

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**THE SENATE**

**COMMITTEE OF PRIVILEGES**

**POSSIBLE INTIMIDATION OF A  
WITNESS BEFORE THE EMPLOYMENT,  
WORKPLACE RELATIONS, SMALL BUSINESS  
AND EDUCATION REFERENCES COMMITTEE**

**85<sup>TH</sup> REPORT**

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## MEMBERS OF THE COMMITTEE

\*Senator Robert Ray (**Chair**) (Victoria)

Senator Sue Knowles (**Deputy Chairman**) (Western Australia)

Senator Alan Eggleston (Western Australia)

Senator Chris Evans (Western Australia)

Senator Julian McGauran (Victoria)

Senator Marise Payne (New South Wales)

Senator the Hon. Nick Sherry (Tasmania)

\*Senator Ray, absent overseas on parliamentary business, did not participate in the deliberations leading to the findings in this report.

The Senate  
Parliament House  
CANBERRA ACT 2600

Telephone: (02) 6277 3360  
Facsimile: (02) 6277 3199  
E-mail: [Priv.sen@aph.gov.au](mailto:Priv.sen@aph.gov.au)  
Internet: [http://www.aph.gov.au/senate\\_privileges](http://www.aph.gov.au/senate_privileges)



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# POSSIBLE INTIMIDATION OF A WITNESS BEFORE THE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION REFERENCES COMMITTEE

## Introduction

1. On 12 August 1999 the Senate referred the following matter to the Committee of Privileges on the motion of Senator O'Brien, at the request of the Chair of the Employment, Workplace Relations, Small Business and Education References Committee (the Employment Committee), Senator Jacinta Collins:

Having regard to the material provided by the Employment, Workplace Relations, Small Business and Education References Committee, whether a witness was penalised in consequence of the witness's communication with that committee, and, if so, whether a contempt was committed in that regard.<sup>1</sup>

The reference of the matter derived from a letter written by Senator Collins to the President of the Senate, Senator the Honourable Margaret Reid.

## Background

2. On 26 July 1999 the Employment Committee held a public hearing at Brewarrina, New South Wales, relating to its inquiry into indigenous education. The *Hansard* of the proceedings on that day appeared on its face to demonstrate an amicable and positive exchange of views, with the General Manager of the Brewarrina Shire Council, Mr Peter Felsch, as the primary spokesman. He appeared with three other officials, including Mr Tony Wiltshire, representing the Council and with a senior sergeant from the New South Wales Police Force. However, the notice of meeting from the Employment Committee listed only Mr Wiltshire, as Youth and Community Development Officer, as a witness from the Brewarrina Shire Council, for the session scheduled with the police representative.

3. No written submissions were presented to the hearing by any of the persons involved, although at the end of the hearing Mr Wiltshire intimated to the committee that he wished to give further evidence in camera. The Chair of the committee drew attention to the time constraints on the hearing, suggesting that there were "other ways to deal with this".<sup>2</sup> Another committee member suggested that Mr Wiltshire might like to make a written submission "which [the committee] could consider in the same way".<sup>3</sup> The Chair concurred, and in concluding the hearing indicated generally that the

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1 *Journals of the Senate* No. 59, 12 August 1999.

2 Transcript, p. EWRSBE 52.

3 *ibid.*

committee was still taking written submissions. There was nothing in the published *Hansard* record of proceedings to suggest that any difficulties had occurred.

4. Subsequently, however, Mr Wiltshire raised with the Employment Committee matters relating to the hearing, which caused the committee to raise them on 2 August 1999 with the President of the Senate as a possible matter of privilege. In doing so, the Employment Committee provided to the President of the Senate the following account of what occurred between the notification of meeting and the appearance of officers of the Brewarrina Shire Council:

On 26 July 1999 the Committee held a public hearing at Brewarrina in New South Wales in connection with its inquiry into indigenous education. A witness at that hearing wrote to the Secretary of the Committee the day after to advise that he had been subjected to intimidation as a result of evidence that he had provided and in relation to a submission which he had intended to put to the Committee.

The witness, Mr Tony Wiltshire, is employed by the Brewarrina Shire Council in the capacity of Youth and Community Development Officer. A disagreement occurred between Mr Wiltshire and the General Manager of the Shire over the status of the written submission which was to be handed to the Committee by Mr Wiltshire. It was agreed that the submission be delayed while its status was being determined, or as the General Manager claimed, until he was satisfied with its content. It was pointed out to Mr Wiltshire by Committee members and by the Secretary that he could make a submission in a private capacity.

The General Manager appears to have expressed himself quite forcefully, in writing, to Mr Wiltshire that any public representation of the Shire needed his approval, and following the hearing, he informed Mr Wiltshire that he was to be placed on immediate probation for 6 months and would no longer undertake certain roles.

While noting Mr Wiltshire's entitlement as a private citizen to make a private submission to the Committee, the General Manager suggested that Mr Wiltshire not do so as *Hansard* had already recorded his position and role as a Shire employee.

The General Manager earlier warned Mr Wiltshire that his employment was under review as a result of this attempt to put a submission to the Committee which he regarded as being based upon opinion rather than fact.

The Committee considers this matter to be a clear case of witness intimidation. The evidence of this which is contained in the four letters in

the possession of the Committee leave it no doubt as to the circumstances of the case. This correspondence is attached.<sup>4</sup>

5. This evidence consisted of a letter of 27 July 1999 Mr Wiltshire wrote to the Employment Committee following the hearing, giving an account of what had occurred, not merely before the hearing was held, but also after the hearing had concluded. Attached to Mr Wiltshire's letter was a letter dated 27 July from Mr Felsch, as General Manager of Brewarrina Shire Council. Mr Felsch's letter too described what had happened between himself and Mr Wiltshire, also before and after the public hearing. It included confirmation of a meeting held between them following the committee hearing. The remaining attachments consisted of a further letter of 30 July from Mr Wiltshire to the secretary of the committee, enclosing another letter to Mr Wiltshire from Mr Felsch.<sup>5</sup>

6. In raising the matter of privilege with the President on 2 August, the Employment Committee made the following observation:

The Committee considers it likely, as suggested in the correspondence it has in its possession, that these differences of opinion have developed over a period of time and that the latest animosity between the two men has been brought to a head on the occasion of the Committee's visit.<sup>6</sup>

7. On the same day, the Employment Committee wrote to Mr Wiltshire and Mr Felsch, informing them of its decision to take steps to refer the issue of the possible intimidation of a witness at the Brewarrina hearings to the Committee of Privileges. In its letter to Mr Felsch, the Employment Committee raised the following matter:

The Committee has received from Mr Wiltshire some information which plainly indicates that he has come under very considerable pressure from you in regard to the evidence he wanted to put to the Committee. While the Committee appreciates the fact that witnesses cannot in all cases claim to represent the views of organisations which employ them, it would only have required a note or a statement on the record from you to the Committee informing it that Mr Wiltshire's opinions were his own and did not represent the views of the Shire. It appears to the Committee, from reports given to it by Mr Wiltshire, that its public hearing in Brewarrina and the aftermath have occasioned behaviour by you that may be considered intimidation of a witness.<sup>7</sup>

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4 Appendix A, pp.1-2.

5 *ibid.*, pp. 3-11.

6 *ibid.*, p. 1.

7 Appendix B, p. 15.



8. The Committee of Privileges has included these documents as appendices to this report and does not intend to go further than the account already provided by the Employment Committee through its own correspondence and the attachments.<sup>8</sup> This is because there are no material discrepancies between the various accounts of what occurred. There is no doubt that all accounts indicate a clear pattern of interference with Mr Wiltshire's attempts to give evidence to the Employment Committee, and there is basic agreement about the repercussions following his appearance before the committee.

9. In giving the matter precedence on 11 August 1999, the President of the Senate made the following point:

Past reports by the Committee of Privileges and determinations by the Senate in relation to those reports have indicated that it is a contempt of the Senate to inflict penalties upon a witness in consequence of their evidence, regardless of whether those penalties would otherwise be lawful. In particular, I refer to the 21<sup>st</sup>, 42<sup>nd</sup>, 67<sup>th</sup> and 72<sup>nd</sup> reports of the committee, all of which have, with the endorsement of the Senate, set out the principle that a person with lawful power to take some adverse action commits a contempt if that action is taken in consequence of evidence given to a Senate committee by a witness or information laid before the Senate in a less formal manner.<sup>9</sup>

### **Conduct of inquiry**

10. On receipt of the reference, the Committee of Privileges sought any further documents the Employment Committee might be able to make available. Following their receipt on 24 August 1999, the committee wrote to Mr Felsch and Mr Wiltshire,<sup>10</sup> in accordance with normal practice, inviting them to make any written submissions to it. It asked Mr Felsch to address specifically the comments made by the Employment Committee as quoted at paragraph 7 above. In Mr Wiltshire's case, the committee asked him specifically to explain the status of a written submission he asked at the Brewarrina hearing that he make to the Employment Committee. All documents forwarded to the Committee of Privileges by the Employment Committee were also sent to both persons.

### *Responses from Mr Felsch and Mr Wiltshire*

11. In the event, the responses from Mr Felsch and Mr Wiltshire<sup>11</sup> added little to the existing information. Much of the material deals with what has occurred since the

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8 Appendices A and B, pp. 1-17. And see also Appendix E, pp. 31-47.

9 Senate *Hansard*, 11 August 1999, p. 7192.

10 Appendix C, pp. 17-20.

11 *ibid.*, pp. 21-26.

hearing and appears to the Committee of Privileges to be more in the nature of a continuing – and now concluded – workplace dispute. It is clear to this committee, as it was to the Employment Committee, that difficulties in the relationship between Mr Felsch, as General Manager of the Brewarrina Shire Council, and Mr Wiltshire were of considerably longer duration than the nominal cause adduced by Mr Wiltshire. The Committee of Privileges has had difficulty, therefore, in disentangling the matters it is required to consider from the rather more complex nature of the relationship between the Brewarrina Shire Council and Mr Wiltshire as an employee, or a contractor, or a contractor to the New South Wales Government. Mr Wiltshire's status in this regard remains unclear, and fortunately is not relevant to the committee's confined purpose.

12. Even the fraught relationship is at times difficult to establish from the papers. For example, even though it appears that difficulties were already manifest soon after Mr Wiltshire took up his role at Brewarrina Shire Council in October 1998, in April 1999, when advising Mr Wiltshire that he had successfully completed his probationary period, Mr Felsch appears to have been glowing in his assessment of Mr Wiltshire's work. Indeed, Mr Felsch, in his subsequent letter to the Privileges Committee, emphasised that Mr Wiltshire's performance was very satisfactory in most aspects, although he was concerned about the quality of Mr Wiltshire's written work, and also about his progress with university studies.<sup>12</sup> It appears that one of Mr Wiltshire's conditions of employment was that he complete a university degree – a requirement within the original job specification — and Mr Felsch was concerned about his progress.

13. Regardless of these inconsistencies in the relationship between them, the question for the Committee of Privileges is whether Mr Felsch improperly interfered with Mr Wiltshire as a witness before the Employment Committee, and it is to this that the Privileges Committee now turns.

#### *Response from the Chair of the Employment Committee*

14. Following receipt of the responses from Messrs Felsch and Wiltshire, addressing in particular the question of Mr Wiltshire's submission and the circumstances surrounding the hearing, the Committee of Privileges wrote to the Chair of the Employment Committee, Senator Collins.<sup>13</sup> The committee has found the response of 19 October from Senator Collins<sup>14</sup> extremely helpful in describing the circumstances giving rise to the matter being referred to it. The Employment Committee has explained the reasons for its visit to Brewarrina and for inviting Mr Wiltshire to attend the meeting. The visit, which was part of an extensive inquiry into indigenous

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12 *ibid.*, p. 21.

13 Appendix D, pp. 27-28.

14 *ibid.*, pp. 29-30.

education on which the Employment Committee is still to report, was arranged at the request of a committee member. A half-day program was scheduled, and it appears that Mr Wiltshire assisted in its organisation. He was listed to appear, along with the police sergeant previously referred to, as the last witness.

15. There is some dispute as to when Mr Felsch, as General Manager of the Brewarrina Shire Council, first became aware of the hearing, but this does not impinge on the possible contempt. Suffice to say that, by the day of the hearing, Mr Felsch had taken over the management of the proceedings, including collecting Employment Committee members and staff from the airport. The Chair's letter helpfully and honestly acknowledges some oversights in the committee's arrangements for the hearing. The Committee of Privileges notes that difficulties were accommodated to some degree by the Employment Committee's rearrangement of its witness list to enable all persons of the Brewarrina Shire Council to attend.

16. What is clear from the Chair's letter, and the transcript of the hearing, is that, although Mr Wiltshire was listed to appear at the hearing, he had not previously forwarded a written submission to the Employment Committee. Nor did the committee ask for or expect one. Furthermore, while the normal introductory documentation was sent to Mr Wiltshire and the Chair made the usual comments at the opening of the hearing, nothing on the public record indicates that the committee was entertaining taking any in camera evidence. It was only at the end of the hearing that the question of private or in camera evidence or submissions arose — and this was well after the contretemps between Mr Felsch and Mr Wiltshire had occurred both in the Shire office and at the hearing. That the committee did not intend, and was not aware, that Mr Wiltshire may wish to give in camera evidence is confirmed in the Chair's letter to the Committee of Privileges.

17. This letter, too, is included as an appendix to the report, together with the initial responses by Mr Felsch and Mr Wiltshire to the Committee of Privileges' invitation to make submissions.<sup>15</sup> Another submission, on behalf of Mr Felsch, is also included (see paragraph 23 below).<sup>16</sup> The committee has decided not to publish the remaining documents forwarded to it by the Employment Committee, Mr Felsch and Mr Wiltshire, as it does not regard them as being directly relevant to its terms of reference.

## Comment

18. The Committee of Privileges is able to give such a brief and uncontested account of the demonstrable intimidation of a witness because Mr Felsch, as the person who, under most circumstances, would be attempting to cast a different light on events

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15 Appendices D pp. 27-28 and C pp. 21-26.

16 Appendix E, pp. 31-47.

surrounding a possible matter of contempt, has been forthcoming in recording the events surrounding the public hearing. It appears to the committee that this is because he regarded himself as fully justified in acting in the way he has. It must have been somewhat galling to Mr Felsch, as General Manager of the Brewarrina Shire Council, to discover that Mr Wiltshire had made arrangements, of which he was clearly unaware, to have a Senate committee visit Brewarrina. And given his already-identified difficulties with Mr Wiltshire's representations, especially written, of the Council's position on various matters, the Committee of Privileges can well understand that he might have been apprehensive about the account Mr Wiltshire would give of the Council's views. That the Employment Committee perceived Mr Wiltshire as representing the Brewarrina Shire Council is obvious from the list of witnesses provided to the Privileges Committee.

19. Unfortunately for Mr Felsch, notwithstanding the inadequacies of the arrangements made for the hearing and his perhaps justifiable chagrin, as demonstrated in his forceful letters both to Mr Wiltshire and to the Committee of Privileges, at being excluded from the Employment Committee processes, this does not absolve or exonerate him from the actions he took before, during and after the hearing. As the Employment Committee subsequently advised Mr Felsch, there were other options available to him to make it clear that Mr Wiltshire did not represent the Brewarrina Shire Council.

20. As the President of the Senate pointed out in her statement when giving this matter of privilege precedence,<sup>17</sup> the Committee of Privileges has advised in its reports over a long period that the fact that an action might otherwise be lawful does not in itself present a defence against findings of contempt of the Senate. The committee first declared this principle as far back as June 1989, when dealing with a matter which bore some similarities to the present case.<sup>18</sup> This particular element of contempt has been a regular feature of other committee inquiries.<sup>19</sup> Nowhere, however, is the relationship between a person giving evidence to a committee and being prevented from or punished for the giving of that evidence been so clear as in the present case.

21. It is obvious that Mr Felsch, acting it appears on legal advice,<sup>20</sup> considered himself justified, as General Manager of the Brewarrina Shire Council, in punishing one of the officers for behaving inappropriately in purporting to represent the Council. The problem for Mr Felsch is that he was not entitled to do so. This committee understands and appreciates the difficulties involved for a person acting in good faith, and on advice, in handling such matters. That said, the committee must continue to

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17 Senate *Hansard*, 11 August 1999, op cit.

18 Senate Committee of Privileges, 18<sup>th</sup> Report, PP No. 461/1989.

19 President's statement, op cit.

20 Appendix C, p. 24.

send a message to all who are in a position of authority over, or otherwise attempt to intimidate or punish, a witness before a Senate committee, however insubordinate or improper the behaviour of a witness seems to be. As all its reports on improper interference with witnesses have emphasised, the committee regards this as the most serious of all possible contempts and will protect witnesses regardless of any provocation they might have caused.

22. This is not to say that the committee enjoys drawing such conclusions. As earlier reports have indicated,<sup>21</sup> it is not enamoured by the use of Senate proceedings to bring workplace disagreements into a forum which affords one party possible inappropriate protection against another. The salutary lesson which might come out of this inquiry for committees generally has already been learned by the relevant committee, as demonstrated by that Chair's comments about the sequence of events leading to its Brewarrina hearing. The Committee of Privileges obviously does not wish to inhibit committees unnecessarily in their pursuit of evidence. Nor does it consider it necessary to introduce any more formality than at present exists under the resolutions governing committee proceedings. It has, however, gained the impression that if the bona fides of a person purporting to speak on behalf of an organisation had been more carefully checked this whole matter might not have arisen.

## Findings

The Committee of Privileges finds:

That Mr Peter Felsch, General Manager, Brewarrina Shire Council, improperly interfered with, and penalised, Mr Tony Wiltshire, then Youth and Community Development Officer, Brewarrina Shire Council, as a consequence of Mr Wiltshire's participation in the proceedings of the Employment, Workplace Relations, Small Business and Education References Committee before, during and after hearings held at Brewarrina on Monday, 26 July 1999.

That Mr Felsch, as General Manager of the Brewarrina Shire Council, has therefore committed a contempt of the Senate.

23. In accordance with Privilege Resolution 2(10) the committee transmitted the findings to Mr Felsch. It received and considered a submission prepared by a barrister whom the Local Government Engineers' Association assisted Mr Felsch to obtain. Although the committee has not modified its findings in the light of the submission, it regarded the submission as raising important points for general consideration. The committee has therefore decided to include the full submission as a further appendix to this report.<sup>22</sup>

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21 See especially Senate Committee of Privileges 72<sup>nd</sup> Report, PP No. 117/1998.

22 Appendix E, pp. 31-47.

24. Specifically, the committee draws attention to paragraph 42, as follows:

Although, it is respectfully submitted, Mr Felsch did not offend the privilege of the Senate, if the Committee considers that he did so, then he asks that his sincere apologies, hereby conveyed to the Committee, are accepted by the Senate for a completely unintended breach and asks that the Senate recognise that Mr Felsch was at all times acting in good faith to fulfill his duties as General Manager of the Brewarrina Shire Council.<sup>23</sup>

### **Penalty**

25. In sending the findings to Mr Felsch, the committee, as is its custom, transmitted a working draft of its report to Mr Felsch, in order to advise him of the context in which it had made the findings. Included in the document was its recommendation to the Senate that no penalty be imposed. The thoughtful submission on Mr Felsch's behalf has reinforced it in its views. Its recommendation in respect of penalty, as set out in paragraph 26, therefore also remains unchanged.

26. It appears to the committee that the Brewarrina Shire Council and its General Manager have already been so punished both financially and through this inquiry as to suggest that any further recommendations for penalty are superfluous.

Robert Ray  
**Chair**

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23 *ibid.*, p. 44.