

## **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.<sup>1</sup> 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

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1 Senate Committee of Privileges, *18<sup>th</sup> report*, PP 461/1989; *36<sup>th</sup> 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.<sup>2</sup>

5.13 The committee continues to reaffirm the view taken in its 35<sup>th</sup> 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,<sup>3</sup> and in fact has recommended reimbursement only once since the Senate adopted the provision.<sup>4</sup> 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,<sup>5</sup> 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 67<sup>th</sup> 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, 35<sup>th</sup> report, PP. 467/1991.

4 Senate Committee of Privileges, 21<sup>st</sup> 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 107<sup>th</sup> 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.<sup>6</sup> 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 submitter.

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6 Senate Committee of Privileges, 118<sup>th</sup> report, PP 80/2004.

5.20 A further unsolicited submission to the committee occurred as a result of the publication of its 112<sup>th</sup> 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 113<sup>th</sup> 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.<sup>7</sup>

### **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 35<sup>th</sup> 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'.<sup>8</sup>

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, *107<sup>th</sup> report*, PP 345/2002.

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

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

### Standard of proof

5.25 Also in the 35<sup>th</sup> 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, 36<sup>th</sup> report, PP 194/1992, paragraph 1.23.

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

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

12 Senate Committee of Privileges, 67<sup>th</sup> 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.<sup>13</sup>

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 64<sup>th</sup> report of the Committee of Privileges.

5.29 The second resolution was included in the 42<sup>nd</sup> report of the committee, was adopted by the Senate on 21 October 1993, and was referred to again in its 46<sup>th</sup>, 64<sup>th</sup> and 119<sup>th</sup> 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 73<sup>rd</sup> 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 73<sup>rd</sup> 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.<sup>14</sup> Departmental responses to the order were consolidated and tabled on 13 April 2000 as the committee's 89<sup>th</sup> report.<sup>15</sup>

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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, 89<sup>th</sup> 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.<sup>16</sup>

### **Guidelines relating to unauthorised disclosure of committee proceedings**

5.32 The 76<sup>th</sup> 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 76<sup>th</sup> report repeated the following general guidance on unauthorised disclosure set out in the 74<sup>th</sup> report:<sup>17</sup>

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.

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

17 Senate Committee of Privileges, 76<sup>th</sup> 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.<sup>18</sup>

5.33 Following the publication of the 74<sup>th</sup> 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,<sup>19</sup> 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, *74<sup>th</sup> report*, PP 180/1998, pp. 10-11.

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

5.36 In its 122<sup>nd</sup> 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.<sup>20</sup>

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

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20 Committee of Privileges, 122<sup>nd</sup> 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.<sup>21</sup>

5.38 In paragraph 3.49 of the 122<sup>nd</sup> 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).<sup>22</sup>

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

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21 122<sup>nd</sup> report, p. 47.

22 122<sup>nd</sup> 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.<sup>23</sup>

5.40 As a result of the committee's 122<sup>nd</sup> 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:

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23 122<sup>nd</sup> 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 122<sup>nd</sup> 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 122<sup>nd</sup> 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<sup>24</sup> and procedures relating to the early tabling of committee reports,<sup>25</sup> that committees and government should examine sections of acts with a view to their clarification,<sup>26</sup> and that other committees keep watching briefs on matters of concern.<sup>27</sup>

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

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

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

27 Senate Committee of Privileges, *36<sup>th</sup> report*, PP 194/1992, *48<sup>th</sup> report*, PP 113/1994 and *50<sup>th</sup> 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;<sup>28</sup>
- 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.<sup>29</sup>

### **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.<sup>30</sup>

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, *22<sup>nd</sup> report*, PP 45/1990 and *74<sup>th</sup> report*, PP 180/1998.

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

30 Senate Committee of Privileges, *67<sup>th</sup> report*, PP 141/1997; *72<sup>nd</sup> report*, PP 117/1998 and *75<sup>th</sup> 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.<sup>31</sup> 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*.<sup>32</sup>

### Execution of search warrants in senators' offices

5.50 The committee earlier discussed individual cases involving the search of senators' offices under warrant.<sup>33</sup> The committee draws to attention a judgment by Mr Justice French in the case which was the subject of the committee's 75<sup>th</sup> report,<sup>34</sup> and which influenced the handling of material as outlined in the 105<sup>th</sup> report.<sup>35</sup> 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, 36<sup>th</sup> report, PP 194/1992; 42<sup>nd</sup> report, PP 85/1993; 67<sup>th</sup> report, PP 141/1997; 73<sup>rd</sup> report, PP 118/1998; 85<sup>th</sup> report, PP 36/2000. And see Clerk of the Senate's memoranda of 20 October 2000 and 16 May 2001, tabled with the 107<sup>th</sup> 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, 75<sup>th</sup> report, PP 52/1999.

35 Senate Committee of Privileges, 105<sup>th</sup> 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 114<sup>th</sup> report made it clear that the committee does not accept the correctness of the judgment.<sup>36</sup>

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.

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