

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**THE SENATE**

**COMMITTEE OF PRIVILEGES**

**COUNSEL TO THE SENATE**

**102<sup>ND</sup> REPORT**

**JUNE 2002**

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# COUNSEL TO THE SENATE

## Introduction

1. On 20 March 2002 the Senate referred the following matter to the Committee of Privileges:

The desirability and efficacy of engaging counsel to represent the Senate in court and other tribunal proceedings on questions involving parliamentary privilege affecting the Senate or senators.<sup>1</sup>

## Background

2. In the course of considering various parliamentary matters, members of the committee, both as members and in their role as senators, have encountered several instances where it has become obvious that questions of parliamentary privilege have, or should have, been raised within the court system. The committee itself has had cause for alarm in respect of a matter which was the subject of its 67<sup>th</sup> report.<sup>2</sup> In brief, the committee had considered whether a contempt had been committed by a plaintiff who sued for defamation a person identified in the Senate as a provider of information to a senator. Some time after the tabling of the committee's report, which found that the plaintiff had been in contempt of the Senate, the committee was disturbed about the implications of a later interlocutory judgment relating to the matter. It sought advice from the Clerk of the Senate, and a legal opinion from Mr Bret Walker SC. Both the advice and the opinion were highly critical of the terms of the judgment, and the committee reported accordingly to the Senate.<sup>3</sup> As a result, the Senate authorised the President to engage counsel as *amicus curiae* in two defamation cases should this be required.<sup>4</sup>

3. In addition, in recent times the Senate has made submissions to a court on the privilege implications of seizure of documents in a senator's offices,<sup>5</sup> and has been asked by a federal judge for its opinion on the scope of privilege in another unrelated case.<sup>6</sup> In this latter case, the committee places on record its appreciation of the judge concerned, because it was he who, in the course of a hearing, drew the attention of counsel for both the plaintiff and the Commonwealth of Australia to possible privilege implications.

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1 *Journals of the Senate*, 20 March 2002.

2 Senate Committee of Privileges 67<sup>th</sup> Report, PP 141/1997.

3 Senate Committee of Privileges 92<sup>nd</sup> Report, PP 150/2000; 94<sup>th</sup> Report, PP 198/2000.

4 Resolution agreed to 4 September 2000, *Journals of the Senate*, p. 3192.

5 See Senate Committee of Privileges 75<sup>th</sup> Report, PP 52/1999, and *Odgers' Australian Senate Practice*, 10<sup>th</sup> ed., p. 43.

6 *NTEIU v The Commonwealth* 2001, cited in *Odgers*, op. cit. p. 43.

4. The Chair of the Committee of Privileges expressed the committee's concerns about the difficulties involved for the Senate when matters of privilege are the subject of court proceedings in the following terms:

We have to consider whether we do need to have a friend at court, as they say, a barrister briefed to at least inform the judge of what the privileges issues are.<sup>7</sup>

5. Following that speech, the committee received a letter from Emeritus Professor Dennis Pearce which included the following comment:

I read with interest your comments in the Senate on 7 August suggesting that the Senate should keep on retainer a person skilled in privileges law who can represent the interests of the Parliament when privileges issues arise. I completely agree with you. There is considerable misunderstanding of the law in this field and the ordinary barrister has neither the knowledge nor the sympathy to represent the interests of the Parliament adequately.<sup>8</sup>

6. Professor Pearce, who was the first legal adviser to the Senate Standing Committee for the Scrutiny of Bills and later Commonwealth Ombudsman, then went on to suggest a person who might be suitable to fulfil this purpose. After considering this letter, the committee decided in the new Parliament to seek a reference from the Senate in the above terms, which was agreed to without debate on 20 March 2002.

### **Conduct of inquiry**

7. Before embarking on a more extensive examination of the proposal, the committee first sought the views of the Clerk of the Senate. In particular, it requested his comments on the proposal's cost implications, and on any other difficulties in implementing the proposal, such as the availability of suitable counsel. The Clerk's response is at Appendix A to this report. Given the nature of the response, the committee has decided not to pursue the inquiry further, for the following reasons.

8. Implicit in the Clerk's letter was an assumption that work undertaken on a retainer basis is not practicable or appropriate. As he notes, it is only on relatively rare occasions, to his and the committee's knowledge, that the services of a barrister are required. He has suggested instead that, perhaps, 'two or more designated knowledgeable barristers [might] be willing to undertake work for the Senate when needed'.

9. The committee does not see this as any more advantageous than the present, ad hoc, arrangements. The committee itself has already been extremely fortunate when it has required legal advice from practising barristers, and takes the Clerk's point that

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7 Senate *Hansard*, 7 August 2001, p. 25761.

8 Letter, dated 17 September 2001.



even on a retainer a barrister may not be available at the precise time the barrister's advice or court appearance is needed.

### **Conclusion**

10. The committee has therefore concluded that, while having counsel readily at hand to represent the Senate would be desirable, appointing counsel on a retainer for those few occasions of which the Senate is or becomes aware of parliamentary privilege questions in court or tribunal proceedings, is not efficacious, particularly given the costs potentially involved. The committee therefore sees no alternative but to continue the ad hoc retention of counsel as required.

Robert Ray  
**Chair**





AUSTRALIAN SENATE

Appendix A

CLERK OF THE SENATE

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12 April 2002

Senator Robert Ray  
Chair  
Committee of Privileges  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Ray

#### **PROPOSED ENGAGEMENT OF COUNSEL**

Thank you for your letter of 27 March 2002, in which the committee seeks comments on the reference to the committee of 20 March 2002 relating to the proposed engagement of counsel to represent the Senate in proceedings involving parliamentary privilege affecting the Senate or senators.

I do not think that I can provide any observations which are not already apparent to the committee, but I hope that the following may be of some use.

Presumably this proposal would involve having a senior barrister in practice, knowledgeable in the law of parliamentary privilege, who would stand ready to represent the Senate as required in proceedings involving such questions of parliamentary privilege. Such a person would be actually engaged only when an occasion for representation arose, and would be remunerated only for time spent on those occasions.

The only difficulty with this proposal is that when an occasion arises, the designated barrister may be unavailable due to their other work. It would not be feasible to expect the designated barrister to give any kind of undertaking that other work would be put aside or reallocated when an occasion to represent the Senate arose. Even if such an arrangement were possible, it would involve ongoing cost which would not be justified given the rarity of the occasions. That the designated barrister may be unavailable when an occasion arises is simply a risk which would have to be taken. It may be possible to overcome this by designating two or more knowledgeable barristers who would be willing to undertake work for the Senate when needed.

The other problem is to find barristers knowledgeable in parliamentary privilege. There are, however, a few who have a proven track record in advocacy on parliamentary privilege. They could be selected on the basis of that track record.

In relation to cost implications, if the arrangement is on the basis stated, the cost implications would not be significant. The designation of one or more barristers in the manner proposed may reduce costs in the future because it may not be necessary to pay for time taken by other barristers to get "up to speed" on parliamentary privilege when occasions for their services arise. The occasions are rare, and, when they arise, some cost is unavoidable.

I would be pleased to provide any other information the committee may require.

Yours sincerely

A handwritten signature in black ink, appearing to read "Harry Evans". The signature is written in a cursive style with a large initial "H" and a long, sweeping tail.

(Harry Evans)