

1994

SENATE

**PARLIAMENTARY PRIVILEGES AMENDMENT
(ENFORCEMENT OF LAWFUL ORDERS) BILL 1994**

EXPLANATORY MEMORANDUM

The purpose of this bill is to provide for the enforcement by the courts through normal legal processes of the lawful orders of the Houses of the Parliament and their committees.

The refusal of certain witnesses to provide documents in accordance with the requirements of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media has drawn attention to the situation that there is no way of enforcing such requirements of the Houses or their committees except through the power of each House to punish contempts, and that the courts probably cannot and would not review an exercise of that power until a penalty is imposed.

Those incidents also drew attention to the absence of any ready means whereby a claim of executive privilege, or public interest immunity, that is, a claim that disclosure of certain information would not be in the public interest, can be adjudicated by the courts.

The bill would amend the *Parliamentary Privileges Act 1987* by inserting a new section 11A to provide:

it would be an offence, prosecuted in the Federal Court, to fail to comply with a lawful order of a House or a committee (such as an order that a witness attend a hearing, that evidence be given or documents be produced) (proposed subsections 11A(1) to (4))

when an offence is proved the Court would make orders to prevent the continuation or recurrence of the offence and to ensure compliance with the parliamentary order (for example, orders that evidence be given or that a document be produced to a House or a committee) (proposed subsection (5))

if an offence is committed by a public servant because of a direction by a minister, the offence would be found proved but the conviction not recorded against the public servant nor a penalty imposed (proposed subsection (6))

if in a prosecution a claim of executive privilege or public interest immunity is made, that is, that evidence should not be given or a document produced because this would be contrary to the public

interest, the Court would determine for itself whether that claim is sustained, and for that purpose would hear the evidence or examine the document in camera; this conforms with the law relating to claims of public interest immunity in court proceedings (proposed subsections (7) and (8)).

Proposed subsections (9) and (10) would ensure that evidence given and documents examined by the Court in camera would not be disclosed except by order of the Court, unless they are given or presented to a House or committee.

Proposed subsection (11) would prevent a House imposing a penalty for an offence which is the subject of proceedings before a court.

Proposed subsection (12) would ensure that a prosecution could not be commenced or carried on except at the direction of the relevant House.

The Parliamentary Privileges Act already provides that certain actions which are also contempts of Parliament, namely interference with witnesses and unauthorised disclosure of in camera evidence, may be prosecuted in the courts as criminal offences (sections 12 and 13 of the Act).

As with those provisions, the proposed provisions of the bill would not affect the existing power of the Houses to deal with contempts of Parliament (section 5 of the Act).

The bill would, however, provide a means whereby an impartial court could enforce lawful orders of the Houses and their committees and determine any claim of executive privilege or public interest immunity.

Only *lawful* orders would be so enforced, and the Court would determine their lawfulness in accordance with the existing law.

The bill would place the Australian Parliament in much the same position as the Congress of the United States of America, which retains its inherent right to punish contempts but which has legislated to allow the courts to impose penalties for non-cooperation with congressional inquiries and to enforce subpoenas.