ADVICE NO. 5

STANDARD OF PROOF

(Advice dated 29 January 1990 from the Clerk of the Senate, Harry Evans, to the Chair of the Committee of Privileges, Senator Giles)

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;
(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 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.