DEPARTMENT OF THE SENATE
PROCEDURAL INFORMATION BULLETIN

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31 March 2006

COMMITTEES

The Selection of Bills Committee report presented on 30 March recommended 13 references of bills to committees, indicating a continuing life of this system. The report was the subject of a committee-initiated amendment to extend reporting dates.

The Select Committee on Mental Health presented its first report on 30 March, with an indication that it would present its final report containing detailed recommendations by its reporting date in late April.

The legislation committees presented their reports on the estimates and on annual reports of departments and agencies, with some points of substantive content on both subjects.

The government response to the Community Affairs References Committee report on poverty, presented on 27 March, set a new and different standard for such responses: apart from taking two years to appear, the response made a virulent attack on the majority report of the committee and a favourable response to the minority report, which, it was alleged in debate, was written in the minister's office. The majority report was criticised on the basis of data which had had two years to become out of date. All this was pointed out in debate on the response.

The Joint Committee on Native Title ceased to exist on 23 March as a result of the sunset clause in its statute.

LEGISLATION

Some major bills were considered in detail and at length in committee of the whole, with many amendments moved, in spite of the government's general refusal to accept any non-government amendments.

The Telecommunications (Interception) Amendment Bill 2006, extending provisions for searches of information by law enforcement and security agencies, had a substantial volume of amendments moved by the government, some based on previous committee scrutiny, but a report by the Legal and Constitutional Legislation Committee, tabled on 27 March, elicited only an undertaking from the government to consider the matters raised by the committee. Non-government senators pointed out at various stages of the proceedings that government backbenchers were voting against recommendations which they supported in the committee.

The Family Assistance, Social Security and Veterans' Affairs Legislation Amendment (2005 Budget and Other Measures) Bill 2006 and the Family Law Amendment (Shared Parental Responsibility) Bill 2006 were also considered at length, although again no non-government amendments were accepted.

The Tax Laws Amendment (2006 Measures No. 1) 2006 was the target of an unsuccessful opposition amendment relating to bribery of foreign officials, with obvious reference to the AWB affair.

"THE PARLIAMENT"

The *Snowy Hydro Corporatisation Act 1997* contains an unusual provision whereby the Commonwealth is not to dispose of its shares in the company "without the approval of the Parliament". This appears to be interpreted by the government as referring to a resolution passed independently by each House, and such a resolution was passed by the Senate, after somewhat heated debate, on 29 March. A strong argument could be made out, however, that "approval of the Parliament" means approval by a bill passed in succession by each House and assented to by the Governor General. In other constitutional and statutory contexts, that is what action by the Parliament means. If independent approval by each House, or approval in succession by each, only is required, that is what the statute prescribes.

Those who are interested in a lengthy and learned discussion of a similar question in another jurisdiction may consult the *Texas Law Review*, April 2005.

LOST DIVISIONS

The government lost a division on 28 March and another on 30 March, but both questions were put again by leave. One involved a motion about destruction of Aboriginal rock art and the other an amendment to a bill. The custom of ensuring that questions are not determined by misadventure is still readily accepted.

VACANCY

A vacancy caused by the resignation of Senator Hill was notified on 27 March, and will not be filled for some weeks. Vacancies are always paired by the parties.

ACCOUNTABILITY REPORT

An accountability negative was the refusal of the government to accept any amendments of bills, even those arising from unanimous committee reports; many such amendments are designed to improve accountability. The intense scrutiny of legislation in the committees and in the Senate continues.

Due to the pressure of government business there was no consideration of government documents, a procedure with accountability significance.

OCCASIONAL NOTE

Attached to this bulletin is an occasional note on the interpretation of constitutional freedom of speech provisions.

SENATE DAILY SUMMARY

The *Senate Daily Summary* provides more detailed information on Senate proceedings, including progress of legislation, committee reports and other documents tabled and major actions by the Senate. Like this bulletin, *Senate Daily Summary* may be reached through the Senate home page at www.aph.gov.au/senate

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OCCASIONAL NOTES

FREEDOM OF SPEECH, ORIGINAL INTENT AND ANTIQUARIAN RESEARCHES

A recurring, if somewhat esoteric, question of constitutional history is: What was the original intent of the provisions for freedom of speech in legislatures? What was their original and intended content and coverage?

The significance of this question is that it continues to arise in court cases involving the interpretation of section 16 of the *Parliamentary Privileges Act 1987*. That provision explicated the content of the parliamentary immunity usually called freedom of speech, the immunity of parliamentary proceedings from question in proceedings before courts and other tribunals. In seeking to interpret and apply the provision, counsel and judges often attempt to refer to the original intent of the earlier provisions. Usually this is part of some scheme of reading down the provision in the 1987 Act so as to conform with some interpretation of the original intent of the parent provisions. Generally speaking, such attempts have not been successful, and courts have interpreted section 16 as reflecting the law as it was immediately before the enactment of the provision, and applied it in accordance with its terms. So long as there are adherents of the original intent school of constitutional and statutory interpretation, however, the argument will keep on arising.

This means that antiquarian researches to disclose evidence of the original intent of the earlier statutory provisions is an ongoing activity. The major ransacking of ancient sources took place in 1985-86 during the dispute between the Senate and the Supreme Court of NSW (see *Odgers' Australian Senate Practice*, 11th ed, pp 34-43), but there is always the possibility of some unconsulted source throwing some new light on the question. This results in an ongoing interest in all kinds of relevant historical documents going back to the 16th and 17th centuries.

One significant aspect of the principal question is: Why was the provision in the United States Constitution drafted so differently from the previous statutory provisions? If it could be shown that the American framers deliberately departed from the previous provisions in order to narrow them or to more accurately reflect their original intended content, this could throw some light on the original intent of the older provisions.

The change in drafting may be shown by quoting the principal provisions. The famous article 9 of the English Bill of Rights of 1688/89, which itself had a long history, with a fertile field for arguments about original intent, 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. (Spelling and capitalisation modernised. The commas which appear in some versions are not in the original text.)

Article V, section 5 of the Articles of Confederation of 1777, which was similar to provisions in some state revolutionary constitutions, provided:

> Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress …

The relevant words in article I, section 6 of the US Constitution, drafted in 1787, provide:

> The Senators and Representatives ... for any Speech or Debate in either House ... shall not be questioned in any other Place.

At first sight, this provision is much narrower than the parent provisions: it provides that the members only will not be questioned, not proceedings as such, and only for their speeches.

In practice, the provision has been interpreted by the Supreme Court as protecting any legislative activity of members, extending even to activities such as staff of committees taking statements from potential witnesses. The immunity applies only to legislative activities of members, however, and does not protect witnesses in respect of their evidence. They are so protected by statutory provision, but may be prosecuted in the courts for false statements in congressional inquiries.

The question is: Was this provision drafted with the intention of narrowing the parent provisions, and, if so, what was intended to be excluded from the coverage of the provision, or did the drafters believe that it captured the original intent and contemporary coverage of the parent provisions, in other words, was it purely a drafting change? The answer to this question could throw some light on the original intent of the older provisions.

So far, the antiquarian researches have provided no definite answers to the question. There are no records of the debates of the 1787 constitutional convention or reports on its drafting efforts, only notes and recollections by participants, which are known to be not reliable in some instances. There is a great volume of contemporary and near-contemporary sources, and the continuing possibility of some significant sources being discovered through the efforts of scholars working in the field. Such a source could be found to be greatly persuasive by devotees of the original intent school, so a lookout has to be kept for new disclosures of unfamiliar or unknown sources.

In a recent monumental tome, an American legal historian, Akhil Reed Amar, has provided an account of the historical background of each provision in the US Constitution[1]. In dealing with the freedom of speech provision, he implies that it was intended to be narrower than the English Bill of Rights provision, and suggests that what was intended to be excluded was the possibility of the legislature claiming the general immunity of proceedings from question as a basis for using the parliamentary contempt jurisdiction to punish seditious libels, as the British Parliament had notoriously done in several cases in the 18th century. He has no direct evidence of this, only a circumstantial case. Before, during and after the framing of the 1787 Constitution, there was great sensitivity about freedom of the press. The history of the suppression of press freedom in Britain and in the colonies was very fresh in the minds of the framers. The absence of any guarantee of press freedom was regarded as a serious deficiency in the draft constitution by sceptics and opponents. In defending the draft, its proponents repeatedly argued that there was nothing in it which would empower any legislative interference with freedom of the press, by implication including the legislative freedom of speech provision. Eventually, a guarantee of press freedom had to be promised and subsequently included by way of amendment in order to secure passage of the draft constitution. In proposing the amendment, the leading framer, Madison, referred to the proposed provision as reflecting the legislative freedom of speech provision, and the two together confirming "the nature of Republican Government … [where] the censorial power is in the people over the Government, and not in the Government over the people". In effect, both the original drafting and the amendment are seen as achieving what was achieved in Australia in 1987 by the Parliamentary Privileges Act, section 6 of which prevents criticism or defamation of the houses of the legislature or their members being treated as contempts of parliament.

All this is suggestive, but by no means conclusive, about the original intent of the old provisions. Several different arguments could be made out of it, as to how the 1987 Act should be interpreted, if the original intent of the parent provisions is thought to have any bearing on that question. The change in drafting could be seen as removing an expanded interpretation of the English formulation, which was never originally intended to be covered by that provision, thereby supporting some reading down of the 1987 Act to take it back to something like the American formulation, although this would not necessarily assist some of the positions that the would-be readers down want to support. On the other hand, the way in which the 1987 Act dealt with the matter of defamatory contempts could be seen as preserving an expansive content of the remainder of the immunity. This kind of argument is relevant only if judges cannot be persuaded simply to read the statute.

The Amar scholarship has therefore been added to the stock of antiquarian researches, ready to be responded to in some future court proceedings. It will probably not be the last addition.

[1] *America's Constitution: a Biography*, Random House, 2005.