THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

MATTERS ARISING FROM 67TH REPORT OF THE COMMITTEE OF PRIVILEGES (2)

POSSIBLE SENATE REPRESENTATION IN COURT PROCEEDINGS

94TH REPORT

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MATTERS ARISING FROM 67TH REPORT OF THE COMMITTEE OF PRIVILEGES (2)

POSSIBLE SENATE REPRESENTATION IN COURT PROCEEDINGS

1. On 29 June 2000, the Committee of Privileges presented, as a matter of urgency, its 92nd report, which drew attention to advices prepared by Mr Harry Evans, Clerk of the Senate and Mr Bret Walker SC, commenting on a judgement of a justice of the Queensland Supreme Court in a defamation action brought by Mr Michael Rowley against Mr David Armstrong.[1]

2. The committee was anxious to disseminate the two advices as widely and as quickly as possible, so that the judgment did not go unanswered. At the time, the committee reported that it would give more detailed consideration to other issues in due course.

3. During the winter adjournment, it sought the views of the Clerk of the Senate as to whether any further steps could be taken in relation to Mr Rowley's action against Mr Armstrong, and also a new action against former Senator William O'Chee who, as a senator, originally raised Mr Armstrong's difficulties as a matter of privilege.

4. In response (see Appendix A) the Clerk suggests that 'the only feasible step' for the Senate to take in the matter would be if either of the actions actually came to trial. He observed:

> In that event counsel instructed for the Senate could seek leave to appear as *amicus curiae* to assist the court on the parliamentary privilege question and to make submissions on the appropriate application of parliamentary privilege principles and the relevant statutory provisions to the particular actions. This may result in appropriate findings by the court and reversal of Jones J's unsatisfactory judgment.[2]

He reminded the committee that this action had previously been taken by the Senate.[3]

5. The committee, having considered his suggestion, has decided to recommend to the Senate an anticipatory course of action to enable the President to act speedily should the need arise.

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1 Parliamentary Paper No. 150/2000.

2 Appendix A, p. 1.

3 ibid.

6. The Committee of Privileges therefore **recommends** that the Senate authorise the President, if required, to engage counsel as *amicus curiae* if either the action for defamation against Mr David Armstrong or a similar action against Mr William O'Chee is set down for trial.

Robert Ray
Chair

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Appendix A

7 August 2000

Senator Robert Ray
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Dear Senator Ray

PROVISION OF INFORMATION TO SENATORS — ACTIONS BY MR ROWLEY

Thank you for your letter of 3 July 2000 in which the Privileges Committee seeks views on further steps which may be taken in relation to the actions brought by Mr Rowley against former Senator O'Chee and Mr Armstrong and the judgment of Jones J.

As you indicated that the committee will not be considering the matter until 17 August, I did not hasten to reply.

When there was still time for Mr Armstrong to lodge an appeal against the judgment of Jones J, the committee could have recommended to the Senate the funding of an appeal by Mr Armstrong. (It was, of course, not open to the Senate, not being a party to the proceedings, to appeal.) I think that the committee was correct in not pursuing this option. Mr Armstrong's action, to have Mr Rowley's action terminated on the ground of abuse of process, was not an appropriate vehicle to determine the parliamentary privilege question, and a determination of that question would not necessarily have resulted even from a successful appeal. There is also the traditional hostility of the law to the funding of legal proceedings by persons not parties to those proceedings; I am not sure whether this is still unlawful in Queensland under an old common law doctrine or some statutory substitute, but it would not be wise for the Senate to enter that arena in any event.

The only feasible step for the Senate to take would become possible if either of Mr Rowley's actions actually came to trial. In that event counsel instructed for the Senate could seek leave to appear as *amicus curiae* to assist the court on the parliamentary privilege question and to make submissions on the appropriate application of parliamentary privilege principles and the relevant statutory provision to the particular actions. This may result in appropriate findings by the court and reversal of Jones J's unsatisfactory judgment. The committee would be aware that there is precedent for such intervention in relevant cases. The committee could recommend this course to the Senate. Such a recommendation could be made and adopted in advance of any indication that Mr Rowley intends to bring the actions to trial.

The only other possible course of action is for the Parliament to legislate to repudiate Jones J's judgment. This would be inadvisable for several reasons. In the first place, the initiation of such legislation would appear to concede that the judgment is a feasible interpretation of the relevant law and might be upheld by a higher court. Such a concession should not be made, and the Senate should be confident in having the judgment overturned if the issue comes before a higher court. Secondly, any such legislation would attempt to spell out the meaning of "for purposes of or incidental to" parliamentary proceedings in the Parliamentary Privileges Act. It is neither possible nor desirable to do so. Any attempt to provide an all-inclusive statement of the content of that expression would rely either on some substitute general expression which would not advance the definition, or on a list of matters included in the expression which would involve the danger of excluding matters which ought to be covered. The Parliament ought to be able to rely on the courts to give appropriate application to the current words of the statute, which are as clear as they can be for the purpose.

It may be helpful to draw to the attention of the committee a judgment given on 25 July 2000 by another justice of the Supreme Court of Queensland, Helman J, in *Criminal Justice Commission and others v Dick.* In that judgment it was held that the conduct of an investigation and the preparation of a report by the Parliamentary Criminal Justice Commissioner, a statutory parliamentary official, for the Parliamentary Criminal Justice Committee of the Queensland Legislative Assembly, was a proceeding in Parliament and therefore not amenable to judicial review. In the light of a statutory provision in Queensland in virtually identical terms to section 16(2) of the *Parliamentary Privileges Act 1987,* declaring the preparation of a report under the authority of the House or a committee to be a proceeding in Parliament, it was hardly open to the court to make any other finding, but the judgment exhibits an understanding of parliamentary privilege which was absent from that of Jones J.

I would be pleased to provide the committee with any further information or assistance in relation to this matter.

Yours sincerely

(Harry Evans)