ADVICE NO. 25

PARLIAMENTARY PRIVILEGE — *ROWLEY V ARMSTRONG* —JUDGMENT OF JONES J

Thank you for your letter of 12 May 2000, in which the committee seeks extended comment on the judgment of Jones J delivered on 12 April 2000 in *Rowley v Armstrong.*

It is difficult to comment further on the judgment because it is so thin, and much of the short compass which is devoted to the question of parliamentary privilege is occupied by quotations which have little or nothing to do with the question at issue. I hope, however, that the following further observations may be of some use to the committee.

The judgment was delivered on an application by Mr Armstrong to have the action against him by Mr Rowley struck out on the grounds of unreasonable delay and abuse of process. The latter ground was based on the finding by the committee that the action constituted a contempt of the Senate and on the argument that the communication between Mr Armstrong and Senator O'Chee which is the subject of the action was protected by parliamentary privilege. By the second ground, therefore, the court was asked to find whether there was abuse of process in the pursuit of the action. It was not necessary for Jones J to determine the question of parliamentary privilege in order to ascertain whether there was abuse of process. A finding that there was no abuse of process would have left the question of privilege to be determined in the subsequent course of the proceedings. Jones J, however, pronounced on the question of parliamentary privilege.

Given that he decided to do so, the question for determination was whether the communication between Mr Armstrong and Senator O'Chee was related to proceedings in the Senate to the extent that the communication could be said to be for purposes of, or incidental to, those proceedings. This question would turn on the character of the communication and its relationship with proceedings in the Senate. The judgment, however, does not consider the character of the communication or its relationship with Senate proceedings. Jones J manages to avoid any such consideration in the course of the judgment. He simply comes to a general conclusion that "an informant in making a communication to a parliamentary representative is not regarded as participating in 'proceedings in Parliament' and therefore the provisions of the *Parliamentary Privileges Act* do not apply", and he applies that general conclusion to the particular communication in question.

Contrary to the judgment, this general conclusion is not one which "follows clearly enough" from the matters cited by Jones J, a point to which I shall return. In any event, no such general conclusion can be drawn. Whether the provisions of the Parliamentary Privileges Act apply depends on whether the communication is for purposes of, or incidental to, parliamentary proceedings. The character of the particular communication and its relationship with proceedings has to be examined. No one has ever claimed that *any* communication with a member of Parliament is protected by parliamentary privilege. Jones J has not only determined a question unnecessarily but has mistaken the question to be determined.

The section of the judgment dealing with parliamentary privilege quotes the Parliamentary Privileges Act, and very nearly states correctly the question in issue (referring to "the position in

particular", but then failing to return to the particular position). It then diverts to the principle of "the Court's reluctance to interfere with the activities of the parliamentary and executive areas of governments". This issue is illustrated by a long quotation from *Criminal Justice Commission v Nationwide News Pty Ltd*. It is not clear whether this issue was raised by the applicant as an additional support for the application, but it has nothing to do with the case. The question of whether some parliamentary and executive activities are non-justiciable is irrelevant to the question of whether, as a matter of law, a particular communication with a member of Parliament is protected by parliamentary privilege. The judgment then leaves this issue without relating it to the case, and observes that the scope of parliamentary privilege and the Commonwealth and Queensland statutes have been examined in *Laurance v Katter* and *Rowley v O'Chee.* It is then stated that "it is not necessary to re-canvas the issues decided in each of those cases". It is left to the reader to puzzle over the relevance which those judgments were thought to have to the case, because no conclusion is drawn about their relevance.

The judgment then launches into a long quotation from *Rost v Edwards*. This quotation refers to ousting the jurisdiction of the courts, which has no relevance to the interpretation of the provision in the Parliamentary Privileges Act, and it then states that there is no exhaustive definition of proceedings in Parliament. The latter observation, in a British case, refers to the British situation in which there is no statutory equivalent of section 16 of the Parliamentary Privileges Act. It has nothing to do with the task of an Australian court of interpreting that Act. The judgment then baldly states the conclusion that "the defendant's act of communicating with the Senator was not 'a parliamentary proceeding' as that term is contemplated by the statute". That is not a difficult conclusion, but it either avoids or misunderstands the question in issue. The question is whether the communication was for purposes of, or incidental to, parliamentary proceedings, as contemplated by the statute.

The judgment then refers to article 9 of the Bill of Rights of 1689, unnecessarily, as that provision is encompassed and explicated by the Parliamentary Privileges Act. This is followed by a quotation from the judgment in *Hamilton v Al Fayed*, which simply states that parliamentary proceedings are protected in two different ways in court proceedings. Indeed they are, but the question is the relationship of Mr Armstrong's communication with proceedings in Parliament. The quotation adds nothing to that question, and the quoted judgment was not concerned with that issue.

The judgment then proceeds to one of only two relevant authorities which are cited. This is a passage in Erkine May's *Parliamentary Practice,* to which attention was drawn by Sir James Killen, junior counsel for Mr Rowley. This quotation contains the sweeping statement that no protection is afforded to informants of members of Parliament, regardless of whether information is subsequently used in parliamentary proceedings. There are several difficulties with this passage which are unperceived by Sir James Killen or Jones J. Even if it were an accurate summary of the law in the United Kingdom (which it is not, because the question in issue has not been adjudicated there), it would be of no help in interpreting the Australian statute. The passage is directed to the question of whether the House of Commons may protect members' informants by the exercise of its contempt jurisdiction. This is quite different from the question of whether a communication with a member is protected by parliamentary privilege as a matter of law, a distinction to which I shall return. Even as a statement of the House of Commons' exercise of its contempt jurisdiction, however, the passage is defective. It is based on two cases in the 1950s

involving communications with members. In one case the House declined to refer a matter of alleged interference with a communication with a member to the Privileges Committee. There were several relevant considerations, apart from an argument, advanced by Winston Churchill, that protection should not be extended to such communications. The Speaker had ruled that the matter could not have precedence because it was not raised at the earliest opportunity, and it was pointed out that the communicant, a clergyman, was merely rebuked by an ecclesiastical superior, a bishop, who had no power to interfere with the clergyman's political activities in any event. In the second case the Committee of Privileges was able to recommend that no action be taken, on the basis that members of the armed forces were involved and it was a matter of military discipline, because government regulations conferred a right on members of the armed forces to communicate with members of Parliament. The two cases cannot be regarded as determining for all time that the contempt jurisdiction will never be exercised to protect a communication with a member.

The judgment then provides a long quotation from Fleming's *Law of Torts* which states that absolute immunity is an aid to the efficient functioning of the legislature, the executive and the judiciary, but which throws no light on the point in question.

The judgment then proceeds to its only other authority, the finding of the Supreme Court of New South Wales in *R v Grassby,* which is quoted at great length. It was there held that the communication of a document to a member of Parliament was not protected by parliamentary privilege. There are several factors involved in this judgment which render it of little assistance. In the first place, it was concerned with the law of parliamentary privilege applying to the Houses of the Parliament of New South Wales, where there is no constitutional or statutory prescription of parliamentary privilege. The protection of the proceedings of the Houses in that state depends on a common law doctrine that the Houses, their committees and members have such protections as are reasonably necessary to allow them to perform their functions. The judgment therefore is of no help in interpreting the Commonwealth Parliamentary Privileges Act. The circumstances of the judgment are also significant. The case was one of an unsolicited communication to a member which had no connection whatsoever with any proceedings in Parliament, actual or potential. The judgment is therefore of little use in determining the position, under Commonwealth law, of a communication which has a very different relationship with proceedings in Parliament.

Jones J then quotes a long passage from the judgment in *O'Chee v Rowley*. The passage deals with some irrelevant points, such as whether an individual member of a House may waive the protection of privilege, and it has only one sentence which is remotely relevant: "The privilege under s.16(2) attaches when, but only when, a member of Parliament does some act with respect to documents for purposes of, or incidental to, the transacting of House business." This sentence should have suggested to Jones J the question to which he should have directed his attention, namely, whether the communication between Mr Armstrong and Senator O'Chee had a sufficiently close connection with proceedings in Parliament to attract the protection of the statute. On the contrary, the passage suggested to Jones J only that an informant is never protected in making a communication with a member.

The judgment then proceeds to dismiss with great brevity the significance of the Senate Privileges Committee determining that the action against Mr Armstrong was a contempt. The

question of whether the action was a contempt, however, was carefully distinguished by the committee from the question of whether Mr Armstrong's communication with Senator O'Chee was protected from legal action by parliamentary privilege. Jones J is not alive to that distinction. He says that the finding of the committee "does not in any way affect the rights of the plaintiff in this instance to pursue his claim and for the Court to determine the question of liability in circumstances of any claim of privilege which the defendant is entitled to raise". So the judgment comes back to the question which, as this sentence appears to suggest, can only be determined in the course of the proceedings on the action brought by Mr Rowley. Oblivious to his own suggestion in this sentence, however, Jones J has already determined the question which it was not necessary for him to determine.

While quoting passages which he thought supported his general conclusion (although most of them do not), Jones J ignored other passages which should have suggested to him that he should not be so ready to conclude that communications with a member of Parliament are never protected. He might have been cautioned by McPherson JA's acceptance in *O'Chee v Rowley* of the proposition that "threats of proceedings being taken against his informants had the effect of discouraging them from providing further information about Mr Rowley's activities, and so of restricting the senator's ability to pursue the subject in the House", and the same justice's reference to the American courts' acceptance of the principle that court processes are capable of having a "chilling" effect on legislative activity by hampering the ability of the legislature "to attract future confidential disclosures necessary for legislative purposes" (1997 150 ALR 199 at 212 and 214). That reference might have led Jones J to the conclusion, in the judgment cited by McPherson JA, that allowing legal processes to reach evidence "that Congress *had not prepared itself* [emphasis added] …. certainly would 'chill' any congressional inquiry; indeed, it would cripple it" (*Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408, at 417 and 419). He might also then have discovered that information-gathering for legislative purposes, including information-gathering from constituents, has been held to be protected (*United Transportation Union v Springfield Terminal Railway Co.,* 1990 132 FRD 4, and the order of 15 March 1989 made in that case).

Analysis of the judgment therefore leaves us simply with the finding that an informant is never protected in communicating with a member of Parliament, and with a collection of quotations which do not support such a conclusion.

I would be pleased to provide any future assistance to the committee in its examination of this matter.