

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE
COMMITTEE OF PRIVILEGES

POSSIBLE UNAUTHORISED
DISCLOSURE OF SENATE
COMMITTEE SUBMISSION

(22ND REPORT)

MAY 1990

MEMBERS OF THE COMMITTEE

Senator Patricia Giles (Western Australia), Chair

Senator John Black (Queensland)

Senator Bruce Childs (New South Wales)

Senator John Coates (Tasmania)

Senator the Honourable Peter Durack, Q.C. (Western Australia)

Senator Janet Powell (Victoria)

Senator Baden Teague (South Australia)

The Senate
Parliament House
CANBERA A.C.T. 2600.

CONTENTS

	Page
Introduction	1
Conduct of Inquiry	3
Comment	6
Finding	8
Observations on Reference	8
Appendices A and B	

REPORT

INTRODUCTION

1. On 6 December 1989 the following matter was referred to the Committee of Privileges:

Whether a document prepared for submission, and submitted, to the Select Committee on Health Legislation and Health Insurance was disclosed without the authorisation of the Committee, and whether a contempt was committed by any person who disclosed that document.

2. The statement by the President of the Senate when he determined on 5 December to give precedence to the motion is at Appendix A to this report. The issue of principle outlined in the determination of 17 August, referred to in the President's statement, involves whether the unauthorised disclosure of a document confidential to a Committee should be treated as a contempt. As the President indicated in his earlier determination, the Senate has in the past treated unauthorised disclosure of committee documents as a contempt. As also pointed out in that determination, there is no other readily available remedy.
3. The present matter of privilege was first raised during question time on 31 October 1989, when Senator Sheil asked a question of the Minister representing the Minister for Community Services and Health, Senator Cook, concerning the circumstances under which an Assistant Secretary in that Department came into possession of a confidential submission from the

Australian Private Hospitals' Association to the Senate Select Committee on Health Legislation and Health Insurance before any committee submissions were approved for release. The Minister suggested that the question might more properly be directed to the Chair of the Committee, Senator Crowley. In the light of the Minister's answer, Senator Peter Baume asked the question of Senator Crowley, by leave of the Senate. Senator Crowley responded as follows:

I have no idea what circumstances might have led to a submission that has come to our Committee having got to the Department. I make it clear, as Senator Peter Baume would know, that that submission, along with a lot of others, has come to our Committee. We have not yet made a decision about whether those documents should be made available to the public. That will be done on Friday at the meeting of the Committee. My understanding is that none of the documents or submissions brought to our Committee have been circulated anywhere else except amongst the senator members of that Committee. My understanding is that there is no way in which that submission to our Committee has gone any wider than the members of that Committee.

4. The matter raised in the questions was discussed by the Select Committee on Health Legislation and Health Insurance on 3 November, and the Committee resolved that the matter be referred to the Committee of Privileges. Senator Crowley, on behalf of the Committee, raised the matter as a matter of privilege with Mr President on 5 December. Mr President gave his determination under

Privilege Resolution No. 4 on that day; Senator Crowley thereupon gave a notice of motion for the next day of sitting; and the matter was referred to the Committee of Privileges without debate on 6 December 1989.

CONDUCT OF INQUIRY

5. The Committee of Privileges wrote on 11 December to all members and the secretary of the Select Committee, the Executive Director of the Australian Private Hospitals' Association Limited (APHA), Dr M.M. Herring, and to the Secretary of the Department of Community Services and Health, Mr Stuart Hamilton, seeking submissions on the matter. The Minister for Community Services and Health, Dr Blewett, was advised that a submission had been sought from Mr Hamilton. All persons responded to the Committee's invitation. The circumstances giving rise to the reference, set out in the submission from Dr Herring, are as follows:

The Australian Private Hospitals Association had delivered to the Secretariat of the Senate Select Committee on Health Legislation and Health Insurance, 8 copies of our Submission on Wednesday 27th or Thursday 28th September 1989. On the same date copies of our Submission were posted to all members of the National Board of APHA and the Executive Directors of State Private Hospitals Associations. The Board Members and Executive Directors were aware that the document was Confidential, which meant that it was not to be discussed with anyone.

On Sunday 22nd October, enroute to Perth, Western Australia, the President of APHA Mr Darryl Maytom and I were made aware that our Submission was in

the hands of a senior official of the Department of Community Services and Health. The official himself made us aware of his having the Submission by saying words to the effect:

"This is going to be a boring trip to Perth as I have to read your Submission."

When subsequently asked by me where he had obtained the Submission, he said he had found it on someones desk.

The copy was not an original but a photocopy.

When I returned from Perth, I sought the advice of Senators John Coulter and Peter Baume. I had read carefully the documentation distributed by the Senate Committee in relation to the confidentiality of Submissions and was therefore surprised to find our Submission had apparently been distributed.

Senator Baume informed me that it was not normal practice for Submissions to be made public without the specific approval of the Senate Committee and that he would investigate the matter.

[Extract from APHA submission of 14 December 1989]

The above account of events was substantially confirmed by Senator Peter Baume and the secretary to the Select Committee.

6. The secretary to the Committee advised that eight copies of the submission were received in the Secretariat on 28 September, and further advised that the Committee did not authorise release of any submissions prior to 3 November 1989, when a public hearing of the Select Committee was held.

7. The Secretary to the Department of Community Services and Health advised as follows:

The Department received copies of a number of submissions to the Senate Select Committee on Health Legislation and Health Insurance from a number of hospital and insurance organisations. Some of these submissions had covering letters from the organisation that sent us a copy. Others did not have covering letters or compliments slips. Most were sent by the authors via the Office of the Minister for Community Services and Health.

I should also mention that the Department sent copies of its submission to other organisations at the time it was ready for despatch to the Committee.

I am advised that the officer co-ordinating the preparation of the Department's submission received the document in question (the Australian Private Hospitals Association Submission) from her then Branch Head who is currently on extended leave without pay. Another Branch Head in the same Division (the one referred to by Senator Baume as having the document in question in his possession) obtained it from the officer co-ordinating our submission.

I understand that the first mentioned Branch Head received the submission from the Senior Private Secretary to the Minister for Community Services and Health. While the Senior Private Secretary cannot be certain how it arrived in the office, he presumed it had been delivered in the mail, just as other submissions were. By the time it reached him, there was no envelope with it. He forwarded it to the first mentioned Branch Head, as he forwarded other submissions received from organisations and individuals.

[Extract from submission of Secretary, Department of Community Services and Health, 20 December 1989]

COMMENT

8. It is clear from the above account that unauthorised disclosure of a document that had been prepared for the purpose of submission, and submitted, to a committee occurred in this instance. This Committee contemplated investigating further the possible source of unauthorised disclosure, but for reasons which will become apparent later in this report decided not to do so. The Committee was advised by all members of the Select Committee, and the secretary to that Committee, that neither they nor their staff had disclosed the submission before it was authorised for publication on 3 November. Dr Herring advised as follows:

I am confident that none of my personal staff disclosed the contents of the Submission. I cannot be certain that officers of my Association did not disclose the contents of the Submission but I would be extremely surprised if they had.

9. The Secretary to the Department of Community Services and Health was also unable to assist the Committee in this matter. However, this Committee points out that, as the Secretary of the Department indicated, the Department had received a number of submissions to the Select Committee, most sent by the authors of the submissions to the Minister's Office, and had distributed its own submission to interested parties. While the Executive of the APHA clearly understood the confidentiality requirements relating to the submission of a document to a committee, as the response from Dr Herring implies there can be no such assumption that the persons to whom the document was distributed would have treated the document with the same care as its authors. This assumption is reinforced by Mr Hamilton's submission, which indicates that the exchange of submissions between organisations and the Department was commonplace and thus the special conditions attached to the submission of documents to the Senate were not addressed. That the submission was accepted in good faith is evident from the manner in which the APHA discovered that it had been prematurely released, as indicated at paragraph 5 above. The Committee, therefore, regarded it as unproductive to investigate any further the source of the disclosure, in that it is likely that the person who actually disclosed the document to the Minister's office did not advert to the confidential nature of the submission and Senate rules concerning unauthorised disclosure.
10. Thus, given the nature of the disclosure; the likelihood that further investigations would not discover the source of the disclosure of the submission; the Select Committee's intention to make public the submissions received, as evidenced by its decision to release all submissions when it met on 3 November, and the way in

which the premature release came to the attention of the APHA, the Select Committee and the Senate, the Committee of Privileges considers that the matter should not be taken any further. In addition, the Committee draws attention to the following paragraph of the submission from the Secretary to the Department of Community Services and Health:

On behalf of the Department, if there was any action taken by its officers which was a breach of the authority of the Senate, I apologise.

FINDING

11. This Committee has concluded, on the evidence, that, although it would be open to the Committee and the Senate to find that a contempt of the Senate had been committed by persons involved in the distribution of the document, in the particular circumstances of the case and having regard to the criteria in paragraphs 3(a) and 3(c) of the Privilege Resolutions of 25 November 1988, the Committee's application of which has been set out in detail in previous reports, such a finding should not be made.

OBSERVATIONS ON REFERENCE

12. As with its previous reference on unauthorised disclosure (Report No. 20, tabled 21 December 1989), the Committee has had the opportunity to consider more general questions deriving from the matter referred to it. In his comprehensive response to the Committee's invitation to make a submission, Mr Hamilton, the Secretary to the Department of Community Services and Health, raised with the Committee a number of questions concerning unauthorised disclosure of committee

documents. Mr Hamilton's full submission is at Appendix B to this report. Briefly, Mr Hamilton sought comment on the interrelationship between the Parliamentary Privileges Act, Privilege Resolution 6, Senate standing order 37 (previously S.O. 308) and the notes sent by committees to witnesses; and the effect of those prescriptions on the practice of circulating submissions to interested parties. In particular, Mr Hamilton suggests that unauthorised circulation of submissions be expressly accepted as a normal and sensible way of proceeding, albeit that such publication does not attract absolute privilege.

13. As has been the Committee's practice in relation to general matters of this kind, the Chair of the Committee sought the written advice of the Clerk of the Senate on the matters raised by Mr Hamilton. So far as the question of the relationship of the provisions is concerned, the Clerk explains exhaustively the operation of the provisions, as follows:

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.

14. In relation to Mr Hamilton's suggestion that unauthorised circulation of submissions be expressly accepted as the normal and sensible way of proceeding, the Committee does not accept that the suggestion is appropriate. Indeed, the Committee was unhappy that some senior officers of a government department seemed to be unaware of the proscription on the unauthorised circulation of submissions made to committees, much less the reasons for the proscription. The Committee considers that it is important that committees retain control of the publication of submissions made to them, because such control can protect both the author of the submission and, in some cases, depending on the nature of the inquiry, persons who might be referred to in such submissions.
15. The Committee does, of course, acknowledge that, in the normal course of events, particularly when a committee, as in the present case, is conducting a general inquiry, submissions are likely to be made for the purpose of

providing information and comment. This is not, however, always the case. In any event, a committee may well wish to consider whether all points made in a submission are relevant to its terms of reference, and to refuse to accept as evidence those which are not. In addition, while an author of a submission may be willing to have a submission placed on the public record, a committee itself, or persons affected by a committee's inquiry, might decide, or seek, to treat a particular submission, or part thereof, as an in camera document. If the submission has been widely circulated, without authority, this option is effectively denied to the committee or other persons. It must be emphasised that only publication by order of a committee confers absolute privilege on the publication of a submission. While Mr Hamilton accepts that unauthorised circulation of submissions would not attract such privilege, the Committee nonetheless regards the case for control as outweighing the benefits of general circulation.

16. The Committee accepts that, when drafting submissions, authors of submissions acting on behalf of the members of an association, for example, or officers of government departments and authorities might wish to consult and receive advice from their constituency, or other officers with an interest in the subject matter of the submission, as the case may be, but sees no reason why this consultative process should not occur during the drafting stage only. Once the document is finalised and submitted to the relevant committee, this Committee believes that the relevant committee is the appropriate body to decide on circulation to others.

17. While the Committee accepts Mr Hamilton's point that the practice of circulating submissions may be helpful to interested parties, it draws attention to the fact that some committees make a practice of giving general authority to authors of submissions to publish their views to other parties. This Committee observes, too, that, if a general authorisation has not been given, or made known, to authors of submissions, the course is always open to the authors to seek the permission of the relevant committee to publish the submissions to others.
18. Thus the Committee is of the view that the present rules of the Senate should be adhered to, and that those rules should be widely publicised to authors of submissions. In order to ensure that persons making submissions to committees are aware of the prohibition against unauthorised disclosure of submissions the Committee recommends that advice of the prohibition be given at every opportunity. The Committee therefore recommends that an appropriate warning be given in public advertisements calling for submissions; in advice contained in the notes to witnesses who contact the committee before making a submission; and in the letter on behalf of the committee acknowledging receipt of such submission. The Committee also recommends that persons making submissions to a committee be notified when such submissions have been publicly released by the committee. While, as the present case indicates, these proposals do not provide a fail-safe method of ensuring that people do not find themselves potentially in contempt of the Senate, inadvertent release should be a lesser problem.

Patricia Giles
Chair

5 December 1989 SENATE 3939

MATTER OF PRIVILEGE

The **PRESIDENT**—Order! Pursuant to the resolution of the Senate of 25 February 1988 relating to the raising of matters of privilege, Senator Crowley, acting in her capacity of Chairman of the Select Committee on Health Legislation and Health Insurance, has written to me to raise a matter of privilege. She has done so pursuant to a decision of the Committee. The matter in question is an apparent unauthorised disclosure of a document prepared for submission and submitted to the Select Committee, and not published by the Committee. I am required by the resolutions of the Senate to consider the matter, having regard to certain criteria specified in the resolutions, and to determine whether a motion to refer the matter to the Privileges Committee should have precedence over other business. The relevant criteria refer to the principle that the Senate's power to deal with contempt should be used only where necessary to provide reasonable protection against improper acts tending substantially to obstruct the Senate or its committees in the performance of their functions, and to the existence of any other remedy. In a number of previous rulings I have indicated to the Senate the way in which I interpret and apply those criteria.

The matter raised by Senator Crowley is clearly one concerning whether a motion should have precedence in accordance with the criteria laid down by the Senate. It raises the same issue of principle as a matter referred to the Committee on 18 August 1989, which was the subject of a ruling I made on 17 August 1989, to which I draw the attention of the Senate. I therefore call Senator Crowley to give a notice of motion, which will have precedence over all other business on the next day of sitting.



COMMONWEALTH OF AUSTRALIA



OFFICE OF THE SECRETARY

DEPARTMENT OF
COMMUNITY SERVICES
AND HEALTH

Ms A Lynch
Secretary
Senate Committee of Privileges
Parliament House
CANBERRA ACT 2600



Dear Ms Lynch

I refer to your letter of 11 December 1989 in which you asked me make a written submission concerning the circumstances giving rise to disclosure of a submission to the Senate Select Committee on Health Legislation and Health Insurance.

The Department received copies of a number of submissions to the Senate Select Committee on Health Legislation and Health Insurance from a number of hospital and insurance organisations. Some of these submissions had covering letters from the organisation that sent us a copy. Others did not have covering letters or compliments slips. Most were sent by the authors via the Office of the Minister for Community Services and Health.

I should also mention that the Department sent copies of its submission to other organisations at the time it was ready for despatch to the Committee.

I am advised that the officer co-ordinating the preparation of the Department's submission received the document in question (the Australian Private Hospitals Association Submission) from her then Branch Head who is currently on extended leave without pay. Another Branch Head in the same Division (the one referred to by Senator Baume as having the document in question in his possession) obtained it from the officer co-ordinating our submission.

I understand that the first mentioned Branch Head received the submission from the Senior Private Secretary to the Minister for Community Services and Health. While the Senior Private Secretary cannot be certain how it arrived in the office, he presumed it had been delivered in the mail, just as other submissions were. By the time it reached him, there was no envelope with it. He forwarded it to the first mentioned Branch Head, as he forwarded other submissions received from organisations and individuals.

On behalf of the Department, if there was any action taken by its officers which was a breach of the authority of the Senate, I apologise.

Having recounted the circumstances of this incident as known to the Department, might I take the opportunity of looking to the future, with a view to assisting others who might find themselves in like circumstances.

As I understand it, on 25 February 1988 the Senate passed a series of resolutions on Parliamentary Privilege, among which was the following

"6. Matters constituting contempts

.....

Unauthorised disclosure of evidence etc.

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

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

(my underlining)

This seems to envisage two classes of documents - those which are to be treated as confidential on the basis of a direction, and all other documents. One might assume that the resolution would enable a direction to protect information given in confidence or otherwise sensitive for commercial, privacy or security reasons for example.

The Parliamentary Privileges Act 1987 ('The Act'), S.13, also seems to envisage two classes of document - those which it is directed "be treated as evidence taken in camera" and the remainder. I am not aware of whether there was a direction under the Resolutions or the Act in the case of any or all documents submitted to the Senate Select Committee.

On the other hand, the "Notes to Assist in the Preparation of Submissions" issued by the Committee Secretariat state that "once a submission is received by the committee it should not be published or disclosed to any other person in that form without the committee's authorisation". This seems, unlike the Act and Resolutions, to assume that all documents are automatically 'protected'. The words perhaps are based on Standing Order 308 which is similarly blanket in nature; however I cannot tell what the interaction of the Act and Resolutions on the one hand and the Standing Order and the Notes on the other is meant to be. For example, are the Notes themselves meant to be a direction of the relevant committee?

It may help those making submissions if the operation and status of the Act, Resolutions, Standing Orders, and Notes were clarified. Clearly, there has been significant departure from the advice in the Notes on the part of many people making submissions - and in all probability not just in the case of this particular Select Committee. I would imagine it would strike many such people as entirely surprising if they were to learn that what they thought to be quite a normal, and arguably helpful, practice of copying Submissions to other interested parties was possibly a contempt of the Parliament.

Could I suggest that, except in cases where the Senate or a committee agrees that a particular document should be confidential, as envisaged by the Act and Resolutions, circulation of submissions on matters of public policy to other interested parties be expressly accepted as a normal and sensible way of proceeding which does not breach the spirit or the letter of Section 4 of the Act?

It would be understood that such 'unauthorised' circulation would not attract absolute privilege, including the specific protections set out in the Act in relation to court proceedings.

Yours sincerely



Stuart Hamilton
20 December 1989