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COMMITTEE OF PRIVILEGES

Fifth Report

Imprisonment of a Senator

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THE SENATE COMMITTEE OF PRIVILEGES

FIFTH REPORT

The Committee of Privileges has the honour to make its Fifth Report to the Senate, as follows.

IMPRISONMENT OF A SENATOR

2. On 30 August 1979 the Senate, on the motion of Senator Georges, referred to the Committee three matters relating to the imprisonment of Senator Georges in the State of Queensland.

Circumstances leading to the Reference

3. On 27 July 1979 Senator Georges was charged in the Brisbane Magistrates' Court with committing two offences, namely, disobeying a direction given by a member of the police force in the exercise of his powers under the Traffic Act of Queensland, and taking part in a procession upon a road for other than funeral purposes, without a permit issued in accordance with the Traffic Regulations of that State. Senator Georges pleaded guilty and was fined $25.00, and in default of payment of the fine was sentenced to seven days imprisonment, in relation to each charge. He did not pay the fines within the period allowed, and was accordingly arrested under warrant and imprisoned on 15 August 1979. He was released on 16 August 1979 when the fines imposed by the Court were paid. Senator Georges was imprisoned in similar circumstances in December 1978. The President of the Senate was not formally notified by the Court of the imprisonment of Senator Georges on either occasion.

The Privilege of Freedom from Arrest

4. Before proceeding to the particular matters referred to the Committee by the Senate, it is necessary to consider the privilege of freedom from arrest as such.

5. By virtue of section 49 of the Constitution the powers, privileges and immunities of the Senate and of its members, until declared by the Parliament, are those of the British House of Commons and its members at the establishment of the Commonwealth. In order to discover what privileges are attracted by this constitutional provision, it is necessary to examine the privileges of the House of Commons and its members as they were in 1901. Those privileges are to be found partly in parliamentary law which in modern times has become part of the common law, and partly in statute law.

6. The oldest of the privileges of members of the House of Commons which is attracted by section 49 is the privilege of freedom from arrest in civil causes. The rationale of this privilege was that the claim of the House to the attendance of its members was of greater importance than, and overrode, the claims of a litigant or of a court in a civil matter. Another reason for the privilege was that it was a safeguard against the harassment of members by other persons using the processes of civil law.

The privilege was recognised and applied by the courts as part of the ordinary law, and was also obliquely recognised by the statutory law. It became a legal right attached to the office of member of Parliament, and the detention of a member in a civil cause was held to be irregular and unlawful. The duration of the privilege was held to be for a session of the Parliament, for forty days after prorogation or dissolution, and for forty days before the beginning of a session, and this was also recognised by the courts.

7. From early times there were clear indications that the privilege did not apply to the arrest and imprisonment of members in criminal causes, and by 1901 the privilege was very narrowly restricted to civil matters. Erskine May's *Parliamentary Practice* refers to the subject in the following way:

> The development of the privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal case, but also cases which, while not strictly criminal, partake more of a criminal than of a civil character (19th ed., 1976, p. 103).

8. How narrowly the privilege was construed by 1901 is illustrated by a number of cases in the nineteenth century in which the House declined to treat as breaches of privilege the commitment of members for contempt of court, where such contempt was regarded as partaking of a criminal character and was not part of a purely civil process. This distinction between criminal contempt and contempt as a civil matter was in accord with the view of the courts, and was clearly expressed in the following judgment, which has been regarded as the authoritative statement on the limit of the privilege:

> Members of Parliament are privileged against commitment, qua process, to compel them to do an act—against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance (Wellesley v. Duke of Beaufort (1831) 2 Russ. & M. 639).

9. In this century the privilege has been regarded as not extending even to the detention of members under emergency legislation where the normal process of law does not apply and the writ of habeas corpus is not available.

10. The strict limitation of the privilege to purely civil matters, and the reduction in the scope for imprisonment in civil causes in the modern law, has meant that the privilege is of limited value in modern times, so that the House of Commons Select Committee on Parliamentary Privilege in 1967 recommended that the privilege be abolished in Britain. This recommendation has not yet been adopted.

11. There are a number of matters which may be regarded as being related to the privilege of freedom from arrest, but which are not strictly relevant to that privilege as such. For example, no question of privilege arises where civil or criminal proceedings are taken against a member, but it has long been held that it is a contempt to seek to serve or execute any civil or criminal process in the precincts of Parliament while either House is sitting. Another question which has arisen is whether privilege is involved in a member, imprisoned for a criminal matter, being restrained by the conditions of his imprisonment from performing his duties as a member. This question was examined by the House of Commons Privileges Committee in 1970, and the Committee concluded that an imprisoned member is in no different position from any other person so detained, and ought not to be given any special advantages.

Matters Referred to the Committee

12. The first matter referred to the Committee by the Senate is as follows:

(a) The failure of any appropriate authority in Queensland to advise the President of the Senate of the arrest and imprisonment of Senator George Georges.

It has already been indicated that the President was not notified of the two occasions on which Senator Georges was fined and in default of payment of the fines sentenced to a term of imprisonment.

13. It is not known whether there have been any other occasions of Senators or Members of the House of Representatives being committed to prison by a court without notification to the President or the Speaker. The imprisonment of members of the Australian Parliament fortunately has been a rare occurrence. On the one other recent occasion which is known to the Committee, the imprisonment in 1971 of Mr T. Uren, M.P., for failure to pay costs awarded against him after an unsuccessful private criminal prosecution, the Speaker of the House of Representatives was notified by letter by the Clerk of the Sydney Central Court of Petty Sessions, even though by the time of notification Mr Uren had been released.

14. It is firmly established in Britain that the Speaker of the House of Commons must be notified by the court whenever a member is committed in a criminal matter. The rationale of this practice is that the House must be informed of the imprisonment of a member and of the cause of the imprisonment so that it can see the reason for its being deprived of the service of its member and so that it can determine whether privilege is involved. Blackstone's *Commentaries on the Laws of England* indicates that this practice has been followed at least since the revolution of 1688, and states that 'the right of receiving immediate information of the imprisonment or detention of any member, with the reasons for which he is detained' is 'the chief, if not the only, privilege of parliament in such cases' (18th edition, 1829, pages 166–7). How firmly the practice was established by 1901 is illustrated by a debate in the House of Commons in 1902, when the Speaker was questioned about whether there had been proper notification of the imprisonment of four members. The Speaker stated that the notification of the House was a duty upon the magistrates, and that in the cases in question the magistrates involved had carried out that duty. This duty was held to arise when a member was committed to prison to await trial, bail not being granted, or when a member was convicted and sentenced to imprisonment. There was held to be no duty upon the court to make any notification where a member was arrested but subsequently released on bail, or was convicted and sentenced to imprisonment but released pending appeal. The reason for this appears to be that the House is interested only if it is deprived of the actual presence of its members by reason of their detention. It was held by the Speaker in another debate in 1917 that there was no duty upon any authority to make any notification in the case of a person who was imprisoned and who was subsequently elected as a member. Notification has been made when attachment orders for contempt of court have been issued in respect of members. In cases of the imprisonment of members by courts martial, the notification has been made by royal message. (A Member of the Australian House of Representatives was imprisoned by a court martial in 1942 and there seems to have been no notification to the Speaker.)

15. There is some authority, including the statement of Blackstone, quoted above, for the proposition that the right of the House of Commons to be notified of the imprisonment of its members is itself a privilege which attaches to each House of the Australian Parliament by virtue of section 49 of the Constitution. It is stated in Erskine

May's *Parliamentary Practice* that the failure of a court to notify the House of Commons at the appropriate time of the imprisonment of one of its members would constitute a breach of privilege (19th edition, 1976, page 148), but there appear to be no cases of the courts failing to do their 'duty' and the House of Commons treating such failure as a contempt, to use the correct term.

16. The Committee considers that it is desirable that the practice of notification of the Presiding Officers of the imprisonment of members of the Parliament should be followed in Australia, not only for the reasons given above, but as a simple rule of courtesy. It would be premature for the Senate to treat the failure to give notification of the imprisonment of one of its members as a contempt, until steps have been taken to make the attitude of the Senate known to the courts and to secure their co-operation.

17. The Committee therefore recommends that the Senate agree to the following resolutions:

(1) It is the right of the Senate to receive notification of the detention of its members.

(2) Should a Senator for any reason be held in custody pursuant to the order or judgment of any court, other than a court martial, the court ought to notify the President of the Senate, in writing, of the fact and the cause of the Senator's being placed in custody.

(3) Should a Senator be ordered to be held in custody by any court martial or officer of the Defence Force, the President of the Senate ought to be notified by His Excellency the Governor-General of the fact and the cause of the Senator's being placed in custody.

The Committee believes that these resolutions would deal with the circumstances in which a Senator might be imprisoned and would give expression to the practice which prevails in Britain. In cases where a court issues a warrant of commitment, the notification may be made when the court receives communication of the execution of the warrant, as was done in the case of Mr Uren.

18. The Committee further recommends that, should the Senate agree to these resolutions, the Commonwealth and State Presiding Officers and the Commonwealth and State Attorneys-General ought to confer upon action to be taken to secure compliance with the practice of notification, as stated in the resolutions, in the various jurisdictions of Australia.

19. The second matter referred to the Committee is as follows:

(b) Whether the matter leading to the arrest and imprisonment of Senator Georges was of a civil or criminal nature.

As was indicated above, the privilege of members of Parliament of freedom from arrest is recognised and applied by the courts as a legal right. The privilege is part of the law of Australia by virtue of section 49 of the Constitution. It is therefore to be expected that the courts would refrain from committing to prison in a civil matter any Senator or Member of the House of Representatives. It is not to be expected that either House of the Parliament would need to enforce the privilege by treating the imprisonment of one of its members as a contempt; such a situation would arise only if there were a disagreement between a House of the Parliament and the courts about whether a particular matter was a civil or a criminal one. A disagreement of this nature could have arisen in 1971 in the case of the imprisonment of Mr Uren. The House of Representatives Committee of Privileges determined that the cause of that member's imprisonment was civil, but the Attorney-General of New South Wales cited

authorities to indicate that in that State the cause was criminal in character, in that the imprisonment was punitive and not coercive. The potential conflict was avoided when the House of Representatives declined to agree with the Committee's report.

20. The matters leading to the imprisonment of Senator Georges were clearly not civil in character. The matters in question were acts which under the laws of Queensland are offences and may bear imprisonment as a punishment. The imprisonment was duly imposed as a punishment, and was clearly not 'in the nature of process to compel a performance', which is regarded as the test established by the courts to determine whether the privilege of freedom from arrest is available. It must be stated that the matters in question were not criminal, in the commonly understood meaning of the word. They belong to a class of matters created by legislatures in modern times under laws whereby offences are made out of, and penalties attached to, acts which would not otherwise be regarded as reprehensible. The term 'quasi-criminal' is sometimes attached to such matters. It must be regarded as well-established that the privilege is not available in relation to such matters.

21. It is the opinion of the Committee, therefore, that the imprisonment of Senator Georges was not as a result of a matter such as to attract the privilege of freedom from arrest, as that privilege has been defined by the British Parliament and by the courts in modern times.

22. The third matter referred to the Committee is as follows:

(c) Whether, if the Committee determines that the matter was of a civil nature, the arrest and imprisonment of Senator Georges constituted a breach of the privileges of the Senate.

It seems to the Committee that this part of the motion is superfluous and tautological. If the matters leading to the imprisonment of Senator Georges were civil ones, then clearly his imprisonment would have been a breach of privilege. As has been indicated above, however, the important question to be determined is whether the matters were of a civil character, and the Committee has given its answer to that question.

D. S. JESSOP
Chairman

Report agreed to by the Committee 23 October 1979