Government.

1.14 The Committee invited the Queensland State Government to make a submission to the inquiry, but it declined to do so. The Premier of Queensland responded to the Committee's invitation as follows:

Given the extensive examination of these issues to date, I can see no public interest in my Government being involved in yet a further inquiry. My Government has no further information or material to add to that already placed on the public record, and it will not be making a submission to the current Inquiry.³

1.15 The question therefore arose as to whether state government office holders or public servants could be compelled to give evidence. Although it is clear that current and former Commonwealth officials may be compelled, this may not be true of state government officials. The Committee sought the advice of the Clerk of the Senate, who advised that:

2 Committee of Privileges, 107th Report, p.33

3 The Hon P Beattie, Premier of Queensland, *Correspondence*, 29 June 2004, p.2

As indicated in *Odgers' Australian Senate Practice* and in advices provided to Senate committees referred to there, Senate committees have refrained from ordering state office-holders to attend and from requiring the production or examination of state documents, on the basis of a rule of comity between levels of government in a federal system.⁴

1.16 In his advice, the Clerk referred to the report of the Select Committee on the Victorian Casino Inquiry in 1996, in which there is a detailed discussion of the Senate's powers to compel evidence and the implicit limitations on those powers. That committee concluded as follows:

As a consequence of the legal issues canvassed ... and the Committee's adherence to the principles of comity, the Committee formed the view that it was inappropriate to proceed with the compelling of witnesses in circumstances in which different classes of witnesses would be subject to different rights.⁵

1.17 In light of the advice received, the relevant precedents and the likely practical difficulties, the Committee resolved not to seek to compel evidence from State Government witnesses, or from any other witnesses.

Contempt and state government office holders

1.18 Given that it is uncertain that the Senate may compel evidence from state government office holders, an associated question arises. May the Senate make a finding of contempt against such a person? In his advice of 20 August 2004, the Clerk of the Senate gave the following opinion:

The advices of 29 April and 7 June 2004 referred to the question of whether state officials are compellable witnesses in a Senate inquiry. A closely related question is whether any finding of contempt may be made against state officials. On one view, the rule of comity between jurisdictions in the federation, which is the basis of the practical, if not legal, immunity of state office holders from compulsion, would also entail that findings of contempt may not be made against them.

Regardless of the answer to that question, any attempt to impose sanctions on state office holders for any contempt which is found would fall squarely into the area covered by the rule of comity and possible legal immunity. The committee would readily appreciate the practical difficulties of enforcing any sanction against state office holders.⁶

4 Clerk of the Senate, *Correspondence*, 29 April, 2004, p.1 (appended to this report)

5 Senate Select Committee on the Victorian Casino Inquiry, *Compelling Evidence*, p.25

6 Clerk of the Senate, *Correspondence*, 20 August 2004, p.2

Contempt and criminal offences

1.19 During the inquiry the Committee also sought the advice of the Clerk of the Senate on the relevance of the terms of reference to any breach of section 129 of the Queensland Criminal Code. This matter is discussed in detail later in the report but, in relation to any relevance of the offence of contempt and criminal offences, the Clerk advised that:

The act of giving misleading evidence to a Senate committee may be a contempt of the Senate, but it is not a criminal offence that can be prosecuted in the courts. The point that a breach of Section 129 of the Queensland Criminal Code is a criminal offence under the law of that state does not alter that situation. Any contempt of the Senate would still be a contempt of the Senate only, and would not have any additional element because the subject matter of the misleading evidence happened to relate to a criminal statute.⁷

Conclusion

1.20 The Committee has conducted its inquiry within the procedures determined by the Senate for the determination of possible contempts. The inquiry has been constrained, however, to the extent that the Committee may not have had access to all the relevant evidence because of the lack of cooperation from the Queensland Government and the uncertainties surrounding the compelling of evidence.

7 Clerk of the Senate, *Correspondence*, 20 August 2004, p.2

