

Possible interference with, or imposition of a penalty on, a witness before the Legal and Constitutional Affairs References Committee

Background to the inquiry

1.1 On 10 September 2009, the following matter was referred to the Committee of Privileges on the motion of the Chair of the Legal and Constitutional References Committee, Senator Barnett:

Having regard to the report of the Legal and Constitutional Affairs References Committee on a possible contempt in relation to a witness to the committee's inquiry into access to justice, whether there was any interference with, or imposition of a penalty on, a witness before that committee, or any threat or attempt to carry out those acts, and whether any contempt was committed in that regard.¹

1.2 The Legal and Constitutional Affairs References Committee ('the references committee') had presented a report to the Senate on 8 September 2009, entitled *A Possible Contempt in Relation to a Witness to the Committee's Inquiry into Access to Justice*.² In that report, the references committee gave an account of its dealings with a witness who made a submission to that committee's inquiry into access to justice, Ms Rowena Puertollano, and her then employer, the Aboriginal Legal Service of Western Australia Inc (ALSWA).

1.3 After Ms Puertollano's submission was published on the references committee's website, her employer, through the person of her supervisor, Ms Katrina Carlisle, issued her with a written warning for serious misconduct in making a submission, signed by Ms Puertollano as Coordinator of the Broome Family Violence Prevention Legal Service (FVPLS), to the references committee.

1.4 Ms Puertollano took the correct action for any person in her position, and contacted the references committee to report this consequence of her having made a submission. At the direction of the references committee, its secretary wrote to Ms Carlisle conveying the committee's view that this was a possible contempt of the Senate, as well as a potential criminal offence, recommending that the warning letter be withdrawn and seeking an assurance that Ms Puertollano would suffer no disadvantage for having made the submission.

1.5 A response to this letter was provided by the Chief Executive Officer of the ALSWA, Mr Dennis Eggington, who challenged the references committee's

¹ *Journals of the Senate*, 10 September 2009, p. 2444.

² *Journals of the Senate*, 8 September 2009, p. 2413.

conclusion that the warning letter could constitute a contempt but indicated that the organisation was prepared to withdraw the warning letter.

1.6 A letter to Ms Puertollano withdrawing the warning letter was prepared, sent and copied to the references committee but was not received by Ms Puertollano who was no longer using the address to which it had been sent. This was rectified after Ms Puertollano again contacted the committee secretary to confirm what action the references committee had taken on her behalf. Unfortunately, however, Ms Puertollano also advised that she had tendered her resignation from ALSWA.

1.7 The references committee resolved to raise a matter of privilege because it was not satisfied as to the acceptance by the ALSWA of its warning that a possible contempt had occurred. It was also concerned by the terms of the ALSWA's letter withdrawing the warning letter which continued to insist that Ms Puertollano was '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', although no action would be taken against her as a consequence of evidence given to the references committee 'in a private capacity'.³ According to the references committee, this qualification indicated that the ALSWA had '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'.⁴

1.8 Accordingly, the chair of the references committee, Senator Barnett, raised a matter of privilege under standing order 81 with the President of the Senate, Senator the Hon. J Hogg, who gave precedence on 9 September 2009 to a notice of motion referring the matter to this committee.⁵ In a statement to the Senate when giving precedence to the notice of motion, Senator Hogg referred to past declarations of this committee that:

... interference with and penalisation of witnesses are the most serious of all contempts, and the committee and the Senate have always regarded such actions as requiring rigorous investigation and firm remedial action. The committee has pointed out that actions which are otherwise lawful, such as the dismissal of an employee, may constitute contempts when taken against a witness in consequence of the witness's evidence.⁶

³ Legal and Constitutional References Committee, *A Possible Contempt in Relation to a Witness to the Committee's Inquiry into Access to Justice*, quoted on pp. 3–4.

⁴ *Ibid.*, p. 4.

⁵ *Journals of the Senate*, 9 September 2009, p. 2419.

⁶ *Senate Debates*, 9 September 2009, p. 6045.

Conduct of the inquiry

1.9 Following receipt of the reference, the committee wrote to Ms Puertollano and to the Chief Executive Officer of the ALSWA, Mr Dennis Eggington (also on behalf of Ms Katrina Carlisle), inviting them to respond to the terms of reference and seeking other particular information from each. Copies of these letters are published in Appendix 1.

1.10 Both Ms Puertollano and Mr Eggington responded within the requested timeframe and copies of their responses are also published in Appendix 1.

1.11 Mr Eggington's submission helpfully set out the history of the ALSWA and how the Broome Family Violence Prevention Legal Service had come under its auspices. The former 'auspicing' body had been the Kullari Indigenous Women's Aboriginal Corporation Committee of which Ms Puertollano had been the Chief Executive Officer. With the transfer of the Broome FVPLS to the ALSWA, Ms Puertollano became an employee of the ALSWA.

1.12 Mr Eggington also gave an account of the issuing and withdrawal of the warning letter to Ms Puertollano, indicating that it was not intended to interfere with the evidence gathering function of the references committee or with Ms Puertollano's freedom to participate in the inquiry. There were concerns that Ms Puertollano's submission was critical of the new arrangements and that, although the references committee concluded that Ms Puertollano was not attempting to put forward her views as representing the FVPLS, there were nonetheless in her submission multiple references to her experience and position as coordinator with the Broome FVPLS.

1.13 When the references committee raised the issue of possible contempt, the ALSWA:

... took issue with the fact that the warning letter constituted a contempt. However, we:-

- (a) stressed that the warning letter was in no way intended to inhibit the freedom of Ms Puertollano to express her personal views;
- (b) stressed that the letter was not intended to obstruct the LCARC [the references committee] in the performance of its functions;
- (c) apologised if the warning letter created an impression contrary to that referred to in (a) and (b) above;
- (d) stated that we proposed to withdraw the warning letter, and confirm in writing to Ms Puertollano that we in no way sought to inhibit her contributing to the Access to Justice Inquiry – but reminding her that she

should make clear that she was doing so based on her own views and not as a representative of ALSWA.⁷

1.14 Mr Eggington then repeated the apology to this committee. In response to the references committee's concerns that the terms of the withdrawal letter did not sufficiently acknowledge the breadth of the Senate's Privilege Resolutions, Mr Eggington assured the committee that he had not sought to justify an erroneous position.

1.15 In addressing the question whether the committee should find that a contempt had been committed on this occasion, Mr Eggington drew attention to the absence of any culpable intention on his or Ms Carlisle's part to interfere with the references committee's conduct of its inquiry. Rather, their concern was:

... to act in the best interests of ALSWA at a time when our auspicing of the Broome FVPLS (on request from the AGD) was in its infancy. We intended to act pursuant to and in accordance with the terms of an employee's contract of employment. Crucially, our concern was with the capacity in which Ms Puertollano made her submission, not the fact that she was contributing evidence per se.⁸

Mr Eggington concluded his submission by reiterating the references committee's view that there was a need for clearer guidance in this difficult area.

1.16 It is apparent to the committee from Ms Puertollano's submission that she had experienced significant difficulties in adapting to the new arrangements which she attributed to the 'metro-centric' structure of the ALSWA compared with the Kimberly structure of the former arrangements. She listed numerous areas of difficulty in trying to ensure that appropriate services were delivered to female clients who had been victims of domestic violence or abuse.

1.17 Ms Puertollano also informed the committee that she had not received any official induction about the ALSWA's employment policies until the telephone call from Ms Carlisle, preceding the warning letter, informed her of her alleged misconduct.

1.18 It appears that Ms Puertollano felt that her continued employment with the ALSWA was untenable and that the warning letter brought to a head the tensions that Ms Puertollano had experienced under the new arrangements.⁹

⁷ Letter to the committee from Mr Dennis Eggington, CEO, ALSWA, dated 19 October 2009; see Appendix 1.

⁸ *Ibid.*

⁹ Letter to the committee from Ms Rowena Puertollano, dated 3 October 2009; see Appendix 1.

Consideration of issues

1.19 It is quite clear on the facts available to the committee that the ALSWA issued a warning letter to Ms Puertollano as a direct consequence of her submission to the references committee. This action by the ALSWA was wrong in all the circumstances. As noted by the references committee in its report, it is irrelevant whether Ms Puertollano's submission was made in a private or official capacity. The references committee went on to conclude:

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 was given in an official or a private capacity. The committee felt that this essential principle has not been understood by the ALSWA and its universal application needs to be restated.¹⁰

1.20 This committee concurs. Under the law of parliamentary privilege, proceedings in parliament ought not be questioned or impeached in any place outside parliament. These are the terms of Article 9 of the Bill of Rights 1689, incorporated into Commonwealth law by section 49 of the Constitution and further declared by section 16 of the *Parliamentary Privileges Act 1987*.

1.21 A person who makes a submission to a committee is participating in proceedings in parliament and that participation therefore attracts all the protections conferred by Article 9 of the Bill of Rights and section 16 of the Parliamentary Privileges Act. Senate Privilege Resolution 6, made pursuant to section 50 of the Constitution, articulates conduct which may offend that protection by being intended to amount, or amounting or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions. Such conduct includes interference with witnesses or molestation of witnesses.¹¹

1.22 Time and again, this committee has declared that it regards the protection of witnesses as constituting the single most important duty of the Senate (and therefore of the committee as its delegate) in determining possible contempts.¹²

¹⁰ Legal and Constitutional References Committee, *A Possible Contempt in Relation to a Witness to the Committee's Inquiry into Access to Justice*, pp. 4–5.

¹¹ See Privilege Resolution 6, paragraphs (10) and (11) in *Standing Orders and Other orders of the Senate*, June 2009, p. 112 at http://www.aph.gov.au/Senate/pubs/standing_orders/c00.pdf.

¹² Committee of Privileges, 125th Report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, p. 46. For an account of the committee's previous experience of such cases, see pp. 46–56.

1.23 Unfortunately, this is not an isolated case and the committee agrees that it would be useful to set out clear guidance for any person who seeks to take action of any kind against another person as a consequence of their evidence to a Senate committee. **The committee's advice is that such action should not be taken in any circumstances.** If it is taken, such action may constitute a contempt of the Senate. A person's right to communicate with the parliament and its committees is an untrammelled right, overriding all other considerations.

1.24 There is a very simple remedy available to any employer or professional organisation or any other body whose staff or members may make submissions to a parliamentary committee that do not accord with the official policy or practices of the organisation. The remedy is for that body to make its own submission to the committee in question, dissociating itself from the submission of the individual and indicating that the views expressed by the individual are not the official views of the organisation. Under no circumstances is it acceptable, as occurred in this case, for the organisation to take the matter up with the individual directly and threaten disciplinary action as a result of the individual's communication with the committee.

Conclusion

1.25 On the evidence before it, the committee concludes that the issuing of a warning letter by the ALSWA was a direct consequence of Ms Puertollano's submission to the references committee. However, the committee accepts that there was no culpable intention on the part of the ALSWA to interfere with the conduct by the references committee of its inquiry into access to justice. In these circumstances, the committee has **concluded** that **no contempt should be found**. The committee reiterates that Ms Puertollano was entitled to make a submission to the references committee and that she did the right thing in informing that committee of the actions her employer took as a consequence. It regrets that she found that she was unable to continue working for the ALSWA and resigned before this matter was concluded.

1.26 The committee also makes the suggestion that the Chairs' Committee, established under standing order 25(10), may care to examine the standard information provided to persons intending to make submissions to Senate committees and to consider whether it adequately addresses this issue.

Recommendation

The committee recommends:

- (a) that the Senate endorse the finding in paragraph 1.25 of the report; and
- (b) that the Chairs' Committee established under standing order 25(10) consider the adequacy of information provided to witnesses on the subject of possible intimidation or imposition of a penalty in consequence of a witness's evidence to a senate committee.

Senator George Brandis

Chair

