



AUSTRALIAN SENATE

COMMITTEE OF PRIVILEGES

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Senator the Hon Stephen Parry
President of the Senate
Parliament House
Canberra ACT 2600

Dear Mr President

In July this year you asked the Privileges Committee to undertake a preliminary investigation into the apparent unauthorised disclosure of the draft report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, raised with you as a matter of privilege by several members of the former committee.

A report on that investigation is attached.

The committee saw its task as determining whether, when tested against the criteria in the Senate's 2007 resolution on unauthorised disclosure and the principles in the committee's 122nd report on that subject, the matter is one the committee would assess as warranting further investigation as a possible contempt. On the material before it, the committee has concluded that further investigation is not warranted.

The report also contains discussion of the Senate's current treatment of unauthorised disclosures, and recommends that you and the Chair of Committees draw the Senate resolutions of 1996 and 2007, and their rationale, to the attention of all senators and committees.

I note that Senator McKenzie and Senator Ruston, who were members of the former select committee and are members of the Privileges Committee, did not participate in the committee's consideration of this matter.

Your sincerely

Senator the Hon. Jacinta Collins
(Chair)

Possible unauthorised disclosure of report of joint select committee

Background

1.1 The Senate Privileges Committee agreed to a request from the President of the Senate, Senator the Hon. Stephen Parry, that it undertake a preliminary investigation into a possible unauthorised disclosure of proceedings of the former Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

1.2 The background to the request and correspondence with the President is set out at Attachment A. Before turning to the investigation it is useful to set out relevant procedural matters.

Senate resolutions on unauthorised disclosures

1.3 The Senate may – but is not required to – treat the unauthorised disclosure of committee proceedings as a contempt, and their investigation is a subject that has attracted detailed consideration by this committee in the past. As with any question involving a possible contempt, the committee has regard to the statutory threshold for contempt in the *Parliamentary Privileges Act 1987* and the Senate's Privilege Resolutions, which among other things constrain the Senate to use its contempt powers only:

...where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending to substantially obstruct them in the performance of their functions...¹

1.4 The evolution of the views of the Privileges Committee – and indeed the Senate – on the treatment of disclosures was described in the committee's 122nd report, particularly in chapter 3, and most recently applied in its 152nd. Those views are now codified in Senate resolutions of 1996 and 2007 which provide guidance to committees as to whether to raise disclosures as matters of privilege, based on an assessment of the harm they may cause. The twin aims of those resolutions are:

- to reserve the Senate's contempt powers for those matters which substantially interfere – or would tend to substantially interfere – with the work of committees, and
- to otherwise place upon committees that are concerned about unauthorised disclosures the responsibility of discovering the source of disclosures and, if required, disciplining their members.

1 Privilege Resolution 3

1.5 This second point reflects the comments of a former Chair of the Privileges Committee, Senator the Hon. Robert Ray, who “pointed out that, as all experienced senators have found, the most likely source of leaks generally, but especially to the media, were members of the relevant committee.”²

1.6 The 2007 resolution establishes a triage process by which committees may determine whether to raise disclosures as matters of privilege. It specifies types of disclosure which should not be raised, absent “actual or potential substantial interference with the work of a committee or of the Senate”, and types of disclosures “for which the contempt jurisdiction of the Senate should primarily be reserved”, which are in the main disclosures connected to in camera evidence. It also requires committees to consult the Privileges Committee before proceeding, and specifies the matters the Privileges Committee will have regard to in such consultations.

1.7 It is important to note that any unauthorised disclosure is contrary to the standing orders of the Senate and poses a risk of interference with the work of committees. The Privileges Committee has always been highly critical of breaches of confidentiality in committee processes, and of the betrayal of trust among committee members this often involves. Whatever effect an unauthorised disclosure has on the work of a particular committee, it also has the potential to inflict broader damage on the integrity of committee processes and the authority and credibility of committees more generally.³ An assessment that a particular disclosure does not warrant further investigation as a contempt does not absolve senators, members and media representatives from observing the confidentiality requirements attaching to the work of parliamentary committees.

Disclosure of deliberations and draft reports

1.8 In the present matter, the former select committee was unable to take the steps required by Senate resolutions of 1996 and 2007 to:

- investigate the circumstances of the apparent disclosure, and seek to discover its source
- consider whether the disclosure “had a tendency substantially to interfere with the work of the committee or of the Senate, or actually caused substantial interference”, and
- seek the guidance of the Privileges Committee as to whether the matter should be pursued.

1.9 The President noted in his letter to the Privileges Committee:

It appeared to me that the unauthorised disclosures reported by Senators McKenzie, Peris and Siewert were of the type of unauthorised disclosures identified in the 2007 resolution that should not be raised as matters of

2 122nd report, paragraph 1.20.

3 See 152nd report, paragraphs 1.2, 1.44.

privilege in the absences of particular circumstances involving actual or potential interference with a committee's work.

1.10 The main task of the committee here is to determine whether such "circumstances involving actual or potential interference" exist as would warrant further investigation. The 2007 resolution requires the committee to have regard to matters in paragraphs 3.43 to 3.59 of its 122nd report. The passages relevant to the current matter are as follows:

Deliberations and draft reports

3.51 Unauthorised disclosure and publication of the deliberations and draft reports of a committee, regardless of the stage at which disclosure occurs, should be a matter for internal discipline unless the disclosure and publication of those deliberations or draft reports:

- (a) also discloses actual or identifiable in camera evidence; or
- (b) discloses deliberations which may have an adverse effect on, or raise the expectations of, individuals who are the subject of or may be affected by the observations or recommendations in a committee's report.

3.52 Again, any committee which consults the Committee of Privileges on this matter can assume that, unless the leaker of the information is discovered, the committee will be reluctant to undertake an inquiry unless in camera evidence is involved. The basis of the committee's decisions on these matters is its long standing concern to protect persons making submissions to or appearing before parliamentary committees, and those who might be adversely affected by parliamentary privilege.

1.11 In agreeing to the President's request to undertake this investigation, the Chair on behalf of the committee wrote:

The Privileges Committee remains of the view, most recently expressed in its 152nd report, that an assessment of actual or potential harm remains the appropriate test for determining whether an unauthorised disclosure should be investigated as a contempt. However, it is not desirable that an unauthorised disclosure which is of concern to former members of a committee escape scrutiny entirely. To that end, the committee considers it appropriate to fill the gap you have identified in the Senate's resolution and undertake a preliminary investigation, applying as best it can the principles espoused in that resolution and in its 122nd and 152nd reports.

1.12 The aim of the preliminary investigation is to assist the President in assessing whether the matter warrants precedence according to the relevant Senate resolutions.

Responses from members and staff

1.13 The committee wrote to the members of the former committee asking whether they could explain the apparent disclosure, and whether it had interfered with the committee's work.⁴

The circumstances of the apparent disclosure

1.14 Three questions sought information about the facts of the matter: whether the members had themselves disclosed without authority proceedings of the committee, or knew who had, or had any further comment on the apparent disclosure. The responses shed little light on the matter. A summary of responses follows:

Q1. Did you disclose to any person, not authorised to received it, a copy of or material from, the draft report of the Joint Select Committee?

Each member answered: No.

Q2. Do you have any knowledge or evidence of who may have disclosed such material to any person not authorised by the committee to receive it?

Each member answered: No.

Q3. Do you have any other comment to make in relation to the apparent unauthorised disclosure?

Senator Siewert noted "It was obvious from questions that journalists were asking that they knew more than they should have and I raised this with the Chair when I became aware of it. Unfortunately this is not the first time that draft reports or parts of draft reports by this committee appear to have been disclosed." Mr Jones MP also commented on earlier incidents, noting "It was one of a series of unauthorised disclosures made during the committee's deliberations."

No other member offered any comment.

1.15 The committee also addressed these questions to the committee secretary, who responded on behalf of the committee's staff, indicating that staff had not disclosed material without authority; had no knowledge who may have done so; and had no other comment.

Assessing 'interference' occasioned by the possible disclosure

1.16 The 2007 resolution requires a committee concerned about an unauthorised disclosure to assess whether the disclosure "involves actual or potential substantial interference with the work of a committee or of the Senate". This assessment is intended to assist in determining whether a matter be raised as a matter of privilege. The Privileges Committee therefore asked members of the former committee:

4 A sample of the letter, and the responses received, appear at Attachment B.

Q4. In your assessment, did the unauthorised disclosure of the draft report interfere with the work of the committee; and if so, how?

1.17 Members had different views as to whether the disclosure interfered with the work of the committee, but the interference cited turned on undermining the consensus achieved among committee members, frustrations in dealing with the media in the lead up to the tabling and a possible impact on members' abilities to work toward implementing the committee's recommendations. A summary of responses follows:

In their letter raising the matter, Senators McKenzie, Peris and Siewert had stated:

... in our view, this unauthorised disclosure was a serious breach of the committee's confidences and has substantially interfered with the work of the committee, by undermining the consensus for which committee members worked so hard during the inquiry, and which will be necessary as committee members work toward implementing the committee's recommendations.

Senator McGrath and Mr Neumann specifically endorsed this view. Senator McKenzie reiterated this view in writing to the committee, adding that the disclosure "substantially interfered with the work of the committee and negatively affected the implementation of the committee's recommendations".

Mr Jones agreed that the article had interfered with the committee's work:

...it pre-empted the approval of the final draft of the report and put Members and Senators in a difficult position as they could neither confirm nor deny the validity of the report in the wake of media enquiries that followed the disclosure.

Senator Ruston added a concern that the report was inaccurate:

In my opinion, because the subsequent reporting of the information was not accurate the breach did interfere with the work of the Committee.

Senator Siewert did not consider the article interfered directly with the committee's work" as the media comment occurred on the day the finalised report was tabled". She continued:

It was however very frustrating to members of the committee who had worked very hard to achieve a consensus report, the media reporting undermined the significance of this consensus. The reports in the media implied positions of members of the committee before the report was tabled and before members could speak to their position in the Parliament.

Ms Henderson expressed the view that the disclosure did not impact on the committee's work, as it had effectively been completed, but noted that it did not reflect well on the committee.

Correspondence with *The Australian*

1.18 Shortly after writing to the committee, the President forwarded a letter he had received from the editor of *The Australian*, Mr Clive Mathieson (see Attachment C). The editor – possibly alerted by Senator McKenzie's reference to the matter in the Senate's adjournment debate on 25 June 2015⁵ – wrote to the President arguing against the reference of the matter to the Privileges Committee. He assumed responsibility for Ms Martin's conduct, noting that Ms Martin is new to the parliamentary press gallery. He apologised "for any embarrassment or distress caused to Senator McKenzie and her colleagues on the committee" and indicated "we have counselled Sarah and reminded her of the very strict rules governing the reporting of matters before Senate committees." Mr Mathieson also noted, however, that Ms Martin "was simply doing her job and there was no intent to undermine or obstruct the work of the Reconciliation Committee". He wrote:

Crucially, the details in Sarah's article did not affect the ability of the committee to perform its duties. The article was, after all, published after the committee's hearings and deliberations, and after the report was printed.

1.19 Mr Mathieson also reflected on the 2002-03 case involving Ms Annabel Crabb, and the principles set down in the committee's 122nd report, quoting paragraph 3.32 of the report:

As a general principle... parliamentary committees may expect that, unless unauthorised revelations of proceedings are of such moment that they make impossible the continuation of an inquiry, such revelations will not be considered by the Committee of Privileges as raising a question of contempt on the basis that they constitute unauthorised disclosure.

1.20 For her part, Ms Martin responded to the committee's questions (also at Attachment C) indicating that she at no stage obtained a copy of the draft or final report, and that she was not aware of any disclosure of the report by any individual to any unauthorised person. Ms Martin added that "[t]he published article was a fair and accurate report based on [her] understanding of the likely contents of the committee's report from various investigations [she] had conducted".

1.21 Ms Martin also addressed the question whether the publication of the article amounted to an interference:

Given the article was published on the same day that the final report was tabled, it was my belief that the article did not interfere with the processes of the committee. In particular, I note... that the Reconciliation Committee

5 Contrary to the prohibition in standing order 81(4) on referring to matters of privilege in the Senate while they are being considered by the President.

had ceased to exist. In those circumstances I would suggest that my conduct could not have interfered with the continuation of the inquiry of the committee.

At no stage did I intend to disrupt the work of the committee, which I understood had concluded its deliberations before the article was published.

1.22 Ms Martin also apologised “for any inconvenience or distress the report may have caused.”

Summary

1.23 The purpose of this preliminary investigation is to determine whether, when tested against the criteria in the 2007 resolution and the principles in the committee’s 122nd report, the matter should be raised as a matter of privilege. On the material before it, the committee has concluded that it should not.

1.24 The committee acknowledges the frustrations expressed in correspondence from members of the former committee, and their disappointment that the apparent disclosure undercut the consensus they had achieved, however their assessment of the harm occasioned by the possible unauthorised disclosure does not approach the threshold of substantial interference in the 2007 resolution, nor satisfy the test in paragraph 3.51 of the Privileges Committee’s 122nd report.⁶

1.25 The committee notes that the journalist, Ms Martin, has denied receiving a copy of any draft. The committee is not well-placed to assess the extent to which the substance of the article could have been derived from investigations which did not involve the unauthorised disclosure of its proceedings. The committee observes that inquiries made of members of the former joint select committee shed no light on the circumstances of the disclosure. The correspondence doesn’t suggest any prospect of identifying the source of the disclosure, as referenced in paragraph 3.52 of the 122nd report.⁷ Finally, both Ms Martin and her editor have apologised, and Ms Martin has been counselled by her employer and reminded “of the very strict rules governing the reporting of matters before a parliamentary committee.”

1.26 In those circumstances, the committee *concludes* that this matter is not one it would assess as warranting further investigation in accordance with the principles set out in relevant Senate resolutions.

Discussion

1.27 In considering this matter, the committee discussed the appropriateness of the Senate’s current treatment of unauthorised disclosures, noting a recent spate of apparently unauthorised disclosures involving leaks (or purported leaks) of proceedings at a late stage in the development of reports and recommendations.

6 As set out at 1.10, above.

7 Also at 1.10, above.

1.28 The Senate's current approach seeks to do two things. First, to avoid going through the motions of investigations where there is no prospect of discovering the source of leaks, and secondly – more importantly – to reserve the Senate's contempt powers for those matters involving substantial obstruction to Senate and committee processes.

1.29 This approach is well-matched to the purpose of the Senate's contempt jurisdiction, which is to protect the ability of the Senate, its committees and its members to carry out their functions and exercise their authority without improper interference. However, it may be argued that, by refraining from investigating and penalising particular types of unauthorised disclosures, the Senate risks normalising practices which – while not reaching the contempt threshold – are nonetheless contrary to standing orders and, individually and cumulatively, undermine the authority and integrity of the Senate committee system, which have traditionally been among its strengths.

1.30 The committee also noted the difficulty involved in charging committees with the responsibility of disciplining their own members where leaks are suspected, but nonetheless reiterates that position. It is for individual Senate committees in the first instance to instil discipline upon their members, and those committees are invariably in a better position to assess the circumstances of, and harm occasioned by, disclosures. The committee recognises that it will not always be possible for standing and select committees to undertake these actions to the satisfaction of all members; however, if an originating committee is unable to identify the source and circumstances of disclosures, there is often little reason to assume the Privileges Committee will fare any better in this task. Moreover, it is for individual senators to ensure and account for the integrity of their own actions.

1.31 The committee does not consider there is a case at this stage for revisiting the 2007 resolution. The fact that this is only the second matter connected to unauthorised disclosure which has come to the committee since its 2005 report – and that both matters have arisen through a gap in the coverage of the 2007 resolution – suggests that it is having its intended effect. However, the committee *recommends* that the President and the Chair of Committees draw the Senate resolutions of 20 June 1996 and 17 September 2007, and their rationale, to the attention of all senators and committees.

(Senator the Hon. Jacinta Collins)

Chair