Chapter Three

Comment, conclusions and recommendations

Purpose of confidentiality

3.1 The Committee of Privileges, and the Senate, have always taken the view that the highest duty of any house of a parliament is to protect its sources of information. As mentioned at paragraph 1.6, this is reflected in the Parliamentary Privileges Act, which separately specifies interference with witnesses and release of in camera evidence as the only two criminal offences under that Act.

3.2 The purpose of the prohibition against unauthorised disclosure is primarily the protection of persons giving information to committees, but also covers persons about whom information may be given or who may be adversely affected by the findings and conclusions of a parliamentary committee. Even the taking of evidence in camera on national security grounds could well be argued as relating to the protection of persons – in this case the population of Australia or indeed of other countries. The basis for privilege has nothing to do with political embarrassment, senators' and members' egos, or any of the spurious reasons often advanced, notably by the media, to deride the necessary protection offered by any deliberative chamber.

3.3 The need for sanctions is based on this principle of protection. It would be infinitely preferable if no sanctions were necessary at all. Unfortunately, experience shows that the deliberate, unauthorised disclosure of confidential information is an inevitable part of political life. As with the relationship between government and parliament, well described by Anthony J.H. Morris QC when commenting on revelations of confidential material during an earlier inquiry by the Committee of Privileges, 'it is all a question of trust'.[1] If, on the one hand, a government could ensure that houses of parliament and their members could receive information responsibly, they might be more forthcoming in divulging confidential information. If, on the other hand, a house of parliament, its committees and members could be sure that claims of confidentiality were in the public interest, and not designed to cover up ineptitude or embarrassment, the word of a government representative would be accepted. If both government and parliament could be sure that information given in confidence to the media or other persons or institutions would be respected and responsibly used, the information flow might be freer and not subject to sanctions.

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1 Senate Committee of Privileges, *49th Report*, PP 171/1994, paragraph 2.7.

Role of the media

Attitudes to confidentiality of documents

3.4 It should be emphasised here that the whole question of the treatment of unauthorised disclosure as a contempt might not have arisen at all if it were not for the fact that so many of the cases before the Committee of Privileges have involved unauthorised publication in the media, especially as it invariably involves the symbiotic relationship between a deliberate leaker and a favoured journalist, buttressed by an editor and publisher who can usually be guaranteed to protect the most errant or irresponsible writer, regardless of the consequences.

3.5 In deciding to publish any material at all which is improperly obtained, the media tend to appeal to that somewhat amorphous concept, the public interest. The committee is entitled to be cynical about these appeals, particularly when combined with declarations about journalistic ethics. As early as 1984, in the case of the improper publication of in camera evidence, the media representatives were asked what constraints might govern their definition of public interest. Having quoted one of the witnesses in the following exchange:

> CHAIRMAN – Would you, for example, publish in camera deliberations of a royal commission?
>
> Mr Toohey – It would depend on whether they were interesting or not, essentially, and whether I could get my hands on them – two requirements.[2]

the committee wryly observed:

> After intensive questioning of all witnesses on the question as to how public interest was to be defined, the Committee obtained from Mr Toohey the two essential criteria which govern his decision to publish, that is, whether documents are interesting and whether he can get his hands on them.[3]

3.6 Little has changed in the years since. Virtually all written and oral evidence from the media during the present inquiry declared that the public interest informed their decision as to whether something should be published. From the committee's perspective, 'public interest' appears to fit into the category, redolent of a scornful Humpty Dumpty, of words which mean just what the media choose them to mean – 'neither more nor less'.[4]

3.7 This report is therefore based on the well-founded assumption that the media are likely to publish anything emanating from a parliamentary committee that they regard as newsworthy, regardless of the harm that may be caused to individuals. To

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2 Senate Committee of Privileges, *7th Report*, PP 298/1984.

3 Senate Committee of Privileges, *7th Report*, PP 298/1984.

4 Lewis Carroll, *Through the Looking Glass*, Chapter VI.

the committee's knowledge this attitude permeates the entire media, culminating in declarations from the Press Council to this effect.

Where responsibility lies

3.8 A parliament must retain some form, desirably limited, of control over its private proceedings. While misrepresentation will remain a contempt – and as the media themselves have pointed out, their reports must be a fair and accurate report of proceedings[5] – it is the committee's view that the removal of any constraint on reporting of proceedings is likely over time to exacerbate irresponsible or careless publication of proceedings.

3.9 Naturally, the media wants to retain de facto control of the dissemination of information, regardless of its merits and consequences for others. If both government and parliament could be sure that the media reported sagely and carefully 'in the public interest' – given that, particularly in parliament, where the greatest possible exposure of its own procedures and proceedings should be the principle under which parliaments operate – the need for private deliberations would diminish.

3.10 As matters stand, however, the media will indeed publish anything they can get their hands on.[6] The committee has repeatedly noted the double standards which, in the name of journalistic ethics, enable media to protect their sources while overriding the right, or duty, of a parliamentary committee similarly to do so.[7]

Rules governing unauthorised disclosure

3.11 The present rules relating to privilege, despite protestations to the contrary, and:

> whatever weaknesses they have, are actually fairly clear and fairly simple. If someone breaks them and parliamentary work is impaired as a result then this is extremely serious. If the damage really was inadvertent, I am sure the Senate is capable of recognising that through leniency and responding to the contempt. But contempt it is and contempt it should remain.[8]

It is inevitable, therefore, that rules have been developed to deal specifically with unauthorised disclosure. These rules, ranging from provisions of the Parliamentary Privileges Act through Senate standing and other orders to privilege and other applicable resolutions, are at Appendix One.

3.12 The basic rule against unauthorised disclosure is contained in standing order 37(1). This standing order has been in existence in the same or a similar form since

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5 *Transcript of evidence*, Mr Paul Bongiorno, Vice-President, Press Gallery Committee, p. 25.

6 See paragraph 3.5.

7 See especially Senate Committee of Privileges, *112th Report*, PP 11/2003, paragraph 1.33.

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

the original standing orders were agreed to in 1903. This ancient rule, which as the previous chapter demonstrates is common to most parliamentary institutions, is reflected in privilege resolution 6(16) which expands upon and declares unauthorised disclosure as a matter which the Senate may (but is not required to) treat as a contempt. Section 13 of the Parliamentary Privileges Act extracts one element of a potential contempt – the unauthorised disclosure of in camera evidence - to enable its prosecution in the courts as a criminal offence. Other provisions deal with matters such as the treatment of in camera evidence in committees (standing order 37(2) and (3)), the method of raising matters of privilege and criteria to be taken into account when determining whether a question of contempt is involved (section 4 of the Parliamentary Privileges Act, standing order 81, Privilege Resolutions 3, 4 and 7 and Procedural Order 3). Standing order 38 lays down procedures for producing and presenting parliamentary committee reports.

3.13 The committee has mentioned in Chapter Two a further guideline, which the Clerk of the Senate has proposed as part of his evidence to the present inquiry, to assist committees in determining whether unauthorised disclosure should be raised as a matter of contempt. That chapter also drew attention to guidelines developed in other legislatures, notably the Canadian Senate, the Queensland Legislative Assembly and the New South Wales Legislative Council, to deal with unauthorised disclosure. The Clerk's guideline, and also guidelines from these other legislatures, have assisted the committee in determining its conclusions on the matter before it.[9]

Material to be protected

3.14 As a prelude to reaching its conclusions, the committee decided to define what, if any, material it needed to consider required protection, under the following headings:

> *Submissions*: before receipt by committee; following receipt by committee; sought or received as in camera evidence (by submitter; by committee)
>
> *Committee proceedings*: deliberations; correspondence; notes for file; discussion of in camera evidence; minutes (including information that in camera evidence has been received); background papers
>
> *Draft reports*: before discussion (i.e. chair's draft); during discussion; dissenting reports; completed reports published immediately before tabling; reports at any stage which include or refer to in camera evidence.

Nature of offences

3.15 Before discussing these matters, the committee wishes to address another major element in the context of its consideration of in camera evidence: the standard

9 See Appendices Two and Three.

of proof which it has formally used since the Parliamentary Privileges Act and Senate privilege resolutions were agreed to. As the 35th report explained:

> Over the period of time since the committee began to examine matters referred to it, particularly possible interferences with witnesses – which….the Senate has always regarded with great seriousness – the committee was conscious that, in making a finding concerning a question of contempt, it was examining circumstances of individual cases against an unstated standard of proof. Following the completion of its third inquiry on this subject, the committee wrote in general terms to the Clerk of the Senate, seeking any comments he may wish to make on the question of the standards of proof which might be appropriate for the committee to bear in mind when making findings concerning contempt. …. Briefly, the Clerk is of the view that the committee should adopt a combination of the following two of five options:
>
> > to vary the standard of proof in accordance with the gravity of the matter before the committee and the facts to be found; or
> >
> > not to adhere to any stated standard of proof or to formulate a standard of proof, but simply to find facts proved or not proved according to the weight of the evidence.
>
> The committee, when noting receipt of the Clerk's advice, recorded in its minutes that it considered that the conclusions contained in the Clerk's response accorded with its already existing practice.[10]

3.16 Notwithstanding the flexibility available to it, the committee has always bound itself to ensuring that it has made decisions based on natural justice criteria, specifically eschewing strict liability offences. Before contemplating any change to this practice, it sought guidance from the Senate Scrutiny of Bills Committee on the implications of strict liability offences and reversal of the onus of proof.

Strict and absolute liability offences

3.17 At common law, and by default under the Criminal Code, a fault element (i.e., intention, knowledge, recklessness or negligence) must be proven for each physical element of an offence. This 'reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk.'[11]

3.18 Where an offence is expressed to be one of strict or absolute liability there are no fault elements which must be proved: a person is held to be liable for his or her conduct irrespective of moral responsibility. A person charged with a strict liability

10 Senate Committee of Privileges, *35th Report*, PP 194/1992.

11 *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, Attorney-General's Department, issued by authority of the Minister for Justice and Customs, February 2004, p. 24.

offence has recourse to a defence of honest and reasonable mistake of fact. Where an offence is expressed to be one of absolute liability this defence is not available.

3.19 In its *Sixth Report of 2002*, the Scrutiny of Bills Committee noted that 'fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter' and concluded that 'the general defence of mistake of fact with its lower evidentiary burden is a substantial safeguard for those affected by strict liability'.[12] That committee generally found that strict liability was warranted only in limited circumstances,[13] and should be applied 'only where the penalty does not include imprisonment and where there is a cap on monetary penalties.'[14]

Reversing the onus of proof

3.20 Generally it is the prosecution which must prove all elements of an offence, including fault elements. This requirement is a practical reflection of the principle that a person is 'innocent until proven guilty'. Legislation can reverse the onus of proof, by including a matter in a defence that must be raised or proven by the defendant. The usual justification put forward is the matter is 'peculiarly within the knowledge' of the defendant.[15]

3.21 An accused person may be in the best position to know his or her state of mind, but the Scrutiny of Bills Committee does not consider this alone should determine who should bear the onus of proof: Where a person's belief at the time he or she carries out an action goes to the issue of his or her intent in performing it then the onus of proving that belief should generally be on the prosecution.

3.22 Where legislation provides a particular state of belief is to constitute an excuse for carrying out an action which would otherwise be a crime, and in that way allows a defence to a person who is accused of committing one, the Scrutiny of Bills Committee will more readily accept the onus being placed on him or her to prove that excuse.[16]

In camera evidence

3.23 In dealing with in camera evidence, the Committee of Privileges proposes a major departure from previous practice. The committee intends that any unauthorised

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12 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002–Application of absolute and strict liability offences in Commonwealth legislation*, June 2002, p. 283. [Scrutiny of Bills Report].

13 Scrutiny of Bills Report, pp 284-5.

14 Scrutiny of Bills Report, p. 284.

15 See, generally, Senate Standing Committee for the Scrutiny of Bills, *The work of the committee during the 39th Parliament*, June 2002, at pp 34-38.

16 See, generally, Senate Standing Committee for the Scrutiny of Bills, *The work of the committee during the 39th Parliament*, June 2002, at pp 34-38.

disclosure of all such evidence, whether actually quoted or referred to in such a way as to leave no doubt that the publication involves divulging the content of the evidence, should be referred to it by the Senate on the recommendation of the Committee of Privileges, following the relevant parliamentary committee's establishing that the evidence has been improperly disclosed. Proof that the material which has been disclosed without authority (a) is or refers to in camera evidence; and (b) was published without authority, must be provided by resolutions of the parliamentary committee concerned. If unauthorised disclosure or publication of in camera evidence of a select committee is involved, the Committee of Privileges suggests that former members of the select committee could raise the matter with the Clerk of the Senate, as the custodian of the records of the Senate, who in turn should bring it to the attention of the Committee of Privileges.[17]

3.24 Anyone who divulges or publishes such in camera evidence may expect a finding of contempt, regardless of the circumstances. The committee may then wish to establish whether the offence is of such gravity that it should recommend to the Senate that a prosecution under section 13 of the *Parliamentary Privileges Act 1987* be proceeded with. Inadvertent unauthorised disclosure or publication of readily-identified in camera evidence will be included as in effect a 'strict liability' offence, although the inadvertence will be taken into account in the determination of penalty.

3.25 The Committee of Privileges intends this rule to apply at all stages of parliamentary committee proceedings, up to and including the premature publication of a completed report.

Treatment of submissions

3.26 As matters stand, the publication of submissions without the authority of a parliamentary committee comes within the category of contempts. In some written and oral evidence, notably that from the representatives of John Fairfax,[18] it was suggested that persons should have the right to publish their submissions at any time, regardless of the views of the relevant committee. The implication appeared to be that the persons publishing would be given the protection of parliamentary privilege without any input from the committee concerned. Furthermore, there was the implication that other persons who happened to receive the submission, by whatever method, would also be entitled to publish without the permission of either the submitter or the relevant committee.

3.27 This approach has some attractions, in that most submissions are general submissions on topics of either broad or specialised interest which it is in the public interest for the information to be shared. Most particularly, often submissions are

17 For role of Committee of Privileges in raising a matter of privilege, see paragraphs 3.47-3.48.

18 *Submissions and Documents*, Mr Bruce C. Wolpe, Manager, Corporate Affairs, John Fairfax Holdings Ltd, p. 31.

written on behalf of organisations, including the Commonwealth Public Service in which departments and agencies have either a participatory or direct interest. It was put to the Committee of Privileges several years ago that such submissions should be circulated without fear of the contempt jurisdiction, even if they were not covered by absolute privilege.[19] The suggestions of some witnesses go further, to enable their dissemination at will, under privilege.

3.28 In the case of publication of general submissions, the Committee of Privileges considers that the parliamentary committees concerned should deal with the matter. To a great degree, this approach is allowed for already by the capacity of a parliamentary committee in effect to authorise blanket publication of submissions on receipt. There is, however, a danger that a general understanding that submissions are automatically published can lead innocent or inexperienced submitters into a potential trap.

3.29 If persons or organisations make a submission to a committee which contains either deliberate or inadvertent adverse comment, and publish it themselves without permission thinking it is covered by parliamentary privilege, they could be separately sued by an independent party. Both they and any media which may disseminate the submission may not be protected by parliamentary privilege. Conversely, to allow persons to make accusations, even if ultimately justified, under privilege without enabling a person who may be adversely affected by those comments to have an opportunity to reply at the same time and in the same forum would, in the committee's view, be irresponsible and improper.

3.30 It is, in the Privileges Committee's view, imperative that potential submitters to an inquiry be made aware, from the moment a parliamentary committee calls for submissions, of what its practice will be in dealing with submissions received. It is committees which must take responsibility for the publication of adverse comment. It is these committees which must give careful consideration as to whether submissions of this nature should even be received as evidence, let alone disseminated publicly. In addition, certain inquiries might involve questions of national security, privacy or even potential legal proceedings which may not be obvious to persons or organisations which are making submissions. The only safe way to ensure that submissions are treated cautiously is through the committees' own procedures for authorising publication.

3.31 Whether the sanction of contempt is an appropriate method of dealing with these types of unauthorised disclosure has already been addressed in the context of in camera evidence. How much further that should be taken is the subject of the committee's conclusions and recommendations. What is clear, however, is that, in keeping with committees' obligations to protect their sources of information, at the least a program of education is necessary to ensure that persons submitting material in good faith are not inadvertently caught in either a legal or a parliamentary trap.

19 Senate Committee of Privileges, *22nd Report*, PP 45/1990, paragraph 12.

Parliamentary committees themselves must take due care to authorise – or, as the case may be, refuse to authorise – publication as soon as possible after receipt of a submission.

Committee proceedings

3.32 As a general principle and subject to paragraph 3.23 above, parliamentary committees may expect that, unless unauthorised revelations of proceedings are of such moment that they make impossible the continuation of an inquiry, such revelations will not be considered by the Committee of Privileges as raising a question of contempt on the basis that they constitute unauthorised disclosure. Purported revelations of committee deliberations which are actually misrepresentations of committee proceedings may still be caught under the provisions of Resolution 6(7):

> A person shall not wilfully publish any false or misleading report of the proceedings of the Senate or of a committee.

3.33 The advantage of excluding committee proceedings of this nature from contempt on the basis of unauthorised disclosure is that it ensures that other committee members, once the disclosure has occurred, may enter the debate contemporaneously. At present persons wanting to behave properly and also to avoid finding themselves in contempt are fettered by the rules which are designed to protect them.

Draft reports

3.34 The Committee of Privileges makes a distinction, when considering draft reports, between the various stages reached in their consideration, and the potential effect on those who might be the subject of the reports. As indicated in the 121st report which recommended this current inquiry, the most unpleasant feature of both matters covered in the report was the fact that a chair's draft was made available to a journalist even before it had been considered at all by the committee.[20]

3.35 The committee appreciates that premature disclosure of draft reports at an early stage has some degree of comparability with the leaking of cabinet documents. However, the effects of disclosure are compounded in the case of parliamentary committees, where it is not only those from the same political party or coalition of parties who are reaching decisions on often-controversial matters. Often, in a spirit of cooperation and compromise, committee members may test, or at first acquiesce in, recommendations which might ultimately prove inimical to their own parties' interests. There is little doubt that premature disclosure would have a chilling effect on such deliberations. The question is whether this should be treated as a contempt, rather than as a matter of internal committee discipline.

20 This element was the subject of British House of Commons consideration in 1990, discussed at paragraphs 2.100-2.102.

3.36 While this is intrinsically more serious than disclosures at a later stage of the deliberative process, the principle which has guided this committee throughout the present inquiry continues to apply: whether it adversely affects persons who are the subject of, or providers of information to, the inquiry.

3.37 The Committee of Privileges has again concluded that it is up to the parliamentary committee concerned to undertake the necessary disciplining of its members, rather than raising the question as a contempt. It is only in circumstances such as mentioned by the Clerk of the Senate, for example, the divulging of a draft report which may jeopardise court proceedings or police investigations, that the Committee of Privileges would entertain advising other committees[21] that the matter should be raised as a contempt.

Culpability

3.38 In its 74th report,[22] as well as in Chapter One of this report, the committee gave a brief outline of its changing views since its establishment about whom to regard as culpable in the deliberate disclosure of material, particularly to the media.

3.39 In recent inquiries, including this present general one, much emphasis has been placed on the leaker as the real culprit. The committee certainly does not disagree. This was made clear in debate when the reference was made to the committee on 16 March. Senators who spoke in the debate were the first to acknowledge, including quoting other senators, that the primary source of leaks was members of committees themselves.[23] However, the attitude of the media during the inquiry appeared to be that this gave them the right not merely to use the material but also to be absolved from all sanctions thereafter.

3.40 The attitude that only the leakers should be punished took its most extreme form in the submission and evidence given on behalf of the Press Council, supplemented by the Press Gallery, reinforcing its previous views expressed in correspondence with the Committee of Privileges.[24] For example:

> You will see from the Press Council's submission that our primary concern is not so much with what should or should not be disclosed or classed as an unauthorised disclosure but more with who it is that should be held responsible, when such a disclosure is made. It is our argument that the person who is responsible for the disclosure should be the person who the Senate should be concerned with, not those who publish the material given

21 See paragraphs 3.47-3.48.

22 Senate Committee of Privileges, *74th Report*, PP 180/1998.

23 *Submissions and Document*s, pp. iii-xiii.

24 Committee of Privileges, *113th Report*, PP 175/2003. And see Chapter Two, paragraph 2.121.

> to them by the person making the disclosure. That would be our primary concern.[25]

3.41 This, however, does not exonerate the media. In the first place, as receivers of stolen goods – terminology that seems particularly to offend the Press Council – they are complicit in the commission of the offence. Perhaps more demurely, if the media did not provide a market for the goods there would be no reason to supply them. Consequently, committee members have learned over the years that the slant placed on media reports is invariably those of the leaker: media take the material uncritically, and often the only interest in an otherwise pedestrian account of the proceedings is the fact that the document is leaked. Publication provides the favoured journalist with the self-satisfaction of scooping colleagues.

3.42 The committee remains of the view, declared in the 74th report, that both the leaker and the receiver of the information are culpable, and should be treated accordingly. The only question which arises is the point at which its investigations and findings should come into play, and who should determine whether matters should be raised as questions of contempt.

Conclusion

3.43 Having examined issues involved in the contempt processes of the Senate, the committee has concluded that, in general, parliamentary committees must be responsible for their own internal discipline. Subject to the exception referred to at paragraph 3.44, committees may assume that:

(a) if they cannot find the source of the unauthorised disclosure, this committee will not be willing to pursue the matter further and will so advise the relevant committee during any consultative process it may undertake.

(b) the only departure from paragraph (a) which this committee would seriously entertain would be if the unauthorised disclosure:

  (i) may have an adverse effect upon individuals who are the subject of, or may be adversely affected by, observations or recommendations in a committee's report; or

  (ii) may involve prejudice to police investigations or court proceedings.

3.44 The single exception to the above guidelines concerns in camera evidence, both written and oral. Committees may be certain that the unauthorised disclosure and publication of in camera evidence will be treated as a 'strict liability' offence. While

25 *Transcript of evidence*, Mr Jack R. Herman, Executive Secretary, Australian Press Council, p. 38.

the Committee of Privileges would expect to undertake inquiries under the present rules for its operation, that is, privilege resolutions 1 and 2, it will be assumed that any such publication of or reference to in camera evidence will be intrinsically harmful, with the publishers accepting their complicity in a potential contempt regardless of whether the source of the unauthorised disclosure is discovered or discoverable.

Consultation with Committee of Privileges

3.45 Unauthorised disclosure and publication of in camera evidence thus will automatically meet the test laid down in paragraph (a) of privilege resolution 3 that committees must establish 'substantial interference' or a tendency for substantial interference before raising a matter of privilege is automatically met. The Privileges Committee expects all parliamentary committees to evaluate carefully any other possible matters of unauthorised disclosure under this criterion, as they are already expected to do. This approach accords with the suggestion of the Clerk of the Senate that there is a need for more rigour in the processes preceding matters being referred to the Committee of Privileges, including debate in the Senate.[26] It also ensures the President of the Senate is not faced with the difficulties referred to in Chapter One[27]of being virtually forced into giving a matter precedence on the basis of a parliamentary committee's subsequently repudiated conclusions.

3.46 With this purpose informing the committee's deliberations, it appears that the provisions of the guideline proposed in the submission of the Clerk of the Senate are not incompatible with the position that only in camera material should be protected as a matter of course, with unauthorised disclosure and publication automatically being assumed to constitute a contempt. This latter notion comes within the firm prohibition outlined in standing order 37. Depending on its seriousness, it may be prosecuted directly through the Senate under section 13 of the Parliamentary Privileges Act without reference to the Committee of Privileges. In certain circumstances the committee could make a preliminary investigation with a view to recommending prosecution of unauthorised disclosure under the Act[28] while still having the capacity to deal with less grave infractions under resolutions 3 and 6(16).

3.47 The Committee of Privileges realises that it is no easy task for committees to evaluate whether other forms of unauthorised disclosure warrant being raised as a matter of privilege. It therefore suggests that committees might find useful the receipt of advice from the Committee of Privileges at an early stage in their consideration of privileges matters. To that end the committee proposes the following addition to the guideline put forward by the Clerk:

> Before deciding to raise a matter of privilege involving possible unauthorised disclosure of committee proceedings, any committee may

26 *Submissions and Documents*, pp. 3-4.

27 See paragraphs 1.13 and 1.16.

28 See especially Senate Committee of Privileges *54th Report*, PP 133/1995, paragraph 2.18.

> seek the guidance of the Committee of Privileges as to whether a matter should be pursued. If the committee decides that such a matter should be raised, it must consult with the Committee of Privileges before taking the matter further.

If there is agreement between the committees that further investigation is required, the Committee of Privileges would then seek Senate endorsement of a proposal to refer the matter to it.

3.48 The basis of this suggestion is that the Committee of Privileges has had wide experience in dealing with such matters and may be able to assist other committees in making judgments as to the appropriateness of raising questions which, at first sight, might be considered serious but subsequently may not warrant further investigation. The committee believes there is no point in attempting to apply an unenforceable law. At the same time, it accepts that there may be a need, as outlined in all submissions other than those of the media, to retain the existing rules in order to cover unforeseen circumstances. The proposal leaves intact the right of any senator individually to pursue a matter.[29]

Parliamentary committee decisions about receiving in camera evidence

3.49 Given the significance of in camera evidence, the Committee of Privileges considers that there is a concomitant duty on parliamentary committees to ensure the use of in camera evidence is as sparing as possible, with appropriate decisions recorded as proof of the committee's intent. The circumstances in which the committee regards the taking of in camera evidence as appropriate are:

(a) when matters of national security are involved;

(b) where there is danger to the life of a person or persons;

(c) when the privacy of individuals may inappropriately be invaded by the publication of evidence by or about them;

(d) when sensitive commercial or financial matters may be involved;

(e) where there could be prejudice to other proceedings, such as legal proceedings, or police investigations; and

(f) where there is adverse comment, necessary to a committee's inquiry, made about another person or persons, at least until the person(s) concerned have had an opportunity to respond under privilege resolution 1(13).

29 See, for example, standing order 81(6).

3.50 In respect of this last point, the relevant committee may wish to consider whether submissions should be received without modification before determining that adverse evidence naming or readily identifying a person should be received.

Deliberations and draft reports

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

(a) also discloses actual or identifiable in camera evidence; or

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

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

Subsidiary matters

3.53 In addition to the suggested changes in approach to the question of unauthorised disclosures as possible contempts, the committee, again guided by useful submissions and evidence, suggests some practical methods of handling documents and proceedings of parliamentary committees.

Publication of minutes and other committee proceedings and documents

3.54 It was suggested to the committee that the minutes of proceedings of parliamentary committees should be made public, as they are in many legislatures.[30] The committee believes the suggestion is sensible, so long as production of minutes as part of a report would not jeopardise its completion and tabling; rather, they could be made available, following their confirmation, on request at any stage of a committee's proceedings.

3.55 Furthermore, the Committee of Privileges sees little purpose in keeping as private documents administrative letters, background papers or any of the paraphernalia which make up committee proceedings and documents. Committee should feel free to release these, too, at any stage of proceedings. Like the minutes,

30 *Submissions and Documents*, Dr Ian Holland, p. 63.

they do not need to be tabled with reports. It should, however, be automatic that they be made available to any interested persons.

3.56 A decision to keep documents private should be the exception rather than the rule, and should be minuted accordingly. At the completion of an inquiry, the secretary to the committee should write to the Clerk of the Senate advising of such a decision. The practice of releasing as much material as possible would be a good antidote to the perception, as expressed in the Clerk's evidence and reflected in his proposed guideline,[31] that too much material is left unpublished.

3.57 This, of course, is in keeping with the committee's earlier comment that the balance within any parliamentary system should be towards openness, with the onus on the person or committee claiming secrecy to justify a requested prohibition on release.

Proper identification of parliamentary committee documents

3.58 Another practical suggestion emanating from the submissions and oral evidence was put forward by Dr Peter Shergold AM, Secretary to the Department of the Prime Minister and Cabinet.[32] In reinforcing the desire of the public service to work 'from the premise that, to the greatest extent possible, the evidence of public servants should be given in public', he emphasised the importance of minimising the taking of in camera evidence but making sure that that evidence is kept confidential. His practical suggestion was that, if committees demand confidentiality of documents on the basis that they are either in camera evidence or draft reports which are not ready for release, this should be made very clear in any of the circulated documents.

3.59 As he pointed out, 'confidential' is in wide use throughout the public service, and a public servant would not automatically assume that he or she was not entitled to circulate such documents within at the very least his or her own department or agency, but even among agencies of the corporate entity known as the Commonwealth. He suggested therefore – and the committee agrees – that any confidential material emanating from a parliamentary committee should be clearly identified in such a way that there is no doubt as to its origins. The committee believes that a brief description of parliamentary privilege on the front page of every confidential committee document, with all other pages labelled CONFIDENTIAL PARLIAMENTARY DOCUMENT, would be appropriate. This can proceed by administrative action within the Senate Committee Office, and is not dependent on Senate consideration or adoption of any other suggestions and recommendations of either the Committee of Privileges or the Procedure Committee.[33]

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31 *Submissions and Documents*, Mr Harry Evans, Clerk of the Senate, p. 4. And see Appendix Two.

32 *Transcript of evidence*, Dr Peter Shergold AM, Secretary, Department of the Prime Minister and Cabinet, p. 51.

33 See recommendation at paragraph 3.60.

RECOMMENDATION

3.60 The Committee of Privileges **commends** the proposals contained in this report to the Senate. Because of the complexity and tightly-interwoven nature of the existing laws, rules, resolutions and guidelines and in accordance with normal Senate practice, the committee **recommends** that this report, its appendices and associated documents be referred to the Procedure Committee to determine any necessary changes to the provisions, to give effect to these proposals.

John Faulkner
Chair