ADVICE NO. 18

ALLEGED INTERFERENCE WITH POTENTIAL WITNESS

Thank you for your letter of 24 October 1997 in which the Committee of Privileges seeks comments on the matters referred by the Senate to the committee on 2 October 1997. I hope that the following observations will be of some assistance to the committee.

The committee has available to it the two advices provided to Senator Faulkner on 29 September 1997. The first of those advices was composed on the basis of a matter put to me by Senator Faulkner over the telephone on 27 September 1997 as a hypothetical case, or at least a case the factual content of which was unknown to me at the time. The second advice was provided after the actual case became known to me as a result of items in the press and questions and answers in the Senate on 29 September, and that advice was directed to the question whether any change was required by the actual case to the considerations of principle set out in the first advice. Both advices were directed to the questions of principle arising and did not purport to determine the facts of the case.

This note is also concerned with the issues of principle arising and does not purport to determine the facts.

Finding the facts is the task of the committee, and when the facts are found the application of principles to those facts can then be determined. In this case, the task of finding the facts resolves itself into finding exactly what transpired between the Attorney-General, any person acting on his behalf, and any other person on the one hand, and on the other hand the President or other officers of the Australian Law Reform Commission. When it is discovered exactly what transpired, the intention with which actions were taken can then be determined. Finding the intention with which acts were done is part of finding the facts. The task of finding intention in this case resolves itself into determining whether any acts were done for the purpose of influencing evidence which might be given before a parliamentary committee and whether that purpose was pursued by anything in the nature of a threat or inducement.

To turn to the issues of principle, the following considerations appear to be relevant.

Taking or threatening to take action with the purpose of, or with the tendency to, influence a witness in respect of the witness's evidence may be held to be a contempt even where the action is otherwise lawful or indeed explicitly authorised by law. This principle was referred to in previous advices to the committee and in previous reports of the committee, and requires no further elaboration. (I refer to the advices dated 6 March 1989, 13 November 1990, 28 February 1991 and 10 April 1992.)

It is necessary to emphasise, however, that the use of the word "improper" in the formulation of the offence of improper interference with witnesses, as in paragraph (10) of resolution 6 of the Senate's Privilege Resolutions, does not indicate that an act has to be improper in any other context in order to constitute improper interference with a witness. As the courts have explained in relation to interference with court witnesses, the use of the word "improper" in this formulation merely distinguishes a very small category of acts which may be regarded as interference but

which are not improper, such as seeking to persuade a witness to correct evidence which the witness knows to be false or to add material facts to evidence. It is necessary to stress this point because of a widespread misconception.

It is also necessary to stress that anything in the nature of a threat to a witness, that is, any indication that some action will be taken, or not taken, if a witness gives evidence, or gives evidence of a certain kind, constitutes improper interference even where the threatened action or non-action is lawful or explicitly authorised by law. This principle is established in relation to interference with court witnesses and in relation to interference with parliamentary witnesses by cases where the threatening or taking of legal action is held to be a contempt where the purpose or tendency is to interfere with a witness. The committee and the Senate have adopted this principle in past cases, most recently in the 67th report of the committee.

Interference with a witness may be constituted by interference with a *potential* witness, a person who may give evidence in the future but who has not been summoned or even invited to give evidence. This point has also been referred to in previous advice. (In relation to interference with court witnesses, this principle was clearly stated by the Supreme Court of Victoria in *R v Carroll* 1913 VLR 380.)

A particular variation of the principle that otherwise lawful action can constitute improper interference with a witness is provided by the circumstance of a person who has some lawful authority over another person and uses that lawful authority to influence that other person's evidence. Such a use of a lawful superior authority constitutes improper interference even though the other person is subordinate and subject to direction.

There are two exceptions to this principle. One is provided by the case of a minister, as part of a claim of public interest immunity, directing a public servant not to give evidence or not to give certain evidence. It is generally accepted that in this circumstance the public servant should not be liable to be dealt with for contempt. The Senate so declared in its resolution of 12 May 1994 referring the Parliamentary Privileges Amendment (Enforcement of Lawful Orders Bill) 1994 to the committee for examination. Secondly, it is accepted that ministers have the prerogative of determining government policy, of expounding the case for that policy and of directing public servants as to the policy to be put in the course of their evidence. This is recognised by paragraph (16) of resolution 1 of the Senate's Privilege Resolutions.

Apart from these exceptions, the use by a minister of the minister's lawful authority over a public official to influence that public official's evidence can be held to constitute an improper interference with a witness.

As with other aspects of this subject, considerable light is thrown on this principle by the approach of the courts to interference with witnesses before the courts. Past cases before the courts leave no doubt as to the correctness of the principle here stated. One case is particularly instructive. It came before the High Court in 1944 (*Watson v Collings and others,* 1944 70 CLR 51). In this case the Commonwealth was a party to an action by the plaintiff Watson, who claimed to have been duly appointed to a position in the Commonwealth Railways which was subsequently unlawfully filled by another person. The Minister for the Army sent to the Minister for the Interior, Senator Collings, a letter concerning the desirability of settling this action. The

letter referred to the fact that the term of appointment of the Commonwealth Railways Commissioner, one Mr Gahan, was about to expire, that Mr Gahan wished to be reappointed as Commissioner, and that "It would be unfortunate if Mr Gahan who I understand desires his reappointment to be considered by Cabinet were to give evidence not completely in accord with the case presented by the Commonwealth". This observation, as the court noted, was open to an entirely innocent interpretation, namely, that the possibility of Mr Gahan giving evidence contrary to the views of the Commonwealth reinforced the desirability of settling the case. Senator Collings, however, passed the letter to Mr Gahan. In that context, the letter could be taken to convey a hint that Cabinet's decision as to the renewal of Mr Gahan's appointment could be influenced by the evidence which he gave in the case. This was enough for the court to detect improper interference with a witness, and to warn sternly:

> No court can allow to pass without observation an act calculated to affect the testimony of a witness, or to embarrass him in giving evidence. Although in the result the transmission of the letter does not appear to have influenced Mr Gahan to disregard his duty as a witness, as he gave his evidence freely, independently and candidly, it is necessary to say that it is against the law for any person who has any authority or means of influence over a witness to use it for the purpose of affecting his evidence. And it is competent for this Court, in cases where other remedies appear inadequate or unavailing, to proceed on its own motion by calling on the party concerned to show cause why he should not be dealt with for contempt.

A significant aspect of this case was that the interference with the witness was constituted by the meaning that the letter had for Mr Gahan, not the meaning which either of the ministers intended or thought it to have. As a communication between the ministers, its intention could be regarded as innocent, but because of the meaning which it conveyed to Mr Gahan it was not.

Subsequent cases give no indication that the attitude of the courts has changed in regard to actions likely to influence witnesses.

As was indicated in previous advices, it would be a strange conclusion that parliamentary evidence is entitled to any lesser protection than evidence before the courts. The underlying rationale of the principles relating to improper interference with witnesses is the same in both contexts: the great public interest in ensuring that, in both forums, evidence is given freely, so that the courts and Parliament are not impeded in discovering the truth in any inquiry.

Please let me know if the committee wishes me to provide any further assistance in relation to this matter.