

**CONTEMPT OF PARLIAMENT  
MATTERS REFERRED TO THE COMMITTEE ON 12 NOVEMBER 1990  
SUBMISSION BY MR M. LE GRAND**

Thank you for your letter of 22 February 1991 in which you seek advice on matters arising from a submission to the Committee by Mr M. Le Grand, dated 11 February 1991, and relating to the matters referred by the Senate to the Committee on 12 November 1990.

You ask that I assume that the facts are as set out in the submission, and that I comment on any possible questions of contempt which might be disclosed by the information contained in the submission. The submission contains not only statements as to matters of fact but expressions of opinion on the significance of those matters of fact, particularly on page 31 and following pages of the submission. For the purposes of this advice I have ignored those expressions of opinion and looked only at the statements of matters of fact.

The reference given by the Senate to the Committee asks the Committee to consider:

- (a) whether there was improper interference with a person in respect of evidence to be given before that Committee [the Parliamentary Joint Committee on the National Crime Authority];
- (b) whether false or misleading evidence was given to that Committee in respect of directions given by the National Crime Authority or its officers to a person, affecting evidence to be given before the Committee; and
- (c) whether contempts were committed in relation to those matters.

The matters of fact recounted in the submission raise two questions as to possible contempts of Parliament:

- (a) whether the direction given by the then chairman of the National Crime Authority to Mr Le Grand on 6 December 1989, the direction given by the Authority to Mr Le Grand on 12 December 1989 and the arrangement entered into by the Authority and Mr Le Grand on 16 December 1989 relating to any evidence to be given by him to the Joint Committee constituted improper interference with a parliamentary witness; and
- (b) whether answers given by officers of the Authority to questions asked at a hearing of the Joint Committee on 16 February 1990 constituted false or misleading evidence given before a parliamentary committee.

**(a) The directions given to Mr Le Grand and the arrangement**

On 6 December 1989 the chairman of the National Crime Authority sent to Mr Le Grand a direction in writing including the words "you are not to make any documents available to or have any

discussions with any committee or person outside the Authority without first consulting the Authority".

On 12 December 1989 there was communicated to Mr Le Grand a direction by the Authority including the words "Mr Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of, or in the course of, the performance of his duties under the NCA Act, unless specifically authorised to do so by the Authority".

At a meeting of the Authority on 16 December 1989 an arrangement was made whereby any request to Mr Le Grand by the Joint Committee for him to appear before the Committee would be referred to the Authority, which would decide if the request were appropriate. If the Authority decided that the request were appropriate, the Authority would agree to Mr Le Grand appearing before the Committee and to necessary documents being provided to him. If the Authority thought the request inappropriate it would seek advice and, if the advice supported that view, would refuse the Committee's request and if necessary have the matter determined by a court.

The question which arises in relation to these directions and the arrangement is whether they constituted a contempt of Parliament, in that they involved improper interference with a person in respect of evidence which may have been given before the Joint Committee.

Improper interference with witnesses is one of the well known categories of contempt of Parliament. It is referred to in the resolution of the Senate of 25 February 1988, relating to matters constituting contempts, in the following terms:

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.

As the preamble to that resolution indicates, the terms of the resolution do not prevent the Senate from treating as a contempt similar conduct which does not fall within the terms of the resolution, in that the resolution does not derogate from the power of the Senate to determine that particular acts constitute contempts.

The contempt of improper interference with a witness may be constituted by "any interference with a witness's freedom" (Report of the Select Committee of the House of Commons on Witnesses, HC 84 1934-5, p. v).

Conduct falling within this category of contempts clearly meets the criterion specified in section 4 of the *Parliamentary Privileges Act 1987*, which prescribes the essential element of contempts:

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.

A preliminary question which arises in relation to the directions given to Mr Le Grand is whether they were intended to apply to any giving of evidence by him to the Joint Committee. The direction by the then chairman of the Authority forbade Mr Le Grand having any discussions "with any committee" without first consulting the Authority. Mr Le Grand's memorandum to the chairman of 1 December 1989, his discussion with the chairman on 12 December 1989, and the advice by Mr David Smith of 15 December 1989 all referred to the application of the directions to the giving of evidence before the Joint Committee. Neither the chairman of the Authority nor the Authority made any disclaimer to the effect that the instructions were not intended to apply to the giving of evidence before the Joint Committee. The arrangement of 16 December 1989 explicitly referred to the giving of evidence before the Joint Committee. It may therefore be concluded that both instructions and the arrangement were made with the intention that they apply to the giving of evidence before the Joint Committee.

The question which arises, then, is whether the directions and the arrangement constituted an improper interference with a parliamentary witness.

The Authority may have thought that the directions and the arrangement were lawful, notwithstanding the advice of Mr David Smith: this conclusion may be drawn from the discussion summarised at page 26 of the submission. The fact that the Authority thought that its actions were lawful, however, does not settle the question of whether the actions constituted improper interference with a witness. Even if it were concluded that the actions of the Authority were otherwise lawful, those actions in their application to the giving of evidence before the Joint Committee could be held to constitute improper interference with a witness.

Improper interference with witnesses is not equivalent to unlawful interference with witnesses. An interference with a witness may be improper and therefore a contempt even where the conduct constituting the interference is otherwise lawful. Thus the bringing of legal proceedings, which is not only lawful but the right of every citizen, has been treated as a contempt of Parliament where it constituted interference with witnesses (Erskine May's *Parliamentary Practice*, 21st ed., 1989, p. 132). The taking of legal proceedings against members or witnesses because of their contributions to proceedings in Parliament is capable of constituting a contempt (Reports of the House of Commons Committee of Privileges, HC 246 1974, HC 233 1981-2). As with contempt of court, "the exercise of a legal right or the threat of exercising it does not excuse interfering with the administration of justice [or the conduct of parliamentary inquiries] by deterring a witness from giving the evidence which he wishes to give" (*R v Kellett* (1976) 1 QB 372 at 391). This point is referred to in more detail in the advice dated 6 March 1989 to the Committee of Privileges, which was published in the 18th Report of the Committee in June 1989.

The significance of the word "improper" in the expression "improper interference with a witness" was also discussed in the advice of 6 March 1989 and in the advice to the Committee dated 13 November 1990 relating to the matter referred by the Senate to the Committee on 18 October 1990. The use of that word ( and it has the same significance in section 4 of the Parliamentary Privileges Act) is intended to exclude actions which might be regarded as interference but which by their nature assist rather than hinder a parliamentary inquiry, for example, attempting to persuade (but not by threats or other improper means) a witness to change false evidence. In relation to contempt of court, this principle was discussed in *R. v Kellett* (1976) 1 QB 372 at 388.

As the advice of 13 November 1990 also indicated, the contempt of improper interference with witnesses covers a wide area of conduct and catches any dealings with witnesses which may be regarded as limiting their freedom to give evidence, deterring them from giving evidence, or improperly influencing them in relation to their evidence.

The question, therefore, may be posed in the following form: Did the directions to Mr Le Grand and the arrangement made with him by the Authority leave him completely free to give evidence before the Joint Committee, or did they limit that freedom, and did they have a tendency to influence him, by deterring him from giving evidence or otherwise?

It could be concluded that the directions given to Mr Le Grand constituted an improper interference with a witness, and therefore a contempt of Parliament, because the directions were intended or likely to have the effect of deterring Mr Le Grand from giving evidence before the Joint Committee, and were an "interference with a witness's freedom" to give evidence.

At pages 37 and 38 of the submission Mr Le Grand discusses the question of whether the arrangement between the Authority and him was in substitution for, or in addition to, the directions already given to him. He makes the point that the directions were not withdrawn. This question may be regarded as not particularly relevant to the Privileges Committee's inquiry, because the reference from the Senate would appear to require the Committee to determine whether there was any improper interference in the past. Moreover, the terms of the arrangement may be regarded as not significantly different from the directions, in that Mr Le Grand was still required to seek the approval of the Authority before giving any evidence before the Joint Committee.

The submission by Mr Le Grand stresses that he submitted to the arrangement with the Authority only under threat of legal action which he regarded as potentially very damaging to him: see pages 26 and 27 of the submission. This threat may also be regarded as not particularly relevant to the question of whether his freedom as a witness was restricted, but it does reinforce the view that the whole purpose of the arrangement was to restrict his freedom as a witness.

A consideration of this matter is assisted by the very relevant precedent established by the Committee in its 18th Report of June 1989. The case which was the subject of that report involved a direction by the Aboriginal Development Commission to the effect that no public statements were to be made by members of the Commission without the prior approval of the Board of Commissioners, and a direction to the effect that documents were not to be submitted to any parliamentary committee without prior approval of the Commission.

In relation to the first-mentioned direction, the Committee concluded that it was not made with any intention of interfering with witnesses proposing to give evidence to a Senate committee. In relation to the second-mentioned direction, the Committee observed that the resolution of the Commission "in the context of contempt of Parliament, would clearly represent an interference with a witness". The Committee found, however, on a consideration of all the circumstances of the case, that the Commission did not intend that the direction interfere with a witness, that an explanation and apology tendered by the Commission should be accepted, and that no contempt had been committed. Thus the Committee's finding rested largely upon an assessment of the intention with which the act concerned was done, and that assessment was based on the particular facts of the case.

This report may be regarded as confirming the principle that to require a witness to seek the permission of some other person or body before giving evidence is an interference with the witness.

The absence of a particular intention does not prevent a finding that a contempt has been committed. This matter is also referred to in the advice of 6 March 1989 to the Committee. The intention with which an act was done may be of less importance in determining whether a contempt was committed than the nature of the act itself. Thus in its 21st Report, presented in December 1989, the Committee found that a contempt had been committed by the adverse treatment of a person, because that treatment was partially in consequence of the person's having given evidence to a Senate committee.

**(b) The answers to questions asked in proceedings of the Joint Committee**

At the hearing of the Joint Committee on 16 February 1990, Senator Hill asked officers of the Authority whether Mr Le Grand had "ever been directed not to give evidence to this Committee or in any way been restricted on the evidence that he should give to this Committee", and received an unambiguous answer in the negative. He further asked whether that was "the view of the Authority as a whole", and received an affirmative answer.

The question which arises in relation to these answers is whether they constituted false or misleading evidence and whether the giving of the answers therefore amounted to a contempt.

The giving of false or misleading evidence to a House of the Parliament or a committee is also one of the well known categories of contempt, and is referred to in the resolution of the Senate of 25 February 1988 in the following terms:

A witness before the Senate or a committee shall not:

- (a) .....
- (b) .....
- (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.

Such conduct also falls within the test applied by section 4 of the Parliamentary Privileges Act.

It is to be noted that the offence extends to the giving of misleading evidence as well as the giving of false evidence. Misleading evidence is evidence intended or likely to give a false impression of the facts. The inclusion of the word "misleading" in the Senate's resolution was not strictly necessary, as the contempt of giving false evidence has long been regarded as extending to any misleading of a house or a committee. For the contempts of "wilfully suppressing the truth" and misleading a committee, the British House of Commons has imprisoned witnesses and expelled a member. The findings of the House in the latter case, in 1947, made it clear that misleading a committee is the equivalent of giving false evidence (HCJ 1828 122, 1947 22).

It may be concluded that the answers given to the questions were misleading in failing to refer to the directions given to Mr Le Grand and the arrangement relating to any evidence to be given by him. Those directions and arrangement could well be regarded as falling within the phrase contained in the question, "in any way.... restricted on the evidence that he should give to this Committee".

Even if the directions and the arrangement are regarded as not falling within the terms of the question, however, it may be argued that the failure to mention the directions to Mr Le Grand and the arrangement gave a misleading impression of the situation in relation to him, and left that misleading impression in the minds of the Joint Committee. It may be contended that a fully truthful answer would have indicated that directions had been given and the arrangement made, but were not regarded by the officers concerned as falling within the terms of the question. Such an answer would have allowed the Joint Committee to inquire further as to the nature of the directions and the arrangement.

Regardless of this contention, any claim that the answers to the questions were technically truthful in the terms of the questions may well be seen as disingenuous. It has been noted that an instruction to a witness not to give evidence without the approval of another person or body is an "interference with a witness's freedom", or, in the terms of the question, a "restriction" on the witness. It would be surprising if officers of the National Crime Authority had any different interpretation of the matter, and therefore also surprising if they did not know that their answers were misleading.

The facts disclosed by the submission, of course, establish that the officers who gave the evidence on 16 February 1990 were aware of the directions given to Mr Le Grand and the arrangement made on 16 December 1989.

In relation to this matter the Committee of Privileges has also established a relevant recent precedent which casts considerable light upon the contempt of giving false or misleading evidence. In its 15th Report, presented in March 1989, the Committee inquired into an allegation that false or misleading evidence had been given before a Senate committee. In this case, as the Committee noted, the answers given by the witness were technically correct, but by his failure to refer to a significant matter members of the committee were left with a false impression as to the facts. The Privileges Committee found that there was no intention on the part of the witness to mislead the committee, and an apology tendered by the witness was accepted. This case demonstrates that withholding relevant information may constitute giving misleading evidence. As with the contempt of interference with witnesses, the intention with which the act was done may or may not be vital in determining whether a contempt was committed.

## **Conclusion**

As you requested, this discussion is based upon an assumption that the facts are as set out in Mr Le Grand's submission, and without the benefit of any other facts or circumstances which may be disclosed by further inquiry.

Whether the Committees draws the conclusions which are suggested here will depend upon its assessment of all the facts and circumstances disclosed by its inquiry.