

The Senate

Committee of Privileges

Persons referred to in the Senate

Ms Jane Carrigan

167th Report

October 2017

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ISBN 978-1-76010-651-5

This document was produced by the Committee of Privileges, and printed by the Senate Printing Unit, Parliament House, Canberra

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Report

1.1 On 22 August 2017, the President of the Senate, Senator the Honourable Stephen Parry, received a submission from Ms Jane Carrigan seeking redress under the resolution of the Senate of 25 February 1988 relating to the protection of persons referred to in the Senate (Privilege Resolution 5).

1.2 The submission referred to a report tabled in the Senate by the Minister for Employment (Senator Cash) on 15 March 2016. The President accepted the submission and referred it to the Committee of Privileges.

1.3 The committee met on 7 September 2017 and, pursuant to paragraph (3) of Privilege Resolution 5, considered the submission. In doing so, it noted that Ms Carrigan's delay in approaching the President for redress was explained by her unsuccessful efforts to find a legal remedy. The committee has previously noted the difficulties that arise when a lengthy period elapses between the action occurring and the Senate considering any recommendation to redress the matter. The committee accepts that the legal processes necessitated the delay in this instance.

1.4 The committee also considered whether the resolution relating to the protection of persons referred to in the Senate extended to the case where the person was referred to in documents tabled in the Senate. In this context the committee noted that the document is a report that was prepared for the purposes of advising the Parliament as to whether there was a reasonable basis to consider requesting the Governor-General to remove a now former Vice President of the Fair Work Commission from his position on the grounds of misbehaviour or incapacity. Ms Carrigan had made a formal complaint about the Vice President and this complaint was considered during the inquiry. It was prepared for the purposes of transacting the business of the Senate and was tabled in the Senate and is therefore part of the Senate's proceedings. In this instance the committee has agreed that Privilege Resolution 5 applies.

1.5 Following this deliberation, the committee resolved to recommend that the response be incorporated in *Hansard* without change. Senator Abetz, a member of the committee, recused himself from these deliberations at the request of Ms Carrigan.

1.6 The committee draws attention to paragraph 5(6) of the resolution which requires that, 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 in the submission.

1.7 The committee **recommends**:

That a response prepared by Ms Jane Carrigan in the terms specified at Appendix 1, be incorporated in *Hansard*.

Senator the Hon Jacinta Collins

Chair

Appendix 1

Ms Jane Carrigan

Pursuant to Resolution 5(7)(b) of the Senate of 25 February 1988

**Reply to the tabling of the “Heerey Report” by the Minister for Employment
Senator the Hon Michaela Cash**

(15 March 2016)

I wish to bring to your attention the conduct of the Minister for Employment and the Attorney General, the result of which was to breach my privacy and the tabling of a Report in the Australian Senate, the contents of which I was neither aware nor had been given any opportunity to respond too. The unchallenged contents of the Report, in so much as they relate to me, have had the effect of seriously defaming me and causing me both considerable personal anguish and professional harm.

My effort to seek a judicial review remedy through the Federal Court has been thwarted by the Commonwealth’s claim, namely, the “Heerey Report” is immunised from judicial review because its tabling in the Senate was protected with parliamentary privilege. The Federal Full Court recently refused me leave to appeal the interlocutory application in favour of the Commonwealth.

The facts

1. On 30 May 2014 I made a complaint (the initial complaint) to the Fair Work Commission President about the Vice President, the Hon Michael Lawler, in the performance of his duties. The complaint was accepted pursuant to s 581A of the *Fair Work Act 2009*. However after one year, and being led to believe no investigation had commenced, I took my complaint pursuant to s 641A of the Act (at the suggestion of the FWC President) to the Minister for Employment.
2. My complaint was made under cover of “private and confidential” and, as a result of a request from the Minister for Employment’s Chief of Staff, I gave an undertaking to treat the process of the investigation with confidence. I understood that to be a reciprocal arrangement including that my name would be kept private.
3. On 19 October 2015 the Minister for Employment announced, by-way of media release, the establishment of an inquiry into complaint(s) about the Vice President, the appointment of an eminent retired Federal Court Judge and the Terms of Reference for the inquiry. The Minister named me publically, (for the first time) in the first of the six Terms of Reference. Neither the Minister for Employment nor the Attorney General discussed with me the decision to publically name me. There was no necessity to name me.

4. The Ministers for Employment had both publically and privately given me an undertaking that I would be provided with procedural fairness as part of the inquiry process. Despite this undertaking, at no time was I contacted by the investigator, the Ministers, or any of their office or Departmental staff. On two occasions I wrote to the investigator and requested to be given the opportunity to speak to the inquiry. Neither request was acknowledged prior to publication.
5. In the absence of a response from the investigator I forwarded submissions to him based on my understanding of the Terms of Reference. At all relevant times I was unaware that the Vice President had, as a matter of fact, responded to my initial complaint (addressed to the FWC President) in a detailed 6 page letter written 10 months after the events complained off. In that letter the Vice President made numerous serious and false allegations against me. Neither the FWC President, the Ministers nor the investigator advised me of this letter, much less gave me an opportunity to respond to the allegations made therein. I only became aware of the allegations as a result of the Report being tabled and subsequently published online by the Australian newspaper on 15 March 2016.
6. The inquiry was a Ministerial Inquiry, as acknowledged by the Minister(s), the President of the Fair Work Commission, the Opposition, the Education and Employment Budget Estimates Committee, the investigator, and the media. At all relevant times the Minister for Employment and/or the Attorney General acted under Executive Authority:
 - i. In accepting my complaint;
 - ii. In considering my complaint;
 - iii. In considering the issues (independent of my complaint) that had and continued to attract significant public interest;
 - iv. In answering, on 4 separate occasions, questions without notice in parliament;
 - v. In establishing an inquiry;
 - vi. In appointing the investigator;
 - vii. In directing their Department to liaise with the investigator including establishing the Terms of Reference prior to their announcement;
 - viii. In advising me publically and privately that I would be afforded procedural fairness;
 - ix. In their decision to (without notice) publically name me at a time the Minister had requested my confidentiality and knew my correspondence to the Minister to be labelled private and confidential;
 - x. In delegating the general administration of the Inquiry to the Department of Employment;

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- xi. In appearing before the Education and Employment Legislation Committee sitting as Budget Estimates and responding to questions asked by the Committee about the Inquiry;
 - xii. In publishing various media releases explaining/updating on related inquiry issues;
 - xiii. In responding to correspondence and questions from the Opposition;
 - xiv. In the Minister for Employment's Department responding to various questions on notice;
 - xv. In directing that the Final Report be returned to Minister for Employment;
 - xvi. In deciding to provide the final report to the Vice President as a matter of procedural fairness without affording me the same opportunity;
 - xvii. In notifying parliament, undercover of Minister's Statement Time, of the Minister's management of the inquiry;
 - xviii. In notifying parliament undercover of Minister's Statement time, that the Vice President had resigned;
 - xix. In deciding not to table the Report at the time of that announcement;
 - xx. In deciding to redact the Report including which parts were to be redacted;
 - xxi. In tabling the Report at a time the Minister knew or ought to have known that the Vice President had made serious allegations about my conduct yet I neither knew of them much less had been given an opportunity to respond to them;
 - xxii. In deciding to leave un-redacted all aspects of the Vice President's allegations against me and which the Ministers knew or ought to have known I had not been given any opportunity to respond to.

No motion was moved to enter into debate and no order was passed by the Senate (or parliament) that the Report should be published as a parliamentary paper. The redacted Report was republished to the world at large pursuant to Standing Order 167.

At all relevant times I acted in good faith. I made my initial complaint about the FWC Vice President not because, as inferred by the investigator, the Vice President embarrassed me in front of my client. He didn't. I complained because plain and simple the Vice President embarrassed the gravitas of the position he held and the oath he had sworn. The Ministers' decisions to publically name me and table a Report they knew or ought to have known contained (unchallenged) serious allegations against me was unfair and indifferent to the damage it was capable of causing me.

If parliamentary privilege can be attached to the conduct of the Ministers then the Ministers' failed their obligation to ensure that in my capacity as a witness I was provided with proper protection.

I ask for the record to be corrected and for the Attorney General to acknowledge to the Senate that the Ministers failed in their undertakings to provide me with procedural fairness the result of which was to effectively publish to the world a Report containing numerous serious allegations against me and which I had not been previously made aware off, much less provided the opportunity to respond to.

I seek the right of reply. I would also welcome the opportunity to appear before the Senate Standing Committee of Privileges and the Senates Standing Committee on Education and Employment and address the substantive issues attached to this matter.