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6 August 2007

Mr David Elder
Secretary
Standing Committee of Privileges
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Secretary

HOUSE PROCEDURES ON PRIVILEGE MATTERS

The committee, by your letter of 3 July 2007, has invited me to comment on a paper prepared by Professors Lindell and Carney on the procedures of the House of Representatives relating to the consideration of privilege matters.

The major considerations arising from this paper will be obvious to the committee, but the following observations may be of some use to the committee.

Transfer of "penal jurisdiction" to the courts

The recommendation for the transfer of the "penal jurisdiction" to the courts requires careful consideration of all the implications. Legislation in this area is likely to last for the century. If the precedents of the Houses are any guide, serious contempt cases meriting real penalties are once-in-a-century affairs. The balance of power between legislature, executive and judiciary would be affected. All possible circumstances should therefore be considered.

The paper appears to contemplate that there should be a series of statutory criminal offences corresponding to contempts of Parliament which should be prosecuted in the courts at the instigation of a House, and that that process should be the exclusive means whereby any penalty is imposed on a person for a contempt of Parliament.

The first difficulty which arises in relation to this proposal is that it would greatly expand the scope for judicial inquiry into, and judgment upon, parliamentary proceedings, the very thing that parliamentary privilege is intended to prevent. The existing criminal offences relating to parliamentary proceedings, for example, penalising a witness (*Parliamentary Privileges Act 1987*, section 12), and bribing a member of Parliament (*Criminal Code Act 1995*, section 114.1), relate to acts occurring outside parliamentary proceedings, and should not give rise to this problem to a great extent. Other contempts, however, are internal to the parliamentary proceedings, and prosecution of them in the courts would involve much more judicial

scrutiny and judgment of those proceedings. The offence of giving false evidence, for example, could often not be proved without examination of the nature of the parliamentary inquiry, the character of the questions asked of a witness, their ambiguity, their relevance to the terms of reference, and so forth. By enacting a comprehensive code for the prosecution of contempts of parliament, the Parliament would be placing its proceedings in the hands of the judiciary to a far greater extent than at present. As with a bill of rights, it would be a very large shift of power to that one branch of government.

The next problem is that, unless the statutory provisions were to include some catch-all provision like section 4 of the *Parliamentary Privileges Act 1987*, the category of contempts in respect of which a penalty could be imposed would be closed, and a House would be powerless to deal with obstructions and interferences not covered by the specific statutory provisions. The same difficulty arises in relation to contempt of court and explains why contempt of court has never been satisfactorily codified. It also explains the preamble to Senate Privilege Resolution no. 6. A catch-all provision as a solution to this problem would no doubt meet with strong objections, as do other such provisions in statutory criminal law.

A complete transfer of the contempt jurisdiction of the courts would give rise to larger issues which could not be avoided, including the issue of executive privilege or public interest immunity. One of the contempts to be prosecuted as a criminal offence would presumably be refusal to provide information in response to a requirement by a House or a committee. The question of what defences would be available would immediately arise. Legal professional privilege, for example, would raise difficult issues. More significantly, how would a claim of executive privilege or public interest immunity be dealt with in such a statutory provision? Would it be left to the courts to determine whether the defence was made out, thereby judicialising what is often an essentially political question, or would there be some conclusive certificate defence given to the executive, which would close off the issue in favour of the executive and against the Parliament? This is only one of many problems which would have to be resolved.

The paper does not mention what would happen in relation to remedies for continuing offences, remedies against offences directed at potential future proceedings, or the ultimate means of applying those remedies, the current parliamentary power of committal. If prosecution for a past offence were to be the only method of imposing a penalty, then a House would often not be able to prevent such offences. Examples would be continuing adverse action against potential witnesses on account of their evidence which they may give, and continuing concealment or destruction of evidence which may be required by a parliamentary inquiry. Under current powers a House could order the cessation of such conduct and impose a penalty for violation of that order. A House could also order the committal of a person engaged in such conduct to prevent the continuation and possible future effect of the conduct; such a committal may in itself be regarded as a significant penalty. It is not clear whether the paper contemplates that these powers should remain; if they did not, what remedy would there be for such offences? Prosecution after the event would not provide an effective remedy in many circumstances.

This raises the question of whether there would be a power of arrest, bail or remand in custody for "normal" contempts punishable under the statutory provisions.

These considerations support the preservation of the current parliamentary power of committal for contempt as a reserve power, even in the presence of statutory prescription of criminal offences corresponding to contempts.*

It is not clear why a prosecution should be initiated only by the decision of a House. Under the Parliamentary Privileges Act a prosecution for an offence against section 12 or 13 could be initiated by anybody. Why should any citizen not be able to initiate a prosecution for such a serious offence if a majority of a House is unwilling to act? This is particularly so in relation to the protection of witnesses, where the witness, not the House, may be the person most harmed by the offence. There have been cases of ministers vilifying witnesses who have given evidence that government does not like, and it is not difficult to imagine a government majority in a House refusing to protect such a witness. Justice could then be obtained by a private prosecution.

The proposal that a prosecution be brought in the High Court is not well considered. The alleged contempt may warrant prosecution but may not deal with matters appropriate to occupy a justice of that court. It is difficult to envisage a High Court justice engaged for some days in hearing evidence about who said what to whom in a case of alleged intimidation of witnesses. A prosecution should surely be brought in the Federal Court in the same way as any prosecution for any similar federal offence. This would also make the right of appeal more plausible.

Proposed procedures

The paper does not make out a convincing case for having an elaborate "trial" process in the Privileges Committee if the only sanction at the end of that process depends on prosecution in the courts for a criminal offence. Such a process would attract all the criticisms merited by the "double trial" involved in committal proceedings, and would still attract additional criticism because the first trial would be by politicians. There would also be the problem of the cross-examination in the court trial of the evidence given by witnesses, and possibly the accused, in the committee hearings, which would normally be prevented by parliamentary privilege, and which would raise the issue already referred to, of judicial inquiry into parliamentary proceedings. This process also may not favour the accused. If prosecution were to be the only available substantive result, it would be better to have an investigative officer appointed by a House to conduct an investigation and recommend to a committee whether a prosecution should be undertaken.

The paper's distinction between a Privileges Committee inquiry as an investigation and as a hearing of an allegation against a particular alleged offender is not so useful in practice as suggested (paragraph 43). Privileges Committee inquiries usually begin as inquiries without an "accused", in that the committee is asked to inquire whether particular circumstances have occurred and whether any contempt was committed. Formally, there is no "accused" at the beginning of an inquiry and the "accused" becomes such only if and when the committee identifies an offence which has occurred and the person responsible for it. So what the paper calls a category (2) inquiry is the process from which a category (1) inquiry may emerge. Any person

involved may become an accused. The Privileges Committee may be well into a category (2) inquiry before discovering whether it has a category (1) inquiry on its hands. The committee in any event always remains in effect an investigative body because it has no power to impose any penalty. In that context, and given the concern of the paper for procedural fairness, it is remarkable that the paper rejects the concept of extending the same rights to all persons involved in any inquiry, and in particular rejects the procedure for allowing any witnesses to examine any other witnesses in relation to adverse evidence (paragraph 94).

In relation to disqualification of members for bias, the paper ignores the major argument against the procedure it recommends, namely, that members of Parliament, unlike judges, will have expressed opinions about almost every subject, and therefore could be disqualified on the basis of expressed views about any subject related to a privileges inquiry. The paper refers to an advice which I gave to the Senate Privileges Committee in 1989 and misconstrues the advice by describing it as "relying on the absence of concerns over bias in any comparable legislature" (paragraph 62). The advice did not "rely" on the absence of provisions in other legislatures; it referred to that absence as evidence for cogent reasons for not having a general disqualification rule, and then proceeded to expound those reasons, which the paper does not consider.

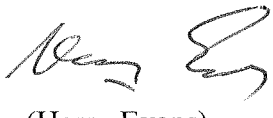
The paper is correct in its assumption that subparagraph 2(2)(d) of the Senate's Privilege Resolution extends a right of a person to have witnesses "called" before the committee (paragraph 83). It might have been thought that this was perfectly clear.

The paper is also correct in assuming that a right to cross-examine witnesses would rather necessarily entail a right to be present during the evidence on which the cross-examination is to take place (paragraph 41). In this regard there is something wrong with the second sentence of paragraph 80 of the paper; it does not appear to make sense.

If the committee decides to pursue the recommendations of the paper, there will be other points requiring consideration.

Please let me know if I can provide any further information to the committee.

Yours sincerely



(Harry Evans)

*The Houses of the US Congress have recently been urged - by professors of law - to use their inherent power to commit persons for contempt to overcome obstruction of their inquiries by the current administration, which claims, in effect, complete non-justiciable immunity from all such inquiries: eg., F. Askin, 'Congress's Power to Compel', *Washington Post*, 21 July 2007; also 'Power Without Limits' [editorial], *New York Times*, 22 July 2007. The courts could continue to find the committal power lawful, as they have in the past, without getting involved in the political issue of executive privilege. The context of these suggestions reinforces the point that, in a transfer of the contempt jurisdiction to the courts, it would not be possible to avoid that issue, amongst others.