



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

**Special Report from the Public  
Accountability Committee  
concerning an unauthorised  
disclosure of in camera evidence**



Report 91

March 2023

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Privileges Committee

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## Terms of reference

1. That Report no. 14 of the Public Accountability Committee entitled "Special report on the unauthorised disclosure of *in camera* evidence given on 29 June 2022", dated August 2022, be referred to the Privileges Committee for inquiry and report by the last sitting day in 2022.
2. No member, or substitute member, of the Public Accountability Committee who had access to the *in camera* transcript referred to in the Special report may participate in the inquiry, and the Leader of the Government and any relevant cross-bench member may nominate substitute members for the purposes of the inquiry.

The terms of reference were referred to the Committee by the Legislative Council on 10 August 2022.<sup>1</sup>

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<sup>1</sup> *Minutes*, NSW Legislative Council, 10 August 2022, pp 3560-3561.

## Committee details

### Committee members

<b>The Hon Peter Primrose MLC</b>	Australian Labor Party	<i>(Chair)</i>
<b>Revd the Hon Fred Nile MLC</b>	Christian Democratic Party	<i>(Deputy Chair)</i>
<b>The Hon Scott Barrett MLC*</b>	The Nationals	
<b>The Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Ms Sue Higginson MLC**</b>	The Greens	
<b>The Hon Shayne Mallard MLC</b>	Liberal Party	
<b>The Hon Taylor Martin MLC</b>	Liberal Party	
<b>The Hon Chris Rath MLC***</b>	Liberal Party	

\* Mr Barrett substituted for Mr Fang for the duration of the inquiry.

\*\* Ms Higginson substituted for Ms Faehrmann for the duration of the inquiry.

\*\*\* Mr Rath substituted for Mr Farlow for the duration of the inquiry.

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## Chair's foreword

On 29 June 2022, as part of its Inquiry into the appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas, the Public Accountability Committee (PAC) took *in camera* evidence from Ms Amy Brown, Secretary, Department of Enterprise, Investment and Trade, and Chief Executive Officer, Investment NSW.

That evidence was subsequently disclosed without the authority of the committee to *The Australian* newspaper and was the subject of a report in *The Australian* on 7 July 2022. This was an appalling breach of the trust of the witness and an inexcusable abuse of power and responsibility.

The PAC subsequently conducted an investigation into the unauthorised disclosure but was not able to identify the source of the disclosure. In those circumstances, the PAC made a special report to the House, recommending the matter be referred to this Committee for inquiry and report. The House referred this inquiry to the Committee on 10 August 2022.

This report considers the events leading up to the referral, the relevant standing orders, guidelines and procedures in place governing the receipt and publication of *in camera* evidence, the past practice of the Legislative Council where there have been unauthorised disclosures of *in camera* evidence, and the appropriateness of a finding of contempt.

While deciding not to conduct further investigations into the source of the unauthorised disclosure, nor to make a finding of contempt, the Committee has used the opportunity this referral has provided to condemn the behaviour of the individual responsible for the unauthorised disclosure and to remind members of their responsibilities to witnesses, colleagues and the Parliament when performing their committee duties and handling *in camera* evidence.

I would like to thank the Committee members and substitute Committee members for their work on this inquiry. Thanks also to the Committee secretariat who have been of great assistance to the inquiry, particularly with the preparation of a discussion paper which helped to inform the Committee's approach to the issues raised by the referral.



Hon Peter Primrose MLC  
**Committee Chair**



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## Finding

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### Finding 1

As the Public Accountability Committee was unable to identify the individual responsible for the unauthorised disclosure of the *in camera* evidence of Ms Amy Brown after conducting its own investigations, the Privileges Committee, while acknowledging the seriousness of the unauthorised disclosure, is not minded to conduct further investigations into the source of the unauthorised disclosure, nor is it minded to make a *prima facie* finding of contempt.

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## **Conduct of inquiry**

The terms of reference for the inquiry were referred to the Committee by the Legislative Council on 10 August 2022.

The Committee prepared a discussion paper for the inquiry, which is at Appendix 1 to this report.

The Committee received one submission from the Clerk of the Parliaments, which is at Appendix 2 to this report.

Inquiry related documents are available on the Committee's website, including the submission.

## Chapter 1 Background and conduct of the inquiry

This chapter provides a brief background to this inquiry, as well as the process that led to the commissioning of a discussion paper and receipt of a submission from the Clerk of the Parliaments. It then goes on to lay-out what will be contained in the following chapters.

### Background

- 1.1 On 29 June 2022, as part of its Inquiry into the appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas, the Public Accountability Committee (PAC) took *in camera* evidence from Ms Amy Brown, Secretary, Department of Enterprise, Investment and Trade, and Chief Executive Officer, Investment NSW.
- 1.2 That evidence was disclosed without the authority of the committee to *The Australian* newspaper and was the subject of a report in *The Australian* on 7 July 2022.
- 1.3 The PAC subsequently conducted an investigation into the unauthorised disclosure but was not able to identify the source of the disclosure. In those circumstances, the PAC tabled a special report in the House, recommending the matter be referred to this Committee for inquiry and report.<sup>2</sup>
- 1.4 On 10 August 2022, on the motion of the Chair of the PAC, Ms Faehrmann, the House adopted this recommendation and referred this inquiry to this Committee.<sup>3</sup>
- 1.5 The material facts leading up to and including the unauthorised disclosure, as set-out in the Special Report, are as follows:
  - On 29 June 2022, towards the end of the hearing at which Ms Amy Brown was giving evidence, in response to a line of questioning about the suitability of Ms Jennifer West as the preferred candidate for the Senior Trade and Investment Commissioner to the Americas, Ms Brown stated that she would prefer to give this evidence in private. The Committee agreed to this request and ended the public hearing.
  - Ms Brown gave her evidence *in camera*, with the only other people present in the room being the seven substantive members of the Committee, Ms Sharpe and Mr Mookhey (participating), the secretariat and Hansard reporters.
  - On the evening of 29 June 2022, the password-protected *in camera* transcript was emailed to members of the PAC, their staff and the whips. Password access to the transcript was emailed separately and immediately after the email containing the transcript. The public and *in camera* transcripts were emailed to Ms Brown on 4 and 5 July 2022.
  - Not being one of the original recipients of the *in camera* transcript, on 1 July 2022, Ms Jenny West requested a copy of the transcript. On 6 July the PAC met and resolved to provide Ms West a copy and to notify Ms Brown that this was to occur.

<sup>2</sup> Public Accountability Committee, *Special report on the unauthorised disclosure of in camera evidence given on 29 June 2022*, Report no 14, August 2022.

<sup>3</sup> *Minutes*, NSW Legislative Council, 10 August 2022, pp 3560-3561.

- On 7 July 2022, *The Australian* newspaper published an article entitled 'NY post dirt dug after job pulled', which quoted extensive text from the *in camera* transcript. The reporters, Yoni Bashan and Christine Lacy stated that they had obtained a copy of the transcript.

**1.6** The steps taken by the PAC in response to the unauthorised disclosure and the basis for their recommendation that the House refer the matter to this Committee are as set out below:

- The PAC met on the day the story containing the leaked *in camera* transcript was published in *The Australian* newspaper to determine who had access to the information and how the Committee ought to respond.
- On behalf of the Chair, the Director of the committee wrote to everyone who had access to the *in camera* transcript to ask the individual responsible to come forward or for individuals to provide any information that may be of assistance to the investigation.
- Responses were received from all members and staff contacted, with no one coming forward to take responsibility for the disclosure, nor to provide information on who the individual responsible might be.
- Having failed to identify the person responsible for the unauthorised disclosure, the committee adopted a Special Report to the House in which it recommended that the matter be referred to the Privileges Committee.<sup>4</sup>

**1.7** In coming to its decision to recommend referral to the Privileges Committee, the PAC reflected on the harm caused by the unauthorised disclosure in the following terms:

The unauthorised disclosure of the *in camera* transcript has resulted in damage to individual participants to the inquiry, and has caused them significant stress and impacted their professional and personal relationships. The unauthorised disclosure has also undermined the integrity of the committee system and the public interest. Such an event deters future witnesses from giving confidential evidence to committees, undermines the relationship of trust between members of the committee, which is necessary for committees to function effectively, and lowers public confidence in the committee, the committee system and the Parliament generally. The committee is extremely disappointed that this unauthorised disclosure has happened and apologises to those directly impacted.<sup>5</sup>

## Conduct of the inquiry

**1.8** On 24 August 2022, this Committee met to consider the terms of reference. As per the terms of reference, three substantive members of this Committee who were also members of PAC, Mr Fang, Ms Faehrmann and Mr Farlow, were substituted by Mr Barrett, Ms Higginson and Mr Rath for the purposes of the inquiry. The Committee commissioned the production by the secretariat of a discussion paper on how previous incidents of unauthorised disclosures have been investigated by this Committee and by committees in other jurisdictions.

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<sup>4</sup> Public Accountability Committee, *Special report on the unauthorised disclosure of in camera evidence given on 29 June 2022*, Report 14, p 2, paras 1.12-1.13.

<sup>5</sup> Public Accountability Committee, *Special report on the unauthorised disclosure of in camera evidence given on 29 June 2022*, Report 14, p 2, para 1.17.

- 1.9** The Committee subsequently met again on 14 November 2022 to consider the contents of the discussion paper, which traversed the practice of the Legislative Council on previous occasions where there had been unauthorised disclosures of *in camera* evidence, the approaches of other jurisdictions, and set out a number of considerations for the Committee in formulating its report. The discussion paper is Appendix 1 to this report.
- 1.10** In response to the contents of the discussion paper, the Committee resolved to invite a submission from the Clerk.
- 1.11** On 7 December 2022, the Clerk provided a submission to the inquiry. This submission was drafted in response to a series of considerations set out by this Committee in the discussion paper. The submission is at Appendix 2 to the report.
- 1.12** The contents of this report address the following issues:
- Current and past practice of the Legislative Council in the event of an unauthorised disclosure.
  - The advice of the Clerk with respect to how unauthorised disclosures ought to be addressed.
  - The Committee's comments with respect to the unauthorised disclosure before it, as well as considerations for future Committees.



## Chapter 2 Approach of the Legislative Council to unauthorised disclosures

This chapter briefly sets out the current practice of the Legislative Council in instances where there has been an unauthorised disclosure of *in camera* evidence. It then goes on to detail the evidence of the Clerk of the Parliaments, who provided a submission to the inquiry.

### Standing orders, guidelines, procedural resolution and past practice of the Legislative Council

#### Standing orders

- 2.1** At the time of the unauthorised disclosure, the standing orders governing the receipt and handling of *in camera* committee evidence were standing orders 222 to 224 (now 229 to 231) of the Proposed Standing Rules and Orders, as adopted as sessional orders in June 2022 for the remainder of the sittings of the House during 2022.
- 2.2** Standing order 222(1) set out the principle that all committee evidence should be taken in public unless a committee decides otherwise. Evidence taken in private is referred to as *in camera* evidence.
- 2.3** Standing order 223 provided that committees may resolve to authorise publication of *in camera* evidence where it is in the public interest to do so:

#### **223. Publishing submissions and evidence**

...

- (2) Evidence taken in camera may be published by resolution of the committee where it is in the public interest to do so.

- 2.4** Standing order 224 contained the prohibition against the unauthorised disclosure of *in camera* evidence. The relevant sub-sections of the standing order provided:

#### **224. Unauthorised disclosure of evidence and documents**

- (1) The evidence taken by a committee and documents presented to it, which have not been reported to the House, may not, unless authorised by the House or committee, be disclosed to any person other than a member or officer of the committee

...

- (3) Any person committing a breach of this standing order may be reported to the House.

## Guidelines

**2.5** In addition to the above standing orders, a 2002 Privileges Committee Report entitled *Report on guidelines concerning unauthorised disclosure of committee proceedings* (the 2002 Report) provided the Council with a set of standards and guidelines to follow in the event of an unauthorised disclosure.<sup>6</sup> While these standards and guidelines were never formally adopted by the House,<sup>7</sup> they are established practice as set out in *New South Wales Legislative Council Practice*.<sup>8</sup> The guidelines are as follows:

**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,

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<sup>6</sup> Standing Committee on Parliamentary Privilege and Ethics, *Report on guidelines concerning unauthorised disclosure of committee proceedings*, Report No. 23.

<sup>7</sup> S. Want and J. Moore. *Annotated Standing Orders of the New South Wales Legislative Council*, (The Federation Press, 2018) pp. 734-5, fn 277.

<sup>8</sup> J. Lovelock and J. Evans, *New South Wales Legislative Council Practice*, (1<sup>st</sup> edn, The Federation Press, 2008) pp. 568-9.



- (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 in any way.

## **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 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 the 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 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 some cases where the person responsible for the original disclosure has not been found.

## **Procedural resolution**

2.6 A Procedural Fairness Resolution has been adopted by the Legislative Council to give further guidance to members as to the steps that should be taken to ensure procedural fairness is

properly afforded to committee inquiry participants.<sup>9</sup> The most pertinent sections of the resolution to this inquiry are as follows:

**4. Opportunity to request a private (*in camera*) hearing**

A witness may request, before or during their hearing, that some or all of their evidence be heard in private (*in camera*). The committee will consider this request and if it declines, will advise the witness of the reasons why.

**5. Publication of evidence taken in private (*in camera*)**

Prior to their private (*in camera*) hearing, a witness will be informed that the committee and the Legislative Council have the power to public some or all of the evidence given. If the committee intends to publish, it will normally consult the witness, advise them of the outcome, and give reasonable notice of when the evidence will be published.

**12. Objections to answering questions**

Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (*in camera*).

**13. Evidence that may seriously damage the reputation of a third party**

**Evidence about to be given**

- (a) Where a committee anticipates that evidence about to be given may seriously damage the reputation of a person or body, the committee may consider hearing the evidence in private (*in camera*).

**Evidence that has been given**

- (b) Where a witness gives evidence in public that may seriously damage the reputation of a person or body, the committee may consider keeping some or all of the evidence confidential.

**Opportunity to respond**

- (c) Where a witness gives evidence that may seriously damage the reputation of a person or body, the committee may give the person or body reasonable access to the evidence, and the opportunity to respond in writing or at a hearing.

**19. Treatment of witnesses**

Witnesses will be treated with courtesy at all times.

<sup>9</sup> Legislative Council, *Procedural Fairness Resolution* <[Procedural fairness resolution.pdf \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/committees/privileges/committees/privileges-committee/procedural-fairness-resolution)>.

## Past practice of the Legislative Council

### *Past investigation*

2.7 The Privileges Committee has the power to decide whether to conduct its own investigation into the source of an unauthorised disclosure.<sup>10</sup> Past practice suggests that this Committee generally defers to the investigative efforts of the referring committee. On the last two occasions this Committee was asked to consider an unauthorised disclosure of *in camera* evidence, the referring committee had not been able to identify the source of the unauthorised disclosure. In both instances, having assessed the investigative efforts of the referring committee, this Committee chose not to conduct further investigations.<sup>11</sup>

### *'Prima facie' contempt*

2.8 Guideline 4.1 cited above, establishes that the Privileges Committee is to consider any instance of an unauthorised disclosure on a case-by-case basis.<sup>12</sup> While it is open to this committee to make a 'prima facie' finding of contempt, unlike other jurisdictions,<sup>13</sup> an unauthorised disclosure of *in camera* evidence does not constitute an *ipso facto* contempt.<sup>14</sup> On the last two occasions the Privileges Committee was asked to report on instances of unauthorised disclosures of *in camera* evidence where the referring committee was not able to identify the source of the unauthorised disclosure, In both instances, no contempt findings were made.<sup>15</sup>

2.9 Further detail on the ways in which the Legislative Council has approached instances of unauthorised disclosures of *in camera* committee evidence in the past, as well as the approach of other Houses in other Parliaments, can be found in the discussion paper.

## Evidence of the Clerk of the Parliament

2.10 Following receipt of the discussion paper, this Committee invited the Clerk of the Parliament to provide a submission in response to a number of considerations raised in the discussion paper, which were as follows:

- The Public Accountability Committee has investigated the matter and has not been able to identify who was responsible for the leak. Does the Privileges Committee wish to conduct its own process to seek to identify the source of the leak?

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<sup>10</sup> Use of the word 'may' in 5.2 of the Guidelines.

<sup>11</sup> Standing Committee on Parliamentary Privilege and Ethics, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, Report No. 156, paras 3.32-3.36; 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, pp 30-37.

<sup>12</sup> Reference to the use of the word 'may' in 5.2 cited above.

<sup>13</sup> Senate Privileges Committee – Parliamentary Privilege, *Unauthorised disclosure of committee proceedings*, 122<sup>nd</sup> Report, 2005, Chapter 2.

<sup>14</sup> The operational word in in 4.1 cited above is 'may'.

<sup>15</sup> Standing Committee on Parliamentary Privilege and Ethics, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, Report No. 156, paras 3.32-3.36; 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, pp 30-37.

- Does the Privileges Committee wish to determine whether what occurred was a contempt of the committee, regardless of whether the identity of who leaked the transcript remains unknown?
- Does the Privileges Committee want to recommend that all such leaks of *in camera* transcripts are *prima facie* a contempt of a committee, (the Senate's position), or does it wish to retain the discretion to decide whether such a disclosure is a contempt in the context of each incident?
- Does the Privileges Committee want to recommend specific guidelines as to when evidence should be heard in private, as occurs in New Zealand, or does it wish to continue current practice which gives greater discretion to individual committees as to when to hear *in camera* evidence?
- Does the Privileges Committee want to investigate the option of recommending that no committee be able to take *in camera* evidence?

**2.11** The Clerk responded to the invitation to make a submission by letter dated 7 December 2022. The Clerk's correspondence is reproduced at Appendix 2 to this report.

**2.12** With respect to the first three dot points, the Clerk indicated that he saw no reason for this Committee to depart from the existing practice of the Council, as set out in standing order 224 (now standing order 231), in the Guidelines contained in the 2002 Privileges Committee Report and the past practice of the Council outlined in *New South Wales Legislative Council Practice*. The Clerk pointed to the 2002 Privileges Committee Report as the authoritative source on the procedures to be followed by all committees where there is an unauthorised disclosure.<sup>16</sup>

**2.13** The Clerk went on to emphasise the significance of the matter, stating:

The leaking of *in camera* evidence is undoubtedly a matter of the utmost seriousness to be deplored in the strongest possible terms. It must I think be assumed that any leak of *in camera* evidence significantly undermines a committee in the conduct of an inquiry.<sup>17</sup>

**2.14** Despite the seriousness of the unauthorised disclosure, given the discretionary nature of the Privileges Committee's power to investigate and determine matters of contempt, and the investigation of the PAC which failed to identify the source of the unauthorised disclosure, the Clerk concluded:

...it is not clear that adopting an automatic or '*prima facie*' finding of contempt against a party or parties unknown would advance the matter in any meaningful sense.<sup>18</sup>

**2.15** Addressing the final two considerations listed above, the Clerk submitted that he could not see any reason to deviate from current arrangements with respect to the complete discretion afforded to committees to make their own decisions as to whether they wish to hear evidence *in camera*.<sup>19</sup> In answer to the question raised in the final dot point, the Clerk went on to list a

<sup>16</sup> Submission 1, Clerk of the Parliament, p. 1.

<sup>17</sup> Submission 1, Clerk of the Parliament, p. 2.

<sup>18</sup> Submission 1, Clerk of the Parliament, p 2.

<sup>19</sup> Submission 1, Clerk of the Parliament, p 2.

number of scenarios in which it would be wholly appropriate for committees to take evidence *in camera*, which are outlined and discussed in the following chapter.

## Chapter 3 Committee comment and finding

This chapter first addresses the unauthorised disclosure that forms the basis of this Inquiry, before going on to set-out a number of considerations for future committees when considering whether to receive evidence *in camera*.

### The unauthorised disclosure

- 3.1** The Privileges Committee echoes the words of the Clerk with respect to the seriousness of unauthorised disclosures of *in camera* evidence. As explained in the various committee reports cited in the discussion paper and in the 2002 Report guidelines, unauthorised disclosures have both personal and institutional ramifications. At the personal level, witnesses are left to face the consequences that flow from sensitive information given confidentially being made public. Institutionally, unauthorised disclosures can cause a breakdown of trust amongst members, as well as (and more importantly) between the Parliament and the public.
- 3.2** The Committee notes and agrees with the comments of the PAC in its Special Report with respect to the effect the unauthorised disclosure has had on Ms Brown. We acknowledge that since the unauthorised disclosure occurred, Ms Brown has resigned from her position as Chief Executive Officer of Investment New South Wales and was then terminated as Secretary of the NSW Department of Enterprise, Investment and Trade. Whilst these outcomes may or may not be linked to the unauthorised disclosure of her evidence, the personal and professional toll of this unauthorised disclosure on Ms Brown is recognised.
- 3.3** The Committee also acknowledges the personal and professional harm that was caused to Ms Jenny West, who was the subject of the portion of the *in camera* transcript that was disclosed to *The Australian* newspaper.
- 3.4** The Committee suggests that the perpetrator of this unauthorised disclosure should reflect on the implications of their actions on these individuals. They should also consider the negative institutional effects of their actions on the committee process and the relationship between committees of the Legislative Council generally and witnesses. The unauthorised disclosure was a profound breach of trust and an inexcusable abuse of power and responsibility.
- 3.5** The committee endorses the following comment made by the Chair of PAC, Ms Faehrmann, in her opening statement to the second public hearing of PAC as part of its Inquiry into the appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas on 11 July 2022:

Before we commence, I would like to make some brief comments about the recent unauthorised disclosure of evidence that was given in camera and confidential to the Committee, and which unfortunately appeared on the front page of *The Australian* newspaper on Thursday 7 July. The disclosure of in-camera evidence is a very serious matter for a committee, as it can constitute a contempt of Parliament. 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. It can also jeopardise 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, deterring future witnesses from giving

confidential evidence to committees. It undermines the relationship of trust between members of the committee, which is necessary for committees to function effectively, and lowering public confidence in the committee, the committee system and the Parliament generally.

- 3.6** Separately, this Committee believes that the PAC took appropriate steps to identify the individual responsible for the unauthorised disclosure as documented in its Special Report to the House. As such, although it is within the power of this Committee to conduct its own inquiry into the source of the unauthorised disclosure, we have come to the position that any further investigations are unlikely to reveal the identity of the individual responsible.
- 3.7** Given the source of the unauthorised disclosure has not been identified, and in accordance with practice, it is the position of the Committee that the question of whether a finding of a *prima facie* contempt ought to be made is essentially moot. While *prima facie* findings of contempt are a feature of other parliamentary jurisdictions, the position of the Legislative Council has been, and remains, that because a finding of contempt is generally linked to the issuing of individually tailored sanctions, unless the individual responsible for the contempt can be identified, there is little utility in finding a perpetrator-less contempt of parliament.
- 3.8** Accordingly, and once again emphasising the seriousness of the unauthorised disclosure and recognising its personal and institutional effects, the Committee makes the following finding:

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### **Finding 1**

As the Public Accountability Committee was unable to identify the individual responsible for the unauthorised disclosure of the *in camera* evidence of Ms Amy Brown after conducting its own investigations, the Privileges Committee, while acknowledging the seriousness of the unauthorised disclosure, is not minded to conduct further investigations into the source of the unauthorised disclosure, nor is it minded to make a *prima facie* finding of contempt.

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## **Guidance to future committees on taking evidence *in camera***

- 3.9** The Privileges Committee notes the Clerk's evidence with respect to the importance of maintaining the complete discretion of committees as for whether certain evidence ought to be received *in camera*.
- 3.10** The Committee also emphasises, however, that the default position, as stipulated in standing order 221(1) (now standing order 230(1)) is that all evidence should be received in public unless there is a pertinent reason for receiving it confidentially. To assist future committees tasked with the need to decide whether it is appropriate to hear certain evidence *in camera*, this Committee suggests that members consult the non-exhaustive list of examples prepared by the Clerk. Circumstances where committees may consider taking evidence *in camera* include:
- Where committees wish to protect against adverse mention.
  - Where issues may be *sub judice* or potentially even before the courts.
  - Where committees are legitimately protecting vulnerable witnesses.



- Where a witness is asked in private to explain the reasons for objecting to answering questions, as per the procedural fairness resolution.



# Appendix 1 Discussion paper



## DISCUSSION PAPER – UNAUTHORISED DISCLOSURE OF *IN CAMERA* EVIDENCE

### 1. Introduction

This discussion paper has been prepared after the Public Accountability Committee produced a Special Report (Report no. 14) into the unauthorised disclosure of Ms Amy Brown's *in camera* evidence, recommending that the matter be referred to the Privileges Committee for inquiry and report. On 10 August 2022, the House agreed to Ms Faehrmann's motion referring the matter to the Privileges Committee.

This paper sets out:

- The current practice of the Legislative Council in the event of an unauthorised disclosure.
- The approach of Privileges Committees in the past to investigating and reporting on unauthorised disclosures.
- An overview of the approach taken by other Australian jurisdictions in the instances where the source of the unauthorised disclosure has/hasn't been identified.
- Examples of procedural reform recommendations made in reports on instances of unauthorised disclosures.
- An overview of the approach of the Legislative Council and other jurisdictions to determining whether evidence should be heard *in camera*.

### 2. Current Practice

The prohibition against the disclosure of *in camera* evidence is contained in Standing Orders 223 and 224 of the Proposed Standing Rules and Orders (hereafter, the Standing Orders). The guidelines set out in Recommendation 1 of the 2002 Privileges Committee report entitled "Report on guidelines concerning unauthorised disclosure of committee proceedings" (**annexure A**) established the procedures and standards that are to be followed in the event of an unauthorised disclosure.<sup>1</sup> While never formally adopted by the House, these guidelines are treated as practice.<sup>2</sup>

In accordance with the guidelines, an unauthorised disclosure is not a *prima facie* contempt.<sup>3</sup> It is therefore for the Privileges Committee to determine whether the source of the unauthorised disclosure can be identified, whether the disclosure constitutes a contempt, the seriousness of the contempt and to recommend any appropriate sanctions.

<sup>1</sup> See J. Lovelock and J. Evans, *New South Wales Legislative Council Practice* (1<sup>st</sup> edn, The Federation Press, 2008) pp. 568-9.

<sup>2</sup> See S. Want and J. Moore, *Annotated Standing Orders of the New South Wales Legislative Council* (The Federation Press, 2018) pp. 734-5, fn 277.

<sup>3</sup> See 4.1 of the guidelines at Annexure A.

### 3. The approach of the Legislative Council Privileges Committee to unauthorised disclosures of *in camera* evidence in the past

1993 - Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of *in camera* evidence<sup>4</sup>

*Brief Background to the Privileges Committee Report – findings of Joint Select Committee*

*In camera* evidence given to the Joint Select Committee Upon Police Administration was leaked to the Sun Herald. The Joint Select Committee's initial investigation could not identify the source of the unauthorised disclosure.<sup>5</sup> The Committee reported to the House that the leak was serious in so far as it related to the functions of the committee system and the Parliament, but that the unauthorised disclosure did not interfere with the work of Committee Members on that particular inquiry.<sup>6</sup>

*Factors considered by the Privileges Committee in coming to a determination on contempt*

- Whether the evidence was designated as being *in camera*.<sup>7</sup>
- The effect of the disclosure on the work of the Joint select committee.<sup>8</sup>
- The level of sensitivity of the evidence.<sup>9</sup>
- The effect of the disclosure of the evidence on the police investigations.<sup>10</sup>

*Findings of the Committee*<sup>11</sup>

- The principal offender was the source of the unauthorised disclosure, not the journalists.
  - In accordance with previous practice where the leaker is not identified, the Committee decided against taking action against the journalists.
- A finding of contempt could not be made, because:
  - The publication did not interfere with the work of the committee.
  - The publication did not deter witnesses from giving evidence.
  - There was no evidence that the publication obstructed or impeded the performance or functions of the Select Committee, the Parliament or its members.

*Recommendations of the Committee*

- A statement from the President to the Press Gallery on the concept of contempt.<sup>12</sup>
- The provision of guidelines to all media editors and new members.<sup>13</sup>
- That committees of the Parliament adopt stringent procedures for protecting the confidentiality of *in camera* evidence.<sup>14</sup>
- That the Parliament enact legislation to define its powers and privileges, including its powers to deal with instances of contempt.<sup>15</sup>

<sup>4</sup> 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.

<sup>5</sup> Para 2.1 of the Sun Herald report.

<sup>6</sup> Paras 1.5 – 1.7 of the Sun Herald report.

<sup>7</sup> Para 3.15 of the Sun Herald report.

<sup>8</sup> Para 3.16 of the Sun Herald report.

<sup>9</sup> Para 3.23 of the Sun Herald report.

<sup>10</sup> Paras 3.24-3.25 of the Sun Herald report.

<sup>11</sup> Paras 3.32 – 3.36 of the Sun Herald report.

<sup>12</sup> Recommendation 2 of the Sun Herald report.

<sup>13</sup> Recommendation 3 of the Sun Herald report.

<sup>14</sup> Recommendation 4 of the Sun Herald report.

<sup>15</sup> Recommendation 5 of the Sun Herald report.

2001 – Report concerning the possible intimidation of witnesses before General Purpose Standing Committee No. 3 and unauthorised disclosure of committee evidence<sup>16</sup>

*Brief background*

The Legislative Council's General Purpose Standing Committee No. 3 conducted an inquiry into policing practices in the Cabramatta region. Police witnesses provided confidential submissions containing references to controversial recruitment practices. This evidence was leaked to the Sydney Morning Herald and the Daily Telegraph.<sup>17</sup> The Standing Committee conducted its own inquiry into the unauthorised disclosure but was unable to identify the source.<sup>18</sup>

*Precedent considered in coming to a contempt determination*

- Definition of contempt: "...conduct which obstructs or impedes the House (or a committee, as the House's delegate) in the performance of its functions, or a Member in the performance of his or her functions or has a tendency to produce such result."<sup>19</sup>
- The Committee considered a number of other sub-factors related to this definition, drawn from the practice of the House of Commons and the Australian Senate:
  - Findings of contempt should be used as sparingly as possible.<sup>20</sup>
  - Although unauthorised disclosures are a prima facie contempt, the Privileges Committee must determine each case on its merits.<sup>21</sup>
  - Where the leaker cannot be identified, Privileges Committees have not been willing to exercise their powers with respect to the media involved. Where they have done so, the House has not been prepared to agree.<sup>22</sup>
  - Despite the above practice, the 74<sup>th</sup> Senate Committee Privileges Report published in 1988, suggested that all persons, including publishers and authors, ought to expect severe sanctions in the event of their involvement in an unauthorised disclosure.<sup>23</sup> Noting that the Parliamentary Privileges Act 1988 (Cth) applies.

*Findings of the Committee*

As the leaker could not be identified, and in accordance with precedent of the House not exercising its powers with respect to those who give wider publicity to the disclosure, the Committee could not make specific contempt findings with respect to certain individuals.

*Main Recommendation*

That the Committee develop an appropriate series of guidelines to deal with future unauthorised disclosures.<sup>24</sup>

<sup>16</sup> 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.

<sup>17</sup> Para 2.14 of the November 2001 report.

<sup>18</sup> General Purpose Standing Committee No. 3 - *Special Report on possible breaches of privilege arising from the inquiry into Cabramatta policing*, June 2001.

<sup>19</sup> Para 2.5 of the November 2001 report.

<sup>20</sup> Para 2.5 of the November 2001 report.

<sup>21</sup> Para 4.3 of the November 2001 report.

<sup>22</sup> Para 4.43 of the November 2001 report.

<sup>23</sup> Para 4.43 of the November 2001 report.

<sup>24</sup> Para 4.45 of the November 2001 report, and Recommendation 5 of the report.

2002 – Report on guidelines concerning unauthorised disclosure of committee proceedings<sup>25</sup>*Brief background*

Following General-Purpose Standing Committee No. 3's 2001 inquiry into the unauthorised disclosure during the Cabramatta policing inquiry, and in response to Recommendation 5 of the associated Standing Committee's Special Report,<sup>26</sup> the Privileges Committee undertook a detailed inquiry into unauthorised disclosures and developed guidelines for consideration by the House.

*Factors considered in preparing the proposed guidelines*

- Contempt is a common law principle governed by the test of "reasonably necessity".<sup>27</sup>
- LC practice derives from a 1984-5 determination of the Commons' Privileges Committee.<sup>28</sup>
- Relevant Commons Privileges Committee practice and precedents:
  - "Substantial interference" is interference that impacts on the "public interest", covering the publication of significant material improperly acquired, leaks of classified information, deliberate attempts to damage the working of a committee, and publications that cause substantial interference to the work of a committee.<sup>29</sup>
  - When the leaker cannot be identified – no sanction, a mere finding of contempt.<sup>30</sup>
  - When identified (via admission) – an apology and suspension of 3-10 sitting days.<sup>31</sup>
- The position of the Australian Senate and House of representatives:
  - Senate – since the publication of its 74<sup>th</sup> Report journalists have also been warned to expect contempt findings should they assist in unauthorised disclosures.<sup>32</sup> Generally this has taken the form of threats to restrict access to sections of the building in the event of future unauthorised disclosures.<sup>33</sup>
  - House of Representatives – all cases referred to the Committee of Privileges involved disclosures to the media, none found the source of the leak.<sup>34</sup> The committee has avoided making contempt findings with respect to the media.<sup>35</sup>
    - Reports delivered in 1995<sup>36</sup> and 2001<sup>37</sup> recommended informing new staff of the contempt rule, stamps be used to indicate confidential evidence, and specific procedures be implemented for handling *in camera* transcripts.

*Recommendations*

Three recommendations were handed down: (1) setting out the proposed guidelines (**Annexure A**); (2) calling for the House to adopt them; and (3), that all people involved in committee inquiry processes be informed of the unauthorised disclosure rule.

<sup>25</sup> Standing Committee on Parliamentary Privilege and Ethics – *Report on guidelines concerning unauthorised disclosure of committee proceedings*, 5 December 2002.

<sup>26</sup> General Purpose Standing Committee No. 3 - *Special Report on possible breaches of privilege arising from the inquiry into Cabramatta policing*, June 2001, Recommendation 5.

<sup>27</sup> Para 2.18 of the report on Guidelines.

<sup>28</sup> Para 2.20 of the report on Guidelines, the practice is set out at p. 5.

<sup>29</sup> House of Commons Committee of Privileges, *Premature disclosure of select committees*, Second Report, Session 1984-5, para 55.

<sup>30</sup> Paras 3.6-3.7 of the report on Guidelines.

<sup>31</sup> See discussion at paras 3.8-3.15 of the report on Guidelines.

<sup>32</sup> Para 3.30 of the report on Guidelines.

<sup>33</sup> Paras 3.32-3.33 of the report on Guidelines.

<sup>34</sup> Para 3.40-3.41 of the report on Guidelines.

<sup>35</sup> Para 3.41 of the report on Guidelines.

<sup>36</sup> 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.

<sup>37</sup> Listed at para 3.42 of the report on Guidelines.

#### 4. The approach of other parliaments

For an overview of the various approaches of Australian, Commonwealth and non-Commonwealth parliaments to the unauthorised disclosure of committee deliberations, the Senate Committee of Privileges, in its 122<sup>nd</sup> Report (the report), provided a comprehensive overview of the practices of a host of parliaments.<sup>38</sup> The below table contains some of the examples in the report, as well as a number of more recent examples.

Before considering the specific examples of other jurisdictions, the report made very clear that the Senate's approach to instances of unauthorised disclosures of *in camera* evidence, is one where:

"...any unauthorised disclosure of all such evidence, whether actually quoted or referred to in such a way as to leave no doubt that the publication involves divulging the content of the evidence, should be referred to it by the Senate on the recommendation of the Committee of Privileges..."<sup>39</sup>

Furthermore, that "[a]nyone who divulges or publishes such in camera evidence may expect a finding of contempt, regardless of the circumstances".<sup>40</sup> It is then the role of the Committee of Privileges to "establish whether the offence is of such gravity that it should recommend to the Senate that a prosecution under section 13 of the *Parliamentary Privileges Act 1987*" be proceeded with.<sup>41</sup>

There is therefore currently a difference between the practice of the Legislative Council and that of the Senate. The Senate takes the position that any unauthorised disclosure is a prima facie contempt, with the role of the Committee of Privileges being to determine whether the contempt was of such gravity that it justifies a recommendation of criminal sanction. The Legislative Council on the other hand, as per the Guidelines drafted by this Committee, does not presume contempt where there has been an unauthorised disclosure, leaving the Committee to make this determination, as well as a determination (in the form of a recommendation to the House) as to the appropriate sanction.

Year	Jurisdiction	Disclosure of/to	Source	Finding	Recommendation
1983	Tasmanian LC	Unreported recommendations published in newspaper and disclosed to the Premier	Unknown source disclosed to the media; two members disclosed to the Premier	Both members guilty of contempt	None <sup>42</sup>

<sup>38</sup> Senate Privileges Committee – Parliamentary privilege — *Unauthorised disclosure of committee proceedings*, 122<sup>nd</sup> Report, 2005, Chapter 2.

<sup>39</sup> *Ibid*, pp. 42-43.

<sup>40</sup> *Ibid*, p. 43.

<sup>41</sup> *Ibid*.

<sup>42</sup> Committee of Privileges, Tasmanian Legislative Council, Report of the Committee of Privileges, December 1983, pp. 7-8.

1997	Western Australian LC	Draft report disclosed to university professor	Not found	Breach of privilege	None <sup>43</sup>
1999	Queensland LA	Committee correspondence published in newspaper	Not found	Unlikely to identify source	House adopt procedure relating to unauthorised disclosures that mirrors the 1986 House of Commons process <sup>44</sup>
2001	Queensland LA	Deliberations of committee, referred to in House	Member	No finding of contempt	Redraft standing order in more precise terms (question as to whether committee proceedings themselves were covered by contempt) <sup>45</sup>
2007	Western Australia LC	Secondary unauthorised disclosure of confidential committee deliberations	Member (Brian Burke) Former member (Julian Grill)	A finding of contempt, and in the case of Mr Grill, grave contempt	An apology within seven days <sup>46</sup>  The admonishment of Mr Grill's entitlements as a former Member (he failed to provide an apology) <sup>47</sup>
2008	House of Representatives	Unauthorised disclosure of yet-to-be tabled report of the Privileges Committee	Not found	Unauthorised disclosure occurred, but no finding of contempt, as the disclosure did not threaten the work of the committee	None <sup>48</sup>
2009	Western Australian LC	Confidential letters disclosed to the press	Local Council	No finding of contempt	Circulate the report to the Council concerned setting out the possibility of contempt being found <sup>49</sup>

<sup>43</sup> Select Committee of Privilege, Western Australian Legislative Council, Report, October 1997.

<sup>44</sup> Members' ethics and Parliamentary Privileges Committee, Queensland Legislative Assembly - *Report on a matter of privilege – unauthorised disclosure of committee proceedings*, Report No. 42, 7 June 2000.

<sup>45</sup> 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.

<sup>46</sup> Standing Committee on Procedure and Privileges - *Referral of letters by resolution of the House on 20 February 2008 Regarding the Select Committee of Privilege on a matter arising in the standing committee on estimates and financial operations*, Report 16, March 2008.

<sup>47</sup> Standing Committee on Procedure and Privileges - *Referral of letters by resolution of the House on 20 February 2008 Regarding the Select Committee of Privilege on a matter arising in the standing committee on estimates and financial operations*, Report 18, April 2008.

<sup>48</sup> D.R. Elder and P.E. Fowler (eds), *House of Representatives Practice* (7<sup>th</sup> edition, Department of the House of Representatives, 2018), Appendix 25 – Matters raised as matters of privilege in the House.

<sup>49</sup> Standing Committee on Procedure and Privileges - *Unauthorised Disclosure of Confidential Committee Correspondence by the City of Joondalup*, Report No. 37, November 2009.



2010	House of Representatives	Confidential briefing material leaked by member	Member	No finding of contempt as Member provided unreserved apology.	None <sup>50</sup>
2013	Senate	Publication of draft report	Not found	No finding of contempt as interference not deemed serious enough	Report non-contempt finding <sup>51</sup>
2013	House of Representatives	Publication of details of draft report in the press	Member (although not entirely clear who)	No finding of contempt (but finding of unauthorised disclosure)	Referred matter to the Privileges Committee. Speaker indicated she was not prepared to give precedence to a motion as the committee had found the disclosure did not immediately interfere with its work <sup>52</sup>
2019	ACT Legislative Assembly	Unauthorised publication of confidential letters from witness to health inquiry	Not found	Finding of contempt	For public servants to be reminded of their obligations, and for amendments to be made to the relevant standing order <sup>53</sup>

### 5. Proposed procedural changes as a consequence of a leak of *in camera* evidence

The following constitute a sample of the most recent and relevant procedural changes/proposed changes stemming from inquiries into unauthorised disclosures in several jurisdictions:

- NSW – The 2001 leak during the Cabramatta policing inquiry led to the development of the Guidelines set out in the 2002 Privileges Committee Report. Although they were not formerly adopted by the House, they have become the accepted practice of the Legislative Council.<sup>54</sup> There was also a recommendation stemming from the inquiry into the leak to the Sun Herald to either amend the Constitution or pass a standalone piece of legislation (like the Commonwealth) to make clear that the privileges conferred to the NSW Parliament are the same as those possessed by the House of Commons as at 1856.<sup>55</sup> The

<sup>50</sup> Parliamentary Standing Committee on Public Works - *Unauthorised disclosure of committee proceedings and evidence*, February 2010.

<sup>51</sup> Senate Privileges Committee - *Possible unauthorised disclosure of the draft report of the Select Committee on Electricity Prices*, 152<sup>nd</sup> Report, 2013.

<sup>52</sup> House of Representatives Standing Committee on Regional Australia – *Unauthorised disclosure of confidential committee documents*, Report 2013.

<sup>53</sup> ACT Legislative Assembly Select Committee on Privileges – *Unauthorised Disclosure of Committee Documents. Report*, 2019.

<sup>54</sup> J. Lovelock and J. Evans, *New South Wales Legislative Council Practice* (1<sup>st</sup> edn, The Federation Press, 2008) pp. 568-9.

<sup>55</sup> Recommendation 5 of the Standing Committee Upon Parliamentary Privilege – *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper*, October 1993. It should also be noted that this was also a recommendation of the 1985 Joint Select Committee Upon Parliamentary Privilege inquiry into the privileges and of the House but was never acted upon.

Committee stated that:

"...as long as there is uncertainty concerning the status of Parliament's powers and privileges, it is likely this uncertainty will be reflected in the minds of persons who report on, or receive information concerning, proceedings in the Parliament and its committees."<sup>56</sup>

- ACT – A leak in 2019 of a confidential letter from a witness to a committee led to a report of the Privileges Committee, which recommended the relevant standing orders be updated to clarify the process for dealing with unauthorised disclosures.<sup>57</sup>
- The Commonwealth – as a result of the Senate Privileges Committee's 122<sup>nd</sup> report (2005), which dealt with a number of alleged unauthorised disclosures, the Senate adopted a sessional order providing clarity as to how 'serious' the interference must be to constitute a contempt. Clause 2(a) identified leaks of *in camera* evidence as being a clear instance of strict liability contempt (whether the leaker can be identified or not).<sup>58</sup> This sessional order was given continuing effect in 2007.
- Queensland – After finding there had not been a contempt, a 2001 Privileges Committee inquiry recommended the introduction of a new standing order to better protect the confidentiality of all elements of committee proceedings. This report set out a draft standing order to address this issue.

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<sup>56</sup> October 1993 Standing Committee Upon Parliamentary Privilege Report, para 4.7.

<sup>57</sup> ACT Legislative Assembly Select Committee on Privileges – *Unauthorised Disclosure of Committee Documents. Report*, 2019.

<sup>58</sup> Senate Standing Committee of Privileges – *Precedents, procedure and practice in the Australian Senate 1966-2005*, 125<sup>th</sup> Report, 19 December 2005.

## 6. Issues for the Committee to consider – approaches to determining whether evidence should be heard *in camera*

### Introduction

This section provides an overview of the practice of the Legislative Council and a number of other jurisdictions in relation to *in camera* evidence. Should the committee resolve to draft a set of proposed guidelines, this can be undertaken as part of the Committee's report into the unauthorised disclosure of Ms Amy Brown's evidence.

### Legislative Council

Standing Order 222 establishes that "a committee is to take all evidence in public unless the committee decides otherwise." The exception to this rule is the annual budget estimates enquiry, where all evidence must be given in public.<sup>59</sup> Standing order 222 embodies the principle that committees should be as transparent and accountable to the public as possible.<sup>60</sup> There are numerous examples of inquiries where committees have agreed to hear evidence *in camera*.

It is established practice that a committee will consider any request from a witness that all or part of their evidence be considered *in camera* (although committees are able to make this determination without the need for a request from a witness). The committee then, by majority vote, makes a determination. There is no clear rule or precedent for committees to follow in coming to a determination. Instead, as set out in Legislative Council Practice:

"Committees generally take evidence in camera in order to protect a witness's **privacy** or to deal with other **sensitive or confidential matters**...[and/or] where holding a public hearing may be contrary to the **public interest**, for example where a public hearing may be prejudicial to court proceedings or commercial dealings."<sup>61</sup>

[Emphasis added]

Standing Order 223(2) establishes that "Evidence taken in camera may be published by resolution of the committee where it is in the public interest to do so." Although this relates to considerations post the receipt of the *in camera* evidence, the witness is given notice of the committee's ability to publish the *in camera* evidence after it has been received.

In addition to practice that has developed with respect to SO 222 (and 222(1) before it) and 223(2), the Procedural Fairness Resolution, adopted by the House on 25 October 2018, sets out a number of relevant procedures to be followed to ensure fair treatment for inquiry participants.<sup>62</sup> The most relevant procedures are:

<sup>59</sup> Since 1998, the resolution of the House referring the annual budget estimates to the general-purpose standing committees for inquiry and report has instructed the committees to hear all evidence in public. Minutes, NSW Legislative Council, 4 June 1998, pp. 543-549.

<sup>60</sup> S. Want and J. Moore. *Annotated Standing Orders of the New South Wales Legislative Council* (The Federation Press, 2018), p. 726.

<sup>61</sup> New South Wales Legislative Council Practice, p. 751.

<sup>62</sup> Procedural Fairness Resolution, Upper House Committees <Procedural fairness resolution.pdf (nsw.gov.au)>.

#### 4. Opportunity to request a private (*in camera*) hearing

A witness may request, before or during their hearing, that some or all of their evidence be heard in private (*in camera*). The committee will consider this request and if it declines, will advise the witness of the reasons why.

#### 5. Publication of evidence taken in private

Prior to their private (*in camera*) hearing, a witness will be informed that the committee and the Legislative Council have the power to publish some or all of the evidence given. If the committee intends to publish, it will normally consult the witness, advise them of the outcome, and give reasonable notice of when the evidence will be published.

#### 12. Objections to answering questions

Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (*in camera*).

#### 13. Evidence that may seriously damage the reputation of a third party

##### Evidence about to be given

- (a) Where a committee anticipates that evidence about to be given may seriously damage the reputation of a person or body, the committee may consider hearing the evidence in private (*in camera*)

To summarise, Legislative Council committees have almost complete discretion to determine whether to hear evidence *in camera*, and, whether to publish *in camera* evidence after it has been received. Longstanding practice and the Procedural Fairness Resolution set out a range of factors and principles which committees consider in response to a breach of the standing order, instead of there being strict guidelines for committee members to consider when making their determination.

##### Australian Senate

Senate practice sets out the competing principles at stake when a committee is asked to consider whether evidence should be allowed to be given *in camera*:

"In camera hearings defeat the purpose of parliamentary inquiries of informing the public. The other main purpose of gathering evidence is that the evidence may be used to support conclusions and recommendations, and taking evidence allows for views and arguments put to the committee to be fully tested."<sup>63</sup>

<sup>63</sup> Odgers Australian Senate Practice (online), Chapter 17 <CHAPTER 17 | Witnesses – Parliament of Australia (aph.gov.au)>.

This is to be balanced against what the 122<sup>nd</sup> Report identified to be "the highest duty of any house of parliament", which is to "protect its sources of information."<sup>64</sup> This is reflected in the Parliamentary Privileges Act, which identifies witness interference and the release of *in camera* evidence as the two criminal offences under the Act.<sup>65</sup>

Ogders sets out the accepted grounds upon which a witness may base their request to have evidence given *in camera*, which can be found in a series of resolutions:<sup>66</sup>

- The relevance of the question being asked of the witness to the inquiry.
- Where an answer may be incriminating.
- Where information required by a question is otherwise protected from disclosure.
- Where the disclosure of information required by a question would be prejudicial to the privacy or the rights of other persons.

Other pertinent factors to consider from the approach of the Senate:<sup>67</sup>

- When applying for evidence to be given *in camera*, the witness will be asked for a statement of reasons. The statement can either be heard *in camera*, or in public.
- When considering the application, the committee can do so either in private or public, in the presence of the witness or in their absence.
- There is no obligation on the committee to publish the fact that a witness has applied for their evidence to be given *in camera*. Indeed, as a matter of principle, this information, if itself given *in camera*, should not be published (publication of the intention to give evidence *in camera* can itself be prejudicial).
- The President has the power under SO 37(3) to disclose, for the purposes of historical research, any *in camera* evidence and documents which have been in the custody of the Senate for 30 years.

### New Zealand

The Parliament of New Zealand makes a distinction between public, private and secret evidence. The default position of the Parliament is that all evidence be heard or received in public.<sup>68</sup> For evidence to be heard or received in private or secret, a unanimous decision must be made by the committee either on its own volition, or in response to an application from a witness.<sup>69</sup>

Private evidence is evidence that does not become available to the public until after the Committee reports to the House. Until that point it remains confidential, and cannot be referred to, even in the House.<sup>70</sup> While it is general practice that private evidence be given to committee members only, the committee has discretion as to whether all members of the public must withdraw from the committee room for the hearing of such evidence.<sup>71</sup> Committees pay particular attention to the following factors when considering whether evidence should be given in private:

- Where the committee is aware that evidence contains allegations against another person, the committee is obliged to consider hearing the evidence in private to limit the potential

<sup>64</sup> Ibid.

<sup>65</sup> Senate Privileges Committee – Parliamentary privilege — *Unauthorised disclosure of committee proceedings*, 122<sup>nd</sup> Report, 2005, p. 1, para 3.1.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> M. Harris, D. Wilson (eds), *McGee Parliamentary Practice in New Zealand* (4<sup>th</sup> edn, Oratia, 2017), p. 321.

<sup>69</sup> Ibid; also see SO 218(1) of the Standing Orders of the Parliament of New Zealand.

<sup>70</sup> SO 114 of the Standing Orders of the Parliament of New Zealand.

<sup>71</sup> M. Harris, D. Wilson (eds), *McGee Parliamentary Practice in New Zealand* (4<sup>th</sup> edn, Oratia, 2017), p. 321.

damage.<sup>72</sup> Where such allegations are made, the person against whom allegations are made must be given a copy of the private evidence, or enough information to respond. This response is also treated as private evidence.<sup>73</sup>

- Other accepted reasons for seeking to have evidence given in private
  - If their evidence will contain sensitive personal information.
  - If their evidence contains information that is deemed to be commercial in confidence.
  - Where there are concerns about the identification of individuals (including those who give evidence on draft regulations).

Secret evidence is evidence that remains secret even after the committee has reported to the House (unless the House so otherwise authorises).<sup>74</sup> Similar to private evidence, where an allegation is made against another individual, the person against whom allegations have been made is entitled to be informed of those allegations and provide a response in secret.<sup>75</sup> There are two accepted circumstances in which a committee may grant leave for evidence to be given in secret:

- Where the committee believes that it can only obtain the information it wishes to obtain if it can assure the person in possession of that information that the evidence given to the committee will remain confidential, or<sup>76</sup>
- Where the committee is satisfied that secrecy is necessary to protect the reputation of any person.<sup>77</sup>

### The United Kingdom

Select Committees of the House of Commons have the power to hold inquiries in public or in private.<sup>78</sup> The practice of resolving to hold a hearing in private is similar to that in each of the other jurisdictions considered above, namely, that an application is made by the witness to the Committee for their evidence to be given in private.<sup>79</sup>

Erskine May provides limited guidance on subject-matter that may be considered to justify holding a private session, namely:

"...[where] it would be prejudicial to the public interest or injurious to character, or would disclose matters of commercial confidentiality, or would be undesirable on similar grounds."<sup>80</sup>

The text also states that private hearings can be used by committees to provide an alternative for witnesses who are unwilling to answer questions asked of them.<sup>81</sup> Otherwise, the focus of Erskine May is on setting out the privilege-based protections offered to witnesses who provide evidence

<sup>72</sup> SO 234(1) of the Standing Orders of the Parliament of New Zealand.

<sup>73</sup> SO 235(1) of the Standing Orders of the Parliament of New Zealand.

<sup>74</sup> M. Harris, D. Wilson (eds), *McGee Parliamentary Practice in New Zealand* (4<sup>th</sup> edn, Oratia, 2017), p. 322.

<sup>75</sup> *Ibid.*

<sup>76</sup> SO 219(1)(a) of the Standing Orders of the Parliament of New Zealand.

<sup>77</sup> SO 219(1)(b) of the Standing Orders of the Parliament of New Zealand.

<sup>78</sup> SO 125 of the Standing Orders.

<sup>79</sup> UK Parliament, 'Giving written or oral evidence to a House of Commons Select Committee' <parliament.uk/get-involved/committees/how-do-i-submit-evidence/guidance-for-house-of-commons-select-committee-witnesses/guidance-for-giving-written-or-oral-evidence-to-house-of-commons-select-committee/#Giving\_oral\_evidence\_to\_a\_select\_committee>.

<sup>80</sup> M. Jack, *Erskine May: Parliamentary Practice* (24<sup>th</sup> edn, Butterworths, 2011), p. 826, noting that this quote refers to instances where non-publication of evidence taken in private session have not been published.

<sup>81</sup> *Ibid.*, p 823.

to committees, and the ability of committees to take evidence from anonymised sources "where there is reason to apprehend that private injury or vengeance might result from publication."<sup>82</sup>

### Conclusion

Of the jurisdictions analysed, only New Zealand has a set of guidelines for committees to consider when faced with an application by a witness to hear evidence in circumstances similar to *in camera* oral evidence (when an application is made for the evidence to be heard in secret). All other jurisdictions defer to the general discretion of the committee hearing the *in camera* application. In practice, this discretion has been exercised in accordance with certain principles and precedents, with the overriding consideration in each jurisdiction being whether it is in 'the public interest' for the evidence to be given *in camera*.

## **7. Issues for further consideration**

In reporting back to the House on this reference, the following are matters which the Privileges Committee could consider:

- The Public Accountability Committee has investigated the matter and has not been able to identify who was responsible for the leak. Does the Privileges Committee wish to conduct its own process to seek to identify the source of the leak?
- Does the Privileges Committee wish to determine whether what occurred was a contempt of the committee, regardless of whether the identity of who leaked the transcript remains unknown?
- Does the Privileges Committee want to recommend that all such leaks of *in camera* transcripts are *prima facie* a contempt of a committee, (the Senate's position), or does it wish to retain the discretion to decide whether such a disclosure is a contempt in the context of each incident?
- Does the Privileges Committee want to recommend specific guidelines as to when evidence should be heard in private, as occurs in New Zealand, or does it wish to continue current practice which gives greater discretion to individual committees as to when to hear *in camera* evidence?
- Does the Privileges Committee want to investigate the option of recommending that no committee be able to take *in camera* evidence?

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<sup>82</sup> D. Limon and W.R. McKay, *Erskine May: Parliamentary Practice* (22<sup>nd</sup> edn, Butterworths, 1999), p. 657.

**Annexure A****Recommendation 1 – excerpt of proposed guidelines****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 information 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.

**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 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 the tabling of the Special Report, the House may refer the matter to the Standing Committee on Parliamentary Privileges 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. *Contraventions – 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 include: temporary exclusion from the parliamentary press 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.

## Appendix 2 Submission



LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

7 December 2022

D22/68610

The Hon Peter Primrose MLC  
Chair  
Privileges Committee  
Legislative Council  
Parliament House  
SYDNEY NSW 2000

Dear Chair

### Submission – Inquiry into the unauthorised disclosure of *in camera* evidence

I understand that at a meeting of the Privileges Committee on Monday 14 November 2022, the Committee considered the unauthorised disclosure of *in camera* evidence given before the Public Accountability Committee on 29 June 2022 and resolved that I be invited to make a submission on the issues raised in a Discussion Paper on the matter provided to the Committee by the secretariat.

I have had the benefit of reading the Discussion Paper and the 'Issues for further consideration' listed at Part 7.

As a general comment, I see no reason for the Privileges Committee to depart from the current established procedures for dealing with unauthorised disclosures, as set out in the standing orders, the guidelines to the Committee's 2002 report entitled 'Report on guidelines concerning unauthorised disclosure of committee proceedings' and *New South Wales Legislative Council Practice*.

The guidelines make it clear that unauthorised disclosure of committee proceedings may significantly affect individual committee participants, the integrity of the committee system and the public interest. As such, unauthorised disclosure may constitute a contempt. The guidelines also set out procedures to be followed in the event of an unauthorised disclosure, both by the affected committee and if necessary, by the House and the Privileges Committee.

Parliament House  
Macquarie Street Sydney  
NSW 2000 Australia

Telephone (02) 9230 2773  
david.blunt@parliament.nsw.gov.au

As I understand the circumstances of this particular matter, the Public Accountability Committee was unable through its own investigation to determine the source of the unauthorised disclosure. In those circumstances, the Committee made a special report to the House and the House chose to refer the matter to the Privileges Committee.

The leaking of *in camera* evidence is undoubtedly a matter of the utmost seriousness to be deplored in the strongest possible terms. It must I think be assumed that any leak of *in camera* evidence significantly undermines a committee in the conduct of an inquiry. However, in the absence of the source of the unauthorised disclosure being identified, it is not clear that adopting an automatic or '*prima facie*' finding of contempt against a party or parties unknown would advance the matter in any meaningful sense.

That is not to say that a finding of contempt against a party or parties unknown may not be made. Ultimately, however, such matters should remain for the Privileges Committee and the House itself to determine on a case-by-case basis. It is notable that the House and the Parliament have not adopted a definition of contempt either in the standing orders or in statute, thereby retaining the maximum flexibility for the House to determine what constitutes a contempt.

The Discussion Paper also raises the utility of taking evidence *in camera* and whether the Privileges Committee wishes to recommend the adoption of specific guidelines as to when evidence should be heard in private, or alternatively whether the Privileges Committee should recommend that no committee be able to take evidence *in camera* at all.

On the face of it, the current arrangements which give committees discretion as to whether to take evidence *in camera* appear appropriate. I can think of a range of scenarios in which it is appropriate for committees to take evidence *in camera*. They include:

- Where committees wish to protect against adverse mention.
- Where issues may be *sub judice* or potentially even before the courts.
- Where committees are legitimately protecting commercial matters or the public interest more generally.
- Where committees are protecting vulnerable witnesses. There have been numerous inquiries where committees have had vulnerable witnesses such as teachers and nurses appearing with the protection of confidentiality.
- Where a witness is asked in private to explain the reasons for objecting to answering questions, as per the procedural fairness resolution.

However, I note that the above list is not definitive. There may be other circumstances in which it may also be appropriate for committees to take evidence privately. To limit the discretion of individual committees in this regard would risk detracting from the inquiry process.

3

I trust this information is of assistance to the Committee. Please do not hesitate to contact me if you require any further information.

Yours sincerely,

**David Blunt**  
Clerk of the Parliaments

## Appendix 3 Minutes

### Minutes no. 34

Wednesday 24 August 2022

Privileges Committee

Room 1254 at 1.00 pm

#### 1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Barrett (via Webex) (substituting for Mr Fang)

Mr Donnelly

Mr Rath (substituting for Mr Farlow)

Mr Mallard

Mr Martin (via Webex)

In attendance: Steven Reynolds, Jenelle Moore, Jock Gardiner and Taylah Cauchi.

#### 2. Apologies

Ms Higginson

#### 3. Draft minutes

Resolved, on the motion of Revd Mr Nile: That draft minutes no. 33 be confirmed.

#### 4. Correspondence

The committee noted the following items of correspondence:

##### *Received:*

- 3 August 2022 – Letter from Mr Sidgraves, Chair of Privileges Committee in the Legislative Assembly to the President the Legislative Council and Speaker of the Legislative Assembly, regarding proposed changes to the Independent Complaints Officer resolution to enable members to lodge complaints about member's staff and ministerial staff.
- 23 August 2022 – Email from Hon Daniel Mookhey MLC to the Clerk of Parliaments, regarding that Opposition members may in the future ask the House to determine its position about which arbiter principles should apply when deciding privilege claims concerning personal information, legal professional privilege and public interest immunity claims arising from matters that might be commercial-in-confidence.

##### *Sent:*

- 3 August 2022 – Letter from Mr Primrose, Chair of Privileges Committee in the Legislative Council, to the President of the Legislative Council, regarding support of the recommendation resulting from the recruitment process for the Independent Complaints Officer.
- 3 August 2022 – Letter from Mr Primrose, Chair of Privileges Committee in the Legislative Council, to Ms Kate Boyd PSM, Deputy Secretary, General Counsel of the Department of Premier and Cabinet, regarding the production of documents which may be subject to Parliamentary privilege.
- 3 August 2022 – Letter from Mr Primrose, Chair of Privileges Committee in the Legislative Council, to the Hon. Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption, regarding the report of the investigation into the conduct of the local member for Drummoyne.

Resolved, on the motion of Revd Nile: That the committee respond to Mr Sidgraves, Chair of Privileges Committee in the Legislative Assembly advising that the committee suggests that the proposed changes to

the Independent Complaints Officer resolution to enable members to lodge complaints about member's staff and ministerial staff be considered in the context of the three month review of the protocol or the 12 month review of the operation of the position rather than as a separate process.

**5. Disputed claims of privilege**

Resolved, on the motion of Revd Nile: That the reports of the Independent Legal Arbitrator, dated 17 August and 22 August 2022, on the further disputed claims of privilege regarding the appointment of Senior Trade and Investment Commissioner be published.

While noting the correspondence from Mr Mookhey, the committee requested the secretariat canvas member availability for a second deliberative to implement the arbitrator's recommendations.

**6. Inquiry into the Special Report No. 14 of the Public Accountability Committee**

The committee noted the terms of reference moved by Ms Faehrmann on Wednesday 10 August 2022.

Resolved, on the motion of Mr Mallard: That the secretariat be requested to prepare a discussion paper on how previous incidents of unauthorized disclosure have been investigated by this committee and by committees in other jurisdictions.

**7. Adjournment**

*Sine die*

Steven Reynolds  
**Committee Clerk**

**Minutes no. 38**

Monday 15 November 2022  
Privileges Committee  
Room 1136 at 10.30 am

**1. Members present**

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Barrett (substituting for Mr Fang) (*via Webex* from 11.00 am, in person from 11.29 am)

Ms Boyd (substituting for Ms Faehrmann)

Mr Donnelly

Mrs MacDonald *via Webex* (substituting for Mr Farlow)

Mr Mallard

Mr Martin.

In attendance: Steven Reynolds, Jenelle Moore, Taylah Cauchi.

**2. Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes nos 36 and 37 be confirmed.

**3. Correspondence**

Nil.

**4. Circulation of Chair's draft reports**

The committee noted that it had previously agreed via email that the Chair's draft reports relating to those inquiries listed for consideration at this meeting would be circulated less than 7 days prior to the report deliberative.

**5. Annual report of the Parliamentary Ethics Adviser 2021-2022**

The Chair welcomed Mr John Evans PSM, Parliamentary Ethics Adviser, to the meeting.

Mr Evans briefed the committee on his 2021-2022 annual report.

Mr Evans left the meeting at 10.48 am.

**6. Protocol for an Independent Complaints Officer**

The Clerk circulated a draft revised protocol containing minor changes recommended by the Parliamentary Ethics Adviser.

The Independent Complaints Officer briefed the committee on the revised proposed protocol, taking into account feedback received from the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics and the Parliamentary Ethics Adviser.

The committee deliberated.

Resolved, on the motion of Revd Mr Nile: That:

- (a) the committee clerk be authorised to meet with the clerk to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics to resolve any differences in terms proposed by the two committees, and recirculate the final version,
- (b) the committee agree to the revised protocol, pending any minor alterations arising from the procedure proposed above, and
- (c) the Chair table the protocol in the House on the next sitting day.

**7. Members Code of Conduct**

The committee considered the Chair's draft report, previously circulated.

Resolved, on the motion of Mr Mallard: That:

- (a) draft report be the report of the committee and that the committee chair present the report to the House,
- (b) the correspondence relating to the inquiry be tabled in the House with the report,
- (c) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling,
- (d) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee, and
- (e) following tabling of the report the chair write to the Chief Commissioner of the ICAC to indicate that Chapter three of the report represents the committee's response to the recommendations of the Commission's report into the Member for Drummoyne.

**8. Inquiry into execution of search warrants by the Australian Federal Police (No. 3)**

The committee considered the Chair's draft report, previously circulated.

Resolved, on the motion of Revd Mr Nile: That:

- (a) the draft report be the report of the committee and that the committee chair present the report to the House,
- (b) the submissions and correspondence relating to the inquiry be tabled in the House with the report,
- (c) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling,
- (d) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee,

- (e) following tabling of the report the Chair write to the Chief Commissioner of the ICAC and the President to pursue the recommendations relating to a revised Memorandum of Understanding regarding execution of search warrants, and
- (f) following the tabling of the report the Chair write to the Commissioner of the Australian Federal Police to confirm the understanding that any future search warrants executed on NSW members or their staffers will follow the AFP's 2021 guideline, and
- (g) following the tabling of the report the Chair write to the Senate Committee on Privileges to forward a copy of the committee's report for consideration.

**9. Special report no. 14 of the Public Accountability Committee**

The committee considered the discussion paper prepared by the Chair, previously circulated.

Resolved, on the motion of Ms Boyd: That the discussion paper be amended to note the chilling effect that disclosure of in camera evidence can have on the willingness of inquiry participants to give evidence to an inquiry and their safety in providing sensitive or incriminating evidence to a committee.

Resolved, on the motion of Mr Donnelly: That:

- (a) the Clerk of the Parliaments be invited to make a submission to the inquiry, and
- (b) following receipt of the submission from the Clerk of the Parliaments, the committee determine its views as to the questions raised in the discussion paper prior to deciding on further action or requesting the Chair to prepare a report.

**10. Adjournment**

The committee adjourned at 12.03 pm, *sine die*.

Steven Reynolds  
**Committee Clerk**

**Minutes no. 40**

Thursday 15 December 2022, 3.00 pm  
Privileges Committee  
Via Webex

**1. Members present**

Mr Primrose (*Chair*)  
Mr Donnelly  
Mr Fang  
Mr Farlow  
Mr Mallard  
Mr Martin.

In attendance: Steven Reynolds, Taylah Cauchi.

**2. Apologies**

Revd Mr Nile (*Deputy Chair*)  
Ms Faehrmann.

**3. Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no 39 be confirmed.



#### 4. Correspondence

The committee noted the following items of correspondence:

##### *Received*

- 8 December 2022 - Submission from Mr David Blunt, Clerk of the Parliaments, to the Privileges Committee, regarding the inquiry into the unauthorised disclosure of in camera evidence.(circulated only to members on that inquiry)
- 14 December 2022 – Letter from the Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics to the Chair, requesting a copy of any response received from the AFP regarding de-identified reports; and also indicating the Assembly committee’s interest in working with the Council committee to develop an interim revised memorandum of understanding with the ICAC.

#### 5. Consideration of interim response to President’s correspondence regarding the Broderick Review recommendations

The committee noted that it has previously resolved that the secretariat prepare a draft response to the letter from the President of the Legislative Council regarding the recommendations made by the Independent Review of Bullying, Harassment and Sexual Misconduct at NSW Parliamentary workplaces (‘the Broderick Review’), dated 6 December 2022.

Resolved, on the motion of Mr Donnelly: That the draft letter be sent by the Chair to the President, and that the committee note the recommendations to be considered in the 12 month review of the Independent Complaints Officer.

#### 6. Disputed claim of privilege – Animal research

The committee discussed the disputed claim of privilege and report of the Independent Legal Arbitrator, the Honourable Keith Mason AC KC, in relation to the return to order regarding Animal research.

Resolved, on the motion of Mr Donnelly:

- (1) That, in view of the interim report of the Independent Legal Arbitrator, the Honourable Keith Mason AC KC, dated 2 December 2022, on the disputed claim of privilege regarding animal research, the committee orders that the Department of Regional NSW documents in the return received by the Clerk on 2 June 2021, considered by the Independent Legal Arbitrator not to be privileged, be published subject to redactions of all signatures.
- (2) That the committee orders the Department of Premier and Cabinet to produce, within 7 days of the passing of this resolution, the redacted versions of the documents referred to in paragraph (1), and that the redacted documents be returned to the Clerk.
- (3) That, on receipt, the documents are authorised to be published.

#### 7. Adjournment

The committee adjourned at 3.13 pm, *sine die*.

Steven Reynolds  
Committee Clerk

#### Minutes no. 41

Friday 10 February 2023, 1.00 pm  
Privileges Committee  
Via Webex

#### 1. Members present

Mr Primrose (*Chair*)  
Revd Mr Nile (*Deputy Chair*) (arrival 1.07 pm)  
Mr Donnelly  
Mr Fang (except item 7)  
Mr Martin.

In attendance: Steven Reynolds, Jenelle Moore and Taylah Cauchi.

## 2. Apologies

Ms Faehrmann, Mr Farlow and Mr Mallard.

## 3. Draft minutes

Resolved, on the motion of Mr Martin: That draft minutes no. 40 be confirmed.

## 4. Correspondence

The committee noted the following items of correspondence:

### *Received*

- 2 December 2022 - Email from the Independent Complaints Officer, to the Privileges Committee, attaching the first Independent Complaints Officer quarterly report for September 2022 to November 2022.
- 21 December 2022 – Correspondence from the Hon Matthew Mason-Cox MLC, President of the Legislative Council, to the Hon John Hatzistergos AM, Chief Commissioner, Independent Commission Against Corruption, acknowledging receipt of letter dated 16 December 2022 advising of the amendments to the Commission Operations Manual policy.
- 8 February 2023 - Correspondence from the Hon Matthew Mason-Cox MLC, President of the Legislative Council to the Chair referring an inquiry to the Committee to determine further claims of privilege made by the legal representatives of Mr John Zhang on documents obtained by the Australian Federal Police (AFP) and lodged with the Acting Clerk on Friday 3 February 2023.

## 5. Disputed claims of privilege

Under trial standing order 52B, the Privileges Committee is given the authority, while the House is not sitting for more than three weeks, to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order under standing order 52.

### 5.1 Method of consideration

The Committee noted that it has previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process.

### 5.2 Publication of report of the Independent Legal Arbiter – Privatisation or efficiency measures relating to Sydney Water or Hunter Water

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 27 January 2023, on the disputed claim of privilege regarding the privatisation or efficiency measures relating to Sydney Water or Hunter Water, be published.

### 5.3 Publication of report of the Independent Legal Arbiter – Exhibited animals and Exhibited animals – Further order

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 1 February 2023, on the disputed claims of privilege regarding exhibited animals, be published.

### 5.4 Publication of report of the Independent Legal Arbiter – Get Wild Pty Ltd

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter, the Honourable Joseph Campbell KC, dated 8 February 2023, on the disputed claim of privilege regarding Get Wild Pty Ltd, be published.

## 6. Inquiry into execution of search warrants by the Australian Federal Police No. 4

### 6.1 Terms of reference

The Committee noted the following terms of reference referred by the President on 8 February 2023, under paragraph 2 (a) of resolution of the House establishing the Privileges Committee, 8 May 2019:

1. That the Privileges Committee further inquire into and report on the status of documents and other things the subject of claims of parliamentary privilege arising from the execution of various search warrants by the Australian Federal Police (AFP) issued on 25 June and 23 July 2020 on Mr John Zhang, then staffer of the Honourable Shaoquett Moselmane and any incidental documents of Mr Moselmane relating to the investigation of Mr Zhang, as delivered to the Acting Clerk by the AFP on Friday 3 February 2023 .
2. That the committee recommend to the House which of the disputed material falls within the scope of proceedings in Parliament by no later than 5:00 pm on 2 March 2023.
3. That the committee, for the purposes of making its determination, have access to the relevant indexes of documents and other things in dispute prepared by the AFP and that the committee seek submissions from the Clerk of the Parliaments, Mr Zhang, Mr Moselmane and the AFP regarding the claims of privilege.
4. That, in recommending which documents are privileged, the committee apply the test used in the determination of the matters involving documents seized by the Independent Commission Against Corruption from the Honourable Peter Breen in 2003 and 2004, as amended by the Senate Privileges Committee in its Report 164, dated March 2017, entitled “Search warrants and the Senate”.
5. That, if a recommendation cannot be made on the basis of the index and submissions received, the committee be given access to the privileged material held in the custody of the Acting Clerk of the Parliaments.

### 6.2 Submissions

Resolved, on the motion of Mr Donnelly:

- That the index of documents the subject of a claim of parliamentary privilege by Mr Zhang be made available for inspection by members of the committee in the Office of the Clerk but not otherwise distributed to members.
- That submissions be invited from Mr Zhang’s legal representatives, Mr Moselmane, the Australian Federal Police and the Clerk of the Parliaments by 5.00 pm on Monday 20 February 2023,
  - (a) Mr Zhang, via his legal representatives, be invited to make a further submission to respond to submissions made by Mr Moselmane, the Australian Federal Police and the Clerk of the Parliaments within 48 hours of the submissions being sent to him,
  - (b) legal representatives for Mr Zhang be advised that in the absence of a submission being made by or on behalf of Mr Zhang, as provided above, the committee will, notwithstanding this, act upon the basis of all other submissions received,
  - (c) the terms of this resolution be made available to Mr Zhang, via his legal representatives, Mr Moselmane, the Australian Federal Police and the Clerk of the Parliaments as soon as practicable following this meeting.

### 6.3 Inquiry timeline

The committee noted a suggested timeline as follows:

- No meeting to consider submissions received.
- Chair's draft report to members will be provided with as much notice as possible but unlikely to be more than 48 hours before the deliberative.
- Report deliberative: 28 February or another date before 2 March 2023.
- Report tabling: no later 5pm 2 March 2023.

## 7. Inquiry into the Special Report No. 14 of the Public Accountability Committee

### 7.1 Chair's draft report

Resolved, on the motion of Mr Donnelly: The committee with the substitute members for the purposes of the inquiry meet on Tuesday 28 February 2023 to consider the draft report prior to the main deliberative.

## 8. Adjournment

The committee adjourned at 1:18 pm, until 28 February 2023 at a time to be determined.

Steven Reynolds  
**Committee Clerk**

### Draft Minutes no. 42

Tuesday 28 February 2023, 11.31 am

Privileges Committee

Via Webex

#### 1. Members present

Mr Primrose (*Chair*)

Revd Nile (*Deputy Chair*)

Mr Barrett (*for the inquiry into the Special Report No. 14 of the Public Accountability Committee*)

Ms Boyd (*for the inquiry into the Special Report No. 14 of the Public Accountability Committee*)

Mr Donnelly

Mr Fang

Mr Farlow

Mr Martin

Mr Rath (*for the inquiry into the Special Report No. 14 of the Public Accountability Committee*).

Secretariat in attendance: Stephen Frappell, Jock Gardiner, Taylah Cauchi, Noora Hijazi, Velia Mignacca

#### 2. Apologies

Ms Faehrmann

Mr Mallard.

#### 3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 41 be confirmed.

#### 4. Correspondence

The committee noted the following items of correspondence:

##### *Received*

- 16 February 2023 – Correspondence from the Select Committee on Barangaroo sight lines, to the Privileges Committee, attaching advice from the Crown Solicitor's Office provided to the Select Committee on Barangaroo sight lines.
- 17 February 2023 – Correspondence from the Premier, to the Privileges Committee, attaching the government response to Report No. 90 of the Privileges Committee entitled "Review of Members' Code of Conduct (2022)", tabled 16 November 2022.
- 20 February 2023 – Correspondence from Mr Zhang's legal representatives, to the Procedure Committee, requesting for a one day extension for the due date of the submission.

- 20 February 2023 - Correspondence from Ms Higginson's Office, to the secretariat, advising Ms Boyd will be substituting for Ms Higginson at the committee meeting on 28 February regarding the inquiry into Special Report No. 14 of the Public Accountability Committee.

*Sent*

- 20 February 2023 - Correspondence from the secretariat, to Mr Zhang's legal representatives, granting a one day extension for the due date of the submission.
- 22 February 2023 - Correspondence from the secretariat, to Mr Zhang's legal representatives, attaching submission nos 1-3 of the inquiry for Mr Zhang to provide a submission in response the attached submissions.

## 5. Disputed claims of privilege

### 5.1 Publication of report of the Independent Legal Arbiter – Exhibited animals and Exhibited animals – Further order (Second dispute)

Resolved, on the motion of Revd Nile: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 20 February 2023, on the further disputed claim of privilege regarding exhibited animals and the further order, be published.

### 5.2 Publication of report of the Independent Legal Arbiter – Ministerial Code of Conduct

Resolved, on the motion of Revd Nile: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 20 February 2023, on the disputed claim of privilege regarding ministerial code of conduct, be published.

### 5.3 Publication of report of the Independent Legal Arbiter – Get Wild Pty Ltd (second dispute)

Resolved, on the motion of Revd Nile: That the report of the Independent Legal Arbiter, the Honourable Alan Robertson SC, dated 27 February 2023, on the further disputed claim of privilege regarding Get Wild Pty Ltd, be published.

### 5.4 Tabling of Privileged Documents – Privatisation or efficiency measures relating to Sydney Water or Hunter Water

Resolved, on the motion of Mr Donnelly: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 27 January 2023, on the disputed claim of privilege regarding privatisation or efficiency measures relating to Sydney Water or Hunter Water, the committee orders that all Sydney Water documents received by the Clerk on 30 November 2022, considered by the Independent Legal Arbiter not to be privileged, be published.

### 5.5 Tabling of Privileged Documents – Exhibited animals and Exhibited animals – Further order

Resolved, on the motion of Mr Donnelly: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 1 February 2023, on the disputed claims of privilege regarding exhibited animals and the further order for papers, the committee orders that the following documents considered by the Independent Legal Arbiter not to be privileged, be published:

- Department of Regional New South Wales documents received by the Clerk on 4 August 2021 in response to resolution of the House of 23 June 2021,
- Minister for Agriculture documents received by the Clerk on 31 August 2022 in response to resolution of the House of 10 August 2022, and
- Department of Regional New South Wales documents received by the Clerk 29 September 2022 in response to resolution of the House of 10 August 2022.

### 5.6 Tabling of Privileged Documents – Get Wild Pty Ltd

Resolved, on the motion of Mr Donnelly:

- (1) That, in view of the report of the Independent Legal Arbitrator, the Honourable Joseph Campbell KC, dated 8 February 2023, on the disputed claim of privilege Get Wild Pty Ltd, the committee orders that:
- (a) the Department of Regional New South Wales documents received by the Clerk on 17 June 2020, considered by the Independent Legal Arbitrator not to be privileged be published, and
  - (b) the following Department of Regional New South Wales documents received by the Clerk on 17 June 2020, considered by the Independent Legal Arbitrator not to be privileged, be returned to the Clerk within 7 days, subject to redactions specified in the report:  
  
(b)(i)187, (b)(i)188, (b)(i)193, (c)(i)24, (d)(i)135, (d)(i)159, (d)(i)161, (d)(i)223, (e)(i)27, (e)(i)28, (e)(i)50, (e)(i)75, (e)(i)76, (f)(i)2, (f)(i)25, (f)(i)28, (g)(i)16, (g)(i)18, (g)(i)50, (g)(i)51, (g)(i)55, (g)(i)60, (g)(i)61, (g)(i)77, (g)(i)79, (g)(i)80, (g)(i)82, (g)(i)92, (g)(i)93, (g)(i)97, (g)(i)98, (g)(i)99 and (g)(i)100.
- (2) That, on receipt on documents referred to in paragraph (1)(b), the redacted documents be published.

## **6. Inquiry into the Execution of search warrants by the Australian Federal Police No. 4**

The secretariat provided an update to the committee regarding the inquiry into the *execution of search warrants by the Australian Federal Police No. 4*.

## **7. Inquiry into the Special Report from the Public Accountability Committee concerning an unauthorised disclosure of in camera evidence**

### **7.1 Consideration of Chair's draft report**

The committee considered the Chair's draft report, previously circulated.

Resolved, on the motion of Mr Donnelly: That: draft report be the report of the committee and that the committee chair present the report to the House.

## **8. Adjournment**

The committee adjourned at 11.46 am, *sine die*.

Mr Stephen Frappell  
**Committee Director**



