Chapter Two

Unauthorised disclosure – practice in other legislatures and summary of evidence

Introduction

2.1 The committee considered that, as part of its deliberations, it would be useful to ascertain the current practice of various legislatures in dealing with cases of unauthorised disclosure of draft committee reports, in camera evidence or other unpublished committee documents. The committee was also interested to know of recent cases of unauthorised disclosure which they had considered.

Australian responses

2.2 The Clerk of the Senate, acting on the committee's behalf, received responses from all states and territories. The committee was also able to review the practice of the Australian House of Representatives by reference to *House of Representatives Practice*[1] and the response by the Speaker[2] to the Privileges Committee's invitation to comment on the inquiry.

House of Representatives

2.3 The statutory provisions of the *Parliamentary Privileges Act 1987* apply to the House of Representatives.

2.4 Standing order 346 provides that the evidence taken by a committee or subcommittee and documents presented to it and proceedings and reports of it, which have not been reported to the House, must not, unless authorised by the House or the committee or subcommittee be disclosed or published to any person other than a member or officer of the committee.[3]

2.5 The House of Representatives requires a member of the committee purportedly affected by the leak to notify the House, or if the House is not sitting the Speaker, that the committee is endeavouring to establish whether the premature release has caused or is likely to cause substantial interference with its work, with the committee system or with the functioning of the House.[4]

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1 *House of Representatives Practice*, Fourth Edition.

2 *Submissions and Documents*, The Hon. David Hawker MP, Speaker of the House of Representatives, pp. 77-82.

3 *House of Representatives Practice*, Fourth Edition, p. 669.

4 *House of Representatives Practice*, Fourth Edition, p. 715.

2.6 The practice adopted by the House of Representatives is for the committee involved with the unauthorised release of material to come to a conclusion as to whether the leak was of sufficient seriousness to constitute a substantial interference to the work of the committee.[5] If a committee arrived at this conclusion then it would report to the House. The matter is then considered by the Speaker who determines whether or not to allow precedence to a motion on the matter.

2.7 On a number of occasions, the House has referred issues of unauthorised disclosure of committee reports, evidence or proceedings to the Committee of Privileges.[6] If the Privileges Committee found that a breach of privilege or contempt had occurred and confirmed that substantial interference with a committee's or House's functions had resulted then the Privileges Committee would recommend appropriate penalties. However, the committee's reports indicate the difficulty of reaching a satisfactory outcome in such inquiries. The committee has expressed the view that complaints in this area should not be given precedence unless the Speaker is of the opinion that there is sufficient evidence to enable the source of the disclosure to be identified or that there are special circumstances, for example, the protection of sources or witnesses, as would warrant reference to a the committee.[7]

2.8 It has been noted that the practice appears to have worked well in the House of Representatives and has saved the Privileges Committee considerable time.[8]

New South Wales

Legislative Council

2.9 The Usher of the Black Rod, replying on behalf of the Clerk of the Council, provided a copy of a recent report, titled *Report on guidelines concerning unauthorised disclosure of committee proceedings.*[9] The inquiry which prompted this report concerned the unauthorised publication in a newspaper of details of a confidential submission which had been provided to a standing committee by four police witnesses during an in camera hearing.

2.10 The report recognises that unauthorised disclosures of committee proceedings have the potential to cause serious damage to witnesses and submission authors,

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5 *House of Representatives Practice*, Fourth Edition, p. 715.

6 *House of Representatives Practice*, Fourth Edition, p. 716.

7 *House of Representatives Practice*, Fourth Edition, p. 716.

8 ACT Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer question in committee hearing and distribution of ACT health document*, 3 November 2003, p. 9.

9 New South Wales Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Report on guidelines concerning unauthorised disclosure of committee proceedings*, Report 23, December 2002, Parliamentary Paper Number 370. [New South Wales Legislative Council, *Report*]

impede the effectiveness of parliamentary committees, and lower public confidence in the Parliament. The inquiry was seen as particularly important and timely, given the increasing volume and the increasing importance of the work of the Legislative Council's committees, both in terms of the development of public policy and the accountability of public administration.[10]

2.11 The report made three recommendations including establishing guidelines concerning unauthorised disclosure of debates, reports or proceedings of Legislative Council committees. These guidelines are at Appendix Three. The report also recommended that a copy of the guidelines adopted by the House be provided to all current and future members of the House and their staff, all members of the Parliamentary Press Gallery, and the Director-General of the Premier's Department for dissemination to relevant public officials and ministerial staff.[11] The third recommendation was that all persons who provide written submissions, or give oral evidence, to a committee be advised of the nature and extent of the prohibition against unauthorised disclosure and the application of the rule to persons providing submissions or oral evidence.

2.12 While the guidelines for dealing with unauthorised disclosures have not yet been formally implemented by resolution, they nevertheless represent the current procedures followed by the Council and its committees.[12]

New South Wales Legislative Assembly

2.13 The Clerk of the NSW Legislative Assembly noted that it is quite common for comments and/or recommendations that are contained in committee reports to be reported in the media prior to the tabling of reports. Whilst this constitutes unauthorised disclosure of committee documents, in practice little is done in terms of attempting to investigate the member or members responsible for the disclosure. Breaches of confidentiality can be reported to the House in the form of special reports or alternatively in a report to the committee chair. However, unless the disclosure is considered by the committee to be of a serious nature, in practice little if anything is done in relation to determining who is responsible and as such no action is taken.

2.14 There have been no recent cases of unauthorised disclosure. The only occasion when the disclosure of confidential documents has been reported to the Assembly occurred in 1993. In this case relevant members and staff signed letters stating they had no knowledge of the source of the disclosure or how it occurred. The source of the disclosure was not ascertained.[13]

10 New South Wales Legislative Council, *Report,* p. 1.

11 New South Wales Legislative Council, *Report,* p. 28.

12 *Correspondence from New South Wales Legislative Council,* 11 January 2005.

13 *Correspondence from New South Wales Legislative Assembly,* 10 January 2005.

Queensland

2.15 The current approach in the Queensland Parliament to unauthorised disclosure arose from a case in 2000 in which the Members' Ethics and Parliamentary Privileges Committee (MEPPC)[14] recommended that the Legislative Assembly affirm an appropriate procedure to be followed upon an unauthorised disclosure of committee proceedings.[15] The Legislative Assembly adopted the committee's recommendation on 16 April 2002.[16] The Acting Clerk advised that, in the event of any unauthorised disclosure, the committee concerned would now follow the procedure adopted by the Assembly.

South Australia

Legislative Council

2.16 The Clerk of the Legislative Council, South Australia, advised that the Council has over the years had a number of instances of unauthorised disclosure but most committees have self regulated by admonishing members within the confines of the committee. A special report may be made in relation to an unauthorised disclosure pursuant to Standing Order 399.[17]

House of Assembly

2.17 There have been no recent cases of unauthorised disclosure in the South Australian House.[18]

Tasmania

Legislative Council

2.18 The Clerk of the Legislative Council advised that the approach has been for the committee concerned to deal with the matter. However, a serious case of unauthorised disclosure would be referred to the Joint Privileges Committee. There has not been such a case in the Council for some 18 years. There was a case in December 2004 where a committee member revealed part of the committee's

14 Queensland Legislative Assembly, Members' Ethics and Parliamentary Privileges Committee, *Report on a Matter of Privilege-Unauthorised release of correspondence between a Committee and Ministers-Report No. 42*, 7 June 2000, pp. 5-6.

15 *Correspondence from Queensland Parliament*, 6 January 2005. For guidelines, see Appendix Three.

16 Queensland Legislative Assembly, *Votes and Proceedings*, 16 April 2002, p. 523.

17 *Correspondence from the South Australian Legislative Council*, 23 December 2004.

18 *Correspondence from the South Australian House of Assembly*, 21 January 2005.

deliberations, namely, the manner in which individual committee members voted. This matter was addressed by the committee concerned.[19]

House of Assembly

2.19 Standing Order 364 of the Tasmanian House of Assembly provides that:

> Evidence taken by any Select Committee, and the Report of the Committee, and documents presented to it which have not been reported to this House, shall be strictly confidential, and shall not be referred to in the House by any member or published or divulged by any member or Officer of the House or by any witness or any other person.

2.20 The Clerk of the House noted that the last case involving unauthorised disclosure was in the late 1970s, when the House referred the matter to the Privileges Committee which in turn called before it the five members of a select committee, who made statutory declarations that they were not the source of the unauthorised disclosure, and the journalist concerned. The committee deliberated and adjourned and did not return to the matter.

2.21 The Clerk further advised that if such circumstances arose again he would expect that the House would refer the matter to the Privileges Committee for investigation and to report its recommendations to the House.[20]

Victoria

Legislative Council

2.22 There have been instances over the years of apparent disclosure of committee reports prior to their tabling in the Legislative Council but only two occasions (in 1992 involving a press release criticising a committee report which had not yet been tabled and in 1993 involving a press release relating to the recommendations of a committee report which had not yet been tabled) when such matters have been raised in the Council as a matter of privilege. In both instances, the procedures in the Council were governed by sessional orders which required a member to give written notice of an alleged breach of privilege to the President who must determine whether the matter merits precedence over other business. In relation to the first matter the President gave the matter precedence and it was referred to the Privileges Committee. However as the Council was prorogued the committee did not have the opportunity to consider it. The second unauthorised disclosure was resolved when a member of the committee concerned apologised to the Council. Subsequently these procedures have been incorporated into the standing orders.[21]

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19 *Correspondence from the Tasmanian Legislative Council*, 22 December 2004.

20 *Correspondence from the Tasmanian House of Assembly*, 23 December 2004.

21 *Correspondence from the Victorian Legislative Council*, 23 December 2004; oral advice June 2005.

2.23 The Clerk of the Legislative Council advised that in recent times, when committee material has been leaked, the practice is for the committee itself to undertake its own investigation and, if anything is forthcoming, the committee must report the facts to the House which will then consider whether to take any action.[22]

Legislative Assembly

2.24 The Victorian Legislative Assembly follows the practice of the British House of Commons in dealing with unauthorised disclosure of draft reports or in camera evidence.[23] In the first instance the committee concerned is required to carry out its own investigation into the source of the leak and whether the leak caused any substantial interference with the work of the committee. Where the committee is concerned about such interference it may report the matter to the House for consideration. There are no recent examples of unauthorised disclosure of committee proceedings being raised in the Legislative Assembly.

2.25 The Clerk of the Assembly advised that there have not been any instances of disclosure of in camera evidence but there have been instances where information regarding the findings of a committee has been leaked to the press. Invariably committees are unable to discover the source of the leak and have found that there has not been a substantial interference in their work, so no further action is taken.[24]

Western Australia

2.26 The Clerk of the Legislative Assembly, Parliament of Western Australia, advised that under Standing Order 109 members of the Western Australian Legislative Assembly can raise matters in the House relating to possible breaches of privilege. Under the standing order, the Speaker may determine the matter, defer the matter or, if the Speaker considers that there is some substance in the matter, give priority to a motion without notice.

2.27 The most recent alleged unauthorised disclosure of committee proceedings arose in September 2002 when the chairman and a member of the Public Accounts Committee were accused of an unauthorised release of committee information. In this case, the Deputy Leader of the Opposition moved, in accordance with Standing Order 109, that the matter be referred to the Procedure and Privileges Committee for determination of whether a breach of privilege or contempt occurred. This motion was defeated on party lines. In response to a request the Speaker ruled that, as the matter had been determined by the assembly, he was unable to further consider it. This ruling was the subject of a motion of dissent which was lost on party lines as well.

22 *Correspondence from the Victorian Legislative Council*, 23 December 2004.

23 See paragraph 2.89.

24 *Correspondence from the Victorian Legislative Assembly*, 21 December 2004.

2.28 In response to this incident, the Speaker wrote to all members advising the position in relation to disclosure of committee information. He emphasised two basic principles. First, unauthorised disclosure of committee proceedings or evidence is a contempt of Parliament. Secondly, if a member of a committee, whether chairman or not, wishes to release non-public information from a committee there must be an authorisation from the committee to do so.[25]

Australian Capital Territory

2.29 The Clerk of the ACT Legislative Assembly indicated that the normal procedure in the Assembly is for a question of unauthorised disclosure to be raised with the Speaker as a matter of privilege. If the Speaker determines that the matter is sufficiently serious, the member who raised it can move a motion to refer it to a select committee for investigation and report. The Assembly does not have any preliminary procedure for the committee itself to determine the origin of the leak and a judgement as to the assessment of the degree of seriousness of any disclosure.

2.30 Recently, the ACT Select Committee on Privileges reported on *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer question in committee hearing and distribution of ACT health document.*[26] In this report, the committee recommended changes to the standing orders to enable a committee to give 'limited' publication and to authorise release of reports under embargo.[27] The Assembly is expected to consider this recommendation during its current term.[28]

Northern Territory

2.31 The Clerk of the Legislative Assembly advised that the Legislative Assembly Powers and Privileges Act of the Northern Territory mirrors section 13 of the Commonwealth Parliamentary Privileges Act. There have been no cases of unauthorised disclosure dealt with under the Territory Act.[29]

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25 *Correspondence from the Western Australian Legislative Assembly*, 27 December 2004.

26 Australian Capital Territory Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer question in committee hearing and distribution of ACT health document*, 3 November 2003.

27 ACT Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer question in committee hearing and distribution of ACT health document*, 3 November 2003, p. 10.

28 *Correspondence from Australian Capital Territory Legislative Assembly*, 22 December 2004; oral advice June 2005.

29 *Correspondence from the Northern Territory Legislative Assembly*, 23 December 2004.

International responses

2.32 The Clerk of the Senate also wrote to selected legislatures overseas to obtain information about how the national legislature responds to unauthorised disclosure of draft reports and other documents of its committees. In particular, he requested information on the following matters:

- whether the legislature protects the privacy of committee deliberations and documents;
- whether the legislature imposes sanctions on those who disclose information without the authority of a committee;
- the frequency of incidents of unauthorised disclosure of information;
- how such cases are dealt with, and what sanctions, if any, are imposed on those found guilty of making unauthorised disclosures; and
- the constitutional and legal basis for any such action against unauthorised disclosure.

2.33 Officials from the following countries responded to the request for information: Austria, Belgium, Canada, Denmark, European Parliament, Germany, Finland, France, Greece, India, Ireland, Israel, Italy, The Netherlands, New Zealand, Norway, Sweden, and the United Kingdom. Dr Stanley Bach, a former Australian Senate Fellow and United States Congressional officer, commented on procedures in the United States Congress. This section of the report reviews these responses.

Austria

2.34 The response from the Austrian Parliament advised that, according to the Rules of Procedure, the deliberations and documents of committees are not confidential, with some exceptions. The most significant is that the committee can decide 'upon the confidentiality of the respective deliberations'.[30]The rules do not impose sanctions when confidentiality is violated by a participant in the committee meeting. The response indicated that such incidents 'do not happen frequently'.[31]Breaches of confidentiality are considered by the President's Conference, consisting of the three presidents and the chairpersons of the parliamentary parties, and 'political consequences' may arise from these deliberations. However, there are no legal provisions to impose sanctions or other actions in the case of such incidents.[32]

30 *Correspondence from Austrian Parliament*, 12 January 2005, p. 1

31 *Correspondence from Austrian Parliament*, p. 2.

32 *Correspondence from Austrian Parliament*, p. 2.

Belgium

Senate

2.35 The Secretary-General of the Belgian Senate advised that, in principle, parliamentary activities are open to the public in plenary sessions and committee meetings. Likewise the activities of investigation commissions are usually in public. A number of committee meetings are, however, always held behind closed doors, such as those examining credentials. Committees can also meet behind closed doors at the request of a member of the government or when the Bureau of the Senate or the committee so decide for a meeting or a specific item on the agenda. Specifically for parliamentary investigation commissions, legislation makes the rule on secrecy more explicit, namely, that members of the chamber shall treat confidentially information obtained from committee meetings not open to the public. The principle of confidentiality must be seen as an intrinsic consequence of a session behind closed doors.

2.36 Failure by a member of parliament to comply with the confidentiality rule in a parliamentary investigation is not considered a criminal violation. Insofar as the standing orders provide no explicit basis, no disciplinary sanction for violation of the aforementioned (unwritten) confidentiality principle appears possible.

House of Representatives

2.37 The response from the Secretary-General of the Belgian House of Representatives indicated that the Belgian legislature came to the view that the confidentiality of confidential information provided to its committees was not 'sufficiently ensured'.[33] Accordingly, the Parliamentary Inquiries Act of 1880 was amended in June 1996 to impose secrecy on the members of parliamentary committees of inquiry and to enable the Houses of Parliament to supplement their Rules of Procedure with a number of provisions making it possible to punish effectively any breach of secrecy. The Act also provides that any person, other than a member of the House, who attends or takes part in a non-public meeting of an inquiry committee must take an oath to observe secrecy and that any breach of secrecy is liable to penal sanction.

2.38 Pursuant to the Act, the Rules of Procedure of the House of Representatives were modified to impose secrecy upon each member of Parliament. A member who breaks this secrecy is deprived, for the rest of the parliamentary term, of the right to be a member or to attend any meeting of any body of the House in which secrecy is imposed. The member's parliamentary allowance is cut by 20 per cent for three months and may not be replaced in the body of the House in which secrecy was broken, thereby reducing the membership of that body.

33 *Correspondence from Belgian House of Representatives*, 7 January 2005, p. 1.

2.39 A breach of secrecy is established by the Speaker of the House, based on advice from the relevant committee or the Committee for the Prosecution of Members. The Speaker gives notice of the decision during the subsequent plenary meeting, without any debate taking place on this item. This rule has been extended to other bodies on which members are required to observe secrecy, including police and intelligence bodies.[34]

Canada

Senate

2.40 The Deputy Clerk and Principal Clerk, Legislative Services, indicated that the Canadian Standing Committee on Privileges, Standing Rules and Orders presented a report in April 2000 which was adopted by the Senate in June 2000.[35] This report outlined a process for dealing with leaked committee reports, which is included at Appendix Three to this report. The Canadian report was adopted by the Senate in June 2000 and is published as an appendix to the Rules of the Senate.[36]

2.41 The report also recommended that new measures and policies be adopted by all Canadian Senate committees to preserve the confidentiality of draft reports and other confidential or in-camera proceedings. The report suggested that 'serious consideration be given to [certain] measures' which are also included at Appendix Three.[37]

2.42 The Deputy Clerk also drew attention to two recent cases where Senate committee reports were disclosed prematurely. In both instances the committees concerned investigated the matter and in both instances the report was not dealt with by the Senate because of prorogation.

House of Commons

2.43 The Clerk of the House of Commons reported that the exclusive rights of the House to control the publication of its debates and proceedings and those of its committees and to deliberate and examine witnesses behind closed doors are frequently affirmed by members and officers.

2.44 Any unauthorised disclosure is initially dealt with by the committee in which the disclosure occurred. The committee may or may not choose to report a possible breach of privilege to the House. The Speaker has repeatedly declined to rule on

34 *Correspondence from Belgian House of Representatives*, p. 2.

35 Canadian Standing Committee on Privileges, Standing Rules and Orders, *Fourth Report*, 13 April 2000, paragraph 26(a) to (f).

36 *Correspondence from the Canadian Senate*, 13 January 2005.

37 Canadian Standing Committee on Privileges, Standing Rules and Orders, *Fourth Report*, 13 April 2000, paragraph 30(a) to (e).

questions of privilege arising from committee business, when the committee in question has not presented a report on the matter. In the event of a ruling by the Speaker that there is a prima facie case of privilege, the House considers a motion to refer the matter to the Standing Committee on Procedure and House Affairs. If the motion is adopted, the committee conducts an investigation and presents its report. Any further action by the House would normally be pursuant to recommendations contained in the report.

2.45 The Clerk of the House referred to a recent case involving the premature disclosure of a committee report. This matter involved an allegation by one committee member that a report was leaked by another member to the press before tabling. The Speaker ruled that the committee in question had dealt with the matter to its own satisfaction, as it had neither decided that it should be reported to the House, nor adopted a report to this end. The Speaker expressed 'deep concern' that committee members found it necessary to raise such matters on the floor of the House.[38]

Denmark

2.46 The administration of the Danish Parliament advised that the basic principle relating to committee material is that the public has access to all committee documents, including proposed amendments, reports and draft reports etc unless the material is confidential.

2.47 The Danish Penal Code states that any person who is exercising or has exercised a public office or function and unlawfully passes on or exploits confidential information, which has been obtained in connection with that person's office or function, shall be liable to a fine or to imprisonment for any term not exceeding two years.[39]

European Parliament

2.48 Pursuant to Rule 96 of the European Parliament's Rules of Procedure, committees normally meet in public, and committee documents and minutes are open to public access. Exceptions to this rule occur in cases relating to immunities and privileges of members of Parliament, consideration of confidential documents, or if a committee decides to hold in camera proceedings.

2.49 The Secretary-General of the European Parliament noted 'because of the general openness of committee work, that incidents of unauthorised disclosure occur very seldom and have not given rise to major concern in the past'. However, in light of a recent case, the authorities of the European Parliament are at present examining what sanctions may be imposed on the grounds of Parliament's Rules of Procedure

38 *Correspondence from the Canadian House of Commons*, 19 January 2005.

39 *Correspondence from Danish Parliament*, 4 February 2005.

and in respect of the statutory rights of the members of the European Parliament in case of unauthorised disclosure of information by a member.[40]

Finland

2.50 In Finland, committee meetings are not open to the public and this has been interpreted to mean that committee members and deputy members may not disclose information concerning matters that are currently being discussed by a committee. This also applies to information presented to the committee as well as discussions with experts heard by the committee and among committee members. Committee members must obtain permission from the committee to disclose unfinished business. In considering this matter the committee must be aware that such permission may be given only if it is clear that disclosing the information will not hamper the work of the committee. The non-public nature of committee meetings is viewed as a means of allowing committees to prepare matters in an atmosphere of confidential negotiations and exchange of information. When the matter is finished the members are in principle free to discuss any aspects, except for matters classified as secret by the committee.

2.51 The Finnish constitution contains provisions concerning access to committee documents. As a rule, committee documents and minutes are open to the public after the committee has finished handling the matter except classified documents.

2.52 In Finland, a committee member's duty to secrecy regarding unfinished committee business is not subject to penal sanctions. From time to time committee matters and documents have been improperly disclosed and have been reported in the media while the matter was still under consideration in committee. The Secretary-General of the Parliament of Finland observed 'this has almost always concerned timely political issues, and sometimes it is difficult to say whether this involves the actual leaking of committee information or the coverage of committee work as a natural part of politics'. Although there have been leaks, these have not led to charges against members of parliament.[41]

France

Senate

2.53 Each committee draws up minutes of its deliberations, and the transcript is confidential. Senators can take note of the committee minutes on the spot, but cannot photocopy them. These minutes and documents are placed in the Senate archives every three years. On the decision of the President, a committee's work can be

40 *Correspondence from the European Parliament*, 13 January 2005.

41 *Correspondence from the Finnish Parliament*, 20 January 2005.

communicated to the press and a committee can decide to make public all or part of its work.[42]

National Assembly

2.54 Inquiry committees of the National Assembly of France collect information both on 'determined facts', and on 'the management of public services' or 'national companies'. These committees 'are of great interest to journalists' and 'increased media pressure has lead to an evolution of the system applicable to them'.[43] Since 1991 hearings of inquiry committees are public but committees are able to 'decide on the application of privacy'. Such decisions are 'extremely rare' as there is sustained media attention on their work. If, within 30 years, non-public information of an inquiry committee is disclosed, the penal code provides for a penalty of one year's imprisonment and a fine of 15 000 euros.

Germany

Bundesrat

2.55 Plenary sessions of the Bundesrat are open to the public and a verbatim report is also made public. Meetings of the committees of the Bundesrat are not public and the deliberations are confidential unless the committee decides otherwise. The secretariat draws up the minutes of each committee meeting and these are confidential unless the committee has waived the confidentiality of its deliberations. The wording of a decision taken by a committee and the associated justifications may be made available to the public, unless the committee takes a decision to the contrary. In practice it is important to guarantee confidentiality for minutes of committee meetings. Certain applicants may be allowed to consult these minutes, and to ensure that confidentiality is maintained a special confidentiality declaration must be signed before consulting the documents.

2.56 There are no specific legal provisions for penalties if confidentiality is breached.[44]

Bundestag

2.57 In the German lower house, the Bundestag, regulations relating to the confidentiality of committee documents and information are set out in the Rules of Procedure and Rules on Document Security. The rules stipulate that committee meetings are not, in principle, open to the public. Material is classified as top secret, secret, confidential or restricted, and members and staff are obliged to observe the secrecy of documents classified confidential or higher. Although no statistics are kept

42 *Correspondence from French Senate*, 18 January 2005.

43 *Correspondence from French National Assembly*, 10 January 2005.

44 *Correspondence from the German Bundesrat*, 28 January 2005.

'it can generally be said that it is rather an exception for classified information to be disclosed without authorisation'. Accordingly, no members have been found guilty of making such disclosures.

2.58 If there is hard evidence that information has been disclosed by someone within Parliament in breach of the regulations relating to confidentiality the offence can be reported to the Public Prosecution Office. The Public Prosecution Office then examines the case and launches an investigation if appropriate. Members' staff and staff of the parliamentary groups or the parliamentary administration can be subject to sanctions arising from their employment contracts. The range of options available includes dismissal. In practice, however, it is difficult to determine who is responsible, as several people are usually aware of confidential information and it can seldom be proven who disclosed the information.[45]

Greece

2.59 The Director of the Greek Parliament advised that all parliamentary committee deliberations are held in public.[46]

India

2.60 The Secretary-General of the Rajya Sabha (upper house) confirmed that the legislature protects the privacy of committee deliberations and documents. Cases of unauthorised disclosure have been rare, the last case reported being in 1991.

2.61 Unauthorised disclosures are treated as a breach of privilege and contempt of the House. The Committee of Privileges of the Rajya Sabha examines any such matter in the light of facts and circumstances leading to the case. The committee can make a recommendation to the House and in the case of any breach of privilege and contempt of the House has the power to recommend censure, reprimand and imprisonment.

Ireland

2.62 Under the constitution and in legislation, members have absolute privilege when speaking in each House and in committees. Similar privilege extends to the publications of committees. Effectively this means that a member is answerable only to the Houses and not the courts in respect of comments made in the Houses, committees or official publications.

2.63 There is a well established parliamentary practice that confidential reports must not be disclosed prematurely. The standard practice in a case where there has been a leak of confidential material is for the chair of the committee to remind members about this practice and advise the committee that standard precautionary steps shall be taken to prevent such a situation recurring. These steps include:

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45 *Correspondence from the German Bundestag*, 3 February 2005.

46 *Correspondence from Greek Parliament*, 17 January 2005.

- reminding members at the outset of a meeting of the confidentiality of documents before them;
- numbering reports distributed to members; and
- returning reports at the end of a meeting.

2.64 In 1953 the Committee on Procedure and Privileges (CPP) prepared a report which was adopted by the Dail Eireann, affirming the principle that the proceedings of any committee of the House which is not open to representatives of the press may not be disclosed by any person until the presentation of the report has taken place. Any person who acts in disregard of this principle is guilty of a breach of privilege of the House.

2.65 The CPP has a general role arbitrating on members but does not have an investigatory role which in all probability in cases of leaks could be undertaken only by police authorities. Recent parliamentary practice has taken a more relaxed approach to the confidentiality of committee hearings and documents disclosed. The CPP would generally become involved only if it received a report from a particular committee presenting the facts of the case and requesting whether a breach of privilege may have occurred or alternatively a report was made to the Dail.

2.66 The number of incidents of unauthorised disclosure is 'very small'.[47]

Israel

2.67 The Secretary-General of the Knesset advised that, except for the deliberations of the Foreign Affairs and Defence Committee and the committee that deals with the defence budget, committee deliberations are not secret and the unedited minutes are published in full. All accompanying documents can be obtained on request.

2.68 There is no provision in the Knesset Rules of Procedure regarding the unauthorised disclosure of information and there is no provision for the imposition of sanctions on those who disclose information. In relation to the private deliberations of the Foreign Affairs and Defence Committee, a Knesset spokesman publishes an official press release on the committee's deliberations immediately after each meeting. In addition, especially secret issues are not dealt with in the committee plenum, but in sub-committees from which there are no leaks. In the case of disclosure of secret information, this is a breach of articles 111 and 117 of the Penal Code (1977).

2.69 The State Attorney may request that the immunity of a Knesset member suspected of leaking secret information be lifted and if the Knesset complies the member can be put on trial.

47 *Correspondence from the Irish Dail*, 28 January 2005.

2.70 In a case that came before the High Court of Justice in 1995, a Knesset member disclosed the content of a secret document that had come to his attention in the Foreign Affairs and Defence Committee during a debate in the plenum. The Court ruled that the disclosure had taken place within the framework of the member performing his parliamentary work, the situation fell under the category of Non-Accountability and therefore his immunity could not be lifted.[48]

Italy

2.71 The Rules of Procedure of the Italian Chamber of Deputies establish the principle that the proceedings of committees shall be made public through summary reports published in a special bulletin. Paragraph 3 of the same rule states that the committees shall decide when their proceedings should, in the interests of the State, remain secret. The secrecy requirement extends to deputies and any administrative staff that participate in the session. In addition, specific measures govern the activity of committees of inquiry. The Acts establishing these committees lay down specific, more stringent, secrecy requirements. As well as the power to meet in closed session, committees of inquiry may impose confidentiality restrictions on the proceedings and documents they have received or produced.

2.72 The Chamber's Rules of Procedure do not establish specific sanctions for the disclosure of parliamentary documents or proceedings covered by secrecy requirements. Violation of such restrictions by deputies may nevertheless represent grounds for the application of disciplinary measures by the Bureau of the Chamber. As regards sanctions established under ordinary law, violation of confidentiality requirements is punishable under the Criminal Code. Article 683 of the Criminal Code punishes with detention of up to 30 days or a fine (where the violation does not constitute a more serious offence). Regarding committees of inquiry, the Acts establishing such bodies envisage the application of specific criminal provisions for the violation of secrecy requirements by committee members, officials or secretariat.

2.73 Unauthorised disclosures of committee information are 'a very rare occurrence'. One case occurred in 1980 and involved the recording and re-transmission through a radio station of a closed session of a standing committee by a deputy. The Bureau censured the deputy with a ban on participation in parliamentary proceedings for 10 days.

2.74 Article 64, paragraph 2 of the Constitution establishes that the sitting (of each House) shall be public; however, each of the two Houses and the Parliament sitting in joint session may resolve to meet in closed session.[49]

48 *Correspondence from the Israeli Knesset*, 10 January 2005.

49 *Correspondence from the Italian Chamber of Deputies*, 25 January 2005.

Netherlands

2.75 In the Netherlands, the confidentiality of certain committee deliberations and documents is protected by article 38 of the Rules of Procedure of the House of Representatives of the States General. Those found guilty of making unauthorised disclosures may be excluded from committee meetings and/or be barred from receiving confidential documents for a maximum period of one month. The Secretary General of the House of Representatives of the States General noted that disclosure 'does not occur frequently' and that there are 'a few cases a year', the seriousness of which varies. No incident has occurred in recent years which was serious enough for a sanction to be imposed.[50]

New Zealand

2.76 Under Standing Order 237(2), a draft report of a select committee is strictly confidential to the committee until the committee reports to the House. The two exceptions to this rule are when a report is referred on a confidential basis to a third party for comment and when the committee agrees to the chairperson informing the public about the committee's consideration of a matter. Standing Order 397(m) recognises that it is a contempt to divulge the proceedings or a report of a select committee.

2.77 The Privileges Committee of the New Zealand Parliament in its 47th Report expressed the view that committees should not be able to release draft reports or parts of draft reports prior to reporting to the House. The committee endorsed the view expressed by the committee in a previous parliament that the House is entitled to receive first advice of select committee conclusions.[51] The committee also recommended that the Speaker refer issues of confidentiality to the chairperson of the Press Gallery to ensure that members of the Gallery are fully aware of the rules in respect of committee reports. The committee concluded that the premature release of a draft committee report is a serious matter and it would continue to take possible breaches of the relevant standing order seriously. The committee stressed the unauthorised disclosure of a select committee report is a contempt of the House.[52] The committee also endorsed a previous conclusion of the committee that the Standing Orders Committee consider amendments to the standing orders to enable members of committees to engage in more open discussion of their proceedings.[53]

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50 *Correspondence from the Netherlands House of Representatives of the States General*, 14 January 2005.

51 New Zealand Privileges Committee, *Report - Question of privilege relating to an article published in the Sunday Star-Times*, September 2003, p. 7.

52 New Zealand Privileges Committee, *Report*, September 2003, p. 7.

53 New Zealand Privileges Committee, *Report*, September 2003, p.6. [*see also* New Zealand Privileges Committee, *Report – Three question of privilege concerning the disclosure of select committee proceedings, May 2003*].

2.78 These recommendations relating to the disclosure of some committee proceedings have been incorporated into the latest revision of the Standing Orders and committees can now agree to disclose information about proceedings or matters of process and procedure that do not relate to any business or decision still before the committee.[54]

2.79 In recent cases considered by the New Zealand Privileges Committee, no further action was taken as either apologies were forthcoming from the participants or there was insufficient evidence to establish how the breach occurred.[55]

Norway

2.80 The Rules of Procedure of the Norwegian Parliament state that committee meetings take place behind closed doors, and that quoting statements given by other committee members in a closed committee meeting is not allowed. Draft recommendations may not be published. The rules also provide that committee recommendations and draft recommendations are not published until 'handed over'. Documents received by committees are, as a rule, regarded as public upon receipt.

2.81 According to the Rules of Procedure, members are pledged to secrecy on matters they acquire knowledge of in the exercise of their parliamentary duties such as classified and commercial information. Any violation of this duty of secrecy is subject to the common penal code. The Court of Impeachment can judge members of Parliament 'to penalty' but members have never been sentenced 'to penalty' for violation of the law which they have committed in their official capacity. Occasionally, committee deliberations or a draft recommendation are disclosed but sanctions are normally not imposed.

Sweden

2.82 In Sweden the deliberations of the committees in the Riksdag are held behind closed doors. Members of committees are normally free to disclose as much or as little of deliberations as they want. Parliamentary staff and others who have been present at the meetings are not free to disclose information and can be held responsible under the Secrecy Act for unauthorised disclosure. Stricter rules can be invoked in cases relating to national security or sensitive relations with other countries or international organisations. The Riksdag Rule provides:

> No member or official of a committee may disclose without authority any matter which the Government, or the committee, has determined shall be kept secret, having regard to the security of the realm or of any other reason of exceptional importance arising out of relations with another state or international organisation.

54 *Correspondence from New Zealand House of Representatives*, 22 December 2004.

55 *Correspondence from New Zealand House of Representatives*, 22 December 2004.

2.83 If, at the opening of a meeting, the chairman of a committee declares that this article applies to information and deliberations that follow, members may be held responsible in a court of law for any unauthorised disclosure. These rules also apply to draft committee reports.

2.84 The Deputy Secretary-General of the Riksdag noted that from time to time there is debate about unauthorised disclosure, but no legal action has been taken against a member or staff for unauthorised disclosure 'for a very long time'.[56]

United Kingdom

House of Lords

2.85 The practice of the House of Lords is to put transcripts of hearings and written evidence into the public domain as soon as practicable and certainly before publication of the report. Select committees 'rarely' hear evidence in camera and where they do it almost always is published later. Therefore the only documents which may be leaked are those giving advice to the committee (which are never published) or draft committee reports. Although the House of Lords has not had any problems in relation to unauthorised disclosures, were there to be a leak the sanctions available would be those applicable in respect of a contempt. However, the House would be unlikely to want to invoke its powers to fine or suspend in respect of any misdemeanour relating to committees. A more usual course may well be based on internal self regulation.[57]

House of Commons

2.86 The response to the request for information from the House of Commons is particularly comprehensive and useful and it is reviewed in detail in this section.

2.87 The Clerk of the Journals, House of Commons, advised that almost all of the House's modern privilege cases of unauthorised disclosure have concerned the leaking of draft reports. The last case relating to disclosure of evidence taken in private is nearly forty years old, occurring in the 1967-68 session. The most recent leaks of draft reports which gave rise to privilege cases were in 1999 and these have provided the approach that the House now takes to such matters.

2.88 The basic rule of the House is:

> That according to the undoubted privileges of this House, and for the due protection of the public interest, the evidence taken by any select committee of this House and documents presented to such committee and which have not been reported to the House, ought not to be published by any member of such committee, or by any other person.

56 *Correspondence from the Swedish Riksdag*, 20 January 2005.

57 *Correspondence from the House of Lords*, 12 January 2005.

2.89 In its Second Report of 1985-86 the former Committee of Privileges (since replaced by the Committee on Standards and Privileges) recommended that, when a leak had taken place, the select committee concerned should first seek to discover its source. It should then come to a conclusion on whether the leak constitutes, or is likely to constitute, 'substantial interference' with its work, with the select committee system, or with the functions of the House. If the committee finds that there has been substantial interference, it reports to the House accordingly, and the report automatically stands referred to the Committee on Standards and Privileges.[58]

2.90 The first of the recent cases arose in the Foreign Affairs Committee (FAC) in 1999. The committee had been inquiring into Government policy towards Sierra Leone and it had been alleged that, in seeking to support the legitimate government against the armed insurgents, the Government had used a company supplying mercenaries. Some members of the Committee from the Government (Labour) party had opposed the FAC's launching of the inquiry.

2.91 A draft report was circulated to the committee by its Clerk on 5 January 1999. A second version was circulated on 21 January, and in the early hours of 3 February the FAC agreed its report, publishing on 9 February. On that day an Opposition (Conservative) member of the committee raised as a point of order in the House the possible leak of the report. The Speaker advised him to pursue the matter inside the committee. The committee began the leak inquiry required under the House's current practice. While this inquiry was continuing, on 23 February in answer to a parliamentary question (from an Opposition member) the Foreign Secretary revealed that there had in fact been two leaks: the Foreign and Commonwealth Office had received 'in the second week of January' a copy of the draft report; and in early February (after agreement of the report but before publication) had been 'made aware of certain key conclusions'. The Foreign Secretary emphasised that his department had not passed its knowledge on to anyone else. The Clerk of the Journals, House of Commons, noted that, prima facie, the first leak was a contempt as it was of a draft report yet to be considered by the committee; the second, being of the contents of report made to the House but not yet published, would normally be regarded as a discourtesy to the House.

2.92 On the same day, 23 February, at the start of the FAC's meeting, one of the Government members of the committee admitted that he had been responsible for the leaks. He tendered his resignation from the committee. The FAC considered the leaks were likely to constitute a substantial interference with the select committee system. It consulted the Liaison Committee (consisting of the Chairmen of all select committees) which agreed. The FAC thereupon made a Special Report to the House, which stood referred to the Committee on Standards and Privileges.

2.93 The Committee on Standards and Privileges reported on 29 June 1999. Its conclusions were in two parts. First, it found that the leaker's actions amounted to 'a

58 *Correspondence from the House of Commons*, 18 February 2005, p. 1.

serious interference with the select committee system'. It noted the views of previous Committees of Privilege and of Procedure that leaks undermined mutual trust of members on a committee, and that if leaking were to become a common practice the cumulative effect could damage the standing of select committees in the public eye. It described the leak as 'a clear breach of faith' and recommended to the House that the member responsible should apologise to the House and be suspended for ten days. The House subsequently endorsed this recommendation.

2.94 Secondly, the Committee on Standards and Privileges considered the position of the recipients of leaked draft reports – both members and departmental officials. The Foreign Secretary had mounted a defence of his own position, saying, among other things:

> existing rules of procedure do not make private knowledge by an MP of the proceedings of a Select Committee a contempt. Any Member of the House is entitled to be present at the sittings of Committees, including deliberations of the Committee. It would not be logical for private knowledge by a Member of what happened at meetings at which he or she had right of attendance to constitute a contempt or even premature disclosure…

2.95 The Committee on Standards and Privileges rejected this argument. The committee agreed that members could attend deliberative meetings, but pointed out that *Erskine May* noted the convention that they should withdraw if requested to do so, as would undoubtedly have been the case with the consideration of a highly sensitive draft report. The committee also pointed to the relatively new Standing Order (now S.O. No. 126) passed in 1995, which gives any select committee the power to exclude a non-member of a committee 'if it considers that his presence would obstruct the business of the committee'. The Clerk of the Journals, House of Commons, noted that it could not be argued that the FAC would not have excluded the Foreign Secretary from a private meeting at which a draft report on his conduct was to be considered.

2.96 Further, the Committee on Standards and Privileges stated that any member who received leaked committee papers should return them without delay to the clerk of a committee. It recommended that the Prime Minister should amend the ministerial code to make this an explicit duty upon ministers and parliamentary private secretaries, and that a similar instruction should be issued to all departmental officials, including special, that is, political advisers. These recommendations were implemented.[59]

2.97 The second of the recent cases arose in 1999 and involved the Social Security Committee. On 4 February 1999 the minority (Liberal Democrat) chair of the 11-member Social Security Committee circulated to the committee his draft report on child benefit – a report of considerable interest as the possibility of taxing benefit for

59 *Correspondence from the House of Commons*, 18 February 2005, pp. 1-3.

certain categories of taxpayers was expected in the Budget. On 10 February the chairman withdrew his draft and undertook to produce a revised version. After hearing oral evidence from Treasury officials, a further revised draft report was approved with amendments on 3 March and published on 4 March.

2.98 Two parliamentary questions had been tabled by Opposition members - one a 'round-robin' to all departments asking whether secretaries of state, or civil servants or special advisers in their departments, had sighted drafts of select committee reports; and a more specific question about the draft report in question. After 'holding replies on 10 and 11 March 1999' the Chancellor gave a lengthy substantive answer on 16 March, which included the sentence 'A preliminary draft of a report [on child benefit] was given to my Parliamentary Private Secretary, but not the final report'.

2.99 The committee embarked on a leak inquiry. In this case, the Social Security Committee was unable to identify the source of the leak, and also divided on party lines as to whether there had been a substantial interference with its work. The Conservative opposition members argued that any leak met this test, not least because it undermined the trust between members that was essential to the effective working of a committee. The Labour members successfully contended that no member had been under pressure as a result of the leak, and that in practice there had been no interference.

2.100 Although the committee did not find 'a substantial interference' with its own work, it reported to the House on the matter, also seeking the view of the Liaison Committee as to whether there had been such interference with the select committee system or the work of the House.

2.101 The Liaison Committee found that substantial interference had taken place, and the Committee on Standards and Privileges thereupon investigated the matter. It sought to investigate the source of the leak, and its chair wrote to each member of the Social Security Committee asking whether he or she had given the Parliamentary Private Secretary a copy of the draft report. All replied in the negative. The PPS refused to say who had given him a copy of the draft.

2.102 Following oral evidence from the Chairman of the Social Security Committee and the PPS, the Committee on Standards and Privileges adopted its report on 20 July 1999. The committee emphasised that the House expected all members to answer questions from the Committee on Standards and Privileges truthfully and that knowingly to mislead the Committee is a contempt of the House. The committee took a serious view of the case, especially as the leaker disclosed the draft in blatant disregard of the covering letter. The committee noted that committee copies of the report in question were numbered and that the copy given to the PPS was not, indicating that the member responsible was well aware that giving a copy to a non-member of the committee was a breach of the rules, and that he or she did not want to be found out. The PPS's evidence showed that he had committed two distinct offences - asking for a copy of the report on 9 February, at a time when it was still expected to

be considered formally the following day; and refusing to identify the person who had given him the draft.

2.103 The Parliamentary Private Secretary had made a full apology in writing to the Committee on Standards and Privileges but the committee considered that a senior PPS in a major department asking for a draft report and refusing to identify its supplier was a serious offence. The committee recommended that the PPS should apologise to the House by means of a personal statement, and that he should be suspended for three sitting days. The committee took into account the offering of an apology; 'otherwise we would have recommended a longer period of suspension'.

2.104 Before the Committee on Standards and Privileges' report agreed to on 20 July 1999 had been published, a member of the Social Security Committee wrote to the Chairman of the Committee on Standards and Privileges admitting that she had been the source of the leak. She apologised for her actions, saying that her lengthy absences due to illness and her limited understanding of the situation in the committee had been factors. She tendered her resignation from the committee.

2.105 The Committee on Standards and Privileges agreed to a further report on 29 July which was published together with its earlier report. The committee drew attention to the member's inexperience and absences through illness, and 'other mitigating factors of a private and personal nature which it is not appropriate for us to detail'. The committee concluded that the member should apologise to the House by way of a personal statement, and that she should be suspended for five sitting days. This was later endorsed by the House.[60]

United States of America

2.106 Dr Stanley Bach, a former Australian Senate Fellow and former Congressional Officer, commented that leaks are accepted much more philosophically in the US Congress than in the Australian Parliament. Dr Bach commented:

> Everyone complains about them, of course, but it is rare that any serious attempt is made to discover who was responsible … One reason is that reporters will refuse to cooperate claiming their need to protect their sources.[61]

2.107 Dr Bach recalled a hearing of the Australian Senate Privileges Committee on the leaking of a committee report and an article in a newspaper referring to the recommendations in the report to be tabled the next day. He expressed the view that in Washington such an article would not have occasioned 'much surprise or consternation' and certainly would not have provoked a public inquiry. [62]

60 *Correspondence from the House of Commons*, 18 February 2005, pp. 3-5.

61 *Correspondence from Dr Stanley Bach*, 22 December 2004.

62 *Correspondence from Dr Stanley Bach*, 22 December 2004.

Summary of submissions and oral evidence presented to Committee of Privileges

2.108 The submissions and oral evidence presented to the inquiry by the Committee of Privileges predictably demonstrated two clear strands of thought. On the media side, several of the submissions demanded open slather on what could and should be made available, up to and including the right of any submitter to distribute his or her own submission under privilege, regardless of its content. These extreme views were, however, modified during oral evidence to acknowledge that there may be a place for keeping in camera evidence secret, with the onus on the media to 'prove that what they did [in publishing in camera evidence without authority] was correct, rather than us having to prove at that point that it was incorrect'.[63] As the representative of the Media Alliance stated:

> If I was sitting here as a trade union official negotiating an outcome, I would probably take that outcome back and say, 'That's a pretty good deal,' because it would be a significant improvement on the current position and would remove probably over 90 per cent of the conflicts that have been generated to date.[64]

Even so, there was a general assumption that it was up to the media to determine what should or should not be published, notwithstanding its in camera status.

2.109 The second strand sought to retain control of publishing proceedings, documents and evidence within the parliamentary system. Everyone of this view who made submissions or gave oral evidence considered that the existing rules should be kept, but most accepted the need to modify the present treatment of unauthorised disclosure as contempts. In other words, the view was: 'don't touch anything in case we need it for some as yet unforeseen circumstances but raise the barrier of what constitutes substantial interference considerably higher'. For example, the President of the Senate, noting the view expressed during debate that the present rules were in practice unenforceable, suggested that there should be a three-tier method of dealing with any improper disclosures:

> I also encourage the Privileges Committee to examine exactly what constitutes "substantial interference" with the operations of a committee. I do not think an exhaustive list could be made, but it might be a useful exercise in this inquiry to list those things (a) which indisputably substantially undermine a committee inquiry (i.e. have a fatal or significantly compromising effect on the eventual report), and have the ingredients to constitute a contempt; (b) which are detrimental and might deserve some censure (say by a statement by the President); or (c) which

63 *Transcript of evidence*, Mr Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance, p. 19.

64 *Transcript of evidence*, Mr Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance, p. 19.

> are regrettable, but which when looked at objectively do not themselves really amount to substantial interference.[65]

2.110 The Speaker of the House of Representatives similarly noted the varying degrees of seriousness of unauthorised disclosures, acknowledging the committee's basic concern in the following terms:

> It would seem that the unauthorised disclosure of confidential submissions or in-camera evidence is the area of greatest concern. Such disclosure can indeed harm innocent persons, and is an abrogation of a committee's responsibility to witnesses and dishonours undertakings given or conditions assumed by witnesses.

The Speaker made the important point, however, that the committee should proceed with caution: any changes to the procedures and processes of the Senate should take into account the implications for joint committees, the proceedings of which are conducted under Senate standing orders.

2.111 The 'no change' view was also supported by the President of the Legislative Council of Victoria, with particular emphasis on committee deliberations; both the President of the Legislative Council and Speaker of the Legislative Assembly of New South Wales shared this perspective. The President of the New South Wales Legislative Council joined the Committee of Privileges and other senators in recognising members' sense of futility when considering proposals for taking action in response to an unauthorised disclosure because it seldom leads to the perpetrator being identified and the damage caused being adequately addressed.[66] The President also drew the committee's attention to the Council's standing order and guidelines on unauthorised disclosure.[67] These have assisted in shaping the committee's recommendations.

2.112 Similarly, submissions from the Senate Environment, Communications, Information Technology and the Arts Legislation Committee and the Parliamentary Joint Committee on the Australian Crime Commission, supported no change. Both committees (the Australian Crime Commission Committee in its previous incarnation as the National Crime Authority Committee) have been subject to difficulties with unauthorised disclosure. In the latter case, this has been particularly disquieting given the nature of the material with which it must deal, as the submission makes abundantly clear.[68]

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65 *Submissions and Documents*, Senator the Hon. Paul Calvert, President of the Senate, p. 9.

66 *Submissions and Documents*, the Hon. Dr. Meredith Burgmann MLC, President, New South Wales Legislative Council, p. 93.

67 See Appendix Three.

68 *Submissions and Documents*, Parliamentary Joint Committee on the Australian Crime Commission, pp. 100-103.

2.113 The rationale behind this second strand of thought was developed by the Clerk of the Senate in both written and oral evidence. In his written submission he made the following points:

- Even the most innocuous-seeming unauthorised disclosure could in some circumstances constitute serious contempt, for example, the unauthorised disclosure of a finalised report which a committee decided to withhold from publication because of prejudice to legal proceedings
- There is a need for more rigour in the processes preceding matters being referred to the committee, including debate in the Senate
- There is over-use by committees of unpublished committee material. There is no good reason for much of the documentation used by committees, for example, background papers, minutes or correspondence, to remain unpublished, particularly at the conclusion of an inquiry.[69]

2.114 This last element of the Clerk's submission was also taken up by a Senate committee secretary, who commented:

> The Senate could also resolve to reduce the range of material that gets caught in that filter in the first place by increasing the range of things that are routinely published. I am specifically referring to the proposal in my submission to publish the approved minutes of committee meetings, as is done in other jurisdictions such as Canada, the UK and Scotland. The committees could even, dare I say, consider publishing draft or interim reports to help foster debate, which is how organisations like the Productivity Commission work. My point is that there is more than one approach to take to reduce the number of unauthorised leaks. You can reduce what is unauthorised in the first place, as well as having a more sensible mechanism for responding to leaks when they do happen.[70]

2.115 In counselling against wholesale change to the existing rules, the Clerk of the Senate suggested that the committee give consideration to recommending, as it has previously done,[71] further guidance to other committees in their consideration of raising a matter of privilege, and proposed a resolution[72] for its consideration. The committee has used this proposed resolution, too, as a basis for the conclusions and recommendations it discusses later in this report.

2.116 One area of agreement which featured in all submissions and oral evidence, and which is a view strongly held by the Committee of Privileges, is that in parliament's dealings with material and deliberations there should be a presumption of

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69 *Submissions and Documents*, Mr Harry Evans, Clerk of the Senate, pp. 3-4.

70 *Transcript of evidence*, Dr Ian Holland, p. 61.

71 See, for example, Senate resolution of 20 June 1996, Appendix One.

72 *Submissions and Documents*, Mr Harry Evans, Clerk of the Senate, pp. 5-6. Proposed resolution is also at Appendix Two.

openness, and of wide-ranging publication of proceedings which themselves should as far as possible be public. Public debate and deliberation underpin a democratic forum. Consequently, the committee was anxious to narrow the focus of its inquiry to areas which easily justified some degree of protection.

2.117 Thus, during the hearing, the committee concentrated on the attitude of all witnesses to in camera evidence. As indicated, even those who had previously asserted that everything should be public, acknowledged when pressed that this element of parliamentary proceedings and documents was in a category of its own even though the treatment of such evidence as in camera would not necessarily preclude their assumed right to publish:

> We strongly support the views of many of the submissions that the test of contempt should be that a leak has somehow interfered with the work of a committee or caused some damage or repercussion, rather than just the fact that a leak has happened. We disagree with some of the submissions on in camera evidence that there should be an automatic contempt. We believe that there should be proof of damage before there is a suggestion of contempt. For example, a person who gives evidence in camera may then want to publicly disclose what they have said. We think that should be an option that is available and that if there is no damage and if that person agrees we see no reason why that should be a contempt.[73]

2.118 The point was well made, however, by the Press Council representative that material must be received in camera 'for proper purposes'[74] – a point also made by the Committee of Privileges when reporting to the Senate on an earlier inquiry.[75]

2.119 That said, the need for the taking of in camera evidence will always exist. This was emphasised by Dr Peter Shergold, Secretary to the Department of the Prime Minister and Cabinet, who stated:

> I think we should start from the premise that, to the greatest extent possible, the evidence of public servants should be given in public. I work on the basis that a good public servant giving evidence in public will know the rules sufficiently as to know when they are able to say, 'I do not intend to answer; it is not necessary for me to give that answer,' or 'This is a matter that will have to be taken up by the minister.' That can be done in public. I suppose the major instances where I think it is important for evidence, on occasions, to be given in camera is when it is to do with matters of intelligence; national security; and defence, to a limited extent. It may be necessary on what I hope are rare occasions regarding matters of law enforcement or public security, and on even rarer occasions—but I can think of instances where it might be appropriate—because of commercial sensitivity, public issues and even defamation. In my view, that should be

73 *Transcript of evidence*, Mr James Grubel, Secretary, Press Gallery Committee, p. 21.

74 *Transcript of evidence*, Mr Jack Herman, Executive Secretary, Australian Press Council, p. 41.

75 Senate Committee of Privileges, *99th Report*, PP 177/2001, paragraph 55.

> rare. **I think it is very important that public servants start from the assumption that their dealings with parliament should be public and I think it is important that when they seek to give evidence in camera the committee should very carefully consider whether the request is appropriate** [emphasis added].[76]

2.120 Another element which was canvassed both in the submissions and at the hearing was the media's determination that they should be exempt from contempt proceedings, notwithstanding that all too frequently the reason for the Committee of Privileges' failure to establish who had improperly disclosed any proceedings was thwarted by the resoluteness of the media in refusing to divulge their sources.

2.121 That only the leaker should be found guilty of contempt reached its zenith in both the submission and the evidence of the Australian Press Council. The view which permeated this evidence was that there was no crime in publishing material that 'falls off the back of a truck'. The Press Council has in correspondence with the committee obviously resented the committee's designation of media outlets as receivers of stolen goods, and has never accepted the committee's position that if there was not a market for stolen goods there would be no purpose in stealing them.[77]

2.122 It was put to the committee that making judgments about whether or not to publish was 'an occupational hazard of the journalistic profession'.[78] It was, however, clear from the tenor of the submissions and oral evidence that the media was distinctly more cautious in relation to potential contempt of court proceedings than those in respect of parliamentary privilege. As Senator Bartlett observed in his oral evidence to the committee:

> We need to look at the contrast between contempt of the Senate or contempt of the parliament and contempt of courts. … There is quite clearly a lot more respect or fear, I do not know which it is, from the media towards contempt of court than there is towards contempt of parliament.[79]

2.123 The committee acknowledges that the courts are demonstrably more forceful than the parliament in dealing with contempt matters. Accordingly, the media clearly regard the need to 'educate' journalists about the perils of contempt of parliament as limited. This was particularly illustrated by the evidence from the Australian Broadcasting Corporation which indicated that, while written material given to all journalists extensively covered contempt of court, there was not a single mention of possible contempt of parliaments and their committees. While the managing director in his written submission, and the witness before the committee, both volunteered that

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76 *Transcript of evidence*, Dr Peter Shergold AM, Secretary, Department of the Prime Minister and Cabinet, pp. 51-52.

77 Senate Committee of Privileges, *113th report*, PP 135/2003, *Submissions and Documents*, p. 25.

78 *Transcript of evidence*, Mr Michael J. Martin, Lawyer, Legal Services, Australian Broadcasting Commission, p. 32.

79 *Transcript of evidence*, Senator Bartlett, p. 54.

they intend to change this,[80] it echoed a derisory response by *The Age*, quoted in the committee's 112th report[81] which similarly evidenced a disdain for any consequences arising from possible parliamentary contempt proceedings. In other words, in respect of the parliament, the journalists, their editors and publishers know what they can get away with.

80 *Submissions and Documents*, p. 19; *Transcript of evidence*, Mr Michael J. Martin, Lawyer, Legal Services, Australian Broadcasting Commission. p. 33.

81 Senate Committee of Privileges, *112th report*, PP 11/2003.