

**SUBMISSION BY SECRETARY,  
DEPARTMENT OF COMMUNITY SERVICES AND HEALTH**

(Advice dated 29 January 1990 from the Clerk of the Senate, Harry Evans, to the Chair of the Committee of Privileges, Senator Giles)

Thank you for your letter of 16 January 1990 requesting comments on matters raised in the submission to the Committee dated 20 December 1989 by Mr Stuart Hamilton, the Secretary of the Department of Community Services and Health.

I think that I can clarify the matters raised by Mr Hamilton.

He refers to two questions: the relationship between the references to committee documents in the Senate's Privilege Resolution 6, section 13 of the Parliamentary Privileges Act 1987, Senate standing order 308, and the notes sent by committees to witnesses; and the effect of those prescriptions on the practice of circulating submissions to interested parties.

First, there is the relationship between the various provisions.

Resolution 6 of the Senate's Privilege Resolutions is, as the preamble to the resolution indicates, a declaration by the Senate, for general guidance, of acts that may be treated by the Senate as contempts. As the preamble also makes clear, the resolution does not exhaust the categories of acts that may be treated as contempts, nor is it intended to be a definitive statement of particular acts which may constitute contempts. Paragraph (16) of the resolution indicates that the Senate may treat as a contempt the unauthorised disclosure of documents falling into any of three categories:

- (a) documents prepared for submission and submitted to a committee where the Senate or the committee has directed that the document be treated as evidence taken in private session or as a document confidential to the committee;
- (b) any report of oral evidence taken by a committee in private session; and
- (c) any report of proceedings of a committee in private session.

Section 13 of the Parliamentary Privileges Act 1987 creates a criminal offence, which may be prosecuted in the courts, of the unauthorised disclosure of committee evidence and documents. This statutory provision provides a remedy, of prosecution and conviction in the courts, which is in addition to the remedy provided by the power of the Senate to treat matters as contempts. In other words, a person who makes an unauthorised disclosure of a protected committee document may be dealt with by the Senate for a contempt, and may also be prosecuted for the criminal offence if the disclosure falls within the statutory provision. The statutory provision, however, is narrower in scope than the Senate's power to deal with contempts, and is also narrower than the declaration contained in Resolution 6. The statutory provision applies only to documents falling into the following categories:

- (a) documents prepared for submission and submitted to a committee and directed by the Senate or a committee to be treated as evidence taken in camera; and
- (b) any report of oral evidence taken by a committee in camera.

This narrower scope of the statutory provision is quite deliberate. The rationale of the provision is to provide an additional remedy, for the protection of witnesses, against the unauthorised disclosure of in camera evidence and submissions, and it is not intended to cover the whole area of unauthorised disclosure of confidential committee documents.

Senate standing order 308 (new standing order 37) refers to evidence taken by a committee and documents presented to a committee. The standing order is a direction by the Senate that evidence taken by, and documents submitted to, a committee are not to be disclosed without authorisation. As with the statute, the standing order does not cover the whole area of unauthorised disclosures which may be treated as contempts; it is a direction particularly relating to committee procedures, as its location among the standing orders governing the procedures of committees indicates.

The relevant paragraph in the "Notes to Assist in the Preparation of Submissions" issued by the Senate Committee Secretariat is, in effect, a shorthand statement of the requirements imposed by all three prescriptions, the Senate's Privilege Resolution, the statutory provision and the standing order. As such, it appears to me to be accurate.

All of the prescriptions which attempt to give expression to the prohibition on unauthorised disclosure of committee documents must be understood to be subject to the following proviso. If a document submitted to a committee has been prepared for some other purpose and is published for that purpose, the unauthorised disclosure of it would, in most circumstances, not constitute a contempt, and could not constitute a criminal offence. Examples of such documents are articles published in journals, and papers prepared for circulation to some group of persons and so circulated, such as a paper of a learned society. The Senate's resolution and the statutory provisions attempt to give expression to this proviso by the use of the words "prepared for the purpose of submission, and submitted", but particular instances and particular documents may raise matters for interpretation in that regard.

It is important to note that the Privilege Resolution and the statutory provision turn on the Senate or a committee having made a direction that a particular document be treated as evidence taken in camera or as a document confidential to a committee. This form of words is used in both prescriptions because it is thought that for a disclosure to be treated as a contempt or as a criminal offence there should be a particular order by the Senate or a committee which is violated. In considering disclosures which may be treated as contempts, the Privileges Committee and the Senate may well have regard to implied orders or directions of the Senate or committees, but for the statutory criminal offence proof of a specific order would probably be required. In the absence of an order by a committee applying to documents submitted to it, the Senate's standing order applies. Committees should be aware, however, that to make the status of documents clear they should have on foot some order applying to the documents which they desire to remain confidential and the unauthorised disclosure of which they may wish to treat as an offence. This matter has been drawn to the attention of all Senate committee staff.

Secondly, there is the matter of the circulation of submissions.

I can only say that, in my view, the circulation of submissions as referred to particularly in the second and third paragraphs of Mr Hamilton's letter is contrary to the prescriptions of the Senate relating to unauthorised disclosure of committee documents, and that that kind of circulation of submissions to other interested bodies should not be undertaken without the authorisation of the committee concerned.

I think that it is a different matter where a submission by a department or government agency is circulated to officers of the department or agency, or a submission intended to express the views of the government is circulated to various government departments and agencies. Such circulation, it seems to me, amounts to circulation among the persons who are collectively the authors of the submission, and does not constitute an unauthorised disclosure. The same consideration applies to submissions made on behalf of societies or associations and circulated to their members.

The circulation of submissions to other parties simply on the basis that they have an interest in the subject matter, however, appears to me to fall within the Senate's prohibitions.

No doubt the problem may be solved by the authors of submissions seeking and obtaining the permission of the committees concerned for the circulation of submissions, and by committees authorising the publication of submissions where appropriate. Committees could give general authorities for persons making submissions to circulate them to other interested parties. I think that it is important, however, that committees retain control of the publication of submissions made to them, as the rules of the Senate require.

The main reason for this is that, as Mr Hamilton points out in the last paragraph of his letter, only publication by order of a committee confers absolute privilege on the publication of a submission.

I hope that these observations are of use to the Committee. I would be pleased to provide any elaboration, elucidation or additional information required by the Committee.