ADVICE NO. 2

PARTICIPATION OF MEMBERS OF COMMITTEE OF PRIVILEGES IN CERTAIN INQUIRIES

(Advice dated 18 January 1989 from the Clerk of the Senate, Harry Evans to the Chair of the Senate Committee of Privileges, Senator Giles)

Thank you for your letter of 15 December 1988 in which you seek my views on whether it is appropriate that members of the Privileges Committee participate in inquiries into matters before the Committee.

The first point which must be made is that the question of whether individual members of the Committee should refrain from participation in certain inquiries, because they might be regarded as not bringing a completely impartial mind to the inquiries, is a question for the good judgement of the individual Senators themselves in the first instance, and of the Senate should the question be raised in the Senate. Having said that, I will make some observations which may be of assistance to the Senators in coming to their decisions.

There is no rule of the Senate relating to the participation in inquiries of Senators who may not be impartial or may not be seen to be impartial. Standing Order 292 provides that a Senator shall not sit on a select committee (this applies to all committees) who is personally interested in the inquiry, but it is clear that this rule relates to a Senator who is interested in an inquiry in the sense that, for example, a Senator who is a director of a company is personally interested in an inquiry into the affairs of the company, which is an entirely different matter, not relevant to the question referred to in your letter.

So far as I can ascertain, no comparable legislature has a rule concerning the participation in inquiries of members who may not be unbiased. It appears that in such legislatures any question of the disqualification of a member from participation in an inquiry is left to the judgement of the member. (I leave aside the House of Lords acting in its capacity as a court.)

The privileges committees of the British Houses perform functions similar to those of the Senate Committee of Privileges, and the question of partiality of members does not seem to have arisen in any public way in relation to those committees. In 1969 the Privileges Committee of the House of Commons had referred to it statements by a person to the effect that the chairman of a sub-committee should not participate in an inquiry into housing in her own town because she would be incapable of impartiality. The committee found that the statement could be construed as a contempt of the House but should not in fact be so construed in this case, by implication as not involving an obstruction of the committee's inquiry. Implicit in this finding was a view that it is improper to attribute partiality to a member in the conduct of an inquiry on the basis of the member's involvement in the subject matter of the inquiry. It may also be concluded that there was an implicit rejection of the view that a member's political interest in a subject prevented the member from conscientiously participating in an inquiry into that subject. (Report of the Committee of Privileges, HC 197 1968-69.)

Going to the Congress of the United States, we find that the United States Senate has a function, in the trial of impeachments, which may be regarded as closer to a judicial function than inquiries by committees of privileges, but has no rule preventing participation in trials of Senators who have expressed views on the matters at issue. While some Senators have disqualified themselves from participation, Senators who clearly had partisan views on the questions arising have participated in trials. (Congressional Quarterly Inc., Powers of Congress, 2nd ed, 1982, pp 166-7.)

It is suggested that there is very good reason for the absence of any rule relating to partial members participating in inquiries, and for legislatures not applying to themselves and their members the very strict rules which apply to judges and courts: such restrictions would be incompatible with the very nature and functions of an elected legislature. Members of elected legislatures in free states are expected to monitor constantly, and participate in discussion of, all matters of public interest and controversy. A strict application of such rules would result in almost all members of the legislature disqualifying themselves from virtually any inquiry. This applies with equal force to the "quasi-judicial" inquiries of committees of privileges as inquiries into other matters of public interest. A privileges inquiry begins with a motion in the House concerned and possibly debate on that motion. Such an inquiry is essentially the first step by a House to protect and preserve the integrity and safety of its own legislative processes. Every member of the House is by the nature of the exercise placed in an entirely different position from that of a judge before whom a prosecution or civil suit is brought.

In the case of the inquiry before the Senate Privileges Committee relating to Aboriginal affairs, for example, every member who has spoken, or who has listened to the debate, on related matters concerning Aboriginal affairs could be challenged for alleged partiality. This point is important because it is not the Committee of Privileges which makes decisions on privilege matters but the Senate on the report of the Committee of Privileges. If a matter arose for determination in the Senate, the members of the Privileges Committee which had made a finding and a recommendation on the matter could be enjoined not to participate in the decision by the Senate, and it would be doubtful whether there would be a quorum of Senators left whose impartiality could not be questioned.

I now turn to the matters concerning the particular Senators and the particular inquiries before the Committee.

The propriety of Senator Durack's participation in the inquiries relating to Aboriginal affairs is challenged on the basis that he signed a reservation attached to the report of November 1988 of Estimates Committee E. That reservation is to the effect that the conduct of the Board of the Aboriginal Development Commission since May 1988 has been highly questionable, as reflected in inter alia the removal of the General Manager of the Commission and the motion of no confidence in its Chairman. The Committee of Privileges is required to inquire whether there was any contempt of the Senate involving an improper interference with witnesses in those actions. In my view Senator Durack, in stating that those actions reflected questionable conduct on the part of the Commission, did not express any view on the question before the Privileges Committee. The letter of 12 December 1988 from Minter Ellison to the President states that it "appears that the Honourable Senator may have prejudged the matters into which the Committee has been charged by the Senate to enquire". This appears to me to be drawing an extremely long

bow, and, as I have said, would provide a basis for questioning the impartiality of virtually every Senator who has said anything in recent debate about Aboriginal affairs. The conclusion that the actions concerned reflected questionable conduct by the Commission could not, in my view, be reasonably regarded as prejudging the question as to whether those actions involved an improper interference with witnesses.

In relation to the participation of Senator Black and Senator Coates in the inquiry into the matter relating to the witness before the Standing Committee on Environment, Recreation and the Arts, I think that the indication by Senator Coates that he did not participate in the proceedings of the Standing Committee giving rise to this report, an indication to which you refer in your letter, avoids any potential problem so far as Senator Coates is concerned, and I think that a public statement to that effect would immediately remove any perception of a problem in relation to him.

Senator Black signed the Committee's report, which stated that "the Committee believes that a prima facie case rests that Ms Howland has been subject to harassment as a result of giving evidence". This might be regarded as providing a stronger basis for the non-participation of Senator Black in the inquiry than the objection to Senator Durack. I would point out, however, that a finding that there is a prima facie case may well be regarded as not preventing the Senator making a totally impartial final judgement after a hearing of all of the evidence. The finding of a prima facie case is just that, and does not involve a concluded view. Under the old procedures of the Senate, prior to the adoption of the new procedures in February 1988, the President was required to find a prima facie case before giving precedence to a motion to refer a matter to the Privileges Committee. Such a finding by the President, implicit or explicit, was not regarded as preventing the President from presiding over or participating by voting in subsequent proceedings. Even under the new procedures, the President in granting a matter precedence, and the whole Senate in deciding to refer the matter to the Privileges Committee, may be regarded as having formed a preliminary view of the matter in question. I therefore suggest that the conclusion should not be readily reached that a finding of a prima facie case prevents a Senator from participating in a full hearing of the matter.

In presenting the report of the Standing Committee, Senator Black made the following statement:

> "The wording of the note received by Ms Howland telling her to look for new accommodation, together with other information provided to the Committee by Ms Howland, and detailed in the report, leads the Committee to believe that the eviction of Ms Howland was a direct consequence of her giving evidence to the Committee. It is, in the Committee's view, a clear case of a witness suffering harassment as a result of giving evidence to a parliamentary committee. The Committee believes that it should be treated by the Senate with the utmost seriousness and that prompt action is required if the progress of the Committee's inquiry into drugs in sport is not to be impeded."

This statement may well be regarded as expressing a concluded view on the very question before the Committee, and therefore may be regarded as raising a more serious problem in relation to the participation of Senator Black in the inquiry. It may be that Senator Black's statement was intended to convey that, in the Standing Committee's view, the evidence in the

case clearly raised a question of the harassment of a witness, but the statement is certainly open to the other interpretation. I think that if Senator Black decides to continue to participate in the inquiry it would be advisable for him to make a statement to the effect that he has not formed a concluded view on the questions before the Privileges Committee and that he is bringing an open mind to the privileges inquiry.

This suggestion may be regarded as a somewhat generous view of the matter, but in this connection I would draw to your attention the report of the Select Committee on Allegations Concerning a Judge, Parliamentary Paper 271/1984, at page 3, where that committee reported a foreshadowed challenge to the membership of the committee of three members who served on the earlier Select Committee on the Conduct of a Judge and who had made findings on some matters before the second committee. The members concerned did not disqualify themselves, and the committee reported as follows:

> "Whilst not conceding the validity of the submission foreshadowed by Mr Hughes, the three members concerned considered whether they should disqualify themselves from sitting on the Committee, and concluded that they should not do so. They considered that their service on the previous Committee did not preclude them from making a proper and unbiased judgement on the matters before this Committee on the basis of the evidence to be heard by it, or that they had any sense of vested interest in maintaining their earlier decision."

It is suggested that the case for the Senators concerned not participating in that inquiry was very much stronger than the considerations applying to the members of the present Privileges Committee. It is significant that the counsel concerned did not pursue the foreshadowed submission and did not, so far as I am aware, subsequently question the Committee's report because of the participation of the Senators concerned. I suggest that this could well provide a significant precedent for the members of the Privileges Committee to consider.

In the last paragraph of your letter you indicate a concern about public perception of the three Senators continuing to participate in the relevant proceedings. I strongly recommend that, when the Senators have made their decisions as to their participation in the committee's inquiries, some form of public statement be made concerning their decisions and the reasons for their decisions. This may take the form of statements by the Senators concerned or a statement or report by the Committee. I consider that, if the Senators decide to participate in the inquiries, an appropriate statement should allay any adverse public perception.

Having made these observations, I again stress that the question of the participation of the Senators in the Committee's inquiries is one for the good judgement of the Senators.

I conclude with the advice that, in making their decisions, the Senators should be careful not to place future committees, not only Privileges Committees, the Senate and all members of the Senate in a difficult position by providing a precedent which would encourage future challenges to the participation of Senators in inquiries, by too ready an acceptance of the misleading analogy with the rules and practices of the courts.

(Advice dated 1February 1989 from the Clerk of the Senate, Harry Evans, to the Chair of the Senate Committee of Privileges, Senator Giles)

Thank you for your letter of 31 January 1989 conveying a request from the Committee of Privileges for advice on a submission by Sir James Killen contained in a letter dated 9 December 1988 from MacPhillamy, Cummins & Gibson.

Sir James submits, through the solicitors, that "there is a long established tradition in Parliamentary enquiries that no parliamentarian should sit on a committee in circumstances where it could be said that that parliamentarian may be biased against the person enquired into or have pre-judged any of the issues to be examined by Committee Members" and that "there are ample precedent for this in the House of Representatives when he stepped down from a Committee Enquiry relating to Mr Sommerville-Smith in 1959".

On the occasion referred to, Mr Killen (as he then was) asked the House of Representatives to discharge him from the Committee of Privileges during its inquiry into an allegation against Mr J. Somerville Smith (this appears to be the correct spelling of the name), on the basis that he had criticised the activities of Mr Somerville Smith in the House on an earlier occasion (Hansard, 7/4/59, p. 903, 8-9/5/58, pp. 1682-3.).

The particular circumstances of this case should be noted. The subject of Mr Killen's earlier criticism was very closely related to the subject of the complaint referred to the Privileges Committee. Both matters involved Mr Somerville Smith's public relations activities and the alleged involvement of members of the House in those activities. It is also significant that Mr Killen left the Committee only after he had been criticised in the House by an opposition member for sitting on the Committee (Hansard, 18/3/59, pp. 772-3). In his speech seeking his discharge from the Committee, Mr Killen stated that he had not been influenced by anything said in the House or by "any reckless requisition that had been served on this Parliament by any person outside". I am not aware of the matter referred to in the latter phrase.

There are other precedents which may be regarded as supporting Sir James' submission. For example, Mr Yates withdrew from the Committee of Privileges of the House when it inquired into a complaint involving defamation of members in a press article which was referred to the Committee on the motion of Mr Yates. (Hansard, 28/2/78, pp. 195, 228, 1/3/78, p. 306.)

These precedents, however, cannot be regarded as establishing any general rule or convention or "long established tradition", because for every such precedent there is a seemingly contrary precedent.

For example, to take another case in the House of Representatives, Mr Bryant in 1963 continued to serve on the Select Committee on the Grievances of the Yirrkala Aborigines, notwithstanding that he was acting for the Aboriginal people concerned in litigation which was stated to involve "precisely the same matters - the matters of the exclusion of land from an aboriginal reserve - which are to be the subject of inquiry by the select committee", and notwithstanding that the Minister for Territories (Mr Paul Hasluck, as he then was) strongly objected in the House to the presence of Mr Bryant on the Committee. (Hansard, 19/9/63, pp. 1176-9.) On that occasion the Minister asked the Speaker to rule on the matter, and the Speaker made a statement to the effect

that the Chair could not determine the question and it was a matter for decision by the member concerned, subject to any decision by the House. The Minister then stated that "this is not the sort of issue that the Government would force a vote in order to exclude a member" and that "we will certainly not move to unseat him", thereby reinforcing the view that such questions should be decided by the individual member concerned.

There are also different precedents in the Senate. For example, in 1971 Senator Wheeldon did not participate in the proceedings of the Committee of Privileges when it inquired into the unauthorised publication of a proposed report of the Select Committee on Drug Trafficking and Drug Abuse in Australia, on the basis that he was a member of that select committee. In the circumstances of this case, Senator Wheeldon may well be regarded as unduly scrupulous, because neither the select committee nor Senator Wheeldon had said anything about the unauthorised publication, and, so far as is known, the select committee had not considered the matter. Thus Senator Branson, who was also a member of the select committee, served on the Privileges Committee, stating that he did not think that it was necessary for him to withdraw from the inquiry unless something arose to alter that decision. (Report of the Committee of Privileges, 13/5/71, Parlt. Paper 163/171, p. 4.)

There is also the precedent of the Select Committee on Allegations Concerning a Judge, to which I referred in my letter of 18 January 1989.

The only conclusions which may be drawn from the precedents, therefore, are that questions concerning the service of members on a committee where they may be regarded as not entirely impartial should be decided by the individual members concerned, and that there is no general rule or convention which may be applied to all cases.

As I have suggested, members in making their decisions may well be influenced by the particular circumstances, which greatly differ from case to case.