ADVICE NO. 40

RECENT PRIVILEGE CASES

This note is to acquaint the committee with developments in recent cases concerning parliamentary privilege.

AUSTRALIAN CASES

Three Australian cases involve actions in the federal courts against the Commonwealth and attempted use of documents prepared for the purpose of Senate proceedings. Two of these cases have been resolved. Another case involves the Parliament of Western Australia and the Crime and Corruption Commission of that state. There is also a case before the Industrial Relations Commission in which a question of parliamentary privilege was raised.

Legal proceedings involving Senate-related documents

In *White v Director of Military Prosecutions* the plaintiff sued the Commonwealth in relation to matters concerning her treatment as a member of the Defence Force. In the High Court the plaintiff attempted to establish that the military justice system is unconstitutional because it confers judicial power on non-judicial bodies. In the course of submissions the plaintiff's counsel attempted to use the report of the Senate Foreign Affairs, Defence and Trade Committee on military justice to support the submissions. The Solicitor-General, appearing for the Commonwealth, referred to the parliamentary privilege point, that a document forming part of proceedings in Parliament could not be used to support the action, but mainly argued that the views of a Senate committee as to the state of the law are not relevant to the question of the constitutionality of the law to be determined by the court. The arguments of counsel for the plaintiff were somewhat confused between using the committee report as an extrinsic aid and urging the court to adopt the committee's view of the law.

The court, in a judgment handed down in June, found against the plaintiff by a majority of six to one. The parliamentary privilege point was not referred to in any of the justices' reasons. There was some unrelated reference to the parliamentary contempt jurisdiction as an example of a seemingly judicial power held by a non-judicial body.

In *CPSU v Commonwealth*, an action in the Federal Court against the Commonwealth under workplace relations legislation, a document prepared for Senate estimates hearings was admitted and referred to in evidence and argument before it was realised that, as a document prepared for the purposes of parliamentary proceedings, it should not be used in that way. The Commonwealth sought the withdrawal of the document and the evidence on the basis of parliamentary privilege. The other party accepted the claim of parliamentary privilege and the document and evidence were withdrawn by consent of the parties.

In *Niyonsaba v Commonwealth* the plaintiff is suing the Commonwealth in the Federal Court in relation to the death of a child migrant. An application by the plaintiff for discovery of documents covered, amongst other things, briefing notes prepared for Senate question time and estimates hearings. The Commonwealth has claimed exemption of these documents on the ground of parliamentary privilege. The matter has not yet been determined.

Western Australian case

The Western Australian Crime and Corruption Commission is conducting an inquiry into misconduct by public office-holders. In February this year it held hearings, taking evidence from current and former members of the state Parliament, and a former member of the Senate, into alleged improper influence on two parliamentary committees, the Estimates and Financial Operations Committee of the Legislative Council and the Standing Committee on Economics and Industry of the Legislative Assembly. The Commission appeared not to realise, at that stage, that it should not be taking evidence about proceedings of parliamentary committees, which are protected from examination in any court or tribunal by the law of parliamentary privilege.

The Commission wrote to the committee asking for access to relevant documents, including minutes and other documents of the committee. The committee drew attention to the parliamentary privilege point and reported the request to the Council. The Commission then made its request to the President. The Commission's letter to the President indicated an awareness that there might be some point of parliamentary privilege involved, but there was still apparently no realisation that the inquiry by the Commission into proceedings of the committee was itself unlawful. The President drew to the Council's attention the matter of parliamentary privilege involved. The committee also reported to the Council on the apparent unauthorised disclosure of committee proceedings which had been revealed by the evidence before the Commission.

After a report by the Procedure and Privileges Committee, the Council agreed to make the documents available to the Commission on condition that the law of parliamentary privilege is observed. This decision is somewhat puzzling, as it is difficult to see what use the Commission could make of the documents which would not involve a violation of parliamentary privilege. The Council also appointed a select committee to inquire into the apparent unauthorised disclosure of committee proceedings. This committee has not yet reported.

Strangely, the Legislative Assembly seems not to have been concerned about the parliamentary privilege point, but only about the unauthorised disclosure of committee proceedings revealed in the testimony before the Commission. The Procedure and Privileges Committee of the Assembly found that a member of the Economics and Industry Committee had disclosed the chair's draft report of the committee to a former member of the Assembly, who had in turn disclosed it to another person. The purpose of these disclosures was found to be private gain. The committee found that the member and the former member were guilty of contempt, and recommended that the member be censured, suspended from the service of the House for seven weeks and disqualified from service on any parliamentary committee for the remainder of the Parliament. These recommendations were adopted by the Assembly.

Industrial Relations case

Smith and Department of Foreign Affairs and Trade is a case before the Industrial Relations Commission in which the applicant Smith is challenging under the Workplace Relations Act his dismissal from the Department of Foreign Affairs and Trade, which was partly on the basis of an exchange of emails with a member of the staff of an Opposition member of the House of Representatives. The staff member asked about a government report and in his response Mr Smith suggested that a question should be asked at the Senate estimates hearings, that perhaps such a question had been asked already and that the Hansard database should be consulted. Mr Smith had sought advice from the Clerk of the Senate and had been

advised that it was at least persuasively arguable that his email was protected by parliamentary privilege in that he was informing a member of the Parliament of the availability of a parliamentary process, namely Senate estimates hearings. He raised this argument in hearings before the Commission in an attempt to have the email excluded as a ground for his dismissal.

The Commissioner hearing the applicant decided on the evidence before him that the email exchange was for the purpose of the formulation of Opposition policy and not for the purpose of proceedings in Parliament, and that therefore the communication was not protected by parliamentary privilege. This decision does not have authority as a judgment in law, because the Commission is not a court. The Commission has not yet issued its final determination on Mr Smith's application. If that determination goes against him, he may have an appeal to the Federal Court, and he could argue the parliamentary privilege point again there.

OVERSEAS CASES

Jefferson case: search warrants

William J. Jefferson is a member of the US House of Representatives whose congressional office was searched and documents seized under warrant by federal law enforcement agencies investigating official corruption. This was believed to be the first occasion of a search of a congressional office, and Jefferson's challenge to the search provided the first occasion for the courts to consider legislative immunity in that context.

The agencies which conducted the search put in place a "filtering" process to ensure that material relating to the congressman's legislative duties was not seized. Jefferson, however, maintained that the search as such was unconstitutional, on separation of powers grounds. The House of Representatives did not support that broad claim, but maintained that Jefferson should have been allowed to remove immune material from the scope of the search.

A District Court rejected both of these arguments and found that the legislative immunity extended only to the use of material in court proceedings, and afforded no protection against lawful searches.

The Court of Appeals, however, ordered a stay of this judgment and put in place an arrangement similar to those used by the Australian Senate in similar cases, whereby the congressman would be allowed to claim immunity for particular documents and the claim would be determined by the court.

In its substantive judgment, delivered on 3 August 2007, the Court of Appeals held that the search and seizure violated the legislative immunity, because Jefferson should have been allowed to claim immunity for particular documents, that claim should have been determined by the court, and immune documents should not be obtained by the law enforcement agencies. The court thereby arrived at a position identical to that argued by the Australian Senate in the Australian cases.
Information in relevant Australian cases was supplied by the Department of the Senate to the US House of Representatives via researchers in the Library of Congress. So a process of cross-fertilisation has occurred: the Australian Senate has relied on US precedents, not relating to search warrants but to other processes for compulsory production of documents, to assert an immunity from seizure under search warrant, and the US legislative authorities have drawn upon the Australian Senate's precedents in arguing for such an immunity in their

courts. The US Court of Appeals judgment will now be persuasive should the issue come before Australian courts again, and will provide a basis for altering the only Australian judgment so far, that of French J. in *Crane v Gething*.

Employment cases

There have been cases in Canada and the United States which have caused great consternation and much discussion by raising the issue of whether parliamentary privilege or legislative immunity extends to employment decisions in respect of legislative staff or personal staff of legislators. These cases are irrelevant to Australia because such employment matters here are well regulated by statute, and it has never occurred to anyone that parliamentary privilege would have anything to do with such decisions. It is just possible that, in a court case about employment matters, there could be some difficulty caused by the inadmissibility of evidence relating to parliamentary proceedings; for example, there could be a dispute between a member of one of their personal staff about whether work done for the member was used in the chamber or in a committee, but the possibility is so remote as not to cause us any concern.