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SENATE STANDING  
COMMITTEE OF  
PRIVILEGES

Tenth Report  
Detention of a Senator

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THE SENATE

COMMITTEE OF PRIVILEGES

TENTH REPORT

DETENTION OF A SENATOR

On 13 November 1985 the Senate passed the following resolutions:

- (1) That the following matters be referred to the Committee of Privileges for urgent investigation and report:
  - (a) the circumstances which led to Senator Georges' bail being conditional upon fingerprinting for identification purposes; and
  - (b) the failure of Queensland authorities to notify the President of the Senate of the detention of a Senator in accordance with paragraph 17 of the Fifth Report of the Committee of Privileges entitled, "Imprisonment of a Senator", tabled in the Senate on 25 October 1979.
- (2) That, notwithstanding anything contained in the Standing Orders, the Committee of Privileges for the purposes of its inquiry and report, shall have power to send for persons, papers and records.

2.

The resolutions referred to the arrest of Senator Georges on 11 November 1985.

2. Later on 13 November Mr President made a statement to the Senate concerning attempts which were made on 11 November by the Queensland Police to inform him of the arrest of Senator Georges. Mr President's statement indicates that the Queensland police attempted to notify him of the arrest, but, due to the indirect methods by which the notification was attempted, the attempts were unsuccessful. Mr President reminded all relevant authorities that communications of this kind should be made directly to him as President. The full text of the statement is attached to this report as Appendix 1.

3. It is clear, then, that the Queensland authorities had not actually failed to give notice of the detention of Senator Georges, as stated in paragraph (b) of the Senate's resolution, but the attempts to notify the President were not properly made. Since the matter was referred to the Committee, the Queensland Police have fully and properly notified the President by direct communication of matters relating to the arrest and detention of Senator Georges.

4. Although paragraph (b) of the resolution was therefore overtaken by events, the Committee considers that there is one aspect of the matter of notification which should be addressed.

#### Notification of the Arrest of a Senator

5. The notification of the arrest and detention of a Senator was the main subject of the Fifth Report of the Committee, discussed at paragraphs 12 to 18 of that report. The report noted that the British House of Commons has always insisted upon being informed of the detention of its members, that authority exists for the proposition that the right to be notified of the detention of its members is a privilege adhering to the Senate under section 49 of the Constitution, and that it would be open to the Senate to treat as a contempt any failure to notify the

Senate of the detention of a Senator. The report concluded that 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 had been taken to make the attitude of the Senate known to the courts and to secure their cooperation.

6. The report therefore recommended that the Senate pass 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.

These resolutions were passed by the Senate on 26 February 1980.

7. It will be noted that the resolutions require a court to inform the Senate of the imprisonment of a Senator pursuant to the order or judgment of the court, and does not place any requirement upon police who arrest a Senator. This formulation was quite deliberate. In his speech to the Senate when moving the motion for the resolutions, Senator Jessop explained the reasons for the resolutions being framed in this way, and also anticipated a problem which appears to be involved in the arrest of Senator Georges which is the subject of this report:

4.

"The Senate will note that the report refers to the arrest and imprisonment of Senator Georges by the court which dealt with his case and does not refer to his earlier arrest and detention by the police.

There are three reasons for this. Firstly, under the law of Australia and that of other common law jurisdictions, arrest by the police can be only for the purpose of bringing a defendant before a court which then determines whether he will be held in custody. Therefore, the primary responsibility falls on the courts to take notice of a person's membership of Parliament for the purpose of observing the privilege of freedom from arrest and the right of the Parliament to be notified of that arrest. Secondly, whilst there is good authority for the proposition that courts must take notice of a defendant's membership of Parliament, there seems to be no authority on the question of a similar obligation falling upon the police. This matter was referred to by Professor Geoffrey Sawer in his submission to the House of Representatives Privileges Committee in connection with the case of Mr Uren. Thirdly, it may in any case be impracticable to impose an obligation upon the police to notify the President or the Speaker whenever they have arrested a member of Parliament.

It is realised that in practice there may be a considerable delay between the arrest of a defendant by the police and his appearance in a court and that the Parliament might be deprived of the services of one of its members for up to two or three days before the opportunity arises for a court to make the required notification. It may well be, therefore, that there ought to be some obligation upon the police to give notification of the arrest of a member. But the Committee's report is concerned with ensuring that the primary responsibility falling upon the courts is accepted in Australia." [Hansard, 21/2/80, p.230, emphasis added].

8. The Queensland Police have, in effect, assumed that they have an obligation to notify the President of any arrest of a Senator, and have also notified the President of events following an arrest, such as the release of the Senator on bail.



9. The Senate may consider that it would be appropriate for it to call upon police to notify the President of any arrest of a Senator. Attached to this report as Appendix 2 are suggested resolutions which would reaffirm the resolutions of 26 February 1980 and which would achieve this aim. The Committee recommends that these resolutions be passed.

Circumstances of Senator Georges' Detention

10. Paragraph (a) of the Senate's resolution requires the Committee to report on the circumstances which led to Senator Georges' bail being conditional upon fingerprinting for identification purposes.

11. In order to report on this matter it was necessary for the Committee to ascertain the facts of Senator Georges' detention. To do this the Committee invited the Minister for Justice and Attorney-General of Queensland, the Hon N. J. Harper, MLA, to provide a statement of those facts. The Minister responded with a summary of the circumstances of the arrest and detention of the Senator. The Committee also received written statements and submissions, supported by oral evidence, from Senator Georges.

12. The facts relating to Senator Georges' detention are as follows. The Senator was arrested on the morning of 11 November 1985 in Ann Street, Brisbane, and was taken to the City Watchhouse, where he was charged with an offence under section 4A of the Vagrants, Gaming and Other Offences Act 1931-1978, which provides as follows:

"4A. Entering or remaining in or upon buildings, etc., without lawful excuse.

(1) Any person who, without lawful excuse (the proof of which shall be upon him), together with others enters or remains in or upon any part of a building or structure, whether public or private, or any land occupied or used in connexion therewith, is guilty of an offence.

Penalty: \$200 or imprisonment for six months.

- 2) Any person who remains in or upon any part of a building or structure, or any land occupied or used in connexion therewith, which part or land is not a public place, and has no lawful excuse for so doing (proof of such lawful excuse being upon him) shall, if he there -

- (a) does any act; or

- (b) uses any language

which, if done or used by him in a public place, would be an offence under this Act or any other Act, be guilty of an offence.

Penalty: \$200 or imprisonment for six months."

13. Senator Georges was then told that his fingerprints and photograph must be taken. In making this requirement of him, the police relied upon section 43 of the Vagrants, Gaming and Other Offences Act, which provides as follows:

'43. Finger prints.

Where a person has been arrested on any charge in respect of which a person may be arrested under this Act, or is in lawful custody for any offence punishable on indictment pursuant to "The Criminal Code," the officer in charge of police at the police station to which he is taken after arrest or where he is in custody, as the case may be, may take or cause to be taken all such particulars as may be deemed necessary for the identification of such person, including his photograph and finger prints and palm prints:

Provided that if such person as aforesaid is found not guilty or is not proceeded against, any finger prints or palm prints or photographs taken in pursuance of the provisions of this section shall be destroyed in the presence of the said persons so concerned."

14. Senator Georges declined to have his fingerprints or photograph taken. His grounds for doing so were that it was not necessary for the purpose of identifying him and that the statutory provision gives an officer a discretion in determining whether fingerprints and photographs are taken, and he asked that that discretion be exercised. The police, however, appear to take the view, in which view they are apparently supported by the Minister, that the Act requires persons charged under it to be

fingerprinted and photographed before being released on bail. This appears to the Committee to be a somewhat strange interpretation of the provision, but that is the interpretation that is taken. Because of his refusal, Senator Georges was charged with obstructing a police officer in the exercise of his duty, an offence against section 59 of the Police Act 1937-1984, and he was not released on bail by the police, but was held in custody. The decision was made by the police not to take his fingerprints by force.

15. He was taken before the Magistrates Court at 10 a.m. the following morning, and was granted bail on his own undertaking. The magistrate apparently took the view, which is supported by the words of the statute, that it is not necessary for fingerprints and photographs to be taken for bail to be granted. Notwithstanding the granting of bail, Senator Georges was not released until 11.26 a.m. The evidence before the Committee does not allow it to nominate any reason for this delay, and it is obvious that the Senator should have been released as soon as practicable after bail was granted by the magistrate.

#### Issues of Parliamentary Privilege

16. The Committee assumes that the task required of it by the Senate is that of reporting upon any issues of parliamentary privilege which arise in relation to these events. The Committee presumes that it is not its task to examine and report upon the adequacy of the law and practice of Queensland relating to the arrest and detention of persons charged with offences.

17. The resolution referring the matter to the Committee makes no mention of the immunity of Senators, by virtue of section 49 of the Constitution, from arrest and detention in a civil cause, and does not require the Committee to consider whether this immunity is involved. The circumstances in which the immunity applies were analysed in some detail in the Fifth Report of the Committee, at paragraphs 4 to 10 and 19 to 21. The immunity arises only where an arrest or detention is for the purpose of

compelling the performance of a civil obligation. It is clear that the immunity is not involved in the arrest which is the subject of this report.

18. It appears to the Committee that there are two questions which the Committee should answer: first, whether the processes of the criminal law were used to harass the Senator because of his being a Senator; and secondly, whether the facts of the case suggest some defect in the immunity of Senators as it exists at present.

Harassment of a Senator?

19. If the Senate were satisfied that one of its members had been treated more harshly, in the process of the enforcement of the criminal law, than other persons in the same or similar circumstances were treated, and that the processes of the criminal law had been used to harass or hinder a Senator because of his being a Senator, the Senate could well regard the treatment of the Senator as a contempt.

20. There appears to be no precedent for such action being treated as a contempt, but the Senate will be well aware that lack of precedent does not prevent it from treating acts as contempts where it is satisfied that the acts in question have the tendency to obstruct it or its members in the performance of their functions.

21. There is great potential for law enforcement authorities, using the many statutory and common law offences of a general character, and the large discretions in respect of arrest, the granting of police bail and the time of first appearance before a court, seriously to impede members of either House of the Parliament in the performance of their duties and to remove members from the Houses for a considerable time, if those authorities are so minded. The Committee would like to think that law enforcement authorities would be incapable of any such actions, but cannot come to this conclusion with complete

confidence, especially since the major part of criminal law enactment and enforcement is undertaken by State authorities, a matter which will be further discussed later in this report.

22. The evidence before the Committee does not allow it to conclude that there has been such improper harassment of a Senator because of his being a Senator. Other persons were arrested under the Vagrants, Gaming and Other Offences Act at the same time as Senator Georges was arrested, and were similarly treated, in that they were required to have their fingerprints and photographs taken before being granted police bail. It does not appear, therefore, that Senator Georges was treated differently from other arrested persons. Before the Committee Senator Georges indicated his belief that the arrest in question and other arrests of him indicate a pattern of behaviour towards him on the part of the police suggesting that there was some police policy of harassing him. He also expressed his belief that this pattern of behaviour may have now ceased. The Committee is not able to find that there was an intention on the part of the police to use their powers to harass him.

#### The Adequacy of the Immunity

23. It is clear that the immunity of members of the Australian Houses from arrest in a civil cause under section 49 of the Constitution is of limited value, because the scope for a civil arrest of a person under the law as it stands at present is very limited. The likelihood of the processes of the civil law being used to deprive a House of the service of its members is extremely remote. The limited utility of the immunity is reflected in the recommendation of the 1967 Joint Select Committee on Parliamentary Privilege of the British House of Commons that the immunity be abolished.

24. There is a much greater danger of the processes of the criminal law being used to interfere with or remove from a House its members. The police have a wide discretion to arrest persons for offences rather than to proceed against them by way of

summons. The police may decline to grant bail, and a considerable time may elapse between the arrest of a person and the person's first appearance in court. A court has power to refuse bail, and if bail is vigorously opposed by police it may not be granted. Refusal to grant bail may be the subject of appeal to a higher court, but this also may take considerable time. As has already been noted, these processes provide great scope for law enforcement authorities to deprive a House of the services of a member and to hinder a member in the performance of the member's functions. A questionable decision by a lower court to impose a term of imprisonment rather than a fine may take some time to overturn on appeal. With the general increase in the numbers of offences and penalties in the criminal law in recent times there is the possibility of a member being sentenced to imprisonment for a relatively minor offence or for a strict liability offence where the offender need not be culpable. There is also the possibility of a member being convicted for a minor offence which nonetheless may bear a penalty of imprisonment of twelve months or more, and the member's seat thereby being vacated under paragraph 44(ii) of the Constitution.

25. In Australia, all of these processes are largely beyond the legislative control of the Federal Parliament. This is a problem which did not and does not exist in the United Kingdom, whence the immunities of members are derived. A Parliament cannot justly complain of its members falling foul of criminal laws for which it is responsible, but in a federal state a federal parliament may find itself deprived of its members because they have become enmeshed in unjust or unjustly administered state laws and practices. It is not beyond the bounds of possibility that a State Government might use its control of State laws to interfere, even if only temporarily, with the composition of the Federal Parliament. The Committee is not suggesting that such things have occurred in the present case or any other case, but the circumstances of Senator Georges' detention remind it of the possibilities.

26. In some countries\*, particularly some of the democracies of Western Europe, members of the legislature have a limited and/or waivable immunity from criminal process. The Committee believes that the Australian Houses should give consideration to whether their members should be protected by some limited immunity from arrest and detention in a criminal matter. Perhaps members should be immune from arrest except in cases involving violence, disturbance of the peace or continuing serious harm to the community, so that prosecutions against members would normally proceed by way of summons or equivalent process. Perhaps a remand of a member in custody or a sentence of imprisonment imposed upon a member should be subject to approval by the member's House.

27. There are at present before the Senate the recommendations of the Joint Select Committee on Parliamentary Privilege and a Bill introduced by Mr President giving effect to those recommendations and other matters. The Senate could give consideration to the question of the immunity from arrest and detention when dealing with that Bill. Attention should also be given to the Constitutional provision relating to the disqualification of members convicted of offences.

#### Recommendations

28. The Committee therefore recommends that the Senate-

- (a) pass the resolutions set out in Appendix 2; and
- (b) give consideration to the alteration of the immunity from arrest and detention.

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\* Austria, Belgium, Denmark, Federal Republic of Germany, Israel, Italy, Japan, Norway, Spain, Sweden, Switzerland.

12.

29. The Committee does not recommend any other action in relation to the matter referred to it.

B.K. Childs  
Chairman



APPENDIX 1

ARREST OF SENATOR GEORGES

STATEMENT BY THE PRESIDENT

Honourable Senators:

I wish to take this opportunity to advise the Senate of information I have received this afternoon relating to the events involving the arrest of Senator Georges in Brisbane on Monday.

At 2.40 p.m., during Question Time, a telex was received in my office from Commissioner Lewis, the Queensland Commissioner of Police. The telex reads as follows:-

"Further to advice 11 November 1985 relating to the arrest of Senator Georges at a protest meeting at the S.E.Q.E.B. Building on 11 November 1985. Senator Georges appeared before the Magistrates Court, Brisbane on 12 November 1985 charged with an offence against Section 4A of the Vagrants Gaming and Other Offences Act and also with a further offence of obstructing police in the execution of their duty. Both matters were remanded for hearing on 24 January 1986 at the Magistrates Court 19, Brisbane. Senator Georges was admitted to Bail on his own undertaking."

Senators will note that the message commences with the words "further to advice 11 November 1985". As I was unaware of any previous advice having been received, I have had inquiries made to ascertain to what advice the telex message referred. The situation is that the Queensland police did take steps to advise me of Senator George's arrest and detention on Monday, steps which in the event proved to be ineffective. I am advised that, at 2.42 p.m. on that day, a telex message was despatched from the Queensland police operations Branch to the Commissioner of the Australian Federal Police in Canberra, in the following terms:-

14.

Attn : President of the Senate, Canberra

From : Vedette

Subject : Arrest of Senator Georges

On Monday 11 November 1985, Senator Georges was involved in an illegal protest at the S.E.Q.E.B. Building in Ann Street, Brisbane.

Senator Georges was arrested under the provisions of Section 4(A)(1) of the Vagrants, Gaming and Other Offences Act - Entering or remaining in or upon the building without lawful excuse.

The Senator is expected to be released on Bail later today to appear Brisbane Magistrates Court, on 12 November 1985 at 9.30 a.m. Court 2.

I will advise you of the result of court action in due course.

This message confirms advice passed to your Mr Jack Carmody, Commonwealth Parliamentary Officer this State.

Lewis Commissioner"

Inquiries from my office have revealed that although the telex is headed "Attention President of the Senate, Canberra" it was taken, I am advised, to be a copy for information rather than a request to pass on the contents to me.

I am also advised that, at 1.30 p.m., on Monday, a Queensland police superintendent telephoned the officer in charge of the Commonwealth Parliament Offices in Brisbane, Mr Carmody, advising him that he wished to get in touch with me to let me know of Senator Georges' arrest. Mr Carmody asked the Superintendent whether he wished him to pass on the message. This offer was accepted. Mr Carmody thereupon telephoned my office here in

Parliament House and told one of my staff that he had received the call from the police to let me know that Senator Georges had been arrested that morning. My staff member told Mr Carmody that advice to that effect had already been informally received in Parliament House. The relaying of the message was not treated as an official notification, and was therefore not referred to me. While perhaps the communication to which I have referred above, may be interpreted as an official notification, the message to my office may properly be seen as informal advice.

I believe these events indicate that the Queensland police authorities did take action to notify me of Senator Georges' arrest and detention - action which, as I have said, proved not to be effective.

I take this opportunity to remind all relevant authorities that communication should be made directly to me personally as President.

As this has significance with respect to a motion moved by Senator Reynolds in the Senate today, I have taken this opportunity to advise the Senate at the earliest opportunity.

APPENDIX 2

PROPOSED RESOLUTIONS

ARREST AND DETENTION OF A SENATOR

(1) The Senate reaffirms its resolutions of 26 February 1980, as follows.

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

(B) 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.

(C) 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.

(2) That, where a Senator is arrested, and the identity of the Senator is known to the arresting police, the police ought to notify the President of the Senate of the fact and the cause of the Senator's arrest.