

A possible contempt in relation to a witness to the Committee's inquiry into Access to Justice

Report to the Senate

Introduction

1.1 This report has been prepared in accordance with the requirements of the Resolutions agreed to by the Senate on 25 February 1988 in relation to Parliamentary Privilege, and in particular, resolution 1(18).

1.2 The report relates to what the committee considers to be a clear case of a contempt.

Facts of the matter

1.3 Ms Rowena Puertollano of Broome, Western Australia, made a submission (Attachment 1) to the committee's current inquiry into Access to Justice in April 2009. Ms Puertollano signed the submission as Coordinator, Broome Family Violence Prevention Legal Service (FVPLS). There was no request for confidentiality or any apparent reason under the committee's operating resolutions to withhold the submission from publication. Accordingly, the submission was received as a public submission from an individual, and designated as submission no. 8. It was posted on the Parliament House website listed under Ms Puertollano's name, notwithstanding the signature block which detailed her position.

1.4 On 18 June, Ms Puertollano contacted the committee's secretary by phone and advised that she had received a "written warning" from her employer, the Aboriginal Legal Service Western Australia (ALSWA) for having made the submission. Ms Puertollano supplied a copy of the written warning (Attachment 2), which was signed by Ms Katrina Carlisle, Manager, FVPLS, to the committee secretary by facsimile the same day. The warning letter states that:

This letter constitutes a formal written warning, regarding a matter which has been deemed "Serious Misconduct" on your behalf.

1. A letter dated 27 April 2009, and signed by you, as Coordinator of the Broome FVPLS, was submitted to the Senate Standing Committee on Legal and Constitutional Affairs.

...

This matter is viewed as a very serious breach of Organisational Policies by Senior Management at ALSWA, and consideration has been given to dismissal...

1.5 The committee met on Thursday 25 June 2009 and discussed the matter. The committee authorised the Secretary to send a letter to Ms Carlisle advising that this was a potential contempt of Parliament and a criminal offence, recommending that the

warning letter be withdrawn and seeking an assurance that Ms Puertollano would suffer no disadvantage for having made a submission. A letter (Attachment 3) was sent to Ms Carlisle in the terms agreed to by the committee on Monday 29 June.

1.6 Mr Dennis Eggington, Chief Executive Officer of the ALSWA, responded on 10 July to the committee's letter. Mr Eggington's response (Attachment 4) disagreed with the committee's advice to the ALSWA that the letter of warning issued to Ms Puertollano may constitute a breach of Parliamentary Privilege. Mr Eggington maintained that:

The letter was a legitimate warning to an employee of ALSWA, and was concerned with the employee holding herself out as representative of ALSWA without permission from Senior management. This is what Ms Puertollano's submission to the inquiry did.

1.7 Mr Eggington also asserted that Ms Puertollano had signed a confidentiality agreement to which she agreed to be bound:

Further, we advise that when Ms Puertollano commenced her employment in September 2008 she signed a confidentiality agreement in which she agreed to be bound by the "Responsibilities of Staff" outlined in the ALSWA Policy and Procedures Manual and referred to in the letter. All employees including Ms Puertollano are expressly advised by the ALSWA Policy and Procedures Manual that no staff member is prohibited from participating in political or Aboriginal or Legal Community activities in their private capacity.

1.8 Mr Eggington stated that although the organisation did not accept that the warning letter may amount to a contempt, it was prepared to withdraw the letter. Mr Eggington's response went on to outline the proposed advice to Ms Puertollano.

1.9 The committee met in Perth on 13 July prior to a public hearing which had been scheduled for that day. The committee considered Mr Eggington's letter and considered Mr Eggington's assertions to be incorrect. The committee prepared a further letter (Attachment 5) to Mr Eggington, which was signed by the Chair, Senator Barnett, and delivered by hand to Mr Eggington at the public hearing on 13 July by the committee's secretary.

1.10 The ALSWA gave evidence to the committee's inquiry later that day, but the matter of Ms Puertollano was not raised with the ALSWA representatives.

1.11 The ALSWA prepared a letter withdrawing the warning letter on the same day, addressing it to Ms Puertollano at PO Box 919 in Broome. This letter (Attachment 6) was copied to the committee secretariat and was received on 16 July.

1.12 On 28 July, Ms Puertollano wrote to the committee secretary seeking confirmation of action by the committee on her behalf, and of the ALSWA's response and acceptance of their responsibilities. (Attachment 7) Ms Puertollano also advised that she had tendered her resignation. The committee secretary responded to Ms Puertollano in writing on 3 August (Attachment 8) and also by phone the following

day, on 4 August. In the subsequent conversation, Ms Puertollano indicated to the secretary that she had not received the ALSWA's letter of 13 July which withdrew the written warning.

1.13 On 4 August, the committee secretary phoned the ALSWA senior Legal Adviser, Mr Peter Collins, to advise that it appeared that Ms Puertollano had not received the advice from the ALSWA withdrawing the written warning. Mr Collins undertook to follow up in relation to the matter, and also provided a copy of Ms Puertollano's letter of resignation. (Attachment 9)

Committee's conclusions

1.14 The committee notes that Ms Puertollano did sign the letter as Co-ordinator, Broome FVPLS, and that she apparently did so without the consent of her employer, who maintained that she was not authorised to represent the views of the organisation. However, the committee does not accept that Ms Puertollano was attempting to put forward her views as representing the views of the FVPLS.

1.15 Apart from the signature block, at no point in her submission did Ms Puertollano claim that the submission was the submission of an organisation. Further, her submission shows that she was in strong disagreement with the policies of the organisation. It is therefore difficult to construe her submission as made in other than a private capacity. That she signed the submission as co-ordinator of the FVPLS in Broome serves only to establish her identity and that she was well placed to comment on the policies and practices of the organisation.

1.16 However, the issue of whether Ms Puertollano's submission was made in an official or a private capacity is irrelevant. The procedures for the protection of witnesses laid down by the Senate are unequivocal. In the committee's opinion this matter appears to be a clear case of interference with a witness and also molestation of a witness, both contempts.

1.17 The committee was concerned about the ALSWA's resistance to the committee's warning that this was a possible breach of privilege, and its apparent view that its action was legitimate and justified. It was only after follow-up action by the committee that the ALSWA acted to withdraw the written warning.

1.18 The committee acknowledges that the ALSWA did intend to withdraw the letter of warning, but notes that its communication of this letter to Ms Puertollano may not have been immediately effective.

1.19 The committee is particularly concerned about the wording of the ALSWA's letter to Ms Puertollano withdrawing the letter of warning. The letter is conciliatory to the extent that Ms Puertollano's freedom to participate in a private capacity is acknowledged. However, the letter also states that:

I remind you that you remain bound by the "Responsibility of Staff" provisions in the ALSWA Policy and Procedures Manual with respect to communications in your capacity as an employee of ALSWA."

and it concludes with the words:

It follows that no action will be taken against you by ALSWA as a consequence of any evidence you have or may give to the Committee in a private capacity.

1.20 The committee is of the view that the last four words of the concluding sentence can be interpreted as continuing to assert the right to take further action against Ms Puertollano if she gave evidence in terms other than those laid down in the letter. While this is now obsolete due to Ms Puertollano's resignation from the organisation, it does appear that the ALSWA has not resiled from its original views about its rights to control the flow of information to the committee and to discipline staff members who give evidence to committees without authorisation. These views appear to be still held despite two attempts by the committee to dissuade the ALSWA of them. They are clearly incorrect and not consistent with the Senate's resolutions.

1.21 The committee has considered the question of whether the possible contempt interfered with the committee's conduct of the inquiry. The committee considers that any interference was marginal, as the written evidence had already been given, and Ms Puertollano had not been selected to give further oral evidence.

1.22 The committee is nonetheless of the view that that the matter is serious and should be referred to the Standing Committee of Privileges. The committee is mindful of the principle repeated by that committee in its 85th report, and also of its findings:

...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...¹

....

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 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...²

1.23 When giving evidence to a Senate committee, an individual's employment conditions, policies and guidelines, including confidentiality agreements however described are of no effect and the witness must be able to assist the committee in complete freedom, and without suffering any disadvantage as a consequence, regardless of whether the evidence is given in an official or a private capacity. The

1 Senate Standing Committee on Privileges, 85th report, p. 7.

2 Senate Standing Committee on Privileges, 85th report, p. 8.

committee felt that this essential principle has not been understood by the ALSWA and its universal application needs to be restated.

1.24 The committee is also conscious of the broader implications of this case. The committee can understand that organisations may wish to ensure that there is a clear demarcation between when individuals present evidence in an official or a private capacity, and that sometimes this line can be blurred, particularly when individuals give evidence in a private capacity but with the benefit of the experience of their employment. The committee requests that the Standing Committee on Privileges committee consider providing some further guidance and restatement of principles on this matter for the benefit of prospective witnesses, employers and other associated persons, as well as committees who must deal with these potential issues in the course of their inquiries.

Recommendation

1.25 The committee recommends that a possible contempt by the Aboriginal Legal Service Western Australia in relation to a witness who submitted evidence to the inquiry into Access to Justice be referred to the Standing Committee of Privileges.

Senator Guy Barnett

Chair

