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Committee of Privileges

Parliamentary privilege — unauthorised disclosure of committee proceedings

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Chapter One

Unauthorised disclosure - basis of inquiry

Introduction

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Debate on reference to Committee of Privileges

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

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

Conduct of inquiry

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

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

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

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

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

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

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

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

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.

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

Appendix One

Extracts from the *Parliamentary Privileges Act 1987* *Standing and other orders of the Senate*, November 2004 and Senate Privilege Resolutions, February 1988

Essential element of offences

4. Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Unauthorised disclosure of evidence

13. A person shall not, without the authority of a House or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence,

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or
(b) in the case of a corporation, $25,000.

Standing Order 37 – Disclosure of evidence and documents

(1) The evidence taken by a committee and documents presented to it, which have not been reported to the Senate, shall not, unless authorised by the Senate or the committee, be disclosed to any person other than a member or officer of the committee.

(2) A senator who wishes to refer to in camera evidence or unpublished committee documents in a dissenting report shall advise the committee of the evidence or documents concerned, and all reasonable effort shall be made by the committee to reach agreement on the disclosure of the evidence or documents for that purpose. If agreement is not reached, the senator may refer to the in camera evidence or unpublished documents in the dissent only to the extent necessary to support the reasoning of the dissent. Witnesses who gave the evidence or provided the documents in question shall, if practicable, be informed in advance of the proposed disclosure of the evidence or documents and shall be given reasonable opportunity to object to the disclosure and to ask that particular parts of the evidence or documents not be disclosed. The committee shall give careful consideration to any objection by a witness before making its decision. Consideration shall be given to disclosing the evidence or documents in such a way as to conceal the identity of persons who gave the evidence or provided the documents or who are referred to in the evidence or documents.

(3) (a) The President is authorised to permit any person to examine and copy evidence submitted to, or documents of, committees, which are in the custody of the Senate, which have not already been published by the Senate or its committees, and which have been in the Senate' s custody for at least 10 years.

(b) If such evidence or documents were taken in camera or submitted on a confidential or restricted basis, disclosure shall not take place unless the evidence or documents have been in the custody of the Senate for at least 30 years, and, in the opinion of the President, it is appropriate that such evidence or documents be disclosed.

(c) The President shall report to the Senate the nature of any evidence or documents made available under this standing order and the person or persons to whom they have been made available.

(amended 13 February 1997, 29 April 1999)

Standing Order 38 – Reports

(1) The chairman of a committee shall prepare a draft report and submit it to the committee.

(2) After a draft report has been considered and agreed to by a committee, with or without amendment, a minority or dissenting report may be added to the report by any member or group of members, and any member or participating member may attach to the report relevant conclusions and recommendations of that member.

(3) If any senator other than the chairman submits a draft report to a committee, the committee shall first decide upon which report it will proceed.

(4) After a draft report has been considered the whole or any part of it may be reconsidered and amended.

(5) A report of a committee shall be signed and presented to the Senate by the chairman.

(6) By order of the Senate a committee may report from time to time its proceedings or evidence.

(7) If the Senate is not sitting when a committee has prepared a report for presentation, the committee may provide the report to the President or, if the President is unable to act, to the Deputy President, or, if the Deputy President is unavailable, to any one of the Temporary Chairmen of Committees, and, on the provision of the report:

(a) the report shall be deemed to have been presented to the Senate;

(b) the publication of the report is authorised by this standing order;

(c) the President, the Deputy President, or the Temporary Chairman of Committees, as the case may be, may give directions for the printing and circulation of the report; and

(d) the President shall lay the report upon the table at the next sitting of the Senate.

(amended 24 August 1994, 13 February 1997)

Standing Order 81 – Privilege motions

A matter of privilege, unless suddenly arising in relation to proceedings before the Senate, shall not be brought before the Senate except in accordance with the following procedures:

(1) A senator intending to raise a matter of privilege shall notify the President, in writing, of the matter.

(2) The President shall consider the matter and determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate.

(3) The President's decision shall be communicated to the senator, and, if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the Senate.

(4) A senator shall not take any action in relation to, or refer to, in the Senate, a matter which is under consideration by the President in accordance with this resolution.

(5) Where the President determines that a motion relating to a matter should be given precedence of other business, the senator may, at any time when there is no other business before the Senate, give notice of a motion to refer the matter to the Committee of Privileges, and that motion shall take precedence of all other business on the day for which the notice is given.

(6) A determination by the President that a motion relating to a matter should not have precedence of other business does not prevent a senator in accordance with other procedures taking action in relation to, or referring to, that matter in the Senate, subject to the rules of the Senate.

(7) Where notice of a motion is given under paragraph (5) and the Senate is not expected to meet within the period of one week occurring immediately after the day on which the notice is given, the motion may be moved on that day.

3. Unauthorised disclosure of committee proceedings, documents or evidence

The Senate adopts the procedures, as outlined in the 20th report of the Committee of Privileges tabled on 21 December 1989, to be followed by committees in respect of matters on which such committees may wish action to be taken:

(1) (a) a committee affected by any unauthorised disclosure of proceedings or documents of, or evidence before, that committee shall seek to discover the source of the disclosure, including by the chair of the committee writing to all members and staff asking them if they can explain the disclosure;

(b) the committee concerned should come to a conclusion as to whether the disclosure had a tendency substantially to interfere with the work of the committee or of the Senate, or actually caused substantial interference;

(c) if the committee concludes that there has been potential or actual substantial interference it shall report to the Senate and the matter may be raised with the President by the chair of the committee, in accordance with standing order 81.

(2) Nothing in this resolution affects the right of a senator to raise a matter of privilege under standing order 81.

(3) This order is of continuing effect.

(20 June 1996 J.361)

PARLIAMENTARY PRIVILEGE

RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

3 Criteria to be taken into account when determining matters relating to contempt

The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

(a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;

(b) the existence of any remedy other than that power for any act which may be held to be a contempt; and

(c) whether a person who committed any act which may be held to be a contempt:

(i) knowingly committed that act, or

(ii) had any reasonable excuse for the commission of that act.

4 Criteria to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business

Notwithstanding anything contained in the standing orders, in determining whether a motion arising from a matter of privilege should have precedence of other business, the President shall have regard only to the following criteria:

(a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and

(b) the existence of any remedy other than that power for any act which may be held to be a contempt.

6 Matters constituting contempts

Without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

Unauthorised disclosure of evidence etc.

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;

(b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or

(c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.

7 Raising of matters of privilege

Notwithstanding anything contained in the standing orders, a matter of privilege shall not be brought before the Senate except in accordance with the following procedures:

(1) A senator intending to raise a matter of privilege shall notify the President, in writing, of the matter.

(2) The President shall consider the matter and determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate. The President's decision shall be communicated to the senator, and, if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the Senate.

(3) A senator shall not take any action in relation to, or refer to, in the Senate, a matter which is under consideration by the President in accordance with this resolution.

(4) Where the President determines that a motion relating to a matter should be given precedence of other business, the senator may, at any time when there is no other business before the Senate, give notice of a motion to refer the matter to the Committee of Privileges. Such notice shall take precedence of all other business on the day for which the notice is given.

(5) A determination by the President that a motion relating to a matter should not have precedence of other business does not prevent a senator in accordance with other procedures taking action in relation to, or referring to, that matter in the Senate, subject to the rules of the Senate.

(6) Where notice of a motion is given under paragraph (4) and the Senate is not expected to meet within the period of one week occurring immediately after the day on which the notice is given, the motion may be moved on that day.

Appendix Two

Unauthorised disclosure of committee proceedings
Proposed Resolution of the Senate

UNAUTHORISED DISCLOSURE OF COMMITTEE PROCEEDINGS
PROPOSED RESOLUTION OF THE SENATE

(1) The Senate confirms that any disclosure of evidence or documents submitted to a committee, of documents prepared by a committee, or of deliberations of a committee, without the approval of the committee or of the Senate, may be treated by the Senate as a contempt.

(2) The Senate reaffirms its resolution of 20 June 1996, relating to procedures to be followed by committees in cases of unauthorised disclosure of committee proceedings.

(3) The Senate provides the following guidelines to be observed by committees in applying that resolution, and declares that the Senate will observe the guidelines in determining whether to refer a matter to the Committee of Privileges:

1. Unless there are particular circumstances involving actual or potential substantial interference with the work of a committee or of the Senate, the following kinds of unauthorised disclosure should not be raised as matters of privilege:

   (a) disclosure of a committee report in the time between the substantial conclusion of the committee's deliberations on the report and its presentation to the Senate;
   (b) disclosure of other documents prepared by a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event, or where they contain only research or publicly-available material, or where their disclosure is otherwise inconsequential;
   (c) disclosure of documents and evidence submitted to a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event;
   (d) disclosure of private deliberations of a committee where the freedom of the committee to deliberate is unlikely to be significantly affected.

2. The following kinds of unauthorised disclosure are those for which the contempt jurisdiction of the Senate should primarily be reserved, and which should therefore be raised as matters of privilege:

   (a) disclosure of documents or evidence submitted to a committee where the committee has deliberately decided to treat the documents or evidence as in camera material, for the protection of witnesses or others, or because disclosure would otherwise be harmful to the public interest;
   (b) disclosure of documents prepared by a committee where that involves disclosure of material of the kind specified in paragraph (a);

(c) disclosure of private deliberations of a committee where that involves disclosure of that kind of material, or significantly impedes the committee's freedom to deliberate.

3. An unauthorised disclosure not falling into the categories in guidelines 1 and 2 should not be raised as a matter of privilege unless it involves actual or potential substantial interference with the work of a committee or of the Senate.

4. When considering any unauthorised disclosure of material in the possession of a committee, the committee should consider whether there was any substantive reason for not publishing that material.

(Extract from *Submissions and Documents*, pp. 5-6).

Appendix Three

Guidelines from other Legislatures

New South Wales

Legislative Council

Report ***on guidelines concerning unauthorised disclosure of committee proceedings***

1. Rule against unauthorised disclosure

1.1 Evidence received by a committee, the proceedings of a committee, and draft committee reports, may not be disclosed by any person before the committee has reported to the House, unless the committee has authorised such disclosure.

1.2 The rule applies to all persons who have access to committee information, including:

(a) committee Members and their staff,

(b) staff of the committee secretariat,

(c) any witness who gives evidence to a committee,

(d) any person who provides a written submission to a committee,

(e) any person to whom committee information has been improperly disclosed.

This may include another Member, staff of a Member, a departmental officer, or a member of the media.

1.3 The rule applies to all information received or generated by a committee, including:

(a) oral evidence provided to a committee at an in camera hearing and the written transcript of such evidence,

(b) documents tendered at a hearing,

(c) written submissions received by a committee,

(d) written briefing papers and other documents prepared by the committee secretariat,

(e) draft reports, including draft dissenting statements,

(f) correspondence between the committee and other persons in relation to an inquiry,

(g) deliberations of the committee, including decisions made by the committee in private, comments made by committee members during debate within the committee, and the minutes of such deliberations.

2. Damage caused by unauthorised disclosures

2.1 Unauthorised disclosure of committee information may result in damage to individual participants in committee inquiries, the integrity of the committee system, and the public interest. Such damage may include:

(a) jeopardising witnesses and others who provide confidential information to committees, by exposing them to the risk of reprisals or other forms of adverse treatment as a result of giving evidence,

(b) deterring future witnesses from giving confidential evidence to committees,

(c) impeding the ability of a committee to reach agreement, by exposing the committee's incomplete deliberations to public scrutiny,

(d) undermining the relationship of trust between members of the committee, which is necessary for committees to function effectively,

(e) lowering public confidence in the committee, the committee system and the Parliament generally.

3. Obligations of recipients of unauthorised disclosures

3.1 A recipient of an unauthorised disclosure of committee information must:

(a) immediately inform the committee secretariat of receipt of the information, and the circumstances of such receipt;

(b) return the information to the committee secretariat as soon as possible; and

(c) not disclose the information to any person or record or copy it in any way.

3.2 Experience in this and other Parliaments suggests that recipients of leaked information commonly include members of the media, ministerial staff, and departmental officers.

4. Contravention – Contempt

4.1 Contravention of the rule against unauthorised disclosure may constitute a contempt of Parliament.

5. Contravention – Procedure

5.1 Where an unauthorised disclosure of committee information occurs, the following procedure applies:

(a) The committee concerned seeks to identify all possible sources of the disclosure.

(b) The committee decides whether the disclosure is significant enough to justify further inquiry.

(c) If the committee considers that further inquiry is warranted, the Chair of the committee writes to all persons who had access to the proceedings, requesting an indication as to whether the person was

responsible for the disclosure or is able to provide any information that could be of assistance in determining the source of the disclosure.

(d) The committee comes to a conclusion as to whether the leak is of sufficient seriousness as to constitute a substantial interference with the work of the committee, the Legislative Council committee system, or the functions of the House. This occurs whether or not the source of the disclosure is discovered.

(e) If the committee concludes that the leak is of sufficient seriousness, it makes a special report to the House, describing the circumstances and the investigations it has made, and recommending that the matter be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report.

(f) Following tabling of the Special Report, the House may refer the matter to the Standing Committee on Parliamentary Privilege and Ethics.

5.2 If the House refers the matter to the Standing Committee on Parliamentary Privilege and Ethics, that Committee may undertake such investigations of the matter as it considers appropriate, including taking evidence on oath or affirmation from the members of the Committee from which the disclosure arose.

6. Contravention - Sanctions

6.1 In a report to the House, the Standing Committee on Parliamentary Privilege and Ethics may find that the person responsible for the unauthorised disclosure is guilty of contempt and that appropriate sanctions be imposed.

6.2 If the person responsible is a member of the House, appropriate sanctions may include: reprimand or admonishment by the House; the provision of an apology to the House; and/or suspension from the service of the House for a defined period.

6.3 If the unauthorised disclosure was published in the media, appropriate sanctions may include: temporary exclusion from the parliamentary precincts; suspension of parliamentary accreditation; suspension of accreditation with the Parliamentary Press Gallery; the publication of an appropriate apology; and/or reprimand by resolution of the House. Such sanctions may be imposed even in cases where the person responsible for the original disclosure has not been found.[1]

[1] New South Wales Legislative Council, *Report,* pp. 25-28.

Queensland

Members' Ethics and Parliamentary Privileges Committee

1. The committee concerned should seek to identify all possible sources of the disclosure.

2. The committee concerned should decide whether the disclosure is significant enough to justify further inquiry.

3. If the committee concerned considers that further inquiry is warranted, the Chair of the committee concerned should then write to all persons who had access to the proceedings. The Chair's letter should request an indication from each person as to whether the person was responsible for the disclosure or if they are able to provide any information that could be of assistance in determining the source of the disclosure.

4. If the source of the disclosure is identified, the committee concerned should then decide whether to report accordingly to the Legislative Assembly.

5. If the source of the disclosure has not been identified, the committee concerned should consider whether the matter merits further formal investigation by the MEPPC.

6. In considering (4) and (5) above, the committee concerned should take the matters below into account and balance the worth of further inquiry.

(a) How serious was the disclosure and is there a public interest in pursuing the matter? (Was the disclosure a substantial interference, or the likelihood of such, with the work of the committee, with the committee system or the functions of the Legislative Assembly?)

(b)If the source of the disclosure has been discovered, was the breach inadvertent or deliberate, mischievous or benign?

(c) If the source of the disclosure has not been discovered, what is the likelihood of discovering the source of the disclosure? (How many people had access to the proceedings? Were the proceedings in the possession of persons outside Parliament, such as public officers?)

(d) Is the disclosure an isolated occurrence, or is it one instance of a larger problem? Has there been a pattern of such disclosures?

(e) What is the likelihood of a disclosure re-occurring?

7. If the committee concerned comes to the conclusion that the matter merits further investigation by the MEPPC, the committee concerned should write to the Speaker accordingly detailing the action it has taken in respect of the above steps.[2]

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[2] 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.

Canada

Senate

(a) If a leak of a confidential committee report or other document or proceeding occurs, the committee concerned should first examine the circumstances surrounding it. The committee would be expected to report the alleged breach to the Senate and to advise the chamber that it was commencing an inquiry into the matter.

(b) While the committee would be required to undertake an investigation of the circumstances surrounding the alleged leak, the means, nature and extent would rest with the committee. As part of the inquiry, it is likely that the committee members, their staff, and committee staff could be interviewed. The committee would be engaged in a fact-finding exercise – to determine, if it can, the source of the leak. The committee should also address the issue of the seriousness and implications – actual or potential – of the leak. The committee would be expected to undertake this inquiry in a timely manner.

(c) The committee investigation of the leak would not prevent any individual Senator raising a question of privilege in the Senate relating to the matter. As a general matter, however, and in the absence of extraordinary circumstances, it would be expected that the substance of the question of privilege would not be dealt with by the Senate until the committee had completed its investigation. Thus, if the Speaker finds that a *prima facie* case exists, any consequent motion would be adjourned until the committee had tabled its report.

(d) Individual Senators would also be able to raise questions of privilege in relation to the leak upon the tabling of the committee report. In other words, while ordinarily a question of privilege is to be raised at the first opportunity, no Senator would be prejudiced by awaiting the results of the committee's investigation. Similarly, no action or inaction or decision taken by the committee in relation to the matter would be determinative in respect of the Speaker's responsibility under the Rules of the Senate to determine wither or not a *prima facie* exists.

(e) In the event that a committee decided not to investigate a leak of one of its reports or documents, any Senator could raise a question of privilege at the earliest opportunity after the determination by the committee not to proceed in the matter. Similarly, if a committee did not proceed in a timely way, any Senator would be entitled to raise a question of privilege relating to the leak.

(f) When the committee concerned tabled its report, the matter would ordinarily be referred to your Committee by the Senate if it discloses that a leak occurred and that it caused substantial damage to the operation of the committee or to the Senate as a whole.[3]

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[3] Canadian Standing Committee on Privileges, Standing Rules and Orders, *Fourth Report*, 13 April 2000, para 26(a) to (f).

This report was adopted by the Canadian Senate in June 2000 and is published as an appendix to the Rules of the Senate.[4]
The report also suggested that 'serious consideration be given to the following measures':

> (a) that draft reports and other confidential documents be individually numbered, with the number shown on each page;
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> (b) that each numbered report and other confidential document be assigned exclusively to an individual, and always given to that individual, and this should be carefully recorded;
>
> (c) that if Senators are to be given draft reports or other confidential documents in advance of a meeting, or are to take such documents away after a meeting, they be required to sign for them. Certain documents, such as *in camera* transcripts, should only be able to be consulted in the committee clerk's office, with the chair's approval;
>
> (d) that the names of all persons in the room at *in camera* meetings to discuss draft reports – including assistants, research staff, interpreters and stenographers – be recorded, preferably on the record; and
>
> (e) that the chairs of committees ensure that all Senators and staff are cautioned and reminded of the nature of confidential an *in camera* proceedings and documents, the importance of protecting them, and the consequences of breaching such confidentiality.[5]

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

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