ADVICE NO. 16

MATTERS REFERRED TO THE COMMITTEE ON 23 AUGUST 1995

Thank you for your letter of 25 August 1995 in which the committee seeks advice on issues arising from the matters referred to the committee on 23 August 1995.

This advice refers to the issues of principle which arise from those matters, and not to the facts of the particular cases, which of course can be found only by the committee after inquiry.

The reference by the Senate on 23 August encompasses two matters: alleged threats of legal action against persons in respect of their provision of information to Senator O'Chee, and an alleged threat of legal proceedings against Senator O'Chee.

It is in relation to the first of these matters that the most significant issues arise.

Alleged threats to persons in respect of provision of information to a senator

The first matter referred to the committee asks the committee to determine whether threats of legal proceedings were made against persons in respect of the provision of information to Senator O'Chee in relation to matters raised in the Senate by Senator O'Chee, and whether contempts were committed in respect of that matter.

This matter gives rise to two issues:

(a) whether the immunity afforded by parliamentary privilege extends to the communication of information to senators by other persons; and

(b) whether the Senate may treat as a contempt any interference with such communication of information to senators by other persons.

The answer to question (a) does not necessarily determine the answer to question (b). If the communication of information to senators does not attract the immunity of parliamentary privilege it may still be lawful for the Senate to treat as a contempt any interference with such communication. If, however, the communication of information to senators *is* protected by parliamentary privilege, this probably determines the answer to question (b), in that there can then be little room for doubt that it is open to the Senate use its contempt jurisdiction to protect such communication.

The committee is required by its reference to determine only question (b), depending on the facts found, but in doing so may find it necessary to consider question (a).

(a) Parliamentary privilege and communications with senators

It has always been thought, in the absence of definitive judicial authority, that the immunity of parliamentary proceedings from any impeachment or question before any court or tribunal extends to matters which, while not part of the actual proceedings of the Senate or its committees, are closely connected with those proceedings. The kinds of examples usually cited include the "publication" by

a senator of information to a parliamentary officer or to a stenographer in the course of seeking advice on, or composing, a notice of motion or question to be used in the Senate or a committee; it is fairly certain that a senator would be protected by parliamentary privilege in making such "publications". It is possible to postulate many other circumstances in which the immunity applies or should apply.

This extended operation of the immunity is provided for in the *Parliamentary Privileges Act 1987* in the following terms:

> ‘proceedings in Parliament' means all words spoken and acts done in the course of, *or for purposes of or incidental to*, the transacting of the business of a House or of a committee [emphasis added].

This provision is regarded as a codification of the pre-existing law, not as an extension of the law, and the relevant section of the Act has been accepted in general as such by the Federal Court in *Amann Aviation v Commonwealth* 1988 19 FCR 223.

In relation to the Commonwealth Houses, therefore, the extended operation of the immunity is a matter of statutory interpretation. There has yet been no occasion for judicial construction of the relevant words of this provision.

The issue which arises is whether this extended operation of the immunity applies to communications of information to senators by other persons.

The answer to this question is likely to be determined by the circumstances of particular cases, and, in particular, by the closeness of the connection between the communication of the information to the senator and potential or actual proceedings in the Senate or a committee. For example, if a person provides information to a senator with an explicit request that the senator initiate some action in the Senate in relation to that information, such as an inquiry by the Senate, there is a much stronger basis for concluding that the communication of that information is protected by parliamentary privilege than if the person provides the information simply as a matter of political intelligence or gossip. Similarly, if a senator has requested the information for the purpose of using it in the Senate or a committee, there is a stronger basis for applying the immunity than if there is no evidence of any potential relationship between the information and parliamentary proceedings. If a senator has actually used the information in the course of parliamentary proceedings, that also provides a firmer basis for applying the immunity to the provision of the information than if no parliamentary use is made of the information. The courts would be likely to determine the question in particular cases by considering these kinds of factors.

In support of this suggestion, it is noted that in an old British case, *Rivlin v Bilainkin* 1953 1 QBD 534, it was held that the publication of information by a person to a member of Parliament did not give rise to an issue of parliamentary privilege because "the publication was not connected in any way with any proceedings of the House of Commons". Presumably if the publication *had* been connected with such proceedings a live issue of parliamentary privilege would have been present, and may have been determined by the nature of the connection.

If the committee decides to come to a view on question (a) in relation to the matters referred to it, its view, therefore, will probably be significantly informed by the particular facts found by the committee.

In matters of recent controversy, a ruling made by the President of the Western Australian Legislative Council has assumed some significance, and is relevant to this question. In the course of the ruling, the President stated:

> Whatever was done by members, ministers and others before the presentation of the Easton petition is not a proceeding in Parliament and is therefore open to non-parliamentary inquiry.

This sentence, however, elaborated on, and followed on from, the substance of the ruling, which was:

> Although the presentation of a petition is as much a proceeding in Parliament as a conference of managers, the preparation, including circulation, of a petition is not. (*Minutes of Proceedings of the Legislative Council*, 16 May 1995, p. 116)

This ruling is stated to be supported by the conclusions of the Senate Privileges Committee in its 11th Report in 1988. In that report the committee concluded that the circulation of a petition prior to its presentation probably would not be covered by parliamentary privilege. That conclusion, however, was largely based on the fact that the circulation of a petition is not essential to its presentation, as it is not necessary for a petition to bear more than one signature. It cannot be concluded that all dealings with a petition, before or after its presentation, would not be "for purposes of or incidental to" its presentation and therefore covered by the immunity attaching to the presentation itself. I do not interpret the sentence in the statement of the President of the Council as indicating that he concluded that no anterior dealing with a petition would attract the immunity. I do not think that such a conclusion could be drawn. It is fairly clear that, for example, the "publication" of a petition to a parliamentary officer prior to its presentation would attract parliamentary privilege, and a strong case can be made out that the immunity would also attach to other anterior dealings, such as seeking the advice of another member.

The provision of information to a member of Parliament may attract qualified privilege under the common law interest or duty doctrine, whereby the publication without improper motive of matter to a person is privileged if the provider and the recipient of the information have an interest or a duty in providing and receiving it (either one may have either an interest or a duty). Whether the qualified privilege applies would presumably depend on circumstances. The only significant judicial authority appears to be an old British case (*R. v Rule* 1937 2 KB 375). Whether qualified privilege is attracted is not of any particular significance for the issues before the committee.

(b) Interference with communications to a senator as a contempt

The substantive issue of principle before the committee is whether it would be lawful for the Senate to treat as a contempt interference with communication of information to senators by other persons.

It is well established that the taking or threatening of legal action can constitute a contempt of Parliament or a contempt of court if the effect or tendency is to interfere with the conduct of proceedings in Parliament or court proceedings. This question was dealt with in some detail in the advices to the committee dated 6 March 1989, 12 November 1990 and 28 February 1991, and the attention of the committee is drawn to the authorities cited in those advices. They also dealt with the question of whether a culpable intention is required to establish a contempt or whether the effect or tendency of an act is sufficient. The advice dated 10 April 1992 summarised the relevant principles and also considered the question of the connection between a threatened or actual legal action and its "target". All of those issues are relevant to the matters now referred to the committee, and their application to the cases in hand will depend on the facts found by the committee.

The new issue is whether the provision of information to a senator by another person can be the "target" of a contempt, in the sense that a contempt is committed by improper interference with such provision of information.

For the Commonwealth Houses this is clearly a question of statutory interpretation, turning on the application of section 4 of the *Parliamentary Privileges Act 1987*:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Unlike the statutory definition of "proceedings in Parliament", this provision does not merely give expression to the pre-existing law, but is thought to embody the rationale of the law which empowers the Houses to punish contempts. The provision limits the power to punish contempts which existed before the Act was passed.

There has been no judicial construction of the provision, so one can only reason from its terms and first principle.

It is clear that the provision of information to senators is often a vital part of their participation in Senate and committee proceedings, and that the suppression of such provision of information could severely hinder those proceedings. It is also clear, however, that information is often provided to senators without any connection, actual or potential, to parliamentary proceedings. The lawfulness of treating as a contempt any interference with the provision of information to a senator is therefore likely to depend on the circumstances, and in particular the closeness of any connection between the provision of information and actual or potential parliamentary proceedings. In a case where interference with the provision of information to a senator clearly had the effect or tendency of hindering the senator in the free performance of the senator's duties, it would be lawful to treat such interference as a contempt. (The attention of the committee is also drawn to the analysis in the previous advices of the significance of the word "improper" in section 4 of the Parliamentary Privileges Act.)

As with other aspects of contempt of Parliament, it is instructive to make comparison with the equivalents in relation to legal proceedings, contempt of court and its criminal law counterpart,

attempting to pervert the course of justice. If it can be a contempt of court or a perversion of the course of justice for a person to interfere with the provision of information to an actual or potential participant in actual or potential legal proceedings, this is strong ground for concluding that it is lawful for the Senate to treat interference with the provision of information to a senator as a contempt.

Fortunately, there is a recent judgment of the High Court which throws considerable light on this matter. In *R. v Rogerson* 1992 174 CLR 268 the High Court held that interference with the gathering of evidence by police can constitute a perversion of the course of justice even though such gathering of evidence is not part of the course of justice as such and even though no actual proceedings are contemplated by the police:

> The fact that police investigation stands outside the concept of the course of justice does not mean that, in appropriate circumstances, interference with a police investigation does not constitute an attempt or a conspiracy to pervert the course of justice .... it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency. (at 277)
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> The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, *hindering of access to it, deflecting applications that would be made to it*, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions. (emphasis added, at 280)

To apply these principles to contempt of Parliament, interference with the provision of information to a senator "in appropriate circumstances" may constitute a contempt even though such provision of information is not part of proceedings in Parliament as such, and even though the senator does not contemplate use of the information in proceedings in the Senate or a committee.

It cannot be suggested that potential legal proceedings are entitled to a greater degree of protection than parliamentary proceedings: the provision of information to a senator may lead to inquiry and legislative action in relation to a matter of immense public interest. That is why proceedings in Parliament are protected by parliamentary privilege and why the Houses have the power to deal with interference with their proceedings.

It will be noted that the High Court appeared to consider that a culpable intention on the part of offenders towards potential legal proceedings is an essential element of the offence, at least where there are no proceedings actually on foot or necessarily contemplated. As the authorities cited in the previous advices make clear, in the actual presence or contemplation of proceedings a culpable intention may not be necessary for an offence to be constituted. It is suggested that these principles are equally applicable to contempt of Parliament. (In its report on contempt in 1987, the Australian

Law Reform Commission suggested that the offence of attempting to pervert the course of justice may not be constituted by any act in the absence of a culpable intention, and that an act may not be in contempt of court, as distinct from constituting the offence of attempting to pervert the course of justice, unless proceedings have actually commenced: Report No. 35, p. 103. This may or may not be correct, but it does not affect the foregoing analysis. If there are such distinctions between contempt of court and perversion of the course of justice, however, they may be of persuasive influence in consideration of contempts of Parliament.)

In two cases in the 1950s the British House of Commons potentially had occasions to consider alleged interference with the provision of information to a member in the context of contempt of Parliament. The circumstances of these cases, however, make them not particularly helpful.

The first case involved a letter from a somewhat eccentric (or, in the view of some, mad) vicar, a Cold War ally of the "Red Dean", to a member, who referred the letter to the bishop, who reproached the vicar. Initially this was received and regarded as a complaint against the member. Eventually the Speaker ruled that a motion concerning the matter could not have precedence because it was not raised at the earliest opportunity. A motion to refer the matter to the Privileges Committee was narrowly negatived, and at least some members in the majority seemed to have regarded themselves as bound to uphold the Speaker's "determination". Some members, however, may have been influenced by Mr Winston Churchill's assertion that the House should not "use its Privilege to protect a correspondent ... from some real or supposed injury ... Privilege was never instituted or intended for such a purpose. It is to protect us and those who have to deal with us, and not to protect the vast mass of the nation outside." (He also made much of the fact that a bishop has no power over a clergyman in a living in the Church of England.) (HC Debates, 1950-51, cc 675-688, 1297-1316, 1773-1779, 2491-2544)

In the second case, also involving ecclesiastics of a sort, a Deputy Assistant Chaplain General of the army was alleged to have threatened a subordinate army chaplain in consequence of the chaplain's provision of information to a member. The Committee of Privileges was able to point to the lack of precedents for treating as a contempt an attempt by one person to influence another in relation to communications with a member, but was also able to say that this was a matter for the responsible minister, because, as a matter of government regulation, members of the armed forced had a right to communicate with members and should not be subjected to any pressure or punishment on that account. (HC 112, 1954-55)

Erskine May's *Parliamentary Practice* makes too much out of these cases in claiming that "Although both Houses extend their protection to witnesses and others who solicit business in Parliament, no such protection is afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide information to Members, the question whether such information is subsequently used in proceedings in Parliament being immaterial." (21st ed., p. 133). The cases do not provide authority for this sweeping statement. They are of little persuasive value for any general conclusion. The expressions "those who have to deal with us" (Churchill) and "others who solicit business in Parliament" (May) indicate that the boundaries are not as clear cut as May makes out. May is confused on the significance of *Rivlin v Bilainkin*, citing it as if it had to do with qualified privilege (p. 133), when in fact the question of parliamentary privilege was at issue, and also mixes up the questions of the scope of the legal immunity and the extent of the contempt jurisdiction (p. 125).

A precedent in the House of Representatives is similarly unhelpful. This involved legal proceedings against a person in respect of the provision by the person to a member of a statutory declaration which the member used in debate. The report of the House Privileges Committee, having quoted May (although apparently without necessarily having been misled thereby) and observed the lack of precedent, made a finding that the legal proceedings did not amount to, and were not intended or likely to amount to, improper interference with the free performance by the member of his duties, without providing any analysis of the facts or reasons for the finding. It is not clear from the report whether the committee thought that interference with the provision of information to a member is ever capable of constituting a contempt. (PP 407/94)

I know of no relevant cases in other jurisdictions.

Significance of the facts

As the foregoing indicates, the facts as found by the committee will determine the application of the questions of principle and the ultimate findings of the committee.

Without purporting to make any judgment of the facts, which only the committee can make after inquiry, it is suggested that the significant questions to be asked about the facts are:

- Did any threats of legal proceedings which may have been made against persons have as their "target" the provision of information by those persons to Senator O'Chee?

- Was that provision of information connected with actual or potential proceedings in the Senate or a committee or with proceedings contemplated by Senator O'Chee, and, if so, what was the nature of that connection?

- Did any such threat of legal proceedings have the effect of interfering or tendency to interfere with the free performance by Senator O'Chee of his duties as a senator?

- Were any threats of legal proceedings made with the intention of influencing the use of the information so provided in actual, contemplated or potential proceedings in the Senate or a committee?

Alleged threat of legal action against a senator

The second matter referred to the committee asks the committee to determine whether a threat of legal proceedings was made against Senator O'Chee in respect of his activities as a senator and whether a contempt was thereby committed.

In relation to this matter little can be added to the analysis of the previous advices. The attention of the committee is particularly drawn to the consideration in those advices of the question of whether a senator's parliamentary activities are the real "target" of a threat of legal proceedings.

Here also the application of the issues of principle is dependent on the facts found by the committee.

Please let me know if I can provide any further assistance.

MATTERS REFERRED TO THE COMMITTEE ON 23 AUGUST 1995: PROVISION OF INFORMATION TO SENATORS

In the advice of 30 August 1995 I indicated that I did not know of any relevant cases in other jurisdictions, other than those mentioned in the advice.

I refrained from mentioning a recent American case because it was not in a superior court. I have since become aware that the original judgment has been upheld by the US Court of Appeals.

In this case (*Maddox v Williams*, decided 15 August 1995, not yet reported), it was held that members of Congress may not be compelled by subpoena to produce documents, or to answer questions concerning their acquisition of the documents, which were supplied to them by an informant and which are relevant to an inquiry being undertaken by a congressional committee of which they are members. This judgment indicates that the immunity of members' legislative activities from question elsewhere under article I, section 6, of the Constitution extends in appropriate circumstances to the provision of information to members by constituents.