Sub #12

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The Research Director
Committee System Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Sir / Madam

Re: Submission

Please find attached a brief submission made on my own behalf relating to the Committee System Review Committee.

Yours faithfully

DANIEL MORGAN

Submission to the Review of the Parliamentary Committee System Committee

Daniel Morgan

Overview

The main theme addressed in this submission is the need for awareness of potential legal problems which changes to the existing committee system should be anxious to avoid.

I am a barrister admitted to practise in the Supreme Courts of Queensland and New South Wales, and the High Court of Australia. I hold the degrees of Bachelor of Arts, Bachelor of Laws, and Doctor of Philosophy, from the University of Queensland. I have written articles on parliamentary privilege which have been published in the *Australian Law Journal* ("Reforming Parliamentary Privilege in Queensland" (2008) 82 ALJ 461) and the *Australian Institute of Administrative Law Forum* ("Parliamentary Privilege in Queensland" (2009, No.58)).

My doctoral thesis[1] examined the ways in which the courts and parliament are drawn into conflict at an institutional level, and the ways in which these tensions are addressed. Parliamentary committees in the Anglo-Australian and the United States jurisdictions rely on the same concept of parliamentary privilege as their source of jurisdiction. Of present relevance are issues which arose through the use of parliament's contempt and coercive powers against witnesses; the nature and extent of the jurisdiction of committees to conduct investigations; historical instances in which committees infringed the constitutional rights of individual citizens; or, committees which behaved in such a way as to lose the respect of public opinion.

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[1] *Points of tension in the relationship between the courts and parliament – an analysis of parliamentary privilege.*

General considerations

In a unicameral parliament, the committee system assumes a special significance in performing the function of the 'grand inquest' of the State, a task which would otherwise be performed by both houses in bicameral system. The perpetual discussion about the merits of having or not having an upper house in Queensland can continue, but the practical solution which does not offend either side of that argument is that a strong committee system under the auspices of the Legislative Assembly can provide proper scrutiny of existing and proposed legislation, and the executive branch of government.

The increasing workload from all sources faced by members of parliament, combined with the increasing complexity and sheer volume of legislative activity, raises for discussion the issue of members' ability to undertake meaningful committee work without significant assistance from staff and access to other resources like libraries and researchers. Those involved in the day to day work of the committees are best placed to offer informed opinions as to the practical problems and solutions which relate to this issue.[2]

It must also be recognised that the establishment of the Criminal Justice Commission / Crime and Misconduct Commission, and its analogues in other Australian states, has introduced a novel feature into the constitutional structure. These bodies enjoy very significant coercive powers against public and private citizens; powers so extensive that it is hard to find a comparative since the abolition of Star Chamber in the 17th Century. The independence which is the distinctive feature of these bodies means that they are not responsible (in the 'responsible government' sense of that word) to Parliament in the conventional way, through ministerial responsibility to Parliament: rather, the only supervision is by parliamentary committee and latterly in Queensland by a parliamentary commissioner. Consequently, it is imperative that the Legislative

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2 In particular, attention is drawn to the detailed analysis of these issues by the Clerk of the Parliament in his submission to the Premier on improving accountability and integrity in Queensland dated 16 September 2009 http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/submissions/assets/clerk-of-parliament-submission.doc

Assembly is cognisant of the very onerous and novel oversight duties with which it is tasked in this respect.

Investigations by committees

The 20th Century experience of committees in jurisdictions following the Westminster tradition has been for parliamentary committees to exercise reticence in their inquiries, notwithstanding the significant coercive powers they have always enjoyed. That reticence has been the primary factor in the UK and Australian jurisdictions largely avoiding institutional clashes between the courts and parliament emerging from investigations conducted by parliamentary committees exceeding their proper jurisdictions, infringing the rights of private individuals, or having to invoke their coercive powers resulting in contempt proceedings. It has also largely preserved the good standing of parliament in the 'court of public opinion'.

This experience is to be contrasted with the conflicts between the courts and Congress, and the disrepute into which Congress was brought by committees who went to extremes in investigating fascist and communist threats immediately before and after the Second World War. The proceedings became politicised, and provided a stage for polemics. Warren CJ. described[3] a "new kind of congressional inquiry unknown in prior periods of American history" which "involved a broad-scale intrusion into the lives and affairs of private citizens." Other commentators[4] have described the shift in the congressional disposition which gave rise to tensions as the rights of private citizens were encroached:-

> "The advent in the 1930's of the inquisitorial congressional panel, typified by the Dies committee aroused new concern. The low-key atmosphere had vanished, replaced by relentless probing questions before massed newsmen and newsreel cameras. Complaints mounted that the procedures of congressional investigators were exceeding their powers and violating the rights of witnesses."

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3 *Watkins v. United States* (1957) 354 US 178 at 195.

4 *Powers of Congress* (1976) at 170.

Between 1949 and 1954, 109 congressional investigations were carried out by the United States Congress.[5] On March 9, 1954 the now-famous Edward R Murrow broadcast *A Report on Senator Joseph R McCarthy* was broadcast on CBS Television in the United States.[6] Murrow was critical of the way that Senator McCarthy conducted himself by "the investigation, protected by immunity, and the half truth". The issue became notorious enough to be discussed in popular culture then – allegorically, by Arthur Miller in *The Crucible* (1953) – and recently in the 2005 film *Good Night, And Good Luck* which examined the Murrow broadcast.

Nothing so exciting presently appears to be of concern in Queensland. But it is imperative that new sources of institutional conflict are not unwittingly created. As McPherson JA. sagely observed in another context, "The potential for such conflict tends to appear remote, until the very day it occurs. One branch of government may not be unwilling to measure its strength against the other."[7]

Topical issues

In general the jurisdictional power to call for persons and papers is uncontroversial. The application of the general to the specific can be more problematic. In the State of Victoria, a topical issue has arisen surrounding the compellability of ministerial advisors to give evidence before committees.[8] Issues such as these create litigation which sometimes raises profound constitutional points - see, for example, the High Court of Australia's decision in *Egan v Willis*[9] which started as a fairly trivial case but which developed into a case in which Kirby J. observed, "The questions presented for decision involve issues of high constitutional importance. It could scarcely be otherwise where the court is asked to define the extent to which the executive government of a

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5 Fried, Richard (1990) *Nightmare in Red: The McCarthy Era in Perspective*, 150.

6 Transcript accessed 19 April 2007 'www.lib.berkeley.edu/MRC/murrowmccarthy.html.'

7 *Laurence v. Katter* [2000] 1 Qd.R. 147, at 224.

8 Paul Austin, "Brumby threatens to take Parliament to court" *The Age*, 14 April 2010; Melissa Jenkins, "Madden storms into email inquiry", *The Age*, 12 March 2010.

9 (1998) 195 CLR 424; (1998) 158 ALR 527.

state is accountable to a democratically elected chamber of a parliament and to the rule of law itself."[10]

A potentially interesting jurisdictional question is whether in Queensland committees' investigations are limited in their scope. In the United Kingdom, the unique legal status of the Westminster parliament means that the issue really has not arisen, but it has been considered in the United States especially in the context of contempt prosecutions. The United States Supreme Court developed a 'pertinency' requirement as a control device to ensure committees act within their jurisdiction, and that the constitutional rights of the individual are protected against the coercive powers of the legislative branch of government.[11] Warren CJ. restated the law generally in *Watkins*, and surveyed how the law had developed[12]:-

(a) The congressional investigative power is broad, and extends to existing, proposed, and possibly needed, laws. The power permits Congress to survey defects in social, political and economic systems so that Congress can implement remedial legislation. Congress can also probe departments of the Federal Government to expose corruption, inefficiency, or waste.

(b) The investigative power is not unlimited. There is no general authority to investigate the private affairs of citizens without justification by reference to the functions of the Congress. Congress is not a law enforcement agency or a court.

(c) No inquiry is an end in itself. It must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to punish those under investigation are indefensible.

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10 158 ALR at 563.
11 Compare Section 34 *Parliament of Queensland Act 2001* in this regard.
12 At 187-8.

(d) The rights conferred on citizens by the Constitution, including the Bill of Rights, apply to congressional investigations. Congress must respect them as would a court.

While the Court recognised that "every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government"[13] the point of the matter was that, in order for it to exercise its judicial review function properly, the Court required Congress to specify the investigation and powers extended to the committee, so that the proper boundaries could be delineated. Failure to do this meant that[14]:

> "The consequences that flow from this situation are manifold. In the first place, a reviewing court is unable to make the kind of judgment made by the Court in *United States v. Rumely, supra.* The Committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activities. In deciding what to do with the power that has been conferred upon them, members of the Committee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it.
>
> "More important and more fundamental than that, however, it insulates the House that has authorized the investigation from the witnesses who are subjected to the sanctions of compulsory process. There is a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power. This is an especially vital consideration in assuring respect for constitutional liberties. Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need."

It must be acknowledged that caution should be used when applying American jurisprudence because responsible government in the Westminster style is not a feature of the American system. The policy considerations remain pertinent,

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13 At 204.
14 At 204-5.

however, bearing in mind the Queensland parliamentary committees are given express – and therefore impliedly limited – jurisdictions under Chapter 5 *Parliament of Queensland Act 2001*. The question of whether this issue would be justiciable in the law courts is a separate matter entirely which is not presently relevant.

Conclusion

The imperatives are submitted to be these:-

- the recognition and realisation (including by members themselves) that for various reasons committees perform a peculiarly important part in ensuring democratic, responsible government in Queensland;
- the assurance that the committee system is properly resourced and that the committees generally and members individually have the capability to perform their duties appropriately;
- the appreciation that performing the role of the 'grand inquest' of the State requires reticent and sparing use of intrusive or coercive powers against private citizens;
- consideration of using alternative options like commissions of inquiry, or the appointment of a parliamentary commissioner, to conduct particular inquiries;
- being mindful of the potential effect of any changes to the operations and jurisdictions of committees which might disturb the present balance of powers between the courts and parliament, or generate litigation which could cause institutional conflict.

D.J. Morgan
21 May 2010