The Senate

Committee of Privileges

Parliamentary privilege

Precedents, procedure and practice in the Australian Senate 1966—2005

125th Report

December 2005

ISSN 1038-9857
ISBN 0 642 71601 3

First published December 1991 (Report on Committee's Work since Passage of Privilege Resolutions of 25 February 1988), Senate Committee of Privileges 35th Report
Second edition June 1996 (Committee of Privileges 1966-1996: History, Practice and Procedure) Senate Committee of Privileges 62nd Report
Third edition June 1999 (Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1966-1999) Senate Committee of Privileges 76th Report
Fourth edition August 2002 (Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1966-2002) Senate Committee of Privileges 107th Report

This document was prepared by the Committee of Privileges, and printed by the Senate Printing Unit, Parliament House, Canberra

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PREFACE

This is the fifth edition of the Committee of Privileges' general report on its operations. The committee believes it is useful to collect in one place the primary materials of parliamentary privilege, together with the significant body of case law accumulated through so many inquiries. This edition includes coverage and analysis of all reports between the publication of the last edition (in August 2002) and December 2005, 17 reports in all, as well as revision of material published in earlier editions.

Some issues which have long been of concern to the committee were brought to a satisfactory conclusion in the period covered by this latest edition. Procedures for the execution of search warrants on the offices of senators and members of the House of Representatives were finalised under a memorandum of understanding signed by the Presiding Officers, the Attorney-General and the Minister for Justice and Customs early in 2005. Yet more cases of unauthorised disclosure of draft reports of committees were referred to the committee but were generally incapable of a satisfactory resolution. In response, the committee undertook a radical re-examination of the basis of the contempt of unauthorised disclosure of committee proceedings. The recommendations of its 122nd report, adopted in the form of a sessional order in October 2005, were designed to ensure that serious cases of unauthorised disclosure, particularly of in camera evidence, would continue to be referred to the committee, but that committees would be encouraged to take greater responsibility for their own internal discipline. The conclusions of the 122nd report are covered in detail in chapter 5 and the committee expects that it will conduct a review of these arrangements before the end of the current Parliament.

This edition also covers the committee's first inquiry into an alleged contempt under the resolutions relating to the registration of senators' interests, as well as a report on the privilege implications of joint meetings of the Houses, held to receive addresses from foreign heads of state.

For much of the period covered by this report, the committee was supported by Miss Anne Lynch, its secretary since 1988 and regular provider of research assistance since joining the Department of the Senate in 1973. Anne retired in June 2005 after more than 32 years' service to the Senate, during which time she was an internationally acknowledged expert on parliamentary privilege. The committee records its gratitude for her service and its best wishes for the years ahead.

John Faulkner
Chair

CHAPTER 1 – PRIVILEGE 1901-1987

Meaning of privilege[1]

1.1 The privileges of Parliament are immunities from the operation of certain laws conferred in order to ensure that the duties of members as representatives of their constituents may be carried out without fear of intimidation or punishment, and without improper impediment.

1.2 For example, members of Parliament when speaking in the Parliament, and witnesses appearing before parliamentary committees, are immune from suit or prosecution under the laws of defamation. While such freedom has given rise to some degree of disquiet in the community, it is generally agreed that the necessity for freedom of speech in Parliament and its committees outweighs any countervailing danger of unfairness in the misuse or abuse of the freedom.

1.3 As a submission by the Department of the Senate to the Joint Select Committee on Parliamentary Privilege pointed out, a further confusion has arisen between the immunities of the Houses of Parliament and their members on the one hand, and the powers of the Houses, particularly the power to punish contempts, on the other. The submission goes on to explain the distinction in the following terms:

> The power of the Houses in respect of contempts is a power to deal with acts which are regarded by the Houses as offences against the Houses. That power is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law *(Transcript of Evidence, 3 August 1982, pp. 14-15)*.[2]

1.4 In other words, when a House of the Parliament is constrained to examine, and perhaps punish persons for, acts which impede the proper operation of that House, it performs a function similar to that of a court to protect the integrity of its proceedings. It is appropriate that the Parliament, the primary law making body, should have the powers to protect its proceedings.

Scope of the report

1.5 The Joint Select Committee on Parliamentary Privilege reported to both Houses in 1984[3] recommending changes to the law of parliamentary privilege. Certain of these changes were given legislative effect through the passage of the

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1 This attenuated definition of privilege is based on a more detailed definition given in the four previous reports.

2 Senate Committee of Privileges, *35th report*, PP 467/1991, pp. ix-x.

3 PP 219/84.

Parliamentary Privileges Act 1987; other non-legislative changes were effected by the passage of the Senate Privilege Resolutions in February 1988.

1.6 The workload of the Senate Committee of Privileges, which was established in 1966, increased significantly since this codification of the law and practice of privilege. In order to place the activities of the Committee of Privileges in the context of parliamentary privilege generally, this chapter describes the operation of privilege from 1901 to 1965, before the establishment of the committee. It then describes the work of the committee from its establishment in 1966 to 1987, before the introduction of the Privileges Act and resolutions. Discussion of the Act and resolutions and of all cases considered by the committee following the passage of the Act and resolutions form the subject-matter of later chapters.

Privilege 1901-1965

1.7 In the first sixty-five years of the Senate, 17 cases of privilege were raised. They included reflections upon the Senate and senators, unauthorised disclosure of evidence given to a Senate committee, and alleged bribery or intimidation of senators. In all but two cases, the matter was resolved on the floor of the chamber: the related motion was withdrawn, negatived or ruled out of order, or no action was taken.

1.8 In one case, conducted in the chamber, the Senate concluded that a grave breach of privilege had been committed. This was in relation to the sending of an intimidatory telegram from the secretary of the Linesmen's Union, Mr McCarthy, to the President of the Senate on 14 March 1917. Mr McCarthy intimated that, if the Senate persisted in delaying the passage of the supply bills, his members would go on strike. The matter was raised in the Senate on 15 March and debated on the following day. The *Journals* recorded the outcome of the debate as follows:

> [I]n view of the fact that no such attempt to influence the deliberations of the Senate had occurred before, the Senate is of the opinion that the said McCarthy in forwarding the telegram was ignorant of, and did not appreciate, the seriousness of the offence he was committing, and therefore deems it sufficient to affirm that the telegram in question, both in its terms and purpose, constitutes an offence, and that, if repeated, other action will be taken.[4]

1.9 This approach has been the template for the relatively tolerant approach taken by the Senate and its Privileges Committee towards persons who are not, and could not reasonably be expected to be, familiar with Senate operations.

1.10 The second case involved the only instance of committee examination of possible contempt before 1971. This occurred early in the life of the Senate, when in 1904 a select committee was appointed to investigate the matter of the alleged harassment of Senator Lt-Col John Neild by Major-General Hutton. Although the committee concluded that Major-General Hutton had recommended that the senator be

4 *Journals of the Senate,* 1917, p. 562.

placed on the retired list of the military forces partly in consequence of speeches delivered in the Senate, and had attempted to interfere with Senator Neild in the discharge of his duties as a senator, the committee concluded that the Major-General's actions did not amount to intimidation.[5] This report represents the general approach which has subsequently been followed by the Senate and the Committee of Privileges in dealing with possible intimidation of senators, the 1904 committee probably taking the view that senators are capable of looking after themselves.

House of Representatives Committee of Privileges

1.11 On 7 March 1944 in the House of Representatives, Prime Minister Curtin moved a motion to adopt a new standing order, 322A,[6] which provided for the appointment at the commencement of each Parliament of a seven-member committee of privileges. The motion was agreed to, members were appointed and the newly-formed committee received its first reference on the same day: 'That the matter of Privilege, brought before this House on 25th February by the Honourable Member for Barker regarding the opening by censors of letters addressed to Members of this House, be referred to the Committee of Privileges for enquiry and report'.[7]

1.12 The *Hansard* record does not indicate why this particular matter should have necessitated the formation of a standing committee to deal with it; nor did the committee recommend further action on the matter referred.

1.13 Several matters were referred to the House of Representatives Privileges Committee in the next twenty years, including most markedly the cases of Mr Fitzpatrick and Mr Browne in 1955, leading ultimately to their imprisonment — the only time in the history of the Australian Parliament that such action has occurred.

1.14 Still the Senate did not follow suit, and indeed appears not to have considered the establishment of a comparable committee until 1965, following another privilege case in the House of Representatives. Eight Australian newspapers had published an advertisement copied from an official photograph showing the Leader of the Opposition, Mr Arthur Calwell, at the table of the House, but with the addition of words advertising a motor vehicle issuing from his mouth. Mr Calwell raised the matter in the House on 18 August 1965 and it was duly referred to the Committee of Privileges.[8] While the committee found a contempt, it did not recommend further action. However, the House recorded a censure and reprimand against the offending newspapers and ordered that they print the resolution.[9]

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5 *Journals of the Senate,* 1904, p. 564.

6 Now 325. *House of Representatives Standing and Sessional Orders* as at 16 September 2002.

7 House *Votes and Proceedings*, 1944, p. 80.

8 House *Votes and Proceedings*, 1964-66, p. 347.

9 House *Votes and Proceedings*, 1964-66, pp. 373, 386.

The establishment of the Senate Committee of Privileges

1.15 Whether the reference of this matter inspired action in the Senate is uncertain, although the Senate committee was first proposed by Senator George Branson on 26 August 1965, after the reference to the House of Representatives committee but before it reported. The following exchange took place during question time:

> Senator BRANSON — My question, with due respect, is addressed to you, Mr President. Will you, Sir, give consideration to the setting up of a permanent standing committee to consist of seven senators to be appointed at the commencement of each Parliament to inquire into and report upon complaints of breach of privilege which may be referred to it by the Senate? I believe that this is done in the House of Representatives at the commencement of each Parliament. By this means it would be possible for the Senate to deal speedily with any questions of privilege.
>
> The PRESIDENT — The honourable senator's question is interesting and has considerable merit. Fortunately, we have not had to worry about a Privileges Committee in the past. The question requires a good deal of thought and consideration. I shall be pleased to refer it to the Standing Orders Committee.[10]

1.16 The Standing Orders Committee duly considered the matter, along with a number of other procedural matters including rules for parliamentary questions and the appointment of committees on a duration-of-Parliament rather than a sessional basis. In recommending the committee's establishment, along with changes to other procedures, the report echoed Senator Branson's justification of a privileges committee, noting that the advantage of a standing committee was that the Senate 'would be in a position to deal speedily with any Question of Privilege which might arise'.[11]

1.17 The recommendation to establish a privileges committee was regarded as so uncontentious that it was agreed to without debate on 2 December 1965,[12] with all the changes to Standing Orders to come into effect as at 1 January 1966. Thus the Committee of Privileges came into being, on paper at least, on that date. It preceded by nearly five years the establishment of a comprehensive legislative and general purpose standing committee and estimates committee system but followed at a considerable distance the Standing Committee on Regulations and Ordinances, established in 1932.

1.18 In the measured way characteristic of the Senate's approach to the question of privilege, it took more than a year to appoint members of the committee. This occurred on 5 April 1967, soon after the 50th session of the Parliament began.[13] The

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10 Senate *Hansard*, 26 August 1965, p. 128.

11 *Journals of the Senate*, 1964-66, p. 674.

12 *Journals of the Senate*, 1964-66, p. 427.

13 *Journals of the Senate*, 1967-68, p. 50.

members were Senators Branson, Cant, Cormack, Drake-Brockman, Morris, Poke, and Wheeldon, who between them had nearly half a century of parliamentary experience.

Reports 1971-1987

Unauthorised disclosure of committee report

1.19 The Committee of Privileges 'stood ready' to receive references for a further four years. It was not until 4 May 1971 that the committee received its first reference. Not surprisingly, given the increased use of Senate committees during the 1960s, culminating in the establishment of the comprehensive committee system in 1970, this reference concerned the premature publication of a report of a select committee. The chairman, Senator Drake-Brockman, tabled the Privileges Committee report in the Senate on 13 May 1971.[14] Several features of the report are noteworthy, in that many of the issues have been raised in later proceedings.

1.20 At the commencement of the committee's inquiry, one member, Senator Wheeldon, disqualified himself from proceedings on the ground that he was a member of the select committee which had reported the premature release to the Senate. In contrast, a second member of that committee, Senator Branson, did not do so. The question whether members of committees which have referred matters to the Privileges Committee should disqualify themselves from participation on the Privileges Committee has been considered by the committee several times since, and will be discussed further in Chapter 5.

1.21 In 1971, the Committee of Privileges made no attempt to establish who might have given the material to the offending newspapers: the editor and publisher of the newspapers concerned were regarded as culpable and the offence as a strict liability offence. In all subsequent cases, the committee has considered itself bound to attempt to find the source of the improper disclosure, and has recommended that any committees the documents or proceedings of which have been improperly disclosed should themselves investigate the source before making a decision to refer a matter to the committee.[15]

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14 Senate Committee of Privileges, *1st report*, PP 163/1971, *Journals of the Senate*, 1971, pp. 605-6.

15 See Senate Committee of Privileges, *20th report*, PP 461/1989. The Senate adopted this recommendation in 1996, following consideration of a further Committee of Privileges report. Continuing Order No. 3, *Standing Orders and Other Orders of the Senate*, November 2004, p. 120. See also Senate Committee of Privileges, *122nd report*, PP 137/2005 which recommended that committees take a more rigorous approach to unauthorised disclosures to ensure that only the more serious cases were referred to the Committee of Privileges. This recommendation, after being scrutinised by the Procedure Committee, was adopted by the Senate on 6 October 2005, *Journals of the Senate*, 2005, pp. 1200-1202. See also paragraphs 5.36 to 5.41.

1.22 In this first inquiry, no public evidence was taken and the only point at issue was the contrition of the offenders. By contrast, in a case of unauthorised disclosure undertaken by the committee in 1984, almost all evidence was taken in, or made, public and all witnesses at hearings held by the committee were sworn. These procedures, as refined by privilege resolution 2, have been followed since.

1.23 In its 1971 report, the committee asserted that the Senate had the power to commit to prison, to fine, to reprimand or admonish or to otherwise withdraw facilities held by courtesy of the Senate in and around its precincts. One element of this assertion was challenged during the 1984 case, that is, the Senate's power to fine. As a result, the committee recommended that the power to fine be clarified by legislation;[16] this was achieved by the passage of the Parliamentary Privileges Act in 1987.

1.24 Despite the apologies by the editor and publisher of the relevant newspapers, the 1971 committee recommended that they be reprimanded before the Bar of the Senate and that any further breach be met with a heavy penalty. The committee has recommended that penalties be imposed only once since 1971,[17] despite several findings of contempt having been made. In addition it has recommended penalties if certain conditions are subsequently met.[18] In some cases the committee has not recommended any penalty because the persons or organisations against whom a finding of contempt has been made have apologised.[19]

1.25 The 1971 report was adopted on the same day it was tabled,[20] and the persons concerned attended at the Bar of the Senate for reprimand by the President the following day.[21] Present procedures require seven days' notice before a motion may be moved to determine that a person has committed a contempt or to impose a penalty for contempt,[22] and the only further reprimand was delivered in writing as the committee had recommended.[23]

Claims of executive privilege

1.26 The next matter on which the committee reported occurred in 1975, at the height of controversy between the Senate and the executive. The question whether the then government had been involved in improper loan dealings was the subject of

16 See paragraph 1.38.

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

18 Senate Committee of Privileges, *8th report*, PP 239/1985; *54th report,* PP 133/1995 and *99th report*, PP 177/2001.

19 Senate Committee of Privileges, *6th report*, PP 137/1981; *42nd report,* PP 85/1993; *72nd report*, PP 117/1998.

20 *Journals of the Senate*, 1971, p. 606.

21 *Journals of the Senate*, 1971, p. 612.

22 Standing Order 82.

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

much debate throughout the year, and contributed to the dismissal of the government by the Governor-General on 11 November 1975.

1.27 In July of that year, both Houses of the Parliament held special sittings to examine the issue. The Senate summoned several public servants, including the departmental heads of Treasury, the Attorney-General's Department and the Department of Minerals and Energy, together with the Solicitor-General, to appear at the bar of the Senate and answer questions relating to the matter. All attended at the bar in response to the Senate's summonses, but all public servants refused to answer any questions of substance, citing instructions from their respective ministers, and referring to a letter from the Prime Minister, read to the Senate by the President, claiming crown privilege in respect of the matters.[24] The Solicitor-General, while noting that he was not subject to any ministerial instructions, observed:

> The Crown has claimed its privilege. As one of its Law Officers, I may not consistently with my constitutional duty intentionally act in opposition to its claim.[25]

1.28 It was clear that the Senate did not wish the public officials to be punished for the actions of government ministers — a view which has been a feature of Senate concerns and actions subsequently. Consequently, the question before the Senate became whether the claims made by the Prime Minister, the Treasurer and ministerial colleagues had any legitimacy, and it was this question which was referred to the Committee of Privileges on 17 July 1975.

1.29 The committee report, tabled by the Chairman, Senator Button, on 7 October 1975, is unique. It is the only one of the 124 Privileges Committee reports which consists of a majority and a dissenting report on party lines; it also features five addenda, composed by five of the seven members singly or in various combinations. The government members found that no breach of privilege was involved, while the minority opposition senators concluded that claims of executive privilege were misconceived, although they recommended that no action should be taken by the Senate.

1.30 While the reports, majority and minority, reflected the political exigencies of the time, one feature of the reports, and of the proceedings leading to their publication, which has characterised the operations of the Privileges Committee over the nearly forty years of its existence, is that there was no acrimony within the committee, and each of the reports was balanced and carefully argued.

1.31 Within a week of tabling, the Privileges Committee reports were overtaken by events, with the Senate's withholding of supply taking precedence on the political agenda. As a result, the reports were not debated in the few weeks before both Houses of the Parliament were dissolved on 11 November 1975. In February 1977, the author

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24 Senate *Hansard*, 15 July 1975, pp. 2727-31.

25 Senate Committee of Privileges, *2nd report*, PP 215/1975.

of the dissenting report, Senator the Hon. Reginald Wright, by then a government senator, moved a motion for the adoption of the dissenting report.[26] The Parliament was prorogued before the motion could be debated and the report was not again considered.

Security measures at Parliament House

1.32 During the years between 1975 and 1984, privilege matters were sporadic. In the Senate, privilege cases have never been concerned with the dignity of senators as such and, as the 1904 case illustrates, the Senate has generally taken a robust attitude towards what might constitute an improper interference with a senator. Nevertheless, matters to do with the proper functioning of the Senate and the possible obstruction of senators in the performance of their duties were the subject of several committee inquiries. One concerned security in Parliament House. In 1978 the committee considered the establishment of reasonably stringent security measures and concluded that no question of privilege was involved in their implementation.[27]

Unparliamentary language used in debate

1.33 The next report of the committee concerned the quoting of unparliamentary language in debate. The committee concluded that the question of the incorporation in *Hansard* of words which would not be permitted in debate was not a matter of privilege and recommended that the Senate consider asking the Standing Orders Committee to examine the matter.[28]

Detention and harassment of senators

1.34 The committee's following report, tabled in June 1981, concerned the imprisonment of Senator Georges, a senator for Queensland. While the committee concluded that Senator Georges' imprisonment did not attract the privilege of freedom from arrest, it made recommendations, agreed to by all Australian governments, concerning notification to the Senate of the imprisonment of senators.[29] A refinement of the procedures, to cover proceedings on the arrest of senators, was recommended by the same committee in relation to the same senator on 5 December 1986,[30] and has similarly been followed by Commonwealth and state authorities.

1.35 The last matter of this nature considered by the committee during this period concerned the harassment of a senator by phone calls. Calls were traced to the home of the staff member of another senator. In its report, tabled on 11 June 1981, the committee found that a contempt had occurred but, in view of an apology made by the

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26 Senate *Notice Paper*, 15 February 1977, p. 3701.

27 Senate Committee of Privileges, *3rd report*, PP 22/1978.

28 Senate Committee of Privileges, *4th report*, PP 214/1979.

29 Senate Committee of Privileges, *5th report*, PP 273/1979.

30 Senate Committee of Privileges, *10th report*, PP 433/1986.

staff member concerned, did not recommend any action except the adoption of the report.[31]

Improper disclosure of in camera evidence and of proposed amendment to bill

1.36 The reference which revolutionised the Senate's approach to privilege and which led at least in part to the procedures which the Committee of Privileges now follows occurred in June 1984.[32] This matter, which involved the unauthorised publication of in camera evidence received by the Senate Select Committee on the Conduct of a Judge, constituted one of the most serious matters of privilege ever to arise in the Senate, and its ramifications were considerable.

1.37 Briefly, a serving magistrate in the New South Wales courts gave in camera evidence to the select committee that was subsequently published by the now defunct *National Times*. The matter was referred by the Senate on the motion of the chairman of the select committee, Senator Tate. The *National Times* repeated its act of publishing in camera proceedings after being notified of the referral of the first matter. Consequently, these publications were themselves referred to the Privileges Committee, on the motion of its chairman, Senator Childs. Newspaper articles questioning the actions of a member of the select committee were referred to the Privileges Committee on the same day, on the motion of the member concerned, but were not pursued.

1.38 The Privileges Committee examination of the improper publication was exhaustive, initially involving taking sworn evidence, most of which was publicly presented, from among others members and staff of the select committee, and the magistrate, as to the possible source of the disclosure. In giving both written and oral evidence to the committee, Senator Tate declared that the publication had the potential to impede the inquiry in the future and also that there was potential immediate damage to the select committee's work.

1.39 At a further public hearing, the Privileges Committee took evidence from the editor, publisher and author of the articles. The structure of that hearing was not dissimilar to court proceedings, with counsel representing the witnesses. The only prohibition was on cross-examination.

1.40 The committee found that a serious contempt had been committed by the editor, publisher and author of the articles. It was not able, however, to discover the source of the disclosure and thus whether the disclosure was deliberate or inadvertent. The committee's report was tabled on 17 October 1984, and was adopted without debate a week later.

1.41 The committee decided to report separately on the question of penalties arising from its conclusions after it gave the opportunity for further submissions by

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31 Senate Committee of Privilege, *6th report*, PP 137/1981.

32 Senate Committee of Privileges, *7th report*, PP 298/1984.

the persons affected by its findings. An election then intervened, and it was not until February 1985 that the committee had the opportunity to consider the question of penalty. The committee, with membership identical to that in the previous Parliament, held further hearings to receive submissions from counsel appearing on behalf of the newspaper. It recommended that the publishers be placed on what in effect was a good behaviour bond for the life of the Parliament. The committee also suggested that, as the Senate's 1971 assertion of its power to impose fines was under challenge, legislation be introduced to put the power to impose a fine beyond doubt.[33] The report was again unanimous, but the Senate did not consider it between its tabling on 23 May 1985 and the simultaneous dissolution of both Houses more than two years later. However, the power to fine was declared in the Parliamentary Privileges Act in 1987, in accordance with the committee's recommendation.

1.42 The last privilege case reported by the committee before the passage of the Parliamentary Privileges Act and the Senate's privilege resolutions of 1988 involved the improper disclosure and misrepresentation by a departmental officer of an amendment prepared by a member of the Australian Democrats in the Senate. While in its report, tabled on 16 September 1985, the committee recommended that the matter be not further pursued, it was critical of the actions of the officer.[34] The committee has followed this precedent, of being critical of what it has regarded as inappropriate behaviour by persons the subject of references to it without finding a contempt, in several of its reports since.

33 Senate Committee of Privileges, *8th report*, PP 239/1985.

34 Senate Committee of Privileges, *9th report*, PP 506/1985.

CHAPTER 2 – *PARLIAMENTARY PRIVILEGES ACT 1987* AND THE SENATE PRIVILEGE RESOLUTIONS

Passage of Parliamentary Privileges Act and Senate Privilege Resolutions

2.1 The passage of the *Parliamentary Privileges Act 1987*, and the agreement by the Senate on 25 February 1988 to a series of eleven privilege resolutions, represented a watershed in the history of privilege matters in the Senate. The passage of the Act was designed to confirm what had always been assumed to be the scope of freedom of speech in Parliament. The necessity for the declaratory enactment derived from unusual judicial interpretations, by two judges of the Supreme Court of New South Wales, of the position concerning the use of proceedings in Parliament during court proceedings. Unlike previous judgments on the question, the two judgments indicated that words spoken in parliamentary proceedings could be used against a person in subsequent court proceedings. Problems with some judicial interpretations of the Parliamentary Privileges Act have continued to the present day, as will become apparent in later chapters.

2.2 While the need to make a corrective declaration provided the impetus for the passage of the Act, the opportunity was also taken to bring into effect changes to the law partly based on recommendations of the Joint Select Committee on Parliamentary Privilege,[1] tabled in the Senate and the House of Representatives in October 1984, which required legislation for their operation. The proposal to appoint the joint committee was initiated in the House of Representatives in March 1982, in order to review, and report whether any changes were desirable in respect of:

- the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the Members and the committees of each House;
- the procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined; and
- the penalties that may be imposed for breach of parliamentary privilege.[2]

The Senate agreed to the proposal on 29 April 1982.[3]

2.3 The committee had not reported by the time both Houses of Parliament were dissolved in February 1983, but was re-established early in the new Parliament.[4] Despite the change of government which had occurred following the March 1983 election, the chairman and deputy chairman of the committee, the latter of whom was by then Attorney-General, remained in those positions for the duration of the inquiry.

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1 Joint Select Committee on Parliamentary Privilege, *Final report*, PP 219/1984.

2 House *Votes and Proceedings*, 1980-83, pp. 805-6.

3 *Journals of the Senate*, 1980-83, p. 884.

4 House *Votes and Proceedings*, 1983, pp. 52-3; *Journals of the Senate*, 1983, pp. 63-4.

The wide-ranging report of the committee concluded, as its primary recommendation, that the exercise of Parliament's penal jurisdiction should be retained in Parliament. It further recommended that, other than the abolition of defamatory contempts and the removal of each House's power to expel its members, no substantive changes be made to the law of contempt. It also recommended that each House codify its own proceedings, for the general information of persons who might be affected by contempt proceedings or by being named by members of either House.[5]

2.4 The report set out the matters which required changes by parliamentary enactment under section 49 of the Constitution, or by amendments to the standing orders of each House, and changes to be implemented by special resolutions.

2.5 No action was taken on the recommendations of the joint committee until 1986, when the need to declare the privileges of Parliament became imperative as a result of the decisions made in the New South Wales courts, referred to above,[6] which impinged upon what had previously been regarded by all legislatures as the scope and protections of privilege. Wide consultations were held both within Australia and with overseas Parliaments, resulting in the introduction of the Parliamentary Privileges Bill in the Senate by the President of the Senate,[7] the first occasion in the Commonwealth Parliament on which a bill had been introduced by a presiding officer. Following its passage through the Senate, the Bill was introduced in the House of Representatives by the Attorney-General, supported in debate by the Speaker.[8] The Bill secured passage through the House in the first half of 1987,[9] and came into operation on 20 May of that year.

2.6 At the same time as the bill was being debated, a series of eleven draft privilege resolutions was tabled in both Houses. These resolutions were intended to be complementary to the *Parliamentary Privileges Act 1987* and were also partly based on recommendations in the report of the joint committee. After significant discussion and negotiation, they were ultimately the subject of debate in the Senate and were agreed to with modifications on 25 February 1988.[10] The House of Representatives has not as yet considered or adopted most of them, although in August 1997 it adopted, with some minor amendments, the right-of-reply procedure established by Senate resolution 5,[11] and subsequently modified the guidelines under which the House of Representatives Committee of Privileges operates.

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5 Report, op. cit. pp. 1-19.

6 paragraph 2.1.

7 *Journals of the Senate*, 1986-87, p. 1250.

8 House *Votes and Proceedings*, 1986-87, p. 1525.

9 House *Votes and Proceedings*, 1986-87, p. 1627.

10 *Journals of the Senate*, 1988, p. 536.

11 House *Votes and Proceedings*, 27 August 1997, pp. 1868-70; 26 November 1997, p. 2513; 7 October 2003, p. 1206; See chapter 3.

2.7 In essence, most of the Senate privilege resolutions codified already-existing practices. By the time of their adoption, the Senate had had extensive experience in committee work, which not merely required standardised procedures but also, as in ensuing years, had generated most of the matters giving rise to possible contempts of the Senate. Several new features of these resolutions, however, have ensured that the Committee of Privileges has performed something of an exploratory and a pathfinding role. For this reason, over the past eighteen years it has developed informal methods of interpreting and adding to a general understanding of privilege. In its reports on most of the specific matters which it has considered, it has adopted the practice of making comments on the general principles of privilege, and this present report, like its predecessors, summarises the matters and themes canvassed in individual reports.

2.8 The Act, resolutions and the explanatory statements relating to each are at Appendices A and B to this report, together with a summary of each of the committee's reports to the Senate (Appendix G).

Summary and discussion of privilege resolutions

Raising matters of privilege

2.9 While, as indicated above, many of the resolutions codified and gave guidance on already-existing practices, they also established a new process for raising matters of privilege. Most other parliaments insist that privilege matters be raised at the first opportunity, a practice which gives little time for reflection and can be arbitrary in what may or may not be referred. Resolution 7, however, ensures that matters need not be raised at the first opportunity; the President of the Senate is not required to make any determination as to whether a prima facie case exists; and the matters are normally first raised in writing with the President by a senator, thereby removing them from the more heated and public arena of the Senate chamber. The resolution provides that the President must make an early determination as to whether a matter of privilege should have precedence over other business, and must communicate the decision to the senator raising the matter. If the President determines that a matter should have precedence, the President must report that decision to the Senate as well as to the senator concerned. The President's decision to give precedence gives the senator raising the matter a right to give notice of motion to refer the matter to the Committee of Privileges, and such a motion has precedence over all other business on the day for which the notice is given. The President has given such precedence on 63 occasions, although in respect of one matter no further action was taken by the senator raising the matter, or any other senator, to refer it to the committee.[12] On one occasion, a notice of motion to refer a matter relating to the alleged failure of a senator to provide a statement of certain interests to the Registrar of Senators' Interests was withdrawn following an apology from the senator concerned.[13] One further contempt matter was referred to the committee following the

12 *Odgers' Australian Senate Practice,* 11th edition, p. 646.

13 *Journals of the Senate,* 2005, p. 610.

President's tabling of certain documents.[14] In respect of two other matters to which the President gave precedence,[15] the Senate determined that they should not be referred to the committee.[16] In both cases, the issue was determined by a division.

2.10 The President has reported three times to the Senate that precedence has been refused to matters raised,[17] but is not obliged to report all such decisions to the Senate. If the President determines that a matter should not have precedence a senator is not precluded from taking other action, but so far senators appear to have been satisfied with the President's decisions.

2.11 Cases of possible contempt frequently arise from proceedings of Senate committees. Such committees are obliged to adhere to strict procedures to protect the integrity of their operations and to ensure the protection of witnesses.[18] Nevertheless, on occasions a committee may become aware that its proceedings have been disclosed in an unauthorised manner, that it has been misled, or that witnesses have been improperly influenced, threatened or penalised because of the evidence they gave, or intended to give, to the committee. In such a situation, the committee makes its own investigations and may report the facts and its conclusions to the Senate, while usually at the same time raising the matter with the President. If the committee recommends that the matter be referred to the Committee of Privileges, it is usual for the chair of the originating committee to give notice of motion to that effect, although it is open to another senator to so move, regardless of the views of the committee as a whole.[19]

Criteria for determining contempt

2.12 In making a decision as to whether a matter which a senator has raised should have precedence, the President is bound under resolution 4 to have regard to two criteria only:

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

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

15 *Journals of the Senate*, 25 March 1998, pp. 3449-50, and 5 September 2005, pp. 997-98.

16 ibid., 26 March 1998, pp. 3462-3, and 7 September 2005, p. 1050.

17 *Odgers' Australian Senate Practice*, 11th edition, Appendix 4, pp. 643-649; and Supplement, Updates to 30 June 2005, p. 10.

18 See resolution 1, Appendix B.

19 Standing Order 81, Procedural Order 3, *Standing Orders and Other Orders of the Senate,* November 2004, pp. 55, 120.

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

2.13 In determining whether the matter should be referred to the Committee of Privileges, and ultimately whether a contempt has been committed, the Senate is required by resolution 3 to take into account the same criteria as the President, but additionally must 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.

2.14 The Committee of Privileges is similarly required by resolution 3 to take all three criteria into account when inquiring into any matter referred to it.

Committee of Privileges proceedings

2.15 The Committee of Privileges is bound under resolution 1 to observe the normal procedures of Senate committees for the protection of witnesses. These include inviting witnesses to make submissions or produce documents in the first instance, unless there are exceptional circumstances; giving witnesses reasonable notice to appear before it and opportunity to comment on adverse evidence; and other, similar protections.[20] However, these protections are supplemented and where necessary overridden by the special provisions of resolution 2 when the committee is considering any matter which may involve or give rise to any allegations of a contempt. Further details of the committee's proceedings are given in Chapter 5.

Matters constituting contempts

2.16 All matters which the committee has been required to consider have come within the ambit of the matters constituting contempts set out in resolution 6 of the resolutions. The full text of resolution 6 can be found at Appendix B; in brief, the matters which the Senate may treat as constituting contempts include:

- interference with the Senate
- improper influence of senators
- senators seeking benefits, etc
- molestation of senators
- disturbance of the Senate
- service of writs in the Senate precincts
- false reports of proceedings

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20 See Appendix B.

- disobedience of Senate or Senate committee orders
- obstruction of Senate or Senate committee orders
- interference with witnesses
- molestation of witnesses
- offences by witnesses (such as failure to produce documents)
- unauthorised disclosure of evidence or proceedings.

2.17 As the preamble to resolution 6 makes clear, the list is not exhaustive but is intended as a general guide to persons that acts coming within the prohibitions specified under the resolution may be treated by the Senate as contempts. The committee is satisfied from its experience that the matters raised in that resolution give firm guidance to persons the subject of contempt references, to senators and Senate committees, and to the Committee of Privileges itself. The committee has not found it difficult to categorise any of the matters before it under one or more of the resolution 6 provisions, and has not had to deal with all the indicative categories.

Findings of and punishments for contempt

2.18 The final resolution relating to consideration of contempt matters concerns the treatment of persons who have been found to be in contempt of the Senate. In practice, action arising in the Senate following a finding of contempt has been generated by the chair of the Committee of Privileges. If the committee has determined that a contempt has been committed or that a penalty should be imposed, the chair is required to give seven days' notice of a motion for the Senate to determine a contempt or impose a penalty. Since the passage of the Parliamentary Privileges Act and Senate privilege resolutions, the committee has found contempt by persons in only nine cases,[21] recommending a penalty in respect of one of those cases,[22] and the requisite notice has been given. In other matters it found that contempts had been committed[23] but, because it was unable to discover the source of the contempt, the seven days' notice was not required or given.

Right of reply

2.19 A further resolution which involves the Privileges Committee concerns the protection of persons referred to in the Senate. This resolution, the only resolution which was the subject of some controversy at the time of its adoption, enables a

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21 Senate Committee of Privileges *21st report*, PP 461/1989; *42nd report*, PP 85/1993; *67th report*, PP 141/1997; *72nd report*, PP 117/1998; *74th report*, PP 180/1998 (one matter); *84th report*, PP 35/2000; *85th report*, PP 36/2000; *99th report*, PP 177/2001; and *100th report*, PP 195/2001.

22 Senate Committee of Privileges, *99th report*, op. cit.

23 Senate Committee of Privileges *50th report*, PP 322/1994; *54th report*, PP 133/1995; *74th report*, PP 180/1998 (three matters); *112th report*, PP 11/2003.

person who has been referred to in the Senate in a way in which the person regards as adverse to seek a right of reply in the same forum. Details of its operation are discussed in the next chapter.

2.20 While the right-of-reply procedure is helpful to persons who consider themselves maligned by comments made in the Senate, ultimately the responsibility for minimising hurt to a person lies with individual senators. While privilege is a necessary instrument of a free and functioning parliament, the most important guardians of that privilege are the legislators. To this end the committee draws attention to a further resolution (resolution 9), which enjoins all senators to exercise their valuable right of freedom of speech in a responsible manner.

Other resolutions

2.21 The two remaining resolutions, although mechanical in nature, are significant in that they recognise the particular relationship between the Senate and the courts on the one hand, and the Senate and the House of Representatives on the other. Briefly, Resolution 10 declares that leave of the Senate is not required to admit into evidence before courts or tribunals reports of evidence of proceedings in the Senate or its committees, although paragraph (3) of the resolution provides that the Senate should be notified of any such admission. Resolution 11 empowers the committee to confer with the Committee of Privileges in the House of Representatives, although the respective committees have not as yet found the need to do so.

CHAPTER 3 – PRIVILEGE 1988-2005 – RIGHT-OF-REPLY MATTERS

Introduction

3.1 Privilege resolution 5 enables a person who has been referred to in the Senate in a way in which the person regards as adverse to seek a right of reply in the same forum. This resolution was regarded at the time of its creation as the most unusual of all the privilege resolutions, and the Senate was the first legislature in the world to introduce the procedure. As a result, it attracted the most controversy and concern during the debate on the resolutions, resulting in a cross-party vote in the Senate chamber.[1] Concerns expressed at the time included the possible vexatious use of the procedure, the philosophical difficulties involved in allowing unelected persons the same access as senators to the absolute privilege of the Senate, and the possibility that permitting a response might imply some criticism of the senators who were the subject of the response. By a majority of two to one, however, the Senate considered that the procedure should be adopted and in the event none of these fears has been realised.

3.2 Since the Senate adopted the procedure in 1988, only 45 responses have been recommended for publication, with another six not proceeded with because the person concerned chose not to pursue the matter further after the committee had made contact. The committee has refused a right of reply three times. In accordance with the requirement of paragraph (2) of the resolution, it reported on the first refusal in the 76th report,[2] and on the two further refusals in its 107th report.[3]

3.3 The committee has continued to devote a separate chapter to right of reply matters because, there has continued to be significant interest in how the procedure works, even though the procedure has not been used with any great frequency. This present chapter again describes the process, and also confirms the committee's earlier evaluations of its effectiveness.

Method of operation

3.4 The method of operation is simple. If a senator when speaking in or using the procedures of the Senate, whether directly or through tabling or incorporation of material, refers to a person by name, or in such a way as to be readily identified, in a manner that the person regards as adverse, that person may make a submission in writing to the President of the Senate, seeking the incorporation of an appropriate response in the parliamentary record. If the President is satisfied that the subject of the submission is not so obviously trivial, frivolous, vexatious or offensive as to make it inappropriate for consideration by the Committee of Privileges, and that it is

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1 *Journals of the Senate*, 1988, p. 536.

2 Senate Committee of Privileges, *76th report*, PP 126/1999, paragraph 3.15; *107th report,* PP 345/2002*,* paragraphs 3.14-15.

3 *107th report*, PP 345/2002.

practicable for the committee to consider it, the President must refer the submission to the committee.

3.5 The committee in turn must make a decision as to whether or not to consider the submission; if it decides not to consider it, it must report that decision to the Senate.[4] Having decided to consider the submission, the committee must meet in private; it may confer with the person concerned or with the senator who referred to the person; and it must not itself publish a submission or its proceedings in relation to the submission, but may present minutes of its proceedings and all or part of the submission to the Senate, recommending that it be published by the Senate or incorporated in *Hansard.*

3.6 The Committee of Privileges is enjoined by the Senate resolution not to consider or judge the truth of either the comment of the senator, or comments in the response. This element of the resolution accords with the duty of senators to present petitions to either House of Parliament for redress of a grievance. A senator is obliged to present the petition but this action does not indicate any view on the merits of its content.

3.7 Because the committee does not judge the truth of the original comments or the proposed response, and makes no finding of wrongdoing on the part of a senator, the only role of the committee is to ensure that a response channel is available.

> This addresses early concerns that the resolution raised philosophical difficulties about allowing unelected persons the same access as senators to absolute privilege and that the procedure entailed implicit criticism of senators. Neither of these concerns has become an issue.[5]

3.8 The provision has also been essential in preventing the committee from becoming embroiled in exchanges between senators and persons alleging they have been mentioned adversely in Senate proceedings. As long as the response is succinct and relevant and does not contain material which, for example, would reflect adversely on either a senator or any other person, the committee is likely to recommend a response.

3.9 In interpreting these requirements the committee has been guided by the criteria governing senators' personal explanations and claims of misrepresentation. Some degree of editing or amending of submissions may be involved, although the committee has committed itself to allowing as much as possible of the person's response to be published, subject to the resolution 5 requirements. In the interests of early redress of a person's perceived grievances, if the committee proposes any changes to the text of a response it normally confers with the person concerned by telephone, and makes, suggests or receives any changes to the person's submission by

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4 See paragraphs 3.12 to 3.15 below.

5 Senator Robert Ray, "The Right of Reply in the Australian Senate", *The Parliamentarian*, 2004/Issue Three, p. 234.

telephone or facsimile. It advises the senator that it proposes to table a right-of-reply report in the Senate, but does not otherwise confer with the senator.

Reports 1988-2005

3.10 The most interesting feature of the operation of the right-of-reply procedure in the Senate has been that, contrary to the initial fears, the committee has not been swamped with such cases. At the time of its 35th report in December 1991, the committee had received only 18 submissions and had reported to the Senate on 14 occasions. This present report reiterates some of the features referred to in the 35th report, as that report contained the blueprint for the committee's future operations.

3.11 Two of the reports recommended responses from persons not named in the Senate but who regarded themselves as referred to in such a way as to be readily identified. The four submissions which were not pursued to finality are summarised as follows.

3.12 In two of the cases, despite the committee's having communicated with the persons seeking a response, the persons concerned did not proceed with the matter. This led the committee to report to the Senate at that time as follows:

> The committee has decided that, in matters of this kind, if no response to the committee's inquiries is received within three months, it should consider the matter closed and report accordingly to the Senate, in general terms, in due course. The committee does not consider it appropriate that matters such as these should be kept "on ice" indefinitely, to be resurrected at a time suitable to the complainant, and makes this report to place on notice its intentions in this regard. In this context, it may be noted that the committee itself, in dealing with matters of this nature, has a policy of dealing with them as expeditiously as possible, within the constraints imposed by the Senate's sitting patterns and the terms of the resolution.[6]

3.13 This restriction has been slightly modified to accommodate exceptional circumstances where the persons could not reasonably have responded within the timeframe. As a corollary, the committee has also decided that the three month rule should generally apply to persons who seek a right of reply in the first instance, again, unless there are exceptional circumstances.

3.14 The third case involved a right of reply which, before the committee had an opportunity to consider it, was incorporated directly into *Hansard*. Under those circumstances, since the remedy sought had already been obtained, the committee did not proceed with the reference and so advised the person.

3.15 The final case involved the naming of a person in documents tabled in the Senate. The committee found that the remedy sought had been given in later tabled documents and advised the person accordingly. The person chose not to pursue the

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6 Senate Committee of Privileges, *35th report,* paragraph 17, PP 467/1991.

matter. One feature of this matter was that the person had become aware of the initial tabling some considerable time after the tabling had occurred. The committee noted that special circumstances would need to exist before it would consider a submission at such a distance from the original naming in the Senate, but did not consider it appropriate to exclude consideration of a submission solely on the ground of the lapse of time.

3.16 In the period covered by the 62nd report, the committee recommended that eight further responses be incorporated in *Hansard* and, following a reference of another matter to it, wrote to the person concerned. The committee did not hear from that person and regarded the matter as having concluded.

3.17 The 76th report covered six submissions, five of which the committee recommended for incorporation, and one which, under paragraph 5(2) of the Privilege Resolutions, the committee refused to consider, for reasons outlined in paragraph 3.15 of that report. An interesting feature of one of the right of reply reports was that the response involved an overseas visitor who, to the committee's knowledge, was neither a citizen nor a resident of Australia.

3.18 The 107th report covered twelve right-of-reply responses and two refusals by the committee to permit a response. Further details are contained in paragraphs 3.13 to 3.15 of that report.

3.19 This present report covers a further seven reports, none of which is appreciably different in kind from previous reports. One interesting outcome, however, which has never been demanded or expected by either the Committee of Privileges or resolutions is that, following the tabling of a report in the Senate, the senator to whom the response was directed apologised for the aspersions cast against one of the persons.[7]

Types of responses

3.20 The responses which the committee has recommended for incorporation since the passage of privilege resolution 5 have come from a wide range of persons, including a former premier and former senators, the chairman of an Australian airline, the president of the Returned and Services League of Australia, the chairman of the Advertising Standards Council, representatives of refugee associations, public servants, statutory office holders, private citizens, local government representatives, scientists, academics and educationists, on their own behalf and on behalf of the institutions for which they work, and the spouse and staff of senators. The matters which they have addressed have been matters raised substantively by senators on their own behalf or representing their constituents.

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7 *Senate Committee of Privileges*, *110th report*, PP 601/2002. And see also Senate *Hansard*, 12 December 2002, p. 8147.

3.21 There has been no appreciable change in the kind of individual wishing to respond to an adverse mention since the inception of the right-of-reply procedure; nor, broadly speaking, in the kind of matter to which he or she has sought to respond. While the resolution formally does not permit responses by corporations, the committee has had no difficulty in dealing with institutions because invariably any adverse comment about an organisation or institution necessarily involves persons within them, and the committee has effectively dealt with responses under the existing resolution 5 provisions.

3.22 In all cases the Senate has adopted the committee's recommendation that a response be incorporated in *Hansard*. The effectiveness of the right-of-reply procedure has been enhanced by the immediate publication of responses in hard copy and electronically, as soon as the report is tabled.

Analysis

3.23 While it is difficult for the committee to evaluate precise reasons for the relatively few users of the provision, several features have, in the committee's view, influenced the limited use of the procedure.

- It is not well known. On recommending a right of reply the committee releases a report, the response is incorporated in *Hansard* and placed on the Internet. Except for the occasional high profile response, it is rare for the media to disseminate what is in fact news of a relatively uncontroversial procedure which in all cases is recommended unanimously by the committee.

- Many of the matters arising in the Senate involving adverse comment tend to be by senators on behalf of constituents at times such as the adjournment or during discussion of matters of public interest, when media interest in Senate proceedings is minimal. Generally, persons seeking a response are likely to be affected within their own community rather than nation-wide, and their concern is more to have their response disseminated at the local rather than at the national level.

- It has been the experience of committee members that, on the whole, adverse comment within each chamber is relatively rare, and tends to be directed primarily at persons within the same arena, or alternatively at persons who choose other mechanisms for asserting a right of reply.

- Furthermore, the most likely sources of adverse comments against individuals are proceedings of committees, which have their own detailed procedures to afford a person adversely named or referred to, usually by witnesses in those proceedings, a right of reply.

3.24 Given the small numbers of persons availing themselves of the right-of-reply procedure, the question arises whether the procedure is worth pursuing. The committee continues to believe that the procedure is both desirable and successful. In its dealings with persons who have perceived themselves to be adversely affected by comment made in the Senate, the committee has found in most cases that the persons

have been concerned, not with vengeance or apology, but rather to ensure that their voice is heard or views are put in the same forum as the original comments were made.

3.25 Another concern of persons seeking a right of reply has been the swift redress of their perceived grievance. As a result, the committee's approach has been to change only minimally, if at all, the person's words; to consult with the person, as required by the privilege resolution if any change is to be made, at the earliest opportunity, usually by telephone; and to report to the Senate as briskly as possible. Thirty-three (or 73 per cent) of the committee's right-of-reply reports have been completed within one month, and twelve (27 per cent) within one week. While the average time taken for all right-of-reply reports has been just over a month, this has included delays brought about by the committee's not meeting during parliamentary adjournments or recesses, and by the time taken to negotiate with the persons affected. In one case, at the end of a sitting period, when the committee was anxious to ensure that a right-of-reply was availed of with minimal delay, the committee received and considered a submission in the morning and tabled a report, immediately adopted by the Senate, later that same day.[8]

Conclusion

3.26 When the procedure was originally established committee members, like other senators, were wary that it could be misused. For the reasons stated above, this has not occurred and the committee emphasises the basic simplicity of the process. The right-of-reply procedure is usually quick, cheap, and effective for the purpose of enabling persons to put their side of the story. The procedure is available to all, regardless of either skill or financial capacity. The committee suggests that this alternative procedure should be examined by all who are contemplating changes to defamation law. It emphasises that a primary reason for the success of the process is that the committee makes no judgment as to the truth or otherwise of the assertion made by either the senator concerned or the responders. This feature is vital, as otherwise the process would be bogged down endlessly by claim and counter-claim involving the committee in an inappropriate adjudicative function. The opportunity can be, and has been, taken for both parties to carry the matter further in the chamber and by another rejoinder. This has not distorted the right-of-reply process and, as with most claims of misrepresentation made by one senator against another, has usually died down after another exchange.

3.27 Having taken the lead in this matter, the committee is pleased to note that most Australasian legislatures have now adopted a right-of-reply procedure in some

8 Senate Committee of Privileges, *97th report*, PP 131/2001.

form, and that the British Commonwealth Parliamentary Association Study Group on Parliament and the Media has included a recommendation that other legislatures follow the Senate's lead in providing such a right of reply.[9]

9 *The Parliamentarian*, 2004/Issue Three, p. 219.

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.

CHAPTER 5 – PRIVILEGE 1988-2005 – COMMITTEE'S METHODS OF OPERATION

Conduct of committee inquiries

5.1 Most of the questions concerning the operations of the Committee of Privileges have arisen in connection with the committee's inquiries into possible improper interferences with witnesses and other persons providing information to the Senate and its committees. Consequently, the first part of this chapter describes the committee's proceedings with particular reference to these inquiries, although its general methods of operation apply to all questions of contempt referred to it.

5.2 The committee's first action has been to advise persons who the committee is immediately aware may be affected by a reference from the Senate that a certain matter has been referred to it, and, inter alia, to invite written submissions on the matter. As the committee has pointed out in all correspondence, the purpose of seeking a written submission is to enable the committee to gain basic information from the persons involved in the matters before it. In other words, it regards its first task as being to undertake an inquiry into the circumstances surrounding the reference, and thus, in all cases so far, has performed the inquiry function of any normal Senate committee.

5.3 In performing this function, however, the committee must afford to all persons special protections provided under the privilege resolutions. The resolutions affecting the committee's proceedings are resolutions 1 and 2, which are included at Appendix B to this report. Where the second resolution is inconsistent with the first, the second resolution prevails to the extent of the inconsistency. In practice, the committee has undertaken all its inquiries on matters involving contempt, and on general matters, as nearly as possible consonant with the procedures outlined in resolution 1, because it, like most Senate committees, regards its primary function as being to investigate matters referred to it. However, it has always at the outset drawn the attention of persons possibly affected by allegations of contempt to the provisions of resolution 2.

Legal representation

For persons affected by matters referred to the committee

5.4 Features of the second resolution include the automatic right of a person to be accompanied by counsel if he or she so wishes, if a hearing is held. The committee must give the person all reasonable opportunity to consult counsel. The committee may authorise counsel to examine any witnesses, and must afford that right to a person or that person's counsel if any evidence is given containing any allegation against, or reflecting adversely on, the person. As a consequence persons affected by matters before the committee have used lawyers at any or all stages of the committee's inquiries, regardless of whether public hearings have been involved.

For Committee of Privileges

5.5 The committee has found it necessary to appoint counsel to assist it in relation to only two possible matters of contempt formally referred to it, both of which it considered soon after the passage of the *Parliamentary Privileges Act 1987* and the Senate Privilege Resolutions of February 1988.[1] In each case the committee appointed, with the approval of the President, an experienced counsel, who is now a judge of the Supreme Court of New South Wales. In respect of the first inquiry, he provided written advices. While the committee envisaged that he might also advise it during the course of public hearings, in the event it was able to make findings based on the papers before it, and no public hearings ensued. In relation to the second matter, he assisted the committee both in preparing briefings and advices, and through his presence at the two public hearings which the committee conducted.

Public hearings

5.6 Although public hearings may be conducted either on the initiative of the committee or in response to requests from persons who are subject to potential findings of contempt, such hearings have in practice been rare, and have been conducted on the initiative of the committee. Of the 51 cases of potential contempt finalised by the committee since 1988, only eight have involved public hearings, with a ninth hearing being conducted in respect of a bill referred to the committee. Not surprisingly, given the gravity with which the committee views possible improper interference with persons providing information to the Senate and its committees, six of the eight contempt hearings have involved these matters. The seventh involved hearings about the unauthorised publication of in camera material submitted to a committee – another matter which the committee, and the Parliament as a whole, regard as potentially a grave contempt – while the eighth also involved unauthorised publication, in this latest case, of a committee report.

5.7 The hearings are arranged as follows:

- all persons affected by the matter before the committee are permitted to be accompanied by counsel;
- each witness is heard by the committee on oath or affirmation;
- opening personal statements are permitted;
- each witness, or his or her counsel, is permitted to examine other witnesses in relation to written and oral evidence;
- each witness, or his or her counsel, is given the opportunity of adducing further evidence or suggesting other witnesses for examination by the committee; and

1 Senate Committee of Privileges, *18th report*, PP 461/1989; *36th report*, PP 194/1992.

- closing personal statements, or statements by counsel on behalf of their clients, are permitted.

A representative outline of arrangements is at Appendix F.

5.8 In each case, the committee has been concerned to ensure that the proceedings have been conducted with as little formality as possible, within the constraints imposed by privilege resolution 2, and in the spirit of inquiry rather than as quasi-judicial proceedings. It may be that in future the committee will perceive the need for more formal proceedings; given, however, the serious nature of all the matters before it and the way in which it has been able to deal with them under existing procedures, the committee is optimistic that the procedures adopted so far will continue to provide a blueprint for future operations.

Notification of committee's findings

5.9 Resolution 2 requires the committee, in the event that an adverse finding is to be made against a person, to acquaint the person of the finding to enable the person to make further submissions to the committee, which must take any such submissions into account before making its report to the Senate. The committee has interpreted this provision broadly, so that most persons who might not be subject to an adverse finding but are subject to adverse committee comment have been offered the opportunity to make comments before the committee reports to the Senate. Notification in both cases generally takes the form of providing persons with a working document which is the basis of the report finally presented to the Senate. This enables the persons to establish the context in which findings or adverse comments have been made.

Senate proceedings

5.10 When the committee reaches its conclusions on a matter, it reports its findings, with or without recommendations, to the Senate, which in turn decides whether to endorse the findings and adopt the recommendations, if any.

Reimbursement of legal costs

5.11 Although the committee has itself used counsel sparingly, it accepts that persons who might be the subject of a contempt finding could feel the need to have early access to legal advice. It does, however, express its concern that persons affected by its inquiries have incurred unnecessary expenditure on legal representation. In four of the eight cases which have resulted in public hearings, the cost of legal representation was met by the taxpayer, while the remaining four involving persons with legal representation being responsible for their own costs. Several other cases which did not require public hearings have involved legal representation.

5.12 Under Privilege Resolution 2(11), the committee is empowered to recommend to the President reimbursement of costs of legal representation to witnesses before the committee, as follows:

> The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.[2]

5.13 The committee continues to reaffirm the view taken in its 35th report that, as a general principle, it is disinclined to exercise its power to recommend reimbursement of costs of representation of witnesses before the committee,[3] and in fact has recommended reimbursement only once since the Senate adopted the provision.[4] The resolution requires the President to be strict in administering the reimbursement provision, and the committee regards itself as obliged to assist the President in making the determination. The committee accepts the right of all witnesses to be assisted by counsel, and acknowledges that such a right is rendered nugatory if persons are unable to afford to exercise it. The committee emphasises, however, that only in the exceptional circumstances provided in resolution 2(11) can reimbursement of legal costs be agreed to and, in determining whether to make a recommendation to the President, will apply strictly the prescribed criteria.

5.14 It acknowledges the inevitability, recognised by privilege resolution 2(4) which gives all witnesses before the committee a right to be assisted by counsel, that those witnesses would choose to exercise that right if it were in practice available to them. When funding is open-ended in respect of one of the parties, this can lead to a perception of structural unfairness. The committee believes, however, that its procedures have ensured that persons without access to legal representation have not been disadvantaged. It makes the point that, in half of the cases which have resulted in public hearings, one or more of the parties appearing before the committee did not have legal representation, and this did not seem to cause detriment to the person's case. The committee draws attention to its own obligation to protect the rights of all persons who appear before it.

Committee's sources of advice

Advice from counsel

5.15 As mentioned above,[5] the committee has appointed counsel to assist it on two occasions. In addition, the committee, with the approval of the President of the Senate, commissioned advice from senior counsel on matters arising from its 67th report, discussed at paragraphs 4.21 to 4.22 and 4.81 to 4.83, and an independent advice to evaluate a senator's documents.

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2 Appendix B.

3 Senate Committee of Privileges, *35th report*, PP. 467/1991.

4 Senate Committee of Privileges, *21st report*, PP. 461/11989.

5 Paragraph 5.5.

Clerk's advice

5.16 The primary source of advice, however, in keeping with the traditions of committees of this nature, has been the Clerk of the Senate. He has provided the committee with 38 written advices, most of which have been published as part of the records of individual inquiries. These advices have often involved more general comment. For example, the Clerk has addressed the scope of privilege, with particular reference to whether information given by a person to a senator, for purposes of or incidental to the transacting of business of a House or of a committee, should be covered by parliamentary privilege; he has provided useful commentary on court judgments in the United States of America, reinforcing the committee's views on the need to protect such information; and has also analysed the scope of parliamentary privilege as interpreted by the New South Wales courts. In addition**,** the committee has sought his comments on matters which have arisen as a result of its own deliberations on matters of principle arising from inquiries. He has also produced for the committee's information several memoranda dealing with judicial developments in a general context.

5.17 All earlier advices were tabled with the 107th report. The committee includes at Appendix H the seven memoranda which the Clerk has provided to it since that report, and has also added them to the electronic version which can be found at the committee's website.

Advice from other sources

5.18 As well as papers by the Clerk and commissioned papers, the committee has from time to time received unsolicited views from various persons and bodies on aspects of individual inquiries. These have usually been published as part of the relevant proceedings. The most significant involved exchanges of correspondence between the Queensland Law Society, the Law Council of Australia, lawyers advising one of the participants in an inquiry, the President of the Senate and the committee on a question whether proceedings of the committee infringed the sub judice doctrine. The committee appeared to satisfy all interested parties that its proceedings did not impinge upon court proceedings.

5.19 On two occasions the committee has advertised for submissions in accordance with normal Senate committee processes. The first occasion was for the purposes of its only inquiry into a bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, and the committee heard evidence from persons who responded. The second occasion was in relation to the committee's inquiry into aspects of the joint meetings convened to receive addresses from foreign heads of state.[6] In this case only one submission appears to have been generated by the advertisement rather than by direct solicitation, and as it was not germane to the issues under consideration, the committee did not take further evidence from the submittor.

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6 Senate Committee of Privileges, *118th report*, PP 80/2004.

5.20 A further unsolicited submission to the committee occurred as a result of the publication of its 112th report discussed at paragraph 4.71. This involved a letter from the Chair of the Australian Press Council, criticising the committee for its views and conclusions in respect of unauthorised disclosure of a draft report of the Environment, Communications, Information Technology and the Arts Legislation Committee. The exchange of correspondence between the Council and the Committee of Privileges constituted the 113th report of the Committee of Privileges.

Committee of Privilege's advice to others

5.21 Conversely, the committee's advice has also been sought in respect of several matters. For example, and in accordance with its own wishes, the committee has been consulted in respect of draft guidelines between the Presiding Officers and the Attorney-General relating to search warrants in senators' offices, as discussed above. In 2004, the committee's views were sought by the Attorney-General in respect of the privilege implications of draft national defamation law. Having sought and received comment from the Clerk of the Senate on the matter, and, subsequently, on draft model defamation provisions issued by the states and territories, the committee forwarded the Clerk's comments to the Attorney-General. Most recently, the committee's views were sought by the Queensland Members' Ethics and Parliamentary Privileges Committee on its review of the Legislative Assembly's power to deal with contempt. The committee provided advice to the Queensland committee on the basis of and procedures for its inquiries into allegations of contempt, and also provided that committee with a copy of its previous general report.[7]

Other matters

5.22 Certain other matters arising from the committee's references are of general application, and are briefly discussed in the hope that they will assist other committees in the conduct of their own inquiries.

Participation of members of the committee in certain inquiries

5.23 A full account of the committee's first dealings with this matter is contained in the 35th report. After considering the Clerk's advice on the question, the committee concluded that 'it was a matter for the Senator concerned, and ultimately the Senate, whether he or she should sit on an inquiry'. In that report it commented that it 'regard[ed] as wise [the Clerk's] caution against too ready an acceptance of the misleading analogy with the rules and practices of the courts when Senators are considering the question of their participation in Senate or committee proceedings'.[8]

5.24 Since the committee's pronouncement, six senators have disqualified themselves from participation in committee deliberations, one in respect of a reference

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7 Senate Committee of Privileges, *107th report*, PP 345/2002.

8 Senate Committee of Privileges, *35th report*, PP 467/1991, paragraph 45.

relating to the National Crime Authority[9] and five in relation to references regarding unauthorised disclosure of a draft report of a committee,[10] one of whom also disqualified herself, along with another senator, on deliberations on right-of-reply matters arising from their comments in the Senate.[11] Another senator withdrew from deliberations on a complex matter because he had been unable to attend the public hearing on the matter.[12]

Standard of proof

5.25 Also in the 35th report, the committee reported on its receipt of advice on the question of the standard of proof which might be appropriate for the committee to bear in mind when making findings concerning contempt. The committee noted the Clerk's suggestion that it adopt a combination of the following two of five options:

- to vary the standard of proof in accordance with the gravity of the matter before the committee and the facts to be found; or
- not to adhere to any stated standard of proof or to formulate a standard of proof, but simply to find facts proved or not proved according to the weight of the evidence.

It observed that the conclusions contained in the Clerk's response accorded with its already existing practice, which has continued to the present time.

Relationship between public officials and the Parliament

5.26 A further theme, that has dominated the committee's proceedings both before and after the passage of the *Parliamentary Privileges Act 1987* and resolutions, has been the relationship of the Senate and its committees with public officials. Successive Committees of Privileges have been astonished at what they have found to be, in rather too many cases, the ignorance of public servants and statutory office holders of their obligations to the parliament and its committees. The Committee of Privileges has encountered many such examples, particularly post-1988. The individual cases are described in Chapter 4 and Appendix G.

5.27 The committee's concerns have led it in several cases to recommend to the Senate that it note, affirm or reaffirm two resolutions that relate directly to public servants and statutory office holders. In all cases the Senate has accepted unanimously the unanimous committee recommendations. The two resolutions are as follows:

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9 Senate Committee of Privileges, *36th report*, PP 194/1992, paragraph 1.23.

10 Senate Committee of Privileges, *74th report*, PP 180/1998; *100th report*, PP 195/2001; *112th report*, PP 11/2003; *121st report*, PP 58/2005.

11 Senate Committee of Privileges, *87th report*, PP 40/2000; *90th report*, PP 113/2000 and *91st report*, PP 119/2000.

12 Senate Committee of Privileges, *67th report*, PP 141/1997, p. iii.

(1) That whilst it may be argued that statutory authorities are not accountable through the responsible minister of state to parliament for day-to-day operations, they may be called to account by parliament itself at any time and that there are no areas of expenditure of public funds where these corporations have a discretion to withhold details or explanations from Parliament or its committees unless the Parliament has expressly provided otherwise.

(2) The Senate is of the opinion that all heads of departments and other agencies, statutory office holders and Senior Executive Service officers should be required, as part of their duties, to undertake study of the principles governing the operation of Parliament, and the accountability of their departments, agencies and authorities to the Houses of Parliament and their committees, with particular reference to the rights and responsibilities of, and protection afforded to, witnesses before parliamentary committees.[13]

5.28 The Senate originally adopted the first of the resolutions on 9 December 1971, as a result of consideration of a report of an estimates committee. It was reaffirmed in 1974, 1980, 1984 and 1997. This last reaffirmation was as a result of the 64th report of the Committee of Privileges.

5.29 The second resolution was included in the 42nd report of the committee, was adopted by the Senate on 21 October 1993, and was referred to again in its 46th, 64th and 119th reports. In response to the resolution, the Department of the Senate arranged courses specifically directed at departmental secretaries and other heads of agencies, and senior executive service (SES) officers, in addition to its already-existing courses for other public service officials. The organisation whose activities led to the committee's recommendation arranged for seminars to be conducted throughout Australia by members of the committee and Senate officers, and the Australian Public Service Commission began regularly to invite officers of the Senate to address entry level SES officers.

5.30 Despite these developments, the committee's concerns continued. As a result, it included in its 73rd report a recommendation that the resolution be reaffirmed. Furthermore, it recommended that the Senate seek a specific report, in a year's time, from each Commonwealth department, on how the terms of the resolution had been complied with. Following the tabling of the 73rd report in the Senate on 30 June 1998, the Australian Public Service Commission developed a specialised course to accommodate this requirement which continues to the present time.[14] Departmental responses to the order were consolidated and tabled on 13 April 2000 as the committee's 89th report.[15]

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13 See *Standing Orders and Other Orders of the Senate,* February 2004, pp. 133-135.

14 The Public Service Commissioner's annual report, *The State of the Service*, routinely includes statistics and commentary on the attendance of SES officers at relevant parliamentary courses.

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

5.31 Notwithstanding the availability of the course and a previous brush with the Committee of Privileges, Telstra again found itself the subject of heavy criticism as a result of an appearance before a legislation committee examining estimates. This led the committee to recommend that the Senate order Telstra to prepare a statement, to be laid on the table by no later than 1 March 2005, of measures taken to ensure that its own officers are appropriately trained in their obligations to Parliament. The order was complied with on 11 February 2005.[16]

Guidelines relating to unauthorised disclosure of committee proceedings

5.32 The 76th report drew attention to an unprecedented concentration of matters involving unauthorised disclosure of committee proceedings, leading to a consolidated report on each of six matters referred to the committee within a very short timeframe. The 76th report repeated the following general guidance on unauthorised disclosure set out in the 74th report:[17]

> The committee has determined for general guidance its future approach to improper disclosure of committee evidence, submissions, reports and documents and proceedings.
>
> *In camera evidence*
>
> All persons within the jurisdiction of the Senate who are party to disclosure of *in camera* evidence may be expected to face severe findings of contempt, with attendant penalties, and a possible prosecution under the criminal provisions of the *Parliamentary Privileges Act 1987*. Publishers and authors within the media, regardless of whether the source of the documents is discovered, can similarly expect to face severe sanctions.
>
> *Committee documents or proceedings not authorised for disclosure*
>
> Unauthorised disclosure of documents or proceedings of a committee can be expected to be examined by the Committee of Privileges on an assumption that a contempt is likely to be found.
>
> *Premature release of committee reports*
>
> This committee does not welcome any references of this nature, and is particularly concerned at the betrayal of trust and one-upmanship which deliberate, premature release of reports, at whatever stage of their preparation, represents. The committee does not subscribe to the fiction, either, that sanctions against improper disclosure of the material to the media may be evaded by phrases such as "it is believed that" or "the committee is expected to" or similar devices. If any such matters are referred to the committee in the future, both the discloser, if discovered, and the media, can be expected to receive severe treatment.

16 *Journals of the Senate*, 2005, p. 398.

17 Senate Committee of Privileges, *76th report*, PP 126/1999, paragraph 5.28.

Investigations by relevant committee

> In determining this approach, the Committee of Privileges points out that it is predicated on an assumption that a committee has undertaken its own investigations in accordance with the Order of the Senate of 20 June 1996. The committee assumes that adherence to this order will ensure that the relevant committees will deliberate seriously on a matter before a reference is sought from the Senate.
>
> The committee also accepts and acknowledges that the procedures to be followed under the order may be used as a weapon by the majority to pursue, or subdue, the minority. The committee therefore continues to endorse the capacity included in that order for senators to take their own separate action under Standing Order 81 to raise a matter of privilege. It [considers], however, … that every effort should be made to reach agreement within a committee as to whether a possible matter of contempt should be pursued.[18]

5.33 Following the publication of the 74th report, the chair of the committee wrote to all members of both Houses of the Parliament pointing out the committee's views on the subject of improper disclosure; including guidelines developed for the committees to minimise inadvertent release; and asking them to draw the committee's comments to the attention of all personal staff. In addition, the committee sent the report to the chiefs of staff of the Prime Minister and Leader of the Opposition and to the president and secretary of the Parliamentary Press Gallery. Heads of all Commonwealth departments were also advised of its tabling. The committee sent this report to all senators and members following the election of 2001.

5.34 Despite these efforts, cases of unauthorised disclosure of draft committee reports in particular have continued to be referred to the committee. In rare cases such as those described in paragraphs 4.52 to 4.55, the disclosures occur in public and the culprit or culprits thus reveal themselves. In most cases, however, there is rarely any prospect of the committee making definitive findings.

5.35 Particularly frustrating for the committee in recent cases has been its inability to find that unauthorised disclosures have led to substantial interference, or the potential for such, with the work of committees because of widely differing perceptions by the members of those committees. Following the concurrent investigation of unauthorised disclosures of two draft reports of the Community Affairs References Committee,[19] the committee sought a general reference from the Senate on the issue of unauthorised disclosures with a view to recommending a radically different approach.

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18 Senate Committee of Privileges, *74th report*, PP 180/1998, pp. 10-11.

19 Senate Committee of Privileges, *121st report*, PP 58/2005.

5.36 In its 122nd report, the committee affirmed that the purpose of the prohibition against unauthorised disclosure (and therefore the need for sanctions) is to protect persons giving information to committees, as well as those about whom information may be given or who may be adversely affected by a committee's findings or conclusions. Foremost among the committee's concerns has been the protection of in camera evidence and it therefore proposed a change of approach to allegations of unauthorised disclosure involving in camera evidence:

> The committee intends that any unauthorised disclosure of all such evidence, whether actually quoted or referred to in such a way as to leave no doubt that the publication involves divulging the content of the evidence, should be referred to it by the Senate on the recommendation of the Committee of Privileges, following the relevant parliamentary committee's establishing that the evidence has been improperly disclosed. Proof that the material which has been disclosed without authority (a) is or refers to in camera evidence; and (b) was published without authority, must be provided by resolutions of the parliamentary committee concerned. If unauthorised disclosure or publication of in camera evidence of a select committee is involved, the Committee of Privileges suggests that former members of the select committee could raise the matter with the Clerk of the Senate, as the custodian of the records of the Senate, who in turn should bring it to the attention of the Committee of Privileges.
>
> Anyone who divulges or publishes such in camera evidence may expect a finding of contempt, regardless of the circumstances. The committee may then wish to establish whether the offence is of such gravity that it should recommend to the Senate that a prosecution under section 13 of the *Parliamentary Privileges Act 1987* be proceeded with. Inadvertent unauthorised disclosure or publication of readily-identified in camera evidence will be included as in effect a 'strict liability' offence, although the inadvertence will be taken into account in the determination of penalty.
>
> The Committee of Privileges intends this rule to apply at all stages of parliamentary committee proceedings, up to and including the premature publication of a completed report.[20]

5.37 In respect of unauthorised disclosures of other committee proceedings, including submissions, deliberations, correspondence, minutes or draft reports in their various stages of development, the committee concluded that individual committees should take more responsibility for their own internal discipline rather than too readily raising matters of contempt. Committees should assume that, with the exception of in camera evidence:

> (a) if they cannot find the source of the unauthorised disclosure, this committee will not be willing to pursue the matter further and will so

20 Committee of Privileges, *122nd report*, PP 137/2005, pp. 42-43.

advise the relevant committee during any consultative process it may undertake.

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

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

(ii) may involve prejudice to police investigations or court proceedings.[21]

5.38 In paragraph 3.49 of the 122nd report, the committee provided guidance to other committees on when in camera evidence might appropriately be taken. These circumstances include:

(a) when matters of national security are involved;

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

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

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

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

(f) where there is adverse comment, necessary to a committee's inquiry, made about another person or persons, at least until the person(s) concerned have had an opportunity to respond under privilege resolution 1(13).[22]

5.39 It also made some practical suggestions about document handling and identification about the value of publishing as much committee documentation as possible:

> It was suggested to the committee that the minutes of proceedings of parliamentary committees should be made public, as they are in many legislatures. The committee believes the suggestion is sensible, so long as production of minutes as part of a report would not jeopardise its completion and tabling; rather, they could be made available, following their confirmation, on request at any stage of a committee's proceedings.
>
> Furthermore, the Committee of Privileges sees little purpose in keeping as private documents administrative letters, background papers or any of the

21 *122nd report*, p. 47.

22 *122nd report*, p. 49.

> paraphernalia which make up committee proceedings and documents. Committee should feel free to release these, too, at any stage of proceedings. Like the minutes, they do not need to be tabled with reports. It should, however, be automatic that they be made available to any interested persons.
>
> A decision to keep documents private should be the exception rather than the rule, and should be minuted accordingly. At the completion of an inquiry, the secretary to the committee should write to the Clerk of the Senate advising of such a decision. The practice of releasing as much material as possible would be a good antidote to the perception, as expressed in the Clerk's evidence and reflected in his proposed guideline, that too much material is left unpublished.
>
> This, of course, is in keeping with the committee's earlier comment that the balance within any parliamentary system should be towards openness, with the onus on the person or committee claiming secrecy to justify a requested prohibition on release.[23]

5.40 As a result of the committee's 122nd report, and following scrutiny of the proposed resolution by the Procedure Committee, the Senate adopted the following resolution on 6 October 2005 as a sessional order:

> Unauthorised disclosure of committee proceedings
>
> That the following order operate as a sessional order:
>
> (1) The Senate confirms that any disclosure of evidence or documents submitted to a committee, of documents prepared by a committee, or of deliberations of a committee, without the approval of the committee or of the Senate, may be treated by the Senate as a contempt.
>
> (2) The Senate reaffirms its resolution of 20 June 1996, relating to procedures to be followed by committees in cases of unauthorised disclosure of committee proceedings.
>
> (3) The Senate provides the following guidelines to be observed by committees in applying that resolution, and declares that the Senate will observe the guidelines in determining whether to refer a matter to the Committee of Privileges:
>
> 1. Unless there are particular circumstances involving actual or potential substantial interference with the work of a committee or of the Senate, the following kinds of unauthorised disclosure should not be raised as matters of privilege:

23 *122nd report*, pp. 50-51.

(a) disclosure of a committee report in the time between the substantial conclusion of the committee's deliberations on the report and its presentation to the Senate;

(b) disclosure of other documents prepared by a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event, or where they contain only research or publicly-available material, or where their disclosure is otherwise inconsequential;

(c) disclosure of documents and evidence submitted to a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event;

(d) disclosure of private deliberations of a committee where the freedom of the committee to deliberate is unlikely to be significantly affected.

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

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

(b) disclosure of documents prepared by a committee where that involves disclosure of material of the kind specified in paragraph (a);

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

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

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

(4) Before deciding to raise a matter of privilege involving possible unauthorised disclosure of committee proceedings, any committee may seek the guidance of the Committee of Privileges as to whether a matter should be pursued. If the committee decides that such a matter should be raised, it must consult with the Committee of Privileges before taking the matter further.

(5) When applying this resolution a committee shall have regard to the matters set out in paragraphs 3.43 to 3.59 of the 122nd Report of the Committee of Privileges, June 2005.

(Agreed to 6 October 2005 upon adoption of a recommendation of the Procedure Committee in its first report of 2005.)

5.41 The order makes specific provision for committees to consult with the Committee of Privileges at any stage for advice to assist them in evaluating whether particular cases of unauthorised disclosure warrant being raised as matters of privilege. However, to ensure that only cases involving actual or potential substantial interference with the work of a committee are referred for inquiry, the order requires consultation with the Committee of Privileges before a committee actually raises a matter of privilege. Following the tabling of the 122nd report, the committee provided clarification about the consultation requirements to all committees on which senators serve.

5.42 The committee hopes that the adoption of these guidelines by committees and, in particular, the exhortation to consult with this committee about such matters, will stem the flow of irresolvable inquiries and result in committees taking greater responsibility for their own internal discipline.

References to other committees

5.43 The committee draws attention to another continuing feature of its reports. It has recommended in various reports, and the recommendations have always been adopted, that parliamentary committees and government organisations examine particular matters in their area of expertise. For example, it has recommended that the Procedure Committee examine proposed procedural changes as a result of Privileges Committee recommendations in respect of disclosure of committee documents[24] and procedures relating to the early tabling of committee reports,[25] that committees and government should examine sections of acts with a view to their clarification,[26] and that other committees keep watching briefs on matters of concern.[27]

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

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

26 Senate Committee of Privileges, *36th report*, PP 194/1992; *68th report*, PP 158/1997 and *73rd report,* PP 118/1998.

27 Senate Committee of Privileges, *36th report*, PP 194/1992, *48th report*, PP 113/1994 and *50th report*, PP 322/1994.

5.44 The committee has also made suggestions to enhance the administration of committees in areas such as:

- warning about conditions of disclosure of submissions;
- preparing and issuing guidelines to senators and others about handling committee documents;
- suggesting that persons making submissions be formally notified by individual committees when these submissions have been published by a committee;[28]
- suggesting, through the Clerk Assistant Committees of the Senate, that opening statements by chairs of committees include an explicit warning that false or misleading evidence may constitute a contempt of the Senate; and
- reminding all committees of the need to pay particular attention to possible instances of adverse reflections and of their obligation to follow procedures for the protection of witnesses as set out in the Senate's Privilege Resolution No. 1.[29]

Relationship with the courts

5.45 The committee has been careful to ensure that its work does not impinge inappropriately on the work of the courts. Probably the most significant matter has involved the protection of persons giving information to senators for use in the Senate, and the general protection of senators' files. As each of its reports on these matters has made clear, the committee has acknowledged the primary role of the courts in interpreting the law of parliamentary privilege and has withheld any definitive judgment of its own as to how far the law should extend until the courts have made their determination as to where the law stands.[30]

5.46 In each of these reports, the committee has given an undertaking that it will seek a reference from the Senate as to any possible change to the law of parliamentary privilege, but only after the courts have brought down judgments in individual cases currently before them, and only after the committee has evaluated the judgments to see whether any such inquiry is warranted.

5.47 The committee believes that it has struck an appropriate balance between the need to protect the integrity of parliamentary proceedings and the necessity to ensure comity between the executive, legislative and judicial arms of governance, and the role of the courts in the interpretation of legislation relating to parliamentary privilege.

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28 Senate Committee of Privileges, *22nd report*, PP 45/1990 and *74th report,* PP 180/1998.

29 Senate Committee of Privileges, *116th report*, PP 53/2004, paragraph 27.

30 Senate Committee of Privileges, *67th report,* PP 141/1997; *72nd report,* PP 117/1998 and *75th report,* PP 52/1999.

5.48 Some difficulties have, however, arisen in the relationship between the law and parliament. As discussed in chapter 4, the committee was so anxious about the implications of a judgment of the Supreme Court of Queensland that, first, it sought advice from the Clerk of the Senate and senior counsel and, second, having considered that advice, recommended to the Senate that the President be authorised to appoint counsel as *amicus curiae* in a particular case. Furthermore, it has become aware of the failure by certain members of the legal profession, including at government level, to take into account the implications of parliamentary privilege.[31] Consequently, on 20 March 2002 the committee sought and received from the Senate a reference on 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. As mentioned in paragraph 4.23 above, having considered the matter the committee was forced to conclude that such a proposal was not practicable.

5.49 The committee does not as yet consider that it has reached the stage of undertaking the more broadly-based inquiry foreshadowed in paragraph 5.45, but it continues to monitor relevant cases. Most recently, its attention was drawn by the Clerk of the Senate to a case of committee evidence being used in court proceedings (relating to a defence force disciplinary matter) contrary to the law of parliamentary privilege and without objection being taken by the Australian Government Solicitor's Office. The Commonwealth sought leave to appeal the decision and in allowing the appeal, the appeal judges found that the original judge had been led into error by the admission of the committee evidence, contrary to the *Parliamentary Privileges Act 1987*.[32]

Execution of search warrants in senators' offices

5.50 The committee earlier discussed individual cases involving the search of senators' offices under warrant.[33] The committee draws to attention a judgment by Mr Justice French in the case which was the subject of the committee's 75th report,[34] and which influenced the handling of material as outlined in the 105th report.[35] The judgment found that it was for the Senate to determine which documents might be subject to parliamentary privilege. The documents in question were sent to the Clerk

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31 See, for example, Senate Committee of Privileges, *36th report*, PP 194/1992; *42nd report*, PP 85/1993; *67th report*, PP 141/1997; *73rd report*, PP 118/1998; *85th report*, PP 36/2000. And see Clerk of the Senate's memoranda of 20 October 2000 and 16 May 2001, tabled with the 107th report, and correspondence with the Commissioner of the Queensland Police Force tabled with this report. In the 2001 case, the committee was gratified to know that it was a judge of the Federal Court who raised the question of possible privilege implications, but was concerned that representatives of the Australian Government Solicitor had not adverted to potential privilege problems. This concern was verified by the 2004 matter.

32 *Commonwealth and McCormack v. Vance*, ACT Supreme Court, SC317 of 2001, 23 August 2005, not reported.

33 See paragraphs 4.22 and 4.23.

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

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

of the Senate in accordance with the order of the court. The Senate appointed a person to examine the documents on its behalf. On 27 August 2001, the President tabled advice from the person that he had completed his task; the documents which he deemed to be protected by privilege were returned to the now former senator concerned, while the remainder were provided to the police. The senator concerned was ultimately cleared of all allegations made against him.

5.51 The Senate's experience following Mr Justice French's judgment gives some indication of the complexities and difficulties involved in dealing with the status of material held in senators' offices, and has caused considerable difficulty, not merely to individual senators but for the political process generally. The problem is compounded given the nature of document storage, which these days is primarily electronic. The 114th report made it clear that the committee does not accept the correctness of the judgment.[36]

5.52 The complexity of this issue is not confined to the Senate. For example, the committee has noted the useful report of the House of Representatives Privileges Committee, and the Queensland Members' Ethics and Parliamentary Privileges Committee's Issues Paper canvassing practices in various jurisdictions including at Commonwealth level. The committee is pleased that the negotiations between the Presiding Officers and the Attorney-General, relating to the guidelines, which have been the subject of both its and the House of Representatives Privileges Committee reports, have now been finalised.

36 Senate Committee of Privileges, *114th report*, PP 175/2003.

CHAPTER 6 – CONCLUSION

6.1 The committee's purpose in giving such a detailed account of the operation of privilege in the Senate is to give guidance to all persons who might be affected by its operations as to the context in which the committee considers matters of privilege. It is difficult for the committee itself to evaluate its effectiveness in considering matters of privilege. As its discussion of each report demonstrates, however, matters of considerable complexity, which have gone to the nature of the relationship between the Parliament, the executive and the judiciary, have been considered in both specific and general terms. While the committee does not claim that it provides the best model for the consideration of matters referred to it, it believes that one of the important purposes of its developed expertise is to enable informed discussion on matters which are common to many legislatures.

6.2 As stated in the 35th report:

> The committee would be less than honest if it were to declare that it has welcomed the plethora of matters referred to it. Nonetheless, the variety and constancy of the matters have meant that it has had an opportunity to work out the implications of the new procedures, identify weaknesses, and develop for itself informal guidelines to supplement, in a practical way, the formal rules under which it must work. The committee considers that the process which it has been required to undertake has been worthwhile and has concluded that the … procedures adopted by the Senate on 25 February 1988 will continue to facilitate the consideration of matters such as these in years to come.[1]

6.3 The present committee continues to support that conclusion.

6.4 A feature of all the reports of the committee since the passage of the privilege resolutions has been their unanimity, with the exception of limited reservations by two individual senators, one in respect of the 11th report[2] and the other in relation to the committee's 42nd report.[3] Such unanimity on matters, many of which have related to highly contentious political issues, has, the committee believes, lent authority to its conclusions. As a result, the Senate has never failed to endorse the findings and adopt the recommendations of the committee's reports.

6.5 In looking at the history of privilege in the Australian Senate, several significant points emerge. As was demonstrated in the first privilege case considered by a Senate committee and by subsequent cases, senators are generally expected to fend for themselves in their dealings with the wider public, unless extreme forms of obstruction occur. The Senate and the Committee of Privileges have been gentle with persons who they have judged are unfamiliar with parliamentary processes and have no idea that their actions might constitute contempt. On the other hand, the committee

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1 Senate Committee of Privileges, *35th report*, PP 467/1991, p. 23.

2 Senate Committee of Privileges, *11th report*, PP 46/1988, pp. 13-16.

3 Senate Committee of Privileges, *42nd report*, PP 85/1993, pp. 49-55.

in particular has reserved its harshest criticisms for persons who should have been in a position to know the law of privilege and the consequences of flouting that law.

6.6 Although the committee has been forthright in making critical comments about the actions of such persons, it has been reticent in finding contempt because of its belief that a culpable intention should be proved for such a finding to be made. Indeed, this is a requirement in relation to the separate contempts established by the senators' interests resolutions. Suggestions have thus been made from time to time that the committee does not have the impact it should. However, success is not necessarily measured in terms of findings. It has long been acknowledged that valuable principle grows out of case law. The experience of the Senate Committee of Privileges, particularly as a result of the matters which it has considered over the past eighteen years, reinforces the truth of this. The committee has been consistent in its examination of cases, and has attempted to place its determination of matters within the historical context of the privilege which binds and protects all parliaments and the people whom the parliaments represent.

John Faulkner
Chair

APPENDIX A

PARLIAMENTARY PRIVILEGES ACT 1987

TABLE OF PROVISIONS

Section

PARLIAMENTARY PRIVILEGES ACT 1987

An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes

Short title

1. This Act may be cited as the Parliamentary Privileges Act 1987. [1]

Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.[1]

Interpretation

3. (1) In this Act, unless the contrary intention appears:

"committee" means:

(a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act; or

(b) a sub-committee of a committee referred to in paragraph (a);

"court" means a federal court or a court of a State or Territory;

"document" includes a part of a document;

"House" means a House of the Parliament;

"member" means a member of a House;

"tribunal" means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power.

(2) For the purposes of this Act, the submission of a written statement by a person to a House or a committee shall, if so ordered by the House or the committee, be deemed to be the giving of evidence in accordance with that statement by that person before that House or committee.

(3) In this Act, a reference to an offence against a House is a reference to a breach of the privileges or immunities, or a contempt, of a House or of the members or committees.

Application of the Criminal Code

3A. (1) Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) To avoid doubt, subsection (1) does not apply the *Criminal Code* to an offence against a House.

Essential element of offences

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

Powers, privileges and immunities

5. Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

Contempts by defamation abolished

6. (1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

Penalties imposed by Houses

7. (1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of a House.

(3) A House does not have power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

(4) A resolution of a House ordering the imprisonment of a person in accordance with this section may provide that the President of the Senate or the Speaker of the House of Representatives, as the case requires, is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the President or the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) A House may impose on a person a fine:

(a) not exceeding $5,000, in the case of a natural person; or

(b) not exceeding $25,000, in the case of a corporation;

for an offence against that House determined by that House to have been committed by that person.

(6) A fine imposed under subsection (5) is a debt due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose.

(7) A fine shall not be imposed on a person under subsection (5) for an offence for which a penalty of imprisonment is imposed on that person.

(8) A House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

Houses not to expel members

8. A House does not have power to expel a member from membership of a House.

Resolutions and warrants for committal

9. Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

Reports of proceedings

10. (1) It is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee.

(2) Subsection (1) does not apply in respect of matter published in contravention of section 13.

(3) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

Publication of tabled papers

11. (1) No action, civil or criminal, lies against an officer of a House in respect of a publication to a member of a document that has been laid before a House.

(2) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

Protection of witnesses

12. (1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

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

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of:

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given;

before a House or a committee.

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

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

Unauthorised disclosure of evidence

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

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

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

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

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

Immunities from arrest and attendance before courts

14. (1) A member:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on any day:

(c) on which the House of which that member is a member meets;

(d) on which a committee of which that member is a member meets; or

(e) which is within 5 days before or 5 days after a day referred to in paragraph (c) or (d).

(2) An officer of a House:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause;

on any day:

(c) on which a House or a committee upon which that officer is required to attend meets; or

(d) which is within 5 days before or 5 days after a day referred to in paragraph (c).

(3) A person who is required to attend before a House or a committee on a day:

(a) shall not be required to attend before a court or a tribunal; and

(b) shall not be arrested or detained in a civil cause; on that day.

(4) Except as provided by this section, a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.

Application of laws to Parliament House

15. It is hereby declared, for the avoidance of doubt, that, subject to section 49 of the Constitution and this Act, a law in force in the Australian Capital Territory applies according to its tenor (except as otherwise provided by that or any other law) in relation to:

(a) any building in the Territory in which a House meets; and

(b) any part of the precincts as defined by subsection 3 (1) of the Parliamentary Precincts Act 1988.

Parliamentary privilege in court proceedings

16. (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

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

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence,

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

(5) In relation to proceedings in a court or tribunal so far as they relate to:

(a) a question arising under section 57 of the Constitution; or

(b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the

authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

Certificates relating to proceedings

17. For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that:

(a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee;
(b) a particular document was directed by a House or a committee to be treated as evidence taken in camera;
(c) certain oral evidence was taken by a committee in camera;
(d) a document was not published or authorised to be published by a House or a committee;
(e) a person is or was an officer of a House;
(f) an officer is or was required to attend upon a House or a committee;
(g) a person is or was required to attend before a House or a committee on a day;
(h) a day is a day on which a House or a committee met or will meet; or
(i) a specified fine was imposed on a specified person by a House;

is evidence of the matters contained in the certificate.

NOTE

1. *The Parliamentary Privileges Act 1987* as shown in this compilation comprises Act No. 21, 1987 amended as indicated in the Tables below.
For all relevant information pertaining to application, saving or transitional provisions see Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
Parliamentary Privileges Act 1987	21, 1987	20 May 1987	20 May 1987	
Parliamentary Precincts Act 1988	9, 1988	5 April 1988	Ss.1-4,7, and 14 (in part): Royal Assent S.11; 6 May 1988 (see *Gazette* 1988, No. S129) Remainder: 1 Aug 1988 (see *Gazette* 1988, No. S229)	S.12
Law and Justice Legislation Amendment Act (No. 3) 1992	165, 1992	11 December 1992	Schedule (Note): Royal Assent (a)	—
Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001	24, 2001	6 April 2001	S. 4(1), (2) and Schedule 38: (b)	S. 4(1) and (2)

(a) The *Parliamentary Privileges Act 1987* was amended by the Schedule (Note) only of the *Law and Justice Legislation Amendment Act (No. 3) 1992*, subsection 2(1) of which provides as follows:

> (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

(b) The *Parliamentary Privileges Act 1987* was amended by Schedule 38 only of the Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001, subsection 2(1)(a) of which provides as follows:

> (1) Subject to this section, this Act commences at the later of the following times:
>
> (a) immediately after the commencement of item 15 of Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000;*

Item 15 commenced on 24 May 2001.

Table of Amendments

ad=added or inserted am=amended rep=repealed rs=repealed and substituted

Provision affected	How affected
S. 3A	ad. No. 24, 2001
Heading to s. 14	am. No. 165, 1992
S. 15	am. No. 9, 1988

PARLIAMENTARY PRIVILEGES BILL 1986
(Mr President)

EXPLANATORY MEMORANDUM

Purpose of the Bill

This Bill has a two-fold purpose:

(a) to provide for the principal changes in the law recommended by the Joint Select Committee on Parliamentary Privilege; and

(b) to avoid the consequences of the interpretation of article 9 of the Bill of Rights 1688 by the judgments of Mr Justice Cantor and Mr Justice Hunt of the Supreme Court of New South Wales.

In putting forward this Bill, Mr President is responding to requests and suggestions by Honourable Senators following his statement in the Senate on 9 April 1986 concerning the judgment of Mr Justice Hunt. It was put to him that it would be appropriate for him to initiate the necessary legislative proposal to avoid the consequences of the court judgments and, at the same time, to give the Parliament the opportunity of considering the legislative changes recommended by the Joint Committee. Accordingly, Mr President arranged for the Bill to be drafted by one of the Senate Department's consultant draftsmen, Mr C.K. Comans, C.B.E., O.C., formerly First Parliamentary Counsel. The Bill takes note of the provisions of the Parliamentary Powers, Privileges and Immunities Bill introduced into the Senate by Senator Macklin in 1985 and the Parliament (Powers, Privileges and Immunities) Bill introduced into the House of Representatives by Mr Spender in 1985. Those two Bills were designed to put into effect the recommendations of the Joint Committee. There are some departures from the recommendations of the Joint Committee in the Bill, and these are noted and the reasons for them explained in this memorandum.

Explanation of clauses

Clause 1: Short title

Clause 2: Commencement

The Bill is to come into operation on Royal Assent.

Clause 3: Interpretation

This clause provides the definitions necessary for the Bill.

The definition of "committee" covers all committees of either House, including committees of the whole, joint committees, and sub-committees.

"Document" is defined to include part of a document. The Acts Interpretation Act defines "document" to include any material containing meaningful symbols and any article from which sound, visual images or writing are capable of being reproduced.

"Tribunal" is defined to include any body having power to examine witnesses on oath, but does not include a court, which is separately defined to include all Australian courts, or a parliamentary committee.

Sub-clause (2) makes it clear that a written submission received as evidence by a House or committee is to be regarded as evidence given before the House or committee.

Sub-clause (3) provides for a single phrase, "offence against a House", to be used for acts commonly called breaches of privilege but more correctly called contempts of a House.

Clause 4: Essential element of offences

This clause provides that conduct does not constitute an offence against a House unless it amounts to an improper interference with a House, its committees or members. Such a provision was not recommended by the Joint Committee, but it is thought to be a useful adjunct to clause 9, and together the two clauses will provide for review by the courts of any imprisonment of a person by a House.

Clause 5: Powers, privileges and immunities

This clause provides that the powers, privileges and immunities of each House continue in force except to the extent that they are altered by the Bill. This is in accordance with the recommendations of the Joint Committee.

Clause 6: Contempts by defamation abolished

This clause provides that it shall no longer be an offence against a House for any person to defame or criticise a House or its members or committees, in accordance with the recommendation of the Joint Committee.

Sub-clause (2) provides that this does not apply to words spoken or acts done in the presence of a House or committee. This is to ensure that a House or a committee can take appropriate action in a situation where a witness or a member of the public makes insulting or offensive remarks at a sitting of a House or a committee.

Clause 7: Penalties imposed by Houses

This clause provides that a House may impose a penalty of a fixed term of imprisonment not exceeding six months and may impose fines, in accordance with the recommendations of the Joint Committee.

Clause 8: Houses not to expel members

This clause abolishes the power of the Houses to expel their members, in accordance with the recommendations of the Joint Committee.

Clause 9: Resolutions and warrants for committal

This clause provides that if a House imposes a penalty of imprisonment upon a person, the resolution of the House and the necessary warrant to commit the person to custody shall set out particulars of the offence committed by the person. This provision is in accordance with the recommendations of the Joint Committee.

The Bill does not contain the provision recommended by the Joint Committee for the High Court to make a non-enforceable declaration concerning an imprisonment of a person by a House. Advice was received that a legislative provision to that effect would be invalid, because it would amount to requiring or empowering the High Court to give an advisory opinion. The Bill also does not prevent a person who is imprisoned by a House from seeking a review by a court of the House's action by other means, such as by application for a writ of habeas corpus.

Any requirement for specification of the offence in a warrant would have the effect that a court could determine whether the ground for the imprisonment of a person was sufficient in law to amount to a contempt of a House: *R. v Richards: ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, at p. 162. This clause, in conjunction with clause 4, will have the effect that a court may review any imprisonment of a person by a House to determine whether the person's conduct was capable of constituting an offence as defined by Clause 4.

Clause 10: Reports of proceedings

This clause provides for the defence of qualified privilege for the publication of reports of parliamentary proceedings, in accordance with the recommendations of the Joint Committee. The clause follows the draft Bill proposed by the Australian Law Reform Commission in its report on unfair publication (report No. 11, 1979).

Clause 11: Publication of tabled papers

This clause provides for absolute privilege for the publication, by officers of a House to members, of a document laid before a House, in accordance with the recommendations of the Joint Committee.

The standing orders of both Houses provide that a tabled document is public, and in practice papers tabled in the Senate are given virtually unlimited publication. Because of this, consideration was given to extending absolute privilege to any publication of a tabled document, but this may be thought to be unduly wide. The Senate may wish to give consideration to the appropriateness of its standing order.

Clause 12: Protection of witnesses

This clause creates criminal offences and provides for penalties in respect of interference with parliamentary witnesses, in accordance with the recommendations of the Joint Committee.

Clause 13: Unauthorised disclosure of evidence

This clause creates a criminal offence and provides penalties in respect of the unauthorised disclosure of in camera evidence taken by a House or committee. This was not recommended by the Joint Committee, but it is thought that it is a logical extension of the provision for protection of witnesses.

Clause 14: Immunities from arrest and attendance before courts

This clause restricts the immunities of members, officers and witnesses from civil arrest and from compulsory attendance before a court to days on which the relevant House or committee sits and, in the case of members and officers, to the period extending from five days before and five days after such a sitting, in accordance with the recommendations of the Joint Committee.

Clause 15: Application of laws to Parliament House

The Joint Committee recommended that doubts about the application of particular laws to Parliament House should be removed. This clause provides that a law in force in the A.C.T. applies in Parliament House subject to the powers, privileges and immunities of the Houses and any contrary statutory provision. The clause is unnecessary because it is clear that the powers, privileges and immunities of the Houses do not involve any general abrogation of the law in Parliament House, but the clause is included because of persistent, though ill-founded, doubts about this. The clause is drafted so as to be consistent with another Bill prepared by Mr President, the Parliamentary Precincts Bill 1986, which is designed to put into effect the recommendations of the Joint Committee on the New Parliament House in relation to the parliamentary precincts.

Clause 16: Parliamentary privilege in court proceedings

The purpose of this clause is to avoid the consequences of the interpretation of article 9 of the Bill of Rights 1688 by the judgments of Mr Justice Cantor and Mr Justice Hunt of the Supreme Court of New South Wales.

Article 9, which applies to the Australian Parliament by virtue of section 49 of the Constitution**,** provides

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

In the past the courts have held that the article prevents parliamentary proceedings from being examined or questioned in a wide sense or used to support a cause of action (*Church of Scientology of California v Johnson-Smith*

(1972) 1 QB 522*, R. v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc*, (1983) 2 All ER 233, *Comalco Ltd v Australian Broadcastinq Corporation* (1983) 50 ACTR l; these judgments were based on authorities stretching back to 1688).

In each trial of *R. v Murphy*, in the Supreme Court of New South Wales, counsel instructed by the President of the Senate submitted that article 9 prevents the cross-examination of witnesses or the accused on evidence which they gave before parliamentary committees for the purpose of impeaching the evidence of witnesses or the accused.

On 5 June 1985 Mr Justice Cantor, before the first trial, gave a judgment to the effect that article 9 does not prevent the cross-examination of persons in court proceedings on their parliamentary evidence, that the test of a violation of article 9 is whether there is any adverse effect on parliamentary proceedings, and that the protection of parliamentary proceedings must be "balanced" against the requirements of court proceedings. Subsequently in the course of the trial a witness was extensively cross-examined on evidence given before a Senate committee, including evidence given in camera, and the truthfulness of that evidence was questioned. The accused was cross-examined on a written statement which he had submitted to a Senate committee and which had been treated as in camera evidence, and the prosecution made submissions to the jury questioning the truthfulness of the accused on the basis of that evidence, despite objections by the defence.

In *R. v Foord*, Mr Justice Cantor's judgment was followed and witnesses in that trial were extensively cross-examined on the truthfulness of their evidence before Senate committees and their motives in giving that evidence.

On 8 April 1986 Mr Justice Hunt, before the second trial in *R. v Murphy*, gave a judgment which expressly repudiated the law expounded in the cases cited, and which held that article 9 prevented only parliamentary proceedings being the actual subject of criminal and civil action, but allowed the use of parliamentary proceedings as evidence of an offence, to impeach the evidence of witnesses or the accused or to support a cause of action.

The clause would prevent such use of proceedings in Parliament and restore the interpretation of article 9 contained in the earlier judgments.

The clause declares that article 9 applies in respect of the Australian Parliament and that it has the effect indicated by the provisions of the clause. The clause has been drafted in this way largely to avoid the difficulty which may be created for other jurisdictions if the Australian Parliament were to legislatively accept that article 9 as such has the restricted meaning given to it by the recent judgments and requires legislative supplementation to be given its broad interpretation. Article 9 is part of the law in many jurisdictions around the world, including the Australian States, and it has been indicated that Parliaments in those jurisdictions would not wish the Australian Parliament to be in any way accepting that article 9 may be read narrowly and that it requires such legislative supplementation.

Sub-clause (1): This sub-clause declares that article 9 applies in relation to the Australian Parliament and is to be construed in accordance with the provisions of the clause.

Sub-clause (2): It is necessary to define the phrase "proceedings in Parliament", which sets the scope of the immunity contained in article 9. The phrase is defined to include all words spoken and acts done in transacting the business of the Houses or their committees, including the preparation and submission of documents.

Sub-clause (3): This sub-clause prevents the use of parliamentary proceedings in court or tribunal proceedings -

(a) in a manner involving questioning or relying on the truth, motive, good faith or intention of words spoken or acts done in the parliamentary proceedings;

(b) to attack or support the evidence or credibility of persons giving evidence in court or tribunal proceedings; and

(c) to draw inferences or conclusions for the purposes of the court or tribunal proceedings.

Sub-clause (4): This sub-clause prevents evidence which has been taken in camera by a House or a committee and not published from being used in court proceedings, as was done in *R. v Murphy* and *R. v Foord*. The sub-clause covers documents specifically prepared for submission to a House or a committee and accepted as in camera evidence, and oral evidence taken in camera.

Sub-clause (5): It may be necessary for a court to examine proceedings in Parliament for the purpose of determining a question arising under section 57 of the Constitution after a double dissolution (e.g., whether the Senate failed to pass a Bill), or interpreting an Act of the Parliament (the Acts Interpretation Act allows for that purpose reference to parliamentary proceedings, including second reading speeches, reports of committees and amendments moved and determined). This sub-clause therefore provides that neither this clause nor the Bill of Rights shall be taken to prevent the admission in evidence in the court proceedings of parliamentary records for those purposes. Nothing in the sub-clause makes admissible anything which would otherwise not be admissible.

Sub-clause (6): This Bill would provide for statutory offences (interference with witnesses, clause 12, and unauthorised disclosure of evidence, clause 13) which relate to proceedings in committees. There are also Acts establishing statutory parliamentary committees which provide for offences relating to proceedings in those committees (e.g., giving false evidence before a committee). It may well be impossible to conduct any proceedings in the courts in relation to such offences without use of evidence relating to the relevant parliamentary proceedings. This sub-clause therefore provides that neither this clause nor the Bill of Rights shall be taken to prevent the admission of evidence concerning parliamentary proceedings in relation to such court proceedings.

Sub-clause (7): This sub-clause would prevent the provisions of the Bill from applying to court proceedings commenced before the Bill comes into operation, but does not prejudice article 9 itself, as properly interpreted, in its application to such court proceedings.

Clause 17: Certificates relating to proceedings

This clause provides for the Presiding Officers of the Houses and chairmen of committees to certify various matters relating to the proceedings of the Houses or committees for evidentiary purposes. Under the clause a certificate, for example, signed by the President of the Senate indicating that a person is an officer of the Senate, would be accepted as proof of that fact in the absence of any evidence to the contrary.

APPENDIX B

PARLIAMENTARY PRIVILEGE

RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

CONTENTS

PARLIAMENTARY PRIVILEGE

RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

1. Procedures to be observed by Senate committees for the protection of witnesses

That, in their dealings with witnesses, all committees of the Senate shall observe the following procedures:

(1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.

(2) Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made) only where the committee has made a decision that the circumstances warrant such an order.

(3) A witness shall be given reasonable notice of a meeting at which the witness is to appear, and shall be supplied with a copy of the committee's order of reference, a statement of the matters expected to be dealt with during the witness's appearance, and a copy of these procedures. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.

(4) A witness shall be given opportunity to make a submission in writing before appearing to give oral evidence.

(5) Where appropriate, reasonable opportunity shall be given for a witness to raise any matters of concern to the witness relating to the witness's submission or the evidence the witness is to give before the witness appears at a meeting.

(6) A witness shall be given reasonable access to any documents that the witness has produced to a committee.

(7) A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.

(8) Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.

(9) A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.

(10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.

(11) Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.

(12) Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.

(13) Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (12) is not taken in respect of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.

(14) A witness may make application to be accompanied by counsel and to consult counsel in the course of a meeting at which the witness appears. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision.

(15) A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears.

(16) An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.

(17) Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.

(18) Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.

2. Procedures for the protection of witnesses before the Privileges Committee

That, in considering any matter referred to it which may involve, or gives rise to any allegation of, a contempt, the Committee of Privileges shall observe the procedures set out in this resolution, in addition to the procedures required by the Senate for the protection of witnesses before committees. Where this resolution is inconsistent with the procedures required by the Senate for the protection of witnesses, this resolution shall prevail to the extent of the inconsistency.

(1) A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the Committee and relevant to the Committee's inquiry, against the person, and of the particulars of any evidence which has been given in respect of the person.

(2) The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:

(a) making written submission to the Committee;

(b) giving evidence before the Committee;

(c) having other evidence placed before the Committee;

(d) having witnesses examined before the Committee.

(3) Where oral evidence is given containing any allegation against, or reflecting adversely on, a person, the Committee shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.

(4) A person appearing before the Committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.

(5) A witness shall not be required to answer in public session any question where the Committee has reason to believe that the answer may incriminate the witness.

(6) Witnesses shall be heard by the Committee on oath or affirmation.

(7) Hearing of evidence by the Committee shall be conducted in public session, except where:

(a) the Committee accedes to a request by a witness that the evidence of that witness be heard in private session;

(b) the Committee determines that the interests of a witness would best be protected by hearing evidence in private session; or

(c) the Committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.

(8) The Committee may appoint, on terms and conditions approved by the President, counsel to assist it.

(9) The Committee may authorise, subject to rules determined by the Committee, the examination by counsel of witnesses before the Committee.

(10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.

(11) The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.

(12) Before appearing before the Committee a witness shall be given a copy of this resolution.

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

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

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

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

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

(i) knowingly committed that act, or

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

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

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

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

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

5. Protection of persons referred to in the Senate

(1) Where a person who has been referred to by name, or in such a way as to be readily identified, in the Senate, makes a submission in writing to the President:

(a) claiming that the person has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person; and

(b) requesting that the person be able to incorporate an appropriate response in the parliamentary record,

if the President is satisfied:

(c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Committee of Privileges; and

(d) that it is practicable for the Committee of Privileges to consider the submission under this resolution,

the President shall refer the submission to that Committee.

(2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Senate.

(3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Senator who referred in the Senate to that person.

(4) In considering a submission under this resolution, the Committee shall meet in private session.

(5) The Committee shall not publish a submission referred to it under this resolution or its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Senate.

(6) In considering a submission under this resolution and reporting to the Senate the Committee shall not consider or judge the truth of any statements made in the Senate or of the submission.

(7) In its report to the Senate on a submission under this resolution, the Committee may make either of the following recommendations:

(a) that no further action be taken by the Senate or by the Committee in relation to the submission; or

(b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person and the Committee, be published by the Senate or incorporated in Hansard,

and shall not make any other recommendations.

(8) A document presented to the Senate under paragraph (5) or (7):

(a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and

(b) shall not contain any matter the publication of which would have the effect of:

(i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or

(ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.

6. Matters constituting contempts

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

Interference with the Senate

(1) A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator's duties as a Senator.

Improper influence of Senators

(2) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Senator in the Senator's conduct as a Senator or induce a Senator to be absent from the Senate or a committee.

Senators seeking benefits etc.

(3) A Senator shall not ask for, receive or obtain, any property or benefit for the Senator, or another person, on any understanding that the Senator will be influenced in the discharge of the Senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Senator's independence or freedom of action as a Senator, or pursuant to which the Senator is in any way to act as the representative of any outside body in the discharge of the Senator's duties.

Molestation of Senators

(4) A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, a Senator on account of the Senator's conduct as a Senator.

Disturbance of the Senate

(5) A person shall not wilfully disturb the Senate or a committee while it is meeting, or wilfully engage in any disorderly conduct in the precincts of the Senate or a committee tending to disturb its proceedings.

Service of writs etc.

(6) A person shall not serve or execute any criminal or civil process in the precincts of the Senate on a day on which the Senate meets except with the consent of the Senate or of a person authorised by the Senate to give such consent.

False reports of proceedings

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

Disobedience of orders

(8) A person shall not, without reasonable excuse, disobey a lawful order of the Senate or of a committee.

Obstruction of orders

(9) A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Senate or of a committee.

Interference with witnesses

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

Offences by witnesses etc.

(12) A witness before the Senate or a committee shall not:

(a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;

(b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or

(c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

(13) A person shall not, without reasonable excuse:

(a) refuse or fail to attend before the Senate or a committee when ordered to do so; or

(b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a committee.

(14) A person shall not wilfully avoid service of an order of the Senate or of a committee.

(15) A person shall not destroy, damage, forge or falsify any document required to be produced by the Senate or by a committee.

Unauthorised disclosure of evidence etc.

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

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

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

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

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

7. Raising of matters of privilege

That, notwithstanding anything contained in the Standing Orders, a matter of privilege shall not be brought before the Senate except in accordance with the following procedures:

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

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

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

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

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

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

8. Motions relating to contempts

That, notwithstanding anything contained in the Standing Orders, a motion to:

(a) determine that a person has committed a contempt; or

(b) impose a penalty upon a person for a contempt,

shall not be moved unless notice of the motion has been given not less than 7 days before the day for moving the motion.

9. Exercise of Freedom of Speech

(1) That the Senate considers that, in speaking in the Senate or in a committee, Senators should take the following matters into account:

(a) the need to exercise their valuable right of freedom of speech in a responsible manner;

(b) the damage that may be done by allegations made in Parliament to those who are the subject of such allegations and to the standing of Parliament;

(c) the limited opportunities for persons other than members of Parliament to respond to allegations made in Parliament;

(d) the need for Senators, while fearlessly performing their duties, to have regard to the rights of others; and

(e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.

(2) That the President, whenever the President considers that it is desirable to do so, may draw the attention of the Senate to the spirit and the letter of this resolution.

10. Reference to Senate proceedings in court proceedings

(1) That, without derogating from the law relating to the use which may be made of proceedings in Parliament under section 49 of the Constitution, and subject to any law and any order of the Senate relating to the disclosure of proceedings of the Senate or a committee, the Senate declares that leave of the Senate is not required for the admission into evidence, or reference to, records or reports of proceedings in the Senate or in a committee of the Senate, or the admission of evidence relating to such proceedings, in proceedings before any court or tribunal.

(2) That the practice whereby leave of the Senate is sought in relation to matters referred to in paragraph (1) be discontinued.

(3) That the Senate should be notified of any admission of evidence or reference to proceedings of the kind referred to in paragraph (1), and the Attorneys-General of the Commonwealth and the States be requested to develop procedures whereby such notification may be given.

11. Consultation between Privileges Committees

That, in considering any matter referred to it, the Committee of Privileges may confer with the Committee of Privileges of the House of Representatives.

PARLIAMENTARY PRIVILEGE

PROPOSED RESOLUTIONS OF THE SENATE

These notes list the recommendations of the Joint Select Committee on Parliamentary Privilege on which the proposed resolutions are based, and indicate the nature of and the reason for any proposed modifications of the terms of the Committee's recommendations.

Some of the Committee's recommendations were for amendments to the Standing Orders, but the following all take the form of resolutions, in accordance with the practice of trying new procedures by resolution before they are written into the Standing Orders. It may also be desirable to keep all the matters together rather than have them scattered through the Standing Orders.

The proposed resolutions have been drafted so as to be consistent with the *Parliamentary Privileges Act 1987*.

Minor changes to the wording of resolutions recommended by the Committee and changes to take account of Senate practice and phraseology are not noted.

Proposed resolution 1: **Procedures to be observed by Senate committees for the protection of witnesses**

Recommendation 35 of the Committee. The Committee substantially adopted a suggested resolution put to it by the Senate Department, which reflected practices already adopted by Senate committees. The following modifications have been suggested to the resolution recommended by the Committee.

(1) The resolution recommended by the Committee was limited to "investigatory" committees. There would seem to be no reason for not extending it to all committees.

(2) Paragraph (5), referring to opportunity for witnesses to raise matters of concern to them before they give evidence**,** was not included in the Committee's recommendation, but it is suggested that it be included in the resolution.

(3) Paragraph (6) of the Committee's recommended resolution would require reasons for refusing a witness's application to be heard in camera to be given in public. It may well be that a witness would prefer not to have the reasons published, and this is reflected in the proposed resolution (paragraph (7)).

(4) Words have been added to paragraph (7) to make it clear that a witness may ask to give part of the witness's evidence in private session during the hearing of the witness's evidence. The witness may wish to answer a particular question in camera.

(5) Paragraph (9) has been altered to make it clear that it is the responsibility of the chairman to rule on the relevance and necessity of a particular question, but that it is open to the committee to deliberate in private session and to determine whether any particular question, the relevance or necessity of which has been questioned, should be asked.

(6) Paragraph (10) has been altered to make it clear that it is open to the committee to determine at once, without going into private session to deliberate, that a question objected to by a witness should not be pressed. It may happen that a Senator immediately withdraws a

question to which objection has been taken, and the committee accepts the withdrawal of the question.

(7) Paragraph (12) of the Committee's recommended resolution would provide that a committee may give reasonable opportunity for a person to respond to evidence adverse to the person. There would seem to be no reason for not making the reasonable opportunity mandatory, given that a committee may decide what is a reasonable opportunity in the circumstances (paragraph (13) of the proposed resolution).

(8) Paragraph (14) has been changed to provide a criterion for a committee to use when determining whether a request for a witness to be accompanied by counsel will be granted, namely, the need for the witness to be accompanied by counsel to ensure the proper protection of the witness.

(9) Words have been added to paragraph (15) to make provision for application by a witness for the reimbursement of legal costs where the witness has been granted the right to be accompanied by counsel, and for the committee to consider such application.

(l0) Paragraph (16) is a new paragraph providing for a witness to make application for the reimbursement of expenses incurred in direct consequence of making a submission to a committee or giving evidence, and for the committee to consider such application.

Proposed resolution 2: **Procedures for the protection of witnesses before the Privileges Committee**

Recommendation 21 of the Committee. The Committee did not recommend the terms of a resolution. The procedures recommended by the Committee are cast in the form of conferring protection upon persons “against whom a complaint has been made”. The difficulty with this formulation is that a reference to the Privileges Committee often does not contain a complaint against any person, but merely refers to a matter which may involve or may give rise to an allegation of contempt against a person. The Privileges Committee has the task of investigating the matter to determine whether any contempt has been committed, and if so, by whom, and of hearing evidence and making a determination in relation to any allegation of contempt which may emerge during the inquiry. In other words, it combines the functions of an investigative agency and a court of first hearing in a criminal matter. A person who is called merely as a witness may turn out to be the person against whom an allegation is made, and different allegations may be made against different people.

It would seem, therefore, to be preferable to confer protection on all persons involved in the Privileges Committee's inquiry against whom any allegation is made or any adverse evidence given, regardless of whether those persons are in the position of an “accused”. This would have a considerable advantage over criminal proceedings in a court. In such proceedings very damaging accusations may be made against witnesses, by cross-examination and submissions, without those witnesses having any opportunity to respond or defend themselves; only the accused is protected, and only in relation to conviction for the specific charges before the court.
The proposed resolution had been drafted accordingly, and because of this it is substantially different from the rules suggested by the Committee. The proposed resolution having been drafted in this way, it subsumes recommendation 24 of the Committee, relating to the reputations of “third persons” in Privileges Committee inquiries.

Other modifications of the Committee's recommendation are as follows.

(1) Paragraph (a) of the Committee's recommended rules would give the Privileges Committee discretion to hear evidence in camera. Paragraph (7) of the proposed resolution would allow the Privileges Committee to hear evidence in camera only for the purpose of protecting witnesses or where the Committee considers it otherwise appropriate. It may be that the protection of witnesses should be the sole ground.

(2) Paragraph (h) of the Committee's recommended resolution would allow the person "against whom the complaint is made" to make submissions "at the conclusion of the evidence". This provision is based on the analogy with criminal proceedings. Paragraph (10) of the proposed resolution would allow any person affected by proposed findings of the Committee to make submissions on those findings before the findings are finally formulated and presented to the Senate.

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

Recommendation 14 of the Committee. The proposed resolution is cast in the form of a declaration by the Senate that it will take criteria into account in determining whether matters should be referred to the Privileges Committee and whether a contempt has been committed, rather than a resolution expressing an opinion as to how the penal jurisdiction should be exercised as recommended by the Committee. The proposed resolution would also require the Privileges Committee to take the stated matters into account.

Paragraph (a) of the proposed resolution contains the principle recommended by the Committee. Other matters not recommended by the Committee are suggested, as follows:

paragraph (b): the existence of another remedy, i.e., a civil or criminal action; and

paragraph (c): mens rea and reasonable excuse.

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

The Committee did not recommend any specification of the matters to be taken into account in determining whether a motion should have precedence, but it would seem to be desirable to give the President some guidance in exercising this discretion, and to use the same criteria as the Senate itself would adopt to determine whether a contempt has been committed, except those which would involve any judgement of the content of an alleged contempt. The proposed resolution has been drafted accordingly.

Proposed resolution 5: **Protection of persons referred to in the Senate**

Recommendation 3 of the Committee. The Committee did not formulate a specific resolution, but suggested a series of ground rules for incorporation on a trial basis in the Standing Orders.

Modifications have been made to the procedures recommended by the Committee, as follows.

(1) The Committee suggested that a complaint of misuse of privilege should not contain "any matter amounting either directly or indirectly to an attack or a reflection on any Member of Parliament". It is suggested that this criterion not be adopted. It may be extremely difficult for a person to claim that the person has been unfairly attacked in Parliament without at least indirectly reflecting on a member. Such a person may well need to state that a member did not tell the truth, which would be a grave reflection.

(2) The Committee suggested procedures that leave the Committee of Privileges at liberty to deal with the matter in any way it thinks fit. The proposed resolution would restrict the Committee to specific procedures and remedies. It is suggested that it would be desirable to do this to prevent undue interference with a member's freedom of speech.

Proposed resolution 6: Matters constituting contempts

Recommendations 27 to 33 of the Committee. The proposed resolution has been cast in the form of a declaration by the Senate, for the information of the public, as to matters it may treat as contempts.

The guidelines recommended by the Committee were taken from the *Offences Against the Parliament Bill 1981* introduced by Senator Button. The Committee departed from the provisions of Senator Button's Bill in a few places, and these departures are the subject of suggested modifications.

The following comments are offered and modifications suggested in relation to the Committee's suggested guidelines.

(1) The Committee suggested, as part of its description of "molestation", that it would be a contempt to "engage in any course of conduct intended to influence a Member in the discharge of his duties as a Member". It is suggested that this formulation could be regarded as preventing normal, acceptable and democratic methods of influencing members, e.g., telling a member that a vigorous campaign will be conducted against the member in the next election unless the member votes for a particular measure.

(2) The Committee suggested a contempt involving a member receiving any benefit on the understanding that the member would be influenced in the discharge of the member's duties, or entering into any arrangement controlling or limiting a member's independence or freedom of action or involving the member acting as the representative of an outside body. Paragraph (2) of the proposed resolution contains the Committee's formulation. In so far as this is intended to relate to bribery and corruption of members, it may be regarded as already covered, to the extent necessary in a declaration for the guidance of the public, by paragraph (2) of the suggested resolution. It may be thought that the wording suggested by the Committee is too wide and could make contempts out of normal, acceptable and democratic activities, e.g., a member agreeing to be bound by the decision of the member's party, or accepting the political support of an interest group, or agreeing to make representations on behalf of an interest group.

(3) The contempt of impairing the respect due to the authority of a House or a committee has been omitted from paragraph (5), relating to disturbance of meetings. It is suggested that this phrase is too vague.

(4) The provisions referring to the publication of in camera evidence and premature publication of reports have been combined in paragraph (16), and drafted so as to be consistent with the *Parliamentary Privileges Act 1987.*

Proposed resolution 7: Raising of matters of privilege

Recommendation 20 of the Committee. No substantive changes are suggested to the procedures recommended by the Committee.

Proposed resolution 8: Motions relating to contempts

Recommendation 22 of the Committee. The Committee recommended that 7 days' notice be given of any motion for the imposition of a penalty for a contempt. It is not clear in the Committee's report or the recommendation whether it was intended that this apply to a motion declaring a person to be guilty of a contempt as well as a motion for imposing a penalty. It has been assumed that this was the intention, and the proposed resolution has been drafted accordingly.

Proposed resolution 9: **Exercise of freedom of speech**

Recommendation 4 of the Committee.

The following modifications of the Committee's recommended resolution are suggested.

(1) The Committee's resolution would enjoin members to take account of the listed matters when reflecting adversely on any person. It is suggested that members should be asked to take the listed matters into account before they make a decision to reflect adversely on any person. The suggested resolution is therefore drafted to request members to consider the matters whenever they speak.

(2) The Committee's recommended resolution would ask members to take into account the damage that may be done by unsubstantiated allegations. It is suggested that members be asked to consider the damage that may be done by any allegations, whether substantiated or not.

Proposed resolution 10: Reference to Senate proceedings in court proceedings

Recommendation 8 of the Committee.

The following modifications of the Committee's recommended resolution are suggested.

(1) It would not seem to be appropriate for a resolution to reaffirm a law which is not made by resolution in the first place. The terminology of non-derogation has been substituted.

(2) Reference is made to any relevant law under section 49 of the Constitution, rather than only article 9 of the Bill of Rights, to take account of any possible interpretation of the effect of the *Parliamentary Privileges Act 1987.*

(3) In order to take full account of the possibility of unauthorised publication of proceedings, it is necessary to refer to any relevant law (such as the Act) and any relevant order.

(4) It would not seem to be appropriate for the Senate to be giving leave for evidence to be admitted when the courts have determined that leave is not as a matter of law necessary. The proposed resolution therefore declares that leave is not required.

(5) The resolution recommended by the Committee refers only to records and reports of proceedings and documents. It is necessary to refer to any form of evidence relating to proceedings.

Proposed resolution 11: Consultation between Privileges Committees

Recommendation 26 of the Committee. No modifications of the recommendation are suggested.

PARLIAMENTARY PRIVILEGE

PROPOSED RESOLUTIONS OF THE SENATE

Amendments to be moved by Senator Durack

NOTES ON THE AMENDMENTS

Resolution 1. Procedures to be observed by Senate committees for the protection of witnesses

Amendments (1) and (2). These amendments make it clear that a committee is not obliged to issue an invitation to appear or to produce documents before issuing a summons if the committee decides that a summons is warranted.

Amendments (3) and (4). These amendments remove the references to reimbursement of legal costs of a person who is accompanied by counsel before a committee and to the reimbursement of expenses incurred by a person in making a submission or appearing before a committee. In the normal course of committee inquiries witnesses are not accompanied by counsel and meet their own expenses except for travel to and from committee meetings.

Resolution 2. Procedures for the protection of witnesses before the Privileges Committee

Amendment (5). This is purely a drafting amendment to make it clear that**,** as contemplated by paragraph (2), a witness against whom adverse evidence is given may make application to have other witnesses called as well as to cross-examine witnesses.

Amendment (6). The proposed new paragraph (11) makes it clear that the President is to grant reimbursement of the costs of representation of witnesses before the Committee only where the President is satisfied that a person would suffer substantial hardship due to liability to pay those costs.

Resolution 5. Protection of persons referred to in the Senate

Amendment (7). This would place an additional restriction on submissions by aggrieved persons, namely that submissions should not contain anything offensive in character.

Amendment (8). The differences between the original paragraphs (2) to (8) and the proposed new paragraphs are as follows:

- amendments consequential on amendment (7) have been made throughout
- the requirement for the committee to invite the aggrieved person and relevant Senators to give evidence has been deleted, and an option for the committee to confer with those persons has been substituted, and other references to receiving evidence have been deleted throughout
- a requirement has been inserted that a response by an aggrieved person be succinct and relevant and not contain any offensive matter.

PRIVILEGE RESOLUTIONS

RESPONSES TO QUESTIONS RAISED IN DEBATE ON 25 FEBRUARY 1988

(l) Senator Puplick asked *(Hansard* p. 634) whether there would be any difference between publication of a response by a person named in the Senate and incorporation of the response in *Hansard.* The only difference between the two methods is that when a document is ordered to be published by resolution of the Senate copies are distributed by the Table Office to the normal list of recipients or other inquirers, but the text does not appear in *Hansard.* It is envisaged that in particular circumstances, e.g., if a response were of considerable length or, possibly, a considerable time had elapsed since the debate in the Senate, the Senate may think it appropriate that the response be published rather than incorporated in *Hansard.*

(2) Senator Puplick asked (*Hansard* p. 634) whether a response published or incorporated in *Hansard* would attract absolute privilege. A response published or incorporated would attract absolute privilege; that is why the rules provide that a response be succinct and strictly relevant and not contain anything offensive in character.

(3) Senator Cooney asked (*Hansard* p. 636) about the appropriateness of considering whether a person had a reasonable excuse for committing an act which might be a contempt in relation to such offences as obstructing the Senate in the performance of its functions. Resolution 3 merely indicates that the Senate will consider whether any defence of reasonable excuse is available. Of course, there may be contempts which, by their nature, exclude any defence of reasonable excuse (e.g. threatening a witness), but that does not prevent the Senate from considering whether such a defence is available.

(4) Senator Cooney asked *(Hansard* p. 637) whether questions as to a witness's credit would be regarded as relevant to a matter under inquiry by a committee. As Senator Durack pointed out, the question of whether a question is relevant would be determined in the first instance by the committee. A committee may well regard questions as to the credit of a witness as relevant, depending on the circumstances, but it would be for the committee to decide, subject to any direction by the Senate. The same answer applies to a question asked by Senator Harradine (*Hansard* p. 638*)* concerning relevance of questions.

(5) Senator Harradine questioned (*Hansard*, pp. 638 and 639) the inclusion of the expression "improperly influence" in the list of matters which may be treated as contempts. Resolution 6, as its terms indicate, is intended to give some guidance as to matters which may be treated as contempts. It is in the nature of the offence concerned that it is not possible to specify in advance all methods of influencing Senators which may be regarded as improper. It is analagous to such statutory offences as attempting to pervert the course of justice.

(6) Senator Harradine asked (*Hansard* p. 638) whether the existence of another remedy for an act which may be held to be a contempt, in the criteria to be taken into account when determining matters relating to contempts, refers to the inability to sue a person for an act which may be held to be a contempt. The criterion does refer to the availability of any civil or criminal remedy, but it does not follow that, as Senator Harradine suggested, no account will be taken of a matter because a civil or criminal remedy is available; it is merely a matter to be considered.

(7) Senator Haines referred (*Hansard* pp. 639 and 640) to the inclusion in the list of matters which may be treated as contempts of the references to influencing Senators and Senators seeking benefits in return for the discharge of their parliamentary duties. That these statements may be too broadly worded was suggested in the explanatory notes accompanying the draft resolutions. Again it must be stressed, however, that Resolution 6 is simply an indication, for the guidance of the public, of matters which may be treated as contempts. The resolution does not commit the Senate Committee to treat any particular matters as contempts, nor does it affect the ability of the Senate to judge particular cases on their merits and according to circumstances. The resolution therefore does not create any difficulties or give rise to any questions which did not exist before the resolution was passed.

[*These responses were provided by Senator the Hon Gareth Evans in his capacity as Manager of Government Business in the Senate - see Senate Hansard 15 March 1988 p. 722*]

APPENDIX C

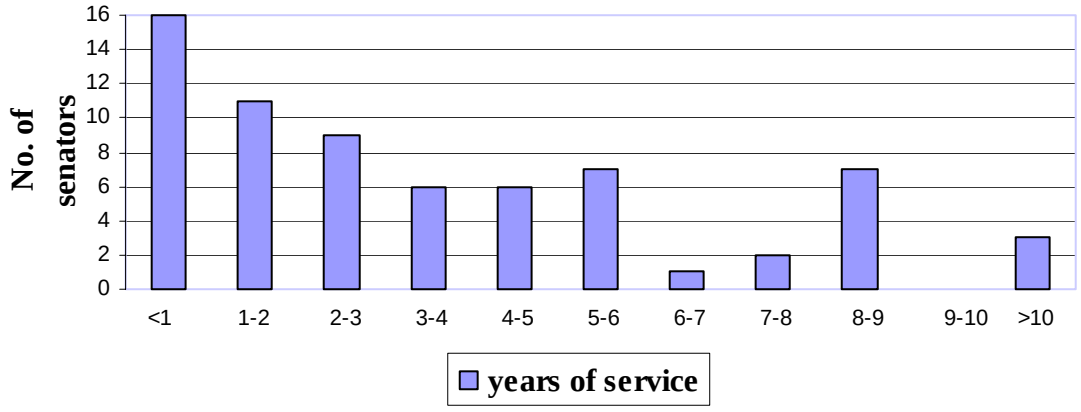
MEMBERSHIP OF THE COMMITTEE OF PRIVILEGES, 1967-2005

Standing Order 18(3), previously Standing Order 33A, states that the Committee of Privileges shall consist of seven senators, four nominated by the Leader of the Government in the Senate and three by the Leader of the Opposition.

There have been 68 members of the Committee of Privileges, 59 men and nine women. Twenty-seven represented the Australian Labor Party, **29** the Liberal Party, eight the Country Party, the National Country Party or the National Party, and four the Australian Democrats. Of the nine women members two (Senators Giles and Reynolds) represented the Australian Labor Party, four (Senators Coonan, Knowles, Payne and Reid) represented the Liberal Party, and three (Senators Bourne, Kernot and Powell) represented the Australian Democrats. Senator Kernot was appointed as a non-voting member for the purposes of the committee's examination of her private member's bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994.

The average duration of service of full committee members, to the end of November 2005, was three years and nine months. The member with the shortest term of service was Senator MacGibbon, who replaced Senator Lewis for five weeks in 1990. The longest-serving member is Senator Ray, who has been with the committee for more than 15 years. As Figure C.1 shows, several others have also shown remarkable staying power in the face of an increasing workload.

Figure C.1: Senators' Years of Service on Committee of Privileges



The 20 senators with five or more years of service on the committee are reasonably equally divided in party political and geographic terms, with each state except Queensland being represented by at least one long-serving member.

In terms of their geographic distribution, 18 members came from Western Australia, 12 from Tasmania, 11 each from New South Wales and Victoria, 9 from Queensland, 3 from South Australia, two from the Australian Capital Territory and one from the Northern Territory.

Privileges Committee members and their terms of service

Note: Since 1966 the committee has been appointed at the beginning of each Parliament. Where a Parliament has been prorogued, the committee is assumed to have remained in existence until the day before the opening of the following Parliament. In the case of the dissolution of the Senate, the committee terminates at the dissolution. However, members who were appointed to successive committees are shown as having unbroken service and the period between the end of one committee and the appointment of the next is not shown.

Name	*State*	*Party*	*Term of Service*
Archer, Brian Roper	TAS	Lib	19/8/93-31/1/94
Aulich, Terrence Gordon	TAS	ALP	11/9/85-5/6/87
Black, John	QLD	ALP	24/9/87-8/5/90
Bolkus, Nick	SA	ALP	25/8/81-15/6/84; 29/5/85-5/6/87
Bourne, Vicki Worrall	NSW	AD	1/7/90-29/4/92
Branson, George Howard	WA	Lib	5/4/67-14/5/71
Button, John Norman	VIC	ALP	18/7/74-15/6/84
Cant, Hartley Gordon James	WA	ALP	5/4/67-3/3/70; 1/5/73-18/5/74
Childs, Bruce Kenneth	NSW	ALP	4/5/83-24/2/88; 18/3/88-4/9/97
Coates, John	TAS	ALP	15/6/84-29/5/85; 24/9/87-20/8/96
Collard, Stanley James	QLD	NCP	25/8/81-5/3/83
Collins, Robert	NT	ALP	4/9/97-3/3/98
Cook, Peter Francis Salmon	WA	ALP	15/6/84-11/9/85
Coonan, Helen	NSW	Lib	1/7/96-31/8/99
Cooney, Bernard Cornelius	VIC	ALP	24/9/87-18/3/88;11/5/90-30/6/93; 1/9/96-24/11/98
Cormack, Magnus Cameron	VIC	Lib	5/4/67-21/8/68
Devitt, Donald Michael	TAS	ALP	1/5/73-11/11/75
Drake-Brockman, Thomas Charles	WA	CP	5/4/67-24/11/69; 29/9/70-26/2/73; 18/7/74-22/7/75; 4/3/76-30/6/78
Durack, Peter Drew	WA	Lib	24/9/87-11/9/90
Eggleston, Alan	WA	Lib	13/2/97-21/8/02
Ellison, Christopher Martin	WA	Lib	18/8/93-30/9/97
Evans, Christopher Vaughan	WA	ALP	24/11/98-15/11/04; 28/11/05-11/12/05
Everett, Mervyn George	TAS	ALP	18/7/74-11/11/75
Faulkner, John Philip	NSW	ALP	18/11/04-
Gibson, Brian Francis	TAS	Lib	15/3/94-4/5/94
Giles, Patricia Jessie	WA	ALP	24/2/88-30/6/93
Greenwood, Ivor John	VIC	Lib	21/8/68-11/11/75
Herron, John Joseph	QLD	Lib	19/8/92-18/8/93
Humphries, Gary John Joseph	ACT	Lib	20/3/03-
Hutchins, Steve	NSW	ALP	7/9/05-28/11/05
Jessop, Donald Scott	SA	Lib	4/3/76-15/6/84
Johnston, David Abbott Lloyd	WA	Lib	1/7/02-
Kernot, Cheryl*	QLD	AD	12/5/94-1/3/95
Knowles, Susan Christine	WA	Lib	2/5/96-22/8/03; 22/12/03-30/6/05
Lewis, Austin William Russell	VIC	Lib	11/9/90-13/11/90; 18/12/90-19/8/92
MacGibbon, David John	QLD	Lib	13/11/90-18/12/90
Macklin, Michael John	QLD	AD	4/5/83-5/6/87
Maunsell, Charles Ronald	QLD	CP	1/4/81-30/6/81

McGauran, Julian	VIC	NP	31/8/99-30/6/02; 22/8/03-22/12/03
McKellar, Gerald Colin	NSW	CP	25/11/69-13/4/70
McKiernan, James Philip	WA	ALP	1/7/93-29/4/96
Missen, Alan Joseph	VIC	Lib	1/4/81-15/6/84; 29/5/85-30/3/86
Morris, Kenneth James	QLD	Lib	5/4/67-30/6/68
Mulvihill, James Anthony	NSW	ALP	19/8/75-11/11/75
Murphy, Lionel Keith	NSW	ALP	25/11/69-9/2/75
O'Byrne, Justin	TAS	ALP	6/5/71-11/4/74; 4/3/76-30/6/81
Panizza, John	WA	Lib	1/7/96-31/1/97
Payne, Marise	NSW	Lib	30/9/97-
Poke, Albert George	TAS	ALP	5/4/67-24/11/69
Powell, Janet	VIC	AD	24/9/87-30/6/90; 29/4/92-30/6/93
Rae, Peter Elliot	TAS	Lib	21/8/68-26/2/73; 15/6/84-29/5/85
Ronaldson, Michael John Clyde	VIC	Lib	23/6/05-
Ray, Robert	VIC	ALP	25/8/81-5/6/87; 2/5/96-7/9/05; 11/12/05-
Reid, Margaret Elizabeth	ACT	Lib	21/8/02-4/2/03
Reynolds, Margaret	QLD	ALP	1/7/93-29/4/96
Rocher, Alan Charles	WA	Lib	19/9/78-10/2/81
Scott, Douglas Barr	NSW	NCP	17/8/78-21/2/80
Sheil, Glenister	QLD	NCP	21/2/80-6/2/81
Sherry, Nick	TAS	ALP	3/3/98-
Teague, Baden Chapman	SA	Lib	24/9/87-30/6/96
Thomas, Andrew Murray	WA	Lib	4/3/76-4/2/83
Webster, James Joseph	VIC	CP	22/7/75-11/11/75
Wheeldon, John Murray	WA	ALP	5/4/67-6/5/71
Willesee, Donald Robert	WA	ALP	25/11/69-26/2/73
Withers, Reginald Greive	WA	Lib	14/5/71-19/8/75; 15/6/84-29/5/85
Woods, Robert Leslie	NSW	Lib	4/5/94-29/4/96
Wriedt, Kenneth Shaw	TAS	ALP	18/2/75- 19/8/75
Wright, Reginald Charles	TAS	Lib	19/8/75-30/6/78

* Non-voting member for the purposes of the committee's examination of the *Parliamentary Privileges (Enforcement of Lawful Orders) Amendment Bill 1994.*

APPENDIX D

PRIVILEGES COMMITTEE CHAIRS AND DEPUTY CHAIRS 1971-2005

As at 30 November 2005, there have been nine chairs of the Committee of Privileges, namely Senators Drake-Brockman, Button, Jessop, Childs, Giles, Reynolds, Teague, Ray and Faulkner. Until 10 October 1994, the chair was required, by Standing Orders, to be a member nominated by the Leader of the Government in the Senate. Changes to Standing Orders which took effect on that date require that certain committees, including the Privileges Committee, be chaired by a member nominated by the Leader of the Opposition in the Senate. The longest-serving chair has been Senator Robert Ray, who held the office for eight years and six months.

Chairs' terms of service

Note: The chairmanship record, while complete, shows lengthy gaps between chairs at times. While the committee was generally re-established promptly in each new Parliament, it did not meet and elect a chair until it received a reference. Where the same person was re-elected chair in successive Parliaments, the period of service is shown as continuous.

Name	*State*	*Party*	*Term of Service*
Drake-Brockman, Thomas Charles	WA	CP	4/5/71-26/2/73
Button, John Norman	VIC	ALP	22/7/75-11/11/75
Drake-Brockman, Thomas Charles	WA	CP	10/4/78-30/6/78
Jessop, Donald Scott	SA	Lib	28/9/78-4/2/83
Childs, Bruce Kenneth	NSW	ALP	15/6/84-5/6/87
Giles, Patricia Jessie	WA	ALP	18/3/88-30/6/93
Reynolds, Margaret	QLD	ALP	1/7/93-9/10/94
Teague, Baden Chapman	SA	Lib	13/10/94-29/4/96
Ray, Robert Francis	VIC	ALP	9/5/96-15/11/04
Faulkner, John Philip	NSW	ALP	18/11/04-

Deputy chairs' terms of service

Deputy chairs of the committee have been elected only recently. Their terms of service are as follows:

Name	*State*	*Party*	*Term of Service*
Lewis, Austin William Russell	VIC	Lib	9/5/91-19/8/92
Teague, Baden Chapman	SA	Lib	20/8/92-9/10/94; 9/5/96-30/6/96
Reynolds, Margaret	QLD	ALP	13/10/94-29/4/96
Knowles, Susan Christine	WA	Lib	12/9/96-22/8/03; 12/2/04-30/6/05
Payne, Marise Ann	NSW	Lib	18/9/03-12/2/04
Ronaldson, Michael John Clyde	VIC	Lib	23/6/05-

APPENDIX E

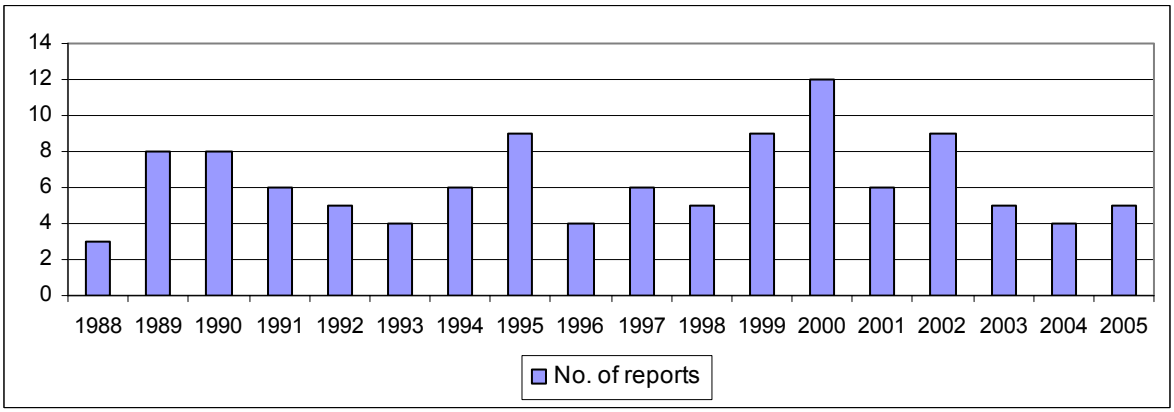
WORK OF THE PRIVILEGES COMMITTEE: SOME FACTS AND FIGURES

References, general inquiries and advisory reports to November 2005

Since 1966, 127 matters have been referred to the Committee of Privileges and 124 reports have been tabled, including five in 2005. Sixteen matters have been referred since the committee's previous general report on its operations, Report no. 107, tabled in August 2002, and 17 reports have been tabled, including four advisory reports.

As advised in previous general reports (nos 35, 62, 76 and 107), the committee may combine matters in a single report or report on them separately. Hence the number of reports tabled does not correspond to the number of matters referred.

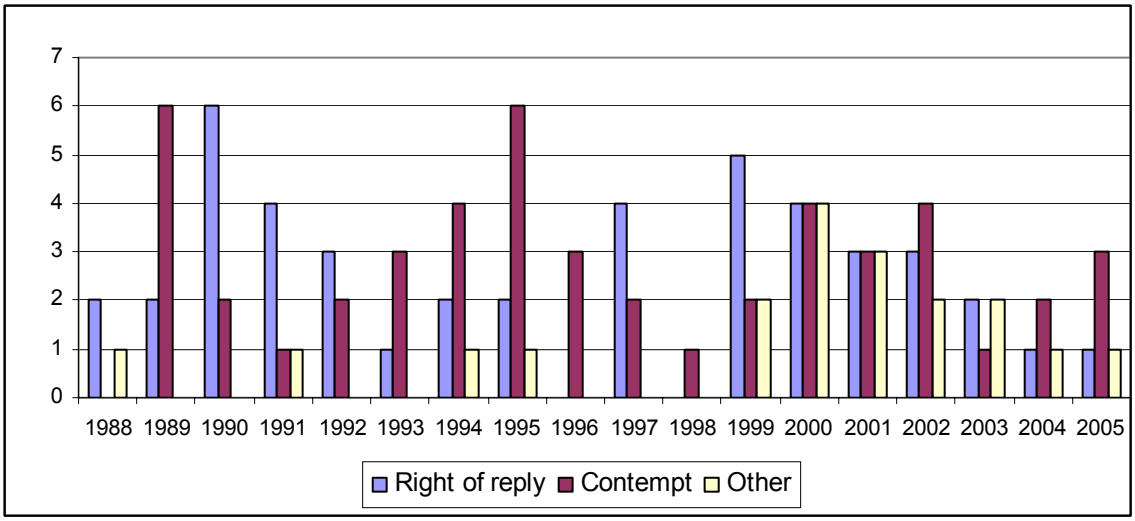
Figure E.1 Number of reports tabled per year, 1988 – 2005



The committee's activities prior to 1988 were spasmodic, with little or no 'bunching' of reports: reports were tabled in 1971, 1975, 1978, 1979 (2), 1981, 1984, 1985 (2) and 1986. Since 1988, however, many more demands have been placed on the committee. As figure E.1 discloses, the busiest year to date has been 2000, during which twelve reports were tabled. Reports can encompass more than one reference with, for example, report no. 74 covering six references. As figure E.1 also discloses, the committee's workload is heavily influenced by the election cycle. In years in which federal elections have been held (1990, 1993, 1996, 1998, 2001 and 2004) its activities have been reduced.

Since the passage of the privilege resolutions, including the introduction of the right-of-reply procedure, in 1988, the committee has tabled 45 right-of-reply reports compared with 51 reports on possible contempts and 18 general or advisory reports. Figure E.2 shows how the types of reports have fluctuated within a fairly narrow band in those 18 years. In 2005, three reports dealing with possible contempts have been tabled, along with one advisory report and one right-of-reply report.

Figure E.2 Reports by report type 1988-2005



Conduct of inquiries

On receiving a reference from the Senate, the Committee of Privileges normally seeks, in writing, inputs from the persons involved. It provides them with all available evidence and invites a response. Such responses often elicit more questions from the committee, which seeks to answer them by providing the further documentation it has received from the complainant to the other persons involved, and vice versa, and inviting further written submissions. Claim and counterclaim can be traded through the committee until it is satisfied it has sufficient reliable evidence on which to reach its conclusions. In the event that the committee considers that it needs to hear evidence in person from those involved, it will invite them to a public hearing. This is the exception, however, rather than the rule. Since its inception, the committee has held public hearings into 12 matters, involving 20 days of public hearings; since the passage of the privilege resolutions in 1988, 13 days of public hearings have been held involving nine cases.

The length of time taken by the committee to complete an inquiry depends on a number of factors: the inherent complexity of the reference; the number of references under consideration simultaneously; the promptness of responses from participants; the interruptions brought about by parliamentary elections; the vagaries of the parliamentary calendar; and the type of reference. From reference to report, the committee's inquiries have taken from one day (Reports nos 34, 38 and 97) to 25 months (Report no. 67). The average duration of the 45 right-of-reply inquiries has been 28 days; 33, or 73 per cent, have been completed within a month and 12, or 27 per cent, within one week. Possible contempt matters may take considerably longer, on average just over 8 months.

Contempt references

Since 1966, the Committee of Privileges has tabled 58 reports on cases of possible contempt, based on 70 references from the Senate. In some cases, more than one type of contempt can be involved in the one inquiry; in other cases, the committee has elected to table together in a single report the results of its inquiries into several distinct references with similar features, such as the six references relating to the unauthorised disclosure of documents in report no. 74.

The committee has, for the purposes of this summary, recognised four broad types of possible contempt: the provision of false or misleading evidence to a senator or a Senate committee; the unauthorised disclosure of documents, oral evidence or reports of the Senate or a Senate committee; interference with witnesses, namely cases in which persons giving information to a senator or a Senate committee have been threatened with some form of reprisal or have been penalised in some way for giving, or preparing to give, such information or evidence; and matters relating to a senator, such as molestation or harassment of a senator, attempts to influence a senator's conduct and matters relating to senators' interests..

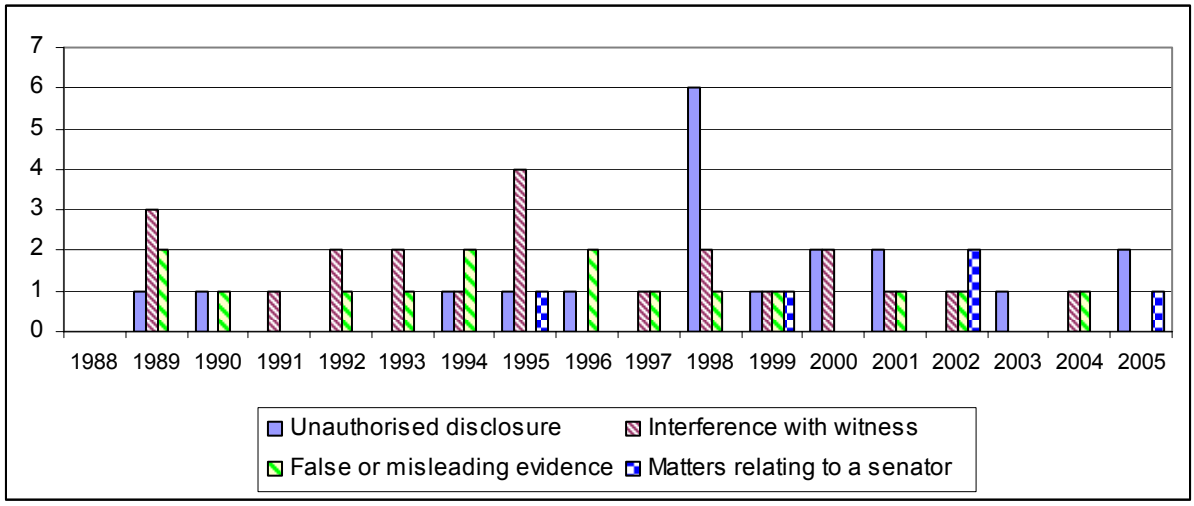
Since 1966, there have been 22 completed cases relating to possible unauthorised disclosure of committee reports or proceedings. Allowing for multiple categorisation, the disclosures in question were reports (2), draft reports (12), submissions (4), in camera evidence (4), proposed amendment (1), deliberations (2), documents (1) and legal opinion (1). In the same period there have been 21 completed cases relating to possible interference with witnesses, 15 of possible false or misleading information and nine of matters relating to a senator. A breakdown of possible contempt cases by type of contempt from 1988 onwards is shown in Figure E.3. As that figure shows, the types of possible contempt referred vary considerably from year to year. Of the three possible contempt reports tabled in 2005, one has been a matter relating to a senator, and two have covered three cases of possible unauthorised disclosure of draft committee reports or deliberations.

Findings of contempt and penalties imposed

Of 70 possible individual contempt references within 58 contempt reports, contempt has been found in 14 cases, six of them in the last six years. In the majority of the earlier cases, the committee concluded that the contempt was inadvertent and that the perpetrator(s) acted out of ignorance of the possible parliamentary privilege consequences. This appears to be increasingly not the case, however.

In two cases a penalty has been applied: the committee's first report, in 1971, recommended a reprimand, which was duly administered by the President in the Senate chamber; while its 99th report recommended a reprimand, which was administered in writing by the President. In three other instances, the committee has recommended a conditional penalty: a fine if there is a reoffence within the life of the Parliament (Report no. 8); prosecution, if the source of the leak is disclosed (Reports nos 54 and 99); and the publisher's access to Parliament House to be curtailed if there is a reoffence (Report no. 99).

Figure E.3 Possible contempt matters by contempt type 1988-2005



Public officials' involvement

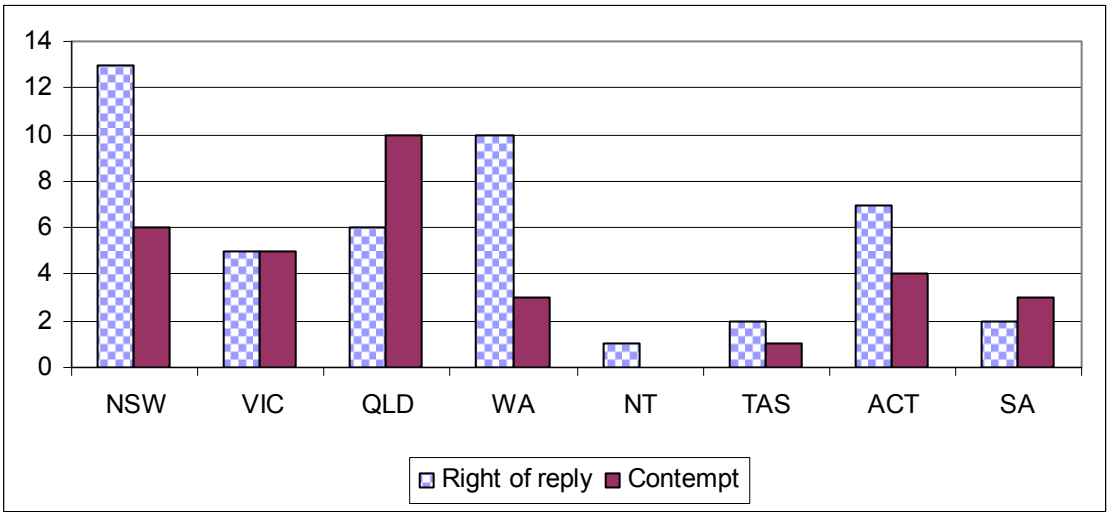
Since the committee's inception, of the 63 cases broadly categorised as involving possible contempt, 31 have involved in some capacity public servants, statutory officers or staff of government agencies at federal, state or local government level. In twenty cases, the possible contempt question related to the activities in their official capacity of the public officials concerned.

While public officials constitute the largest category of persons against whom possible contempt allegations have been made, other groups are also significant. Members of Parliament themselves and/or their staff are increasingly being involved in possible contempts (15 cases); followed by journalists or publishers (8 cases); universities, the police service and banks or credit unions have been involved in two each; with the remainder comprising private individuals from a variety of occupations.

Geographic source of references

The majority of the committee's references is generated partly or solely from parliamentary committee activities, particularly in their dealings with federal government departments, agencies or ministers' offices. Possible contempts which took place outside the parliament are shown in Figure E.4, as is state or territory of residence of the person or organisation seeking redress under the Senate's right-of-reply procedures. Since 1988, every state and territory has been the source of at least one reference involving possible contempt, while all but the Northern Territory have contributed at least one right-of-reply case.

Figure E.4 State and Territory source of references 1988-2005



APPENDIX F

PROCEDURES FOR COMMITTEE OF PRIVILEGES HEARINGS

1. Chair to make opening statement, declaring purpose of hearing. Various submissions from Mr A, Mr B, Mr C to be incorporated in volume of documents.

2. (a) Mr A to be called and sworn.
   (b) Mr A to be invited to make opening statement.
   (c) Chair, and other members if they wish, to ask questions of Mr A.
   (d) Chair to invite Mr B, or his representative, to examine Mr A if he wishes.
   (e) Chair, and other members, to ask further questions, if required.
   (f) Mr A to be invited to make statement.

3. (a) Mr B to be called and sworn.
   (b) Mr B, or his representative, to be invited to make opening statement.
   (c) Chair, and other members if desired, to ask questions of Mr B and, if required and after a brief deliberative meeting, to ask questions arising from the oral evidence given by Mr A.
   (d) Committee to invite Mr A to examine Mr B if he wishes.
   (e) Chair, and other members, to ask further questions, if required.
   (f) Mr B to be invited to make statement.

4. (a) Mr C to be called and sworn.
   (b) Mr C, or his representative, to be invited to make opening statement.
   (c) Chair, and other members if desired, to ask questions of Mr C, and, if required and after a brief deliberative meeting, to ask questions arising from oral evidence given by Mr A and Mr B.
   (d) Committee to invite Mr A and Mr B to examine Mr C if they wish.
   (e) Chair, and other members, to ask further questions, if required.
   (f) Mr C to be invited to make statement.

5. Committee to adjourn for a brief deliberative meeting to determine whether it wishes to receive any further evidence or to examine any other witnesses.

If other witnesses called:

(a) Witness to be called and sworn.
(b) Witness to be invited to make opening statement.
(c) Chair, and other members if they wish, to ask questions of witness.
(d) Chair to invite other witnesses or legal counsel to examine witness if they wish.
(e) Chair, and other members, to ask further questions, if required.
(f) Witness to be invited to make statement.

6. Chair to invite Mr A, Mr B, or his representative, and Mr C, or his representative, to make closing statements, if desired.

7. Hearing to conclude.

APPENDIX G

RESUMÉ OF REPORTS OF COMMITTEE OF PRIVILEGES

1. *Report upon Articles in the Sunday Australian and the Sunday Review of 2 May 1971 (PP No. 163/1971)*

Reference: Motion moved by Chairman of Select Committee on Drug Trafficking and Drug Abuse (Senator Marriott) and agreed to 4/5/71 (J.555).
Action: Report tabled and adopted 13/5/71 (J.605-6); persons attended and reprimanded 14/5/71 (J.612).
Persons/organisations involved: Mr J.R. Walsh; Mr H.B. Rothwell; the *Sunday Review*; the *Sunday Australian*; Select Committee on Drug Trafficking.
Resumé: On 2 May 1971, articles dealing with the proposed report of the Select Committee on Drug Trafficking and Drug Abuse appeared in the *Sunday Review* and the *Sunday Australian.* The Committee held six meetings and heard evidence from Senator Marriott and the two editors but did not consider itself entitled to inquire into the source of the information they published.
Findings: That publication prior to presentation to the Senate of the contents of a report constituted a breach of the privileges of the Senate; that the editor and publisher of each newspaper were responsible and culpable for the breach of privilege; that the Senate has the power to commit to prison, to fine, to reprimand or admonish or otherwise withdraw facilities held in and around its precincts; and that any such breach of privilege should in future be met with a heavier penalty.
Recommendation: That Messrs Walsh and Rothwell be required to attend before the Senate to be reprimanded by the Presiding Officer.

2. *Report on Matters referred by Senate Resolution of 17 July 1975* [*Executive Government Claim of Privilege*] (*PP No. 215/1975)*

Reference: Motion moved by Leader of the Opposition in the Senate (Senator Withers); amendment moved by Leader of the Government in the Senate (Senator Wriedt); amendment negatived; motion agreed to 17/7/75 (J.836).
Action: Report tabled 7/10/75 (J.936); motion for adoption of dissenting report debated 17/2/77 (J.571).
Persons/organisations involved: Senator Wriedt; Senator Withers; the Prime Minister; the Treasurer; the Attorney-General; the Minister for Minerals and Energy.
Resumé: The Committee considered the directions dated 15 July 1975 of the Prime Minister, the Treasurer, the Attorney-General and the Minister for Minerals and Energy that public servants called to the Bar of the Senate to answer questions and produce documents on the 'loans affair' claim privilege. The claim of privilege was asserted in the public interest, on the basis that officers do not decide, and are not responsible for, Government policy or action.
Findings: The majority report found that no breach of privilege was involved; the dissenting report found that the claims of executive privilege were misconceived but that no action should be taken by the Senate.

3. *Report on the Appropriate Means of Ensuring the Security of Parliament House (PP No. 22/1978)*

Reference: Motion moved by Senator Button; amendment moved by Senator Chaney agreed to; motion as amended agreed to 4/4/78 (J.88-9).
Action: Public hearings 12/4/78, 2/5/78; report tabled 30/5/78 (J.207); noted 17/8/78 (J.310).
Persons/organisations involved: Clerk and Deputy Clerk of the Senate; Usher of the Black Rod; Clerk of the House of Representatives; Serjeant-at-Arms; Commonwealth and ACT Police Forces; Director, Protective Services Co-ordination Centre, Department of Administrative Services; Interim Security Co-ordinator, Parliament House.
Resumé: After considering the evidence, the Committee concluded that there was a need for protective services.
Recommendations: Resolutions should be passed by both Houses to establish the police authority for Parliament's protection; external and internal policing of Parliament should be within the jurisdiction of one force; a position of security coordinator, directly responsible to the Presiding Officers, should be permanently created; methods of identification of members and visitors should be instituted; an effective protection system is necessary for Parliament House; details of the agreed system should be incorporated in standing orders.

4. *Quotation of Unparliamentary Language in Debate (PP No. 214/1979)*

Reference: Motion moved by Senator Georges and agreed to 29/5/79 (J.748).
Action: Report tabled and adopted 20/9/79 (J.936).
Persons/organisations involved: Senator McLaren; Senator Georges.
Resumé: During debate on Appropriation Bill (No. 3) 1979, Senator McLaren quoted from the *Illawarra Mercury* words which the Acting Deputy-President ruled to be unparliamentary. Senator Georges moved a motion for dissent from the ruling. It was defeated. Thereupon Senator Georges raised the matter as one of privilege, on the basis that Senator McLaren was restricted in what he could say within the chamber, although the same words could be used outside. The Committee concluded that the question was not one for the Privileges Committee, but rather for the Standing Orders Committee to consider.
Finding: Question not a matter of privilege.
Recommendation: Matter should be referred to Standing Orders Committee.

5. *Fifth Report - Imprisonment of a Senator (PP No. 273/1979)*

Reference: Motion moved by Senator Georges and agreed to 30/8/79 (J.901-2).
Action: Report tabled 25/10/79 (J.1000); resolutions agreed to 26/2/80 (J.1153).
Persons/organisations involved: Senator Georges; Brisbane Magistrates' Court.
Resumé: On 27 July 1979, Senator Georges was charged in the Brisbane Magistrates' Court with committing two offences, relating to taking part in an unauthorised public protest. He pleaded guilty and was fined $25 on each count, but did not pay the fines and was arrested and imprisoned on 15 August 1979. He was released on 16 August, after the fines were paid. The Committee considered the privilege of freedom from arrest as such, before turning to the specific matter of the failure of the appropriate authority in Queensland to advise the President of the Senate of the arrest and

imprisonment of Senator Georges. The Committee concluded that it would be premature for the Senate to treat this failure as a contempt. The Committee further concluded that the imprisonment of Senator Georges was for a quasi-criminal matter and not one which would attract the privilege of freedom from arrest.

Finding: That the imprisonment of Senator Georges did not attract the privilege of freedom from arrest.

Recommendation: That the Senate agree to resolutions that it is the right of the Senate to receive notification of the detention of its members, and that courts (or the Governor-General, in the case of a court martial) ought to notify the President of the Senate of the fact and cause of the senator's being placed in custody; if the resolutions are agreed to, that the Commonwealth and State Presiding Officers and Attorneys-General confer upon action to be taken to ensure compliance.

6. *Sixth Report* [*Harassment of a Senator*] *(PP No. 137/1981)*

Reference: Motion moved by Senator Harradine and agreed to 26/5/81 (J.271-2).
Action: Report tabled 11/6/81 (J.388); adopted 22/10/81 (J.591).
Persons/organisations involved: Senator Brian Harradine; Ms Harriet Swift.
Resumé: The Committee heard evidence that, early in the morning of 8 and 10 April 1981, Senator Harradine received a number of offensive phone calls at his office in Parliament House. Telecom traced the later calls to a telephone held in the name of Ms Harriet Swift. In evidence to the Committee, Ms Swift indicated that there had been a party on her premises on the night of 9 April, which continued into the early hours of 10 April. A number of people, including herself, had become intoxicated and could have made abusive phone calls. She was unable to remember who had made any such call.
Finding: Contempt found, but no action by the Senate recommended, other than the adoption of the report.

7. *First Report October 1984 (7th Report of the Series)* [*Unauthorised Publication of Committee Evidence taken* in camera] *(PP No. 298/1984)*

Reference: Motion moved by Chairman of Select Committee on the Conduct of a Judge (Senator Tate) and agreed to 14/6/84 (J.992); on 22 August 1984 the Senate agreed to a motion of the Chairman of the Committee of Privileges to extend the reference (J.1029).
Action: Public hearings 12, 26 September 1984; report tabled 17/10/84 (J.1243); adopted 24/10/84 (J.1295).
Persons/organisations involved: Mr Brian Toohey; Ms Wendy Bacon; the *National Times*; John Fairfax and Sons Ltd; members and staff of the Select Committee on the Conduct of a Judge.
Resumé: In the *National Times* of 8-14 June 1984, an article purported to report evidence given in camera before the Select Committee on the Conduct of a Judge. Following the referral of the matter to the Committee of Privileges, three further articles in the same vein were published, which were also referred to the committee. The committee sought submissions and heard evidence from relevant persons and legal counsel, including the chairman of the select committee who indicated that the publication could impede the work of that committee, as well as that of other Senate committees. It was unable to discover, however, whether the disclosure was deliberate or inadvertent. It also noted that Mr Toohey defended the publication on the grounds

of the public interest, and that neither he nor Ms Bacon expressed any regret for their actions.

Findings: That the publication of purported reports of in camera proceedings of the Select Committee on the Conduct of a Judge constituted a serious contempt of the Senate; that the editor and publisher of the *National Times* should be held responsible and culpable for the publication and the author culpable for contempt; that the unauthorised disclosure of the proceedings also constituted a serious contempt, if wilfully and knowingly made; and that the Committee would report on the question of penalty after the persons affected had placed submissions before it.

8. *Question of Appropriate Penalties Arising from the Report of the Committee of Privileges of 17 October 1984 (PP No. 239/1985)*

Reference: Motion moved by Chairman of Standing Committee of Privileges (Senator Childs) and agreed to 27/2/85 (J.64).

Action: Two public hearings 3 and 30/4/85; report tabled 23/5/85 (J.317).

Persons/organisations involved: The *National Times*; John Fairfax and Sons Ltd; Mr Brian Toohey; Ms Wendy Bacon; Senate Select Committee on the Conduct of a Judge.

Resumé: In the 7th Report of the Committee, serious contempts of the Senate were found in respect of certain publications in the *National Times* by the publisher, John Fairfax, editor Mr Toohey and journalist Ms Bacon on the purported evidence taken, and proceedings of, the Select Committee on the Conduct of a Judge. In considering the question of penalty, the Comittee noted that Mr Toohey and Ms Bacon continued to maintain that they were not guilty of contempt, on the ground that the publication was in the national interest; that they did not express regret; and that the source of the disclosure of the information was unknown. The Committee concluded that a substantial fine would be appropriate for organisations in contempt of the Parliament. In this case, however, the Committee recognised that it was difficult to contemplate imposing a penalty on the publishers of information while the informant remained undetected. It noted too the question of the efficacy of fines as a deterrent, and took into consideration the expenses already incurred by the company in the legal defence of its actions.

Recommendations: That no penalty be imposed at the time but, if a similar offence were to be committed within the life of the Parliament, the Senate should impose an appropriate penalty for the initial offence; that legislation be introduced to put the power of the Houses of Parliament to fine beyond doubt.

9. *The Improper Disclosure and Misrepresentation by a Departmental Officer of an Amendment Prepared for Moving in the Senate (PP No. 506/1985)*

Reference: Motion moved by Senator Haines and agreed to 23/4/85 (J.193).

Action: Report tabled 16/9/85 (J.454); adopted 18/9/85 (J.470).

Persons/organisations involved: Senator Tony Messner; Senator Janine Haines; Department of Community Services.

Resumé: On 22 April 1985 during debate on the Supported Accommodation Assistance Bill, Senator Messner discussed a proposed opposition amendment. Senator Haines indicated privately to both government and opposition spokesmen a proposed Democrat amendment to Senator Messner's amendment. In the course of the following day, Democrat offices were lobbied by non-government groups who opposed the proposed Democrat amendment, citing an officer of the Department of

Community Services as the source of their information. The officer wrote to Senator Haines to reassure her that she had been unaware of the Democrat amendment and had merely recommended that lobby groups contact the Democrats' spokesperson for clarification of the party's stance.
Recommendation: That the matter be not further pursued.

10. *Detention of a Senator (PP No. 433/1986)*

Reference: Motion moved by Senator Reynolds and agreed to 13/11/85 (J.594).
Action: Oral evidence received from Senator Georges; report tabled 5/12/86 (J.1571); resolutions agreed to 18/3/87 (J.1693-4).
Persons/organisations involved: Senator George Georges; Queensland Police.
Resumé: On 11 November 1985, Senator Georges and a number of other persons were arrested at a protest meeting at the SEQEB Building in Brisbane and charged with offences under s.4A of the Vagrants Gaming and Other Offences Act. Senator Georges declined to have his fingerprints or photograph taken before being released on bail; he was therefore charged with obstructing a police officer in the exercise of his duty, and held in custody overnight before appearing before a magistrate and being granted bail. The Queensland Police initially attempted only indirectly to notify the President of the Senate of Senator Georges' arrest. The Committee concluded that there was no intention on the part of the police to harass Senator Georges.
Recommendations: That the Senate reaffirm its right to receive notification of the detention of its members, and related matters; that the Senate give consideration to the alteration of the immunity from arrest and detention.

11. *The Circulation of Petitions (PP No. 46/1988)*

Reference: President determined precedence to notice of motion 15/3/88; motion moved by Leader of the Opposition in the Senate (Senator Chaney) 16/3/88; amendment moved by Senator Collins agreed to; motion as amended agreed to 16/3/88 (J.556).
Action: Report (including a dissenting report from Senator Durack) tabled 2/6/88 (J.843); noted 2/11/88 (J.1065).
Persons/organisations involved: The Hon. Brian Burke; Mr R.M Strickland; Senator Fred Chaney.
Resumé: Senator Chaney's motion referred to a specific incident relating to petitions, namely, whether a petition prepared by Mr Strickland was suppressed in consequence of a threat of legal proceedings by the Hon. Brian Burke; the motion, as agreed to, related to whether the circulation of a petition containing defamatory material was, or ought to be, privileged. The Committee treated the questions of the circulation of petitions and of defamation separately.
Findings: That the circulation of petitions is not absolutely privileged and is probably not subject to any form of qualified privilege; if Parliament were to determine that the circulation of a petition be privileged, a change to the law would be required; that the circulation of petitions containing defamatory matter should not be privileged; that the circulation of other petitions requires no special protection and therefore no change to the law is required.
Dissent: Senator Durack, in his dissenting report, included the text of the petition to which Senator Chaney referred: it sought to have deferred the appointment of the Hon. Brian Burke as Ambassador to Ireland. Senator Durack dissented from the

findings that the circulation of a petition containing defamatory material should not be protected by parliamentary privilege and that no change to the law was warranted.

12. *Person Referred to in the Senate (Mr T. Motion) (PP No. 385/1988)*

Reference: Referred by President 30/11/88.
Action: Report tabled 7/12/88 (J.1264); adopted 13/12/88 (J.1297).
Persons/organisations involved: Mr Tony Motion; Senator Peter Walsh.
Resumé: In question time on 10 November 1988, in response to a question on a proposed gold tax, Senator Walsh referred to certain named individuals who opposed the tax as 'spivs' who 'lounged' around Perth. His remarks were repeated in the *West Australian* newspaper. In his response, Mr Motion rebutted Senator Walsh's description and stated that his remarks had caused considerable unjustifiable distress to Mr Motion and his family.
Recommendation: That the response be incorporated in *Hansard.*

13. *Person Referred to in the Senate (Mr I.R. Cornelius) (PP No. 386/1988)*

Reference: Referred by President 12/12/88.
Action: Report tabled and adopted 14/12/88 (J.1314).
Persons/organisations involved: Mr Ian Cornelius; Senator Peter Walsh.
Resumé: On 10 November 1988 in question time in the Senate, Senator Walsh described Mr Cornelius as a 'spiv' who had conspired to defraud the Commonwealth and who had been gaoled. In his response, Mr Cornelius denied the allegations, pointing out that he was not the Cornelius who had been gaoled and also pointing to the hurt and embarrassment the Senator's comments had caused personally and to the companies on whose boards Mr Cornelius sat.
Recommendation: That the response be incorporated in *Hansard.*

14. *Possible False or Misleading Evidence and Manipulation of Evidence before Senate Committees - Travel by Aboriginal Community Representatives (PP No. 461/1989)*

Reference: President determined precedence to notice of motion 7/11/88; motion moved by Leader of Opposition in the Senate (Senator Chaney) and agreed to 8/11/88 (J.1098-9).
Action: Report tabled 28/2/89 (J.1385); noted 12/4/89 (J.1549).
Persons/organisations involved: Mr Ray Robinson; Mr Darby McCarthy; Mr Norman Johnson; Mr Charles Perkins; Senator John Coulter; Senator Bob Collins; Estimates Committee E; Select Committee on the Administration of Aboriginal Affairs.
Resumé: In estimates hearings on 25-26 October 1988, it was asserted that the Department of Aboriginal Affairs had not committed funds for persons to prepare or present submissions to the Select Committee on the Administration of Aboriginal Affairs and that Messrs Robinson, McCarthy and Johnson, whose expenses for a visit to Canberra on 1-2 September 1988 had been paid by the Department, had come primarily to discuss sporting matters with the Secretary. In responses to the Committee, Messrs Robinson, McCarthy and Johnson indicated that their giving evidence to the Select Committee on 2 September was merely opportunistic.
Findings: That on evidence available to the Committee no false or misleading evidence was given to Estimates Committee E in relation to the attendance in Canberra of Messrs Robinson, McCarthy and Johnson on 1 and 2 September 1988;

there was no attempt to manipulate the evidence laid before the Select Committee; therefore, no contempt was committed.

15. *Possible False or Misleading Evidence before a Senate Estimates Committee - Department of Defence Project Parakeet (PP No. 461/1989)*

Reference: President determined precedence to notice of motion 5/12/88; motion moved by Senator MacGibbon and agreed to 6/12/88 (J.1247).
Action: Report tabled 6/3/89 (J.1433-4); noted 12/4/89 (J.1549).
Persons/organisations involved: Dr Malcolm McIntosh; Senator Jocelyn Newman; Department of Defence; Estimates Committee E.
Resumé: On 29 November 1988 during debate on the Appropriation Bills, Senator MacGibbon indicated that he believed Dr McIntosh, Chief of Capital Procurement in the Department of Defence, had provided false or misleading information to senators in response to their questions about Project Parakeet, a trunk communications system, in the Additional Estimates hearings in May of that year. The information centred on supposed technical problems, cost overruns and delays, and whether the later stages of the project would go to open tender. The response from Dr McIntosh indicated that discussion of the project was of a partial nature so as not to preempt ministers; if senators were misled, it was not deliberate and he apologised. The Committee concluded that Dr McIntosh's responses to questioning could have been more helpful.
Finding: The response could have been more helpful. As there was no intention to give false or misleading evidence to a Senate estimates committee, no contempt was committed.

16. *Person Referred to in the Senate (Mr C. Wyatt) (PP No. 461/1989)*

Reference: Referred by President 11/4/89.
Action: Report tabled and adopted 5/5/89 (J.1606)
Persons/organisations involved: Mr Cedric Wyatt; Senator Noel Crichton-Browne.
Resumé: During debate in the Senate on 9 March 1989 on the special audit report on the Aboriginal Development Commission and the Department of Aboriginal Affairs, Senator Crichton-Browne implied that, during Mr Wyatt's tenure as WA head of the Department of Aboriginal Affairs, funds may have been used for purposes for which they were not intended, and that Mr Wyatt's appointment to the ADC was inappropriate. In his response, Mr Wyatt rejected the allegations.
Recommendation: That the response be incorporated in *Hansard.*

17. *Possible Improper Interference with a Witness - Drugs in Sport Inquiry (PP No. 461/1989)*

Reference: President determined precedence to notice of motion 8/12/88; motion moved by Chairman of Environment, Recreation and the Arts Committee (Senator Black), by leave, and agreed to 8/12/88 (J.1276-7).
Action: Public hearing 10 May 1989; finding reported to the Senate 11/5/89 (J.1662); report tabled 5/6/89 (J.1792); finding endorsed 4/10/89 (J.2087-8).
Persons/organisations involved: Ms Suzanne Howland; Mr Greg Blood; Australian Institute of Sport; Standing Committee on Environment, Recreation and the Arts.
Resumé: On 30 November 1988, Ms Howland gave evidence, as a summoned witness, to the Standing Committee on Environment, Recreation and the Arts inquiry into drugs in sport. On the following day, she was asked by her landlord, Mr Blood, a

librarian at the Australian Institute of Sport, to leave the house in which she was living. The committee concluded that Mr Blood was stressed by the whole issue of drugs in sport and that he had not intended to interfere with Ms Howland's giving of evidence or to penalise her for it.
Finding: Because the requisite intention was not established, no contempt was committed.

18. *Possible Interference with Witnesses in Consequence of their giving Evidence before the Senate Select Committee on Aboriginal Affairs (PP No. 461/1989)*

Reference: President determined precedence to notice of motion 2/11/88; motion moved by Leader of Opposition in the Senate (Senator Chaney) and agreed to 3/11/88 (J.1070).
Action: Report tabled 16/6/89 (J.1921); findings endorsed 4/10/89 (J.2087).
Persons/organisations involved: Mr Charles Perkins; Mrs Shirley McPherson; Mr Michael O'Brien; Aboriginal Development Commission; Select Committee on the Administration of Aboriginal Affairs.
Resumé: In May 1988, the Aboriginal Development Commission (ADC) passed a resolution that no public statements on behalf of the Commission be made by Commissioners or officers without the prior approval of the Board; in October the ADC Board resolved that papers or submissions of whatever kind should not be presented to any parliamentary committee without prior approval; it passed a motion of no confidence in the Chairman, Mrs McPherson, for, inter alia, appearing before the Select Committee on the Administration of Aboriginal Affairs without notifying the Commissioners; the ADC also transferred Mr O'Brien from his position of General Manager to a newly-created position. After examining copious documentation, the committee concluded that Mrs McPherson had given her evidence to the Select Committee in a private capacity and that she had, in fact, notified the Board of her intention to do so; and that Mr O'Brien's evidence was also given in a private capacity. The committee concluded that the actions taken were reprisals but that any penalty or injury was not inflicted solely in consequence of the giving of evidence to the select committee.
Findings: In relation to the resolutions of May and October 1988, no contempt committed; in relation to the no confidence motion, in the particular circumstances a finding of contempt should not be made; in relation to the proposed transfer of Mr O'Brien, no contempt committed.

19. *Person Referred to in the Senate (Sir Charles Court) (PP No. 461/1989)*

Reference: Referred by the President 25/9/89.
Action: Report tabled and adopted 27/10/89 (J.2171).
Persons/organisations involved: Sir Charles Court; Senator the Hon. Peter Walsh.
Resumé: In question time on 6 September 1989, Senator Walsh, the Minister for Finance, commented on the North West Shelf Natural Gas Project and Sir Charles Court's role in it. Sir Charles objected that the Minister's comments were both offensive and inaccurate.
Recommendation: That the response be incorporated in *Hansard.*

20. *Possible Unauthorised Disclosure of Senate Committee Report (PP No. 461/1989)*

Reference: President gave precedence to notice of motion 17/8/89; motion moved by Senator Hamer at the request of Senator Teague and agreed to 18/8/89 (J.1961).
Action: Report tabled 21/12/89 (J.2445); finding endorsed and recommendations adopted 16/5/90 (J.96-7).
Persons/organisations involved: Senator Irina Dunn; Standing Committee on Foreign Affairs, Defence and Trade.
Resumé: On the morning of 16 August, three newspapers carried articles reflecting the contents of the report of the Standing Committee on Foreign Affairs, Defence and Trade on its inquiry into visiting nuclear-powered ships. The report was tabled later that day. The tabling of the report had been delayed, owing to pressure of business in the Senate chamber. After inquiries to all senators and staff concerned, the Committee was informed that a member of the standing committee, Senator Dunn, had prepared media releases and briefed the press on 15 August, the day on which the report was scheduled to be tabled. The Committee concluded that Senator Dunn had knowingly briefed the media, but had done so in the belief that the tabling of the report was imminent; it also noted her apology. It also suggested that committees should examine matters themselves before referring them to the Committee of Privileges.
Findings: That in the light of all the circumstances, a finding of contempt not be made; that no further action be taken.
Recommendations: That the President draw to the attention of all senators paragraph 6(16) of the Privilege Resolutions and Standing Order 37; that the Procedure Committee consider a proposal to schedule the tabling of committee reports early in the day.

21. *Possible Adverse Treatment of a Witness before the Select Committee on the Administration of Aboriginal Affairs (PP No. 461/1989)*

Reference: President gave precedence to notice of motion 9/3/89; motion moved by Senator Baume; debated and agreed to 9/3/89 (J.1458-9).
Action: Public hearing 29 November 1989; report tabled 22/12/89 (J.2465); notice of motion given for next day of sitting not less than 7 days after the day on which notice given - that the Senate endorse findings 22/12/89 (J.2466); fresh notice given 9/5/90 (J.37); findings endorsed 16/5/90 (J.97).
Persons/organisations involved: Mr Michael Pope; Mr Cedric Wyatt; Mr Michael Stewart; Aboriginal Development Commission, Senate Select Committee on the Administration of Aboriginal Affairs.
Resumé: Mr Pope was a senior officer in the Aboriginal Development Commission (ADC) until his resignation on 4 November 1988. He gave evidence critical of the ADC to the Select Committee on the Administration of Aboriginal Affairs on 9 December 1988, as a private citizen. On 4 January 1989, at the instigation of the Acting General Manager, Mr Wyatt, a letter was sent to Mr Pope, advising him that, in the light of his evidence to the select committee, he was not to enter the Bonner House premises of the ADC, without first seeking and obtaining the permission of the General Manager. Mr Stewart issued a staff circular dated 20 February 1989, broadening the proscription to all ADC premises. The ADC explanation for these actions was that it was concerned about the extent of leakage of information from its premises.
Findings: The committee found that there was adverse treatment of Mr Pope, though not of a serious nature; that it was partially in consequence of his giving evidence to the select committee; that contempts had been committed, although not of a serious

nature; and that, in the light of the ADC apology to Mr Pope and the Senate, no penalty should be imposed.

22. *Possible Unauthorised Disclosure of Senate Committee Submission (PP No. 45/1990)*

Reference: President gave precedence to notice of motion 5/12/89; motion moved by Chairman of the Select Committee on Health Legislation and Health Insurance (Senator Crowley) and agreed to, 6/12/89 (J.2321).
Action: Report tabled 9/5/90 (J.41); finding endorsed and recommendations adopted 23/5/90 (J.130).
Persons/organisations involved: Mr Stuart Hamilton, Secretary, Department of Community Services and Health; Australian Private Hospitals Association; Select Committee on Health Legislation and Health Insurance.
Resumé: Towards the end of September 1989, the Australian Private Hospitals Association (APHA) made a submission to the Select Committee on Health Legislation and Health Insurance. On 22 October, the APHA became aware that its submission was in the hands of a senior officer of the Department of Community Services and Health, before the committee had authorised its publication. The department indicated that it had received the document from the minister's senior private secretary, who was unaware how it arrived in the minister's office and who circulated it with many other such submissions. The select committee published the submissions received on 3 November and the department apologised for its action. The Committee of Privileges concluded that further investigations would be unlikely to discover the source of the disclosure and therefore considered that the matter should not be taken any further.
Finding: Although it would be open to the committee, and to the Senate, to find that a contempt of the Senate had been committed by the unauthorised distribution of the document, the committee concluded that, in the particular circumstances of the case, such a finding should not be made.
Recommendations: That appropriate warnings about conditions of disclosure be given in public advertisements calling for submissions, in notes to witnesses, and in letters acknowledging receipt of submissions; that persons making submissions be notified when submissions are publicly released by a committee.

23. *Person Referred to in the Senate (Mr A.E. Harris) (PP No. 45/1990)*

Reference: Referred by the President 26/2/90.
Action: Report tabled 25/5/90 (J.144); adopted and noted 25/5/90 (J.146).
Persons/organisations involved: Mr A.E. Harris; Senator David MacGibbon.
Resumé: During the adjournment debate on 19 December 1989, Senator MacGibbon referred to what he regarded as a threatening letter from Mr Harris, then chairman of Australian Airlines. In his response, Mr Harris included a copy of the letter, which detailed the airline's approach to the pilots' dispute. He denied any part in the other letters received by the Senator; pointed out the bipartisan nature of his public appointments; and outlined the company's profitability.
Recommendation: That the response be incorporated in *Hansard.*

24. *Person Referred to in the Senate (Dr P. Ingram Cromack) (PP No. 438/1990)*

Reference: Referred by the President 18/7/90.
Action: Report tabled and adopted 19/9/90 (J.293).

Persons/organisations involved: Dr P. Ingram Cromack; Senator Jean Jenkins.
Resumé: On 28 May 1990 in the adjournment debate, Senator Jean Jenkins named Dr Cromack as an orthopaedic surgeon 'noted for being a hard-liner' in the matter of supporting compensation claims for work-related disabilities, particularly RSI. In his response, Dr Cromack claimed that he suffered professional injury, financial loss and stress as a result of the allegations and the associated media publicity and rejected Senator Jenkins' assertions about RSI.
Recommendation: That the response be incorporated in *Hansard*.

25. *Person Referred to in the Senate (Mr A.E. Harris) (PP No. 438/1990)*

Reference: Referred by the President 26/2/90.
Action: Report tabled, adopted and noted 17/10/90 (J.345).
Persons/organisations involved: Mr A.E. Harris; Senator David MacGibbon.
Resumé: During debate in the Senate following the adoption of the 23rd report of the Committee of Privileges, Senator MacGibbon again made allegations about Mr Harris' conduct, this time as chairman of the Australian Sports Commission. Mr Harris responded, denying that his intention had been to force Senator MacGibbon into silence or that he had been discourteous or dishonest, and rejecting the allegations against him.
Recommendation: That the response be incorporated in *Hansard*.

26. *Possible Misleading Evidence before a Senate Estimates Committee - Department of Defence - Asbestos in Royal Australian Navy Ships (PP No. 438/1990)*

Reference: President gave precedence to notice of motion 23/8/90; motion moved by Senator Newman and agreed to 24/8/90 (J.250-1).
Action: Report tabled 8/11/90 (J.398); finding endorsed 14/11/90 (J.449).
Persons/organisations involved: Senator Jocelyn Newman; Department of Defence; Australian Defence Force; Estimates Committee B.
Resumé: In answer to a question on notice relating to the use of asbestos in the Defence Force, the Navy response indicated that preventative measures had been adopted in 1966, creating the impression that the matter had come to the attention of the Navy only at that time. Yet documentation made available to Senator Newman showed that the dangers of asbestos were drawn to the attention of the Navy in 1943. The committee concluded that the reply drafted by the officer was accurate to the best of his knowledge and belief at the time and that he could not have known, or been expected to know, of the existence of the material subsequently provided to Senator Newman.
Finding: No contempt was committed in regard to evidence given to Estimates Committee B in May 1990 concerning asbestos in Royal Australian Navy ships.

27. *Person Referred to in the Senate (Sir William Keys) (PP No. 438/1990)*

Reference: Referred by the President 26/11/90.
Action: Report tabled, adopted, motion to take note 29/11/90 (J.493); report noted 5/12/90 (J.510).
Persons/organisations involved: Sir William Keys; Senator Jocelyn Newman; Senator John Herron.

Resumé: During a discussion of matters of public importance on 15 November 1990, Senator Newman referred to Sir William as a government 'stooge' for his support of repatriation hospital integration. Sir William responded that the views he expressed were his own. In the same debate, Senator Herron referred to Sir William's input on the subject of recognition of overseas-trained doctors to an Australian Medical Association national conference. Sir William's response claimed that the Senator was incorrect in his statements.
Recommendation: That the response be incorporated in *Hansard.*

28. *Person Referred to in the Senate (Mr C.H. Cannon) (PP No. 438/1990)*

Reference: Referred by the President 11/12/90.
Action: Report tabled and adopted 19/12/90 (J.644).
Persons/organisations involved: Mr C.H. Cannon; Senator Paul McLean.
Resumé: During the adjournment debate on 12 November 1990, Senator McLean alleged that Mr Cannon, when manager of the National Australia Bank in Toowoomba, had been guilty of fraud and deceptive conduct. The senator's comments were published by Darling Downs media. Mr Cannon responded that the senator's remarks were without substance and had damaged his reputation.
Recommendation: That the response be incorporated in *Hansard.*

29. *Person Referred to in the Senate (the Honourable Tom Uren) (PP No.438/1990)*

Reference: Referred by the President 17/12/90.
Action: Report tabled and adopted 19/12/90 (J.644).
Persons/organisations involved: The Hon. Tom Uren; Senator the Hon. Robert Ray.
Resumé: In question time on 12 December 1990, the Minister for Defence, Senator Robert Ray, criticised Mr Uren for comments made by the latter during a trip to Iraq to seek the release of Australian hostages. He also alleged that Mr Uren briefed former Prime Minister Fraser on Labor Party matters. In his response, Mr Uren clarified his position on both matters.
Recommendation: That the response be incorporated in *Hansard*.

30. *Possible Improper Influence or Penalty on a Witness in respect of Evidence before a Senate Committee (PP No. 258/1991)*

Reference: President gave precedence to notice of motion 17/10/90; motion moved by Chairman of Environment, Recreation and the Arts Committee, Senator Crowley, and agreed to 18/10/90 (J.359).
Action: Report tabled 6/3/91 (J.812); finding endorsed 7/3/91 (J.831).
Persons/organisations involved: Mr Glen Jones; Mr Chris Turner; Australian Drug Free Powerlifting Federation; Standing Committee on Environment, Recreation and the Arts.
Resumé: Mr Glen Jones, National Drug Testing Officer of the Australian Drug Free Powerlifting Federation, alleged that another member of the Federation, Mr Turner, threatened to publish to other members allegations against Mr Jones, including that he had given false evidence to the standing committee during its drugs in sport inquiry, if he did not withdraw from a contest for an office within the Federation. Mr Turner submitted that he had not intended to interfere with Mr Jones on account of his having given evidence to a Senate committee. The Committee of Privileges concluded that

the proposal to publish a document claiming that false evidence had been given to a Senate committee was insufficient evidence of intention to interfere with a witness.
Finding: That no contempt of the Senate was committed.

31. *Person Referred to in the Senate (Sir William Keys) (PP No. 258/1991)*

Reference: Referred by the President 11/12/90.
Action: Report tabled and adopted 11/3/91 (J.842).
Persons/organisations involved: Sir William Keys; Senator Jocelyn Newman.
Resumé: On 5 December 1990, during a debate on the committee's 27th Report, Senator Newman again discussed matters relating to Sir William Keys. Sir William's response explained the context of his visit with the then Minister for Defence to defence facilities in north Queensland, the rationale for his media comments and his representation of the verterans' community.
Recommendation: That the response be incorporated in *Hansard.*

32. *Person Referred to in the Senate (Ms Patsy Harmsen) (PP No. 258/1991)*

Reference: Referred by the President 19/6/91.
Action: Report tabled and adopted 21/6/91 (J.1280).
Persons/organisations involved: Ms Patsy Harmsen; Senator Paul Calvert.
Resumé: During the adjournment debate in the Senate on 5 June 1991, Senator Calvert raised the matter of the impending closure of the Electrona silicon smelter. Ms Harmsen believed that her campaign against the smelter had been misrepresented, and that Senator Calvert's remarks had harmed her reputation as a community representative and political candidate and had caused her to be harassed.
Recommendation: That the response be incorporated in *Hansard.*

33. *Person Referred to in the Senate (Dr Alex Proudfoot, FRACP) (PP No. 470/1991)*

Reference: Referred by President 21/8/91.
Action: Report tabled and adopted 3/9/91 (J.1452).
Persons/organisations involved: Dr Alex Proudfoot; Senator Margaret Reynolds.
Resumé: Dr Proudfoot took exception to remarks made in the Senate by Senator Reynolds on 30 May 1991 and to a response to a question on notice from her which was published in *Hansard* on 14 August 1991. In Dr Proudfoot's view, the response readily identified him and could have led to a belief that he was biased against women and that his court action against the Human Rights and Equal Opportunity Commission was frivolous or vexatious.
Recommendation: That the response be incorporated in *Hansard.*

34. *Person Referred to in the Senate (Ms Jeannie Cameron) (PP No. 470/1991)*

Reference: Referred by President 13/11/91.
Action: Report tabled and adopted 14/11/91 (J.1726).
Persons/organisations involved: Ms Jeannie Cameron; Senator Graham Richardson.
Resumé: During the committee of the whole stage of the Appropriation Bills in the Senate on 17 October 1991, Senator Richardson made comments about a staff member of Senator Jocelyn Newman. Ms Cameron asserted that the person referred to was readily identifiable as herself and that the comments were unfair, untrue, and had adversely affected her reputation.

Recommendation: That the response be incorporated in *Hansard*.

35. *Report on Committee's Work since Passage of Privilege Resolutions of 25 February 1988 (PP No. 467/1991)*

Action: Report tabled 2/12/91 (J. 1811); noted 26/3/92 (J.2133).

36. *Possible Improper Interference with a Witness and Possible Misleading Evidence before the National Crime Authority Committee (PP No. 194/1992)*

Reference: President determined precedence to notice of motion 8/11/90; motion moved by Leader of the Opposition in the Senate (Senator Hill) and agreed to 12/11/90 (J.410).
Action: Public hearings 9/12/91, 27/4/92; report tabled 25/6/92 (J.2623); finding endorsed and recommendations adopted 17/12/92 (J.3427).
Persons/organisations involved: Mr Mark Le Grand; Mr Peter Faris, QC; Mr Gregory Cusack, QC; Mr Julian Leckie; National Crime Authority; Parliamentary Joint Committee on the National Crime Authority.
Resumé: In late 1989, the Parliamentary Joint Committee on the National Crime Authority commenced an inquiry into the NCA's 'Operation Ark', an investigation into possible police corruption in South Australia. Mr Mark Le Grand, an additional member of the NCA for South Australia in 1989, was directed by the new NCA Chairman, Mr Peter Faris, not to make any documents available or have any discussions with any committee or person outside the Authority without first consulting the Authority; he reminded him of the secrecy provisions of the NCA Act. Whether intended or not, this had the effect of restricting Mr Le Grand in the giving of evidence to the joint committee. The committee concluded that this and subsequent directions could have had the effect of restricting Mr Le Grand in his dealings with the joint committee; that answers about the restrictions by NCA members had the effect of misleading the joint committee; that the restrictive actions of the members of the NCA in late 1989 were undertaken in the belief that they were in accordance with the NCA Act; and that the joint committee was not ultimately prevented from acquiring the information it needed to perform its functions.
Finding: The Committee determined that it should not find that a contempt had been committed.
Recommendations: That sections 51 and 55 of the NCA Act be clarified; that any conflict between accountability of statutory bodies to Parliament and secrecy requirements be resolved during passage of legislation through Parliament; that the Scrutiny of Bills Committee draw such provisions to the attention of Parliament; that urgent consideration be given to legislation clarifying the position of parliamentary privilege vis-a-vis secrecy provisions of other legislation; that the Senate warn persons dealing with a House of Parliament or its committees to answer questions fully and frankly.

37. *Possible Improper Interference with Witnesses before the Community Affairs Committee (PP No. 235/1992)*

Reference: President determined precedence 2/4/92; motion moved by Chair of Community Affairs Committee (Senator Zakharov) and agreed to 2/4/92 (J.2178).
Action: Report tabled 9/9/92 (J.2731); finding endorsed 17/12/92 (J.3427).

Persons/organisations involved: Messrs John Murphy, Kevin Baker, Andrew Walmsley and Mark Plunkett; Standing Committee on Community Affairs.
Resumé: Complaints were made to the Standing Committee on Community Affairs about a solicitor who had allegedly intimidated a person or persons because of evidence they gave to the committee on 6 September 1991 in respect of its inquiry into the implementation of pharmaceutical restructuring measures. However, the witnesses making the assertions refused the Committee of Privileges' invitation to substantiate their claims. The committee reported its disquiet about a possible abuse of process.
Finding: No findings of contempt could or should be made.

38. *Person Referred to in the Senate (the Honourable Paul B. Toose) (PP. No. 540/1992)*

Reference: Referred by the Deputy President 13/10/92.
Action: Report tabled and adopted 13/10/92 (J.2891).
Persons/organisations involved: The Hon. Paul Toose; Advertising Standards Council; Senator the Hon. Michael Tate; *The Australian*.
Resumé: In the Senate on 2 December 1991, Senator Jones asked Senator Tate a question about an article in *The Australian* in which the Hon. Paul Toose, as chairman of the Advertising Standards Council (ASC), was quoted as being hostile to certain lobby groups. Mr Toose regarded the comments as misleading, and an assault on the status of the ASC and on the integrity of its chairman.
Recommendation: That the response be incorporated in *Hansard*.

39. *Person Referred to in the Senate (Mr Dale E. Hennessy) (PP No. 540/1992)*

Reference: Referred by the President 24/11/92.
Action: Report tabled, adopted 30/11/92 (J.3158).
Persons/organisations involved: Mr Dale Hennessy; Senator John Watson, Select Committee on Superannuation.
Resumé: In the adjournment debate on 3 November 1992, Senator Watson referred to the evidence of Mr Hennessy, Director of the Queensland Government Superannuation Office, and suggested that the Select Committee on Superannuation might have been misled by Mr Hennessy with regard to the level of funding of State superannuation schemes. Mr Hennessy denied Senator Watson's allegations.
Recommendation: That the response be incorporated in *Hansard*.

40. *Persons Referred to in the Senate (Ms Margaret Piper, Ms Eve Lester and Mr Seth Richardson) (PP No. 540/1992)*

Reference: Referred by the President on 14/12/92.
Action: Report tabled, adopted and noted 17/12/92 (J.3426).
Persons/organisations involved: Ms Margaret Piper; Ms Eve Lester; Mr Seth Richardson; Senator Jim McKiernan; Refugee Council of Australia (RCOA).
Resumé: On 7 December 1992, Senator McKiernan commented in the Senate on the quality of the evidence provided by RCOA witnesses to the Joint Standing Committee on Migration Regulations. Ms Piper, on behalf of the other witnesses, objected that many of his remarks were inaccurate.
Recommendation: That the response be incorporated in *Hansard*.

41. *Person Referred to in the Senate (Mr R.S.Lippiatt) (PP No.92/1993)*

Reference: Referred by President after consultation with Committee of Privileges, 26/8/92.
Action: Report tabled and adopted 12/5/93 (J.126).
Persons/organisations involved: Mr Richard Lippiatt; Senator Robert Bell.
Resumé: In the adjournment debate on 3 June and 13 October 1992, Senator Bell referred to Mr Lippiatt's administration of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* on behalf of Australia Post, particularly as it affected a former Australia Post employee 'Y'. For privacy reasons, the Committee discouraged Mr Lippiatt from placing specific facts relating to the case on the public record but he was able to indicate that he believed Senator Bell's information was unsubstantiated.
Recommendation: That the response be incorporated in *Hansard*.

42. *Possible Adverse Treatment of a Witness before the Corporations and Securities Committee (PP No. 85/1993)*

Reference: Deputy President determined precedence 8/10/92; motion moved by Senator Bell at request of Senator Spindler and agreed to 2/10/92 (J.2879).
Action: Public hearings 15/12/92, 11/2/93; report tabled and noted 27/5/93 (J.310); findings and recommendations debated 30/9/93 (J.557); amendment moved by Senator Cooney (negatived), findings endorsed and recommendations adopted 21/10/93 (J.684); President's response 16/3/94 (J.1413); Government response 22/8/95 (J.3650).
Persons/organisations involved: Mr James Gaffey; Australian Securities Commission; Joint Committee on Corporations and Securities.
Resumé: Mr Gaffey, then a legal officer with the Australian Securities Commission, gave evidence on 11 October 1991 to the Joint Committee on Corporations and Securities as a representative of the Young Lawyers Section of the Law Institute of Victoria. The Young Lawyers' attitude was contrary to the attitude taken before the committee by the ASC. On 18 May 1992, six charges under the Public Service Act were laid against Mr Gaffey: five were intra-office matters; the sixth, that 'he engaged in improper conduct as an officer' by making a submission to the joint committee at variance with the ASC position, thus compromising the latter. Although the last-named charge was withdrawn, and the operations of the joint committee were not affected, the Privileges Committee concluded that the laying of the charge could deter

other witnesses from appearing before other committees and therefore constituted a contempt.

Findings: That the ASC and two of its officers took action which constituted a contempt, with intent, against Mr Gaffey for having given evidence in a private capacity before the Corporations and Securities Committee. No contempt was involved in the other charges.

Recommendations: That the Senate endorse the findings; that no penalty be imposed in respect of the identified contempts, in light of the apologies offered; that heads of departments, statutory office holders and SES officers be required to undertake study of the principles governing the operations of Parliament and of the accountability of departments, agencies and statutory authorities to Parliament.

43. *Possible Threat to Senate Select Committee or Senators (PP No. 389/1993)*

Reference: President determined precedence 4/5/93; motions moved by Senators Reynolds and Walters and agreed to 5/5/93 (J.67).

Action: Report tabled 15/12/93 (J.1028); findings endorsed 3/2/94 (J.1198).

Persons/organisations involved: Ms Fiona Patten; Mr Robert Swan; Eros Foundation; Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies.

Resumé: The Eros Foundation is a lobby group for legalised adult goods and services in Australia. Ms Patten, a public relations consultant of the Foundation, indicated in a covering letter to the select committee that traders disadvantaged by the committee's proposed limits on 0055 telephone services would contemplate damages action. Mr Swan was reported in *The Australian* of 23 January 1993 as indicating that the Foundation would 'out' Liberal Party figures if the party adopted a policy of cracking down on the sex industry; similar comments were also allegedly made by Ms Patten. The Committee of Privileges concluded that the intention of the Foundation's representatives was not to threaten the select committee members; and that the 'outing' proposal, while offensive, could not be regarded as having the effect or tendency of substantially obstructing senators in the performance of their functions.

Finding: The Committee did not find that a contempt of the Senate had been committed by representatives of the Eros Foundation, in that they did not intend to utter a threat to the select committee and their actions did not have the effect or tendency of substantially obstructing senators in the performance of their functions.

44. *Possible Improper Interference with or Misleading Reports of Proceedings of Senate Legal and Constitutional Affairs Committee (PP No. 390/1993)*

Reference: President determined precedence 8/8/93; motion moved by Chair of Legal and Constitutional Affairs Committee (Senator Cooney) and agreed to 30/8/93 (J.405).

Action: Report tabled 15/12/93 (J.1028); finding endorsed and recommendation adopted 3/2/94 (J.1198); Watchdog Association complied with Senate order 15/3/94 (J.1394).

Persons/organisations involved: Mr Andrew Wade; Watchdog Association Inc; Australian Securities Commission; Senate Standing Committee on Legal and Consitutional Affairs.

Resumé: In July 1993, the Watchdog Association placed an advertisement in several newspapers, encouraging submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Australian Securities Commission. The

advertisement was so worded that it could have created the impression that the Senate committee was interested only in submissions from persons whose rights had been 'trampled on' by the ASC or that the inquiry was hostile to the ASC. The Committee of Privileges concluded that the advertisement was potentially misleading, but that this was not the intention of the Association. The Committee reported that Mr Wade, for the Association, agreed to take action to remedy the situation.
Finding: The Committee did not find that a contempt had been committed.
Recommendations: That the Senate endorse the finding; and that the Watchdog Association place a notification of the report and the committee's conclusions in the *Watchdog Reporter* as soon as possible.

45. *Person referred to in the Senate (Mr T.T. Vajda) (PP No. 4/1994)*

Reference: Referred by President 28/1/94.
Action: Report tabled 7/2/94 (J.1208); adopted 7/2/94 (J.1209).
Persons/organisations involved: Mr T.T. Vajda; Senator Jim Short.
Resumé: On 20 May 1993 in the Senate, Senator Short repeated allegations which had been published in the *Sydney Morning Herald* that Mr Vajda had been involved in the arrest or interrogation of Mr and Mrs Bardy in Hungary in 1951. In his response, Mr Vajda denied the allegations.
Recommendation: That the response be incorporated in *Hansard*.

46. *Possibly False or Misleading Information given to Estimates Committee E or the Senate (PP No. 43/1994)*

Reference: President determined precedence 27/9/93; motion moved by Senator Ferguson and agreed to 29/9/93 (J. 528).
Action: Report tabled 2/3/94 (J.1342); finding endorsed 24/3/94 (J.1524).
Persons/organisations involved: Senator the Hon. Chris Schacht; Australian Customs Service; Estimates Committee E.
Resumé: During the hearings of Estimates Committee E on 26 August 1993, the minister responsible for Customs, Senator Schacht, twice indicated that he did not think legislation was necessary to introduce a fee or tax in relation to the diesel fuel rebate scheme. In fact, legislation was being drafted at the time. The Committee of Privileges concluded that the minister gave false information to Estimates Committee E, but that he did so inadvertently; and that the officers advising him were unsure whether false information was being given. The committee also concluded that, although the matter was clarified in the Senate on 31 August, it would have been preferable had it been clarified at the first possible opportunity, and criticised the public servants involved in briefing the minister. The committee also observed that public servants are required to answer fully and honestly all questions which are asked directly of them and, in the event that their minister provides wrong, inaccurate or incomplete information, to make the fact known to the minister as soon as practicable so that any errors or omissions may be rectified, preferably during the hearing in question.

Finding: The committee determined that it should not find that a contempt had been committed.

47. *Person referred to in the Senate (Councillor Michael Samaras) (PP No. 112/1994)*

Reference: Referred by President, 11/5/94.
Action: Report tabled 31/5/94 (J.1713); report adopted 2/6/94 (J.1746).
Persons/organisations involved: Councillor Michael Samaras; Senator Michael Baume.
Resumé: On 3 May 1994, Senator Michael Baume alleged, in a notice of motion, that Councillor Samaras of Wollongong City Council had been involved in electoral fraud. Councillor Samaras wrote to the President of the Senate on 7 May 1994, denying the allegation and seeking redress.
Recommendation: That the response by Councillor Samaras be incorporated in *Hansard*.

48. *Possible Improper Disclosure of Document or Proceedings of Migration Committee (PP No. 113/1994)*

Reference: President determined precedence 25/11/93; motion moved by Chair of Migration Committee (Senator McKiernan) and agreed to 25/11/93 (J.901).
Action: Report tabled 8/6/94 (J.1778); finding endorsed and recommendation adopted 30/6/94 (J.1999).
Persons/organisations involved: Joint Standing Committee on Migration; Ms Margo Kingston; the *Canberra Times*.
Resumé: On 25 November 1993, an article in the *Canberra Times* purported to reveal the draft recommendations of the Migration Committee's report into detention practices. All committee members, their staff and staff of the secretariat denied any knowledge of the source of the disclosure, while Ms Kingston, the journalist concerned, refused to assist the Privileges Committee for ethical reasons.
Findings: The committee was unable to make a finding that there was an improper disclosure of a document before, or proceedings of, the Joint Committee on Migration; it therefore did not find that a contempt had been committed.
Recommendation: The committee recommended that the issue of journalistic ethics be referred to the Senate Standing Committee on Legal and Constitutional Affairs.

49. *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (PP No.171/1994)*

Reference: Motion moved by the Leader of the Australian Democrats, Senator Kernot, and agreed to, 12/5/94 (J.1683).
Action: Public hearing 18/8/94; report tabled 19/9/94 and noted by the Senate (J.2160).
Persons/organisations involved: the Senate.
Resumé: On 23 March 1994, Senator Kernot introduced the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, designed to provide for the Federal Court to enforce lawful orders made by the Parliament and to allow the court to determine claims of executive privilege. Options for determining claims of public interest immunity were canvassed before the committee, as were sanctions for the enforcement of orders. The committee concluded that such matters should not be determined by courts.
Recommendation: That the Bill not be proceeded with.

50. *Possible Improper Interference with a Witness and Possible False or Misleading Answers given to the Senate or a Senate Committee (PP No. 322/1994)*

Reference: President gave precedence 19/5/93; motion moved by Senator Watson and agreed to 20/5/93 (J.214).
Action: Report tabled 8/12/94 (J.2766); findings endorsed and recommendations adopted 2/2/95 (J.2863).
Persons/organisations involved: Mr John Richardson; Mr Frank Kelly; Australian Customs Service (ACS); Joint Committee of Public Accounts; Estimates Committee A.
Resumé: Mr John Richardson was a customs agent with a firm which represented Midford Paramount, a shirtmaking firm charged with misuse of export quotas and threatened with other charges. The charges failed, but the company was forced to close because of the activities of the ACS. These matters were investigated by the Joint Committee of Public Accounts. Mr Richardson gave evidence to the joint committee on 29 August 1991, in which he was highly critical of the ACS. During his evidence, he reported that an unknown caller had threatened to put him out of business if he criticised Customs to the inquiry. He subsequently provided documentation to the Senate on the question of a penalties scheme administered by the ACS, alleging that Customs officers had misled Estimates Committee A in their responses to questions concerning the scheme.
Findings: A threatening call was made to Mr Richardson, and this constituted a serious contempt (the committee was unable to discover the source of the call); the witness suffered penalty or injury but the committee could not establish whether this was as a result of his giving evidence to a committee; ACS answers and evidence to the Senate and an estimates committee did not constitute a contempt.
Recommendations: That the Senate request the Comptroller-General of Customs to circulate copies of the committee's report to all senior officers in the ACS; that the Senate refer the matter of the implementation of the recommendations of a report on customs operations (the Conroy report) to the relevant committee.

51. *Possible Penalty or Injury to a Witness before the Employment, Education and Training Committee (PP No. 4/1995)*

Reference: President gave precedence 30/5/94; motion moved by Senator Crane and agreed to 31/5/94 (J. 711).
Action: Report tabled 7/2/95 (J.2899); finding endorsed 2/3/95 (J.3008).
Persons/organisations involved: Mr Roger Boland; Mr Bert Evans; the Hon. Laurie Brereton; the Metal Trades Industry Association (MTIA); the Australian Industrial Relations Commission.
Resumé: On 11 November 1993 Mr Roger Boland, director of industrial relations for the MTIA, gave evidence critical of government policies to the Senate Standing Committee on Employment, Education and Training in relation to the Industrial Relations Reform Bill 1993. An article in the *Australian Financial Review* of 29 March 1994 alleged that the Minister for Industrial Relations, the Hon. Laurie Brereton, had overturned a proposal to appoint Mr Boland to the Australian Industrial Relations Commission. Discussion in both Houses linked Mr Boland's non-appointment to the views he expressed before the Senate committee. Mr Brereton and Mr Bert Evans of the MTIA denied that Mr Boland had been deprived of the appointment. Mr Boland stated he did not regard himself as having been prejudiced in any way because of his giving evidence.

Finding: The committee did not find that a contempt had been committed.

52. *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 — Casselden Place reference (PP No. 21/1995)*

Reference: Motion moved by Senator Spindler and agreed to 22/6/94 (J.830-1).
Action: Report tabled 1/3/95 (J.2984); report noted 2/3/95 (J.3008).
Persons/organisations involved: the Senate, the Department of Administrative Services, the Auditor-General.
Resumé: The committee considered a particular instance of refusal by a minister to produce documents in response to an order of the Senate. The documents related to Commonwealth leaseholding arrangements in Casselden Place, Melbourne, and were denied on commercial-in-confidence grounds. The impasse was broken by the Senate's asking the Auditor-General to investigate and report on the matter. The committee concluded that claims of executive privilege are for a House of Parliament to determine and that, in the event of conflict, an independent arbiter be called upon to evaluate material to assist the relevant House to determine the matter. The committee noted the success of the process in respect of the matter it considered.

53. *Possible Threat to a Senator (PP No. 44/1995)*

Reference: President gave precedence 19/10/94; motion moved by Senator Parer and agreed to 20/10/94 (J.2342).
Action: Report tabled 22/3/95 (J.3107); finding endorsed 23/3/95 (J.3136).
Persons/organisations involved: Senator Woodley, Mr Keith Williams.
Resumé: In the Senate on 21 September 1994, Senator Woodley alleged that, when he raised concerns about the Port Hinchinbrook development, he had been threatened by Mr Keith Williams, the principal of the development. The committee concluded that Mr Williams had prosecuted his campaigns vigorously but in doing so did not obstruct Senator Woodley in the performance of his duties.
Finding: The committee did not find that a contempt had been committed.

54. *Possible Unauthorised Disclosure of a Submission to the Joint Committee on the National Crime Authority (PP No. 133/1995)*

Reference: President gave precedence 2/3/94; motion moved by Deputy Chair of Joint Committee on National Crime Authority (Senator Vanstone) and agreed to 3/3/94 (J.1359).
Action: Report tabled 30/6/95 (J.3602); findings endorsed and recommendation adopted 24/08/95 (J.3694).
Persons/organisations involved: Mr Les Ayton, the Hon. KT Griffin, the Hon. Stephen Baker, the Hon. Dean Brown, Mr Chris Nicholls, Joint Committee on the National Crime Authority.
Resumé: The Joint Committee on the National Crime Authority received as in camera evidence a confidential submission dated 29 May 1991 relating to its inquiry into casinos from then Superintendent Les Ayton of the Western Australia Police. On 4 March 1993, Messrs Griffin and Brown quoted from the submission in the South Australian Parliament and the document was tabled. An anonymous telephone call to the joint committee secretariat implicated journalist Chris Nicholls as the source of the improper disclosure of the submission.

Findings: The Committee found that the Ayton submission, received in camera by the Joint Committee on the National Crime Authority, was improperly disclosed and that such disclosure constituted a serious contempt; it was unable to establish the source of the improper disclosure, owing substantially to the constraints on its capacity to examine the members of the South Australian legislature responsible for publishing and referring to the submission under privilege.
Recommendation: If the source of the improper disclosure is subsequently revealed, that the matter again be referred to the committee, with a view to a possible prosecution for an offence under section 13 of the *Parliamentary Privileges Act 1987.*

55. *Possible Penalty or Injury to a Witness before the Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure (PP No. 134/1995)*

Reference: President gave precedence 27/10/93; motion moved by Chair of the Industry, Science, Technology, Transport, Communications and Infrastructure Committee (Senator Childs) and agreed to 18/11/93 (J.812).
Action: Public hearings 18/8/94, 27 and 28/10/94; report tabled 30/6/95 (J.3602); finding endorsed 19/10/95 (J.3984).
Persons/organisations involved: Dr Philip Nitschke, Royal Darwin Hospital, the Hon. Mike Reed, Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure.
Resumé: Dr Nitschke, then a Resident Medical Officer at Royal Darwin Hospital, gave evidence to the standing committee's inquiry into disaster management as a representative of the Medical Association for the Prevention of War. The evidence was critical of the Hospital's preparedness for a nuclear accident. The responsible minister, the Hon. Mike Reed, issued a press release on the same day, suggesting that the Hospital could 'scrape by' without Dr Nitschke; he was interviewed the following day for a contract for the following year and was not, initially, successful, despite the fact that contract renewal was virtually automatic at the hospital.
Findings: The Committee found that the Minister's press release could be regarded as constituting a threat to Dr Nitschke; that he was penalised by the hospital by his initial rejection for a 1994 contract; that the threat was not made and penalties were not imposed in consequence of his appearance before the Standing Committee; therefore, no contempt was committed.

56. *Person Referred to in the Senate (Ms Yolanda Brooks) (PP No. 135/1995)*

Reference: 20/6/95, by the President.
Action: Report tabled 30/6/95 (J.3602); report adopted 24/08/95 (J.3694).
Persons/organisations involved: Ms Yolanda Brooks, Senator Ian Macdonald.
Resumé: On 18 November 1993 during discusssion of matters of public importance and on 28 June 1994 during the adjournment debate, Senator Ian Macdonald revealed the content of affidavits filed in the Queensland Supreme Court relating to the dismissal of Ms Brooks from her position of Shire Clerk of the Whitsunday Shire Council. Ms Brooks stated that the allegations against her had no basis in fact; the publication of them was both professionally and personally damaging; and that Senator Macdonald had no direct knowledge of the matter.
Recommendation: That the response be incorporated in *Hansard*.

57. *Possible Penalty or Injury Imposed on Witnesses before the Senate Select Committee on Superannuation (PP No. 183/1995)*

Reference: President gave precedence 16/12/93; motion moved by Senator West on behalf of Superannuation Committee and agreed to (J.1073).
Action: Report tabled 17/10/95 (J.3937); finding endorsed 19/10/95 (J.3984).
Persons/organisations involved: Mr Kevin Lindeberg, Mr Des O'Neill, Mr Cecil Lee, Mr Gordon Rutherford, Queensland Professional Credit Union, Select Committee on Superannuation.
Resumé: Mr Kevin Lindeberg alleged that he and his wife had their membership of the Queensland Professional Credit Union terminated, and Mr Des O'Neill had his application for membership rejected, as a result of their giving evidence to the Select Committee on Superannuation in Brisbane on 29 April 1993. Messrs Lindeberg and O'Neill had raised before that committee, and attempted to raise before the 1993 Credit Union AGM, the matter of extraordinary withdrawals from the superannuation fund in 1987, and related matters.
Finding*:* The committee noted that the question of possible contempt was intertwined with wider disputes between persons within an organisation. It was unable to establish that the penalty and injury caused to Messrs Lindeberg and O'Neill were on account of their giving evidence to the Senate Superannuation Committee and accordingly determined not to make a finding that a contempt of the Senate had occurred.

58. *Possible Improper Interference with a Witness before Select Committee on Unresolved Whistleblower Cases (PP No. 476/1995)*

Reference: President gave precedence; motion moved by Senator Foreman on behalf of Chair of Select Committee on Unresolved Whistleblower Cases (Senator Murphy) and agreed to 30/6/95 (J.3600).
Action: Report tabled 26/10/95 (J.4069); finding endorsed 9/5/96 (J.146).
Persons/organisations involved: Mr Peter Jesser, Professor Craig Littler, University of Southern Queensland, Select Committee on Unresolved Whistleblower Cases
Resumé: Mr Jesser, a senior lecturer in the Faculty of Business at the University of Southern Queensland, alleged that Professor Craig Littler questioned his [Jesser's] right to make a submission about departmental matters to an outside body and that intimidation and reprisal followed his giving evidence to the Select Committee on Unresolved Whistleblower Cases.
Finding*:* The Privileges Committee concluded that, whether or not intimidation or reprisal had occurred, it was not because of Mr Jesser's giving evidence to the Senate committee. Therefore no contempt of the Senate was committed.

59. *Person Referred to in the Senate (Mrs Esther Crichton-Browne) (PP No. 475/1995)*

Reference: 22 November 1995, by the President.
Action: Report tabled 1/12/95 (J.4344); report adopted 9/5/96 (J.146).
Persons/organisations involved: Mrs Esther Crichton-Browne, Senator Sue Knowles.
Resumé: During the adjournment debate on 15 November 1995, Senator Knowles commented on aspects of a matter relating to a restraining order against Senator Crichton-Browne. Mrs Crichton-Browne responded that Senator Knowles' version of events was inaccurate.
Recommendation: That the response be incorporated in *Hansard*.

60. *Possible Unauthorised Disclosure of Documents or Deliberations of Senate Select Committee on the Dangers of Radioactive Waste (PP No. 9/1996)*

Reference: Deputy President gave precedence to notice of motion 29/6/95; motion moved by Senator Chapman and agreed to, 30/6/95 (J.3600).
Action: Report presented to the President, 29/4/96; tabled 30/4/96 (J.30); finding endorsed 20/6/96 (J.361).
Persons/organisations involved: Senator Grant Chapman; the Hon. Duncan Kerr, Minister for Justice; Select Committee on the Dangers of Radioactive Waste.
Resumé: At a meeting held on 27 June 1995, the Radioactive Waste Committee agreed to order the production of certain documents by the Australian Federal Police and other bodies. On the following day the Minister for Justice issued a press release commenting on this demand, before it was more widely known. The Radioactive Waste Committee considered the unauthorised disclosure, although it did so after the matter had been referred to the Committee of Privileges. Its conclusion was that, although the source of the leak could not be determined, the unauthorised disclosure had not impeded the work of the committee.
Finding: No question of contempt involved.
Recommendation: That the Senate endorse procedures first outlined in the committee's 20th report, in the form of a resolution, that a committee affected by an unauthorised disclosure should seek to discover the source of the disclosure. It should then conclude whether the disclosure potentially or substantially interfered with the work of the committee; if so, it should report to the Senate and the matter may be raised in accordance with Standing Order 81.

61. *Possible False or Misleading Statements to Senate Select Committee on Public Interest Whistleblowing (PP No. 10/1996)*

Reference: President determined precedence 9/3/95; motion moved by Senator Murphy and agreed to, 21/3/95 (J.3084).
Action: Report presented to the President 29/4/96; tabled 30/4/96 (J.31); finding endorsed 20/6/96 (J.361).
Persons/organisations involved: Mr Alwyn Johnson; Mr John Harris; Trust Bank; Select Committee on Public Interest Whistleblowing.
Resumé: On 27 February 1995, Mr Johnson drew to the attention of a select committee secretary statements pertaining to the termination of his employment by the Trust Bank, made by the bank's chairman Mr John Harris in response to an invitation by the Select Committee on Public Interest Whistleblowing. Mr Johnson had alleged to that committee that he had been dismissed by the bank for his role in disclosing problem loans. Through its solicitors, the bank asserted that Mr Johnson's position had been made redundant as a result of the amalgamation of two banks, that he was independently assessed as being unsuitable for redeployment at a lower level, and that his contribution to the disclosure of the problem loans was not a factor in the decision to terminate his employment. The committee concluded that, although Mr Harris' statements were not as precise as they might have been, they did not constitute false or misleading evidence before a committee.
Finding: No finding of contempt should be made.

62. *Committee of Privileges 1996-1996: History, Practice and Procedure (PP No. 108/1996)*

Action: Report presented to the President of the Senate 28/6/96, tabled 21/8/96 (J.481); noted 25/9/97 (J.2527).

63. *Possible false or misleading evidence before Select Committee on Unresolved Whistleblower Cases (PP No. 360/1996)*

Reference: President gave precedence 24/6/96; motion moved by Senator Shayne Murphy and agreed to 25/6/96 (J.385).
Action: Report tabled 5/12/96 (J.1212); finding endorsed 29/5/97 (J.2041).
Persons/organisations involved: Mr Kevin Lindeberg; Mr Peter Coyne; Senator Shayne Murphy; Queensland Criminal Justice Commission; Select Committee on Unresolved Whistleblower Cases.
Resumé: Senator Murphy, as former chair of the Select Committee on Unresolved Whistleblower Cases, received submissions from Mr Lindeberg and Mr Coyne which alleged that deliberately misleading evidence had been given to that committee by the Criminal Justice Commission about the number and availability of advices given by the Queensland Crown Solicitor, and awareness of documents held by the Queensland Department of Family Services and Aboriginal Islander Affairs, in relation to what came to be known as the Heiner documents case. The Committee concluded that the CJC was unaware of the documents. It also made the point that state bodies were the most appropriate avenues for examinations of this kind.
Finding: That no contempt had been committed by the Criminal Justice Commission in respect of the matter.

64. *Possible false or misleading evidence before the Environment, Recreation, Communications and the Arts Legislation Committee (PP No. 40/1997).*

Reference: President gave precedence 22/8/96, motion moved by Senator Patterson and agreed to 9/9/96 (J.532).
Action: Report tabled 19/3/97 (J.1635); finding endorsed and recommendation adopted 29/5/97 (J.2042).
Persons/organisations involved: Mr Geoffrey Marr; Mr Paul Miles; Mr David Krasnostein; Senate Environment, Recreation, Communications and the Arts Legislation Committee.
Resumé: Mr Marr, an administrative officer with Telstra, and Mr Miles, a private investigator and friend of Mr Marr, wrote to the President of the Senate in November 1995 and January 1996 claiming that, during evidence given by Mr Krasnostein, Telstra General Counsel, to the Senate Environment, Recreation, Communications and the Arts Legislation Committee estimates hearing on 27 June 1995, Mr Krasnostein falsely alleged that Mr Marr had threatened violence against Telstra employees and their families; and that Mr Marr and Mr Miles had unlawfully obtained an internal Telstra e-mail message. The Committee concluded that Mr Krasnostein did not make the allegation that Mr Marr had threatened Telstra employees. However, Mr Krasnostein's evidence left the ERCA Committee with the clear impression that there were grounds for suspicion that Mr Miles and Mr Marr had illegally acquired a Telstra internal e-mail, thus misleading that committee. The Privileges Committee concluded that misleading evidence was not intentionally given.
Finding: The Committee found that no contempt of the Senate had been committed.
Recommendation: That a statement of principle relating to the accountability of statutory authorities to Parliament be reasserted.

65. *Person referred to in the Senate (Dr Neil Cherry) (PP No. 48/1997)*

Reference: Referred by the President 5/3/97.
Action: Report tabled 25/3/97 (J.1759); report adopted 25/3/97 (J.1759)
Persons/organisations involved: Dr Neil Cherry; Senator the Hon. Richard Alston.
Resumé: During question time on 5 March 1997, Senator Alston alleged that Dr Neil Cherry was a 'shameless charlatan' and 'snake oil merchant' in relation to the emerging research on electro-magnetic radiation. Dr Cherry wrote to the President of the Senate on 5 March 1997, denying the allegations and seeking redress.
Recommendation: That the response by Dr Neil Cherry be incorporated in *Hansard*.

66. *Person Referred to in the Senate (Ms Deborah Keeley) (PP No. 89/1997)*

Reference: Referred by the President 22/4/97.
Action: Report tabled 29/5/97 (J.2038); report adopted 29/5/97 (J.2038)
Persons/organisations involved: Ms Deborah Keeley; Senator Bill O'Chee.
Resumé: On 25 February 1997 during debate in the Senate, Senator O'Chee alleged that the principal author of a report prepared by the Office of Government Information and Advertising, relating to tenders for a creative advertising and media strategy to explain, promote and encourage voluntary compliance for the Australia-wide gun amnesty, had been offered a lucrative position with an advertising agency which was one of the final tenderers for the contract. Ms Keeley wrote to the President of the Senate on 21 April 1997, denying the allegation and seeking redress.
Recommendation: That the response by Ms Keeley be incorporated in *Hansard*.

67. *Possible threats of legal proceedings made against a senator and other persons (PP No. 141/1997)*

Reference: 23/8/95. President gave precedence 22/8/95. Motion moved by Senator Boswell and agreed to 23/8/95 (J.3665).
Action: Public hearings 31/1/97, 16/4/97; Report tabled 3/9/97 (J.2412); findings endorsed 22/9/97 (J.2456)
Persons/organisations involved: Senator Bill O'Chee; Mr David Armstrong; Mr Michael Rowley; Mr Ron Crew; Cairns Professional Game Fishing Association.
Resumé: During question time on 8 June 1995, Senator O'Chee asked a question about a possible conflict of interest by one of the board members of the East Coast Tuna Management Advisory Committee, Mr Michael Rowley, who undertakes tuna fishing in North Queensland. Senator O'Chee claimed that a proposal to allow longline fishing, previously forbidden in a specified area in order to prevent the depletion of marlin and other bill fish, had been put before the Committee, and tabled certain photographs that purported to show Mr Rowley's boats landing prohibited fish. In an adjournment speech on 22 June 1995, Senator O'Chee referred to certain information provided to him by Mr David Armstrong, a former manager of a tuna company of which Mr Rowley was a shareholder and director. Mr Rowley subsequently instructed the firm of Bottoms English to initiate defamation proceedings against certain persons, including Mr David Armstrong, with the letter of demand in respect of Mr Armstrong citing only the material contained in Senator O'Chee's speech as evidence of the alleged defamation.

Findings: A contempt of the Senate was committed by Mr Rowley, acting on legal advice, in taking legal action against Mr Armstrong. No contempt of the Senate was involved in the taking of other legal actions.
Penalty: No penalty was recommended, the Committee deeming it inappropriate to recommend a penalty against a person who, after receiving legal advice, regarded himself as exercising his legal rights.

68. *Persons referred to in the Senate (Mr Ray Platt, Mr Peter Mulheron) (PP No. 158/1997)*

Reference: Referred by the President 21/7/97 and 7/8/97.
Action: Report tabled 23/9/97 (J.2478); report adopted 23/9/97 (J.2478).
Persons/organisations involved: Mr Ray Platt; Mr Peter Mulheron; Senator Boswell.
Resumé: On 18 June 1997, during discussion on matters of public interest, Senator Boswell made a speech criticising of *The Strategy* newspaper and its editor, Mr Platt. Mr Mulheron subsequently identified himself as a staff member of *The Strategy*. Both Mr Platt and Mr Mulheron wrote to the President on 21 July and 7 August 1997 respectively, claiming that Senator Boswell's statements were incorrect.
Recommendation: That the responses be incorporated in *Hansard.*

69. *Person referred to in the Senate (Dr Clive Hamilton) (PP No. 183/97)*

Reference: Referred by the President 29/9/97.
Action: Report tabled 21/10/97 (J.2659); report adopted 21/10/97 (J.2659).
Persons/organisations involved: Dr Clive Hamilton; Senator the Hon. W. Parer.
Resumé: During question time on 25 September 1997, in response to a question on Dr Clive Hamilton's criticism of the government's position on greenhouse, Senator Parer alleged that Dr Hamilton was 'anti-Australian' and read extracts from Dr Hamilton's interview on an ABC radio program *The Search for Meaning.* Dr Hamilton wrote to the President seeking redress, stating that *The Search for Meaning* was a long-running program that provided an opportunity for well-known people to discuss their personal, spiritual and religious journeys. His revelations on that program were a personal matter and entirely unrelated to his credentials to discuss climate change policy.
Recommendation: That the response be incorporated in *Hansard.*

70. *Questions arising from proceedings of the Parliamentary Joint Committee on the National Crime Authority (PP No. 68/1998)*

Reference: Motion moved by Senator Ferris and agreed to 26/6/1997 (J.2257-8).
Action: Report tabled 6/4/98 (J.3623); conclusions and recommendations noted 28/5/98 (J.3881).
Persons/organisations involved: Mr John Elliott; Senator Stephen Conroy; Parliamentary Joint Committee on the National Crime Authority.
Resumé: In 1997 the Joint Committee on the National Crime Authority undertook an evaluation of the operations of the National Crime Authority. At a public hearing of the joint committee, Mr John Elliott gave evidence concerning the Authority's investigation of him; at the same hearing Senator Stephen Conroy was prevented from putting certain questions to Mr Elliott and certain material was expunged from the *Hansard* transcript of evidence. The joint committee sought clarification of certain matters from the Privileges Committee: whether Senator Conroy's rights to question a

witness were infringed; the limitations on the joint committee of the *National Crime Authority Act 1984,* sections 51 and 55; and whether certain further material should be expunged from the *Hansard* record.

Conclusions: The Committee of Privileges concluded that the entire joint committee hearing was contrary to the statute under which the joint committee was established, and as a consequence Senator Conroy's rights could not have been infringed. It further found that, as the proceedings had been widely publicised, a belated expungement order would be ineffectual. It drew attention to the extremely restrictive terms of the relevant provisions of the NCA Act and suggested that they should be reviewed.

Recommendations: That the NCA Committee seek amendment to sections 51 and 55 of the National Crime Authority Act or that, as an alternative to seeking amendment to section 51 of the Act, a declaratory enactment be made by Parliament to make it explicit that parliamentary privilege cannot be set aside except by express words in a statute.

71. *Further possible false or misleading evidence before Select Committee on Unresolved Whistleblower Cases (PP No. 86/1998)*

Reference: President determined precedence 4/12/97. Motion moved by Senator Woodley and agreed to 5/12/97 (J.3206).

Action: Report tabled 26/5/98 (J.3839); finding endorsed 28/5/98 (J.3882).

Persons/organisations involved: Mr Kevin Lindeberg; Senator John Woodley; Senate Select Committee on Unresolved Whistleblower Cases; Queensland Criminal Justice Commission; Parliamentary Criminal Justice Committee of the Queensland Legislative Assembly.

Resumé: This inquiry dealt with further allegations that the Queensland Criminal Justice Commission had presented misleading evidence to the Senate Select Committee on Unresolved Whistleblower Cases in relation to the Parliamentary Criminal Justice Committee's handling of Mr Lindeberg's complaint and in relation to its investigation of the shredding of the Heiner documents. The Privileges Committee dismissed these allegations, and, having again noted that they were part of a series of disputes in Queensland involving the role of the Commission, suggested that such disputes should be resolved by state bodies.

Finding: That no contempt of the Senate has been committed by the Queensland Criminal Justice Commission.

72. *Possible improper action against a person (Dr William De Maria) (PP No. 117/98)*

Reference: Documents tabled by the President on 25/8/97; motion moved by Senator Bourne and agreed to 4/9/97 (J.2438).

Action: Report tabled 30/6/98 (J.4110); findings endorsed and recommendation adopted 1/12/98 (J.225).

Persons/organisations involved: Dr William De Maria; The University of Queensland; Senator John Woodley.

Resumé: On 27 May 1997 Senator John Woodley gave a speech in the Senate which added to remarks he had made on the previous evening about whistleblowers. Senator Woodley's speech mentioned two Senate select committee reports on whistleblowing, referring specifically to the work of Dr William De Maria, who had been a witness before the committees. On 29 May 1997 Senator Woodley took the opportunity to table documents which he believed to be associated with his previous speech but

which in fact contained Dr De Maria's allegations of misconduct against University of Queensland staff. On 18 June 1997 Senator Woodley apologised to those staff and to the Senate for his role in tabling the documents. The University subsequently took disciplinary action against Dr De Maria based on the documents tabled by Senator Woodley on 29 May.

Findings: The University of Queensland, in taking action against Dr William De Maria as a direct consequence of his communication with the Senate through Senator Woodley, committed a contempt. The Committee of Privileges was unable to conclude that Dr De Maria should be found in contempt. It observed, however, that all senators have a duty to check material before tabling.

Recommendation: That no penalty be imposed.

73. *Possible improper interference with a potential witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PP No. 118/98)*

Reference: President determined precedence 1/10/97. Motion moved by Senator Bolkus and agreed to 2/10/97 (J.2611).

Action: Report tabled 30/6/98 (J.4111); finding endorsed and recommendations adopted 1/12/98 (J.225-6).

Persons/organisations involved: The Hon. Daryl Williams; Mr Alan Rose, Australian Law Reform Commission; Attorney-General's Department; Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

Resumé: After communications between the Australian Law Reform Commission and the Native Title Committee secretariat, an invitation was extended to the former to make a written submission and to give oral evidence to that committee. The Commission's President, Mr Alan Rose, accepted the invitation on 19 September 1997 but withdrew following discussions with the Attorney-General's Department. On 29 September 1997, an article in the *Sydney Morning Herald* alleged Mr Rose had been pressured to withdraw by the Attorney-General.

Finding: The Committee of Privileges found that no contempt was committed in respect of the matter, as the Attorney-General and his officers had not sought by improper means to influence the evidence of the Australian Law Reform Commission, or to cause the Commission to refrain from giving that evidence. The Committee noted, however, the pResuméd failure by all persons involved to take account of the rights, obligations and protections of witnesses before parliamentary committees.

Recommendations: That the following matter be referred to the Legal and Constitutional Legislation Committee for inquiry and report: The statutory powers and functions of the Australian Law Reform Commission; and that the Senate resolution of 21 October 1993, relating to senior public officials' duty to undertake study of the principles governing the operations of Parliament, be reaffirmed, with each department to report in a year's time on how the terms of the resolution have been complied with.

74. *Possible unauthorised disclosure of parliamentary committee proceedings (PP No. 180/98) (Note: This report incorporates six separate references to the Committee)*

References:

(1) Possible unauthorised disclosure of documents of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund –

President gave precedence; motion moved by Senator Evans and agreed to 27 October 1997 (J.2717)

(2) Possible premature disclosure of the report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund – President gave precedence; motion moved by Senator Abetz and agreed to 29 October 1997 (J.2759)

(3) Possible unauthorised disclosure of advice to the Parliamentary Joint Committee on the National Crime Authority – President gave precedence; motion moved by Senator McGauran and agreed to 26 November 1997 (J.2991)

(4) Possible unauthorised disclosure of the report of the Environment, Recreation, Communication and the Arts References Committee – President gave precedence; motion moved by Senator Evans and agreed to 26 November 1997 (J.2991)

(5) Possible unauthorised disclosure of a draft report of the Economics References Committee – President gave precedence; motion moved by Senator Collins and agreed to 12 March 1998 (J.3379)

(6) Possible unauthorised disclosure of a draft report of the Parliamentary Joint Committee on the National Crime Authority – President gave precedence; motion moved by Senator McGauran and agreed to 2 July 1998 (J.4162)

Action: Report tabled 9/12/98 (J. 360); findings endorsed and recommendations adopted 15/2/99 (J.428).

Persons/organisations involved:

(1) Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund; Senator the Hon. Nick Bolkus; the Hon. Daryl Williams; Mr Warren Entsch; Senator the Hon. Nick Minchin.

(2) Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund; Senator Jeannie Ferris; Senator Eric Abetz; Senator the Hon. Nick Bolkus; Mr D. Melham MP; Ms Margo Kingston; Ms Aban Contractor; Mr Jack Waterford.

(3) Parliamentary Joint Committee on the National Crime Authority; Senator Stephen Conroy; Senator Jeannie Ferris; Senator Julian McGauran; Professor Jim Davis.

(4) Environment, Recreation, Communications and the Arts References Committee; Senator the Hon. Chris Schacht; the Hon. Michael Baume; Senator the Hon. Richard Alston; Mr Neville Stevens.

(5) Economics References Committee; Senator Jacinta Collins; Senator George Campbell; other committee members and staff.

(6) Parliamentary Joint Committee on the National Crime Authority; Senator Jeannie Ferris; Senator Julian McGauran.

Resumé: This report covers six separate instances of unauthorised disclosure of Senate committee reports, proceedings or documents. Having examined each of the matters referred, the Committee concluded that it should also examine the underlying principles governing improper disclosures. The Committee therefore devoted the first chapter to examining the issues of principle, concluding that the existing prohibitions should remain, while in the second chapter it discussed and made findings on the individual matters referred to it.

(1) Two documents from the Native Title Committee (NTC) secretariat relating to contacts between the Committee and the Australian Law Reform Commission were tabled in the House of Representatives on 22 October 1997 by the Attorney-General. It was claimed that the NTC chair, a member of the House of Representatives, had transmitted the documents without the authority of the NTC. The Committee

concluded that the second of the two documents had indeed been transmitted without the authority of the NTC, though its attachments had been authorised for release. It considered that the release was not particularly serious and, in any event, the Committee could not make a finding of contempt against a member of the House of Representatives.

Finding: No contempt of the Senate committed.

(2) Before the tabling of a report from the Native Title Committee (NTC) on the Native Title Amendment Bill 1997, at least two newspapers gave accurate accounts of its contents, and two members of the NTC, Mr Daryl Melham MP and Senator the Hon. Nick Bolkus, held a televised press conference based on a minority report. The Committee was unable to discover the source of the earlier disclosures of the draft report to various news media, nor was it able to examine the actions of Mr Melham as a participant in the press conference.

Finding: Senator the Hon. Nick Bolkus committed a contempt of the Senate

(3) On 23 October 1997 Senator Conroy responded in the adjournment debate to a matter raised in the Senate concerning parliamentary privilege and the Joint Committee on the National Crime Authority, quoting an opinion sought by the NCA Committee from Professor Jim Davis, an opinion which had not at that time been authorised for release but which supported the senator's views on a contentious issue within that committee. The Privileges Committee considered that Senator Conroy had been unwise to disclose the document but that there had been no NCA Committee intention to suppress the document.

Finding: No contempt of the Senate committed.

(4) In a response dated 8 September 1997 to a question taken on notice in an estimates hearing, the Department of Communications and the Arts advised that a draft of the majority report on the Telstra sale bill by the Environment, Recreation, Communications and the Arts References Committee had been found in the department. On investigation, it appeared that the committee secretary had been instructed by a member of the committee to provide successive drafts of the minority report and the draft majority report to the minister's office so that the minister's staff could assist government senators in the preparation of the minority report and have access to departmental resources in doing so.

Finding: Unidentified officer, or officers, of the Department of Communications and the Arts committed contempt of the Senate.

(5) On 7 December 1997 an article in the *Weekend Australian* quoted from a draft report of the Economics References Committee on promoting Australian industry. Committee members and secretariat advised that they had no knowledge of how the draft report contents were disclosed. One senator suggested that, as such documents were not always clearly stamped 'confidential', they could be inadvertently passed on or left lying in an open area; he also suggested that briefings on the handling of committee documents were required for new senators.

Finding: Unidentified person or persons who disclosed draft report committed contempt of the Senate.

(6) An article appeared in *The Age* on 6 April 1998, giving an accurate account of the outcome of the deliberations of the National Crime Authority (NCA) Committee before its report evaluating the NCA had been tabled. In this instance, the unauthorised disclosure did not impede the work of the committee but placed the relationship of trust between committee members in jeopardy.

Finding: Unidentified person or persons who disclosed draft report likely to have committed contempt of the Senate.

Recommendations:

That no penalty be imposed in respect of any persons against whom a contempt finding has been made; and that the question of authority to divulge private deliberations and documents of committees be referred to the Procedure Committee.

75. *Execution of Search Warrants in Senators' Offices (PP No.52/99)*

Reference: Deputy President, as Chair of the Senate Procedure Committee, requested that the Privileges Committee consider the matter (1/12/98).
Action: Report tabled 22/03/99 (J.581); recommendation adopted 25/03/99 (J.633).
Persons/organisations involved: Presiding Officers, Australian Federal Police.
Resumé: The committee considered the question whether parliamentary privilege provides an immunity from legal processes for compulsory production of documents and the significance of search warrants in the context of this question. It did not reach a firm conclusion on the matter but considered that general guidelines between the Australian Federal Police and the Law Council of Australia in respect of legal professional privilege could form the basis for developing comparable protocols between the Presiding Officers and law enforcement authorities.
Recommendation: That the general guidelines between the Australian Federal Police and the Law Council of Australia should form the basis for discussion between the Presiding Officers and the Attorney-General regarding the execution of search warrants in the offices of senators and members.

76. *Parliamentary Privilege: Precedents, Procedures and Practice in the Australian Senate 1966-1999 (PP No. 126/1999)*

Action: Report noted 26/8/99 (J.1585).

77. *Persons Referred to in the Senate (Certain Faculty Members of Greenwich University) (PP No.151/1999)*

Reference: Referred by the President 27/5/99.
Action: Report tabled and adopted 28/6/99 (J.1350).
Persons/organisations involved: Senator Kim Carr; Greenwich University; Dr Claudine Jeanrenaud; Dr Carl E. Lindgren; Dr Lisa A. Mertz; Dr Daniel W. Miller; Dr Francesco Patricolo; Dr C. Norman Shealy; Dr Rick Walston and Dr John Walsh.
Resumé: During the adjournment debate on 22 March 1999, Senator Kim Carr referred to the establishment of Greenwich University on Norfolk Island and commented on the nature of the courses offered and the qualifications of the faculty. In their responses, faculty members asserted that they themselves, and the courses they offered, were academically sound.
Recommendation: That the response be incorporated in *Hansard.*

78. *Possible Improper Use of Proceedings of Community Affairs References Committee (PP No. 183/1999)*

Reference: President gave precedence to notice of motion; motion moved by Senator Crowley and agreed to, 27/5/99 (J.947).
Action: Report tabled 1/9/99 (J.1626); findings endorsed 23/9/99 (J.1739).
Persons/organisations involved: Community Affairs References Committee; Associate Professor Margaret Allars; Dr Frank Peters; Dr Wes Whitten; Dr David Howes; the Hon. Dr Michael Wooldridge; Department of Health and Family Services.

Resumé: In its report on the Creutzfeldt-Jakob Disease settlement offer, the Community Affairs References Committee recommended, inter alia, that a review be undertaken by Professor Allars of further scientific information, including that provided to the committee by Drs Peters, Whitten and Howes. The review was undertaken and provided to the minister, whose department provided copies to the committee, and to many other interested persons before the committee had authorised publication. Dr Howes complained to the committee that Professor Allars' review disparaged him and reflected badly on his reputation. The department asserted that the review had been undertaken for a Senate committee and was thus covered by parliamentary privilege.
Findings: The committee did not make a finding with respect to its first two terms of reference, namely whether committee witnesses were injured in consequence of the evidence they gave the committee or whether the proceedings of the committee were misused to harm them. It considered the matters to be ones for scientific peer review to determine and beyond its competence. In respect of the questions as to whether the proceedings of the Community Affairs References Committee were misrepresented by the department and whether the department published a document prepared for and submitted to a parliamentary committee, the Privileges Committee found that no contempt was committed as the department was unsure of the status of the review report and unaware of the need to obtain committee authorisation to distribute it. The Privileges Committee criticised the department for its inadequate understanding of parliamentary processes.

79. *Possibly False or Misleading Statements Tabled in the Senate - Discontinuation of Inquiry (PP No. 196/1999)*

Reference: President determined precedence 6/5/97; motion moved by the Leader of the Opposition in the Senate, Senator Faulkner, at the request of Senators Bolkus and Margetts, and agreed to 7/5/97, though inquiry not to commence until conclusion of Australian Federal Police investigations and any legal proceedings (J.1855-6).
Action: Report tabled 29/9/99 (J.1792); adopted 30/9/99 (J.1811).
Persons/organisations involved: Senator Malcolm Colston; Mrs C. Smith; Attorney-General; Australian Federal Police; Director of Public Prosecutions.
Resumé: Statements were tabled in the Senate on 24 March and 6 May 1997 relating to travel allowance payments to then Senator Colston, statements which were alleged to be false or misleading. As the payments were under investigation by the Australian Federal Police (AFP) and legal proceedings a possibility, the committee's inquiry was to commence only following a statement from the Attorney-General, advising that those investigations and proceedings had been concluded. A statement dated 2 September 1999 was duly provided by the Attorney, indicating that the AFP investigations had been concluded and that Commonwealth legal proceedings consequent on those investigations had also been concluded. The Attorney included a statement from the Office of the Director of Public Prosecutions, indicating that the Commonwealth had declined to prosecute in view of the health of the alleged offender. In the circumstances, the Committee concluded it would be inappropriate to pursue its own inquiry.
Recommendation: That the inquiry be not further pursued.

80. *Persons Referred to in the Senate (Board Members and Staff of Electronic Frontiers Australia Inc.) (PP No.358/1999)*

Reference: Referred by the President 13/10/99.

Action: Report tabled and adopted 21/10/99 (J.1986).
Persons/organisations involved: Senator Richard Alston; Electronic Frontiers Australia Inc.
Resumé: During a Senate debate on Internet censorship on 30 September 1999, Senator Alston, the Minister for Communications, made disparaging remarks about Electronic Frontiers Australia Inc (EFA) and attacked its views on Internet regulation. EFA asserted that the Minister's allegations were unsubstantiated and took the opportunity to clarify its position.
Recommendation: That the EFA response be incorporated in *Hansard.*

81. *Persons Referred to in the Senate (Dr Chris Atkinson and Dr Chris Harper) (PP No. 373/1999)*

Reference: Referred by the President 9/11/99.
Action: Report tabled and adopted 30/11/99 (J.2159).
Persons/organisations involved: Senator Chris Evans; Royal Australian and New Zealand College of Radiologists; Dr Chris Atkinson; Dr Chris Harper.
Resumé: Senator Evans sought information in respect of a number of members of the Royal Australian and New Zealand College of Radiologists, via questions on notice published in the Senate Notice Paper of 29 September 1999. The College, on behalf of Drs Atkinson and Harper, expressed concern that misleading information had been published concerning the two doctors' alleged involvement with imaging groups, information which had the potential to damage the doctors' professional reputations and standing.
Recommendation: That the response be incorporated in *Hansard.*

82. *Person Referred to in the Senate (Ms Christine Bourne) (PP No. 374/1999)*

Reference: Referred by the President 10/11/99.
Action: Report tabled and adopted 30/11/99 (J.2159).
Persons/organisations involved: Senator Stephen Hutchins; Ms Christine Bourne.
Resumé: During the adjournment debate on 23 September 1999, Senator Hutchins alluded to the result of a Leichhardt Council by-election following a High Court ruling and added that one candidate, Ms Bourne, had been served with a bankruptcy notice. Ms Bourne asserted that her reputation and standing in the community had been adversely affected as a result.
Recommendation: That Ms Bourne's response be incorporated in *Hansard.*

83. *Persons Referred to in the Senate (Mr Raymond Rose, Principal, Bridge Business College) (PP No. 375/1999)*

Reference: Referred by the President 10/11/99.
Action: Report tabled and adopted 30/11/99 (J.2159).
Persons/organisations involved: Senator Kim Carr; Mr Raymond Rose; Bridge Business College.
Resumé: During a matters of public interest discussion in the Senate on 29 September 1999, Senator Carr discussed private providers of international education in Australia. He made certain allegations, inter alia, about the adequacy of the Bridge Business College, allegations which were responded to by its principal, Mr Raymond Rose. Mr Rose claimed that Senator Carr's comments had unfairly damaged the

reputation of the college and caused it to be subject to an unscheduled investigation by the Department of Immigration and Multicultural Affairs.
Recommendation: That Mr Rose's response be incorporated in *Hansard.*

84. *Possible Unauthorised Disclosure of Draft Parliamentary Committee Report (PP No. 35/2000)*

Reference: President determined precedence 1/9/99; motion moved by Senator O'Brien at the request of Senator Collins, and agreed to, 2/9/99 (J.1636).
Action: Report tabled 7/3/2000 (J.2374); findings endorsed and recommendations adopted 15/3/2000 (J.2447).
Persons/organisations involved: Senate Employment, Workplace Relations, Small Business and Education References Committee; Senator Karen Synon; the Hon. Peter Reith; Department of Employment, Workplace Relations and Small Business.
Resumé: The chair's draft report of the inquiry by the Senate Employment, Workplace Relations, Small Business and Education References Committee into regional unemployment was disclosed to the Department of Employment, Workplace Relations and Small Business, a fact which became apparent when an officer of the department contacted the committee secretary to inquire about the status of the document. The Employment Committee investigated the disclosure and was advised by then Senator Synon that her then staff had inadvertently provided a copy of the draft report to Minister Reith's office. The minister insisted his staff had not solicited a copy of the draft report and that they were unaware of its privileged nature when the departmental liaison officer passed it to the department for comment; the departmental secretary also disclaimed any knowledge of the report's status.
Findings: That the staff member of a former senator disclosed without authority a draft report to a ministerial staff member; that a ministerial staff member in turn disclosed without authority that draft report to a departmental liaison officer who provided it to the department; that the officers of the department circulated the report internally and to another department; that the departmental officers concerned should have been aware of the status of the document; that departmental training in parliamentary procedures was inadequate; that the handling of the draft report in both the minister's office and in the department constituted culpable negligence and that a contempt of the Senate was committed.
Recommendations: That arrangements be made for ministerial and shadow ministerial staff to attend a seminar on parliamentary procedure; that committees mark all pages of draft reports as confidential and transmit them with care; that no penalty be imposed.

85. *Possible Intimidation of a Witness before the Employment, Workplace Relations, Small Business and Education References Committee (PP No. 36/2000)*

Reference: President determined precedence 11/8/99; motion moved by Senator O'Brien at the request of Senator Collins and agreed to 12/8/99 (J.1481).
Action: Report tabled 7/3/2000 (J.2374); findings endorsed and recommendation adopted 15/3/2000 (J.2448).
Persons/organisations involved: Senate Employment, Workplace Relations, Small Business and Education References Committee; Mr Peter Felsch; Mr Tony Wiltshire; Brewarrina Shire Council.
Resumé: On 26 July 1999 the Senate Employment Committee held a public hearing at Brewarrina, NSW, as part of its inquiry into indigenous education. Four witnesses from the Brewarrina Shire Council, including General Manager Mr Peter Felsch, gave

evidence, although only one, Mr Tony Wiltshire, the Council's Youth and Community Development Officer, was listed on the program. Mr Wiltshire subsequently sought to give further evidence in camera but time constraints precluded this; he was informed that written submissions were still being received, however. Mr Wiltshire later wrote to the Employment Committee, asserting that Mr Felsch had prevented him from providing a submission to the Employment Committee on the day of the hearing and that his employment was under review as a result of his proposed submission to the inquiry. Mr Felsch confirmed that he had caused Mr Wiltshire's submission to be delayed while its status and contents were determined.

Finding: That Mr Peter Felsch improperly interfered with and penalised Mr Tony Wiltshire, then Youth and Community Development Officer of Brewarrina Shire Council, as a consequence of the latter's participation in the proceedings of the Employment Committee. The committee noted, however, that Mr Felsch had acted on legal advice, with the best interests of the Brewarrina Shire in mind.

Recommendation: That no penalty be imposed.

86. *Alleged Threats to a Witness before the Select Committee on A New Tax System (PP No. 39/2000)*

Reference: President determined precedence 6/12/99; motion moved by Senator Allison and agreed to 7/12/99 (J.2189).

Action: Report tabled 13/3/2000 (J.2424); finding endorsed 16/3/2000 (J.2485).

Persons/organisations involved: Senate Select Committee on A New Tax System; Mr Fred Wren; Mr Grant Fortescue; Mr Terry Peabody Jnr; Wren Oil; Nationwide Oil.

Resumé: Mr Fred Wren, Managing Director of Wren Oil, alleged that he had received phone threats from Mr Fortescue, then General Manager of Nationwide Oil, concerning Wren Oil's submission and evidence to the Senate Select Committee on A New Tax System in February 1999. By the time the Privileges Committee examined the matter, Mr Fortescue had retired. His successor, Mr Peabody, asserted that Mr Fortescue's objection was not to the fact that Mr Wren had given evidence but to the quality of Mr Wren's evidence and to the fact that he had used a parliamentary forum to raise matters relating to an ongoing commercial dispute which were unrelated to the committee's inquiry. The committee concluded that Mr Fortescue's comments were probably made in the heat of the moment and did not warrant further inquiry, which might lead to an escalation of commercial hostilities out of all proportion to any possible offence of contempt

Finding: On the basis of the evidence before the committee, no contempt of the Senate was committed.

87. *Person Referred to in the Senate (Mr R.T. Mincherton) (PP No. 40/2000)*

Reference: Referred by President 8/3/2000.

Action: Report tabled, adopted, 13/3/2000 (J.2424-5).

Persons/organisations involved: Mr R.T. Mincherton; Senator Sue Knowles; Western Australian Liberal Party.

Resumé: On 8 December 1999, during matters of public interest discussion in the Senate, Senator Knowles addressed certain media coverage of the internal workings of the Western Australian Liberal Party and made allegations about Mr Mincherton, which he asserted were untrue and which had damaged his reputation and caused hurt to his family.

Recommendation: That Mr Mincherton's response be incorporated in *Hansard.*

88. *Person Referred to in the Senate (Mr N. Crichton-Browne) (PP No. 71/2000)*

Reference: Referred by the President 30/3/2000.
Action: Report tabled, adopted 10/4/2000 (J.2585).
Persons/organisations involved: Mr Noel Crichton-Browne; Senator Sue Knowles; Western Australian Liberal Party.
Resumé: On 8 December 1999, during matters of public interest discussion in the Senate, Senator Knowles addressed certain media coverage of the internal workings of the Western Australian Liberal Party and made allegations about Mr Noel Crichton-Browne, which he asserted were untrue.
Recommendation: That Mr Crichton-Browne's response be incorporated in *Hansard.*

89. *Senior Public Officials' Study of Parliamentary Processes: Report on Compliance with Senate Order of 1 December 1998 (PP No. 79/2000)*

Reference: Advisory report.
Action: Report tabled, noted 13/4/2000 (J.2632).
Persons/organisations involved: Australian Public Service.
Resumé: On 21 September 1993, following a number of inquiries which showed a lack of understanding on the part of senior public servants of parliamentary procedures and processes, the Senate adopted a recommendation of the Committee of Privileges that all senior executives in the Australian Public Service and statutory authorities be required to undertake study on accountability to Parliament, including the protection afforded to witnesses before parliamentary committees. The response was patchy. Following yet another instance of public sector failure to afford appropriate protection to a parliamentary committee witness, as outlined in the Privileges Committee's 73rd report, the Senate repeated its 1993 resolution and added a requirement that each department report within a year to the Senate on how it and its related agencies had complied with the Senate resolution. All departments responded; from their responses it appeared that some 50 per cent of relevant officers had attended courses on the topic offered by the Public Service and Merit Protection Commission or the Department of the Senate.

90. *Person Referred to in the Senate (Dr Malcolm Colston) (PP No.113/2000)*

Reference: Deputy President referred 19/4/2000.
Action: Report tabled, adopted 5/6/2000 (J.2723).
Persons/organisations involved: Dr Malcolm Colston; Senator Robert Ray.
Resumé: During a second reading speech in the Senate on the Norfolk Island Amendment Bill 1999 [2000] Senator Ray made certain allegations about former Senator Colston's visit to Norfolk Island and to other external territories and to his seeking the position of administrator of Norfolk Island. Dr Colston denied the allegations.
Recommendation: That Dr Colston's response be incorporated in *Hansard.*

91. *Person Referred to in the Senate (Mr Noel Crichton-Browne) (PP No. 119/2000)*

Reference: Referred by the President 30/5/2000.
Action: Report tabled, adopted 19/6/2000 (J.2797).
Persons/organisations involved: Mr Noel Crichton-Browne; Senator Sue Knowles.

Resumé: On 10 April 2000, Senator Knowles spoke to the motion that the Senate adopt the 88th report of the Committee of Privileges, which recommended that an earlier response from Mr Crichton-Browne be incorporated in *Hansard.* Mr Crichton-Browne again alleged that Senator Knowles' statements were untrue, and vexatious.
Recommendation: That Mr Crichton-Browne's response be incorporated in *Hansard.*

92. *Matters arising from 67th Report of the Committee of Privileges (PP No 150/2000.)*

Action: Report tabled 29/6/2000 (J.2997); Chair's statement (29/6/2000; *Hansard* p. 16040); report noted 17/8/2000 (J.3114).
Persons/organisations involved: Mr Michael Rowley; Mr David Armstrong; former Senator Bill O'Chee; Justice Jones; Mr Harry Evans, Clerk of the Senate; Mr Bret Walker SC.
Resumé: On 12 April 2000 Jones J. of the Supreme Court of Queensland brought down a judgment in a defamation action between Michael Rowley (plaintiff) and David Armstrong (defendant), proceedings which were one of the subjects of the committee's 67th report. The committee was concerned about the issues raised in the judgment and sought advice from the Clerk of the Senate and from Mr Bret Walker SC on the status of communications between informants and members of Parliament. The Clerk found that the judgment failed to address the key question of the nature of the communication between Mr Armstrong and former Senator O'Chee and its relationship with proceedings of the Senate. Mr Walker concluded that there was no doubt that the communication by Mr Armstrong to [then] Senator O'Chee constituted 'proceedings in Parliament' for the purposes of sub-section 16(3) of the Parliamentary Privileges Act and suggested that the 'egregious deficiencies in the decision should be addressed by an appellate court'.

93. *Possible Unauthorised Disclosure of in camera Proceedings of the Economics References Committee (PP No. 179/2000)*

Reference: President determined precedence; motion moved by Senator Calvert on behalf of Senator Gibson and agreed to 11/5/2000 (J.2704-5).
Action: Report tabled 28/8/2000 (J.3126); finding endorsed 31/8/2000 (J.3181).
Persons/organisations involved: Economics References Committee; Senator Brian Gibson; Senator Shayne Murphy; Australian Taxation Office.
Resumé: The Chair of the Economics References Committee, Senator Shayne Murphy, confirmed to a journalist the name of an individual who had given in camera evidence to that committee's inquiry into the Australian Taxation Office. He claimed that he did so in order to protect the committee's reputation from a factually incorrect proposed story. The Deputy Chair, Senator Brian Gibson, raised the matter as a question of privilege as he feared that the disclosure of the identity of an in camera witness would undermine the confidence of future witnesses in the ability of Senate committees to maintain anonymity when requested. The Privileges Committee concluded that a finding of contempt against Senator Murphy was inappropriate: the name of the in camera witness had previously been published in *Business Review Weekly;* no harm was done to the committee's proceedings; and no in camera evidence had been disclosed without the authority of the committee.
Finding: That no contempt of the Senate should be found in respect of the matter.

94. *Matters Arising from 67th Report of the Committee of Privileges (2) — Possible Senate Representation in Court Proceedings (PP No. 198/2000)*

Action: Report tabled and recommendation adopted 4/9/2000 (J.3192).
Persons/organisations involved: Mr David Armstrong; Mr William O'Chee; the Senate.
Resumé: The committee sought advice on possible action that could be taken with regard to the judgment of Justice Jones of the Queensland Supreme Court in the defamation action brought by Mr Michael Rowley against Mr David Armstrong, and concerning a new action by the former against former Senator William (Bill) O'Chee who originally raised Mr Armstrong's concerns in the Senate. The Clerk of the Senate advised that, if either action came to trial, counsel instructed for the Senate could seek leave to appear as *amicus curiae* to assist the court on the parliamentary privilege question.
Recommendation: That the Senate authorise the President, if required, to engage counsel as *amicus curiae* if the action for defamation against Mr David Armstrong or a similar action against Mr William O'Chee is set down for trial.

95. *Penalties for Contempt: Information Paper (PP No. 199/2000)*

Action: Report tabled 4/9/2000 (J.3193); noted 5/10/2000 (J.3321).
Resumé: A commissioned survey of the powers, privileges and immunities of 16 national legislatures, and those of the 8 Australian state and territory parliaments, together with those legislatures' powers to punish contempts.

96. *Possible Misleading Evidence to and Improper Interference with Witnesses before the Employment, Workplace Relations, Small Business and Education Legislation Committee (PP No. 118/2001)*

Reference: President determined precedence 27/2/2001; motion moved by Senator Collins and agreed to 28/2/2001 (J.3980).
Action: Report tabled 25/6/2001 (J.4393); finding endorsed 9/8/2001 (J.4650).
Persons/organisations involved: Senate Employment, Workplace Relations, Small Business and Education Legislation Committee; Senator Jacinta Collins; Mr Jonathan Hamberger; Mr Peter McIlwain; Dr Peter Shergold; Department of Employment, Workplace Relations and Small Business.
Resumé: In the course of the budget estimates hearings of May 2000, Senator Collins of the Employment Committee requested copies of certain Australian Workplace Agreements (AWAs); the Employment Advocate, Mr Hamberger, undertook to provide them. Some days later, however, he wrote to the Employment Committee indicating a change of mind and stating his belief that it would be 'inappropriate' to do so. The Employment Committee persevered with its request at subsequent estimates hearings, during which Acting Employment Advocate Peter McIlwain suggested that Mr Hamberger's change of mind had been based partly on legal advice from the Department of Employment, Workplace Relations and Small Business, advice which both he and Dr Shergold insisted was protected by legal professional privilege. At a special hearing of the Employment Committee on 14 August 2000, Mr Hamberger asserted that his decision not to provide copies of the AWAs was not based on legal advice but because he believe it inappropriate to do so; he also confirmed he had discussed the matter with both the relevant minister and the department. Certain senators on the Employment Committee were left with the impression that they had been deliberately misled on the matter and that the statutory Employment Advocate and/or the Acting Employment Advocate had been improperly influenced to change

their decisions. However, the Committee of Privileges, with access to an array of extra documentation, was able to conclude that, on the basis of the evidence before it, no contempt had occurred.

Finding: That there was no evidence to support a conclusion that a contempt of the Senate had been committed.

97. *Person Referred to in the Senate (Mr Terence O'Shane) (PP No. 131/2001)*

Reference: Referred by President 28/6/2001.
Action: Report tabled, adopted 28/6/2001 (J.4458).
Persons/organisations involved: Senator Bill Heffernan; Mr Terry O'Shane; Dr Evelyn Scott.
Resumé: In the adjournment debate on 25 June 2001, Senator Heffernan addressed the topic of child sexual abuse in indigenous communities and alleged that Mr Terry O'Shane was the person responsible for abusing certain children. Mr O'Shane denied the allegations, claiming that they had damaged his reputation and standing in the community.
Recommendation: That Mr O'Shane's response be incorporated in *Hansard.*

98. *Person Referred to in the Senate (Alderman Dr John Freeman) (PP No. 166/2001)*

Reference: Referred by the President 7/8/2001.
Action: Report tabled, adopted 27/8/2001 (J.4765).
Persons/organisations involved: Senator Bob Brown; Dr John Freeman; Hobart City Council.
Resumé: In the committee stages of the consideration of the Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Bill 2001 on 20 June 2001, Senator Brown attributed certain remarks to Hobart City Council alderman Dr John Freeman relating to an area of land on Mt Nelson known as habitat of the endangered swift parrot but proposed for the development of an old people's home. Alderman Freeman asserted that the remarks attributed to him were both untrue and offensive.
Recommendation: That Dr Freeman's response be incorporated in *Hansard.*

99. *Possible Unauthorised Disclosure of a Submission to the Parliamentary Joint Committee on Corporations and Securities (PP No. 177/2001)*

Reference: President determined precedence 26/6/2000; motion moved by Chair of the Parliamentary Joint Committee on Corporations and Securities, Senator Chapman, and agreed to 27/6/2000 (J.2908).
Action: Report tabled 30/8/2001 (J.4834); findings endorsed and penalty imposed 18/9/01 (J.4866).
Persons/organisations involved: Australian Securities and Investments Commission; Yannon Pty Ltd; Parliamentary Joint Committee on Corporations and Securities; Nationwide News Pty Ltd.
Resumé: On 12-13 February 2000, *The Weekend Australian* published two articles by its national business correspondent on the ASIC investigation into the Yannon transaction, indicating that the source of the information was a 'secret' ASIC report to the Parliamentary Joint Committee on Corporations and Securities. A similarly-sourced article was published in *The Australian* on the following Monday. The Corporations and Securities Committee had not authorised the release of the document and

considered that the unauthorised disclosure adversely affected its work. After extensive preliminary investigation, the Privileges Committee held a public hearing into the matter on 25 May 2001. It was unable to discover the source of the disclosure or to establish with certainty whether the disclosure was deliberate. It concluded, however, that the publication in *The Weekend Australian* and *The Australian* of information based on the disclosure was deliberate and was made in the full knowledge that the document had not been authorised for publication. The Committee of Privileges advised that committees should take particular care in receiving and handling in camera documents and other evidence.

Findings: That the person or persons who disclosed in camera ASIC evidence to a journalist, and Nationwide News Pty Ltd, as the organisation responsible for the actions of the journalist, committed a contempt of the Senate.

Recommendation: In the event that the person or persons who disclosed in camera ASIC evidence to a journalist are found, a penalty of a $5,000 fine as authorised by the *Parliamentary Privileges Act 1987* be imposed, or a prosecution for an offence under section 13 of that Act be initiated by the Senate; and that the Senate reprimand Nationwide News. If Nationwide News offends again, the committee may recommend that its access to certain areas in Parliament House be restricted.

100. *Possible Unauthorised Disclosure of Draft Report of Legal and Constitutional Legislation Committee (PP No. 195/2001)*

Reference: President determined precedence 25/6/2001; motion moved by Senator Calvert at the request of the Chair of the Legal and Constitutional Legislation Committee, Senator Payne, and agreed to, 26/6/2001 (J.4405).

Action: Report tabled 19/9/2001 (J.4882); findings endorsed 26/9/2001 (J.4974).

Persons/organisations involved: Senate Legal and Constitutional Legislation Committee; Senator Marise Payne; Nationwide News Limited.

Resumé: On 19 February 2001 the draft report of the Chair of the Legal and Constitutional Legislation Committee (Senator Payne) on the Sex Discrimination Amendment Bill (No. 1) 2001 was emailed to committee members. The following day, the chair was contacted by a journalist to discuss the draft report; she refused, and informed him of its confidential status. Notwithstanding this, an article was published in *The Australian* on 22 February 2001 under the journalist's by-line and based in part on the draft report. The Legal and Constitutional Legislation Committee found that the unauthorised disclosure both affected its operations and had the potential to affect its work adversely.

Findings: That the unauthorised disclosure of the Legal and Constitutional Legislation Committee draft report was probably deliberate but the Privileges Committee was unable to find the source of the disclosure; that the person or persons who disclosed the information to the journalist committed a contempt of the Senate; and that Nationwide News Pty Ltd, publisher of *The Australian,* as the organisation responsible for the actions of the journalist, committed a contempt of the Senate.

Recommendation: That no penalty be applied, as the committee's recommendation in respect of the 99th report had not been published before the article appeared in *The Australian*, and the disclosure was not as serious.

101. *Persons Referred to in the Senate (Staff and Faculty of Greenwich University) (PP No. 215/2001).*

Reference: Referred by the President 17/9/2001.

Action: Report tabled and adopted 26/9/2001 (J.4976).
Persons/organisations involved: Senator Kim Carr; Mr Jack Marges; Greenwich University; Senate Employment, Workplace Relations, Small Business and Education Legislation Committee.
Resumé: On both 7 June 2001 during an estimates hearing of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, and 25 June 2001 in the Senate chamber, Senator Carr referred to Greenwich University, alleging that it lacked qualified faculty, failed to coordinate communications among academic staff and offered spurious programs. Mr Marges responded, on behalf of the staff and faculty of Greenwich University, denying the allegations.
Recommendation: That the response by Mr Marges be incorporated in *Hansard.*

102. *Counsel to the Senate (PP No. 307/2002)*

Reference: motion moved by Chair of Committee of Privileges, Senator Ray, and agreed to, 20/3/2002 (J.244).
Action: Report tabled 26/6/2002 (J.492); noted 22/8/2002 (J.646).
Persons/organisations involved: The Senate; the courts.
Resumé: In view of the number of cases with privilege implications coming before the courts, the committee considered whether the Senate should retain counsel on a permanent basis to represent it as required. After considering advice from the Clerk of the Senate, the committee concluded that the expense of such retention would be excessive and compounded by the problem of availability of counsel when required.
Conclusion: That the present ad hoc arrangements for the engagement of counsel be continued.

103. *Possible Improper Influence and Penalty on a Senator (PP No. 308/2002)*

Reference: President determined precedence 6/8/2001; motion moved by Leader of the Government in the Senate, Senator Hill, and agreed to 7/8/2001. (J.4597).
Action: Report tabled 26/6/2002 (J.492); findings endorsed 22/8/2002 (J.646).
Persons/organisations involved: Senator Tambling; Northern Territory Country Liberal Party (CLP); the Hon. Denis Burke MLA; Mrs Suzanne Cavanagh.
Resumé: After lengthy internal CLP discussion on the merits of the federal government's Interactive Gambling Bill 2001, the party gave written directions to its federal representative, Senator Grant Tambling, on how to vote on the legislation. Senator Tambling, a parliamentary secretary, convinced that he had achieved the best possible outcome for the Northern Territory via the government's amendments to the legislation, ignored his party's directive and voted with the government on the bill on 28 June 2001. On 3 July 2001, the CLP disendorsed Senator Tambling. After the party refused to consider his appeal against the disendorsement, Senator Tambling opened legal proceedings and raised the matter of privilege. Proceedings were stayed, the CLP met the senator's legal costs, and both parties agreed to a new preselection process, which Senator Tambling did not contest.
Findings: That the CLP purported to direct a senator as to how he should exercise a vote on the interactive gambling legislation and penalised him by revoking his preselection, in consequence of that vote. The Committee of Privileges concluded that, while the CLP's actions were reckless and ill-judged, on balance a contempt should not be found.

104. *Possible False or Misleading Evidence before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PP No. 309/2002)*

Reference: President determined precedence 19/9/2001; motion moved by Senator McGauran, at the request of the Chair of the Native Title Committee, Senator Ferris, and agreed to 19/9/2001 (J.4879).
Action: Report tabled 26/6/2002 (J.492); finding endorsed 22/8/2002 (J.645).
Persons/organisations involved: Ms Sharon Firebrace; Indigenous Land Corporation; Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund.
Resumé: In its 18th report, the Native Title Committee highlighted two cases of what it regarded as misleading evidence from the then chair of the Indigenous Land Corporation (ILC), Ms Sharon Firebrace. The first instance related to the action taken concerning the leaking to the media of an Australian National Audit Office issues paper on the ILC; the second, to whether the Australian Federal Police was investigating the ILC purchase of the Roebuck Plains cattle station. The issues were complicated by their interrelationship and by the fact that Ms Firebrace and the ILC Board were at loggerheads for much of this period. Much of Ms Firebrace's evidence on the first issue was based on second-hand reports, as she had not been present for the Board consideration of the ANAO paper.
Finding: That, while misleading evidence was given to the Native Title Committee, it is unlikely it was given with deliberate intent, and therefore no contempt was committed.

105. *Execution of Search Warrants in Senators' Offices — Senator Harris (PP No. 310/2002)*

Reference: President determined precedence 14/2/2002; motion moved by Senator Harris and agreed to 14/2/2002 (J.91).
Action: Report tabled 26/6/2002 (J.492); finding endorsed 22/8/2002 (J. 645).
Persons/organisations involved: Senator Len Harris; Queensland Police Service.
Resumé: On 27 November 2001 Queensland Police entered Senator Harris's Mareeba office, searched, under warrant, for certain material, and took away copies of computer-based information. Senator Harris asked the Clerk of the Senate for advice and the Clerk wrote to the Commissioner of the Queensland Police Service (QPS), pointing out that material outside the authorisation of the search warrant might have been seized and that some of the material so seized may be covered by parliamentary privilege. The Commissioner informed the committee that the material in question had been secured in the safe of the QPS solicitor and arrangements were made for the senator and his solicitor to inspect the computer disks and to identify those documents to which privilege applied. They did not do so.
Conclusion: No breaches of the immunities of the Senate were involved in this case; Senator Harris and his solicitors should take the opportunity offered by the QPS to identify material in respect of which privilege could be claimed; guidelines concerning the execution of search warrants in parliamentary offices should be established between the Presiding Officers and the Australian Federal Police, which would also be applicable to state and territory police forces; and the seizure of documents over which a claim of parliamentary privilege is not made is a matter for the courts.
Finding: No contempt of the Senate is involved.

106. *Possible Improper Interference with a Witness before the Senate Select Committee on a Certain Maritime Incident (PP No. 344/2002)*

Reference: President determined precedence 16/5/2002; motion moved by Senator the Hon. Peter Cook, Chair, Select Committee on a Certain Maritime Incident, and agreed to 16/5/2002 (J.359).
Action: Report tabled August 2002.
Persons/organisations involved: Senator Cook; Dr Brendon Hammer; Rear Admiral R.W. Gates CSM RAN; Mr Max Moore-Wilton AC; Commander Stefan King; Ms Barbara Belcher; Ms Harinder Sidhu; Mr Michael Potts.
Resumé: On 11 March 2002 a meeting was held between Dr Brendon Hammer, Commander Stefan King, and Ms Harinder Sidhu relating to evidence which might be given before the Maritime Incident Committee. On 29 April Rear Admiral Gates raised the question that the meeting might have been intended improperly to influence Commander King in the giving of evidence. Following the allegation's being made known to the Department of the Prime Minister and Cabinet, Dr Hammer wrote to Commander King stressing that he did not intend to influence him on the matter.
Conclusion: No improper interference was attempted or exerted.
Finding: No contempt of the Senate was committed.

107. *Parliamentary Privilege: Precedents, Procedures and Practice in the Australian Senate 1966-2002 (PP No. 345/2002)*

Action: Report tabled 27/8/2002 and noted 29/8/2002 (J.712).

108. *Person Referred to in the Senate (Mr John Hyde Page) (PP No. 388/2002)*

Reference: Referred by the President 16/9/2002.
Action: Report tabled and adopted 15/10/2002 (J.875).
Persons/organisations involved: Senator Steve Hutchins; Mr John Hyde Page.
Resumé: On 22 August 2002 during debate in the Senate, Senator Hutchins read an anonymous email he claimed to have received, including the transcript of a purported telephone conversation between two people. The inference of the email and transcript was that Mr John Hyde Page had offered a bribe to a member of the Young Liberal Movement to attend a meeting of the Movement. Mr John Hyde Page responded denying the allegation.
Recommendation: That the response by Mr John Hyde Page be incorporated in *Hansard.*

109. *Person Referred to in the Senate (Mr Tony Kevin) (PP No. 497/2002)*

Reference: Referred by the President 14/10/2002.
Action: Report tabled and adopted 22/10/2002 (J.949).
Persons/organisations involved: Senator Brett Mason; Senator George Brandis; Senator Alan Ferguson; Mr Tony Kevin, Mr Kevin Rudd.
Resumé: On 26 September 2002 during proceedings in the Senate, Senators Mason, Brandis and Ferguson made adverse comments about Mr Tony Kevin in respect of his former career as an Australian ambassador, his temporary employment with Mr Kevin Rudd, MP and evidence he gave to the Select Committee on a Certain Maritime Incident. Mr Kevin responded, refuting the allegations.
Recommendation: That the response by Mr Tony Kevin be incorporated in *Hansard.*

110. *Persons Referred to in the Senate (Dr Geoffrey Vaughan, Dr Peter Jonson, Professor Brian Anderson) (PP No. 601/2002)*

Reference: Referred by the President 15/11/2002, 20/11/2002 and 2/12/2002.
Action: Report tabled and adopted 10/12/2002 (J.1285).
Persons/organisations involved: Senator Ron Boswell; Dr Geoffrey Vaughan; Dr Peter Jonson; Professor Brian Anderson.
Resumé: On 12 November 2002, Senator Boswell made adverse comments relating to Dr Geoffrey Vaughan, Dr Peter Jonson and Professor Brian Anderson during debate on the Research Involving Embryos Bill 2002. On 15 November 2002 the President of the Senate received letters from Dr Geoffrey Vaughan and Dr Peter Jonson asking that their responses be circulated to all senators. A further letter from Dr Geoffrey Vaughan was received on 20 November 2002, and on 2 December 2002 the President received a letter from Professor Brian Anderson. All four letters refuted the allegations of conflict of interest and were treated as submissions under Privilege Resolution 5.
Recommendation: That the responses by Dr Geoffrey Vaughan, Dr Peter Jonson and Professor Brian Anderson be incorporated in *Hansard.*

111. *Persons Referred to in the Senate (Mr Bob Moses, on behalf of Board and Management of National Stem Cell Centre) (PP No. 2/2003)*

Reference: Referred by the President 12/12/2002.
Action: Report tabled and adopted 5/2/2003 (J.1458).
Persons/organisations involved: Senator Ron Boswell; Mr Bob Moses; Board and Management of the National Stem Cell Centre.
Resumé: On 12 November 2002 during debate on the Research Involving Embryos Bill 2002, Senator Boswell made a series of allegations concerning the National Stem Cell Centre and research funding in Australia. Mr Bob Moses, on behalf of the Board and Management of the National Stem Cell Centre, responded, refuting the allegations.
Recommendation: That the response by Mr Bob Moses, on behalf of Board and Management of National Stem Cell Centre be incorporated in *Hansard.*

112. *Possible Unauthorised Disclosure of Draft Report of Environment, Communications, Information Technology and the Arts Legislation Committee*

Reference: President determined precedence 27/6/2002; motion moved by Chair of the Environment, communications, Information Technology and the Arts Legislation Committee, Senator Eggleston, and agreed to 27/6/2002 (J.524).
Action: Report tabled and findings endorsed 6/2/2003 (J.1475).
Persons/organisations involved: Senator Alan Eggleston; Environment, Communications, Information Technology and the Arts Legislation Committee; The Age Company Limited, Ms Annabel Crabb; Mr Michael Gawenda
Resumé: On 17 June 2002, *The Age* published an article by Ms Annabel Crabb, which contained references, including summaries of two of four recommendations, to the contents of the Environment, Communications, Information Technology and the Arts Legislation Committee's report on the Broadcasting Services Amendment (Media Ownership) Bill 2002, which was to be tabled the next day. Senator Eggleston wrote to the President of the Senate advising that the disclosure of the report had not been authorised. After extensive preliminary investigation, the Privileges Committee held a public hearing into the matter on 24 October 2002.

Findings: There was an unauthorised disclosure, by an unknown person, of two recommendations contained in the Report of the Employment, Communications, Information Technology and the Arts Legislation Committee on the bill, and of the fact that there was to be a joint dissenting report by the Australian Labor Party and the Australian Democrats. The disclosure was deliberate and the person who disclosed the committee proceedings was *prima facie* in contempt of the Senate. The Age Company Limited published the article by Ms Crabb knowingly based on the deliberate unauthorised disclosure. However, under the circumstances, no contempt was found against The Age Company Limited, Mr Michael Gawenda, Associate Publisher and Editor of *The Age*, and Ms Annabel Crabb.

113. *Australian Press Council and Committee of Privileges Exchange of Correspondence (PP No. 135/2003)*

Reference: Advisory report.
Action: Report tabled and noted 25/6/2003 (J.1983).
Persons/Organisations involved: Committee of Privileges; Professor Ken McKinnon, Chairman, Australian Press Council.
Resumé: On 3 March 2003, the Committee of Privileges sent a copy of its 112th report to, among others, the editors and publishers of the major media outlets in Australia, and every journalist in the Press Gallery. On 14 March 2003, the Australian Press Council initiated correspondence with the committee which appeared to be based on media descriptions of the committee's 112th report. An exchange of correspondence then ensued. That correspondence formed the basis of the committee's report.

114. *Execution of Search Warrants in Senators' Offices — Senator Harris: Matters arising from the 105th report of the Committee of Privileges (PP No 75/2003)*

Reference: Statement by Chair of the Committee of Privileges, Senator Ray, 5/2/2003, *Hansard*, pp. 8573-4; (J.1457)
Action: Report tabled and noted 20/8/2003 (J.2245).
Persons/Organisations involved: Senator Len Harris; Mr Robert Atkinson APM; Queensland Police Service; Mr Stephen Skehill SC
Resumé: Queensland Police executed a search warrant in the Mareeba office of Senator Harris on 27 November 2001 seized several documents and copied the contents of the hard discs of computers in the office. The committee considered the question of whether any breaches of the immunities of the Senate or contempts were involved in the search and seizure in its 105th report (see above). In view of Senator Harris' solicitors maintaining a general claim of privilege over all the seized documents, the committee, with the approval of the President, appointed Mr Stephen Skehill SC to make an evaluation of the seized material. Both Senator Harris and the Queensland Police Service agreed in advance to accept Mr Skehill's determination. After examining more than 74,000 pages of documents, Mr Skehill reported to the committee that, in his view, none of the documents were within the scope of the search warrant. Having reached this conclusion, he had no need to consider which of the documents would have been immune from seizure on the basis of parliamentary privilege.
Recommendation: That the Presiding Officers and the Attorney-General finalise draft protocols for the execution of search warrants in senators' and members' offices and that the committee be given the opportunity to comment on the draft.

115. *Persons Referred to in the Senate (Board Members of Electronic Frontiers Australia Inc.) (PP No. 292/2003)*
Reference: Referred by the President 17/9/2003.
Action: Report tabled and adopted 18/9/2003 (J.2447).
Persons/organisations involved: Senator the Hon. Richard Alston; Senator Brian Harradine; Ms Irene Graham; Electronic Frontiers Australia Inc.
Resumé: On 9 September 2003 during debate in the Senate on the Communications Legislation Amendment Bill (No. 1) 2002, Senators Alston and Harradine made adverse comments about the Board of Electronic Frontiers Australia Inc. On 17 September 2003, Ms Irene Graham, Executive Director, responded on behalf of the Board Members of Electronic Frontiers Australia Inc., refuting the allegations.

Recommendation: That the response by the Board Members of Electronic Frontiers Australia Inc. be incorporated in *Hansard.*

116. *Possible Improper Interference with a Witness before the Rural and Regional Affairs and Transport Legislation Committee (PP No. 53/2004)*
Reference: President gave precedence to the motion 1/12/2004. Motion moved by Senator McGauran, at the request of the Chair of the Rural and Regional affairs and Transport Legislation Committee, Senator Heffernan, and agreed to 2/12/2003, (J.2810).
Action: Report tabled 2/3/2004 (J.3052); finding endorsed 4/3/2004 (J.3092).
Persons/organisations involved: Mr Colin Dorber; Mr Alix Turner; Rural and Regional Affairs and Transport Legislation Committee; Australian Wool Innovation Pty Limited; Mr Simon Campbell, WoolProducers.
Resumé: In December 2003 the Senate Rural and Regional Affairs and Transport Committee was conducting an inquiry in the Statutory Funding Agreement between the Commonwealth of Australia, Australian Wool Innovation Pty Limited (AWI) and Australian Wool Services Limited. A submission was received from Mr Alix Turner, a wool grower, in a private capacity, which made adverse comments about Mr Colin Dorber, former Managing Director of AWI. In a supplementary submission, Mr Turner stated that he had received a phone call from Mr Dorber responding to the adverse comments and allegedly threatening to take action to terminate the collection of the levy that funds AWI. A further submission from Mr Simon Campbell, President of WoolProducers, alleged Mr Turner had been subjected to verbal intimidation and threats designed to influence his evidence to the committee, contrary to statements made in Mr Turner's supplementary submission. The committee examined the various accounts which were not incompatible and concluded that although a robust exchange had occurred there was no evidence that Mr Dorber intended to influence Mr Turner's evidence. The committee observed that the use of procedures to deal with adverse committee evidence in paragraphs (11) to (13) of Privilege Resolution 1 might have prevented the exchange taking place outside the parliamentary forum where there was a grave risk of contempts being committed.
Finding: A contempt of the Senate should not be found.

117. *Person Referred to in the Senate (Dr I.C.F. Spry, Q.C.) (PP No. 77/2004)*
Reference: Referred by the President 23/3/2004.
Action: Report tabled and adopted 30/3/2004 (J.3277).
Persons/organisations involved: Senator Julian McGauran; Dr I.C.F. Spry, Q.C.; the *National Observer*.
Resumé: On 3 March 2004 during proceedings in the Senate, Senator McGauran was critical of editorial comments made in the *National Observer* under the heading "Israel and Anti-Semitism". Dr I.C.F. Spry, Q.C., editor of the *National Observer*, provided a response under Privilege Resolution 5.
Recommendation: That the response by Dr I.C.F. Spry, Q.C., be incorporated in *Hansard.*

118. *Joint Meetings of the Senate and the House of Representatives on 23 and 24 October 2003 (PP No. 80/2004)*
Reference: Motion moved by Senator Bob Brown, and agreed to 29/10/2003.
Action: Report tabled 1/4/2004 (J.3321). Report noted 5/8/2004 (J.3836).

Persons/organisations involved: President of the United States of America, George W. Bush; President of the People's Republic of China, Hu Jintao; Senator Bob Brown; Senator Kerry Nettle.

Resumé: On 23 October 2003 and 24 October 2003 two joint meetings of the Senate and the House of Representatives were held in the House of Representatives chamber for the purpose of receiving addresses from President George W. Bush of the United States of America and President Hu Jintao of the People's Republic of China. During the address by President George W. Bush, both Senator Brown and Senator Nettle, representatives of the Australian Greens, interjected and were ordered to leave the chamber by the Speaker. They refused to do so. After the address, the Speaker stated that they had committed an offence and called the Leader of the House to move that they be suspended 'from the service of the House'. The Speaker declared the motion carried. Senators Brown and Nettle were subsequently excluded from the House of Representatives for twenty-four hours and therefore from the address by President Hu Jintao the following day. The committee did not treat the inquiry as a contempt inquiry, as it had not been raised in accordance with standing order 81 and did not identify specific contempts to be investigated. Its ability to make findings of fact on allegations of improper conduct or improper interference was limited by jurisdictional issues. The events took place in the House of Representatives under the chairmanship of the Speaker, or in the precincts of that chamber, involved House of Representatives staff or officials of foreign governments. The constitutional status of the joint meetings and what immunities or privilege applied was also unclear and, in the committee's view, unresolvable.

Recommendation: That the Senate agree to a resolution, along the lines proposed by the Procedure Committee in its Third Report of 2003, that future addresses by foreign heads of state should be received by a meeting of the House of Representatives in the House chamber, to which all senators are invited as guests.

119. *Possible False or Misleading Evidence before the Environment, Communications, Information Technology and the Arts Legislation Committee (PP No. 177/2004)*

Reference: President gave precedence to the motion 23/3/2004. Motion moved by Senator Mackay, and agreed to 24/3/2004, (J.3215).

Action: Report tabled 3/8/2004 (J.3791); finding endorsed and recommendation adopted 5/8/2004 (J.3836).

Persons/organisations involved: Senator Sue Mackay; Mr Bill Scales AO; Mr Anthony Rix; Telstra

Resumé: On 16 February 2004 at the Environment, Communications, Information Technology and the Arts Legislation Committee's additional estimates hearing, evidence was given by officers of Telstra that the high rate of faults in the Telstra network was due largely to recent heavy rain and not to network deterioration. On 10 March 2004 a document claimed to be an internal Telstra briefing was tabled in the House of Representatives. That evening, during the adjournment debate in the Senate, Senator Mackay highlighted apparent contradictions between the evidence given at the estimates hearing and statements made in the internal Telstra document. The committee sought explanations from the Telstra witnesses. Detailed and technical explanations were required to explain the inconsistencies, leaving the committee to conclude that the potential for committees to be left with misleading impressions about Telstra's operations was high, even though there was no evidence in the case that the officials intended to mislead the committee.

Finding: No contempt should be found.

Recommendation: That there be laid on the table by no later than 1 March 2005 a statement of measures taken by Telstra to ensure that senior officers are appropriately trained in their obligations to Parliament, including the number and level of officers who have undergone such training and the dates of any such training.

120. *Possible unauthorised disclosure of private deliberations or draft report of Select Committee on the Free Trade Agreement between Australia and the United States of America (PP No. 52/2005)*

Reference: President gave precedence to the motion 4/8/2004. Motion moved by Senator Ridgeway and agreed to 5/8/2004 (J.3829).

Action: Report tabled 8/3/2005 (J.432); finding endorsed 10/3/2005 (J.477).

Persons/organisations involved: Senator the Hon. Peter Cook; Senator Kerry O'Brien; Senator Stephen Conroy; Senator Aden Ridgeway; Select Committee on the Free Trade Agreement between Australia and the United States of America.

Resumé: On 30 July 2004, the Select Committee on the Free Trade Agreement between Australia and the United States of America held a meeting by telephone. The following day various press articles appeared, purporting to give reports of the discussion at the meeting and the content of the draft report. Also, at a press conference on 2 August 2004, the Labor Party members of the FTA Committee, who participated via teleconference, disclosed their recommendations in relation to the provisions of the legislation which was before the committee and released a document setting out those recommendations. The select committee was unable to investigate these matters as it ceased to exist when the draft report occurred in the press reports and at a press conference. Inaccurate accounts of private deliberations given to the media may have been designed to pressure certain members to reveal their intentions in relation to the report. However, the select committee had already become dysfunctional and neither the unauthorised disclosure or misrepresentations resulted in further interference.

Finding: No contempt should be found.

121. *Possible unauthorised disclosure of draft reports of Community Affairs References Committee (PP No. 58/2005)*

Reference (1)**:** President gave precedence to the motion 11/5/2004. Motion moved by Senator Ferris, at the request of Senators Knowles and Humphries, and agreed to 12/5/2004 (J.3403).

Reference (2): President gave precedence to the motion 24/6/2004. Motion moved by Chair, Community Affairs References Committee, Senator McLucas, and agreed to 24/6/2004 (J.3699-3700).

Action: Report tabled 15/3/2005 (J.507); finding endorsed 17/3/2005 (J.568).

Persons/organisations involved: Reference (1) – Community Affairs References Committee; Senator Sue Knowles; Senator Gary Humphries.

Reference (2) – Community Affairs References Committee; Senator Jan McLucas.

Resumé: Reference (1) – Before the consideration of a draft report on an inquiry into poverty and financial hardship, articles based on the draft report appeared in several newspapers. The Community Affairs References Committee considered the matter but did not consider the disclosure had significantly interfered with the work of the committee. Two members of the committee in effect dissented from this conclusion and raised a matter of privilege. As they were both also members of the Privileges Committee, they did not participate in this committee's inquiry into either matter. The

committee was unable to identify the leaker and views within the committee were divided on whether there had been significant interference with its work.

Reference (2) – Before the consideration of a draft report on an inquiry into Hepatitis C and the blood supply, articles based on the draft report appeared in several newspapers. Senator McLucas, on behalf of the committee, raised it as a matter of privilege. The Privileges Committee was unable to identify the leaker and views within the committee varied on whether the interference with its work caused by the unauthorised disclosure was substantial.

Finding: References (1) and (2): There was an unauthorised disclosure by an undiscovered (and in all likelihood, undiscoverable) source; it was likely to have been deliberate and had a tendency substantially to interfere with the work of the committee because it occurred before the committee had a chance to consider the report, could have influenced the committee's deliberations or conclusions, and had a deleterious effect on the level of trust among members of the committee. However, in view of the Privileges Committee's intention to inquire broadly into the contempt of unauthorised disclosure, no contempt should be found.

122. *Parliamentary privilege – unauthorised disclosure of committee proceedings (PP No. 137/2005)*

Reference: Advisory report. Motion moved by Chair of the Privileges Committee (Senator Faulkner) and agreed to 16/3/2005 (J.544).

Action: Report tabled 21/6/2005 (J.781).

Persons/organisations involved:

Resumé: In view of the large number of cases of unauthorised disclosure of committee proceedings, particularly draft reports, the committee sought a general reference on the contempt of unauthorised disclosure. It sought submissions and held one public hearing. The committee affirmed that the purpose of the prohibition against unauthorised disclosure (and therefore the need for sanctions) is to protect persons giving information to committees, as well as those about whom information may be given or who may be adversely affected by a committee's findings or conclusions. It signalled an intention that unauthorised disclosures of in camera evidence should be treated in future as, in effect, a 'strict liability' offence and identified a number of measures to be implemented by committees to either reduce the risk of unauthorised disclosure or to ensure that committees take greater responsibility for their own internal discipline. It developed draft guidelines to be followed by committees in cases of unauthorised disclosure.

Recommendation: The Committee of Privileges commended the proposals contained in this report to the Senate. Because of the complexity and tightly-interwoven nature of the existing laws, rules, resolutions and guidelines and in accordance with normal Senate practice, the committee recommended that the report, its appendices and associated documents be referred to the Procedure Committee to determine any necessary changes to the existing provisions relating to unauthorised disclosures, to give effect to these proposals. Recommendation adopted 11/8/2005 (J.934).

123. *Possible failure by a senator to comply with the Senate's resolution relating to registration of interests (PP No. 224/2005)*

Reference: President determined precedence 15/6/2005. Motion moved by Senator George Campbell, at the request of the Leader of the Opposition in the Senate (Senator Evans), and agreed to 16/6/2005 (J.706).

Action: Report tabled 5/10/2005 (J.1174)
Persons/organisations involved: Senator Chris Evans; Senator Ross Lightfoot.
Resumé: On 26 May 2005, the Leader of the Opposition in the Senate (Senator Evans) raised a matter of privilege with the President of the Senate under standing order 81, relating to Senator Lightfoot's share trading activities and whether he had properly disclosed details of his registrable interests in accordance with the resolutions of the Senate relating to the registration of interests. The committee focussed on the issue of intention and concluded that while Senator Lightfoot had failed to comply with the resolutions, there was no evidence that he had done so knowingly.
Finding: No contempt should be found.

124. *Person Referred to in the Senate (Professor David Peetz) (PP No. 405/2005)*
Reference: Referred by the President 29/11/2005.
Action: Report tabled and adopted 6/12/2005 (J.1652).
Persons/organisations involved: Senator the Hon. Eric Abetz; Professor David Peetz.
Resumé: On 8 November 2005 during question time in the Senate, Senator Abetz, in his capacity as Minister representing the Minister for Employment and Workplace Relations, made a number of claims regarding Professor Peetz. Professor Peetz provided a response under Privilege Resolution 5.
Recommendation: That the response by Professor David Peetz, be incorporated in *Hansard.*

APPENDIX H

ADVICES FROM THE CLERK OF THE SENATE SEPTEMBER 2002 – NOVEMBER 2004

ADVICE NO. 33

PARLIAMENTARY PRIVILEGE — DOCUMENTS PROTECTED FROM COMPULSORY PRODUCTION — FURTHER US JUDGMENT

There has recently been a further judgment in the American courts about documents protected by parliamentary privilege from compulsory process for production.

In this case, a group of litigants sought to compel several members of Congress to produce documents from their offices relevant to an action about campaign financing legislation.

The court refused to order the production of documents in the terms sought, on the basis that it would be inconsistent with the parliamentary privilege to require the members to identify and separate from protected documents the non-protected documents which would be compelled, because this would impose a burden of the kind which the privilege is construed to avoid.

The judgment follows others, including that in the tobacco corporation case (*Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408). The latter, in addition to confirming that members may not be compelled to produce documents within the sphere of their legislative activities, indicated that it would be inconsistent with the privilege to authorise wide-ranging searches of members' files containing protected material.

The additional element in the recent judgment is that, even when it is known or conceded that an order will turn up non-protected documents, members may not be required to search their files simply on that basis.

If that principle were followed in Australia, and applied in criminal investigations, the Senate, following the judgment in *Crane v Gething,* could reasonably have declined to authorise the examination of Senator Crane's documents and returned them to him, and Senator Harris could have required the return of all his documents without separating the protected and non-protected documents.

This gives added point to the contention that it is not proper for searches under warrant of senators' offices simply to sweep up all documents in the offices without regard to their relevance to the investigation or their privileged status, and impose on the senators the task of identifying and separating the protected documents.

Attached is a copy of the judgment, which is very brief.

ADVICE NO. 34

PARLIAMENTARY PRIVILEGE — EXECUTION OF SEARCH WARRANTS DRAFT GUIDELINES

Thank you for your letter of 4 December 2003, in which the Committee of Privileges seeks my comments on the draft guidelines for the execution of search warrants provided to the President by the Attorney-General and the Minister for Justice and Customs.

The draft guidelines appear to have been significantly amended since I last saw them, and they also take into account comments made on earlier drafts.

In analysing the draft guidelines, it should be recognised that they are to be interpreted and applied by police officers in the process of executing search warrants and conducting searches. The draft guidelines therefore cannot be lengthy or complex. They are not an exercise in legal drafting or law codification.

The draft guidelines are basically sound. They cover all of the essential points, and appropriately preserve the rights of senators who may be subjected to warranted searches.

The following changes, however, would improve the drafting of the guidelines.

Paragraph 4.1, third dot point: It is not clear why "confidential material" is referred to here. Parliamentary privilege and confidentiality are two different issues, and the guidelines are intended to cover parliamentary privilege. The expression "confidential material" should be replaced by "material covered by parliamentary privilege", in accordance with the expression used elsewhere in the guidelines.

Paragraph 5.6, subparagraph (a): "in Parliament" should be "in Parliament House".

Paragraph 5.11, third dot point: Perhaps the Presiding Officer and Clerk of the relevant House should be added to the list of examples of neutral third parties who might be asked to hold material until a process for determining its status is begun or a claim of parliamentary privilege is abandoned. It may be thought that the Presiding Officer and Clerk are not sufficiently neutral, in that they may be expected to favour unduly the affected member, but the member and the police could well agree on their acting as the neutral third party.

Paragraph 5.11, fourth dot point: The phrase "the Presiding Officer of the relevant House" should be "the relevant House". The Presiding Officer of the relevant House cannot make a ruling on the status of material; the ruling has to be made either by a court (if the judgment of French J is not followed) or by the relevant House (if that judgment is followed).

Paragraph 5.11, after fourth dot point: For complete clarity, there should be a new fifth dot point here, along the following lines:

- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the neutral third party until the disposition of the items is determined in accordance with the ruling.

It may be thought that this goes without saying, but it should be included for completeness.

With these changes I think that the draft guidelines will be appropriate.

I would be pleased to provide the committee with any further assistance in relation to this matter which the committee may require.

ADVICE NO. 35

This note is to acquaint the committee with two matters of interest, and to suggest a possible course of action in relation to one.

United Kingdom Corruption Bill

The committee would be aware that there has been considerable publicity and concern in the United Kingdom in recent years about corruption of members of Parliament. Due to defects in the statutory law, it was discovered that members of Parliament could be prosecuted only for a common law offence of corruption. There arose a quite mistaken perception that parliamentary privilege was a barrier to the successful prosecution of members for corruption, and a view that the law of parliamentary privilege should be modified accordingly. A joint committee on parliamentary privilege gave credence to this view, notwithstanding attempts to dissuade them of it. The Home Office prepared a draft Corruption Bill, which included a provision that parliamentary privilege would be waived to allow proceedings in Parliament to be used against any person in a prosecution for a corruption offence. This bill was referred to another joint committee.

I made a submission to the joint committee, pointing out that the perception that parliamentary privilege was a problem was mistaken, and that it would be extremely unwise to undermine the fundamental constitutional principle of parliamentary immunity, not least because this would indirectly undermine that principle in other jurisdictions which gained their parliamentary privilege law by reference to the United Kingdom. This submission was supported by others, including the recently retired Clerk of the House of Commons.

In its report, the joint committee recommended that the provision be narrowed so as to permit the use of parliamentary proceedings to prosecute only the accused member and any co-accused. This is still a highly unsatisfactory and unnecessary erosion of parliamentary immunity.

Attachment 1 is an extract from *Odgers' Australian Senate Practice,* 10th ed, 2001, which sets out the principle involved and refers to two supporting cases, one American and one British. Attachment 2 shows the provision in the draft bill, attachment 3 is my submission to the joint committee, and attachment 4 shows the joint committee's report on the relevant provision and the recommended substitute provision.

I have expressed to my British counterpart the hope that members of the House of Commons will have sufficient independence and regard for a basic constitutional principle to reject the proposed provision.

The Privileges Committee may wish to consider the possibility of writing to its British counterpart to express concern about the proposed provision.

Answers to questions on notice: privilege of publication

Attachment 5 is a brief paper on a gap in the protection by parliamentary privilege of the process of asking and answering questions on notice. All stages of the asking and answering of such questions are protected, but the gap is that the general publication of answers is not protected until they appear in the next sitting's Hansard, which may be after many weeks where questions are answered in a long adjournment.

The paper suggests a simple amendment of the standing orders to close this gap.

The paper has been circulated to the Procedure Committee by the President, with a suggestion that the matter can wait until that committee has sufficient business to hold a meeting, but if members of that committee consider that the matter should be dealt with more expeditiously, this will be arranged.

Likewise, if the Privileges Committee considers that the matter should be dealt with more expeditiously, I will suggest to the President that this be done.

ADVICE NO. 36

PARLIAMENTARY PRIVILEGE—EXECUTION OF SEARCH WARRANTS DRAFT GUIDELINES

Today I attended a meeting with officers of the Attorney-General's Department and the Australian Federal Police (AFP) at which we discussed a proposed memorandum of understanding between yourself, the Speaker, the Attorney-General and the Minister for Justice and Customs to agree to the proposed AFP guidelines for execution of search warrants where parliamentary privilege may be involved.

An amended version of the guidelines was presented at the meeting. All of the amendments which were endorsed by the Senate Privileges Committee have been incorporated, with the exception of the suggestion that the Presiding Officer and Clerk of the relevant House could be added to the list of examples of neutral third parties who might be asked to hold material until a process for determining its status is conducted. The guidelines do not preclude anyone acting as a neutral third party, but the AFP is reluctant to expand the list of possible examples beyond the indication in the guidelines that the warrant issuing authority or another agreed third party may perform this role. I indicated that, as this was merely a suggestion and did not substantively affect the operation of the guidelines, you and the Privileges Committee would probably not insist on the amendment. The other amendments, which have all been made, are of greater significance.

Attached is a copy of the draft memorandum of understanding. It will be noted that it provides for the guidelines to be changed by the AFP, but only after consultation with yourself and the Speaker. As the guidelines are issued by the AFP to bind their officers and may need to be changed in accordance with operational exigencies or emerging legal requirements, I think that this provision is appropriate. There is a remote possibility that the guidelines might be changed, even after that consultation, in a way which is not approved by yourself or the Speaker. Because of that possibility, I suggested that the memorandum include a revocation clause whereby the Presiding Officers could revoke their agreement to the guidelines. This suggestion was accepted. The only other amendment of the draft memorandum is that the "promulgation" referred to in section 3 will be carried out by tabling in each House.

I think that, with these amendments, the proposed memorandum is appropriate for signature. It will be provided for that purpose in the next few weeks.

I am sending a copy of this note to the Privileges Committee in case the committee wishes to make any further comment on the guidelines or the proposed memorandum.

ADVICE NO. 37

REFERENCE TO PARLIAMENTARY PROCEEDINGS IN DEFAMATION SUITS — COURT DECISIONS

The committee may be interested to hear of two recent court decisions relating to the question of whether parliamentary proceedings may be referred to, and, if so, to what effect, in the course of defamation proceedings relating to statements made outside parliamentary proceedings.

It is clear that the repetition outside of parliamentary proceedings of statements made in the course of those proceedings is not protected by parliamentary privilege. The question which arises is whether reference may be made to statements in parliamentary proceedings (protected statements) to establish the meaning or effect of statements made outside parliamentary proceedings (unprotected statements) to support a defamation action.

Such a course clearly involves using parliamentary proceedings to further a legal action against a person, and is therefore prohibited by the law of parliamentary privilege. The wording of section 16 of the *Parliamentary Privileges Act 1987* clearly prevents such a course, as it prohibits reference to parliamentary proceedings by way of, or for the purpose of,

> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

These provisions simply codify the pre-existing law of parliamentary privilege, and various judicial decisions have recognised that that is all the Act does.

While this may be crystal clear to us, certain judges do not find it so. The problem appears to arise from a deeply-ingrained view in the legal system that the law of defamation is a fundamental law, and that the right to sue for defamation is the most fundamental human right, and every other law must give way to it. There have been three cases in which courts have held that use may be made of protected statements to support an action in respect of unprotected statements. *Laurance v Katter* (1996) involved federal parliamentary proceedings but state defamation law, and was adjudicated by Queensland Supreme Court judges, two of whom appeared to hold that the Parliamentary Privileges Act had to be either read down or held invalid to allow the defamation law precedence; the case was settled before a final determination. *Beitzel v Crabb* (1992) was a Victorian case in which parliamentary statements were used to prove the defamatory meaning of unprotected statements; and *Buchanan v Jennings* (2002) was a New Zealand case to the same effect. The approach of the judges in these cases was expressly repudiated by others in other defamation cases in which the law was correctly applied, for example by the full South Australian Supreme Court in *Rann v Olsen* (2000).

The latest news is that the New Zealand case was taken to the Privy Council on appeal, and the appeal was dismissed earlier this month. The Judicial Committee of the Privy Council did not see that reference to a protected statement to further a defamation action involves using

parliamentary proceedings against a person in a manner prohibited by parliamentary privilege. Its judgment boiled down to nothing more than a reiteration of the principle that an unprotected statement is unprotected. Having gone to the highest court of appeal of the country, the New Zealand Parliament has nowhere else to go except to change the statutory law.

The other recent case occurred in Queensland, and is more complex because of the peculiar circumstances. The case involved a member of the nursing staff of a hospital, Ms Erglis, suing some of her colleagues (the nurses) and the state for statements made in a letter and apparently circulated by the nurses. Those statements responded to statements made by Ms Erglis to Opposition members who raised the content of her statements in the Legislative Assembly. The responsible minister read out in the Assembly and tabled a copy of the nurses' letter. The relationship between this copy and other circulated copies is not clear. The state applied to strike out part of the ground for Ms Erglis' action, which is that the tabling of the letter compounded the defamation by the nurses. The basis of the application was that parliamentary privilege attached to the tabling of the nurses' letter and its publication by the Legislative Assembly. There was also an argument that the letter was prepared for the minister to table, although there appears to be no evidence of this. A further difficulty is that some copies of the letter as circulated appear to be different from the tabled copy.

The application to strike out that part of the ground of action was successful, but Ms Erglis appealed to the Supreme Court sitting as the Court of Appeal, and her appeal was upheld earlier this month by a majority of two to one. In upholding the appeal the majority simply restored the ground of Ms Erglis' action, and did not of course adjudicate on its merits. The majority judgment, however, endorses the erroneous notion that reference may be made to parliamentary proceedings, the tabling of the letter, to further the action against the unprotected statements, in the letter as circulated. It goes further than the New Zealand judgment in allowing the parliamentary proceedings to be regarded as adding to the damage of the original publication.

The minority judge correctly held that referring to the minister's act of tabling the letter in Parliament for the purpose of furthering the defamation action necessarily involves questioning and impeaching the parliamentary proceedings, and that one consequence of the majority's finding would be:

> the potential detrimental effect on the willingness of citizens to provide possibly important and possibly defamatory information to members of Parliament … A Member of Parliament who is exposing a source of information to the risk of increased damages by merely publishing verbatim the information given, thus enabling civil proceedings to occur of the kind brought here … may be able to avoid that consequence to her or his informants by adding comment and observation from other asserted or actual sources and thus providing a bowdlerized or fragmented version of the information given … it will [then] be difficult for any person to tender the relevant Hansard extract without it being held that the plaintiff is requiring the court to examine what the Member said and the extent to which it was a republication.

In other words, freedom of communication to Parliament and freedom of speech in Parliament are both infringed. Furthermore, the reasoning of the majority judgment collapses as soon as it is extended to the slightest variation of the facts. It also involves the absurdity of recognising the immunity of parliamentary proceedings when they are a primary publication, but allowing them to be questioned when they are merely a republication. The judgment represents a failure to apply properly the general principle of parliamentary privilege to the facts of the case.

It is not known whether the Queensland government will now apply to the High Court, or wait for the action to progress to see how the offending ground of Ms Erglis' action fares in the court proceedings. That part of the action may fail. The latter course, however, is dangerous, as an unfavourable result in the defamation action would be more difficult to overturn in the long run.

The judgment is another bad precedent weighing in the scales against the sound precedents, and it is to be hoped that it will not stand.

Further developments in this case will be awaited with interest, and I will keep the committee informed.

ADVICE NO. 38

DRAFT NATIONAL DEFAMATION LAW

Thank you for your letter of 12 August 2004, in which the committee seeks comments on the parliamentary privilege implications of the revised outline of a possible national defamation law, provided to the committee by the Attorney-General.

There are two provisions in the draft law which relate to the law of parliamentary privilege: the proposed statutory absolute privilege in respect of parliamentary proceedings (clause 12 of the draft law); and the defence of fair report (clause 15 of the draft law).

Parliamentary proceedings

This provision would provide a statutory defence to a defamation action that the contested publication occurred in the course of parliamentary proceedings, and also covers certain other transactions. The privilege giving rise to the defence is stated to be absolute, that is, the defence is not lost if the defendant makes the publication from malice or some other improper motive. The definition of parliamentary proceedings covers proceedings in the Houses of the Commonwealth Parliament and their committees, and is virtually identical to the definition contained in section 16 of the *Parliamentary Privileges Act 1987*.

The proposed provision would therefore duplicate, but only in relation to defamation actions, the parliamentary privilege provided by section 49 of the Constitution and the Parliamentary Privileges Act. The privilege under section 49 and the Parliamentary Privileges Act, of course, has a much wider application than in the defamation law.

It would be conceptually more accurate to say that the proposed law would merely reflect, rather than duplicate, that aspect of parliamentary privilege: the privilege is conferred by section 49, explicated in the Act and reflected, in one aspect, in the draft law.

The question which first arises is why it is necessary to reflect that aspect of parliamentary privilege in the proposed defamation law. The answer, no doubt, is that the proposed law is intended to be a code, and the defence of parliamentary privilege is included for the sake of completeness. There is no harm in this, provided that there is no difference in language which would enable some future judicial finding that the Act and the defamation law are inconsistent or in conflict. Given the copying in the proposed law of the language of the Parliamentary Privileges Act, this problem should not arise.

I therefore see no difficulty with clause 12 of the proposed law.

Fair report

Clause 15 of the proposed law would provide a defence to a defamation action of fair report of a range of public proceedings. Public proceedings are defined to include parliamentary proceedings within the meaning of clause 12. The outline of the proposed law refers to section 10 of the Parliamentary Privileges Act, which provides a similar defence.

In relation to this proposed provision a number of questions arise.

(1) The traditional formulation of this defence, including in the common law, refers to fair and accurate report. Section 10 of the Parliamentary Privileges Act uses that expression. The outline of the proposed law also uses that expression in describing the draft law. Clause 15 of the draft law, however, refers only to fair report. This disparity between the outline and the draft law requires some explanation.

(2) The proposed defence of fair report would apply to all parliamentary proceedings, including the proceedings of a parliamentary committee in private session. Section 10 of the Parliamentary Privileges Act explicitly excludes the defence in cases of publication of unauthorised reports of private meetings. In other words, any unauthorised publication of private committee proceedings is not protected under the Parliamentary Privileges Act but would be protected under the draft law.

It may be that the drafters of the proposed law would say that unauthorised publication of private committee proceedings is not a problem to be dealt with by the defamation law, that the appropriate course is to protect reports of all proceedings and to leave it to the House concerned to deal with any unauthorised disclosures. In order to establish the defence of fair report, however, the defendant in a defamation action would have to refer to the proceedings reported, and the law of parliamentary privilege, as explicated in section 16(4) of the Parliamentary Privileges Act, prevents the tendering of any evidence in a court about any private proceedings of a committee unless the committee has authorised the publication of the proceedings. The answer of the drafters of the proposed law may be that, in practice, their proposed defence would not be available in a case of unauthorised disclosure of private committee proceedings, so the effect would be the same as that of the Parliamentary Privileges Act. It would be better for the question to be completely clarified, and for the proposed provision to make the defence available only for reports of public or published proceedings. Perhaps the use of the expression "public proceedings" in the draft law is intended to convey this, but that interpretation is not available because of the way in which the expression is defined.

(3) Section 10 of the Parliamentary Privileges Act refers only to proceedings at a meeting of a House or a committee, not to parliamentary proceedings under the broad definition of that expression in both the Act and the proposed law. Clause 15 of the proposed law, however, would confer the defence in relation to all parliamentary proceedings. This would include, for example, a report of the preparation of a document for purposes of or incidental to parliamentary proceedings. So a journalist could have the defence for a fair report of a witness drawing up a submission to a parliamentary committee even before the submission is presented: the drawing up of the submission is a proceeding in Parliament, so a fair report of the drawing up of the submission would be protected. It might be thought that the use of the expression "public proceedings" in the draft law excludes this interpretation, but as already noted that expression is defined to include all parliamentary proceedings. In some way the clause needs to be narrowed to avoid this unwanted consequence. It has been suggested that section 10 of the Act is too narrow, in that it may exclude from the defence, for example, a report of a submission published by a committee which was published under a standing resolution of the committee but not at a meeting of the committee. Regardless of that kind of contention, the application of the proposed clause 15 would be too wide.

(4) The defence provided by section 10 of the Parliamentary Privileges Act is stated in the explanatory memorandum which accompanied the bill for the Act to be a qualified privilege for a fair and accurate report. The outline of the proposed defamation law also refers to that section as providing a qualified privilege. The description in the explanatory memorandum was based on a belief that the section did no more than make uniform across the country the common law defence of qualified privilege for a fair and accurate report in respect of Commonwealth parliamentary proceedings, that section 10 would therefore be interpreted as conferring a qualified privilege only, and that additional words would have to be added to the section in order to make privilege absolute. The section was based on the 1984 report of the Joint Select Committee on Parliamentary Privilege, which recommended qualified privilege only for a fair and accurate report.

The outline of the proposed defamation law, however, while referring to the common law privilege and that of section 10 as qualified, describes the proposed defence of fair report in clause 15 as "available, regardless of the defendant's motive in publishing the matter", that is, as absolute. The various statements in the outline of the draft law cannot all be correct. There is a contradiction in the outline. If section 10 of the Parliamentary Privileges Act confers only a qualified privilege, clause 15 must confer only a qualified privilege, but if clause 15 confers an absolute privilege, section 10 must also confer an absolute privilege. There is no difference in the language of the two provisions which would make one absolute and one qualified. This contradiction should be cleared up.

Unlike clause 12, clause 15 would in any event probably provide a very different defence from the equivalent provision in the Act. This may be thought to be of no consequence: a defendant can choose whichever defence is the most favourable. The difference between the provisions, however, is likely to cause difficulties when considered in conjunction with the matters set out above.

I hope that these observations are of some interest to the committee. I would be pleased to provide any elaboration of these points or any further information that the committee requires.

ADVICE NO. 39

DRAFT NATIONAL DEFAMATION LAW (2)

Since I responded on 18 August 2004 to the committee's request for comments on the Draft National Defamation Law, the states and territories have issued a document called Model Defamation Provisions. The committee may be interested in some comparison between the parliamentary privilege clauses of the model and those of the draft national law.

Clause 31 of the model begins with a general defence of absolute privilege (subclause 31(1)). This effectively incorporates the *Parliamentary Privileges Act 1987* as well as any other pre-existing source of absolute privilege. It then specifically covers a publication occurring in the course of parliamentary proceedings (subclause 31(2)(a)). It applies to the proceedings of all parliaments and legislatures, domestic and foreign (clause 4). Parliamentary proceedings extend to words spoken and acts done in the course, or for the purposes, of parliamentary proceedings (subclause 31(3)). While this wording is slightly different from that of the *Parliamentary Privileges Act 1987*, the difference should cause no difficulties, and in any event the specification of parliamentary proceedings is subject to the general defence of absolute privilege contained in subclause 31(1).

The defence of fair report of parliamentary proceedings, in clause 33, mostly overcomes the questions which arise in relation to the equivalent provision in the draft national law. The following refers by number to the questions raised about the national draft.

(1) The model also refers to fair report, rather than fair and accurate report. It may be that the omission of any reference to accuracy is thought to make the defence less onerous for the defendant.

(2) The defence applies only to *public* parliamentary proceedings (clause 33(4)(a)), and therefore overcomes the problem relating to unauthorised reports of in camera proceedings. There may be a question about whether the defence would apply to evidence taken in camera by a committee and subsequently published by the committee or the house concerned, but I should think that such evidence would then be regarded as proceedings in public, because the publication would occur in the course of parliamentary proceedings. Section 10 of the Parliamentary Privileges Act lends itself more readily to that interpretation because it refers to proceedings at a parliamentary meeting. Perhaps this should be clarified in the model. The qualified defence of publication of a public document (clause 32) would certainly apply.

(3) Because the definition of proceedings already referred to applies only to the defence of absolute privilege in clause 31, the defence of fair report would be confined to actual parliamentary proceedings and would not extend to the "penumbra" of matters incidental. It is therefore limited in much the same way as section 10 of the Parliamentary Privileges Act is limited.

(4) It is clear that the defence of fair report would confer a qualified privilege only, by virtue of subclause 33(3).

On the whole, the parliamentary privilege provisions in the model are an improvement on those in the draft national law, subject to the clarification mentioned in (2).

APPENDIX I

INDEX TO PERSONS, ORGANISATIONS AND SUBJECTS MENTIONED IN REPORTS OF THE COMMITTEE OF PRIVILEGES

The numbers refer to the relevant report of the Privileges Committee. General reports nos 35, 62, 76, 107 and the present one, which cover all persons, organisations and subjects canvassed in individual reports, are not included.