

Standing Committee on Parliamentary Privilege and Ethics

**Report on guidelines
concerning unauthorised
disclosure of committee
proceedings**

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Terms of Reference

That this House, having considered the recommendations of Report No. 13 of the Standing Committee on Parliamentary Privilege and Ethics entitled "Possible intimidation of witnesses before General Purpose Standing Committee No. 3 and unauthorised disclosure of committee evidence", requests the Standing Committee on Parliamentary Privilege and Ethics to inquire into and report on appropriate guidelines for dealing with unauthorised disclosure of debates, reports or proceedings of Legislative Council committees.

The terms of reference were referred to the Committee by resolution of the House on 15 November 2001 (*Minutes of the Proceedings of the Legislative Council*, No. 132, Thursday 15 November 2001, entry 4).

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Table of Contents

	Chair's Foreword	vii
	Summary of Recommendations	viii
Chapter 1	Origin of the inquiry	1
	Report No. 13	1
	Referral of inquiry	2
Chapter 2	Current practice in the Legislative Council	3
	General principles	3
	Relevant legislation	3
	Relevant Standing Orders / authorities	4
	Committee practices regarding publication of information	5
	Contempt of Parliament	6
	Administrative procedures to protect the confidentiality of committee material	9
Chapter 3	Procedures and precedents in other Parliaments	11
	House of Commons (United Kingdom)	11
	Australian Senate	14
	House of Representatives	19
	Other Australian State Parliaments	22
Chapter 4	Proposed Guidelines	25
Appendix 1	Procedures recommended by Standing Committee upon Parliamentary Privilege	29
Appendix 2	Minutes of the Committee's proceedings	31

Chair's Foreword

This inquiry arose from a recommendation made by this Committee in a report concerning two matters which had arisen during an inquiry conducted by another Legislative Council Committee, one of which involved the unauthorised publication in a newspaper of details of a confidential submission.

The House subsequently requested this Committee to:

inquire into and report on appropriate guidelines for dealing with unauthorised disclosure of debates, reports or proceedings of Legislative Council committees.

Chapter Two of this report outlines current practices in the Legislative Council in relation to dealing with unauthorised disclosures of committee proceedings and documents. Reference is made to general principles, relevant legislation and standing orders, committee practices regarding the publication of information (including precedents), and administrative procedures to protect the confidentiality of committee material. Chapter Three discusses procedure and precedents in other parliaments, with particular reference to the House of Commons (UK), Australian Senate and House of Representatives.

Chapter Four sets out the Committee's proposed guidelines for dealing with unauthorised disclosure. Some of the key features of the proposed guidelines are:

- The inclusion of a comprehensive and unambiguous statement of the nature and extent of the prohibition against unauthorised disclosure and the classes of persons to whom the prohibition applies;
- A statement of some of the forms of damage which may be caused by unauthorised disclosures;
- A statement of the obligations of recipients of unauthorised disclosures; and
- Identification of the imposition of sanctions against media organisations as an option available to the House in dealing with the publication of unauthorised disclosures.

Unauthorised disclosures of committee proceedings have the potential to cause serious damage to witnesses and submission authors, impede the effectiveness of parliamentary committees, and lower public confidence in the Parliament. In the context of the increasing volume and the increasing importance of the work of the Legislative Council's committees (both in terms of the development of public policy and the accountability of public administration) it is important that this issue be addressed without delay.

I would like to thank the Committee Secretariat for their work on this report. Finally, I would like to thank my fellow Committee Members for their constructive approach to this report and for their work on the Standing Committee on Parliamentary Privilege and Ethics over the last four years.

Hon Helen Sham-MLC
Chair

Summary of Recommendations

Recommendation 1 *Page 25*

That the House adopt the following guidelines concerning unauthorised disclosures of debates, reports or proceedings of Legislative Council committees:

1. Rule against unauthorised disclosure

- 1.1 Evidence received by a committee, the proceedings of a committee, and draft committee reports, may not be disclosed by any person before the committee has reported to the House, unless the committee has authorised such disclosure.
- 1.2 The rule applies to all persons who have access to committee information, including:
 - (a) committee Members and their staff,
 - (b) staff of the committee secretariat,
 - (c) any witness who gives evidence to a committee,
 - (d) any person who provides a written submission to a committee,
 - (e) any person to whom committee information has been improperly disclosed. This may include another Member, staff of a Member, a departmental officer, or a member of the media.
- 1.3 The rule applies to all information received or generated by a committee, including:
 - (a) oral evidence provided to a committee at an in camera hearing and the written transcript of such evidence,
 - (b) documents tendered at a hearing,
 - (c) written submissions received by a committee,
 - (d) written briefing papers and other documents prepared by the committee secretariat,
 - (e) draft reports, including draft dissenting statements,
 - (f) correspondence between the committee and other persons in relation to an inquiry,
 - (g) deliberations of the committee, including decisions made by the committee in private, comments made by committee members during debate within the committee, and the minutes of such deliberations.

2. *Damage caused by unauthorised disclosures*

- 2.1 Unauthorised disclosure of committee information may result in damage to individual participants in committee inquiries, the integrity of the committee system, and the public interest. Such damage may include:
- (a) jeopardising witnesses and others who provide confidential information to committees, by exposing them to the risk of reprisals or other forms of adverse treatment as a result of giving evidence,
 - (b) deterring future witnesses from giving confidential evidence to committees,
 - (c) impeding the ability of a committee to reach agreement, by exposing the committee's incomplete deliberations to public scrutiny,
 - (d) undermining the relationship of trust between members of the committee, which is necessary for committees to function effectively,
 - (e) lowering public confidence in the committee, the committee system and the Parliament generally.

3. *Obligations of recipients of unauthorised disclosures*

- 3.1 A recipient of an unauthorised disclosure of committee information must:
- (a) immediately inform the committee secretariat of receipt of the information, and the circumstances of such receipt;
 - (b) return the information to the committee secretariat as soon as possible; and
 - (c) not disclose the information to any person or record or copy it in any way.
- 3.2 Experience in this and other Parliaments suggests that recipients of leaked information commonly include members of the media, ministerial staff, and departmental officers.

4. *Contravention – Contempt*

- 4.1 Contravention of the rule against unauthorised disclosure may constitute a contempt of Parliament.

5. *Contravention – Procedure*

- 5.1 Where an unauthorised disclosure of committee information occurs, the following procedure applies:
- (a) The committee concerned seeks to identify all possible sources of the disclosure.
 - (b) The committee decides whether the disclosure is significant enough to justify further inquiry.

- (c) If the committee considers that further inquiry is warranted, the Chair of the committee writes to all persons who had access to the proceedings, requesting an indication as to whether the person was responsible for the disclosure or is able to provide any information that could be of assistance in determining the source of the disclosure.
 - (d) The committee comes to a conclusion as to whether the leak is of sufficient seriousness as to constitute a substantial interference with the work of the committee, the Legislative Council committee system, or the functions of the House. This occurs whether or not the source of the disclosure is discovered.
 - (e) If the committee concludes that the leak is of sufficient seriousness, it makes a special report to the House, describing the circumstances and the investigations it has made, and recommending that the matter be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report.
 - (f) Following tabling of the Special Report, the House may refer the matter to the Standing Committee on Parliamentary Privilege and Ethics.
- 5.2 If the House refers the matter to the Standing Committee on Parliamentary Privilege and Ethics, that Committee may undertake such investigations of the matter as it considers appropriate, including taking evidence on oath or affirmation from the Members of the Committee from which the disclosure arose.

6. *Contravention - Sanctions*

- 6.1 In a report to the House, the Standing Committee on Parliamentary Privilege and Ethics may find that the person responsible for the unauthorised disclosure is guilty of contempt and that appropriate sanctions be imposed.
- 6.2 If the person responsible is a Member of the House, appropriate sanctions may include: reprimand or admonishment by the House; the provision of an apology to the House; and/or suspension from the service of the House for a defined period.
- 6.3 If the unauthorised disclosure was published in the media, appropriate sanctions may include: temporary exclusion from the parliamentary precincts; suspension of parliamentary accreditation; suspension of accreditation with the Parliamentary Press Gallery; the publication of an appropriate apology; and/or reprimand by resolution of the House. Such sanctions may be imposed even in cases where the person responsible for the original disclosure has not been found.

Recommendation 2 *Page 28*

That a copy of the guidelines adopted by the House be provided to all current and future Members of the House and their staff, all Members of the Parliamentary Press Gallery, and the Director-General of the Premier's Department for dissemination to relevant public officials and ministerial staff.

Recommendation 3 *Page 28*

That all persons who provide written submissions, or give oral evidence to, a committee be advised of the nature and extent of the prohibition against unauthorised disclosure and the application of the rule to persons providing submissions or oral evidence.

Chapter 1 Origin of the inquiry

Report No. 13

- 1.1** The current inquiry originates from a recommendation made by this Committee in its Report No. 13, dated November 2001.¹ That Report concerned a Special Report from General Purpose Standing Committee No. 3 (GPSC 3), which related to two possible contempts of Parliament which had arisen during GPSC 3's inquiry into Cabramatta policing.² One of the possible contempts involved the unauthorised publication in a newspaper of details of a confidential submission, which had been provided to GPSC 3 by four police witnesses during an in camera hearing.
- 1.2** The matters referred to in the submission and reported in the newspaper included the alleged recruiting of drug criminals from high schools in the Cabramatta area. Following publication of the article, the four officers received written directions from their commanding officer, requiring them to provide any information they had concerning the published allegation. This action, which had the effect of intimidating the officers in respect of the evidence they had given to the Committee, constituted the second possible contempt raised in the Special Report.
- 1.3** The Special Report indicated that GPSC 3 had attempted to identify the original source of the disclosure of the submission, by writing to all persons who could have had access to the document, but that no information had come to light as a result of such investigations which would assist in identifying the source.³ The Special Report also stated that GPSC 3 regarded the publication of the material seriously, and as potentially interfering with the Committee's functions, but did not believe the source of the disclosure would be discovered through further inquiry.⁴
- 1.4** In view of the comments contained in the Special Report, Report No. 13 of this Committee did not examine the unauthorised publication in any detail. However, it did discuss the problem of unauthorised disclosures of committee material in general, noting the serious impact which such disclosures can have on the committee system,⁵

¹ Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before General Purpose Standing Committee No. 3 and unauthorised disclosure of committee evidence*, Report No. 13, November 2001, Recommendation No. 5, p. 40.

² General Purpose Standing Committee No. 3, *Special Report on possible breaches of privilege arising from the inquiry into Cabramatta policing*, Report No. 6, June 2001.

³ Ibid, paragraph 1.6.

⁴ Ibid, paragraph 1.17.

⁵ Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before General Purpose Standing Committee No. 3 and unauthorised disclosure of committee evidence*, Report No. 13, November 2001, paragraph 4.35.

and certain procedures which have been introduced in other Parliaments to deal with the problem.⁶ In relation to this general issue, the Report concluded:

4.45 Given the potential damage which could occur to the parliamentary inquiry process if the unauthorised publication of committee reports, oral evidence, submissions and proceedings in private session remains unchecked, it is recommended that this Committee develop an appropriate series of guidelines to deal with future unauthorised disclosures.

4.46 The Committee therefore recommends:

Recommendation No. 5

That the issue of unauthorised disclosure of debates, reports or proceedings of committees be referred by the House to this Committee for inquiry and report on appropriate guidelines for dealing with future unauthorised disclosure.

Referral of inquiry

1.5 On 15 November 2001 the Legislative Council referred an inquiry to this Committee along the lines of the Committee's Recommendation No. 5. The resolution of the House was in the following terms:

That this House, having considered the recommendations of Report No. 13 of the Standing Committee on Parliamentary Privilege and Ethics entitled "Possible intimidation of witnesses before General Purpose Standing Committee No. 3 and unauthorised disclosure of committee evidence", requests the Standing Committee on Parliamentary Privilege and Ethics to inquire into and report on appropriate guidelines for dealing with unauthorised disclosure of debates, reports or proceedings of Legislative Council committees.⁷

⁶ Ibid, paragraphs 4.36 to 4.44.

⁷ *Minutes of the Proceedings of the Legislative Council*, No. 132, 15 November 2001, entry 4.

Chapter 2 Current practice in the Legislative Council

This chapter outlines current practices and procedures of the Legislative Council which are relevant to the confidentiality of unreported committee proceedings and documents, and unauthorised disclosures of such material.

General principles

- 2.1** *Erskine May's Parliamentary Practice* states that it has long been declared to be 'against the custom of Parliament for any act done at a committee to be divulged before being reported to the House'.⁸ There is long-standing authority that evidence and documents presented to a committee, committee deliberations, and draft reports, may not be disclosed until the committee has reported to the House.⁹
- 2.2** The rationale for the prohibition against premature disclosure includes the protection of committee witnesses, and the maintenance of the integrity of committee proceedings, including the relationship of trust between committee members which is necessary for the productive functioning of a committee.¹⁰ Underlying this rationale is the need to prevent conduct which impedes a committee or the House in the performance of their functions.
- 2.3** The prohibition applies to all persons who have access to committee material, including persons who have provided material such as evidence and submissions to a committee. Once such material has been received by a committee, it becomes the property of the committee, and subject to parliamentary privilege.
- 2.4** The rule against disclosure has been modified to some extent by Standing Order and statute permitting committees to authorise publication of certain material before they report to the House (see paras 2.5-2.7 below).

Relevant legislation

- 2.5** Section 4(2) of the *Parliamentary Papers (Supplementary Provisions Act) 1975* provides:

A Committee may authorise the publication of a documents received by it or evidence given before it.

⁸ *Erskine May's Treatise on the law, privileges, proceedings and usage of Parliament*, 22nd ed, London, Butterworths, 1997, p. 118.

⁹ *Ibid*, pp. 118-119, 670.

¹⁰ Senate Committee of Privileges, *Possible unauthorised disclosure of parliamentary committee proceedings*, 74th report, December 1998, paragraph 1.18.

Relevant Standing Orders / authorities

- 2.6** Standing Order 252 prohibits the disclosure of unreported evidence and documents provided to a committee, unless the committee has given its permission:

252. Evidence not to be disclosed

Evidence taken by any select committee¹¹ of the House, and documents presented to such committee which have not been reported to the House, may not, except with the permission of the Committee, be disclosed or published by any Member of such Committee or by any other person.

- 2.7** A committee may give its permission by passing a resolution authorising publication, under the authority of Standing Order 252, and section 4(2) of the *Parliamentary Papers (Supplementary Provisions Act) 1975*.

- 2.8** Standing Orders 250 and 251 are also relevant in this context, as they empower committees to exclude the public ('strangers'), and Members of the House, from their proceedings:

250. Admission of Strangers

When a Select Committee is examining witnesses or deliberating, strangers may be excluded at the request of any Member, or at the discretion of the Chairman.¹²

251. Admission of Members

Any Members of the House may be present when a Select Committee is examining witnesses, but shall withdraw when the committee is deliberating, if so requested.

- 2.9** In addition, certain resolutions of the House which have referred inquiries to particular committees have enabled Members who are not members of the committee to participate in the committee's deliberations.¹³

¹¹ Standing Order 257B states that, unless otherwise ordered, the rules and orders relating to select committees shall apply to standing committees.

¹² The House may require a committee to conduct its hearings in public: see resolution of the House referring the budget estimates to the General Purpose Standing Committees for inquiry and report, *Minutes of the Proceedings of the Legislative Council*, No. 14, 4 June 2002, entry 26, paragraph 4.

¹³ Eg *Minutes of the Proceedings of the Legislative Council*, No. 14, 4 June 2002, entry 26, paragraph 3.

Committee practices regarding publication of information

Transcripts of evidence

- 2.10** Following public hearings, committees usually authorise publication of the transcript of evidence given, under Standing Order 252 and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*.
- 2.11** Where the public has been excluded from a hearing under Standing Order 250, a committee may still authorise publication of the transcript, though a committee will normally do so only after consultation with the witness. In some cases, committees authorise publication of only part of a transcript, or of a version of the transcript with certain matters (eg identities of individuals) suppressed.

Submissions

- 2.12** Committees usually authorise publication of any written submissions they receive in relation to an inquiry. This may be done either during the inquiry or at the conclusion. As with transcripts, committees may authorise publication of a part of a submission.

Deliberations

- 2.13** Committee deliberations (in which the committee discusses, debates, and votes), are conducted in private.¹⁴ The minutes of the committee's proceedings record the Members present, and decisions made, during deliberations.
- 2.14** At the conclusion of an inquiry, committees usually authorise publication of their minutes. The minutes are either included as an appendix within the report, or more rarely, simply tabled with the report. Once the report is tabled, the deliberations of the committee, to the extent they are recorded in the minutes, become a matter of public record.

Reports

- 2.15** After a committee has gathered all the evidence it requires in relation to an inquiry, the Chair of the committee, assisted by the committee secretariat, prepares a draft report for the consideration of the committee.
- 2.16** After the committee has adopted the report, as amended or otherwise, the report is tabled in the House and ordered to be printed by the House, at which point the report becomes a public document. It is usual for resolutions of the House establishing committees to provide that, if the House stands adjourned when the committee agrees to a report, the report may be tabled with the Clerk of the House, and is to be printed and published by the Clerk.

¹⁴ *Erskine May*, *ibid*, p. 644.

Contempt of Parliament

2.17 The unauthorised disclosure of committee proceedings, draft reports, or unreported evidence may be treated as contempt of Parliament.¹⁵ *Erskine May* defines contempt as follows:

any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results.¹⁶

2.18 In NSW, unlike the other Australian jurisdictions, there is no legislation conferring power on the Houses to deal with contempts.¹⁷ Therefore, where contempts occur, the Houses may only take action in accordance with their inherent, common law powers. The inherent powers are limited to such powers as are 'reasonably necessary' for the existence of the House and the proper exercise of its functions. 'Reasonable necessity' encompasses action which is 'protective' and 'defensive' of the House and its procedures, but does not extend to the punishment of offenders.

2.19 In some cases, unauthorised disclosure of committee material has been treated as a 'breach of privilege', rather than contempt.¹⁸

Procedure followed in cases of unauthorised disclosure

2.20 In the two most recent cases where unauthorised disclosures have been reported to the House (see para 2.21 below), a procedure has been followed which was first developed by the House of Commons Committee of Privileges in 1984-5 and adopted by that House in 1986.¹⁹ The procedure, as it applies in the Legislative Council, involves the following steps:

- (1) The Chair of the committee from which the unauthorised disclosure arose writes to all those who could have had access to the material (eg Members of the Committee, Hansard, committee officers), asking them to provide written advice as to whether they, or their staff, have any knowledge of the source of or how the disclosure occurred.

¹⁵ See footnote 10, above.

¹⁶ *Erskine May*, *ibid*, p. 108.

¹⁷ However, under the *Parliamentary Evidence Act 1901*, certain penalties apply in the case of a person who fails to comply with a summons to attend and give evidence before a House or committee (sections 7-9), and in the case of any committee witness who refuses to answer a lawful question during his or her examination (section 11).

¹⁸ Eg House of Commons Committee of Privileges, *Complaint concerning an article in the Observer newspaper of 26th May 1968*, Session 1967-68, p. 55, paragraphs (v) and (vi).

¹⁹ *Erskine May*, *ibid*, p. 670.

- (2) The committee comes to a conclusion as to whether the leak is of sufficient seriousness as to constitute a substantial interference with the work of the committee, the Legislative Council committee system, or the functions of the House. This occurs whether or not the source of the disclosure is discovered.
- (3) If the committee concludes that the leak is of sufficient seriousness, it makes a special report to the House, describing the circumstances and the investigations it has made, and recommending that the matter be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report.
- (4) Following tabling of the Special Report, the House may refer the matter to the Standing Committee on Parliamentary Privilege and Ethics.

Precedents

Reported cases

- 2.21** In the past decade there have been two cases of unauthorised disclosures of committee material being reported to the Legislative Council. The most recent of these is the case which gave rise to the current inquiry, discussed in Chapter 1. The other case, which arose in 1993, involved the publication in a newspaper of details of in camera evidence which had been given by a former Police Minister to the Joint Select Committee Upon Police Administration.²⁰
- 2.22** In that case, the joint committee attempted to ascertain the source of the disclosure in accordance with the standard procedure, without success. It then tabled a Special Report in both Houses, stating the publication was ‘of sufficient seriousness as could constitute a substantial interference or likelihood of such with the work of the Committee, the Committee system or the functions of the Houses’, but that ‘in this particular instance the disclosure will not interfere with the Committee Members’ work’.²¹ The Special Report concluded that the matter should be referred to ‘any Committee of Privileges of either House’.²²
- 2.23** The Special Report was referred to the Legislative Council Standing Committee upon Parliamentary Privilege (the predecessor to this Committee), for consideration and report. That Committee took evidence from the Chair of the joint committee, the journalist who wrote the article, and the acting editor of the newspaper. The conclusions and recommendations of the Committee are summarised below.

²⁰ Legislative Council Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993. The in camera evidence concerned alleged police corruption and failure to investigate criminal activity.

²¹ *Ibid*, Appendix 7, p. 36.

²² *Ibid*.

Breach of privilege and contempt

- 2.24** The Committee found that a breach of privilege had been committed by the person who originally disclosed the evidence (whose identity had not been discovered), the journalist who wrote the article, and the acting editor who approved its publication. However, in line with House of Commons precedents, the Committee was not prepared to recommend sanctions against those who gave the disclosure wider publicity, in the absence of any information as to the identity of the original source.²³
- 2.25** On the question of contempt, the Committee gave weight to the evidence of the Special Report, and the testimony of the joint committee Chair, that the publication had not interfered with the work of the Committee or deterred any witnesses from coming before it. As there was no evidence that the publication had obstructed or impeded the performance of the functions of the Committee or the House, the Committee found that no contempt had occurred.

Protection of in camera evidence

- 2.26** The Committee noted that the journalist and acting editor had given evidence that they had not been aware that the publication of in camera evidence could constitute a contempt of Parliament. It also noted that there may be others in the media who are similarly unaware of the relevant principles. Against this background, and in view of the need to minimise the risk of further disclosures occurring in future, the Committee made two recommendations concerning committee proceedings and the media:

That the Legislative Council resolve that the President issue a statement informing all members of the Press Gallery that the disclosure or publication of any details of evidence which is given in camera before a parliamentary committee, may constitute a breach of privilege and a contempt of Parliament...

That all media editors, and all new members of the Press Gallery be issued with guidelines regarding the reporting of the proceedings of Parliament and its committees, at the time when they receive security passes granting access to Parliament House.²⁴

- 2.27** The Committee also recommended that committees adopt more stringent procedures for protecting the confidentiality of in camera evidence, and suggested various possible procedures (see Appendix 1).

Privileges legislation

- 2.28** The Committee noted that there is uncertainty surrounding the law relating to parliamentary privilege in NSW as the powers of the Houses have not been defined by legislation. While the relevant common law principles have been stated clearly by the courts, 'the way that these principles are to be applied in any particular case is far from

²³ Ibid, paragraph 3.36.

²⁴ Ibid, paragraphs 3.40- 3.41.

clear.²⁵ In particular, ‘the boundaries between a power that is “necessary” and “self-defensive” and one which is “punitive” are in many cases uncertain and open to considerable debate’.²⁶ The Committee further noted that, if there is uncertainty concerning the Parliament’s powers in this area, such uncertainty is likely to be reflected in the attitude of persons who report on proceedings in Parliament and its committees.²⁷

- 2.29** In view of these concerns, the Committee recommended that the Parliament enact legislation to define the powers and privileges of the Houses, including the power to deal with breach of privilege and contempt.

Unreported cases

- 2.30** In addition to the two cases referred to above, there have been cases of unauthorised disclosure of committee material which have not been made the subject of a Special Report to the House. For example, in each of the two inquiries which did give rise to Special Reports, additional unauthorised disclosures occurred which the committees concerned did not pursue.²⁸

Administrative procedures to protect the confidentiality of committee material

- 2.31** When dealing with unreported evidence and other confidential material, Legislative Council committees commonly adopt certain administrative procedures to assist in protecting the confidentiality of the material. These include printing ‘Confidential’, ‘Draft’, or ‘In camera’ as appropriate on the material, and ensuring that material is hand delivered to Members’ offices in sealed envelopes. In some cases, certain additional procedures have been adopted by individual committees in particular cases. These include:

- printing watermarks on copies of confidential material (eg ‘Draft’ or ‘Confidential’)
- copying documents onto red paper which makes re-copying difficult
- printing warnings against disclosure on copies of material, advising that unauthorised disclosure may constitute contempt

²⁵ Ibid, paragraph 4.3.

²⁶ Ibid.

²⁷ Ibid, paragraph 4.7.

²⁸ Standing Committee Upon Parliamentary Privilege and Ethics, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993, evidence of the Chair of the Joint Select Committee upon Police Administration (Hon Duncan Gay MLC), 24 May 1993, p. 70; . General Purpose Standing Committee No. 3, *Cabramatta policing*, Report No. 8, July 2001, p. 58, footnote 130; p. 268, Minutes No. 42, entry 5; p. 59, footnote 130; p. 269, Minutes No. 42, entry 5.

- advising people who have provided submissions or other information to the Committee that any unauthorised disclosure of the material may constitute contempt
- requiring Members of the Committee to view material in the Director's office/ Black Rod's office/ Clerk's office (no copies being made).

Chapter 3 Procedures and precedents in other Parliaments

This chapter examines relevant provisions, procedures, and precedents in a number of other Parliaments relating to the unauthorised disclosure of committee material.

House of Commons (United Kingdom)

Provisions and procedures

3.1 The basic resolution of the House of Commons concerning unauthorised disclosure of committee information was passed in 1837, and affirmed what was the already ‘undoubted privilege of the House’, supported by earlier resolutions and case law.²⁹ The resolution, which provided the model for Legislative Council Standing Order 252 and equivalent standing orders in other Australian Houses, states that:

according to the undoubted privileges of this House, and for the due protection of the public interest, the evidence taken by any select committee of this House and the documents presented to such committee and which have not been reported to the House ought not to be published by any Member of such committee, or by any other person.³⁰

3.2 Although the resolution did not refer to the disclosure of committee deliberations and reports, the long standing practice of the House is that those matters remain private until reported to the House. The premature disclosure of deliberations, reports, evidence or documents, may be treated as a contempt or breach of privilege.³¹

3.3 The rule against disclosure is subject to two modern modifications which permit publication of evidence given in public before it reports to the House (Standing Order 136), and giving committees (and the Speaker where a committee is no longer in existence) power to authorise witnesses to publish evidence they have submitted (Standing Order 135).³²

3.4 In 1986, the House adopted a procedure for dealing with improper disclosure of select committee evidence or proceedings, in accordance with recommendations of the House’s Committee of Privileges. Under that procedure, the committee concerned seeks to discover the source of the leak and to assess whether it constitutes or is likely to constitute a

²⁹ House of Commons Committee of Privileges, *Premature disclosure of proceedings of select committees*, Second Report, Session 1984-85, p. v, paragraph 7.

³⁰ CJ (1837) 282; Parl Deb (1837) 38, cc 170-171, referred to in *Erskine May*, *ibid*, p. 118.

³¹ *Erskine May*, *ibid*, p. 120.

³² *Ibid*, p. 120.

substantial interference with the committee system or the functions of the House. If the Committee considers that there has been or is likely to be such interference, it reports to the House accordingly, and a report of this character stands automatically referred to the Committee on Standards and Privileges (previously, the Committee of Privileges).³³

- 3.5** The report of the Committee of Privileges in which these recommendations were made indicated that serious leaks constituting ‘substantial interference’ could include publications of significant material improperly acquired; leaks of clearly classified information; and cases where a member or other person has deliberately attempted to damage the working of a committee by premature press publication, or when such publications can be shown to have caused, or be likely to cause, substantial interference with the committee’s work. The Committee further stated that:

the ultimate criterion in all such cases lies, as it always has (see the Resolution of 1837) in the effect of the leak on the public interest. Leaks which simply cause annoyance or political or personal embarrassment should not be considered serious cases for the purposes of the rules of privilege. But, in the opinion of Your Committee, the test of public interest does embrace substantial interference with the effective working of a committee or the committee system or the functions of the House itself.³⁴

Precedents

Overview

- 3.6** The majority of cases of unauthorised disclosures in modern times have involved disclosure of the contents of draft reports. The approach which has been taken in these cases is summarised in *Erskine May* as follows:

Although successive Committees of Privileges have concluded that such interference with the work of select committees and contraventions of the Resolution of 1837 are a contempt of the House and damaging to the work of Parliament, in none of the modern cases involving draft reports has it been possible to identify those responsible for the original disclosure. In the absence of such information, Committee of Privileges have usually not been willing to recommend exercise of the House’s penal powers against those who gave wider publicity to the disclosure, and when they have done so the House has not been prepared to agree.³⁵

- 3.7** Sanctions recommended by the Committee of Privileges against members of the media in such cases have included: exclusion of the author of the article and the editor from the

³³ *ibid*, p. 119.

³⁴ House of Commons Committee of Privileges, *Premature disclosure of proceedings of select committees*, Second Report, Session 1984-85, paragraph 55.

³⁵ *Erskine May*, *ibid*, p. 119.

precincts for six months; temporary exclusion of a journalist from the precincts; and the reduction of the number of lobby passes available to the newspaper.³⁶

Recent cases

- 3.8** The two most recent cases of unauthorised disclosure investigated in the Commons arose in 1999.³⁷ Each case involved disclosure of draft reports to Ministers or officials. In each case, the Member responsible for the disclosure admitted responsibility (in one case, after an initial denial).
- 3.9** In the first case, the Member gave evidence that he had leaked the draft report because he disagreed with the direction the committee was taking and wished to alert the relevant Ministers that their departments would be criticised.³⁸ The matter was referred to the Select Committee on Standards and Privileges, which found that the Member's actions were a serious interference with the work of the committee system, and fell below the standards which the House is entitled to expect from its Members. The Committee recommended that the Member apologise to the House by means of a personal statement, and be suspended from the service of the House for ten sitting days.³⁹
- 3.10** The Committee also discussed the position of Members and officials who receive leaked committee information. In this regard, the Committee specified that:
- (a) A Member who receives leaked committee papers should make no use of them and return them without delay to the clerk of the committee. The Prime Minister should amend the ministerial code so as to require Ministers and Private Secretaries to comply with this.⁴⁰
 - (b) The duty of an official (including any political adviser) who receives leaked committee papers is exactly the same as that of a Member, namely, to make no use of the papers and to return them without delay to the committee clerk.⁴¹ Once the official has done this, the official should inform his or her Minister.⁴²
- 3.11** In the second recent case, the Parliamentary Private Secretary to the Chancellor of the Exchequer (PPS) was approached by a number of Members of a particular committee in

³⁶ Ibid, p. 119, footnote 4.

³⁷ As recorded on the website of the Committee on Standards and Privileges of the House, at: http://www.parliament.uk/parliamentary_committees/standards_and_privileges/standards_reports_and_publications.cfm

³⁸ Committee on Standards and Privileges, *Premature disclosure of reports of the Foreign Affairs Committee*, Eighth Report, June 1999, paragraph 7.

³⁹ Ibid, para 22.

⁴⁰ Ibid, para 27.

⁴¹ Ibid, para 31.

⁴² Ibid, para 30.

relation to the Treasury's refusal to allow its officials to give evidence to the committee. The PPS asked for, and obtained, a copy of a draft report. He then held discussions with Treasury officials about the giving of evidence, but did not discuss or disclose the draft report.

- 3.12** Despite the evidence of the PPS that one of the members of the committee had given him the draft report, all members of the committee provided correspondence denying responsibility.
- 3.13** In an initial report on the matter, the Select Committee on Standards and Privileges concluded that the PPS had committed two offences: asking for a copy of the draft report, and refusing to identify the person who had provided it to him. The Committee recommended that the PPS apologise to the House for his conduct by means of a personal statement, and that he be suspended from the House for three sitting days. The Committee specified that this penalty took account of the mitigating circumstances (eg that the PPS had apologised for his conduct), and that otherwise, a longer period of suspension would have been recommended.⁴³
- 3.14** Subsequently, a member of the original committee wrote to the Committee on Standards and Privileges admitting that she had allowed the PPS to sight her copy of the draft report. She offered her full apologies for having done so, and for not being forthcoming earlier, and stated she would resign from the committee.⁴⁴
- 3.15** In a second report on the matter, the Committee on Standards and Privileges noted that there were mitigating circumstances in relation to the Member's conduct, such as that she was not an experienced Member of the House, and had admitted and apologised for her conduct. However, the committee noted that the Member had aggravated her original offence by denying responsibility. The Committee therefore recommended that the Member apologise to the House by means of a personal statement, and be suspended from the House for five sitting days.⁴⁵

Australian Senate

Relevant provisions and procedures

- 3.16** Standing Order 37 provides that the evidence taken by a committee and documents presented to it, which have not been reported to the Senate, shall not, unless authorised by the Senate or the committee, be disclosed to any person other than a member or officer of the committee.

⁴³ Select Committee on Standards and Privileges, Tenth Report, *Unauthorised receipt of a draft report of the Social Security Committee*, July 1999, paragraph 14.

⁴⁴ Select Committee on Standards and Privileges, Eleventh Report, *Unauthorised receipt of a draft report of the Social Security Committee*, July 1999, paragraph 2.

⁴⁵ *Ibid*, paragraph 6.

- 3.17** Privilege Resolution No. 6 defines matters constituting contempts to include unauthorised disclosure of a document submitted to a committee which the committee has directed to be treated as confidential; oral evidence taken by a committee in private session or the report of such evidence; and any proceedings of a committee conducted in private session or report of such proceedings.
- 3.18** It is also a criminal offence under section 13 of the *Parliamentary Privileges Act 1987* (Commonwealth) to publish or disclose, without the authority of a House or committee, a confidential submission, oral evidence taken in camera or a report of such evidence.
- 3.19** An order of the Senate, adopted on the recommendation of the Senate Committee of Privileges, requires committees to investigate in a preliminary way any unauthorised disclosure of their unpublished materials, and form a conclusion about whether the disclosures tended to interfere with their work, before raising such disclosures as matters of privilege for investigation by the Privileges Committee.⁴⁶ This is similar to the House of Commons procedure referred to earlier. In the Senate, the procedure preserves the right of any individual Senator to raise a matter of privilege under Standing Order 81.⁴⁷

Precedents

- 3.20** The Senate Committee of Privileges has considerable experience in dealing with cases involving unauthorised disclosure. For example, in the period between February 1988 and June 2002, 17 such cases were considered.⁴⁸ The matters considered by the Committee have included unauthorised disclosures by Senators, ministerial staff, and members of the media. The Committee has made findings of contempt in various cases within these categories, as well as findings against public servants who have received and retained leaked information. In the particular circumstances of each case, however, the only penalties which the committee has recommended have been in relation to unauthorised disclosures by the media.

Disclosures by identified Senators

- 3.21** In most cases considered by the Committee, the original source of the disclosure has not been found, as has been the case in other Houses. However, even where the source has been identified and the Committee has made a finding of contempt against the Senator concerned, no further penalty has been recommended in the circumstances.
- 3.22** Even so, the Committee has stated that, in inquiries concerning unauthorised disclosures, it is prepared to investigate Senators with the same rigour it applies to others:

⁴⁶ *Oggers' Australian Senate Practice*, 10th ed, 2001, Canberra, pp. 420 (resolution of the Senate 20 June 1996, J361).

⁴⁷ Resolution 20 June 1996, J361, paragraph 2.

⁴⁸ Senate Committee of Privileges, *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002*, 107th Report, August 2002, paragraph 4.43.

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 findings against them.⁴⁹

Public servants

- 3.23** In some cases the Committee has considered possible contempts in respect of ministerial staff who have disclosed leaked material to departments, and departmental officers who have received such material.
- 3.24** In a recent case, a Minister's office obtained successive copies of a draft majority report for the purpose of assisting in the drafting of the minority report. The Minister's office provided a final copy of the report to the relevant department.
- 3.25** The Committee of Privileges found that the Minister's staff member had improperly disclosed the majority report to the department, but that it would not be appropriate to make a finding of contempt against the officer personally, as responsibility rested with his Minister. As there was no conclusive evidence that the Minister had known the officer had come into possession of the report, the Committee could not find that the Minister had committed a contempt. However, the Committee did find a contempt had been committed by an unidentified officer or officers in the department, in that they had received and retained a copy of the majority report without authority of the committee. Concerning the practice of providing draft reports to ministerial and departmental offices, the Committee commented:

The committee considers the practice of using the resources of the executive, both within a minister's office and within the department, to assist government senators in the preparation of a Senate committee report to be inappropriate. It is inevitable that the distinction between Senate committee deliberations and direct government influence on the outcome of those deliberations will become blurred.⁵⁰

- 3.26** In some other cases involving public servants, no contempt has been found, but the Committee has drawn attention to the obligations of public servants to be aware of parliamentary privilege.⁵¹

The media

- 3.27** As noted earlier, the only penalties which the Senate Committee has recommended in cases of unauthorised disclosure have been in relation to media disclosures. The first such case occurred in 1971 and involved the premature disclosure in two newspapers of details of a committee report due for tabling the following day. Despite apologies from the editors of the newspapers concerned, the Committee recommended that a contempt be found, and

⁴⁹ Ibid.

⁵⁰ Senate Committee of Privileges, *Possible unauthorised disclosure of parliamentary committee proceedings*, 74th report, December 1998, paragraph 2.52.

⁵¹ Ibid, paragraph 1.12, referring to the Committee's 9th Report (1985), and 22nd Report (1990).

that the editors be formally reprimanded by the Senate. The Senate adopted the report, and the editors were duly reprimanded at the bar of the Senate.⁵²

3.28 The next relevant case arose in 1984, and concerned publication in a newspaper of in camera evidence. The Committee found a contempt had been committed by the editor, the author, and the publisher of the relevant articles.⁵³ However, as the source of the information was undetected, the committee considered it would be unfair to impose a penalty on the recipients, though it placed the persons concerned on notice that they could not expect immunity from penalty in future. The Senate did not consider the report between its tabling and the dissolution of both Houses more than two years later.⁵⁴

3.29 This case reflects the approach which the Committee took to media disclosures generally up until the publication of its 74th report in 1998. That approach was summarised by the Committee as follows:

the committee has concentrated almost exclusively on attempts to find the source, virtually ignoring the role of the media in publishing such disclosures. In accordance with the views expressed in the 1984 case, it has not been willing to punish the publisher of the information without being able to penalise the source.⁵⁵

3.30 However, in its 74th report, the Committee signalled a change in its future approach to such matters:

The media, if they knowingly receive a leaked document or an improper briefing on committee proceedings, are complicit in any undue attempts to influence or distort the outcome of deliberations of a committee. The committee therefore warns media recipients of leaked information that, while it has in the past been reluctant to punish the media without satisfying itself as to the source of the information, it may not be so restrained in future.⁵⁶

3.31 The next relevant case involved what the Senate Committee regards as the most serious disclosure matter to have been raised in recent times.⁵⁷ In that case, a national newspaper published articles based on an in camera document provided to the Joint Committee on Corporations and Securities.⁵⁸ Elaborate precautions had been taken by the Committee to

⁵² Ibid, paragraph 1.6, referring to the Committee's 1st Report, PP No. 163/1971.

⁵³ 107th Report, *ibid*, paragraph 1.37.

⁵⁴ Ibid, paragraph 1.38. The Committee's further recommendation that the Senate's power to impose a fine be placed beyond doubt, was implemented with the passage of the *Parliamentary Privileges Act 1987*: 107th Report, paragraph 1.38.

⁵⁵ 74th Report, *ibid*, para 1.9.

⁵⁶ Ibid, paragraph 1.40.

⁵⁷ 107th Report, para 4.59.

⁵⁸ Ibid.

keep the document confidential. The joint committee regarded the disclosure as constituting a serious obstruction to its work.

3.32 Although the source of the improper disclosure was not established, as it had warned in its 74th report, the Committee of Privileges 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 disclosure 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.⁵⁹

3.33 The same national newspaper was the subject of a further report by the Committee, which concerned publication of a draft committee report. In that report, the Committee found that an unknown person and the publisher of the newspaper had committed a contempt of the Senate. However, it did not recommend a penalty, because the case was not of the same order of seriousness as the previous matter involving the newspaper, and the case had been referred to the Committee before the outcome of the previous case was known.⁶⁰

Guidelines concerning treatment of improper disclosures

3.34 In its 74th report referred to above, the Committee of Privileges issued the following general guidelines concerning its future approach to improper disclosures:

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

⁵⁹ Ibid, paragraph 4.60.

⁶⁰ Ibid, paragraph 4.62.

such matters are referred to the committee in the future, both the disclosure, if discovered, and the media, can be expected to receive severe treatment.

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.⁶¹

- 3.35** Following 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 disclosures; including guidelines developed for committees to minimise inadvertent release, and asking them to draw the committee's comments to the attention of their 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, and advised heads of all Commonwealth departments of its tabling.⁶²
- 3.36** In an earlier report published in 1990, the Committee recommended certain procedures to ensure that persons making submissions are aware of the prohibition against unauthorised disclosure of committee proceedings and to minimise the risk of inadvertent release.⁶³ The Committee recommended 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; and that
 - persons making submissions to a committee be notified when such submissions have been publicly released by the committee.⁶⁴

House of Representatives

Relevant provisions and procedures

- 3.37** Standing Order 346 provides that the evidence taken by a committee and documents presented to it, as well as proceedings and reports of the committee, which have not been

⁶¹ 74th Report, *ibid*, paras 1.47 – 1.51.

⁶² 107th Report, *ibid*, paragraph 5.30.

⁶³ 22nd Report, *Possible unauthorised disclosure of Senate committee submission*, May 1990.

⁶⁴ *Ibid*, paragraph 18.

reported to the House, must not, unless authorised by the House or the committee, be disclosed to any person other than a member or officer of the committee.⁶⁵

3.38 Under section 13 of the Parliamentary Privileges Act 1987, as noted above, it is an offence to publish or disclose, without the authority of the House or committee, a confidential submission, oral evidence taken in camera or a report of such evidence.

3.39 The *House of Representatives Practice* describes the procedures followed for dealing with complaints of premature disclosure:

A Member wishing to raise a complaint in this area must raise it in the House at the first appropriate opportunity... If it has not already done so, the committee in question must then consider the matter – in particular it must consider whether the matter has caused or is likely to cause substantial interference with its work, with the committee system or with the functioning of the House. The committee must also take whatever steps it can to ascertain the source(s) of the disclosure(s). The committee must inform the House of the results of its consideration and, if it finds that substantial interference has occurred, it must explain why it has reached that conclusion. The issue is then considered by the Speaker, who determines whether or not to allow precedence to a motion on the matter. Should a committee conclude that substantial interference has not occurred the House should be informed accordingly.

...The [Committee of Privileges] has expressed the view that complaints in this area should not be given precedence unless the Speaker is of the opinion that there is sufficient evidence to enable the source(s) of disclosure to be identified or that there are such special circumstances (for example, the protection of sources or witnesses) as would warrant reference to the committee.⁶⁶

Precedents

3.40 According to the *House of Representatives Practice*, in some cases committees have chosen to take no action on unauthorised disclosures of the contents of their reports or deliberations, on the basis that it has been thought counter-productive to give further publicity and credence to such articles.⁶⁷

3.41 Of the cases which have been pursued and referred to the Committee of Privileges of the House, all have involved disclosures to the media. In none of these cases has the source of disclosure been found, and in the absence of such information, the Committee has generally not made any recommendations against the media.⁶⁸ The exception to this was a case in 1973, where the Committee made findings of breach of privilege against the editor and journalist of the newspaper in which the information relating to the contents of a draft

⁶⁵ *House of Representatives Practice*, 4th ed, ed Ian Harris, Department of the House of Representatives, Canberra, 2001, p. 669.

⁶⁶ *Ibid*, pp. 715-716.

⁶⁷ *Ibid*, pp. 669-670.

⁶⁸ See summary of privilege cases at *House of Representatives Practice*, *ibid*, Appendix 25.

committee report had been published. The Committee recommended that the editor be required to publish an adequate and appropriate apology, and that the Speaker bring to the notice of the president of the press gallery and all journalists the long-standing rule against premature disclosure. The House agreed to the latter recommendation, but no action was taken against the editor, who had died by the time the House considered the matter.⁶⁹

3.42 In a number of its reports, the Committee of Privileges has recommended the introduction of procedures to minimise the risk of unauthorised disclosures occurring. For example, in 1995, the committee recommended that:

- all new Members, together with all new staff members who may be involved with committee inquiries, should be informed as to the rules against unauthorised disclosure of committee information;
- applicants for press gallery passes should also be informed of the rules in these matters, and consideration should be given to having passes incorporate reference to the rules including the possibility that a pass may be withdrawn for a period for contravention of these rules;
- consideration should be given to the use of stamps in appropriate places on certain documents to indicate that they should not be published without a check to ascertain whether publication has been authorised.⁷⁰

3.43 In 2001, the Committee recommended that the following procedures be adopted in the handling of in camera transcripts:

- A minimum number of copies be made to meet the needs of witnesses, committee members and secretariat staff;
- Copies be made on a distinctively coloured paper to stand out from other material and be appropriately labelled as confidential;
- Copies be numbered and a register be kept of the issuing of copies;
- Both committee members and secretariat staff retain in camera material in a lockable cabinet that is locked at times when the area is not occupied;
- Committee members return in camera evidence to secretariats when they have no further use for it; and
- Secretariats destroy copies of in camera evidence when they have no further use for them.⁷¹

⁶⁹ Ibid, privilege case no. 51.

⁷⁰ See House of Representatives Committee of Privileges, *Report concerning the unauthorised disclosure of the report by the House of Representatives Standing Committee on Economics, Finance and Public Administration*, June 1999, para 1.19, referring to recommendations made by the Committee in 1995.

⁷¹ Committee of Privileges, *Report concerning the possible unauthorised disclosure of in camera evidence to the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade*, June 2001, para 1.53.

3.44 The Committee has also recommended the adoption by the House of a resolution formalising the procedures to be followed in investigations of unauthorised disclosures. In particular, the committee has emphasised the importance of the committee from which the disclosure arose conducting its own investigations to attempt to ascertain the source of the disclosure, and of that committee reaching a conclusion as to whether or not there has been substantial interference with the work of the committee house or committee system.⁷²

Other Australian State Parliaments

3.45 In general, the relevant provisions and procedures in the other Australian State Parliaments are similar to those which apply in the Legislative Council. These include:

- A Standing Order equivalent to Legislative Council Standing Order 252 relating to disclosure of evidence and documents.
- Unauthorised disclosure may be treated as breach of privilege or contempt.
- Provisions enable committees to authorise publication of information prior to reporting.
- Where unauthorised disclosures occur, the committee concerned may report the matter to the House, or the matter may be raised as a matter of privilege by a Member in the House. The House, or the Presiding Officer, may refer the matter to a committee of privileges, or equivalent committee, for inquiry and report to the House.

3.46 Cases of unauthorised disclosure which have been reported to or raised in the House concerned have been rare. Such cases include:

Year	House	Disclosure of/to	Source	Finding	Recommendation
1978	Tasmanian Legislative Assembly	Committee's deliberations and proceedings disclosed in newspaper. ⁷³	Not found	None	Privileges Committee did not report on the matter.

⁷² Ibid, para 1.56, and Appendix D.

⁷³ Select Committee on Victimless Crime, Tasmanian House of Assembly, *Report on newspaper article in 'The Examiner' of 7 September 1978*, 1978. Report referred to Privileges Committee: House of Assembly, *Votes and Proceedings*, No. 17, 4 October 1978.

Year	House	Disclosure of/to	Source	Finding	Recommendation
1983	Tasmanian Legislative Council	Unreported recommendations published in newspaper, and disclosed to Premier.	Unknown source disclosed to media; two Members disclosed to Premier	Both Members guilty of contempt	No recommendation against Members in view of review of Standing Orders and privileges legislation. ⁷⁴
1997	Western Australian Legislative Council	Draft report disclosed to university professor	Not found	Breach of privilege	None ⁷⁵
1999	Queensland Legislative Assembly	Committee correspondence published in newspaper.	Not found	Minimal likelihood of identifying source.	House adopt procedure relating to unauthorised disclosures (House of Commons procedure with modifications). ⁷⁶
2001	Queensland Legislative Assembly	Deliberations of committee, referred to in House.	Member	Various; no finding of contempt.	Redraft relevant Standing Order in more precise terms. ⁷⁷

3.47

In the final case referred to in the table above, the Members' Ethics and Parliamentary Privileges Committee of the Queensland Legislative Assembly recommended the introduction of a new Standing Order concerning the confidentiality of committee proceedings and disclosure of evidence and documents. The new Standing Order was to replace the existing Standing Order, which is in similar terms to Legislative Council Standing Order 252. In relation to the existing Standing Order, the Committee noted that, while disclosure of 'evidence taken by' and 'documents presented to' a committee is prohibited, the position regarding disclosure of 'committee proceedings' is unclear.⁷⁸ The

⁷⁴ Committee of Privileges, Tasmanian Legislative Council, *Report of the Committee of Privileges*, December 1983, pp 7-8.

⁷⁵ Select Committee of Privilege, Western Australian Legislative Council, *Report*, October 1997.

⁷⁶ Members' Ethics and Parliamentary Privileges Committee, Queensland Legislative Assembly, *Report on a matter of privilege – unauthorised release of correspondence between a committee and ministers*, Report No. 42, 7 June 2000.

⁷⁷ Members' Ethics and Parliamentary Privileges Committee, Queensland Legislative Assembly, *Report on a matter of privilege – unauthorised disclosure of committee proceedings*, Report No. 48, 31 October 2001 (Section 7 'Recommendations').

⁷⁸ *Ibid*, Section 6 'Findings', paragraph 3.

Committee commented that this ambiguity was unhelpful, particular to newly elected Members.

3.48 In the recommended Standing Order, the prohibition on disclosure extends to 'committee proceedings' and reports. 'Committee proceedings' is defined to include:

- evidence taken by the committee by way of in camera hearings
- written or oral submissions presented to the committee
- written briefing papers and other documents prepared by the committee secretariat
- draft reports by the committee
- correspondence between the committee and witnesses, departments and ministers
- private deliberations of the committee and the records of those proceedings.

Chapter 4 Proposed Guidelines

4.1 The terms of reference for this inquiry require the Committee to inquire into and report on:

appropriate guidelines for dealing with unauthorised disclosure of debates, reports or proceedings of Legislative Council committees.

4.2 Chapters Two and Three of this report outline the current practices for dealing with unauthorised disclosure in the NSW Legislative Council and other parliaments. The guidelines set out below, under Recommendation 1, primarily consolidate and clarify the current practices which apply in the NSW Legislative Council. It is envisaged that these guidelines will assist Members and their staff, other participants in committee inquiries, and any future recipients of unauthorised disclosures (should such issues arise), to fully understand the nature of their obligations and the relevant procedures.

4.3 However, there are a number of areas in which the recommended guidelines draw upon the practices in (and observations from) other parliaments to further clarify and develop current practices. These include:

- The inclusion of a comprehensive and unambiguous statement of the nature and extent of the prohibition against unauthorised disclosure and the classes of persons to whom the prohibition applies;
- A statement of some of the forms of damage which may be caused by unauthorised disclosures;
- A statement of the obligations of recipients of unauthorised disclosures; and
- Identification of the imposition of sanctions against media organisations as an option available to the House in dealing with the publication of unauthorised disclosures.

Recommendation 1

That the House adopt the following guidelines concerning unauthorised disclosures of debates, reports or proceedings of Legislative Council committees:

1. *Rule against unauthorised disclosure*

1.1 Evidence received by a committee, the proceedings of a committee, and draft committee reports, may not be disclosed by any person before the committee has reported to the House, unless the committee has authorised such disclosure.

1.2 The rule applies to all persons who have access to committee information, including:

- (a) committee Members and their staff,
- (b) staff of the committee secretariat,
- (c) any witness who gives evidence to a committee,
- (d) any person who provides a written submission to a committee,
- (e) any person to whom committee information has been improperly disclosed. This may include another Member, staff of a Member, a departmental officer, or a member of the media.

1.3 The rule applies to all information received or generated by a committee, including:

- (a) oral evidence provided to a committee at an in camera hearing and the written transcript of such evidence,
- (b) documents tendered at a hearing,
- (c) written submissions received by a committee,
- (d) written briefing papers and other documents prepared by the committee secretariat,
- (e) draft reports, including draft dissenting statements,
- (f) correspondence between the committee and other persons in relation to an inquiry,
- (g) deliberations of the committee, including decisions made by the committee in private, comments made by committee members during debate within the committee, and the minutes of such deliberations.

2. *Damage caused by unauthorised disclosures*

2.1 Unauthorised disclosure of committee information may result in damage to individual participants in committee inquiries, the integrity of the committee system, and the public interest. Such damage may include:

- (a) jeopardising witnesses and others who provide confidential information to committees, by exposing them to the risk of reprisals or other forms of adverse treatment as a result of giving evidence,
- (b) deterring future witnesses from giving confidential evidence to committees,
- (c) impeding the ability of a committee to reach agreement, by exposing the committee's incomplete deliberations to public scrutiny,
- (d) undermining the relationship of trust between members of the committee, which is necessary for committees to function effectively,
- (e) lowering public confidence in the committee, the committee system and the Parliament generally.

3. *Obligations of recipients of unauthorised disclosures*

3.1 A recipient of an unauthorised disclosure of committee information must:

- (a) immediately inform the committee secretariat of receipt of the information, and the circumstances of such receipt;
- (b) return the information to the committee secretariat as soon as possible; and
- (c) not disclose the information to any person or record or copy it in any way.

3.2 Experience in this and other Parliaments suggests that recipients of leaked information commonly include members of the media, ministerial staff, and departmental officers.

4. *Contravention – Contempt*

4.1 Contravention of the rule against unauthorised disclosure may constitute a contempt of Parliament.

5. *Contravention – Procedure*

5.1 Where an unauthorised disclosure of committee information occurs, the following procedure applies:

- (a) The committee concerned seeks to identify all possible sources of the disclosure.
- (b) The committee decides whether the disclosure is significant enough to justify further inquiry.
- (c) If the committee considers that further inquiry is warranted, the Chair of the committee writes to all persons who had access to the proceedings, requesting an indication as to whether the person was responsible for the disclosure or is able to provide any information that could be of assistance in determining the source of the disclosure.
- (d) The committee comes to a conclusion as to whether the leak is of sufficient seriousness as to constitute a substantial interference with the work of the committee, the Legislative Council committee system, or the functions of the House. This occurs whether or not the source of the disclosure is discovered.
- (e) If the committee concludes that the leak is of sufficient seriousness, it makes a special report to the House, describing the circumstances and the investigations it has made, and recommending that the matter be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report.
- (f) Following tabling of the Special Report, the House may refer the matter to the Standing Committee on Parliamentary Privilege and Ethics.

5.2 If the House refers the matter to the Standing Committee on Parliamentary Privilege and Ethics, that Committee may undertake such investigations of the matter as it considers appropriate, including taking evidence on oath or affirmation from the Members of the Committee from which the disclosure arose.

6. *Contravention - Sanctions*

- 6.1 In a report to the House, the Standing Committee on Parliamentary Privilege and Ethics may find that the person responsible for the unauthorised disclosure is guilty of contempt and that appropriate sanctions be imposed.
- 6.2 If the person responsible is a Member of the House, appropriate sanctions may include: reprimand or admonishment by the House; the provision of an apology to the House; and/or suspension from the service of the House for a defined period.
- 6.3 If the unauthorised disclosure was published in the media, appropriate sanctions may include: temporary exclusion from the parliamentary precincts; suspension of parliamentary accreditation; suspension of accreditation with the Parliamentary Press Gallery; the publication of an appropriate apology; and/or reprimand by resolution of the House. Such sanctions may be imposed even in cases where the person responsible for the original disclosure has not been found.

Recommendation 2

That a copy of the guidelines adopted by the House be provided to all current and future Members of the House and their staff, all Members of the Parliamentary Press Gallery, and the Director-General of the Premier's Department for dissemination to relevant public officials and ministerial staff.

Recommendation 3

That all persons who provide written submissions, or give oral evidence to, a committee be advised of the nature and extent of the prohibition against unauthorised disclosure and the application of the rule to persons providing submissions or oral evidence.

Appendix 1

Procedures recommended by Standing Committee upon Parliamentary Privilege concerning in camera evidence

Extracted from: *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence (October 1993)*

Appendix 2

Minutes of the Committee's proceedings

Minutes

Meeting No. 16

Monday 18 March 2002

at Parliament House, Sydney at 2.30 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Mr Primrose
Mr Kelly	Ms Saffin
Revd Mr Nile	

Apologies were received from Ms Gardiner and Ms Forsythe.

In attendance: Lynn Lovelock, Velia Mignacca and Janet Williams.

Unauthorised disclosure of debates, reports and proceedings

The Committee continued to deliberate.

Resolved, on motion of Ms Saffin: That the Clerk prepare a background paper outlining procedures adopted in other parliaments.

The Committee adjourned at 3.15 pm sine die.

Meeting No. 19

Thursday 28 August 2002

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Gardiner	Mr Primrose
Mr Kelly	Revd Mr Nile

Apologies were received from Ms Fazio, Ms Forsythe, and Ms Saffin.

In attendance: Lynn Lovelock, Velia Mignacca and Janet Williams.

Other current inquiries

The Committee continued to deliberate.

Resolved, on motion of Mr Primrose: That the Clerk prepare briefing papers on the Committee's current inquiries, especially the review of the Members' code of conduct, and the inquiry concerning the unauthorised disclosure of committee proceedings.

The Committee adjourned at 1.14 pm sine die.

Meeting No. 26

Thursday 21 November 2002

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Mr Kelly
Ms Forsythe	Revd Mr Nile
Ms Gardiner	Mr Primrose
Mr Hatzistergos	

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca and Janet Williams.

Procedures for dealing with unauthorised disclosures

The Committee deliberated.

Resolved, on the motion of Revd. Mr Nile, that a Chair's draft report be prepared including options for recommendations to be adopted by the Committee.

The Committee adjourned at 2.20 pm sine die.

Meeting No. 27

Tuesday 3 December 2002

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Mr Kelly
Ms Forsythe	Revd Mr Nile
Ms Gardiner	Mr Primrose
Mr Hatzistergos	

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca and Janet Williams.

Confirmation of Minutes

The minutes of meeting no. 26, as circulated, were confirmed on the motion of Revd Mr Nile.

Procedures for dealing with unauthorised disclosures

The Chair's draft report entitled "Report on guidelines concerning unauthorised disclosure of committee proceedings", as circulated, was taken as read.

The Committee deliberated.

Resolved, on the motion of Ms Fazio: That paragraph 1.2 (e) of the proposed guidelines under paragraph 4.3 of the draft report, be amended by deleting the words "a Minister" and "or Minister".

Resolved, on the motion of Revd Mr Nile: That the report, as amended, be adopted.

Resolved, on the motion of Revd Mr Nile: That the report be signed by the Chair and presented to the House.

The Committee adjourned at 2.00 pm sine die.