# Chapter One

## Unauthorised disclosure - basis of inquiry

### Introduction

1.1 On 16 March 2005, on the motion of the Chair of the Privileges Committee, Senator Faulkner, the Senate referred the following matter to the Committee of Privileges for inquiry and report:

> Whether, and if so what, acts of unauthorised disclosure of parliamentary committee proceedings, evidence or draft reports should continue to be included among prohibited acts which may be treated by the Senate as contempts.[1]

### Background

1.2 The Privileges Committee has for some time, as the delegate of the Senate, been required to consider as possible contempts leaks of in camera evidence, draft reports and private deliberations of parliamentary committees. There have been twenty-two cases of unauthorised disclosure involving eighteen reports since the establishment of the committee in 1966, including the first report in 1971. Four reports on three cases were made to the Senate before the passage of the *Parliamentary Privileges Act 1987* and complementary Senate privilege resolutions in 1988.

1.3 Several of the reports have involved the unauthorised disclosure of in camera evidence, a matter which the Committee of Privileges regards with grave concern, as reflected in its reports. The majority of the matters referred to it, however, have involved the unauthorised disclosure of draft reports of parliamentary committees at various stages of their production, that is, from the point at which they have not even been considered by a committee through to their disclosure on the day they were due to be tabled in any case. In addition, some reports have also involved the purported disclosure of the private deliberations of committees. Most matters referred have involved publication of the unauthorised disclosure in the media.

1.4 The committee's first report in 1971[2] in effect assumed that the media publishers of unauthorised material were guilty of a strict liability offence, and no attempt was made to establish the source of the unauthorised disclosure. In l984, however, the committee undertook a watershed inquiry,[3] which in the present committee's view remains at or near the apex of the most heinous contempts ever committed. It involved the publication of in camera evidence which had the potential

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1 *Journals of the Senate*, 16 March 2005, p. 88.

2 Senate Committee of Privileges, *1st Report*, Parliamentary Paper Series (PP) 163/1971.

3 Senate Committee of Privileges, *7th Report*, PP 298/1984; see also *8th Report*, PP 239/1985.

to seriously adversely affect both a witness and another person against whom certain allegations were made.

1.5 The Committee of Privileges at that time realised that it could not treat only the publishers as guilty of an offence without making an attempt to discover the source of the leak. It did so by requiring all members of the relevant Senate select committee which had made the complaint, together with staff of the committee, to swear that they had not improperly divulged grossly prejudicial material taken as evidence in camera. This was the first time in the history of the Senate that senators were required to give sworn evidence before a Senate committee. Although the committee undertook this process – by means of an inquiry which, for its day, was revolutionary – it was unsuccessful in finding the source, and ultimately found a contempt against the publisher, editor and journalist involved, not least because the journalist, supported by her editor and publisher, refused to reveal the source.

1.6 The whole matter of that particular disclosure, and subsequent court proceedings, led to the passage of the Parliamentary Privileges Act in 1987. That Act included provisions which specifically created two criminal offences, the first involving protection of witnesses and the second involving unauthorised disclosure of in camera evidence before parliamentary committees. As the explanatory notes and the debate on the Act indicate, there is no doubt that the reason for these two offences being treated as potentially criminal offences is the risk of harm to individuals giving evidence and information to the Houses of Parliament and their committees.

1.7 Since the passage of the Act and privilege resolutions, matters of privilege have almost become a growth industry in the Senate. Of the 121 reports published by the committee since its establishment, only 11 were published before the passage of that Act, of which, as indicated at paragraph 1.3, four reports on three cases involved unauthorised disclosure. Since the Senate referred the first matter of privilege to the Committee of Privileges in 1988 following the passage of the Act and resolutions, 19 further cases have involved unauthorised disclosure.

1.8 The first few of these cases were relatively easily dealt with, and only one involved disclosure to the media. Among the many decisions the Committee of Privileges made when undertaking these and other inquiries was that it should not make a finding of contempt against any person unless the committee found a culpable intention – even though it was entitled to make a finding on any basis it chose.

1.9 As early as 1989,[4] the committee also recommended that, under the terms of the resolution governing matters of privilege, the complainant committees should attempt to determine the source of the leaks and evaluate the seriousness of the potential contempt. The committee's observations culminated in a change to the standing orders in 1991 to enable early tabling of committee reports, and the passage of a Senate resolution of 20 June 1996 requiring the committees to make a judgment

4 Senate Committee of Privileges, *20th Report*, PP 461/1989.

as to whether actual or potentially *substantial* [emphasis added] interference to the committee's operation had occurred. All provisions relating to unauthorised disclosure are at Appendix One to this report.

1.10 In 1998, however, the trickle of unauthorised disclosures became a flood. This led the committee to deal in one report – its 74th – with six matters.[5] In an introduction to the individual cases it canvassed the whole spectrum of improper disclosure, and developed a hierarchy of matters which it should take into account when determining the seriousness or otherwise of unauthorised disclosure of all types of material that had come before other committees. The most serious of these was, unsurprisingly, unauthorised disclosure of in camera evidence.

1.11 The 74th report was intended as a blueprint for all future treatment of unauthorised disclosures. It concentrated equally on both the providers and the recipients of unauthorised information. That report reinforced at all levels the committee's intense disapproval of the betrayal of trust involved in the dissemination of the information, and declared the committee's intention to use sanctions against the leaker and the receiver of stolen goods.

1.12 The committee dealt satisfactorily with a further four matters between 1999 and 2001. In considering a matter raised in 2002, however, it was confronted with a difficulty which caused it to begin the process which has led to its present inquiry. This matter, which was the subject of the committee's 112th report tabled in the Senate in February 2003,[6] involved the unauthorised disclosure to a favoured journalist, two days before it was due for tabling, of the conclusions of a report of the Environment, Communications, Information Technology and the Arts Legislation (ECITA) Committee. The otherwise innocuous article was published in *The Age* newspaper a day before tabling.

1.13 The ECITA Committee undertook the procedures outlined in the 1996 resolution. Faced with that committee's conclusion that 'the disclosure caused substantial interference with its work',[7] the President of the Senate had little choice other than to give a motion to refer the matter of privilege to the Committee of Privileges precedence over other business.

1.14 In this case, the Committee of Privileges decided to undertake the relatively rare process of holding a public hearing on the matter. Having called all members of the ECITA Committee to give evidence, the Committee of Privileges was surprised to discover that, notwithstanding the ECITA Committee's conclusion that substantial interference had occurred, most members advised that they did not really think that the disclosure had impaired the committee's work. These views virtually forced the Committee of Privileges to refrain from finding that a contempt occurred. In its report

5 Senate Committee of Privileges, *74th Report*, PP 180/1988.

6 Senate Committee of Privileges, *112th Report*, PP 11/2003.

7 Senate Committee of Privileges, *112th Report*, PP 11/2003, paragraph 1.3.

the committee signalled that it would examine whether unauthorised disclosure of this nature was of such intrinsic seriousness that a contempt should be found in future matters.[8]

1.15 Subsequently, the committee received three further references involving unauthorised disclosure. These were the subject of the 120th and 121st reports.[9] The 120th report crystallised the committee's misgivings about the Senate's whole approach to the treatment of unauthorised disclosure as a potential contempt. The questions for consideration in that case were whether both deliberations and the report of the Select Committee on the Free Trade Agreement between Australia and the United States of America (FTA Committee) had been disclosed without authority.

1.16 The Privileges Committee found that the deliberations were not disclosed without authority, for the simple reason that the disclosure which had occurred constituted a misrepresentation of the FTA Committee's proceedings, itself a contempt. What that supposed disclosure led to, however, was a press conference in which three members of the FTA Committee, despite their best efforts, nonetheless revealed the content of a report. The Privileges Committee took the view that the misrepresentation had stampeded them into holding a press conference which, while arguably politically necessary, resulted in their being cited as potentially in contempt.

1.17 To make matters worse, the FTA Committee ceased to exist the moment that the report was tabled, only three days after the assumed contempt, and therefore the FTA Committee itself was unable to go through the procedures laid down by the 1996 resolution to make a judgment as to the potential seriousness of the contempt. The two matters of seeming unauthorised disclosure were raised as a question of privilege by one committee member only. Again, given the nature of the potential contempts involved, the President of the Senate had little choice but to place the matters in the hands of the Senate to determine whether they should be referred to the Privileges Committee; the Senate did so. The Committee of Privileges was, of course, unable to find the person who had misrepresented the proceedings; the authors of the unauthorised disclosure were self-evident. It concluded that, under the circumstances, no contempt of the Senate should be found.

1.18 At the same time as the Privileges Committee was undertaking the above inquiry, it also considered two references emanating from the Community Affairs References Committee, which involved unauthorised disclosure of draft reports even before that committee had had the chance to consider their contents. There was no doubt that the Committee of Privileges regarded these disclosures as significantly more serious than the politically-based misrepresentation and the almost-accidental disclosure involved in the inquiry the subject of the 120th report. In particular, the second of the two cases potentially led to unrealistic expectations, including the prospect of monetary compensation, on which no responsible committee could have

8 Senate Committee of Privileges, *112th Report*, PP 11/2003, paragraph 1.45.

9 Senate Committee of Privileges, *120th and 121st Reports*, PP 52/2005 and PP 58/2005.

made the recommendations implied by articles based on the unauthorised disclosure. In the event, the Community Affairs Committee did not do so – undoubtedly a courageous decision in the circumstances.

1.19 The 120th and 121st reports, in combination with the 112th report, led the Committee of Privileges to evaluate where its duty to carry out its inquiries and make findings of contempt might lie. As a consequence, and particularly given the circumstance that two of its members, as members of the Community Affairs References Committee, were obliged to absent themselves from its deliberations on the 121st report, the committee sought the above reference. In the meantime, for reasons explained in that report,[10] the committee declined to make the findings of contempt it was otherwise entitled, on the basis of the evidence, to do. After debate, the Senate accepted that the general matter should be referred to the committee; this occurred on 16 March 2005.

## Debate on reference to Committee of Privileges

1.20 During the debate, the Chair of the Committee of Privileges 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. Those members always denied to their own committee that they had divulged the information, and despite the Committee of Privileges' efforts from time to time to attempt to find the source of the leak by taking evidence on oath from committee members, it too had been unsuccessful.[11] The media, as recipients of the leaks, invariably had recourse to 'journalistic ethics' to refuse to divulge their sources – entirely understandable because their sources would immediately dry up.

1.21 Other participants in debate canvassed a potentially radical shift in the committee's approach to unauthorised disclosure; in particular, one committee member suggested that only the disclosure of in camera evidence should be subject to the Senate's contempt powers.[12]

## Conduct of inquiry

1.22 Given the potential for significant change at the very least to the committee's processes but possibly even to the Parliamentary Privileges Act, Senate standing and other orders and Senate resolutions on the subject, the committee decided to advertise the reference and also separately to invite submissions from a wide variety of parties with a potential stake in the inquiry's outcome, including the presiding officers of all Australian legislatures, and significant media players. In the meantime, at the request of the committee, the Clerk of the Senate sought advice from all state and territory

10 Senate Committee of Privileges, *121st Report*, PP 58/2005, paragraph 1.34.

11 Senate *Hansard*, 16 March 2005, p. 136.

12 Senate *Hansard*, 16 March 2005, Senator Robert Ray, p. 140.

clerks and from several overseas legislatures on their practices relating to unauthorised disclosure.

1.23 In response to its invitation, the committee was delighted to receive 23 thoughtful submissions, including comments from the President of the Senate, the Speaker of the House of Representatives and three state presiding officers, and from most major media outlets.[13] The committee gave an opportunity to all who had made submissions to appear before it at a public hearing held on 3 May 2005. Witnesses included a senator, the Clerk of the Senate, one of the Senate's own committee secretaries, the most senior officer of the public service, and representatives of the media.

1.24 The responses received from Australian and overseas legislatures, and the submissions and oral evidence taken by the Committee of Privileges, are summarised in Chapter Two of this report.

13 *Submissions and Documents*, pp. 1-102.