ADVICE NO. 19

PROVISION OF INFORMATION TO A SENATOR

Thank you for your letter of 30 October 1997, attaching submissions to the committee by the University of Queensland and Dr William De Maria, and inviting comments on the matters contained in the submissions relating to the reference to the committee on 4 September 1997.

The issues of principle

Previous advices referred to the question of the privilege which may attach to the provision of information to senators. Such provision of information may be privileged in two senses: it may be protected by the law of parliamentary privilege, as clarified by section 16 of the Parliamentary Privileges Act, in so far as the provision of information may be held to be "for purposes of or incidental to" the transaction of the business of a House or a committee; and such provision of information may be legitimately protected by the Senate's contempt jurisdiction, in that improper interference with the provision of information may be treated as a contempt. The advices indicated that the status of the provision of particular information would be apt to be determined by the relationship between such provision of information and proceedings in the Senate or in a committee. The nature of the connection between the provision of information and parliamentary proceedings would determine whether the provision of information was "for purposes of or incidental to" the proceedings.

It is clear that there are two possible polarised sets of circumstances and a range of possible circumstances in between. The provision of information to a senator may be so closely connected with proceedings in the Senate that it is obvious that the act of providing the information should be protected; on the other hand, the provision of information to a senator may be totally unrelated to any parliamentary proceedings actual or potential, so that there is no basis for protection of the provision of the information. Examples of these two ends of the spectrum may be readily postulated. A person may provide information to a senator on the basis that it relates to a matter of public interest, with a request that the senator initiate a Senate investigation of the matter, and the senator may subsequently incorporate the information in proceedings in the Senate as part of an application to the Senate for an investigation of the matter concerned. This would provide the strongest case for protection of the provision of the information in both senses. On the other hand, a person may provide a senator with information for the express purpose of publishing defamatory matter with parliamentary privilege in order to cause damage to persons the subject of the information, and the senator may refrain from any action in relation to the information. In this circumstance, it could readily be concluded that the provision of the information is not protected by parliamentary privilege in either sense. A range of circumstances may be postulated between these two extremes, and some circumstances may make a decision as to the protection which adheres to the provision of information extremely difficult.

Authorities

When the earlier advices were provided there were virtually no relevant authorities. Decisions of the Court of Queen's Bench in *Rivlin v Bilainkin,* of the Supreme Court of New South Wales in *Grassby,* of the President of the Western Australian Legislative Council in the Easton matter and

of the British House of Commons in two 1950s privilege matters were found to be unhelpful because of the circumstances of the cases. A judgment of the United States Court of Appeals in *Brown & Williamson Tobacco Corp v Williams* suggested that there exists an immunity of members against compulsory production of documents relating to their legislative activities and, therefore, that parliamentary privilege may extend to the provision of the documents to the members.

Some further light, but not a great deal, is thrown on the issue by the judgment of the Queensland Court of Appeal in *Rowley v O'Chee,* which was handed down on 4 November 1997. The court held that Senator O'Chee should not be compelled, at least until further investigation of the nature of the documents concerned, to produce documents which he states came into existence, or came into his possession, for purposes of, or incidental to, his raising of matters in the Senate. One of the three justices, perhaps two, appear to believe that an immunity from production of documents exists and extends to documents provided to the senator by other persons. One justice is doubtful whether the immunity extends beyond documents created by, or on behalf of, the senator. The judgment is not very helpful on the question of whether the provision of information to a senator is protected by parliamentary privilege, although it could be said that one justice appears to be of a mind to accept such a contention. The judgment is useful, however, in indicating that a close connection between information provided to a senator and the senator's use of the information in proceedings in Parliament, or at least the senator's intention to use the information in such proceedings, is crucial to determining relevant issues. Further judgments in this case may further clarify those issues.

The case in question

Available evidence before the committee in the case in question indicates that, if the facts are in accordance with that evidence, the case is well towards the non-protected end of the spectrum of possible circumstances. The case does not conform with the pattern of a clear relationship between the provision of information and proceedings such that the provision of information was "for purposes of or incidental to" the proceedings.

In relation to the purpose for which the information was provided, there is some evidence that it was provided for the purpose of bringing about a parliamentary investigation (this is Dr De Maria's explanation of his purpose), but there is also evidence that the purpose was simply to gain privileged publication of material known to be defamatory (the statement of Ms Vivienne Wynter that, in her conversation with Dr De Maria, he stated that his purpose was to obtain privileged publication of material to be included in a newspaper article). It could well be concluded that the purpose was not primarily to bring about parliamentary action or investigation.

More significant, however, is the position of Senator Woodley in the matter. If there is one thing which clearly emerges from the judgment of the Queensland Court of Appeal, it is that the actions of the senator in receipt of the information are crucial in determining the issue. It is clear from Senator Woodley's statement in his letter of 13 June 1997, which was tabled in the Senate on 18 June 1997, that he did not deliberately place before the Senate the document containing Dr De Maria's allegations against the University with the considered intention of achieving parliamentary attention to the allegations or a parliamentary inquiry. On the contrary, it could be concluded that the material was presented to the Senate by inadvertence or misadventure on

Senator Woodley's part. The circumstances could be regarded as close to those postulated by McPherson J A of the Queensland Court of Appeal in his characterisation of *Rivlin v Bilainkin* and *Grassby:* "It is not, I think, possible for an outsider to manufacture Parliamentary privilege for a document by the artifice of planting the document upon a Parliamentarian". The circumstances, of course, are different in that Senator Woodley *did* use the material in proceedings in the Senate, but, as his statement discloses, without a deliberate intention of doing so.

The combination of these circumstances, doubt about Dr De Maria's purpose and the lack of deliberate purpose on the part of the Senator Woodley, would lead to the conclusion that this is not a case strongly suggesting that parliamentary privilege attaches to the provision of the information.

The question of law

In determining whether the law of parliamentary privilege protects the provision of information to senators, a court would base its judgment on the circumstances of a particular case. If the court were well advised, the question would be determined only in relation to the particular circumstances, and the general question of whether such provision of information is ever protected would be left open. A court may well, however, determine the question of general principle on the basis of the particular case. This is what the Supreme Court of New South Wales did in the *Grassby* case, and what the Supreme Court of Queensland attempted to do in *Rowley v O'Chee.* The Court of Appeal of that state, in reviewing the latter judgment, kept to the question in issue, namely whether a senator should be compelled to produce documents relating to proceedings in the Senate.

There is much truth in the old adage that hard cases make bad law. The case before the committee is a hard case. If it were to come before a court, it is highly likely that the court would determine that the provision of information to Senator Woodley by Dr De Maria was not protected by parliamentary privilege, whatever other privilege may adhere to it. This conclusion could be reached even if the most favourable reasoning in the judgment of the Queensland Court of Appeal were adopted. It is also likely, unfortunately, that the court would go further, determine the general principle, and hold that the provision of information to a senator is not in any circumstance protected by parliamentary privilege. If the case were stronger, that is, closer to the other end of the spectrum of possible circumstances, contrary determinations might be made.

This leaves the evidentiary question of how the publication of the material to Senator Woodley by Dr De Maria is to be proved. In an action against Dr De Maria for the publication of the material to Senator Woodley, if the only evidence of the publication were Senator Woodley's speech in the Senate and his tabling of the documents in the Senate, the action should fail because those proceedings in Parliament cannot, under the law of parliamentary privilege as clarified by section 16 of the Parliamentary Privileges Act, be used to support an action against a person. This evidentiary question, however, is distinct from the question of whether the provision of the information was protected in the first place. The action could be successful on the basis of other evidence of the publication of the material to Senator Woodley by Dr De Maria. The Queensland Court of Appeal judgment is not helpful here because there is no suggestion of Senator Woodley being compelled to produce documents.

Protection by the contempt power

In relation to the possible protection, by the exercise of the Senate's contempt jurisdiction, of the provision of information to Senator Woodley, the case may also be seen as a hard case. The circumstances would appear not to provide a strong basis for extending that protection to the communication of the material to Senator Woodley.

The evidentiary question, however, is also significant here. It appears that the University's action against Dr De Maria is based solely on his publication of his allegations to Senator Woodley, and, more significantly, that the only evidence of that publication is Senator Woodley's speech and tabling of documents in the Senate. This makes the question of the protection of Dr De Maria's approach to Senator Woodley much more difficult. While it could be concluded that his communication with Senator Woodley should not be protected as such, it is another matter to accept a situation of proceedings in Parliament being used as evidence against a person in a disciplinary action. Such use of parliamentary proceedings would seem to be unlawful under the Parliamentary Privileges Act. It may be concluded, however, that, if the acts of Dr De Maria are not eligible for protection by the exercise of the contempt jurisdiction, the Senate should not intervene to overcome the probable evidentiary illegality.

The circumstances of the case are readily distinguishable from those referred to in the committee's 67th report, in respect of which the committee found, and the Senate determined, that a contempt had been committed. In that case, legal action was taken against a person solely on the basis of the person's provision of information to a senator. The provision of the information to the senator was closely connected with actions by the senator to have a matter of public interest raised in the Senate. The senator concerned clearly and deliberately incorporated the information into his submissions to the Senate. The circumstances, particularly the actions of the senator, therefore provided a firm basis for the Senate making a finding of contempt.

The consideration of the possible application of the contempt power leads to a reflection on the action of the University. If a person makes unsubstantiated allegations, the primary remedy is surely to refute the allegations. If the allegations are published in an actionable context, another remedy is to take civil action against that publication. It is not obvious why the University thinks that disciplinary proceedings against Dr De Maria are the appropriate method of dealing with his allegations. If the provision of information to Senator Woodley is part of a pattern of improper conduct on the part of Dr De Maria, there must be evidence of that conduct other than Senator Woodley's speech in the Senate. The whole approach of the University is open to question. The Senate, however, cannot instruct the University as to how it should conduct its affairs, but can only make a decision on whether to exercise its powers, given the particular circumstances.

I hope these observations are of some assistance to the committee. Please let me know if I can provide any further advice on this matter.