

The Parliament of the Commonwealth of Australia

Report on Committee's Work  
since Passage of Privilege Resolutions  
of 25 February 1988

(35th Report)

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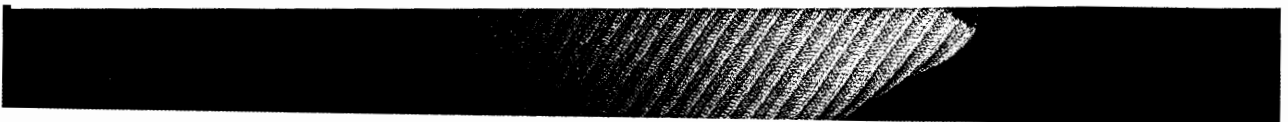
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## PREFACE

### A QUESTION OF PRIVILEGE

#### **Privilege, immunity, contempt**

The word "privilege", in modern usage, connotes a special right accorded to a select group which sets that group apart from all other persons. The Macquarie Dictionary's primary definition of privilege is as follows: "A right or immunity enjoyed by a person or persons beyond the common advantages of others". The privileges of Parliament are immunities conferred in order to ensure that the duties of members as representatives of their constituents may be carried out without fear of intimidation or punishment, and without improper impediment. These immunities, established as part of the common law and recognised in statutes such as the Bill of Rights of 1688, are limited in number and effect. They relate only to those matters which have come to be recognised as crucial to the operation of a fearless Parliament on behalf of the people. As pointed out in a submission by the Department of the Senate to the Joint Select Committee on Parliamentary Privilege,<sup>1</sup> a privilege of Parliament is more properly called an immunity from the operation of certain laws, which are otherwise unduly restrictive of the proper performance of the duties of members of Parliament.

The most obvious and the most important privilege or immunity, recognised by the 1688 Bill of Rights, is the privilege of freedom of speech. Such a privilege or immunity ensures that no member of Parliament, and no person appearing before a committee of the Parliament, can be called to account in another forum on the basis of matters raised in the course of parliamentary proceedings. Thus, for example, members of Parliament when speaking in the Parliament, and witnesses appearing before parliamentary committees, are immune from suit or prosecution under the laws relating to defamation.

While such freedom has given rise to some degree of disquiet in the community, it is generally agreed that the necessity for freedom of speech in Parliament and its committees outweighs any countervailing danger of unfairness in the misuse or abuse of the freedom. Later in this report, details are given of the operation of a mechanism introduced by the Senate to give redress to persons who may be affected by the exercise of that freedom. As the submission by the Department of the Senate to the Joint Select Committee on Parliamentary Privilege also pointed out, a further confusion has arisen between the immunities of the Houses of Parliament and their members on the one hand, and the powers of the Houses, particularly the power to punish contempts, on the other. The submission goes on to explain the distinction in the following terms:

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<sup>1</sup> *Transcript of Evidence*, 3 August 1982, p. 20

The power of the Houses in respect of contempts is a power to deal with acts which are regarded by the Houses as offences against the Houses. That power is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law.<sup>2</sup>

In other words, when a House of the Parliament is constrained to examine, and perhaps punish persons for, acts which impede the proper operation of that House, it performs a function similar to that of a court to protect the integrity of its proceedings. It is appropriate that the Parliament, the primary law making body, should have the powers to protect its proceedings.

It may be noted that, throughout this report, the term "breach of privilege" is not used. Nor has the Committee of Privileges, in making findings concerning possible contempts of the Senate, fallen into the terminological trap. It is therefore unfortunate that the committee itself, albeit as part of a long tradition, labours under the designation of "Committee of Privileges". The committee does not, however, wish to suggest a change in its name at this stage.

#### ***Parliamentary Privileges Act 1987 and Senate Privilege Resolutions***

In 1987 the Commonwealth Parliament passed the Parliamentary Privileges Act. The primary purpose of the Act was to declare legislatively what had been understood to be the scope of freedom of speech since the passage of the 1688 Bill of Rights. The necessity for the declaration derived from judicial interpretations, by two judges of the Supreme Court of New South Wales, of what had been understood to be the position concerning the use of proceedings in Parliament during court proceedings. The judgments indicated that words spoken in parliamentary proceedings could be used against a person in subsequent court proceedings. While the need to make a corrective declaration provided the impetus for the passage of the Act, opportunity was also taken to bring into effect changes to the law reflecting certain recommendations of the Joint Select Committee on Parliamentary Privilege, tabled in the Senate and the House of Representatives in October 1984,<sup>3</sup> which required legislation for their operation.

In addition, on 25 February 1988 the Senate passed a series of resolutions relating to parliamentary privilege. These resolutions were intended to be complementary to the *Parliamentary Privileges Act 1987* and were also based partly on the report of the Joint Committee. While many of the resolutions codified already existing Senate practices, notably in relation to the conduct of committee inquiries, the resolutions also provided for a new method of raising matters of privilege in the Senate; new procedures which the Committee of

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<sup>2</sup> *Ibid.*, pp. 14-15.

<sup>3</sup> *Parliamentary Paper No. 219/1984.*



Privileges is obliged to follow when considering a matter; and a completely new procedure for persons referred to in the Senate to have a reply published by the Senate or incorporated in *Hansard*. The Committee of Privileges is involved in this new procedure.

In order to make available the codified Act and resolutions in a readily accessible form, attached at Appendix A are the following documents:

*Parliamentary Privileges Act 1987, as amended by the Parliamentary Precincts Act 1988*

Explanatory Memoranda relating to the Act

Privilege Resolutions of 25 February 1988

Explanatory memoranda relating to the resolutions and responses, prepared by the Clerk of the Senate and incorporated in *Hansard* by the then Manager of Government Business, Senator Evans, to matters raised in debate on the adoption of the resolutions

The matters relating to the Act and resolutions which have been of particular relevance to the operations of the Committee of Privileges since their passage are:

Act, sections 4, 12 and 16

Resolution 1 (Protection of witnesses before committees)

Resolution 2 (Protection of witnesses before the Privileges Committee)

Resolution 3 (Criteria to be taken into account when determining matters relating to contempt)

Resolution 5 (Protection of persons referred to in the Senate) and

Resolution 6 (Matters constituting contempts), with particular reference to paragraph (10) Interference with witnesses, paragraph (11) Molestation of witnesses, paragraph (12) Offences by witnesses etc. and paragraph (16) Unauthorised disclosure of evidence etc.

### **Powers of the Houses to deal with contempts**

The question has frequently arisen whether a House of Parliament should have the power to deal with contempts. Criticisms of the power of the Houses to deal with contempts were well summarised in the following extracts from the Department of the Senate's submission to the Joint Committee, and fall into

four groups: the lack of specification of offences; the alleged impropriety of the Houses acting as judges in their own cause; the alleged unsuitability of the Houses to act as judicial bodies; and the effect on the rights of accused persons.

#### **Lack of specification of offences**

First, it is contended that because of the discretionary nature of the power to punish contempts, offenders are given no guide as to what acts are likely to constitute contempts and to be visited with punishment. It is therefore said that the discretionary power to punish contempts should be replaced by a codification containing specific offences...

The lack of codification and the discretionary nature of the power are features of the law of contempt of court. So far as is known, the complete codification of the law of contempt of court has not been achieved in any major common law jurisdiction... The difficulty which occurs in any attempt to enumerate contempts is that it is the effect or tendency of an act (to interfere with the course of justice or to obstruct the work of the Houses) which constitutes the offence, and not the act itself, and it is therefore impossible to specify in advance all acts which constitute contempts...

In contempt of Parliament, as in contempt of court, the case law and authoritative expositions of it do in fact provide a good guide to acts which may be held to be offences. For some reason it is not considered satisfactory that a person seeking guidance on what acts may constitute contempts of Parliament should be referred to the detailed accounts of past cases in Erskine May's *Parliamentary Practice*, yet a person seeking similar guidance in relation to contempt of court (or other branches of the law, for that matter) can only consult the authoritative expositions...

#### **The Houses as judges**

The second major criticism of the power of the Houses to punish contempts is that in exercising this power the Houses are acting as judges in their own cause, contrary to the principles of natural justice. Again, the same difficulty arises with contempt of court: no incongruity is seen in courts judging and punishing such contempts. The fact that there is now a right of appeal in respect of contempt of court does not affect the matter: the appeal is to another court. Moreover, ...there is just as effective an appeal in respect of a contempt of Parliament.

(In this regard, the Committee points out that the procedure followed by both Houses generally requires examination of the matter by a Presiding Officer, reference by the relevant House to its Committee of Privileges, examination and report by that Committee, and examination of its proceedings by the whole

House. The relevant House is, of course, not bound to accept the Committee's findings. In respect of the Senate, the Privilege Resolutions of 25 February 1988 contain the rules governing privilege matters.)

Just as the courts are the best judge of what interferes with the administration of justice, the Houses may be the best judge of acts which interfere with the performance of their functions and obstruct their members in the performance of their duties.

### **The Houses as judicial bodies**

Thirdly, it is said that in judging and punishing contempts of Parliament, the Houses are exercising a judicial function, and as political bodies they are unfit to exercise a judicial function. It is clear that the Houses are political bodies and that they are by constitution not adapted to act as courts of law, but the very premise of this criticism is questionable. The question of what acts obstruct the Houses in the performance of their functions may well be seen as essentially a political question requiring a political judgment and political responsibility. As elected bodies, subject to electoral sanction, the Houses may be seen as well fitted to exercise a judgment on the question of where the legitimate exercise of political liberty, particularly the freedom of speech, ends, and where improper obstruction of the political processes embodied in the legislature begins.

### **Rights of accused persons**

Fourthly, it is said that in dealing with alleged contempts, the Houses do not allow to accused persons the normal rights allowed by the processes of the ordinary law. There is validity in this criticism. The Houses are not bound to recognise any rights of accused persons at all, and instances may be cited of apparent unfair treatment of such persons. This criticism may easily be overcome, however, by each House adopting procedures to be followed in the investigation of alleged contempts.<sup>4</sup>

The Joint Committee, having considered these and other arguments, recommended that the power to deal with contempts should remain with the Houses of Parliament and made suggestions as to how best that power could be exercised. The Senate has acted in accordance with the intent of those recommendations.

So far as the rights of accused persons are concerned, procedures laid down by the privilege resolutions ensure fairness to all persons involved in the investigation of contempts. The committee in following the procedures outlined

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<sup>4</sup> *Department of the Senate submission, op. cit., pp. 35-37.*

in Resolutions 1 and 2 does not purport to act in place of a court. As those procedures indicate, however, the committee affords both to accused persons and to witnesses special protections consonant with parliamentary processes. Illustrations of the operation of the committee under these procedures are set out in the following chapters.

# CHAPTER 1

## GENERAL OUTLINE OF COMMITTEE ACTIVITY

### Introduction

1. The first matter referred to the Committee of Privileges following the passage of the privilege resolutions occurred in March 1988 and the committee reported to the Senate in June. Five months were to elapse before the next matter was referred, but since that time, that is, November 1988, the committee has constantly had matters before it for consideration. The committee has met 71 times between March 1988 and November 1991. The committee, which was first established in 1966, has generated between June 1988 and November 1991 24 of the 34 reports which have been presented to the Senate since the committee was established; of these, 14 have related to citizens' right of reply. The other 10 have resulted from substantive matters referred by the Senate. A list of all reports by the committee since its establishment in 1966, indicating their findings and action taken by the Senate, is at Appendix B.
2. The question has arisen whether the deluge of work has been in consequence of the passage of the resolutions or whether matters such as those the committee has considered would have arisen in any case. The committee's view is that, apart from its role in considering matters relating to persons referred to in the Senate, most of the matters which it has been required to consider were likely to have been raised as questions of privilege and were likely to have been referred to the committee in any case. An analysis of the matters referred to the committee indicates that most have derived from inquiries before other committees, and 5 of the 11 matters which the committee has examined or is in the process of examining have involved what the Senate has always regarded with particular seriousness, that is, possible interferences with witnesses.
3. The committee has decided to make this report to the Senate because, with such a period of intense activity and with a constant membership for the first two years of the operation of the resolutions, when activity on substantive matters was at its height, the committee has had the opportunity to apply the resolutions, with regularity and consistency, in relation to a wide range of privilege matters. Former members of the committee have been consulted about the content and conclusions of the report.

### **Subjects covered by report**

4. The report makes general comments in relation to:
- the application of Resolution 5 (Protection of persons referred to in the Senate)
  - conduct of inquiries
  - the role of legal advisers to persons affected by a matter referred to the committee
  - the committee's use of counsel
  - public hearings
  - reimbursement of costs of legal representation
  - committee's sources of advice
  - conflict of interest
  - standard of proof
  - broadcast and rebroadcast of committee's proceedings
  - particular and general terms of reference
  - recommendations and comments made by the committee, in addition to findings relating to contempt

### **Types of reference**

5. References to the committee during the period fall into three categories:
- (a) right of reply references under Resolution 5 (18 references, 14 reports);
  - (b) matters connected with the appearance of witnesses before various Senate committees (8 references, 7 reports). This category in turn may be broken down into 2 further categories:
    - (i) possible interference with witnesses (5 references, 4 reports) and
    - (ii) possible misleading evidence by witnesses (3 references, 3 reports)
  - (c) matters associated with documents prepared for submission to the Senate or its committees (3 references, 3 reports).

## Structure of Report

6. Matters arising from Resolution 5 are first discussed in this report. The question of possible interferences with witnesses before committees has created the greatest difficulty for the committee, and most of the aspects, outlined at paragraph 4, which will be discussed in more detail in this report have derived from its consideration of this question. Without doubt, and perhaps unsurprisingly, these matters have also been the most time-consuming. The question of misleading evidence, on the other hand, has been able to be dealt with, in the three cases so far resolved, relatively readily, but this has come about primarily because of the circumstances in relation to each case. An interesting factor in relation to the matters arising under category (c) has been that, in all cases, the committee has made general comments and recommendations, in addition to formal findings, arising out of the reference, and this aspect, too, is discussed.





## CHAPTER 2

### THE APPLICATION OF RESOLUTION 5

#### Introduction

7. This resolution is unique, in that, for the first time, it enables a person unfavourably referred to in the Senate to approach the President of the Senate to request that a reply to statements made in the Senate concerning the person be published by the Senate or incorporated in *Hansard*. The President, in turn, may refer the matter to the Committee of Privileges.

#### Methodology

8. The committee has received 18 submissions to date and has considered all submissions referred to it under this resolution. On some occasions the committee has conferred, in writing, with the person who made the submission. This has been the case where the original submission has not complied with the provisions of Resolution 5(8)(a), which require that a proposed response be "succinct and strictly relevant to the questions in issue" or has contained something "offensive in character" as referred to in that paragraph, or, in terms of Resolution 5 (8)(b)(i) and (ii), would have the effect of "unreasonably adversely affecting or injuring a person" or "unreasonably adding to or aggravating any such adverse effect". In these cases the committee has requested the person concerned to redraft the submission in the light of these paragraphs. In all cases, even when no substantial redrafting has been requested, the committee has made some changes before recommending to the Senate that a response be incorporated in *Hansard*, and the submissions, as amended, have been agreed to by the persons concerned as an appropriate response.
9. The committee has not found it necessary to confer with any Senator who referred in the Senate to the person who made the submission, although this course of action is provided for in the resolution. However, the committee has now adopted the practice of advising the Senator concerned that a report of the committee is to be made on a particular day, as a matter of courtesy. Following the introduction of this practice, and the Senate's agreement to the incorporation of persons' responses in *Hansard* in accordance with the committee's recommendations, three Senators have used other Senate procedures to make further comments on matters raised by the persons. As with Senators' responses to personal explanations and claims of misrepresentation by their own colleagues, there is nothing to prevent this occurring, and it is the committee's view that such a right, permitted to Senators, does not nullify the effectiveness of the Resolution 5 procedures. The committee

has also dealt with two persons' responses to Senators' responses without difficulty, and, again drawing an analogy with repetitive personal explanations or claims of misrepresentation, assumes that, ultimately, continuation of claims and counter-claims will be perceived by the protagonists as fruitless or counter-productive.

10. It should also be noted that the committee may decide not to consider a submission referred to it if the committee considers that "the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Senate". The committee has not, however, found it necessary to take this action.

### **General principles**

11. The resolution lays down a relatively simple set of procedures to be followed regarding an aggrieved person's right of redress. As was indicated when the first matter of this nature was reported to the Senate on 7 December 1988 the committee has considered submissions as analogous to Senators' personal explanations or claims of misrepresentation, and has deliberated with this factor in mind. The committee emphasises that, under the terms of Resolution 5, submissions must be concise and strictly relevant to the issues under consideration and that they must not contain any statements that may further aggravate the situation. In the committee's view, these provisions are consistent with the requirements for personal explanations or claims of misrepresentation, and therefore the analogy is reasonable.
12. It should also be noted that under the resolution the committee does not consider or judge the truth of any statement made in the Senate or of any submission in reply. Thus the committee, in making a recommendation that a right of reply be given, is not making a finding of wrongdoing on the part of a Senator. In this regard, the procedures relating to right of reply may best be compared with the right to present petitions. It is the privilege of any individual in the community to petition the Parliament to obtain redress of grievances, and a moral obligation is placed on a Senator to present the petition, even if the Senator does not agree with the contents of the petition. Similarly, the committee does not have to agree with, nor is it permitted to judge the rights and wrongs of, the matters before it.

### Proposed responses (*four*) not recommended for publication

13. So far, the committee has reported to the Senate on 14 occasions and has recommended in each case that a response be incorporated in *Hansard*. The Senate has accepted the recommendations. In the case of four further submissions, however, the committee has not reported to the Senate recommending that a response be published or incorporated in *Hansard*.

(i) **First case**

14. In the first case, the Deputy-President of the Senate referred a submission to the committee on 22 June 1989, concerning references made in relation to a person during debate in the Senate. The committee considered the submission on 18 August 1989 and decided to write to the person requesting further information in relation to the matter. Having received no reply the committee wrote again to the person on 1 November 1989 asking if he intended to respond to the committee and indicating that in the absence of a response by 30 November the committee would assume that he did not intend to proceed with the matter. The person indicated in a letter received on 27 November that he intended to respond but no further correspondence was received from him.

(ii) **Second case**

15. (a) In the second instance the President referred a submission to the committee on 1 September 1989. The committee considered the submission on 5 September 1989 and decided to write to the person seeking clarification of the nature of the complaint. Having received no response, the committee wrote again to the person on 1 November in the same terms.

(b) The person responded on 27 November 1989 giving reasons for the delay in relation to the first letter, and drawing attention to two further references to him in the Senate, made by the Senator the subject of the original complaint. He asked that the further submission be considered jointly with his first submission. The committee decided that, as the matters raised were germane to the first submission, it would extend its original decision to consider the earlier submission to the person's second communication.

(c) The committee having so decided, it wrote to the person on 4 December 1989, advising that the person's proposed response, as attached to the second letter, did not fulfil the requirements of paragraph (8) of Resolution 5, and suggesting that he base a proposed response on another attachment to his letter. The committee has received no further communication from the person.

(iii) **Report to Senate on these two cases**

16. The committee does not consider it appropriate to proceed with these two references, given the time that has elapsed since the persons concerned last communicated with the committee. It believes that sufficient opportunity was given in both cases for the person to respond and thus, pursuant to Resolution 5(7)(a), **reports** to the Senate that, in its view, no further action should be taken by the Senate or by the committee in relation to the submissions in question.
17. The committee has decided that, in matters of this kind, if no response to the committee's inquiries is received within three months, it should consider the matter closed and report accordingly to the Senate, in general terms, in due course. The committee does not consider it appropriate that matters such as these should be kept "on ice" indefinitely, to be resurrected at a time suitable to the complainant, and makes this report to place on notice its intentions in this regard. In this context, it may be noted that the committee itself, in dealing with matters of this nature, has a policy of dealing with them as expeditiously as possible, within the constraints imposed by the Senate's sitting patterns and the terms of the resolution.

(iv) **Third case**

18. A Senator asked a question without notice which included certain allegations concerning a person. A submission was subsequently received by the President, and referred to the committee, on 31 May 1990. On the same day, however, a minister, in response to a question without notice, sought and received leave to incorporate in *Hansard* the response from the person. The committee decided, under Resolution 5(3), to consider the submission, as the subject was clearly serious, and the submission was not "frivolous, vexatious or offensive in character" in the terms of Resolution 5(1).

(v) **Report to Senate on third case**

19. The Committee **reports** that, as the response was already incorporated in *Hansard*, it decided that to proceed with the reference was inappropriate, since the remedy sought had already been obtained by other means. The Committee informed the person accordingly.

(vi) **Fourth case**

20. (d) On 15 September 1990 a person wrote to the President of the Senate concerning a matter raised in the Senate on 4 September 1989. The Deputy-President, in the absence of the President, referred the submission to the committee on 19 September. The submission was unusual in that more than a year had elapsed between the naming of the person and his making the submission and also, as the

Deputy-President pointed out, the harmful allegation occurred not in remarks made by Senators but in a reference by a Senator to an alleged anonymous letter.

- (e) Notwithstanding both of these matters, the committee decided under paragraph (3) of Resolution 5 to consider the submission. The person affected had become aware of the Senate resolution just before he made his submission to the committee, and the alleged anonymous letter quoted in the Senate did in fact affect him.
- (f) During its investigation of the matter, the committee discovered that the person's concerns had been met by the tabling of papers in the Senate almost a year before. The committee therefore wrote to the person drawing his attention to the papers and suggesting that such an action should be adequate for his purposes. The committee undertook to draw the Senate's attention to the person's submission, in general terms, in this report on the committee's operations.

**(vii) Report to Senate on fourth case**

- 21. Special circumstances would need to exist, as in this case, before the committee would consider a submission at such a distance from the original reference in the Senate. Unlike the time limit that the committee intends to place on matters once contact has been made between the committee and the person affected, however, the committee does not wish to lay down a hard and fast rule about consideration of such matters.

**Evaluation of Resolution 5 procedure**

- 22. In considering whether Resolution 5 has worked as intended, the committee has concluded that, despite the behind-the-scenes workload involved in considering the matters, the advantages far outweigh any disadvantages, both perceived at the time of introduction of the process and uncovered during the succeeding three-and-a-half years, as indicated in the above account.



## CHAPTER 3

### POSSIBLE INTERFERENCES WITH WITNESSES BEFORE SENATE COMMITTEES

#### Introduction

23. As indicated at paragraph 6, most of the questions concerning the operation of the privilege resolutions have arisen in connection with the committee's inquiries into possible interferences with witnesses. It may be noted that, in all reports which the committee has published so far, a detailed outline of the conduct of the inquiry, or in the case of Resolution 5 matters the method of proceeding, has been given at the commencement of each report. The purpose of this account is to distil matters common to the five references concerning possible interferences with witnesses.

#### Conduct of inquiries

24. As the accounts contained in each of the reports completed so far indicate, the committee's first decision has been to advise persons who the committee is immediately aware may be affected by the reference that a certain matter has been referred to it, and, inter alia, to invite written submissions on the matter. As the committee has pointed out in all correspondence, the purpose of seeking a written submission is to enable the committee to gain basic information from the persons involved in relation to the matters before it. In other words, it regards its first task as being to undertake an inquiry into the circumstances surrounding the reference, and thus, in all cases so far, has performed the inquiry function of any normal Senate committee.
25. In performing this function, however, the Committee has afforded to all persons special protections provided under the privilege resolutions. The resolutions affecting the Committee's proceedings are Resolutions 1 and 2 of the privilege resolutions, which are included at Appendix A to this report. It may be noted that, where the second resolution is inconsistent with the first resolution, the second resolution prevails to the extent of the inconsistency.

#### Legal representation

##### (a) for persons affected by matters referred to the Committee

26. Features of the second resolution include the automatic right of a person to be accompanied by counsel if he or she so wishes, if a hearing is held. The committee must give the person all reasonable opportunity to consult counsel. Examination of any witnesses by counsel may be

authorised by the committee, and must be afforded to a person or that person's counsel if any evidence is given containing any allegation against, or reflecting adversely on, a person. As a consequence of this right, recourse by persons affected by matters before the committee to the use of lawyers at any or all stages of the committee's inquiries has been a feature of the proceedings.

**(b) for Committee of Privileges**

27. The committee has found it necessary to appoint counsel to assist it in relation to only one matter on which it has reported so far, which concerned the most complex of all the matters on which the committee has reported. This involved the committee's first reference on possible interference with witnesses, relating to the Aboriginal Development Commission, which was referred to the committee on 3 November 1988. After a significant amount of material was received and evaluated by the committee, it decided that its purposes would be assisted if it were to have available counsel to assist it in relation to the inquiry. After taking advice from the Clerk of the Senate on this question, as well as on other questions at issue in the reference (see paragraphs 33 and 44 below), the committee appointed, with the approval of the Deputy-President in the absence overseas of the President, Mr Theo Simos, Q.C., to assist it. Mr Simos had previously assisted two Senate committees, and had appeared for the Senate in matters relating to privilege arising during the court cases concerning the late Mr Justice Murphy. The value of Mr Simos' assistance to the Committee in the case may be seen in the two written advices he prepared, which were included at volume 3 of the documents which were tabled with the committee's report on the matter.
28. It was also envisaged that Mr Simos might assist the committee at any public hearings that might be held in relation to the matter. In the event, the committee was able to make findings based on the papers before it, and no public hearings ensued.

**Public hearings**

29. The committee has, however, conducted two public hearings, in relation to two of the four further references concerning possible interferences with witnesses. The hearings were arranged as follows:
  - (a) all persons affected by the matter before the committee were permitted to be accompanied by counsel;
  - (b) each witness was heard by the committee on oath or affirmation;
  - (c) opening personal statements were permitted;
  - (d) each witness, or his or her counsel, was permitted to examine other witnesses in relation to written and oral evidence;



- (e) each witness, or his or her counsel, was given the opportunity of adducing further evidence or suggesting other witnesses for examination by the committee; and
- (f) closing personal statements, or statements by counsel on behalf of their clients, were permitted.

The full text of the arrangements, as sent to the persons in the second case, is at Appendix C.

- 30. The committee was concerned to ensure that the proceedings were conducted with as little formality as possible and in the spirit of inquiry rather than as quasi-judicial proceedings. As part of its commitment to informality, the committee specifically rejected the opportunity itself to have counsel's assistance in the public hearing process. The committee is of the view that this aspect alone ensured that its proceedings were consonant with normal Senate committee proceedings. The committee is pleased to report that the lawyers appearing for the persons affected in each case sensed the intentions of the committee and ensured that their behaviour was in keeping with those intentions.
- 31. It may be that in future the committee will perceive the need for more formal proceedings; given, however, the serious nature of all the matters before it and the way in which it has been able to deal with them under existing procedures, the committee is optimistic that the procedures adopted so far may provide a blueprint for future operations.

#### **Reimbursement of costs of legal representation**

- 32. The costs of legal representation of persons connected with the two matters referred to the committee in relation to the Aboriginal Development Commission was the subject of a special inquiry by the Legal and Constitutional Affairs Committee, which found, in its report tabled on 14 May 1991, that certain overcharging for legal services had occurred. While the reference to that committee was made by the Senate as a result of questions asked during estimates committee proceedings, the findings reinforce the Privileges Committee's concern that unnecessary expenditure may be incurred by persons affected by the committee's inquiries. The committee appreciates that persons who may be found guilty of contempt may wish to maximise their protection at the earliest possible stage. Nonetheless, the question of costs to be borne by the persons affected or, especially in relation to the two Aboriginal Development Commission cases, by the taxpayer, is a matter of concern.
- 33. The committee wishes to state that, as a general principle, it is disinclined to exercise its power under Resolution 2(11) to recommend reimbursement of costs of representation of witnesses before the

committee. Before finally determining its approach, it wrote to the Clerk of the Senate on the matter; the correspondence is at Appendix D to this report.

34. Notwithstanding this principle, it found itself in the position of having so to recommend in the second of the Aboriginal Development Commission matters. The circumstances were as follows. Matters were raised concerning possible adverse treatment of a former officer of the Aboriginal Development Commission as a consequence of his having given evidence to the Senate Select Committee on the Administration of Aboriginal Affairs. As both reports on the Aboriginal Development Commission demonstrated, the matters raised were extremely complex, and the situation in the Aboriginal Development Commission at that time was tumultuous. As indicated in those reports, all relevant Aboriginal Development Commission officers, commissioners and ex-commissioners had legal representation from an early stage in the proceedings in each inquiry, particularly the first one.
35. The former officer of the Aboriginal Development Commission who was the possible victim of adverse treatment responded to the committee's invitation to make a written submission without assistance from legal advisers. When, however, the committee decided that it must conduct a public hearing the former officer sought advice from a firm of solicitors. That firm indicated that the former officer was reluctant to appear before the committee without legal assistance, on the grounds that the other persons affected by the inquiry had access to counsel and the committee was being assisted by counsel (the second assumption was not correct). He therefore wished also to have access to legal advice but was not in a position to pay the costs of such advice.
36. The committee pointed out to the former officer's solicitors that in the previous public hearing one of the two witnesses was unaccompanied by counsel and fulfilled her function more than adequately for the committee's purposes — indeed, the committee had cause to comment favourably on her capacity and integrity. Nonetheless, the committee, noting that the former officer would not appear before it without legal assistance and realising that it required his oral evidence, was ultimately satisfied, after detailed consideration of the matter, that the former officer was justified in seeking reimbursement and finally recommended to the President that full reimbursement of costs should be granted.
37. In this context, it may be noted that the terms of the resolution require the President to be satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation before the committee and, further, that the President, if so satisfied, may make reimbursement of all or part of such costs as the President considers reasonable. In dealing with its obligations under the provisions of this resolution, the committee considers that it is incumbent on the

committee to make such inquiries and form such opinions as are necessary to assist the President in coming to a decision. In the specific case, the committee before submitting a recommendation for reimbursement to the President consulted the Legal Aid Administration Office of the Attorney-General's Department; discussed with that Office the possible terms and conditions of financial assistance; and on the basis of the Office's advice drew up written conditions. The committee then recommended to the President that reimbursement be granted up to a certain amount. The President gave approval based on the detailed submission made to him. On receipt of the itemised accounts from the person's solicitor, the committee sought advice from the Legal Aid Office to assist it in certifying the accounts.

38. The committee is pleased to report that the charges of the firm chosen by the former officer were less than the amount to which the President had agreed, and were regarded by the Attorney-General's officers as reasonable. It may be noted that the same firm was the firm found by the Legal and Constitutional Affairs Committee to have charged clients appropriately in the other Aboriginal Development Commission matter before the Committee of Privileges.
39. The committee accepts the right of all witnesses to be assisted by counsel, and acknowledges that such a right is rendered nugatory if persons are unable to afford to exercise it. The committee emphasises, however, that only in the exceptional circumstances provided in Resolution 2(11) can reimbursement of legal costs be agreed to, and the committee, in determining whether to make a recommendation to the President, will apply strictly the prescribed criteria. The committee considers that, given the methods by which it operates, the requirement for legal representation is in practice limited.

#### **Committee's sources of advice**

40. It has already been mentioned in this report that the committee appointed counsel to assist it in relation to the first Aboriginal Development Commission inquiry. The primary source of advice, however, in keeping with the traditions of committees of this nature, has been the Clerk of the Senate. The committee has made public his advice in relation to the following issues:

### **Privilege — Clerk's Advices to Privileges Committee**

Petitions: Privileges: reference to Committee of Privileges, 24 March 1988 (printed in 11th Report of the committee, June 1988).

Participation of members of Committee of Privileges in certain inquiries, 18 January 1989; Supplementary advice, 1 February 1989 (printed in 18th Report of the committee, June 1989, documents, vol. 3).

Submission on behalf of Mr Charles Perkins (contempt — improper influence of witnesses), 6 March 1989 (printed in 18th Report of the committee, June 1989, documents, vol. 3).

Reimbursement of legal costs, 31 July 1989 (printed in current Report).

Standard of proof, 29 January 1990 (printed in current Report).

Submission by Secretary, Department of Community Services and Health (circulation of submissions to committees), 29 January 1990 (included in part in 22nd Report of the committee, 9 May 1990).

As may be observed, all but one element of these advices is now public, although four further advices have been received, three of which relate to a matter currently before the committee. The committee emphasises the point that matters which it is required to consider are of a parliamentary nature. The requirement to seek advice from external sources is therefore limited, although the committee accepts that, particularly in the light of the passage of the *Parliamentary Privileges Act 1987*, legal effect and interpretation have some part to play in the questions which the committee is required to consider.

41. As the above list indicates, much of the Clerk's advice related to specific questions arising in respect of individual inquiries, and may be found in the relevant reports. However, certain matters are of general application, and are thus briefly discussed in the hope that they will assist other committees in the conduct of their own inquiries.

### **Participation of members of the committee in certain inquiries**

42. This question arose in relation to both the first Aboriginal Development Commission reference and a reference deriving from the inquiry by the Environment, Recreation and the Arts Committee into drugs in sport. Two of the three firms of solicitors acting for persons affected by the Aboriginal Development Commission inquiry raised with the President of the Senate the question of potential conflict of interest involved in Senator Durack's participation in both an inquiry of a Senate estimates

committee into the proposed expenditure of the Aboriginal Development Commission and the inquiry being conducted by the Committee of Privileges. The question was not, however, raised by or on behalf of persons affected by a further Privileges Committee inquiry into the Aboriginal Development Commission, arising directly from evidence given before that estimates committee.

43. The second question of potential conflict of interest discussed by the committee came before it on the initiative of the then Chairman of the Environment, Recreation and the Arts Committee, Senator Black, who, as Chairman, had signed, tabled and spoken to the report of that committee recommending that a matter be referred to the Committee of Privileges, of which he was also a member. A third member of the Committee of Privileges, Senator Coates, was a member of the Environment, Recreation and the Arts Committee but advised the Committee of Privileges that he had not participated in any of the proceedings relating to the matter.
44. The Committee of Privileges sought advice from the Clerk of the Senate relating to the positions of Senator Durack and Senator Black, following receipt, through the President of the Senate, of the first letter from solicitors and Senator Black's declaration of his concerns. When the second letter from the firm of solicitors concerning the Aboriginal Development Commission matter was transmitted by the President, a further advice from the Clerk was sought specifically relating to the assertion in that letter to the effect that "long established tradition" and "precedent" dictated that Senator Durack should disqualify himself from attendance on the Committee of Privileges.
45. After considering the Clerk's advice, the committee responded to the President of the Senate that in its view it was a matter for the Senator concerned, and ultimately the Senate, whether he or she should sit on an inquiry. The committee commented that, in the instant cases, it considered that it had neither the right nor the duty to contemplate suggesting that any member should disqualify himself or herself from participating in an inquiry, while of course accepting that he or she may choose not to participate. In the event, Senator Durack participated in all proceedings of the committee in relation to the Aboriginal Development Commission matter. Senator Black decided not to participate in the public hearings of the committee in relation to the drugs in sport matter and did not participate in the committee's decision to make a finding concerning the matter, such a decision being reached at a private meeting immediately after the public hearing concluded. Senator Black did, however, participate in all other deliberations of the committee.
46. In drawing its conclusions in the particular cases to the attention of the Senate in this report, the committee notes in particular page 7 of the first advice of the Clerk of the Senate. The committee regards as wise

his caution against too ready an acceptance of the misleading analogy with the rules and practices of the courts when Senators are considering the question of their participation in Senate or committee proceedings, and also commends its own approach in relation to the two cases to all Senators.

### **Standard of proof**

47. Over the period of time since the committee began to examine matters referred to it, particularly possible interferences with witnesses — which, as indicated at paragraph 2 above, the Senate has always regarded with great seriousness — the committee was conscious that, in making a finding concerning a question of contempt, it was examining circumstances of individual cases against an unstated standard of proof. Following the completion of its third inquiry on this subject, the committee wrote in general terms to the Clerk of the Senate, seeking any comments he may wish to make on the question of the standard of proof which might be appropriate for the committee to bear in mind when making findings concerning contempt. The Clerk's comments appear at Appendix E to this report. Briefly, the Clerk is of the view that the committee should adopt a combination of the following two of five options:

to vary the standard of proof in accordance with the gravity of the matter before the committee and the facts to be found; or

not to adhere to any stated standard of proof or to formulate a standard of proof, but simply to find facts proved or not proved according to the weight of the evidence.

The committee, when noting receipt of the Clerk's advice, recorded in its minutes that it considered that the conclusions contained in the Clerk's response accorded with its already existing practice.

### **Broadcast and rebroadcast of committee proceedings**

48. When the committee was first considering the rules for the public hearing relating to the Drugs in Sport Inquiry, the question was raised whether it should permit the rebroadcasting of its public proceedings on radio and/or television. The committee agreed to the filming of its proceedings without sound before the hearing began, for subsequent use if television stations wished, but decided that, in the interests of the persons affected, rebroadcasting of the hearings, whether by radio or television, should not be permitted. This course was also adopted for the second hearing. The question then arose whether the transmission of the proceedings throughout the building, in accordance with normal practice, should be permitted. In both cases, the transmission of the committee proceedings throughout Parliament House did not occur.

49. The committee has determined, as a general principle, that in future all such proceedings will be transmitted throughout the internal broadcast system, but the question of direct broadcast or rebroadcast, whether by television or radio, will be a matter for the committee to determine in each case. The committee draws to the attention of all persons within the building, but particularly the sound and vision unit and the media generally, that it is within the province of any committee to determine whether broadcasting or rebroadcasting of any or all of its public hearings should be permitted. The committee is pleased that the Senate has adopted the Procedure Committee's 3rd Report of the 63rd Session of the Parliament, tabled on 2 May 1989. The resolution of the Senate proposed by that committee and adopted by the Senate on 23 August 1990, included as Appendix F to this Report, gives excellent guidance to all persons, and the committee makes these comments in the context of that resolution.





## CHAPTER 4

### MATTERS ARISING FROM OTHER INQUIRIES

#### Introduction

50. As indicated at paragraph 6, the matters of possible misleading evidence resolved so far have been relatively straightforward. The role of the committee in dealing with possible contempts is very precise: in contemplating whether it should make a finding of contempt, it must exclude any extraneous comments so far as that specific finding may be concerned. Thus, the committee has made statements, in relation to many of the matters before it, such as "on the evidence before it, the committee does/does not find a contempt"; or "while it is open to the committee and the Senate to find that a contempt has been committed, the committee recommends that such a finding should not be made". In making findings such as these, however, the committee has sometimes considered it necessary to set down cautions, views and recommendations deriving from its consideration of whether contempt is involved.

#### Misleading evidence references

51. The first occasion on which the committee took this approach related to the second of the two questions of misleading evidence which came before it in last session of Parliament. The committee, while finding, in its 15th Report, that in the particular circumstances of the case a contempt of the Senate had not been committed, considered it necessary to conclude that responses by an officer of the Department of Defence to Senators serving on an estimates committee had been unhelpful.
52. In this regard, it is interesting to note that the decision giving rise to the committee's third inquiry into possible misleading evidence before a Senate estimates committee was influenced by the committee's 15th Report. The President of the Senate, who gave precedence to the notice of motion which led to the inquiry, indicated to the Senate that he had had regard to the committee's report in making his determination to give the matter precedence. In that case, which also involved an officer of the Department of Defence, the committee found that no contempt had been committed, and indicated that the same concern about unhelpfulness did not arise.

### **Matters associated with documents before the Senate and its committees**

53. When the first reference relating to documents was referred to the committee in March 1988, it was placed before the committee in general terms. This question arose from the consideration by the Senate of the circulation of a petition. While the initial proposal was put to the Senate in terms of a specific case, after substantial debate the motion was amended to provide that the committee consider the matter in general terms. The point was made in that debate that it was unusual for privileges committees to examine matters in general terms, and that principles relating to parliamentary law and practice had been established through consideration of individual cases. Nonetheless, in view of the Senate's ultimate decision to refer the first matter to arise under the new privilege resolutions to the committee in general terms, the committee proceeded on that basis, and was able to make a satisfactory report on the matter.
54. The two further matters relating to documents before the Senate and its committees involved specific cases. The first concerned the possible unauthorised disclosure of a Senate committee report, while the second involved the possible unauthorised disclosure of a document submitted to a Senate committee. Although the committee concluded in both cases that it was open to the committee and the Senate to find that a contempt of the Senate had been committed, it recommended that such a finding should not be made, given the particular circumstances of each case. It took the opportunity, however, to make general comments in relation to the premature publication of committee documents and reports, and formally drew certain matters to the attention of the President of the Senate, Senators and Ministers. The committee has found it useful to draw attention, in a formal way, to matters which might otherwise have escaped attention and to guide persons in their dealings with the Senate and its committees. The efficacy of deriving general principles from specific cases has been well illustrated by these two cases.
55. Specifically, the committee made observations and recommendations on matters such as timely presentation of committee reports, a proposed new procedure for debate on such reports, the rights and duties of Senators in performing their role as members of committees, and the obligations of public servants, and others, to conform to the requirements of the Senate regarding the making of submissions to committees. In all cases the committee's recommendations have been accepted by the Senate, and note has been taken of its observations.
56. These initiatives have resulted in proposed changes to the procedures of the Senate recommended by the Procedure Committee, which derived from matters referred to it on the recommendation of the Privileges Committee; thoughtful responses by ministers and public service

departments to the committee's initiative in drawing the attention of portfolio ministers to its comments on the premature release of departmental submissions, and the President's drawing the attention of Senators to matters raised in a committee report.

### **Report to the Senate**

57. The committee reports to the Senate that it considers that all these developments are highly desirable, and sees no reason why general principles may not be developed from individual cases in the future.

### **Conclusion**

58. The committee would be less than honest if it were to declare that it has welcomed the plethora of matters referred to it. Nonetheless, the variety and constancy of the matters have meant that it has had an opportunity to work out the implications of the new procedures, identify weaknesses, and develop for itself informal guidelines to supplement, in a practical way, the formal rules under which it must work. The committee considers that the process which it has been required to undertake has been worthwhile and has concluded that the new procedures adopted by the Senate on 25 February 1988 will continue to facilitate the consideration of matters such as these in years to come.

**Patricia Giles**  
Chair

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## APPENDICES

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## Parliamentary Privileges Act 1987

No. 21 of 1987

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## Parliamentary Privileges Act 1987

No. 21 of 1987

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**An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes**

*[Assented to 20 May 1987]*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

**Short title**

1. This Act may be cited as the *Parliamentary Privileges Act 1987*.

5 **Commencement**

2. This Act shall come into operation on the day on which it receives the Royal Assent.



**Interpretation**

3. (1) In this Act, unless the contrary intention appears—

“committee” means—

(a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act; or 5

(b) a sub-committee of a committee referred to in paragraph (a);

“court” means a federal court or a court of a State or Territory;

“document” includes a part of a document; 10

“House” means a House of the Parliament;

“member” means a member of a House;

“tribunal” means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power. 15

(2) For the purposes of this Act, the submission of a written statement by a person to a House or a committee shall, if so ordered by the House or the committee, be deemed to be the giving of evidence in accordance with that statement by that person before that House or committee. 20

(3) In this Act, a reference to an offence against a House is a reference to a breach of the privileges or immunities, or a contempt, of a House or of the members or committees.

**Essential element of offences**

4. Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member’s duties as a member. 25

**Powers, privileges and immunities** 30

5. Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

**Contempts by defamation abolished** 35

6. (1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Sub-section (1) does not apply to words spoken or acts done in the presence of a House or a committee. 40

**Penalties imposed by Houses**

7. (1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

5 (2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of a House.

10 (3) A House does not have power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

(4) A resolution of a House ordering the imprisonment of a person in accordance with this section may provide that the President of the Senate or the Speaker of the House of Representatives, as the case requires, is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the President or the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) A House may impose on a person a fine—

(a) not exceeding \$5,000, in the case of a natural person; or

20 (b) not exceeding \$25,000, in the case of a corporation,

for an offence against that House determined by that House to have been committed by that person.

25 (6) A fine imposed under sub-section (5) is a debt due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose.

(7) A fine shall not be imposed on a person under sub-section (5) for an offence for which a penalty of imprisonment is imposed on that person.

30 (8) A House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

**Houses not to expel members**

8. A House does not have power to expel a member from membership of a House.

**Resolutions and warrants for committal**

35 9. Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

**Reports of proceedings**

10. (1) It is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee. 5

(2) Sub-section (1) does not apply in respect of matter published in contravention of section 13.

(3) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted. 10

**Publication of tabled papers**

11. (1) No action, civil or criminal, lies against an officer of a House in respect of a publication to a member of a document that has been laid before a House.

(2) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted. 15

**Protection of witnesses**

12. (1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence. 20

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or  
(b) in the case of a corporation, \$25,000. 25

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of—

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given,

before a House or a committee. 30

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee. 35

**Unauthorised disclosure of evidence**

13. A person shall not, without the authority of a House or a committee, publish or disclose—

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by 40

a House or a committee to be treated as evidence taken in camera;  
or

(b) any oral evidence taken by a House or a committee in camera, or  
a report of any such oral evidence,

5 unless a House or a committee has published, or authorised the publication  
of, that document or that oral evidence.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment  
for 6 months; or

(b) in the case of a corporation, \$25,000.

10 **Immunities from arrest and attendance before courts**

14. (1) A member—

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause,

on any day—

15 (c) on which the House of which that member is a member meets;

(d) on which a committee of which that member is a member meets;  
or

(e) which is within 5 days before or 5 days after a day referred to in  
paragraph (c) or (d).

20 (2) An officer of a House—

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause,

on any day—

25 (c) on which a House or a committee upon which that officer is  
required to attend meets; or

(d) which is within 5 days before or 5 days after a day referred to in  
paragraph (c).

(3) A person who is required to attend before a House or a committee  
on a day—

30 (a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause,

on that day.

35 (4) Except as provided by this section, a member, an officer of a House  
and a person required to attend before a House or a committee has no  
immunity from compulsory attendance before a court or a tribunal or from  
arrest or detention in a civil cause by reason of being a member or such an  
officer or person.

**Application of laws to Parliament House**

40 15. It is hereby declared, for the avoidance of doubt, that, subject to  
section 49 of the Constitution and this Act, a law in force in the Australian  
Capital Territory applies according to its tenor in and in relation to any

building in the Territory in which a House meets, except as otherwise provided by that law or any other law.

#### **Parliamentary privilege in court proceedings**

16. (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section. 5

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes— 10

- (a) the giving of evidence before a House or a committee, and evidence so given; 15
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and 20
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of— 25

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or 30
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not— 35

- (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or 40
- (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence,

unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to—

- 5 (a) a question arising under section 57 of the Constitution; or  
(b) the interpretation of an Act,

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making  
10 of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments,  
15 in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

20 **Certificates relating to proceedings**

17. For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that—

- 25 (a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee;  
(b) a particular document was directed by a House or a committee to be treated as evidence taken in camera;  
(c) certain oral evidence was taken by a committee in camera;  
30 (d) a document was not published or authorised to be published by a House or a committee;  
(e) a person is or was an officer of a House;  
(f) an officer is or was required to attend upon a House or a committee;  
(g) a person is or was required to attend before a House or a committee on a day;  
35 (h) a day is a day on which a House or a committee met or will meet; or  
(i) a specified fine was imposed on a specified person by a House, is evidence of the matters contained in the certificate.

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[Minister's second reading speech made in—  
Senate on 7 October 1986  
House of Representatives on 19 March 1987]

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**SCHEDULE 2—continued**

APPENDIX A

*Parliamentary Privileges Act 1987*

**Section 15:**

Omit all the words after "tenor", substitute:

"(except as otherwise provided by that or any other law) in relation to:

- (a) any building in the Territory in which a House meets; and
  - (b) any part of the precincts as defined by subsection 3 (1) of the *Parliamentary Precincts Act 1988*."
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1986

THE SENATE

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PARLIAMENTARY PRIVILEGES BILL 1986  
(Mr President)

EXPLANATORY MEMORANDUM

**Purpose of the Bill**

This Bill has a two-fold purpose:

- (a) to provide for the principal changes in the law recommended by the Joint Select Committee on Parliamentary Privilege; and
- (b) to avoid the consequences of the interpretation of article 9 of the Bill of Rights 1688 by the judgments of Mr Justice Cantor and Mr Justice Hunt of the Supreme Court of New South Wales.

In putting forward this Bill, Mr President is responding to requests and suggestions by Honourable Senators following his statement in the Senate on 9 April 1986 concerning the judgment of Mr Justice Hunt. It was put to him that it would be appropriate for him to initiate the necessary legislative proposal to avoid the consequences of the court judgments and, at the same time, to give the Parliament the opportunity of considering the legislative changes recommended by the Joint Committee. Accordingly, Mr President arranged for the Bill to be drafted by one of the Senate Department's consultant draftsmen, Mr C.K. Comans, C.B.E., Q.C., formerly First Parliamentary

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Counsel. The Bill takes note of the provisions of the Parliamentary Powers, Privileges and Immunities Bill introduced into the Senate by Senator Macklin in 1985 and the Parliament (Powers, Privileges and Immunities) Bill introduced into the House of Representatives by Mr Spender in 1985. Those two Bills were designed to put into effect the recommendations of the Joint Committee. There are some departures from the recommendations of the Joint Committee in the Bill, and these are noted and the reasons for them explained in this memorandum.

**Explanation of clauses**

Clause 1: Short title

Clause 2: Commencement

The Bill is to come into operation on Royal Assent.

Clause 3: Interpretation

This clause provides the definitions necessary for the Bill.

The definition of "committee" covers all committees of either House, including committees of the whole, joint committees, and sub-committees.

"Document" is defined to include part of a document. The Acts Interpretation Act defines "document" to include any material containing meaningful symbols and any article from which sound, visual images or writing are capable of being reproduced.

"Tribunal" is defined to include any body having power to examine witnesses on oath, but does not include a court, which is separately defined to include all Australian courts, or a parliamentary committee.

3.

Sub-clause (2) makes it clear that a written submission received as evidence by a House or committee is to be regarded as evidence given before the House or committee.

Sub-clause (3) provides for a single phrase, "offence against a House", to be used for acts commonly called breaches of privilege but more correctly called contempts of a House.

**Clause 4: Essential element of offences**

This clause provides that conduct does not constitute an offence against a House unless it amounts to an improper interference with a House, its committees or members. Such a provision was not recommended by the Joint Committee, but it is thought to be a useful adjunct to clause 9, and together the two clauses will provide for review by the courts of any imprisonment of a person by a House.

**Clause 5: Powers, privileges and immunities**

This clause provides that the powers, privileges and immunities of each House continue in force except to the extent that they are altered by the Bill. This is in accordance with the recommendations of the Joint Committee.

**Clause 6: Contempts by defamation abolished**

This clause provides that it shall no longer be an offence against a House for any person to defame or criticise a House or its members or committees, in accordance with the recommendation of the Joint Committee.

Sub-clause (2) provides that this does not apply to words spoken or acts done in the presence of a House or committee. This is to ensure that a House or a committee can take appropriate action in a situation where a witness or a member of the public makes insulting or offensive remarks at a sitting of a House or a committee.

Clause 7: Penalties imposed by Houses

This clause provides that a House may impose a penalty of a fixed term of imprisonment not exceeding six months and may impose fines, in accordance with the recommendations of the Joint Committee.

Clause 8: Houses not to expel members

This clause abolishes the power of the Houses to expel their members, in accordance with the recommendations of the Joint Committee.

Clause 9: Resolutions and warrants for committal

This clause provides that if a House imposes a penalty of imprisonment upon a person, the resolution of the House and the necessary warrant to commit the person to custody shall set out particulars of the offence committed by the person. This provision is in accordance with the recommendations of the Joint Committee.

The Bill does not contain the provision recommended by the Joint Committee for the High Court to make a non-enforceable declaration concerning an imprisonment of a person by a House. Advice was received that a legislative provision to that effect would be invalid, because it would amount to requiring or empowering the High Court to give an advisory opinion. The Bill also does not prevent a person who is imprisoned by a House

from seeking a review by a court of the House's action by other means, such as by application for a writ of habeas corpus.

Any requirement for specification of the offence in a warrant would have the effect that a court could determine whether the ground for the imprisonment of a person was sufficient in law to amount to a contempt of a House: R. v Richards: ex parte Fitzpatrick and Browne (1955) 92 C.L.R. 157, at p. 162. This clause, in conjunction with clause 4, will have the effect that a court may review any imprisonment of a person by a House to determine whether the person's conduct was capable of constituting an offence as defined by clause 4.

**Clause 10: Reports of proceedings**

This clause provides for the defence of qualified privilege for the publication of reports of parliamentary proceedings, in accordance with the recommendations of the Joint Committee. The clause follows the draft Bill proposed by the Australian Law Reform Commission in its report on unfair publication (report No. 11, 1979).

**Clause 11: Publication of tabled papers**

This clause provides for absolute privilege for the publication, by officers of a House to members, of a document laid before a House, in accordance with the recommendations of the Joint Committee.

The standing orders of both Houses provide that a tabled document is public, and in practice papers tabled in the Senate are given virtually unlimited publication. Because of this, consideration was given to extending absolute privilege to any publication of

a tabled document, but this may be thought to be unduly wide. The Senate may wish to give consideration to the appropriateness of its standing order.

Clause 12: Protection of witnesses

This clause creates criminal offences and provides for penalties in respect of interference with parliamentary witnesses, in accordance with the recommendations of the Joint Committee.

Clause 13: Unauthorised disclosure of evidence

This clause creates a criminal offence and provides penalties in respect of the unauthorised disclosure of in camera evidence taken by a House or committee. This was not recommended by the Joint Committee, but it is thought that it is a logical extension of the provision for protection of witnesses.

Clause 14: Immunities from arrest and attendance before courts

This clause restricts the immunities of members, officers and witnesses from civil arrest and from compulsory evidence before a court to days on which the relevant House or committee sits and, in the case of members and officers, to the period extending from five days before and five days after such a sitting, in accordance with the recommendations of the Joint Committee.

Clause 15: Application of laws to Parliament House

The Joint Committee recommended that doubts about the application of particular laws to Parliament House should be removed. This clause provides that a law in force in the A.C.T. applies in Parliament House subject to the powers, privileges and immunities of the Houses and any contrary statutory provision. The

clause is unnecessary because it is clear that the powers, privileges and immunities of the Houses do not involve any general abrogation of the law in Parliament House, but the clause is included because of persistent, though ill-founded, doubts about this. The clause is drafted so as to be consistent with another Bill prepared by Mr President, the Parliamentary Precincts Bill 1986, which is designed to put into effect the recommendations of the Joint Committee on the New Parliament House in relation to the parliamentary precincts.

Clause 16: Parliamentary privilege in court proceedings

The purpose of this clause is to avoid the consequences of the interpretation of article 9 of the Bill of Rights 1688 by the judgments of Mr Justice Cantor and Mr Justice Hunt of the Supreme Court of New South Wales.

Article 9, which applies to the Australian Parliament by virtue of section 49 of the Constitution, provides

"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

In the past the courts have held that the article prevents parliamentary proceedings from being examined or questioned in a wide sense or used to support a cause of action (Church of Scientology of California v Johnson-Smith (1972) 1 QB 522, R. v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc, (1983) 2 All ER 233, Comalco Ltd v Australian Broadcasting Corporation (1983) 50 ACTR 1; these judgments were based on authorities stretching back to 1688).

In each trial of R. v Murphy, in the Supreme Court of New South Wales, counsel instructed by the President of the Senate submitted that article 9 prevents the cross-examination of witnesses or the accused on evidence which they gave before parliamentary committees for the purpose of impeaching the evidence of witnesses or the accused.

On 5 June 1985 Mr Justice Cantor, before the first trial, gave a judgment to the effect that article 9 does not prevent the cross-examination of persons in court proceedings on their parliamentary evidence, that the test of a violation of article 9 is whether there is any adverse effect on parliamentary proceedings, and that the protection of parliamentary proceedings must be "balanced" against the requirements of court proceedings. Subsequently in the course of the trial a witness was extensively cross-examined on evidence given before a Senate committee, including evidence given in camera, and the truthfulness of that evidence was questioned. The accused was cross-examined on a written statement which he had submitted to a Senate committee and which had been treated as in camera evidence, and the prosecution made submissions to the jury questioning the truthfulness of the accused on the basis of that evidence, despite objections by the defence.

In R. v Foord, Mr Justice Cantor's judgment was followed and witnesses in that trial were extensively cross-examined on the truthfulness of their evidence before Senate committees and their motives in giving that evidence.



On 8 April 1986 Mr Justice Hunt, before the second trial in R. v Murphy, gave a judgment which expressly repudiated the law expounded in the cases cited, and which held that article 9 prevented only parliamentary proceedings being the actual subject of criminal and civil action, but allowed the use of parliamentary proceedings as evidence of an offence, to impeach the evidence of witnesses or the accused or to support a cause of action.

The clause would prevent such use of proceedings in Parliament and restore the interpretation of article 9 contained in the earlier judgments.

The clause declares that article 9 applies in respect of the Australian Parliament and that it has the effect indicated by the provisions of the clause. The clause has been drafted in this way largely to avoid the difficulty which may be created for other jurisdictions if the Australian Parliament were to legislatively accept that article 9 as such has the restricted meaning given to it by the recent judgments and requires legislative supplementation to be given its broad interpretation. Article 9 is part of the law in many jurisdictions around the world, including the Australian States, and it has been indicated that Parliaments in those jurisdictions would not wish the Australian Parliament to be in any way accepting that article 9 may be read narrowly and that it requires such legislative supplementation.

Sub-clause (1): This sub-clause declares that article 9 applies in relation to the Australian Parliament and is to be construed in accordance with the provisions of the clause.

Sub-clause (2): It is necessary to define the phrase "proceedings in Parliament", which sets the scope of the immunity contained in article 9. The phrase is defined to include all words spoken and acts done in transacting the business of the Houses or their committees, including the preparation and submission of documents.

Sub-clause (3): This sub-clause prevents the use of parliamentary proceedings in court or tribunal proceedings -

- (a) in a manner involving questioning or relying on the truth, motive, good faith or intention of words spoken or acts done in the parliamentary proceedings;
- (b) to attack or support the evidence or credibility of persons giving evidence in court or tribunal proceedings; and
- (c) to draw inferences or conclusions for the purposes of the court or tribunal proceedings.

Sub-clause (4): This sub-clause prevents evidence which has been taken in camera by a House or a committee and not published from being used in court proceedings, as was done in R. v Murphy and R. v Foord. The sub-clause covers documents specifically prepared for submission to a House or a committee and accepted as in camera evidence, and oral evidence taken in camera.

Sub-clause (5): It may be necessary for a court to examine proceedings in Parliament for the purpose of determining a question arising under section 57 of the

Constitution after a double dissolution (e.g., whether the Senate failed to pass a Bill), or interpreting an Act of the Parliament (the Acts Interpretation Act allows for that purpose reference to parliamentary proceedings, including second reading speeches, reports of committees and amendments moved and determined). This sub-clause therefore provides that neither this clause nor the Bill of Rights shall be taken to prevent the admission in evidence in the court proceedings of parliamentary records for those purposes. Nothing in the sub-clause makes admissible anything which would otherwise not be admissible.

Sub-clause (6): This Bill would provide for statutory offences (interference with witnesses, clause 12, and unauthorised disclosure of evidence, clause 13) which relate to proceedings in committees. There are also Acts establishing statutory parliamentary committees which provide for offences relating to proceedings in those committees (e.g., giving false evidence before a committee). It may well be impossible to conduct any proceedings in the courts in relation to such offences without use of evidence relating to the relevant parliamentary proceedings. This sub-clause therefore provides that neither this clause nor the Bill of Rights shall be taken to prevent the admission of evidence concerning parliamentary proceedings in relation to such court proceedings.

Sub-clause (7): This sub-clause would prevent the provisions of the Bill from applying to court proceedings commenced before the Bill comes into operation, but does not prejudice article 9 itself, as properly interpreted, in its application to such court proceedings.

Clause 17: Certificates relating to proceedings

This clause provides for the Presiding Officers of the Houses and chairmen of committees to certify various matters relating to the proceedings of the Houses or committees for evidentiary purposes. Under the clause a certificate, for example, signed by the President of the Senate indicating that a person is an officer of the Senate, would be accepted as proof of that fact in the absence of any evidence to the contrary.

PARLIAMENTARY PRIVILEGES BILL 1986  
(Mr President)

LIST OF CLAUSES SHOWING CORRESPONDING RECOMMENDATIONS  
OF THE JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE  
AND ANY DIFFERENCES BETWEEN THE BILL AND THE RECOMMENDATIONS

Clause	Recommendation No.	Differences in Bill, if any
6 Contempts by defamation abolished	15	an exception made for contempts in the presence of a House or committee as indicated in the explanatory memorandum
7 Penalties imposed by Houses	18, 19	the fine for corporations increased from \$10,000 to \$25,000; other powers to commit not abolished (follows Macklin and Spender Bills)
8 Houses not to expel members	25	
9 Resolutions and warrants for committal	23	
10 Reports of proceedings	7	
11 Publication of tabled papers	6	

14.

Clause	Recommendation No.	Differences in Bill, if any
12 Protection of witnesses	34	
14 Immunities from arrest and attendance before courts	10, 12	extended to officers and witnesses before committees, but only on the day of their appearance in the case of witnesses
15 Application of laws to Parliament House	31	extended to all laws in force in the ACT, as indicated in explanatory memorandum

1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

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PARLIAMENTARY PRIVILEGES BILL 1987

EXPLANATORY MEMORANDUM

ERRATUM

In the note on clause 14, at page 6 of the Senate explanatory memorandum and page 8 of the House of Representatives explanatory memorandum, the phrase "from compulsory evidence before a court" should read "from compulsory attendance before a court".

- the Parliament House Construction Authority Act 1979 to remove the requirement for the Authority to consent to the granting of leases or licences within the precincts; and
- the Parliamentary Privileges Act 1987 to adapt s. 15 of that Act to reflect the declaration of the precincts under the Bill. Section 15 currently declares, for the avoidance of doubt, that, subject to Section 49 of the Constitution and the Privileges Act, a law in force in the Australian Capital Territory applies according to its tenor in and in relation to any building in the Territory in which a House meets, except as otherwise provided by that law or any other law.

**Schedule 1 : Parliamentary Precincts**

**Schedule 2 : Amendments of Other Acts**

**Schedule 3 : Schedule to be inserted in the Parliament Act 1974.**



**PARLIAMENTARY PRIVILEGE**

**RESOLUTIONS AGREED TO BY THE SENATE ON  
25 FEBRUARY 1988**

**1. Procedures to be observed by Senate committees for the protection of witnesses**

That, in their dealings with witnesses, all committees of the Senate shall observe the following procedures:

- (1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.
- (2) Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made) only where the committee has made a decision that the circumstances warrant such an order.
- (3) A witness shall be given reasonable notice of a meeting at which the witness is to appear, and shall be supplied with a copy of the committee's order of reference, a statement of the matters expected to be dealt with during the witness's appearance, and a copy of these procedures. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.
- (4) A witness shall be given opportunity to make a submission in writing before appearing to give oral evidence.
- (5) Where appropriate, reasonable opportunity shall be given for a witness to raise any matters of concern to the witness relating to the witness's submission or the evidence the witness is to give before the witness appears at a meeting.
- (6) A witness shall be given reasonable access to any documents that the witness has produced to a committee.

- (7) A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.
- (8) Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.
- (9) A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.
- (10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.
- (11) Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.

- (12) Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.
- (13) Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (12) is not taken in respect of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.
- (14) A witness may make application to be accompanied by counsel and to consult counsel in the course of a meeting at which the witness appears. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision.
- (15) A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears.
- (16) An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.
- (17) Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.
- (18) Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.

## **2. Procedures for the protection of witnesses before the Privileges Committee**

That, in considering any matter referred to it which may involve, or gives rise to any allegation of, a contempt, the Committee of Privileges shall observe the procedures set out in this resolution, in addition to the procedures required by the Senate for the protection of witnesses before committees. Where this resolution is inconsistent with the procedures required by the Senate for the protection of witnesses, this resolution shall prevail to the extent of the inconsistency.

- (1) A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the Committee and relevant to the Committee's inquiry, against the person, and of the particulars of any evidence which has been given in respect of the person.
- (2) The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:
  - (a) making written submission to the Committee;
  - (b) giving evidence before the Committee;
  - (c) having other evidence placed before the Committee; and
  - (d) having witnesses examined before the Committee.
- (3) Where oral evidence is given containing any allegation against, or reflecting adversely on, a person, the Committee shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.
- (4) A person appearing before the Committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.
- (5) A witness shall not be required to answer in public session any question where the Committee has reason to believe that the answer may incriminate the witness.
- (6) Witnesses shall be heard by the Committee on oath or affirmation.

- (7) Hearing of evidence by the Committee shall be conducted in public session, except where:
  - (a) the Committee accedes to a request by a witness that the evidence of that witness be heard in private session;
  - (b) the Committee determines that the interests of a witness would best be protected by hearing evidence in private session; or
  - (c) the Committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.
- (8) The Committee may appoint, on terms and conditions approved by the President, counsel to assist it.
- (9) The Committee may authorize, subject to rules determined by the Committee, the examination by counsel of witnesses before the Committee.
- (10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.
- (11) The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.
- (12) Before appearing before the Committee a witness shall be given a copy of this resolution.

**3. Criteria to be taken into account when determining matters relating to contempt**

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.

**4. Criteria to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business**

Notwithstanding anything contained in the Standing Orders, in determining whether a motion arising from a matter of privilege should have precedence of other business, the President shall have regard only 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.

## **5. Protection of persons referred to in the Senate**

- (1) Where a person who has been referred to by name, or in such a way as to be readily identified, in the Senate, makes a submission in writing to the President:
  - (a) claiming that the person has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person; and
  - (b) requesting that the person be able to incorporate an appropriate response in the parliamentary record,

if the President is satisfied:

- (c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Committee of Privileges; and
- (d) that it is practicable for the Committee of Privileges to consider the submission under this resolution,

the President shall refer the submission to that Committee.

- (2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Senate.
- (3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Senator who referred in the Senate to that person.

- (4) In considering a submission under this resolution, the Committee shall meet in private session.
- (5) The Committee shall not publish a submission referred to it under this resolution or its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Senate.
- (6) In considering a submission under this resolution and reporting to the Senate the Committee shall not consider or judge the truth of any statements made in the Senate or of the submission.
- (7) In its report to the Senate on a submission under this resolution, the Committee may make either of the following recommendations:
  - (a) that no further action be taken by the Senate or by the Committee in relation to the submission; or
  - (b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person and the Committee, be published by the Senate or incorporated in *Hansard*,

and shall not make any other recommendations.

- (8) A document presented to the Senate under paragraph (5) or (7):
  - (a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and
  - (b) shall not contain any matter the publication of which would have the effect of:
    - (i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or
    - (ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.



## **6. Matters constituting contempts**

That, without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

### **Interference with the Senate**

- (1) A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator's duties as a Senator.

### **Improper influence of Senators**

- (2) 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 a Senator in the Senator's conduct as a Senator or induce a Senator to be absent from the Senate or a committee.

### **Senators seeking benefits etc.**

- (3) A Senator shall not ask for, receive or obtain, any property or benefit for the Senator, or another person, on any understanding that the Senator will be influenced in the discharge of the Senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Senator's independence or freedom of action as a Senator, or pursuant to which the Senator is in any way to act as the representative of any outside body in the discharge of the Senator's duties.

### **Molestation of Senators**

- (4) A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, a Senator on account of the Senator's conduct as a Senator.

#### **Disturbance of the Senate**

- (5) A person shall not wilfully disturb the Senate or a committee while it is meeting, or wilfully engage in any disorderly conduct in the precincts of the Senate or a committee tending to disturb its proceedings.

#### **Service of writs etc.**

- (6) A person shall not serve or execute any criminal or civil process in the precincts of the Senate on a day on which the Senate meets except with the consent of the Senate or of a person authorised by the Senate to give such consent.

#### **False reports of proceedings**

- (7) A person shall not wilfully publish any false or misleading report of the proceedings of the Senate or of a committee.

#### **Disobedience of orders**

- (8) A person shall not, without reasonable excuse, disobey a lawful order of the Senate or of a committee.

#### **Obstruction of orders**

- (9) A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Senate or of a committee.

#### **Interference with witnesses**

- (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.

#### **Molestation of witnesses**

- (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.

**Offences by witnesses etc.**

- (12) A witness before the Senate or a committee shall not:
- (a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;
  - (b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or
  - (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 material particular.
- (13) A person shall not, without reasonable excuse:
- (a) refuse or fail to attend before the Senate or a committee when ordered to do so; or
  - (b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a committee.
- (14) A person shall not wilfully avoid service of an order of the Senate or of a committee.
- (15) A person shall not destroy, damage, forge or falsify any document required to be produced by the Senate or by a committee.

**Unauthorised disclosure of evidence etc.**

- (16) A person shall not, without the authority of the Senate or a committee, publish or disclose:
- (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;
  - (b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or

- (c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.

## **7. Raising of matters of privilege**

That, notwithstanding anything contained in the Standing Orders, a matter of privilege shall not be brought before the Senate except in accordance with the following procedures:

- (1) A Senator intending to raise a matter of privilege shall notify the President, in writing, of the matter.
- (2) The President shall consider the matter and determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate. The President's decision shall be communicated to the Senator, and, if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the Senate.
- (3) A Senator shall not take any action in relation to, or refer to, in the Senate, a matter which is under consideration by the President in accordance with this resolution.
- (4) Where the President determines that a motion relating to a matter should be given precedence of other business, the Senator may, at any time when there is no other business before the Senate, give notice of a motion to refer the matter to the Committee of Privileges. Such notice shall take precedence of all other business on the day for which the notice is given.
- (5) A determination by the President that a motion relating to a matter should not have precedence of other business does not prevent a Senator in accordance with other procedures taking action in relation to, or referring to, that matter in the Senate, subject to the rules of the Senate.
- (6) Where notice of a motion is given under paragraph (4) and the Senate is not expected to meet within the period of one week occurring immediately after the day on which the notice is given, the motion may be moved on that day.

## **8. Motions relating to contempts**

That, notwithstanding anything contained in the Standing Orders, a motion to:

- (a) determine that a person has committed a contempt; or
- (b) impose a penalty upon a person for a contempt,

shall not be moved unless notice of the motion has been given not less than 7 days before the day for moving the motion.

## **9. Exercise of Freedom of Speech**

- (1) That the Senate considers that, in speaking in the Senate or in a committee, Senators should take the following matters into account:
  - (a) the need to exercise their valuable right of freedom of speech in a responsible manner;
  - (b) the damage that may be done by allegations made in Parliament to those who are the subject of such allegations and to the standing of Parliament;
  - (c) the limited opportunities for persons other than members of Parliament to respond to allegations made in Parliament;
  - (d) the need for Senators, while fearlessly performing their duties, to have regard to the rights of others; and
  - (e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.
- (2) That the President, whenever the President considers that it is desirable to do so, may draw the attention of the Senate to the spirit and the letter of this resolution.

## **10. Reference to Senate proceedings in court proceedings**

- (1) That, without derogating from the law relating to the use which may be made of proceedings in Parliament under section 49 of the Constitution, and subject to any law and any order of the Senate relating to the disclosure of proceedings of the Senate or a committee, the Senate declares that leave of the Senate is not

required for the admission into evidence, or reference to, records or reports of proceedings in the Senate or in a committee of the Senate, or the admission of evidence relating to such proceedings, in proceedings before any court or tribunal.

- (2) That the practice whereby leave of the Senate is sought in relation to matters referred to in paragraph (1) be discontinued.
- (3) That the Senate should be notified of any admission of evidence or reference to proceedings of the kind referred to in paragraph (1), and the Attorneys-General of the Commonwealth and the States be requested to develop procedures whereby such notification may be given.

#### **11. Consultation between Privileges Committees**

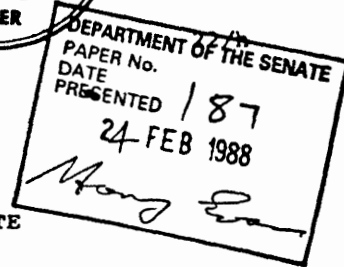
That, in considering any matter referred to it, the Committee of Privileges may confer with the Committee of Privileges of the House of Representatives.



APPENDIX A

PARLIAMENTARY PRIVILEGE

PROPOSED RESOLUTIONS OF THE SENATE



EXPLANATORY NOTES

These notes list the recommendations of the Joint Select Committee on Parliamentary Privilege on which the proposed resolutions are based, and indicate the nature of and the reasons for any proposed modifications of the terms of the Committee's recommendations.

Some of the Committee's recommendations were for amendments to the Standing Orders, but the following all take the form of resolutions, in accordance with the practice of trying new procedures by resolution before they are written into the Standing Orders. It may also be desirable to keep all the matters together rather than have them scattered through the Standing Orders.

The proposed resolutions have been drafted so as to be consistent with the Parliamentary Privileges Act 1987.

Minor changes to the wording of resolutions recommended by the Committee and changes to take account of Senate practice and phraseology are not noted.

**Proposed resolution 1: Procedures to be observed by Senate committees for the protection of witnesses**

Recommendation 35 of the Committee. The Committee substantially adopted a suggested resolution put to it by the Senate Department, which reflected practices already adopted by Senate committees. The following modifications have been suggested to the resolution recommended by the Committee.

- (1) The resolution recommended by the Committee was limited to "investigatory" committees. There would seem to be no reason for not extending it to all committees.
- (2) Paragraph (5), referring to opportunity for witnesses to raise matters of concern to them before they give evidence, was not included in the Committee's recommendation, but it is suggested that it be included in the resolution.
- (3) Paragraph (6) of the Committee's recommended resolution would require reasons for refusing a witness's application to be heard in camera to be given in public. It may well be that a witness would prefer not to have the reasons published, and this is reflected in the proposed resolution (paragraph (7)).
- (4) Words have been added to paragraph (7) to make it clear that a witness may ask to give part of the witness's evidence in private session during the hearing of the witness's evidence. The witness may wish to answer a particular question in camera.
- (5) Paragraph (9) has been altered to make it clear that it is the responsibility of the chairman to rule on the relevance and necessity of a particular question, but that it is open to the committee to deliberate in private session and to determine whether any particular question, the relevance or necessity of which has been questioned, should be asked.



- (6) Paragraph (10) has been altered to make it clear that it is open to the committee to determine at once, without going into private session to deliberate, that a question objected to by a witness should not be pressed. It may happen that a Senator immediately withdraws a question to which objection has been taken, and the committee accepts the withdrawal of the question.
- (7) Paragraph (12) of the Committee's recommended resolution would provide that a committee may give reasonable opportunity for a person to respond to evidence adverse to the person. There would seem to be no reason for not making the reasonable opportunity mandatory, given that a committee may decide what is a reasonable opportunity in the circumstances (paragraph (13) of the proposed resolution).
- (8) Paragraph (14) has been changed to provide a criterion for a committee to use when determining whether a request for a witness to be accompanied by counsel will be granted, namely, the need for the witness to be accompanied by counsel to ensure the proper protection of the witness.
- (9) Words have been added to paragraph (15) to make provision for application by a witness for the reimbursement of legal costs where the witness has been granted the right to be accompanied by counsel, and for the committee to consider such application.
- (10) Paragraph (16) is a new paragraph providing for a witness to make application for the reimbursement of expenses incurred in direct consequence of making a submission to a committee or giving evidence, and for the committee to consider such application.

**Proposed resolution 2: Procedures for the protection of witnesses before the Privileges Committee**

Recommendation 21 of the Committee. The Committee did not recommend the terms of a resolution. The procedures recommended by the Committee are cast in the form of conferring protection upon persons "against whom a complaint has been made". The difficulty with this formulation is that a reference to the Privileges Committee often does not contain a complaint against any person, but merely refers to a matter which may involve or may give rise to an allegation of contempt against a person. The Privileges Committee has the task of investigating the matter to determine whether any contempt has been committed, and if so, by whom, and of hearing evidence and making a determination in relation to any allegation of contempt which may emerge during the inquiry. In other words, it combines the functions of an investigative agency and a court of first hearing in a criminal matter. A person who is called merely as a witness may turn out to be the person against whom an allegation is made, and different allegations may be made against different people.

It would seem, therefore, to be preferable to confer protection on all persons involved in the Privileges Committee's inquiry against whom any allegation is made or any adverse evidence given, regardless of whether those persons are in the position of an "accused". This would have a considerable advantage over criminal proceedings in a court. In such proceedings very damaging accusations may be made against witnesses, by cross-examination and submissions, without those witnesses having any opportunity to respond or defend themselves; only the accused is protected, and only in relation to conviction for the specific charges before the court.

The proposed resolution had been drafted accordingly, and because of this it is substantially different from the rules suggested by the Committee. The proposed resolution having been drafted in

this way, it subsumes recommendation 24 of the Committee, relating to the reputations of "third persons" in Privileges Committee inquiries.

Other modifications of the Committee's recommendation are as follows.

- (1) Paragraph (a) of the Committee's recommended rules would give the Privileges Committee discretion to hear evidence in camera. Paragraph (7) of the proposed resolution would allow the Privileges Committee to hear evidence in camera only for the purpose of protecting witnesses or where the Committee considers it otherwise appropriate. It may be that the protection of witnesses should be the sole ground.
- (2) Paragraph (h) of the Committee's recommended resolution would allow the person "against whom the complaint is made" to make submissions "at the conclusion of the evidence". This provision is based on the analogy with criminal proceedings. Paragraph (10) of the proposed resolution would allow any person affected by proposed findings of the Committee to make submissions on those findings before the findings are finally formulated and presented to the Senate.

**Proposed resolution 3: Criteria to be taken into account when determining matters relating to contempt**

Recommendation 14 of the Committee. The proposed resolution is cast in the form of a declaration by the Senate that it will take criteria into account in determining whether matters should be referred to the Privileges Committee and whether a contempt has been committed, rather than a resolution expressing an opinion as to how the penal jurisdiction should be exercised as recommended by the Committee. The proposed resolution would also require the Privileges Committee to take the stated matters into account.

Paragraph (a) of the proposed resolution contains the principle recommended by the Committee. Other matters not recommended by the Committee are suggested, as follows:

paragraph (b): the existence of another remedy, ie., a civil or criminal action; and

paragraph (c): mens rea and reasonable excuse.

**Proposed resolution 4: Matters to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business**

The Committee did not recommend any specification of the matters to be taken into account in determining whether a motion should have precedence, but it would seem to be desirable to give the President some guidance in exercising this discretion, and to use the same criteria as the Senate itself would adopt to determine whether a contempt has been committed, except those which would involve any judgement of the content of an alleged contempt. The proposed resolution has been drafted accordingly.

**Proposed resolution 5: Protection of persons referred to in the Senate**

Recommendation 3 of the Committee. The Committee did not formulate a specific resolution, but suggested a series of ground rules for incorporation on a trial basis in the Standing Orders.

Modifications have been made to the procedures recommended by the Committee, as follows.

- (1) The Committee suggested that a complaint of misuse of privilege should not contain "any matter amounting either directly or indirectly to an attack or a reflection on any Member of Parliament". It is suggested that this criterion not be adopted. It may be extremely difficult for a person to claim that the person has been unfairly attacked in

Parliament without at least indirectly reflecting on a member. Such a person may well need to state that a member did not tell the truth, which would be a grave reflection.

- (2) The Committee suggested procedures that leave the Committee of Privileges at liberty to deal with the matter in any way it thinks fit. The proposed resolution would restrict the Committee to specific procedures and remedies. It is suggested that it would be desirable to do this to prevent undue interference with a member's freedom of speech.

**Proposed resolution 6: Matters constituting contempts**

Recommendations 27 to 33 of the Committee. The proposed resolution has been cast in the form of a declaration by the Senate, for the information of the public, as to matters it may treat as contempts.

The guidelines recommended by the Committee were taken from the Offences Against the Parliament Bill 1981 introduced by Senator Button. The Committee departed from the provisions of Senator Button's Bill in a few places, and these departures are the subject of suggested modifications.

The following comments are offered and modifications suggested in relation to the Committee's suggested guidelines.

- (1) The Committee suggested, as part of its description of "molestation", that it would be a contempt to "engage in any course of conduct intended to influence a Member in the discharge of his duties as a Member". It is suggested that this formulation could be regarded as preventing normal, acceptable and democratic methods of influencing members, eg, telling a member that a vigorous campaign will be conducted against the member in the next election unless the member votes for a particular measure.

- (2) The Committee suggested a contempt involving a member receiving any benefit on the understanding that the member would be influenced in the discharge of the member's duties, or entering into any arrangement controlling or limiting a member's independence or freedom of action or involving the member acting as the representative of an outside body. Paragraph (2) of the proposed resolution contains the Committee's formulation. In so far as this is intended to relate to bribery and corruption of members, it may be regarded as already covered, to the extent necessary in a declaration for the guidance of the public, by paragraph (2) of the suggested resolution. It may be thought that the wording suggested by the Committee is too wide and could make contempts out of normal, acceptable and democratic activities, eg, a member agreeing to be bound by the decision of the member's party, or accepting the political support of an interest group, or agreeing to make representations on behalf of an interest group.
- (3) The contempt of impairing the respect due to the authority of a House or a committee has been omitted from paragraph (5), relating to disturbance of meetings. It is suggested that this phrase is too vague.
- (4) The provisions referring to the publication of in camera evidence and premature publication of reports have been combined in paragraph (16), and drafted so as to be consistent with the Parliamentary Privileges Act 1987.

**Proposed resolution 7: Raising of matters of privilege**

Recommendation 20 of the Committee. No substantive changes are suggested to the procedures recommended by the Committee.

**Proposed resolution 8: Motions relating to contempts**

Recommendation 22 of the Committee. The Committee recommended that 7 days' notice be given of any motion for the imposition of a penalty for a contempt. It is not clear in the Committee's report or the recommendation whether it was intended that this apply to a motion declaring a person to be guilty of a contempt as well as a motion for imposing a penalty. It has been assumed that this was the intention, and the proposed resolution has been drafted accordingly.

**Proposed resolution 9: Exercise of freedom of speech**

Recommendation 4 of the Committee.

The following modifications of the Committee's recommended resolution are suggested.

- (1) The Committee's resolution would enjoin members to take account of the listed matters when reflecting adversely on any person. It is suggested that members should be asked to take the listed matters into account before they make a decision to reflect adversely on any person. The suggested resolution is therefore drafted to request members to consider the matters whenever they speak.
- (2) The Committee's recommended resolution would ask members to take into account the damage that may be done by unsubstantiated allegations. It is suggested that members be asked to consider the damage that may be done by any allegations, whether substantiated or not.

**Proposed resolution 10: Reference to Senate proceedings in court proceedings**

Recommendation 8 of the Committee.

The following modifications of the Committee's recommended resolution are suggested.

- (1) It would not seem to be appropriate for a resolution to reaffirm a law which is not made by resolution in the first place. The terminology of non-derogation has been substituted.
- (2) Reference is made to any relevant law under section 49 of the Constitution, rather than only article 9 of the Bill of Rights, to take account of any possible interpretation of the effect of the Parliamentary Privileges Act 1987.
- (3) In order to take full account of the possibility of unauthorised publication of proceedings, it is necessary to refer to any relevant law (such as the Act) and any relevant order.
- (4) It would not seem to be appropriate for the Senate to be giving leave for evidence to be admitted when the courts have determined that leave is not as a matter of law necessary. The proposed resolution therefore declares that leave is not required.
- (5) The resolution recommended by the Committee refers only to records and reports of proceedings and documents. It is necessary to refer to any form of evidence relating to proceedings.

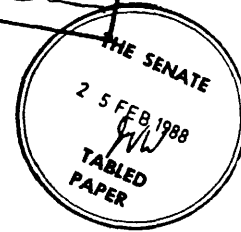


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**Proposed resolution 11: Consultation between Privileges  
Committees**

Recommendation 26 of the Committee. No modifications of the  
recommendation are suggested.

PAPER NO. OF THE SENATE I  
DATE PRESENTED 207 APPENDIX A  
2<sup>5</sup> FEB 1988 (5.96h)  
*Mary Swain*



PARLIAMENTARY PRIVILEGE

PROPOSED RESOLUTIONS OF THE SENATE

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Amendments to be moved by Senator Durack

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NOTES ON THE AMENDMENTS

**Resolution 1. Procedures to be observed by Senate committees for the protection of witnesses**

**Amendments (1) and (2).** These amendments make it clear that a committee is not obliged to issue an invitation to appear or to produce documents before issuing a summons if the committee decides that a summons is warranted.

**Amendments (3) and (4).** These amendments remove the references to reimbursement of legal costs of a person who is accompanied by counsel before a committee and to the reimbursement of expenses incurred by a person in making a submission or appearing before a committee. In the normal course of committee inquiries witnesses are not accompanied by counsel and meet their own expenses except for travel to and from committee meetings.

**Resolution 2. Procedures for the protection of witnesses before the Privileges Committee**

**Amendment (5).** This is purely a drafting amendment to make it clear that, as contemplated by paragraph (2), a witness against whom adverse evidence is given may make application to have other witnesses called as well as to cross-examine witnesses.

**Amendment (6).** The proposed new paragraph (11) makes it clear that the President is to grant reimbursement of the costs of representation of witnesses before the Committee only where the President is satisfied that a person would suffer substantial hardship due to liability to pay those costs.

**Resolution 5. Protection of persons referred to in the Senate**

**Amendment (7).** This would place an additional restriction on submissions by aggrieved persons, namely that submissions should not contain anything offensive in character.

**Amendment (8).** The differences between the original paragraphs (2) to (8) and the proposed new paragraphs are as follows:

- . amendments consequential on amendment (7) have been made throughout
- . the requirement for the committee to invite the aggrieved person and relevant Senators to give evidence has been deleted, and an option for the committee to confer with those persons has been substituted, and other references to receiving evidence have been deleted throughout

3.

- a requirement has been inserted that a response by an aggrieved person be succinct and relevant and not contain any offensive matter.

## PRIVILEGE RESOLUTIONS

RESPONSES TO QUESTIONS RAISED IN DEBATE ON  
25 FEBRUARY 1988

- (1) Senator Puplick asked (*Hansard* p. 634) whether there would be any difference between publication of a response by a person named in the Senate and incorporation of the response in *Hansard*. The only difference between the two methods is that when a document is ordered to be published by resolution of the Senate copies are distributed by the Table Office to the normal list of recipients or other inquirers, but the text does not appear in *Hansard*. It is envisaged that in particular circumstances, e.g., if a response were of considerable length or, possibly, a considerable time had elapsed since the debate in the Senate, the Senate may think it appropriate that the response be published rather than incorporated in *Hansard*.
- (2) Senator Puplick asked (*Hansard* p. 634) whether a response published or incorporated in *Hansard* would attract absolute privilege. A response published or incorporated would attract absolute privilege; that is why the rules provide that a response be succinct and strictly relevant and not contain anything offensive in character.
- (3) Senator Cooney asked (*Hansard* p. 636) about the appropriateness of considering whether a person had a reasonable excuse for committing an act which might be a contempt in relation to such offences as obstructing the Senate in the performance of its functions. Resolution 3 merely indicates that the Senate will consider whether any defence of reasonable excuse is available. Of course, there may be contempts which, by their nature, exclude any defence of reasonable excuse (e.g., threatening a witness), but that does not prevent the Senate from considering whether such a defence is available.
- (4) Senator Cooney asked (*Hansard* p. 637) whether questions as to a witness's credit would be regarded as relevant to a matter under inquiry by a committee. As Senator Durack pointed out, the question of whether a question is relevant would be determined in the first instance by the committee. A committee may well regard questions as to the credit of a witness as

relevant, depending on the circumstances, but it would be for the committee to decide, subject to any direction by the Senate. The same answer applies to a question asked by Senator Harradine (*Hansard* p. 638) concerning relevance of questions.

- (5) Senator Harradine questioned (*Hansard* pp. 638 and 639) the inclusion of the expression "improperly influence" in the list of matters which may be treated as contempts. Resolution 6, as its terms indicate, is intended to give some guidance as to matters which may be treated as contempts. It is in the nature of the offence concerned that it is not possible to specify in advance all methods of influencing Senators which may be regarded as improper. It is analogous to such statutory offences as attempting to pervert the course of justice.
- (6) Senator Harradine asked (*Hansard* p. 638) whether the existence of another remedy for an act which may be held to be a contempt, in the criteria to be taken into account when determining matters relating to contempts, refers to the ability to sue a person for an act which may be held to be a contempt. The criterion does refer to the availability of any civil or criminal remedy, but it does not follow that, as Senator Harradine suggested, no account will be taken of a matter because a civil or criminal remedy is available; it is merely a matter to be considered.
- (7) Senator Haines referred (*Hansard* pp. 639 and 640) to the inclusion in the list of matters which may be treated as contempts of the references to influencing Senators and Senators seeking benefits in return for the discharge of their parliamentary duties. That these statements may be too broadly worded was suggested in the explanatory notes accompanying the draft resolutions. Again it must be stressed, however, that Resolution 6 is simply an indication, for the guidance of the public, of matters which may be treated as contempts. The resolution does not commit the Senate Committee to treat any particular matters as contempts, nor does it affect the ability of the Senate to judge particular cases on their merits and according to circumstances. The resolution therefore does not create any difficulties or give rise to any questions which did not exist before the resolution was passed.

**COMMITTEE OF PRIVILEGES  
REPORTS 1966-1991**

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Unauthorised Publication of Draft Committee Report (No. 1)	4.5.71 (J555) <sup>1</sup>	Senate: <sup>2</sup> Motion moved by Chairman of Select Committee on Drug Trafficking and Drug Abuse (Senator Marriott) and agreed to 4.5.71	13.5.71 (J605)	<p><b>Findings</b></p> <ul style="list-style-type: none"> <li>● the publication prior to presentation to the Senate of contents of report constitutes a breach of the privileges of the Senate</li> <li>● the editor and publisher of the relevant newspapers are the responsible and culpable persons</li> <li>● the Senate has the power to commit to prison, to fine, to reprimand or admonish, or to otherwise withdraw facilities held, by courtesy of the Senate, in and around its precincts</li> </ul> <p><b>Recommendations</b></p> <ul style="list-style-type: none"> <li>● that the editor and publisher be reprimanded</li> <li>● that any such breach in future be met by a much heavier penalty</li> </ul>	Report adopted 13.5.71 (J606); persons attended and reprimanded 14.5.71 (J612)
Executive Government claim of Privilege (No.2)	17.7.75 (J836)	Senate: Motion moved by the Leader of the Opposition in the Senate (Senator Withers), amendment moved by Leader of Government in the Senate (Senator Wriedt), amendment negatived, motion agreed to 17.7.75	7.10.75 (J936)	<p><b>Findings</b></p> <ul style="list-style-type: none"> <li>● no breach of privilege involved (majority report)</li> <li>● claims of executive privilege were misconceived but that no action should be taken by the Senate (dissenting report)</li> </ul>	Motion for adoption of dissenting report debated 17.2.77 (J571)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Security in Parliament House (No.3)	4.4.78 (J88-9)	Senate: Motion moved by Senator Button, amendment moved by Senator Chaney, agreed to, motion as amended agreed to 4.4.78	30.5.78 (J207)	<p>Recommendations</p> <ul style="list-style-type: none"> <li>resolutions should be passed by both Houses to establish the police authority for Parliament's own protection</li> <li>external and internal policing of Parliament should be within the jurisdiction of one force</li> <li>a position of security coordinator, directly responsible to the Presiding Officers, should be permanently created</li> <li>certain methods of identification of members and visitors should be instituted</li> <li>an effective protection system is necessary for Parliament House and its occupants</li> <li>details of the agreed system should be incorporated in standing orders</li> </ul>	Report noted 17.8.78 (J310)
Quotation of Unparliamentary Language in Debate (No.4)	29.5.79 (J748)	Senate: Motion moved by Senator Georges and agreed to 29.5.79	20.9.79 (J936)	<p>Finding</p> <ul style="list-style-type: none"> <li>question not a matter of privilege</li> </ul> <p>Recommendation</p> <ul style="list-style-type: none"> <li>matter should be referred to Standing Orders Committee for consideration</li> </ul>	Report adopted 20.9.79 (J936)



REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Imprisonment of a Senator (No.5)	30.8.79 (J901-2)	Senate: Motion moved by Senator Georges and agreed to 30.8.79	25.10.79 (J1000)	<p><b>Finding</b></p> <ul style="list-style-type: none"> <li>imprisonment of a certain Senator did not attract the privilege of freedom from arrest</li> </ul> <p><b>Recommendations</b></p> <ul style="list-style-type: none"> <li>that certain resolutions relating to notification of detention of Senators should be agreed to</li> <li>if resolutions agreed to, Commonwealth and State Presiding Officers and Attorneys-General should confer upon action to be taken to secure compliance</li> </ul>	Resolutions agreed to 26.2.80 (J1153)
Harassment of a Senator (No.6)	26.5.81 (J271-2)	Senate: Motion moved by Senator Harradine and agreed to 26.5.81	11.6.81 (J388)	<p><b>Finding</b></p> <ul style="list-style-type: none"> <li>contempt found but no action recommended other than adoption of report</li> </ul>	Report adopted 22.10.81 (J591)
Unauthorised Publication of Committee Evidence taken <i>in camera</i> (No.7)	14.6.84 (J992)	Senate: Motion moved by Senator Tate and agreed to 14.6.84	17.10.84 (J1243)	<p><b>Findings</b></p> <ul style="list-style-type: none"> <li>publication constituted serious contempt of Senate</li> <li>editor and publisher of relevant newspaper should be held responsible and culpable for the publication</li> <li>author of articles culpable for the contempt</li> <li>publications were based on unauthorised disclosure by unknown person(s), and that such disclosure, if wilfully and knowingly made, constitutes serious contempt of Senate</li> <li>that committee would report on the question of penalty after persons affected place submissions before committee</li> </ul>	Report adopted 24.10.84 (J1295)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Questions of Appropriate Penalties Arising from the 7th Report of the Committee (No.8)	27.2.85 (J64)	Senate: Motion moved by Chairman of the Standing Committee of Privileges (Senator Childs) and agreed to 27.2.85	23.5.85 (J317)	<b>Recommendations</b> <ul style="list-style-type: none"> <li>● that no penalty be imposed at that time but that if further offence committed within the remainder of the session of Parliament consideration be given to impose an appropriate penalty for present offence</li> <li>● that legislation be introduced to put the power of the Houses of Parliament to find beyond doubt</li> </ul>	—
The Improper Disclosure and Misrepresentation by a Departmental Officer of an Amendment Prepared for Moving in the Senate (No.9)	23.4.85 (J193)	Senate: Motion moved by Senator Haines and agreed to 23.4.85	16.9.85 (J454)	<b>Recommendation</b> <ul style="list-style-type: none"> <li>● that matter be not further pursued</li> </ul>	Report adopted 18.9.85 (J470)
Detention of a Senator (No.10)	13.11.85 (J594)	Senate: Motion moved by Senator Reynolds and agreed to 13.11.85	5.12.86 (J1571)	<b>Recommendations</b> <ul style="list-style-type: none"> <li>● that certain resolutions be passed</li> <li>● that the Senate give consideration to the alteration of the immunity from arrest and detention</li> </ul>	Resolutions agreed to 18.3.87 (J1693-4)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT Tabled	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
The Circulation of Petitions (No.11)	16.3.88 (J556)	Senate: President determined precedence to notice of motion 15.3.88, motion moved by Leader of the Opposition in the Senate (Senator Chibney) 16.3.88, amendment moved by Senator Collins, agreed to motion, as amended, agreed to 16.3.88.	2.6.88 (J843)	Findings <ul style="list-style-type: none"> <li>● that the circulation of petitions is not absolutely privileged and is probably not subject to qualified privilege</li> <li>● that a change to the law would be required if Parliament were to determine that circulation of petitions should be privileged</li> <li>● that the circulation of petitions containing defamatory matter should not be privileged</li> <li>● that the circulation of most petitions requires no special protection and that therefore no change to present law is warranted</li> </ul>	Report noted 2.11.88 (J1065)
Person Referred to in the Senate (Mr T. Motion) (No.12)	30.11.88	President	7.12.88 (J1264)	Recommendation <ul style="list-style-type: none"> <li>● that response be incorporated in <i>Hansard</i></li> </ul>	Report adopted 13.12.88 (J1297)
Person Referred to in the Senate (Mr I.R. Cornelius) (No.13)	12.12.88	President	14.12.88 (J1314)	Recommendation <ul style="list-style-type: none"> <li>● that response be incorporated in <i>Hansard</i></li> </ul>	Report adopted 14.12.88 (J1314)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible False or Misleading Evidence and Manipulation of Evidence before Senate Committees – Travel by Aboriginal Community Representatives (No.14)	8.11.88 (J1098-9)	Senate: President determined precedence to notice of motion 7.11.88, motion moved by Leader of the Opposition in the Senate (Senator Chaney) and agreed to 8.11.88	28.2.89 (J1385)	<b>Finding</b> ● that on evidence available to the Committee (a) no false or misleading evidence was given to Estimate Committee E in relation to attendance of officers, (b) there was no attempt to manipulate the evidence laid before the Select Committee, and (c) therefore no contempt was committed	Report noted 12.4.89 (J1549)
Possible False or Misleading Evidence before a Senate Estimates Committee – Department of Defence Project Parakeet (No.15)	6.12.88 (J1247)	Senate: President determined precedence to notice of motion 5.12.88, motion moved by Senator MacGibbon and agreed to 6.12.88	6.3.89 (J1433-4)	<b>Finding</b> ● as there was no intention to give false or misleading evidence to a Senate Estimates Committee, no contempt committed	Report noted 12.4.89 (J1549)
Person Referred to in the Senate (Mr C. Wyatt) (No.16)	11.4.89	President	5.5.89 (J1606)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 5.5.89 (J1606)
Possible Improper Interference with a Witness – Drugs in Sport Inquiry (No.17)	8.12.88 (J1276-7)	Senate: President determined precedence to notice of motion 8.12.88, motion moved by Chairman of Environment, Recreation and the Arts Committee (Senator Black), by leave, and agreed to 8.12.88	5.6.89 (J1792) Note: finding separately reported to Senate 11.5.89 (J1662)	<b>Finding</b> ● because requisite intention not established, no contempt committed	Finding endorsed 4.10.89 (J2087-8)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Interference with Witnesses in Consequence of their giving evidence before Senate Select Committee on Administration of Aboriginal Affairs (No. 18)	3.11.88 (J1070)	Senate: President determined precedence to notice of motion 2.11.88, motion moved by Leader of the Opposition in the Senate (Senator Chaney) and agreed to 3.11.88	16.6.89 (J1921)	<b>Findings</b> <ul style="list-style-type: none"> <li>in relation to term of reference (1)(a) (resolution of 23 May 1988) no contempt committed</li> <li>in relation to term of reference (1)(b) (presentation of papers and submissions) no contempt committed</li> <li>in relation to term of reference (1)(c) (resolution of no confidence in Mrs S. McPherson) in particular circumstances of case finding of contempt should not be made</li> <li>in relation to paragraph (1)(d) (proposed transfer of Mr M. O'Brien) no contempt committed</li> </ul>	Findings endorsed 4.10.89 (J2087)
Person Referred to in the Senate (Sir Charles Court) (No. 19)	25.9.89	President	27.10.89 (J2171)	<b>Recommendation</b> <ul style="list-style-type: none"> <li>that response be incorporated in <i>Hansard</i></li> </ul>	Report adopted 27.10.89 (J2171)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT Tabled	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Unauthorised Disclosure of Senate Committee Report (No.20)	18.8.89 (J1961)	Senate: President gave precedence to notice of motion 17.8.89, motion moved by Senator Hamer at the request of Senator Teague and agreed to 18.8.89	21.12.89 (J2445)	<p><b>Findings</b></p> <ul style="list-style-type: none"> <li>that a finding of contempt should not be made in light of all circumstances</li> <li>that no further action should be taken</li> </ul> <p><b>Recommendations</b></p> <ul style="list-style-type: none"> <li>that the President draw paragraph 6(16) of the Privilege Resolutions and standing order 37 to the attention of Senators</li> <li>that a proposal for the early tabling of committee reports when the Senate meets in the mornings be referred to the Procedure Committee for consideration</li> </ul>	Findings endorsed and recommendations adopted 16.5.90 (J97)
Possible Adverse Treatment of a Witness before the Select Committee on the Administration of Aboriginal Affairs (No.21)	9.3.89 (J1458-9)	Senate: President gave precedence to notice of motion 9.3.89, motion moved by Senator P. Baume, debated and agreed to 9.3.89	22.12.89 (J2465)	<p><b>Findings</b></p> <ul style="list-style-type: none"> <li>that there was adverse treatment of Mr M. Pope by Messrs Wyatt and Stewart partially in consequence of Mr Pope's having given evidence to a Senate Committee</li> <li>that a contempt was committed in each case although not serious</li> </ul> <p><b>Recommendation</b></p> <ul style="list-style-type: none"> <li>that in the light of apologies no further action should be taken</li> </ul>	Notice of motion given for next day of sitting not less than 7 days after the day on which notice given – that Senate endorse findings 22.12.89 (J2466). Fresh notice given 9.5.90 (J37). Findings endorsed 16.5.90 (J96-7)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT Tabled	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Unauthorised Disclosure of Senate Committee Submission (No.22)	6.12.89 (J2321)	Senate: President gave precedence to notice of motion 5.12.89, motion moved by Chairman of the Select Committee on Health Legislation and Health Insurance (Senator Crowley) and agreed to 6.12.89	9.5.90 (J41)	<b>Finding</b> <ul style="list-style-type: none"> <li>that in the light of circumstances no finding of contempt should be made</li> </ul> <b>Recommendations</b> <ul style="list-style-type: none"> <li>that an appropriate warning about conditions of disclosure be given in public advertisements calling for submissions, in notes to witnesses, and in letter acknowledging receipt of submissions</li> <li>that persons making submissions be notified when submissions are publicly released by a committee</li> </ul>	Finding endorsed and recommendations adopted 22.5.90 (J122)
Person Referred to in the Senate (Mr A.E. Harris) (No.23)	26.2.90	President	25.5.90 (J144)	<b>Recommendation</b> <ul style="list-style-type: none"> <li>that response be incorporated in <i>Hansard</i></li> </ul>	Report adopted and noted 25.5.90 (J144)
Person Referred to in the Senate (Dr P. Ingram Cromack) (No.24)	18.7.90	President	19.9.90 (J293)	<b>Recommendation</b> <ul style="list-style-type: none"> <li>that response be incorporated in <i>Hansard</i></li> </ul>	Report adopted 19.9.90 (J293)

REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT Tabled	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Person Referred to in the Senate (Mr A. E. Harris) (No.25)	23.8.90	President	17.10.90 (J345)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 17.10.90 (J345)
Possible Misleading Evidence before a Senate Estimates Committee – Department of Defence Asbestos in Royal Australian Navy Ships (No.26)	24.8.90 (J250-1)	Senate: President gave precedence to notice of motion 23.8.90, motion moved by Senator Newman and agreed to 24.8.90	8.11.90 (J398)	<b>Finding</b> ● no contempt committed	Finding endorsed 14.11.90 (J449)
Person Referred to in the Senate (Sir William Keys) (No.27)	26.11.90	President	29.11.90 (J493)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted (J493), motion to take note (J494) 29.11.90. Report noted 5.12.90 (J510)
Person Referred to in the Senate (Mr C.H. Cannon) (No.28)	11.12.90	President	19.12.90 (J644)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 19.12.90 (J644)
Person Referred to in the Senate (The Honourable Tom Uren) (No.29)	17.12.90	President	19.12.90 (J646)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 19.12.90 (J646)



REPORT	DATE MATTER REFERRED	REFERRED BY	DATE REPORT TABLED	FINDINGS/ RECOMMENDATIONS	ACTION BY SENATE
Possible Improper Influence or Penalty on a Witness in respect of Evidence before a Senate Committee (No.30)	18.10.90 (J359)	Senate: President gave precedence to notice of motion 17.10.90, motion moved by Chairman of the Standing Committee on Environment, Recreation and the Arts (Senator Crowley) and agreed to 18.10.90	6.3.91 (J812)	<b>Finding</b> ● no contempt committed	Finding endorsed 7.3.91 (J831)
Person Referred to in the Senate (Sir William Keys) (No.31)	11.12.90	President	11.3.91 (J842)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 11.3.91 (J842)
Person Referred to in the Senate (Ms Patsy Harmsen) (No.32)	19.6.91	President	21.6.91 (J1280)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 21.6.91 (J1280)
Person Referred to in the Senate (Dr Alex Proudfoot, FRACP) (No.33)	21.8.91	President	3.9.91 (J1449-50)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 3.9.91 (J1449-50)
Person Referred to in the Senate (Ms Jeannie Cameron) (No.34)	13.11.91	President	14.11.91 (J1724)	<b>Recommendation</b> ● that response be incorporated in <i>Hansard</i>	Report adopted 14.11.91 (J1724)

1. Journals of the Senate (official minutes of Senate proceedings)
2. Before passage of Privilege Resolutions on 25 February 1988 all matters were referred to the Committee of Privileges by the Senate

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PROCEDURES FOR CONDUCT OF THE HEARINGS

1. Chair to make opening statement, declaring purpose of hearing. Submissions from Mr A, Mr B and Mr C to be incorporated in Hansard.
  
2.
  - (a) Mr A to be called and sworn.
  - (b) Mr A to be invited to make opening statement.
  - (c) Chair to ask questions of Mr A.
  - (d) Chair to invite legal adviser/s (if accompanying Mr B or Mr C), or Mr B and Mr C, to examine Mr A if they wish.
  
3.
  - (a) Mr B to be called and sworn.
  - (b) Mr B to be invited to make opening statement.
  - (c) Chair to ask questions of Mr B, and, if required and after a brief deliberative meeting, to ask questions arising from oral evidence given by Mr A.
  - (d) Committee to invite legal adviser (if accompanying Mr A), or Mr A, to examine Mr B if he wishes.
  
4.
  - (a) Mr C to be called and sworn.
  - (b) Mr C to be invited to make opening statement.
  - (c) Chair to ask questions of Mr C, and, if required and after a brief deliberative meeting, to ask questions arising from oral evidence given by Mr A.
  - (d) Committee to invite legal adviser (if accompanying Mr A), or Mr A, to examine Mr C if he wishes.

5. Chair to ask legal adviser (if accompanying Mr A) or Mr A, and legal adviser/s (if accompanying Mr B or Mr C), or Mr B and Mr C, whether they wish to suggest that any further evidence be introduced and that any other witnesses be examined by the Committee.
6. Chair to invite legal adviser (if accompanying Mr A), or Mr A, and then legal adviser/s (if accompanying Mr B or Mr C), or Mr B and Mr C, to make closing statements, if desired.
7. Hearing to conclude.



AUSTRALIAN SENATE  
CANBERRA. A.C.T.

COMMITTEE OF PRIVILEGES

PARLIAMENT HOUSE  
CANBERRA, A.C.T. 2600

21 July 1989

Mr H. Evans  
Clerk of the Senate  
Parliament House  
CANBERRA ACT 2600

Dear Mr Evans,

During the Committee of Privileges' inquiry into the possible improper interference with a witness appearing before the Standing Committee on Environment, Recreation and the Arts, the matter of the payment of legal costs of persons involved in inquiries conducted by the Committee of Privileges arose.

At its meeting on 7 June 1989, the Committee resolved that it request you to provide it with advice on this matter. During discussion, the Committee canvassed the possibility of formulating guidelines for the Committee to follow in deciding whether to recommend to the President that legal costs, or a proportion thereof, be met by the Senate.

The Committee is mindful that the President, in making a decision concerning costs, is required by the resolution of the Senate to be satisfied "that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee". The Committee recognises, therefore, that, in deciding to make a recommendation to pay costs, or a proportion thereof, it has an obligation to place before the President sufficient information as to enable the President to make a judgment concerning the substantial hardship question.

As a general principle, the Committee has a predisposition not to recommend that costs be granted to persons involved in inquiries undertaken by the Committee. It accepts, however, that under some circumstances a Senate payment of costs may be warranted, as the circumscribed conditions laid down in the resolution also acknowledge. The major problem which has arisen for the Committee is at what stage the Committee should make an in principle decision to

forward the appropriate recommendation to the President. The Committee is inclined to the view that such an in principle decision should be made at an early stage of its inquiry on grounds somewhat analogous to the granting of legal aid.

The Committee recognises that there may be some degree of difficulty in this proposition in that to decide at the commencement of an inquiry to recommend that costs be paid could imply that there existed a presumption that a contempt had occurred.

On the other hand, to deal with an application for payment of legal costs after an inquiry has been completed gives rise to other difficulties, including the possibility that a person unfamiliar with Senate committee processes might, in good faith, have expended a great amount of money, quite unjustifiably but nonetheless leading to substantial hardship, in meeting the difficulties he/she perceives as arising from being involved in a reference to the Committee.

The Committee would therefore be grateful for any advice you may have on the matter.

Yours sincerely,



*for* (Patricia Giles)  
Chair

OFFICE OF THE CLERK OF THE SENATE

31 July 1989

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

Dear Senator Giles

REIMBURSEMENT OF LEGAL COSTS

Thank you for your letter of 21 July 1989 requesting advice on the reimbursement of the costs of representation of witnesses before the Privileges Committee.

I am not certain that I can offer anything worthy of the name of advice, but the following observations may be of some use to the Committee.

Paragraph (11) of the resolution of the Senate relating to the Privileges Committee does not provide any criteria for the Committee to consider in recommending to the President the reimbursement of costs, but provides criteria to which the President is to have regard in making a decision. The two elements of the criteria are:

- (a) the President must be satisfied that a person would suffer hardship due to liability to pay costs; and
- (b) the President may make reimbursement only of such costs as the President considers reasonable.

Thus the President must make a judgment of two matters: the likelihood of substantial hardship and the reasonableness of costs. The President may make a reimbursement of only part of costs even where those costs are regarded as reasonable, but may also reimburse only the reasonable part of costs which have an unreasonable dimension to them.

It would be rational for the Committee to have regard to these criteria in making its recommendation to the President, and to provide to the President not only the information to allow the President to make a judgment, but also to indicate its view as to whether the criteria are met.

In relation to substantial hardship, it is for the Committee in the first instance and the President finally to determine what is substantial hardship and whether a particular applicant would suffer substantial hardship. In search of some guidance as to how these matters may be assessed, I have examined the criteria used by bodies which provide legal aid in the various jurisdictions of Australia to determine eligibility for legal aid. The basic criterion applied in most jurisdictions is whether the applicant can afford to pay costs. It appears that it is only in South Australia that the relevant criteria refer to hardship. Detailed income and assets tests are specified in application of the criteria. I do not think that these various criteria are of much assistance, and it is probably best for the Committee to make its own interpretation of substantial hardship.

In relation to reasonableness of costs, this is also a matter for the President and the Committee to interpret. I think that the first question which should be asked is: what level of representation, if any, is appropriate for the proper protection of this particular witness in proceedings before the Committee? It may be quite inappropriate for some witnesses to be represented at all, for example, witnesses who are giving largely uncontested factual evidence. It may be appropriate for a witness to be accompanied by a barrister, but not by a Q.C. and a junior. The next question should be: given the appropriate level of representation, what are reasonable costs for that representation? Costs of representation may be unreasonable because of the scale of fees applied or the total magnitude of the costs. As has been indicated, the Committee may recommend the reimbursement of the reasonable part only of costs.

Again I have examined the criteria of eligibility for legal aid in the various jurisdictions, a number of which impose a test of reasonableness, but I do not think that these criteria are of much assistance because they relate to legal proceedings, in which only the parties are entitled to be represented, and in which a judgment as to reasonableness is obviously closely related to the nature of the proceedings.

In relation to the stage in the proceedings at which a decision as to the reimbursement of costs should be made, the Senate's resolution clearly leaves open the possibility of a decision being made before a witness appears in the proceedings or after the proceedings have been concluded and costs have been incurred, or at any stage between.

I do not think that a decision to reimburse costs could reasonably be taken as an indication that a finding is likely that a contempt has been committed or that a particular person may be in the position of the accused. The whole rationale of the Senate's resolution, and this is



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where it differs markedly from the rules applying to legal proceedings, is that it is directed to the protection of all witnesses and not only those who may be regarded as the accusers or the accused. The basis of the resolution is that a witness who is not in danger of a penalty may still be damaged in the course of the proceedings and is entitled to the opportunity of protection through legal representation. As has been indicated, the Committee should, I think, take into account the need of a witness for that protection.

I also do not think that there should be a problem of witnesses over-committing themselves because of an early indication that costs will be reimbursed. It should be made clear to all witnesses that only costs regarded as reasonable may be reimbursed. This may involve the Committee in giving an indication of what it regards as a reasonable level of representation, and any such assessment may need to be remade as the proceedings progress.

In coming to a determination as to whether costs should be reimbursed, the Committee and the President may be involved in looking closely at a person's financial situation, but this is unavoidable and is inherent in any provision for legal assistance subject to any sort of test.

Please let me know if the Committee requires any elaboration of these remarks, or whether I can provide any further information.

Yours sincerely,



(Harry Evans)

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APPENDIX E

AUSTRALIAN SENATE  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

PARLIAMENT HOUSE  
CANBERRA, ACT 2600

16 January 1990

Mr H. Evans  
Clerk of the Senate  
Parliament House  
CANBERRA ACT 2600

Dear Mr Evans

During its recent inquiry into possible adverse treatment of a witness, the Committee briefly considered the question of the standard of proof which may be appropriate for the Committee to bear in mind when determining a finding that a contempt of the Senate has been committed.

I should appreciate any comments you may wish to make on this matter.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Patricia Giles'.

(Patricia Giles)  
Chair



PARLIAMENT HOUSE  
CANBERRA ACT 2600  
TEL (062) 77 3350  
FAX (062) 77 3199

OFFICE OF THE CLERK OF THE SENATE

(1/779)

29 January 1990

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

Dear Senator Giles

#### STANDARD OF PROOF

Thank you for your letter of 16 January 1990 seeking comments on the question of the standard of proof which should be adopted by the Committee in making findings on allegations of contempt.

I hope that the following observations may be of use to the Committee.

There is certainly no law or rule of the Senate which requires the Committee to adopt any particular standard of proof in making its findings. The standard of proof is a matter for the Committee to determine in the first instance.

It would appear that the options available to the Committee in relation to the standard of proof are as follows:

- (a) to adopt the criminal standard of proof, proof beyond reasonable doubt;
- (b) to adopt the civil standard of proof, proof on the balance of probabilities;
- (c) to adopt some other standard formulated elsewhere or formulated by the Committee for the purpose;

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- (d) to vary the standard of proof in accordance with the gravity of the matter before the Committee and the facts to be found; or
- (e) not to adhere to any stated standard of proof or to formulate a standard of proof, but simply to find facts proved or not proved according to the weight of the evidence.

The Committee should not, in my view, regard itself as obliged to choose between the criminal standard and the civil standard. I express this view particularly having regard to the history of the law of standards of proof in the courts, to which I will refer briefly.

If the Committee were to make a choice between the criminal and the civil standards of proof, or between some very strict standard like the criminal standard and some less strict standard like the civil standard, there are arguments which may be made on either side.

The contention most often made is that contempt proceedings may result in the infliction of penalties on persons found to have committed contempts, and therefore the criminal standard of proof should be required. According to this view, contempt proceedings are really criminal proceedings before a special tribunal.

The counter-argument is that the purpose of contempt proceedings is to protect the integrity of the processes of the Houses of the Parliament and their committees, and only secondarily to punish the perpetrators of contempts. The rationale of the power to deal with contempts, as is indicated by section 4 of the Parliamentary Privileges Act 1987, is to prevent improper obstruction of the Houses and their committees. Where the purpose of a penalty for contempt is coercive, to prevent the continuance of an

obstruction, this argument is all the more cogent. In effect, this view holds that it is unnecessarily restrictive that a House should have to have proof beyond reasonable doubt before it acts to protect the integrity of its processes.

That both of these views have some validity is demonstrated by the similar debate which has taken place in relation to contempt of court. The courts have exhibited a good deal of uncertainty as to whether the criminal standard or the civil standard of proof should apply in relation to contempt of court, and the matter appears not to be settled. The distinction between civil and criminal contempts has not necessarily elucidated the matter. A similar degree of uncertainty existed for some time in relation to whether proof of a criminal offence in civil proceedings is required to be beyond reasonable doubt.

The formulation of the two standards of proof and the exposition of them in the courts have largely been for the benefit of juries. In expounding the law, judges have been greatly influenced by a presumed tendency of juries to make findings based on "fanciful possibilities", and the need to clearly direct juries to have regard to the evidence and to make findings on the basis of the weight of the evidence.

Notwithstanding that the law seeks to clarify matters for juries, there have been great difficulties in the courts in the exposition of the standards of proof. Attempts by judges to explain what is meant by proof beyond reasonable doubt and proof on the balance of probabilities, and the difference between them, have often miscarried and led to successful appeals. The courts have been very uncertain about what juries should be told; failure to expound the standard of proof has led to the upholding of appeals, but it has also been held that a judge may omit any direction as to the standard of proof.

Although the High Court has stated that the difference between the criminal and the civil standards of proof "is no mere matter of words: it is a matter of critical substance", because of the confusion surrounding the matter some judges have sought to repudiate the whole basis of the two standards. A British law lord confessed that he had some difficulty in understanding how there could be two different standards, and a superior court judge said that he had never seen the difference between the two standards. The former, in a famous case, tried to ban the phrase "beyond reasonable doubt" from judicial usage. Another law lord suggested that there were various degrees of proof within the two standards, and a formulation of a standard varying in different situations was judicially suggested. Judges have sought to cut the Gordian Knot by referring to juries being "satisfied" as to the facts and feeling certain or sure as to their findings.

This history, I think, should caution the Committee against too readily accepting that it has to choose a particular judicially-expounded standard of proof.

The Committee of Privileges is not a jury. The greatest difference between the Committee and a jury is that the Committee explains its assessment of its evidence and gives its reasons for its findings. If the Committee states, in a report to the Senate, that facts have been proved or that it has come to conclusions on the basis of the evidence, such a report is no less likely to be accepted than one to the effect that the Committee has found matters proved beyond reasonable doubt. If the evidence provides grounds for the findings to be disputed, the disputation will not be lessened by a statement by the Committee that it has treated itself as a jury and adopted the standard of absence of reasonable doubt.

In my view, the best course is probably for the Committee to adopt a combination of options (d) and (e); that is, to present the evidence, to explain its assessment of the evidence and to

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express its conclusions, without explicitly adhering to a particular standard of proof, while requiring more cogent evidence in proportion to the gravity of the matter in issue.

At first sight the suggestion of a variable standard of proof may seem bizarre, but, as I have already indicated, the courts have occasionally not thought it so, and practical examples illustrate that it is a supportable view. If the question before the Committee is whether a person has done an act which is technically a contempt but which caused no serious obstruction to the operations of the Senate or a committee, the Committee may well be more easily satisfied as to the facts than if it is considering an allegation of a very serious interference with the Senate or a committee.

I did not think it appropriate to cite the judgments to which I have referred, but this can be done if the Committee so requires.

I would also be pleased to provide any elaboration the Committee requires.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Harry Evans".

(Harry Evans)



**ORDER OF THE SENATE**

**Broadcasting of committee proceedings**—That the following rules apply in relation to broadcasting, including rebroadcasting, in sound or visual images, or in combined sound and visual images, of the proceedings of a committee.

- (1) Recording and broadcasting of proceedings of a committee may occur only in accordance with the authorisation of the committee by a deliberate decision of the committee.
- (2) A committee may authorise the broadcasting of only its public proceedings.
- (3) A committee may determine conditions, not inconsistent with these rules, for the recording and broadcasting of its proceedings, may order that any part of its proceedings not be recorded or broadcast, and may give instructions for the observance of conditions so determined and orders so made. A committee shall report to the Senate any wilful breach of such conditions, orders or instructions.
- (4) Broadcasting of committee proceedings shall be for the purpose only of making fair and accurate reports of those proceedings, and, in particular:
  - (a) shall not be the subject of commercial sponsorship or be used for commercial advertising; and
  - (b) shall not be used for election advertising.
- (5) Recording and broadcasting of proceedings of a committee shall not be such as to interfere with the conduct of those proceedings.
- (6) Where a committee intends to permit the broadcasting of its proceedings, a witness who is to appear in those proceedings shall be given reasonable opportunity, before appearing in the proceedings, to object to the broadcasting of the proceedings and to state the ground of the objection. The committee shall consider any such objection, having regard to the proper protection of the witness and the public interest in the proceedings, and if the committee decides to permit broadcasting of the proceedings notwithstanding the witness' objection, the witness shall be so informed before appearing in the proceedings.  
*(Agreed to 23 August 1990.)*