CHAPTER 4 – PRIVILEGE 1988-2005 – ANALYSIS OF CONTEMPT MATTERS

Introduction

4.1 Since the passage of the Privileges Act and resolutions in 1987 and 1988, the workload of the committee has been considerable. Between its establishment in 1966 and 1987, it tabled ten reports; from then till December 2005, it tabled a further 114 reports. Forty-five of these reports, or 39 per cent of reports tabled from 1988, were right-of-reply matters. Four reports produced since 1988 were general reports;[1] fourteen were what the committee has categorised as advisory reports;[2] and the remaining 51 have dealt with possible contempt matters, with individual reports occasionally covering more than one type of contempt or several references. The Senate has always endorsed any findings and recommendations which the committee has made.[3]

4.2 In 1994, the committee's jurisdiction was extended when the Senate agreed to resolutions establishing a mechanism for the disclosure of senators' interests and creating specific contempts of failure to comply with the disclosure requirements. The committee has tabled one report on a case of alleged failure to comply with the resolutions.[4]

4.3 The matters which the committee has considered have ranged in complexity from what have turned out to be relatively trivial questions to matters of grave concern, going to the heart of possible obstruction of the Senate and senators in the performance of their duties. This chapter describes thematically reports from the passage of the Privilege Resolutions of 25 February 1988 to December 2005. A sequential resume of each Privileges Committee report from the first, in 1971, to the 124th in 2005, is at Appendix G.

Scope of privilege – advisory reports

Circulation of petitions

4.4 The complex and unusual nature of privilege cases was exemplified by the first matter referred to the committee following the passage of the *Parliamentary*

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1 Senate Committee of Privileges, *35th report,* PP 467/1991; *62nd repor*t, PP 108/1996; *76th report*, PP 126/1999 and *107th report*, PP 345/2002.

2 Senate Committee of Privileges, *11th report,* PP 46/1998*; 49th report,* PP 171/1994; *52nd report,* PP 21/1995*; 70th report,* PP 68/1998; *75th report,* PP 52/1999; *89th report*, PP 79/2000; *92nd report*, PP 150/2000*; 94th report*, PP 198/2000; *95th report*, PP 199/2000; *102nd report*, PP 307/2002; 113th report, PP 135/2003; 114th report, PP 175/2003; 118th report, PP 80/2004 and 122nd report, PP 137/2005.

3 *Journals of the Senate,* 2002, pp. 359 and 524.

4 Senate Committee of Privileges, *123rd report*, PP 224/2005.

Privileges Act 1987 and the Senate privilege resolutions. What began in the Senate as a proposed specific reference to the committee of the matter as a possible contempt metamorphosed during an extensive debate to a general question as to whether the circulation of a petition containing defamatory material is or ought to be privileged. The committee concluded that the circulation was not so covered, and that it should not be, although one committee member did not agree with this view. The committee made the point that persons with specific grievances could themselves petition the Senate and their petitions, if in order, could be presented and thus would be covered by privilege. The committee considered it inappropriate that privilege, whether absolute or qualified, should extend to the malicious circulation of defamatory material purportedly to collect signatures for a petition.[5]

Claims of executive privilege

4.5 Two reports[6] took up the theme of the committee's 1975 report[7] on executive privilege. Each derived from an executive failure to comply with an order of the Senate to produce documents required by the Senate. As a result of one such failure, in March 1994 the then Leader of the Australian Democrats, Senator Kernot, introduced into the Senate the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill,[8] proposing that the Federal Court act as an independent arbitrator should the executive government refuse a Senate demand for material. Like her predecessors in 1975, Senator Kernot worked from the basis that the Senate or its committees should not punish public servants because they obeyed ministerial orders not to comply with demands. Thus, the sanctions proposed in the bill related solely to the minister, a refusal by whom to produce such information could result in a finding of contempt of court.

4.6 Having taken public evidence from a range of experts, the committee, which for the purpose of its inquiry included Senator Kernot as a non-voting member, concluded that removing the responsibility to make such determinations from the Senate to the courts was inappropriate. The committee considered that ultimate power lay within the Senate and it was for the Senate to assert that power. It also suggested that it might be possible for an independent arbiter, such as a retired judge or a person such as the Auditor-General, to examine material on behalf of the Senate.

4.7 During the course of the committee's consideration of the bill, the Senate referred to it a further example of executive refusal to provide information, on commercial confidentiality grounds, for examination in the context of the bill. The committee's report, following examination by the Commonwealth Auditor-General on behalf of the Senate of documents which had been the subject of commercial-in-confidence claims, noted that the arbitration process had occurred in this case, and

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5 Senate Committee of Privileges, *11th report*, PP 46/1988.

6 Senate Committee of Privileges, *49th report*, PP 171/1994; *52nd report*, PP 21/1995.

7 See paragraphs 1.26 to 1.31.

8 *Journals of the Senate*, 1994, p. 1460.

very successfully. The bill was not proceeded with following the presentation of the committee's reports.

Reports on questions raised by other committees

4.8 The next advisory report of the committee was tabled in the Senate in April 1988.[9] The report resulted from a request by the Parliamentary Joint Committee on the National Crime Authority (NCA) for advice as to whether that committee had gone beyond its terms of reference in respect of a public hearing in June 1997. The NCA Committee's terms of reference are established by the *National Crime Authority Act 1984*. The Senate referred the question to the Privileges Committee on 26 June 1997. The committee concluded that the entire hearing was contrary to the statute under which the joint committee was established, and, as it had done in respect of another matter relating to the NCA Committee,[10] involving a question of contempt, again drew attention to the extremely restrictive provisions of the NCA Act and suggested that they should be reviewed.

4.9 Another advisory report derived from a request made in December 1998 by the Procedure Committee that the Committee of Privileges consider the matter of the execution of search warrants in senators' offices. In its report, tabled on 30 March 1999,[11] the committee made some observations on the question whether parliamentary privilege provides an immunity from legal processes for compulsory production of documents, and on the significance of search warrants in the context of this question.

4.10 The committee noted that it did not need to reach a conclusive view on these matters. Instead, it recommended that steps be taken to have procedures for the execution of search warrants in senators' offices agreed to by the President and the Australian Federal Police (AFP), along the lines of a similar arrangement between the AFP and the Law Council of Australia. The House of Representatives Committee of Privileges[12] made a similar recommendation in a comprehensive report on the same matter. Pending the formalisation of these arrangements, the committee observes that the AFP voluntarily adhered to such procedures (see paragraphs 4.15 and 4.16 below).

4.11 The committee has since twice reported on another matter of this nature.[13] This involved seizure by the Queensland Police Service under authority of a general search warrant of material from a senator's office. The material included copies of information on the hard drives of the senator's computers. The warrant was executed

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9 Senate Committee of Privileges, *70th report*, PP 68/1998.

10 Senate Committee of Privileges, *36th report*, PP 194/1992.

11 Senate Committee of Privileges, *75th report*, PP 52/1999.

12 House of Representatives Privileges Committee, *Report on the inquiry into the status of the records and correspondence of Members of the House of Representatives*, 6 December 2000, PP 417/2000.

13 Senate Committee of Privileges, *105th report*, PP 310/2002; *114th report*, PP 175/2004.

on 27 November 2001 but the senator could not take any action on a potential matter of privilege until the Senate resumed on 12 February 2002. In the meantime, following a letter of 30 November 2001 from the Clerk of the Senate to the Commissioner of the Queensland Police Service (QPS), the relevant material was secured in the office safe of the QPS Solicitor, where it remained pending the outcome of the committee's examination of the question of privilege, which the Senate referred to it on 14 February 2002.

4.12 In its first report, tabled on 26 June 2002, the committee concluded that no contempt was involved, and that the Queensland Police Service had fulfilled its obligations in respect of parliamentary privilege impeccably.[14] Subsequently, on 30 September 2002, following advice that the senator concerned and the QPS had reached a stalemate in relation to the classification of the material, the QPS Solicitor wrote to the committee requesting that the committee or the Senate determine the question of parliamentary privilege claimed by the senator concerned.

4.13 Ultimately, the committee decided that it would undertake the course of action sought by the QPS Solicitor. The committee based its procedures on a notice of motion given by the senator concerned.[15] This notice, in turn, had been based on a resolution of the Senate previously passed in respect of another senator. In brief, the procedure involved the appointment of an independent advisor, who had previously undertaken the same task, to evaluate the material provided to him by the QPS. As noted above, the material had been held in the custody of the Solicitor for the QPS. The committee sought and received from both the senator concerned and the QPS that they would be bound by the findings of the independent advisor.

4.14 Because of the massive and complex nature of the documentation, all of which was stored in electronic form, both parties further agreed that the advisor would evaluate the documentation on two criteria, the first as to whether the documentation was privileged, and the second, whether it came within the scope of the search warrant under which the material had been seized. The advisor concluded that none of the material fell within the scope of the warrant; it was therefore unnecessary for him to determine which of the documents was immune from seizure on the basis of parliamentary privilege.

4.15 When referring the matter originally to the committee, the Senate also asked that it examine, whether procedures should be established to ensure that, in cases of the execution of search warrants in senators' premises, material protected by parliamentary privilege is appropriately treated. The committee suggested that the procedures originally recommended in its 75th report, relating to the establishment of guidelines between the Presiding Officers and the Australian Federal Police, should be

14 Senate Committee of Privileges, *105th report*, PP 310/2002, pp. 9 and 8.

15 Senate Committee of Privileges, *114th report*, PP 175/2003, Appendix 2.

developed, and that such guidelines should also be applicable to the police forces of the states and the Northern Territory.[16]

4.16 Following the committee's tabling of the report, it wrote to the President of the Senate drawing attention to its conclusions and seeking advice on any developments in respect of the suggested guidelines between the Presiding Officers and the Australian Federal Police. It followed the matter up in its 114th report, recommending that the Presiding Officers and the Attorney-General finalise draft protocols as proposed as soon as practicable, and that the committee be given opportunity to comment on the draft. The requisite consultation took place, and a memorandum of understanding was signed by the Presiding Officers, the Attorney-General and the Minister for Justice and Customs early in 2005. The memorandum of understanding, together with the associated Australian Federal Police Guideline, was tabled in the Senate on 9 March 2005.[17]

4.17 In its 114th report, the committee made the point which it now reiterates, that the Senate is in effect performing a function which should be performed by the courts, and also made critical comment on the scope of seizure of materials under the terms of a search warrant. This question and the relationship between a House of Parliament and the courts will be discussed in Chapter 5.[18]

Reports consequential on Committee of Privileges inquiries

4.18 The committee itself has had cause to report to the Senate on matters arising from its own inquiries or, in one case, its reasons for discontinuing an inquiry. On 7 May 1997, the Senate referred to the committee questions as to whether certain false or misleading statements had been made in the Senate in respect of travel allowance payments to a senator. The committee was enjoined not to commence an inquiry until the conclusion of Australian Federal Police investigations and of any legal proceedings consequent on those investigations.

4.19 On 2 September 1999, the Attorney-General advised the President of the Senate that legal proceedings would not take place. The Committee of Privileges, having considered the advice, concluded that it would be inappropriate to undertake the investigations necessary to resolve any question of contempt and therefore recommended that the inquiry be not further pursued.[19] The Senate adopted the committee's recommendation on 30 September 1999.[20]

4.20 The next general report of this nature arose from the committee's recommendation in respect of senior public servants that each department provide a

16 Senate Committee of Privileges, *105th report*, PP 310/2002.

17 *Journals of the Senate*, 2005, p. 451.

18 And see *Odgers' Australian Senate Practice*, 11th edition, pp. 46-47.

19 Senate Committee of Privileges, *79th report*, PP 196/1999.

20 Journals of the Senate, 1999, p. 1811.

report on compliance with a resolution that departmental officials undertake study of the principles governing the operation of parliament and the accountability of departments, agencies and authorities to parliament.[21] This report is discussed at paragraph 5.30 of chapter 5.

4.21 Two further reports derived from the most far-reaching matter which the committee has considered.[22] This involved the committee's finding that a contempt had been committed by a person who took legal action for defamation against another person for providing information to a senator for use in proceedings in the Senate. The committee subsequently discovered that a judgment against the person providing the information had been brought down in the Supreme Court of Queensland. The committee was so concerned about the implications of the judgment that it sought advice from the Clerk of the Senate, and commissioned advice, with the approval of the President of the Senate, from an eminent senior counsel, Mr Bret Walker SC. In brief, both advices were highly critical of the terms of the judgment. The committee disseminated them widely, as a matter of urgency, under cover of its 92nd report.[23] That report also indicated that the committee would give further consideration to these and other related matters, with a view to reporting subsequently.

4.22 In its 94th report,[24] tabled in September 2000, it recommended to the Senate that, if further court proceedings on the matter were to take place, the Senate authorise the President to engage counsel as *amicus curiae* if necessary. Counsel has not been engaged to this point.

4.23 In addition, the committee decided to examine the general question of the desirability and efficacy of engaging counsel to represent the Senate in court and other tribunal proceedings on questions involving parliamentary privilege affecting the Senate or senators. The Senate referred this matter to it on the motion of the chair of the committee on 20 March 2002. Having sought advice from the Clerk of the Senate the committee came to the reluctant conclusion that, 'while having counsel readily at hand to represent the Senate would be desirable, appointing counsel on a retainer for those few occasions of which the Senate is or becomes aware of parliamentary privilege questions in court or tribunal proceedings, is not efficacious, particularly given the costs potentially involved.'[25]

4.24 The committee has produced four further self-generated reports. The first of these, the committee's 95th report,[26] is an information paper on penalties for contempt. This derived from advice in the committee's 84th report that it had commissioned a paper on the range of penalties both available and imposed in other jurisdictions,

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21 Senate Committee of Privileges, *89th report*, PP 79/2000.

22 Senate Committee of Privileges, *76th report*, PP 126/1999, paragraph 4.46.

23 Senate Committee of Privileges, *92nd report*, PP 150/2000, and see chapter 5, paragraph 5.47.

24 Senate Committee of Privileges, *94th report,* PP 198/2000.

25 Senate Committee of Privileges, *102nd report,* PP 307/2002.

26 Senate Committee of Privileges, *95th report*, PP 199/2000.

within Australia and overseas.[27] The paper comprised a survey of sixteen countries, ranging from federal and state legislatures in Australia, through European countries such as Finland and the Nordic countries, to the United Kingdom and the United States, at both federal and state level. Two reports, relating to search warrants in senators' offices and correspondence deriving from the committee's 112th report, are discussed at paragraph 4.16 and paragraph 5.20 in chapter 5, respectively. The fourth report, on unauthorised disclosure of committee proceedings, is discussed at paragraphs 5.36 to 5.41.

4.25 On 29 October 2003, the Senate referred two matters to the Committee of Privileges, both derived from joint meetings of the Senate and the House of Representatives on 23 and 24 October. While the matters referred to the committee involved possible improper interference with two senators, the references were also much more broadly based, going to the heart of relationships between the Houses and the constitutionality of the proceedings which gave rise to the potential contempts.

4.26 Conclusions in respect of the matters referred were so extensive that they required a complete chapter to deal with them. In respect of the two matters of possible obstruction of senators, the committee was unable to make any findings at all. The basis of the second conclusion included the uncertain constitutional status of the joint meetings. Furthermore, the committee was unable to make findings on other aspects of the terms of reference, primarily on the basis that it was not possible to intrude on the domain of the House of Representatives, its Presiding Officer and other officers. It finally recommended that, given the serious problems raised by the joint meeting format under present constitutional arrangements, the Senate adopt a resolution proposed by the Procedure Committee, that future addresses by foreign heads of state should be received by meetings of the House of Representatives in the House chamber, to which all senators are invited as guests. The Senate did so on 11 May 2004.[28]

Possible improper obstruction of senators or committees

4.27 One category of possible contempts is the improper obstruction of senators or committees in the exercise of their duties. Aside from the search warrant reports discussed above, both of which were based on a possible contempt of improper obstruction, in the three other cases on which the committee has reported in recent years, it has continued the practice first established in 1904 of taking a robust view as to whether senators have been improperly obstructed.[29]

4.28 The first of these cases, involving an attempt by representatives of the adult entertainment industry to influence members of the opposition, and of a select

27 Senate Committee of Privileges, *84th report*, PP 35/2000.

28 *Journals of the Senate*, 2004, p. 3377.

29 Senate Select Committee on Parliamentary Privilege, *Report*, 1904; and see paragraphs 1.10 and 1.34.

committee, was dismissed by the Committee of Privileges, although it was critical of the representatives.[30] In a second case, the committee concluded that the efforts of a property developer vigorously to prosecute his own interests by threatening to sue a senator did not in the particular case have the effect or tendency of substantially obstructing the senator in the performance of his duties.[31] Similarly the committee concluded that certain correspondence to a senator from lawyers representing a client who was the subject of a finding of contempt against another person[32] did not constitute a threat against him in respect of his activities as a senator. The committee also found that defamation action taken by the client against the senator did not constitute a threat against him in respect of his activities as a senator.[33]

4.29 The most recent matter under this category caused the committee the most difficulty and concern. It involved the question whether a senator was disendorsed by his party because of the way he voted on a particular piece of legislation. While the committee had no doubt that the party, as an external body, directed the senator concerned as to how he should exercise his vote, and punished him by disendorsing him when he refused to vote in accordance with the direction, the committee concluded that, on balance, particularly given that the senator reached a settlement with his party, a contempt of the Senate should not be found.[34]

Possible false or misleading evidence before committees

4.30 Fifteen of the committee's reports in the period 1988-2005 have related in whole or in part to whether false or misleading evidence was given to the Senate or a Senate committee. Given the scope for differing interpretations of the character of evidence, it is not surprising that the committee has been unable, to date, formally to find contempt on this ground.

4.31 Three of the cases involving possible misleading evidence are considered below in the context of the potentially more grave offence of possible improper interference with witnesses. The first concerned a National Crime Authority matter, discussed at paragraphs 4.91 to 4.94; the second occurred as part of the committee's extensive inquiry into the Australian Customs Service, discussed at paragraphs 4.98 to 4.100, while the third concerned evidence before the Employment, Workplace Relations, Small Business and Education Legislation Committee (see paragraph 4.112).

30 Senate Committee of Privileges, *43rd report*, PP 389/1993.

31 Senate Committee of Privileges, *53rd report*, PP 44/1995.

32 See paragraphs 4.80 to 4.82.

33 Senate Committee of Privileges, *67th report*, PP 141/1997.

34 Senate Committee of Privileges, *103rd report*, PP 308/2002.

Matters raised by senators or committees

4.32 In an early case, the committee considered a matter of possible false or misleading evidence before a Senate committee examining defence estimates. The nature of the evidence was such that it had the effect of misleading senators interested in a specialised subject. The Committee of Privileges found that no contempt had been committed, but was critical of the public servant who gave the evidence, taking the view that he should have been more forthcoming to the senators who had asked the questions.[35] This report illustrates a recurring practice of the committee which, while not finding contempt, has been critical of unhelpful or disingenuous responses to responsibly posed questions by senators.[36]

4.33 The committee has also noted criticisms within other parliamentary committees of public servants for giving misleading evidence.[37] These incidents have not been raised as matters of privilege because they have been dealt with during the proceedings of those committees. Nonetheless, this disturbing trend has led the Committee of Privileges to arrange for a reminder to be given to witnesses appearing before all Senate committees, and joint committees administered by the Senate, that false or misleading evidence may constitute a contempt of the Senate.

4.34 A second case, this time involving a defence services officer before a committee examining defence estimates, had the opposite outcome. The Privileges Committee found that, far from deliberately giving false or misleading information, the particular officer had been singularly assiduous in his attempts to provide a senator with responses to questions asked.[38] The senator concerned had been involved in the previous matter, which might perhaps have given rise to mistrust when the answers, however well-intended and quickly provided, appeared to the senator to be incomplete.

4.35 Another variation on the misleading information theme was outlined in the Privileges Committee's 14th report. A committee also examining estimates learnt that three witnesses had travelled to Canberra and given evidence to a select committee, although the relevant department maintained that it had not committed funds for such a purpose. The Privileges Committee accepted that the visit had been primarily for another reason and that, on the evidence before it, false or misleading evidence had

35 Senate Committee of Privileges, *15th report*, PP 461/1989.

36 See also Senate Committee of Privileges, *46th report*, PP 43/1994; *50th report*, PP 322/1994; *71st report*, PP 86/1998; *78th report*, PP 183/1999; *84th report*, PP 35/2000, paragraphs 18 and 19 and *96th report*, PP 118/2001.

37 See, for example, Community Affairs Committee, *Report on evidence presented to Estimates Committee D on 17 September 1992 regarding the alleged misuse of printing facilities at the Department of Social Security National Administration,* 1993, pp. 28-9.

38 Senate Committee of Privileges, *26th report*, PP 438/1990.

not been given and nor was there any attempt to manipulate the evidence before the select committee.[39]

4.36 A further case relating to information before a committee examining estimates involved the then Minister for Customs, Senator the Hon. Chris Schacht, who was questioned about the diesel fuel rebate scheme administered by the Australian Customs Service. The minister twice provided an incorrect answer, with some hours elapsing between the first time he gave the answer and the second. He was not corrected by any of the Customs officers assisting him in the hearing. This matter was referred to the committee while it was examining two other matters also involving the Customs Service and one of which involved possible misleading information.[40] The Privileges Committee concluded that Senator Schacht's misleading of the estimates committee was unintentional; it was suspicious of the silence of the Customs officers present but on balance concluded that they too might not have known the exact situation or might have believed that the minister had more recent knowledge.

4.37 Although the committee concluded that no contempt should be found in respect of any of the matters referred by the Senate, it was highly critical of the lack of knowledge by public servants of their obligations and responsibilities to the Parliament. In setting down briefly its view of such responsibilities, it drew specific attention to the Government Guidelines for Official Witnesses before Parliamentary Committees and related matters, and also expressed the hope that the recommendations of a review of the Australian Customs Service would be implemented.[41]

4.38 The committee also drew attention to a further resolution adopted by the Senate in 1993 relating to the obligations of senior officers of departments and agencies to undertake study of the principles governing the operation of Parliament. The committee's actions in relation to this matter, and its concerns which gave rise to the original resolution, will be discussed further in chapter 5.

4.39 The next case involving possible false or misleading evidence was raised by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, in its 18th report and in a statement by the chair in formally raising the matter of privilege. That committee raised the question whether misleading evidence had been given over several months by the then chair of the Indigenous Land Corporation about the corporation's handling of the leak of a draft issues paper from the Australian National Audit Office, and whether the purchase of a cattle station had been referred to the Australian Federal Police for investigation. The Committee of Privileges found that, while misleading evidence was given to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, it was unlikely

39 Senate Committee of Privileges, *14th report*, PP 461/1989.

40 See paragraphs 4.98 to 4.100.

41 Senate Committee of Privileges, *46th report*, PP 43/1994.

that it was given with deliberate intent. The committee therefore concluded that no contempt had been committed.[42]

4.40 The most recent case of possible false or misleading evidence involved Telstra, an organisation which had previously been the subject of a scathing committee report on whether it had provided false or misleading evidence to a committee examining estimates.[43] The recent report[44] was similarly scathing, although in both cases the committee concluded that, in the absence of any evidence of an intention to mislead, no contempt should be found. Furthermore, both reports were highly critical of the lack of knowledge of officers within the organisation, leading to recommendations that these officers should participate in training about their obligations to Parliament. Further discussion of the measures the committee recommended to ensure that these obligations are monitored is in chapter 5.

Matters raised by other persons

4.41 Most cases of false or misleading information are raised by senators in their own right or on behalf of committees. However, persons interested in the subject-matter of inquiries can also feel strongly that witnesses, or ministers acting on advice of other persons, have misled a committee or the Senate. The first such instance is discussed at paragraphs 4.98 and 4.99. The second involved a claim by a former senior officer of a Tasmanian bank that false or misleading statements had been given to the Select Committee on Public Interest Whistleblowing on a number of matters, including the reasons for his no longer being employed by the bank. While the Privileges Committee determined that the offending statements were not as helpful to the select committee as they might have been, it found that they did not constitute false or misleading evidence.[45]

4.42 Another private citizen ensured that the Privileges Committee examined the question of alleged misleading evidence deriving from evidence before a select committee further examining some of the same whistleblower cases. The person alleged that the Queensland Criminal Justice Commission (CJC) had misled the Select Committee on Unresolved Whistleblower Cases by withholding certain documents. The Committee of Privileges found that the CJC was unaware at the relevant time of the existence of the documents in question, and therefore was not guilty of contempt.[46] The Queensland parliamentary committee with responsibility for supervising the CJC followed up the original complaint, asking that the Privileges Committee again look at the question of misleading evidence; the original complainant, aware the matter had been referred to this committee, again made a submission which was in effect an

42 Senate Committee of Privileges, *104th report*, PP 309/2002.

43 See paragraphs 4.46-4.47 below; Senate Committee of Privileges, *64th report*, PP 40/1997.

44 Senate Committee of Privileges, *119th report*, PP 177/2004.

45 Senate Committee of Privileges, *51st report*, PP 4/1995.

46 Senate Committee of Privileges, *63rd report*, PP 360/1996.

expansion of the submission previously made on his behalf and published with the earlier report.

4.43 The committee, after considering the material provided by the Queensland Committee and the original complainant, together with a response from the CJC, found that the CJC had satisfactorily answered such allegations as were identified in the material before it.[47] In its response the CJC sought that the Committee of Privileges:

> make a finding that, absent genuine and substantive fresh evidence, it does not intend to inquire again into any of the allegations contained in the documents tabled on this occasion about false and misleading evidence being given by officers of the Commission to the Senate Committee on Unresolved Whistleblower Cases.[48]

4.44 The committee, while noting that it would like to give effect to the plea, advised in its report that it could not accede to the CJC's request in that, if the Senate refers a matter of privilege, it must undertake an investigation. It also observed that the most appropriate avenues for examination of such matters are state institutions. Furthermore, it endorsed the view of the President of the Senate in correspondence with the Queensland parliamentary committee that, if that committee is sufficiently concerned about the matters raised, it has a capacity to conduct its own inquiries.

4.45 The committee subsequently received a further letter from the same complainant. It considered and noted his views. He has also pursued the matter through senators and members. A House of Representatives committee has reported on the matter and a Senate select committee was also established. In 2004, the select committee found that the complainant's allegations that false and misleading evidence had been given to several Senate committees were unable to be substantiated.[49]

4.46 The final matter raised by persons with an interest in committee proceedings involved evidence given by a witness from Telstra to a committee examining estimates. Initially, two persons raised with the President of the Senate questions about the accuracy of the witness's evidence. The President referred the letters, and subsequent correspondence, to the relevant Legislative and General Purpose Standing Committee which, after considering the material, recommended that the allegations of misleading evidence be referred to the Committee of Privileges.

4.47 The Committee of Privileges found that the effect of certain evidence was to mislead the Senate committee, but that the witness did not intend to do so. The committee, while concluding that under the circumstances it should not find that a contempt had been committed, was extremely critical of both the officer and the statutory authority which he represented. It made the point that the organisation had

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47 Senate Committee of Privileges, *71st report*, PP 86/1998.

48 ibid.

49 Senate Select Committee on the Lindeberg Grievance, PP 226/2004.

demonstrated over a considerable period that it was inappropriately equipped to deal with its accountability responsibilities to each House of the Parliament and its committees. This conclusion led the committee to recommend that the Senate's long-standing assertion of its right to hold statutory authorities accountable for their activities be reaffirmed.[50]

Misreporting and misrepresentation of committee proceedings

4.48 Another matter categorised as coming under the heading of false or misleading information might more appropriately have been called a misinterpretation of terms of reference of a committee. The editor of a bulletin for shareholders and others who regarded themselves as having had unsatisfactory dealings with the then Australian Securities Commission editorialised about an inquiry by the Senate Legal and Constitutional Affairs Committee into the way the commission handled its inquiries. He implied that the committee inquiry had been established for the purpose of criticising the commission and suggested that the Legal and Constitutional Affairs Committee was 'on side' with complainants. While the Committee of Privileges found that there was indeed misrepresentation, it did not find that a contempt had been committed. It did, however, recommend that the Senate order that a report of the committee's concerns be placed in the relevant newsletter, and warned the person against further misrepresentation.[51] The Senate adopted the recommendation and the resultant order was complied with.

4.49 Another reference involved improper representation of the proceedings of the Community Affairs References Committee. It is also briefly discussed under the heading of unauthorised disclosure of committee proceedings.[52] Following a report of the Community Affairs References Committee, the relevant department complied with that committee's recommendation that a review be conducted of certain scientific information. The review, which was critical of the information, was provided both to the committee, and to other interested persons before the committee had authorised publication. On receiving a complaint about the review, the department claimed that the review had been prepared for submission to the committee, even though in fact it was a government report. Having in effect attempted to change the status of the document, the department did not advert to the difficulties of its unauthorised publication. While finding that no contempt had been committed, the Committee of Privileges was highly critical of the relevant department's ignorance of parliamentary process, particularly as this was the second time that the department had published a submission without parliamentary authority.

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50 Senate Committee of Privileges, *64th report*, PP 40/1997. And see 119th report and paragraph 4.39 above.

51 Senate Committee of Privileges, *44th report*, PP 390/1993.

52 Senate Committee of Privileges, *78th report*, PP 183/1999; see also paragraphs 4.58 and 4.109.

Unauthorised disclosure of proceedings or documents of committees

4.50 In the period 1988 to December 2005, 21 cases of unauthorised disclosure of committee proceedings, reports, evidence or documents were referred to the Privileges Committee and the committee also tabled an advisory report on the subject in June 2005.[53] It must be said that the committee finds some difficulty in dealing with such cases. It has followed the principle first established in 1984 that it should not make a finding of contempt against, and punish, the publisher of the improperly disclosed material without also making an attempt to find and punish the person who disclosed the matter. As the 1984 case indicates, the committee treats Senate members of committees with the same severity as it does any known publisher, in that it has made demands of them to provide information, has taken sworn evidence and has made contempt findings against them.

4.51 However, the process involved in examining these matters can sometimes be frustrating and ineffectual. Persons receiving or publishing the material, normally journalists, will not reveal their sources, often on grounds of 'journalistic ethics'. Similarly, it is unusual for a person who has deliberately disclosed material to admit to the offence. Furthermore, several such offences have derived from proceedings of joint committees, and one potential extremely serious offence involved proceedings and possibly members of a state legislature. Both the Senate and the Committee of Privileges have recognised that it is beyond the power of the committee to inquire into actions of members of the House of Representatives and of other legislatures. As a result the committee has been inhibited in pursuing the question of unauthorised disclosure as far as it would wish.

Discovery of sources of unauthorised disclosure

4.52 The committee has, however, had some success in dealing with improper disclosure matters. For example, one 1989 case involved a senator who had given a premature briefing to the media on the content of a report, in the expectation that the report would be presented to the Senate on the day that the briefing was given. In the event, Senate delays meant that the report was not tabled until the next day but information contained in the report was widely and prematurely published. In this case, the committee did not seek information from the relevant newspapers or journalists, because the senator admitted to giving the premature briefing. The committee decided that in the circumstances a finding of contempt should not be made but recommended that the attention of all senators be drawn to their obligations in respect of committee reports or proceedings. It further recommended changes to the Senate's order of business to ensure that committee reports be tabled early in the day. It also suggested guidelines for Senate committees to follow in the investigation of possible unauthorised disclosures.[54]

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53 Senate Committee of Privileges, *122nd report*, PP 137/2005.

54 Senate Committee of Privileges, *20th report*, PP 461/1989.

4.53 In a recent case, the unauthorised disclosure of the structure and some content of a draft report were made by committee members in a document distributed at a press conference in the days before the report was due to be tabled. The press conference was held partly as an attempt to refute misrepresentations of private committee deliberations that had appeared in the press over the previous weekend. The unauthorised disclosure of private committee deliberations was also considered by the committee. It was open to the committee to find that a contempt had been committed on both counts but it did not do so, partly because the select committee concerned had become so dysfunctional that the unauthorised disclosures and misrepresentations did not result in any further substantial interferences or tendency substantially to interfere with the workings of that committee.

4.54 In two further cases, the committee was able to discover the identity of at least one party to the premature disclosure, and made findings of contempt in each case. The first matter, reported in an omnibus 74th report involving six separate matters of unauthorised disclosure, led the committee to find that a senator had committed a contempt in that he too gave a public briefing to journalists at a press conference on the content of a minority committee report before its tabling.[55]

4.55 In the second case, the committee found that certain officers of a department had committed contempt in that they received and retained a copy of a draft report of a committee without the authority of that committee. It also found that a ministerial staff officer had improperly disclosed the report but that responsibility for his actions must rest with the minister. The committee was unable to find a contempt against the minister directly, in the absence of conclusive evidence that he was personally aware that the report was in the possession of the staff member concerned. In the same report, the committee found that no contempt had been committed in respect of two identified senators.[56] The remaining matters canvassed in the report are discussed at paragraph 4.64 below.

4.56 Given the pervasiveness of unauthorised disclosure cases, the committee indicated in its 74th report how it intended to handle such cases in the future but these measures did little to stem the tide. Most recently, in its 122nd report, the committee recommended the adoption of guidelines to achieve much stricter filtering of unauthorised disclosure cases by the affected committees before a reference to this committee is initiated. These and other general matters going to its operations are discussed in chapter 5 of this report.

4.57 An earlier case involving public servants' possession of committee documents without authority concerned the unauthorised release of a submission which had been made to the Health Legislation and Heath Insurance Select Committee. The person who had made the submission discovered that it was in the possession of officers of the relevant public service department before the committee had publicly released it.

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55 Senate Committee of Privileges, *74th report*, PP 180/1998 (second reference).

56 Senate Committee of Privileges, *74th report*, PP 180/1998 (fourth reference).

In reaching a conclusion that in the light of the particular circumstances no finding of contempt should be made, the Privileges Committee nonetheless took the view that submissions must remain in the control of a committee, however innocuous those submissions might appear to be to persons making or receiving them, until the committee authorises their release. The committee recommended that all committees should introduce mechanisms to reduce the likelihood of the inadvertent release of documents.[57]

4.58 One aspect of the case mentioned in paragraphs 4.49 and 4.109 also involved unauthorised publication of a report by a consultant to the then Department of Health and Family Services reviewing evidence received by the Community Affairs References Committee on the use of pituitary-derived hormones. The government had commissioned the review, on the recommendation of the Community Affairs References Committee; the minister indicated that the review had been prepared for submission to that committee; and yet his department widely circulated the review before the committee had authorised its publication. The Privileges Committee accepted that the department had circulated the review with the best possible motives but, in doing so, neglected to observe basic procedures for the handling of parliamentary committee documents.

Undiscovered sources of unauthorised disclosure

4.59 A more characteristic example of the committee's 'leak' inquiries was its investigation of the publication in a major newspaper of information relating to the proceedings of the Joint Standing Committee on Migration. The Privileges Committee was unable to establish the source of the information, and was unable to make a finding that there was an improper disclosure of committee documents or proceedings. In making its report, the committee advised the Senate that it was hampered in its investigation of the matter by the unwillingness of journalists to assist it. It reported also that it regarded premature publication of information, or speculation possibly based on inside information with the intentional effect of influencing the outcome of a committee's deliberations, as being of considerable concern. It went on to recommend that the issue of journalistic ethics arising from the case be referred to the Senate Standing Committee on Legal and Constitutional Affairs for consideration as part of that committee's media reference.[58] That committee decided at the commencement of the 39th Parliament in 1998 not to pursue the matter further.

4.60 The matter of the unauthorised disclosure of an in camera submission from a police officer to the Joint Committee on the National Crime Authority was, and remains, in the Privileges Committee's view, the most serious example of an improper act tending substantially to obstruct a committee in the performance of its functions which it has encountered since the passage of the *Parliamentary Privileges Act 1987*

57 Senate Committee of Privileges, *22nd report*, PP 45/1990.

58 Senate Committee of Privileges, *48th report*, PP 113/1994.

and the Senate privilege resolutions of 1988. The submission, which at no stage was authorised for publication by the NCA Committee, was tabled in a state parliament.

4.61 The Committee of Privileges was unable to establish the source of the improper disclosure, not least because of the constraints on its capacity to examine members of the legislature responsible for publishing and referring to the privileged documents. However, in view of the serious nature of the improper disclosure, the committee found that it constituted a serious contempt and recommended that, if the source of the improper disclosure was subsequently revealed, the matter should be referred to it again with a view to a possible prosecution for an offence under section 13 of the *Parliamentary Privileges Act 1987*.[59] A later report has left scope for similar action.[60]

4.62 The next possible improper disclosure matter referred to the committee related to the proceedings of the Select Committee on the Dangers of Radioactive Waste. The then Minister for Justice issued a press release which was clearly based on private proceedings of the select committee. In raising the matter of privilege, the chairman of the select committee made it clear that he was not raising any question relating to the conduct of the minister concerned, but rather was concerned with the unauthorised disclosure of material on which the minister's press release was based.

4.63 Because the chairman subsequently advised the Privileges Committee that the select committee had not been obstructed in its operations and had itself been unable to determine the source of the disclosure, the Committee of Privileges concluded that no question of contempt was involved. However, in considering the matter, it decided to recommend that the procedures previously recommended in a report on possible unauthorised disclosure be formalised as a resolution of the Senate.[61]

4.64 A further two matters which the committee included in its omnibus 74th report involved the premature disclosure of the draft reports of a Senate and a joint committee. The Committee of Privileges made the almost customary findings that it had been unable to discover the source of the premature disclosures, but found that a contempt had or was likely to have been committed.[62]

4.65 On 2 September 1999 the Senate referred to the committee the matter of the unauthorised disclosure of yet another draft parliamentary committee report. The relevant committee had investigated the matter, in accordance with the resolution of the Senate mentioned in paragraph 4.63 that committees themselves must investigate improper disclosure and reach a conclusion that they have been improperly obstructed. That committee established that a senator's inexperienced staff member had provided

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59 Senate Committee of Privileges, *54th report*, PP 133/1995.

60 Senate Committee of Privileges, *99th report*, PP 177/2001. And see paragraphs 4.(?) and 4.(?) below.

61 Senate Committee of Privileges, *60th report*, PP 9/1996. Continuing Order No. 3, *Standing and Other Orders of the Senate*, February 2004, p. 120.

62 Senate Committee of Privileges, *74th report*, PP 180/1998.

a draft report to a minister's office, and that the office had in turn referred the draft to the minister's department for comment. Following its investigation, the Committee of Privileges was sceptical of the protestations from both the minister and his department that they were not aware of the status of the document. It found that a contempt had been committed in both the minister's office and the department, because the handling of the draft report constituted culpable negligence.[63] The committee decided that in the circumstances of the case it should not recommend a penalty but decided to commission a paper on penalties in other jurisdictions, a paper subsequently published in the committee's 95th report.[64]

4.66 The next unauthorised disclosure matter concerned the disclosure of in camera proceedings of a committee. The chair of the committee, responding to a journalist's question, confirmed the name of a person who had given in camera evidence to the committee. The Committee of Privileges, noting that the name of the witness had previously been revealed in the media and that no action had been taken, nonetheless appreciated the reasons for the matter having been referred to it. As the senator raising the matter insisted, it was important to establish the principle that committees must take the protection of in camera evidence and the protection of witnesses seriously, and cannot excuse committee members who have disclosed in camera proceedings while at the same time pursuing other persons. The committee concluded, however, that no contempt of the Senate should be found.[65]

4.67 The most serious unauthorised disclosure matter raised in recent times involved an in camera submission to the Joint Committee on Corporations and Securities. On 12-13 February 2000, and again on 14 February, a national newspaper published articles based on an in camera document provided to the joint committee. Elaborate precautions had been taken to keep the document confidential, but it was clear that the articles were based on it. The joint committee had itself made exhaustive inquiries, but was unable to establish the source of the disclosure. It regarded the disclosure as constituting a serious obstruction to its work.[66]

4.68 While the Committee of Privileges, in turn, was unable to establish the source of the improper disclosure, as it had warned in its 74th report it made a finding of contempt against the publishers of the articles. The committee recommended that the Senate formally reprimand the publishers and foreshadowed that it could recommend possible restriction of access to certain areas within Parliament House should the publishers offend again. It also recommended that the discloser of the information, if ever found, be subject to a fine or prosecution under the *Parliamentary Privileges Act 1987*. Furthermore, it cautioned committees against too readily according in camera status to documents or evidence.

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63 Senate Committee of Privileges, *84th report*, PP 35/2000.

64 Senate Committee of Privileges, *95th report*, PP 199/2000.

65 Senate Committee of Privileges, *93rd report*, PP 179/2000.

66 Senate Committee of Privileges, *99th report*, PP 177/2001.

4.69 The same national newspaper was the subject of the committee's next report.[67] The Chair of the Legal and Constitutional Legislation Committee, on being contacted by a journalist to discuss a draft report, refused to do so and informed him of its confidential status. However, an article, based in part on the draft report, was subsequently published. That committee, too, investigated the matter and determined that it had been obstructed by the premature publication of its findings.

4.70 The Committee of Privileges found that an unknown person, and the publisher of the newspaper, committed a contempt of the Senate. In this case, however, it did not recommend a penalty because it was not of the same order of seriousness as the previous matter involving the newspaper. It was also referred to the committee before the outcome of the previous case was known.

4.71 On 27 June 2002, the Senate referred a further case of unauthorised disclosure to the Committee of Privileges.[68] This involved the possible unauthorised disclosure of a report of the Environment, Communications, Information Technology and the Arts Legislation (ECITA) Committee before its presentation to the Senate. This case (and three subsequent 'leaked report' cases) has forced the committee to confront several issues arising from the prohibition on unauthorised disclosure which has come to dominate its proceedings. These issues which were the subject of a recent advisory report[69] will be discussed in chapter 5. Briefly, the committee found that a contempt had been committed by the person who deliberately disclosed the ECITA Committee proceedings and that, while the newspaper concerned published an article knowingly based on the deliberate unauthorised disclosure, no contempt could be found against the publisher, the editor and the journalists concerned.[70]

4.72 Two final cases in which the source of the unauthorised disclosure of draft reports of the Community Affairs References Committee could not be discovered were dealt with by the committee in its 121st report.[71] These cases highlighted the committee's difficulty in making definitive findings on matters of this nature, not least because members' perceptions of whether the unauthorised disclosures had substantially interfered with the work of the affected committee differed widely. The need for the committee to be satisfied that substantial interference had occurred or potentially occurred was a threshold reinforced by the terms of the Procedural Order of the Senate of 20 June 1996, which sets out procedures to be followed by committees before raising cases of unauthorised disclosure as matters of privilege.

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67 Senate Committee of Privileges,100*th report*, PP 195/2001.

68 *Journals of the Senate*, 27 June 2002, p. 524.

69 Senate Committee of Privileges, *122nd report*, PP 137/2005.

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

71 PP 58/2005.

This difficulty led the committee to indicate to the Senate that it would seek a reference to re-examine the whole basis of the contempt of unauthorised disclosure.[72]

Possible improper interference with persons providing information to the Senate and committees

4.73 The committee continues to regard the protection of persons providing information to the Senate, and in particular of witnesses before parliamentary committees, as constituting the single most important duty of the Senate, and therefore of the committee as its delegate, in determining possible contempts. As a result all 20 cases of possible intimidation reported on to date have been considered with the utmost care and have resulted in the most comprehensive inquiries which the committee has undertaken. In six cases,[73] the committee has determined that it was necessary to take evidence in public session, and also in six cases[74] has made a finding that a contempt has been committed. The matters falling under this heading are divided into possible contempts involving private citizens and possible contempts involving public officials.

Possible contempts involving private citizens

4.74 Two matters of possible interference with witnesses arose from the inquiry into drug use in sport by the Senate Environment, Recreation and the Arts Committee. In the first case, following one athlete's evidence to that committee the owner of a shared house immediately evicted her. The Committee of Privileges found that, because the requisite intention to punish the witness specifically as a result of her evidence before the committee had not been established, no contempt had been committed.[75] The second matter involved a proposal to publish a document claiming that false evidence had been given to a Senate committee, with the intention of influencing the outcome of an election for a sporting association position. Again the committee concluded that no contempt of the Senate had been committed.[76]

4.75 The Senate referred the next general case of improper interference to the committee as a result of a report of the Senate Community Affairs Committee. The report drew to the attention of the Senate complaints which had been made to the secretary to the committee about a person who allegedly had intimidated others because of evidence given to the committee in respect of its inquiry into the implementation of pharmaceutical restructuring measures. The case was unusual

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72 The reference was agreed to on 16 March 2005 (*Journals of the Senate*, 2005, p. 544) and is the subject of the committee's 122nd report, PP 137/2005. See paragraphs 5.36 to 5.41 in chapter 5.

73 Senate Committee of Privileges, *17th report,* PP 461/1989; *21st report,* PP 461/1989; *36th report,* PP 194/1992; *42nd report,* PP 85/1993; *55th report,* PP 134/1995 and *67th report,* PP 141/1997.

74 Senate Committee of Privileges, *21st report,* PP 461/1989; *42nd report,* PP 85/1993; *50th report,* PP 322/1994; *67th report*, PP 141/1997; *72nd report,* PP 117/1998 *and 85th report*, PP 36/2000.

75 Senate Committee of Privileges, *17th report*, PP 461/1989.

76 Senate Committee of Privileges, 30th *report*, PP 258/1991.

because the persons who had advised of the possible intimidation did not respond to the Privileges Committee's invitation to make submissions to it. Consequently, the committee had no hesitation in concluding that no finding of contempt could or should be made against the subject of the assertions. The committee expressed disquiet that a possible abuse of process might have been involved in raising the matter, warning that it is possible for the committee to recommend that the Senate take action to deal with any such abuse in the future.[77]

4.76 Another matter involved two persons who appeared before the Senate Select Committee on Superannuation. Some months after they had given evidence to the select committee about what they regarded as improprieties in the management of a Queensland credit union, one of the witnesses had his membership of the credit union, and that of his wife, terminated, while the second witness was refused membership altogether. The committee concluded that penalty and injury were undoubtedly caused to the two witnesses, and to the wife of one of them, but was unable to establish that this result was on account of their having given evidence to the Superannuation Committee. Although it determined not to make a finding that contempt had occurred, the committee was critical of actions taken against the two witnesses.[78]

4.77 While the committee's own deliberations on this matter were relatively brief, it took a considerable time to determine, having been referred to the committee on 16 December 1993, with the committee's report being tabled on 17 October 1995. This inquiry illustrates one aspect of the committee's work which is often not obvious to persons unfamiliar with the processes relating to privilege. Most of the committee's information is provided by the persons directly affected by the reference of the matter and, in the interests of natural justice, the committee is obliged to give reasonable opportunity for information to be provided and exchanged. In the particular case, the committee awaited the outcome of certain investigations in another jurisdiction before being able to finalise its report.

4.78 In contrast, a further matter considered by the committee took less than four months to resolve. In accordance with its normal practice, the Privileges Committee investigated the question of possible interference with a witness who gave evidence before the Select Committee on Unresolved Whistleblower Cases, by seeking submissions from the witness and from a person referred to in the select committee's report. After examining the witness's submission, the committee concluded that it did not provide evidence to support his contention that reprisals and intimidation had occurred on account of his giving evidence to the select committee.[79] The committee emphasised in this case, as in other cases on which it has made comment, that although it may conclude that penalty, injury or reprisal has occurred, in order to find a contempt of the Senate it must be satisfied that any such penalty or intimidation was as a result of participation in parliamentary proceedings.

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77 Senate Committee of Privileges, *37th report*, PP 235/1992.

78 Senate Committee of Privileges, *57th report*, PP 183/1995.

79 Senate Committee of Privileges, *58th report*, PP 476/1995.

4.79 In three further cases, however, the committee has been able to make a direct link between provision of information — to a senator for use in the Senate — and a person's being penalised as a consequence. The first, which also involved the committee in public hearings, is also among the most far-reaching. The processes involved in these hearings are discussed in Chapter 5, together with developments arising from parallel court proceedings on the case. A brief outline of the significance of the matter is appropriate in this section, as it demonstrates the concerns of the committee to protect persons dealing with the Parliament.

4.80 On 23 August 1995, the committee received a reference involving threats of legal proceedings against both a senator and other persons. The committee's conclusions relating to the senator are mentioned in paragraph 4.28 above. It became clear to the committee on an examination of papers and submissions sent to it that most of the other persons involved had not been penalised as a result of Senate proceedings. However, one person against whom the threat of legal proceedings was made and subsequently carried out was a person who had been named in the Senate as a source of information by a senator whom he had briefed orally on particular matters. The legal proceedings involved an action for defamation.

4.81 In its 67th report, presented on 3 September 1997, the committee found that a contempt had been committed by a person who took legal action for defamation against the other person because he provided information to a senator for use in proceedings in the Senate. Owing to the unusual nature of the case, and the fact that the person took defamation action on legal advice, the committee decided not to recommend any penalty against the offender.

4.82 This report is significant, in that it identifies circumstances in which the provision of information to a senator may be protected by the Senate's contempt jurisdiction.

4.83 On 4 September 1997 the committee received another reference relating to possible reprisals against a person, for giving documents to a senator who tabled them in the Senate. The reference itself came about as a result of the President's receipt of further documents, which the President laid before the Senate. They contained a complaint by an academic that a university had initiated disciplinary proceedings against him because of his earlier communication to the senator.

4.84 The committee found that the university had committed a contempt of the Senate in taking disciplinary action against the person concerned, and duly notified this adverse finding to the university before reporting to the Senate, as the privilege resolutions require it to do. The university thereupon withdrew its action against the academic. Because of the withdrawal, the committee recommended in its report to the Senate that no penalty be imposed.[80]

80 Senate Committee of Privileges, *72nd report,* PP 117/1998.

4.85 The committee was also critical of the conduct of the academic concerned, although it considered that it should not pursue the question whether contempt was involved. In addition, it drew the attention of all senators to their duty to read the material they are tabling and to take responsibility for it.

4.86 The next case involved a person who had given evidence to a select committee. The managing director of a company alleged that he had received phone threats from another company in the same industry.[81] By the time that the committee received the reference the possible offender had retired and his successor denied the company's intention to threaten the complainant. The committee concluded that the comments made at the time did not warrant further investigation and found that, on the basis of the evidence before it, no contempt of the Senate had been committed.

4.87 Finally, the committee examined a matter deriving from an inquiry of the Rural and Regional Affairs and Transport Legislation Committee. On 2 December 2003, the Senate referred the question as to whether there had been improper interference with a witness before that committee as a result of a submission made by a person to that committee which was critical of certain officers of a company which had entered into an agreement with the Commonwealth. The committee was able to conclude that, on the basis of the evidence before it, a contempt of the Senate should not be found. (And see paragraph 5.43 below.)

Possible contempts involving public officials

4.88 A primary source of advice and information available to senators generally, and particularly in relation to their service on parliamentary committees, are public officials at Commonwealth, state, territory and local levels. It may therefore seem unsurprising that several matters of contempt, involving ministers and their ministerial advisers, and senior public officials and statutory office holders, have come before the Committee of Privileges. At another level, however, the continuing series of matters involving public officials who, by the nature of their profession, should be more aware than most of parliamentary principles, has been of concern to the committee, as evidenced in its reports. The committee's observations and recommendations to address the problem are discussed in Chapter 5.

4.89 What has caused the committee its greatest worry has been the persistence of representation of public officials in cases involving possible interference with, or penalty imposed on, persons giving information to the Senate and parliamentary committees.

4.90 Two of the early matters involved the then Aboriginal Development Commission (ADC). The first involved suggestions that reprisals had been taken against the chairman and the general manager of the ADC as a result of their having given evidence to the Senate Select Committee on the Administration of Aboriginal

81 Senate Committee of Privileges, *86th report*, PP 39/2000.

Affairs.[82] In the following year, a further matter involving a former senior officer of the commission was referred to the committee, alleging that he had been adversely treated as a result of his giving evidence to the same committee.[83] After an extensive inquiry into the first matter, the committee reported that, because of the particular circumstances, no contempt was committed or should be found. However, the committee made clear its view of the responsibilities of members and officers of statutory authorities, although it did not make a formal recommendation. In the second case, the committee found that a contempt was committed, although it did not regard the contempt as serious, and recommended that in the light of the apologies made no further action should be taken.

4.91 One of the more time-consuming matters which the Privileges Committee has dealt with involved the chairman and members of the National Crime Authority (NCA), all of whom were senior lawyers, and their attempts to prevent another member giving information to the joint parliamentary committee established under the National Crime Authority Act to supervise the NCA's activities. One of the NCA members was further accused of giving misleading evidence to the supervisory committee. After several attempts to receive submissions from the various persons involved, the committee held two public hearings to examine the matter. The committee itself, and all except one witness, were represented by counsel. The unrepresented witness, by then the former chairman of the NCA, threatened to take the Committee of Privileges to the High Court to challenge the committee's ruling that he was required to answer questions. The committee adjourned the hearings to enable him to do so, but he did not pursue the action.

4.92 Several features of this inquiry were unusual. In the first place, all the persons concerned in the matter were senior lawyers working at the highest levels of a statutory authority which had a direct relationship with a parliamentary committee. Secondly, the basis of the attempts by such members of the NCA to prevent another of their members from giving evidence to the NCA Committee was their belief that the secrecy provisions of the National Crime Authority Act overrode the protections and requirements of parliamentary privilege.

4.93 Having disabused these members about statutory secrecy provisions overriding parliamentary privilege, the committee found that the members of the NCA had placed restrictions on the member seeking to give evidence and that, when challenged, one member's denial that this had occurred had the effect of misleading the NCA Committee. However, the Privileges Committee determined that it should not find that a contempt had been committed. It was nonetheless concerned about the failure of such highly qualified persons at such senior levels to understand their responsibilities and obligations to the Parliament and its committees, particularly given their organisation's direct relationship with a parliamentary committee. The Privileges Committee pointed out that all witnesses before parliamentary committees,

82 Senate Committee of Privileges, *18th report*, PP 461/1989.

83 Senate Committee of Privileges, *21st report*, PP 461/1989.

particularly persons representing statutory authorities with a close association with a monitoring committee, are under an obligation to take their responsibilities to such committees seriously.

4.94 In summary, the committee was highly critical of the behaviour of the NCA members who had, despite the question of privilege having been brought specifically to their attention, ignored the implications of their actions. It also recommended that ambiguous sections of the National Crime Authority Act should be clarified.[84]

4.95 The committee was similarly concerned when it received a reference of a second matter of possible intimidation, also involving officers at senior levels of a statutory authority. This time, the reference involved the then Australian Securities Commission (ASC), an organisation also in a special relationship with the Parliament through the Joint Statutory Committee on Corporations and Securities, which had been established to scrutinise its activities. ASC officers imposed a penalty on a junior officer by, inter alia, charging him under the Public Service Act for improper conduct, as a result of his having given evidence in a private capacity to the Corporations and Securities Committee.

4.96 The Committee of Privileges found that a contempt had been committed, although one committee member would not have made such a finding in respect of one of the persons involved. While the committee concluded that its inquiry process was sufficient penalty as not to warrant the Senate's taking any action other than to endorse its finding of contempt, the committee was uncomplimentary about the officers and the organisation. Furthermore, in the light of its previous experience with the NCA, it expressed its grave concern at the 'astonishing ignorance within both organisations of officers' rights and obligations in respect of Parliament generally and their own parliamentary committees in particular'.[85]

4.97 The committee also noted that the ASC officers acted on the advice of the Australian Government Solicitor's Office but went on to point out that this did not absolve them from the responsibility to ensure that their actions accorded with well-established rules governing relations with the Parliament. The committee emphasised that 'in this case, as in the case of the National Crime Authority, it was dealing with senior officers of a regulatory agency with a direct relationship with a parliamentary committee who, it is not unreasonable to suppose, would not be prepared to accept ignorance of the law as an excuse for offences against the complex legislation which they administer'.[86]

4.98 Another contentious reference of possible interference with a witness also involved a senior statutory office-holder, the then Comptroller-General of Customs. It was alleged that the Comptroller-General and other officers of the Australian Customs

84 Senate Committee of Privileges, 36th *report*, PP 194/1992.

85 Senate Committee of Privileges, *42nd report*, PP 85/1993, p. 42.

86 ibid.

Service (ACS) had penalised a witness before another joint statutory committee, the Joint Committee of Public Accounts, on account of evidence he had given before that committee. The same witness further alleged that the Comptroller-General and officers had given, or had caused ministers to give in the Senate and before parliamentary committees, false or misleading information in respect of a number of matters.

4.99 The complexity of the issues made this inquiry the most difficult of all that the committee has considered, involving a comparative examination of some 25 000 pages of documentation. The committee was further hampered in its investigations by the time which had elapsed between the alleged intimidation and the alleged misleading information and the reference of the matter to the Committee of Privileges. Having analysed the issues involved, the committee concluded that the witness had been threatened and that the threat constituted a serious contempt. It was, however, unable to discover the source of the threat. It also concluded that the witness had suffered penalty or injury but could not establish whether this was as a result of his giving evidence to the Joint Committee of Public Accounts. Finally, it concluded that the minister's answers in the Senate and evidence given to the committee, although less helpful than they might have been, did not constitute contempt.

4.100 In its report, the committee concentrated on the defensive culture of the ACS, which the committee considered had caused much of the difficulty in dealing with a substantial number of persons and scrutiny organisations including the Public Accounts Committee and successive Senate committees examining the ACS estimates. The committee also noted that a total restructure of the ACS was being implemented by the time it was ready to report and expressed optimism that the changes would lead to a positive cultural change. It further recommended that the Senate Economics Legislation Committee continually scrutinise the implementation of the recommendations contained in the review of the Customs Service,[87] and linked the current report to another highly critical report on the behaviour of customs officers before the committee examining ACS estimates at that time.[88] As with the NCA and ASC reports, the committee made wide-ranging comment on and expressed concern about organisational weaknesses which it found during its inquiry. The Customs Service now falls within the responsibilities of the Legal and Constitutional Legislation Committee, which continues scrutiny of the organisation both through the estimates process and through its general scrutiny of departments and agencies.

4.101 The committee's next reference involving possible penalty to a witness arose from a newspaper report which alleged that a House of Representatives minister had refused to appoint a person to a position with the Australian Industrial Relations Commission because the person had been critical of government policies in evidence to the then Senate Employment, Education and Training Committee. Before the matter was referred to the committee, the Leader of the Government in the Senate made a

87 Senate Committee of Privileges, *50th report*, PP 322/1994.

88 Senate Committee of Privileges, *46th report*, PP 43/1994. And see paragraph 4.36.

statement to the Senate, on behalf of the minister concerned, which formed the basis of the minister's later submission to the committee.

4.102 In accordance with its normal practice the committee invited responses from the person who had allegedly been refused the appointment and also from a person referred to in the minister's statement, seeking confirmation of the points made. All confirmed the substance of the statement. The committee concluded that, in the light especially of the person's categorical denial that he was penalised or injured as a result of his giving evidence before the Employment, Education and Training Committee, it should not make a finding that a contempt had been committed.[89] The committee was able to examine the actions of the member of the House of Representatives in this instance because he was acting in his ministerial capacity, not as a member. This understanding of the committee's capacity to examine contempt has also enabled it to examine later matters of possible ministerial intervention in other committee proceedings.[90]

4.103 Another substantial inquiry into possible interference with a witness concerned a doctor at the Northern Territory government-administered Royal Darwin Hospital, who gave evidence to a Senate committee on the hospital's state of preparation to deal with a nuclear accident. Immediately following the doctor's evidence to the committee, the Northern Territory Minister for Health issued a press statement which concluded with the words 'if [the doctor concerned] does not like the situation, I have no doubt that Royal Darwin Hospital would be able to scrape by without him'. The doctor was interviewed the next day for a resident medical officer position for the following year and was initially not offered a position – a situation which the committee was advised was virtually unknown at the hospital.

4.104 The committee took public evidence on this matter. The committee aborted the hearings in Canberra when counsel representing the Northern Territory Government produced substantial additional documentation shortly before the committee was due to meet, thus preventing both the committee and the other witnesses from considering it properly. After taking further public evidence in Darwin from the doctor concerned, officers from the hospital and ministerial staff, the committee concluded that, while the doctor was clearly threatened and penalties were imposed, the evidence showed that the threat and penalties could not be causally linked with his giving evidence to the Senate committee.[91]

4.105 This report built on comments in previous reports about the pattern of behaviour developed by institutions to deal with perceived troublemakers. The committee drew particular attention to its previous endorsement of views expressed in the report of the Senate Select Committee on Public Interest Whistleblowing. The committee can but hope that its consistent observations, derived from its

89 Senate Committee of Privileges, *51st report*, PP 4/1995.

90 See paragraph 4.97 and Senate Committee of Privileges, *84th report*, PP35/2000.

91 Senate Committee of Privileges, *55th report*, PP 134/1995.

parliamentary case law experience, will provide guidance to organisations, particularly public institutions, in these matters.

4.106 The next report involving possible interference with persons giving information to the Senate or a committee involved the question whether the Attorney-General or any other person sought improperly to influence a statutory officer to refrain from giving evidence to a parliamentary committee.[92]

4.107 Briefly, it was alleged that the Attorney-General and his officers had sought improperly to dissuade the President of the Australian Law Reform Commission (ALRC) from presenting a submission and appearing before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, in respect of the Native Title Amendment Bill 1997. Following consideration of written material from or in relation to all persons concerned, the committee concluded that no contempt was committed, because the Attorney-General and his officers had not sought by improper means to influence the evidence of the ALRC, but had acted in ignorance of the parliamentary dimension of the matter. It also recommended that the Senate:

- refer ambiguities in the powers and functions of the ALRC to the Legal and Constitutional Legislation Committee[93]
- reaffirm earlier resolutions of the Senate, based on the recommendation of the committee, that heads of departments and other agencies and senior executive officers of the Public Service should undertake study of parliamentary principles, to avoid committing offences through ignorance
- require all departments and agencies to table by 1 December 1999 reports on their compliance with the resolution.

4.108 Following the Senate's adoption of the report on 1 December 1998, the chair of the committee notified all ministers of the requirement, while the Clerk of the Senate similarly notified departmental secretaries. The Committee of Privileges reported on the outcome of the Senate order on 13 April 2000.[94]

4.109 A case mentioned previously, in paragraphs 4.49 and 4.58 also involved an element of potential injury to the reputation of scientific witnesses to the Community Affairs References Committee's inquiry into CJD. On this aspect of the inquiry, the Privileges Committee concluded that it was beyond its competence to judge whether

92 Senate Committee of Privileges, *73rd report*, PP 118/1998.

93 That committee presented an interim report on the reference on 20 March 2003 but a motion not to proceed further with the reference was agreed to on 24 March 2003, *Journals of the Senate*, 2003, p. 1634.

94 Senate Committee of Privileges, *89th report*, PP 79/2000.

the witnesses were injured in consequence of their evidence; it considered that peer review was the appropriate answer to this matter.[95]

4.110 An unusual matter arose as a result of a Senate references committee hearing of evidence from local government representatives in country New South Wales. After a public hearing of the Employment, Workplace Relations, Small Business and Education References Committee in July 1999, one witness asserted that he had been subjected to intimidation as a result of the evidence he had given. The information which the references committee provided when referring the matter left the Committee of Privileges in no doubt that there was a clear pattern of interference with the witness's attempts to give evidence to the committee and that he was penalised for having done so. The Committee of Privileges concluded that the witness's supervisor, acting on legal advice, had both improperly interfered with and penalised the witness who had given evidence before the references committee.

4.111 The Committee of Privileges, while sympathetic to the circumstances in which the supervisor found himself, was obliged to find that a contempt had occurred. It recommended, however, that no penalty should be imposed, on the basis that the local government authority and the supervisor had already been so punished, both financially and through the committee's inquiry, as to suggest that any further recommendations for penalty were superfluous. The committee also made observations on the somewhat cavalier conduct of the proceedings of the references committee, suggesting that had the arrangements been more precise the whole matter might not have arisen.[96]

4.112 The next report[97] under this heading examined two matters of possible contempt, involving possible misleading evidence and improper interference with witnesses. This involved the appearance of a senior public servant and statutory office holders before the Employment, Workplace Relations, Small Business and Education Legislation Committee examining the estimates of the Employment Advocate. In setting out the basis for its conclusions that no false or misleading evidence had been given before the legislation committee, the Committee of Privileges noted, however, that all persons involved had given convoluted and complex answers, both orally and in writing over a long period, to senators' questions. The committee noted that it was understandable that senators could have had the impression that they had been misled. In respect of possible improper interference with witnesses, the committee found that there was no evidence to suggest that any such interference had occurred. In relation to both matters it found that there was no evidence to support any conclusion that a contempt of the Senate had occurred.

4.113 The final report on a public servant's possible improper interference with a witness before a parliamentary committee was referred to the committee on

95 Senate Committee of Privileges, *78th report*, PP 183/1999.

96 Senate Committee of Privileges, *85th report*, PP 36/2000.

97 Senate Committee of Privileges, *96th report*, PP 118/2001.

16 May 2002.[98] The question concerned whether an officer of the Department of the Prime Minister and Cabinet attempted improperly to interfere, or actually interfered, with a Royal Australian Navy (RAN) officer witness before the Select Committee on a Certain Maritime Incident. The matter had been raised by a Rear Admiral with the Minister for Defence, who in turn referred it to the Prime Minister's office. The public servant concerned wrote to the RAN officer reassuring the officer that there was no intention to interfere with any evidence he might give, but this, too, led to concerns that a matter of privilege might be involved.

4.114 The Committee of Privileges, having received written documentation from all relevant persons, was able quickly to conclude that no contempt had been committed and expressed concern at the manner in which the whole matter had arisen.

Possible failure to comply with the resolutions relating to the registration of interests

4.115 The committee has an additional and particular jurisdiction under the Senate's resolutions of 17 March 1994 relating to the registration of interests. The resolution establishes a regime for all senators to provide statements to the Registrar of Senators' Interests of a range of registrable interests,[99] within 28 days of the meeting of a new Senate after 1 July following an election, and in certain other circumstances. Senators are also required to notify the Registrar within 28 days of any alteration to their registrable interests. Knowingly failing to register interests in accordance with the resolution or knowingly providing false or misleading information to the Registrar of Senators' Interests is a serious contempt, to be investigated by this committee before being dealt with by the Senate.

4.116 The committee's first inquiry under the resolutions was the subject of a recent report.[100] A similar reference proposed in 1998 was given precedence by the President but defeated in the Senate on party lines,[101] one of only two proposed referrals to the committee to be negated by the Senate on a partisan basis.[102]

4.117 The inquiry involved allegations by one senator that a senator representing another political party had failed to register alterations to his statement of interests with respect to shareholdings within the 28 day deadline. It was alleged that the senator concerned had declared the purchase of some shares, but not their sale, and in other cases had declared the sale of shares but not their purchase. In another instance,

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98 Senate Committee of Privileges, *106th report*, PP 344/2002, August 2002.

99 Registrable interests are defined in Resolution 3 of the resolutions relating to senators' interests, *Standing Orders and Other Orders of the Senate*, November 2004, pp. 144-45.

100 Senate Committee of Privileges, *123rd report*, PP 224/2005.

101 *Journals of the Senate*, 1988, pp. 3462-3.

102 The other being on 7 September 2005, *Journals of the Senate*, 2005, p. 1050. The procedures adopted in 1988 for dealing with privilege matters were designed to take such matters out of partisan controversy. Except in rare cases, they have generally been successful in doing so.

the senator had declared the sale of shares but company records indicated that he still held shares in that company. The senator concerned did not dispute the facts but claimed that he had made inadvertent errors, exacerbated by the difficulty of complying with the 28 day time frame for such declarations.

4.118 The issue for the committee was whether the senator concerned knowingly failed to comply with the resolutions, an essential element of the several 'serious' contempts created by the resolutions. Resolution 3 of the 1988 privilege resolutions requires the committee to *take into account* whether a person who committed any act which may be held to be a contempt knowingly committed that act (or had any reasonable excuse for the commission of that act). In practice, however, there is little difference between the contempts created by the senators' interests resolution and those created under the privilege resolutions, as the committee has always taken into account a person's intention and circumstances in making its findings.

4.119 In this case, the senator concerned denied committing the breaches knowingly and the senator making the allegations refrained from asserting that he had done so. In the circumstances, and in the absence of any other relevant information, the committee concluded that the senator concerned had failed to comply with the resolutions but that he had not done so knowingly and therefore no contempt should be found.

4.120 As the first inquiry by the committee into a possible contempt under the senators' interests resolution, this was an important opportunity for the committee to establish a framework for how it would approach such matters in future.