



**House of Representatives
Standing Committee of Privileges**

**Report concerning the possible unauthorised disclosure of in camera
evidence to the Defence Sub-Committee of the Joint Standing
Committee on Foreign Affairs, Defence and Trade**

June 2001

The Parliament of the Commonwealth of Australia

**Report concerning the possible unauthorised disclosure of in camera
evidence to the Defence Sub-Committee**

***Time* article of 6 November 2000**

House of Representatives
Standing Committee of Privileges

June 2001, Canberra

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Membership of the Committee

Chair Hon A M Somlyay MP

Deputy Chair Mr R W Sawford MP

Members Mr K J Andrews MP

Mr M Danby MP

Hon D F Jull MP

Hon L B McLeay MP

Mrs M A May MP

Mr P C Neville MP

Mr R C G Sercombe MP

Mr R McClelland MP

Ms J Bishop MP

Committee Secretariat

Secretary Mr David Elder

Research Officer Ms Catherine Cornish

Administrative Officer Ms Natasa Sikman



Terms of reference

On the 9 November 2000 the House referred to the committee the following matter for inquiry and report:

That, having regard to an article by Mr Michael Ware in *Time Magazine* of 6 November 2000, the matter of whether there was an unauthorised disclosure of *in camera* evidence taken by, or confidential information provide to, the Defence subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade be referred to the Committee of Privileges.

The terms of reference for the inquiry being conducted by the Defence Subcommittee at the *in camera* hearing of 6 October 2000 were:

That the Defence Subcommittee continue its examination of the Annual Reports of the Department of Defence 1998-99 and, when tabled, 1999-00 with specific reference to:

- The conduct of military justice and the alleged events in 3RAR;
- Equipment fleet management and life cycle costing of equipment;
- Personnel issues including Mutual Obligation Agreements upon both the unemployed and Army recruiting, changes to service conditions and superannuation;
- The use of military exercises as a means of assessing military outputs.



List of recommendations

Recommendation

The Committee recommends that the following procedures be adopted in the handling of in camera transcripts:

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

The complaint

- 1.1 On 6 November 2000, the Chair of the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT), Mr David Hawker MP, raised as a matter of privilege issues arising from an article by Mr Michael Ware entitled “Attacking the Flaws” that had appeared in *Time* magazine of 6 November 2000. Mr Hawker informed the House that the article appeared to reveal confidential information of great sensitivity to the Sub-Committee’s work. He indicated that he would have the matter considered further by the Sub-Committee.¹ A copy of the article is at Appendix A.
- 1.2 On 9 November 2000, Mr Hawker informed the House that it was clear from what appeared in the *Time* magazine article that the transcript of the in camera evidence which the Sub-Committee had taken on 6 October 2000 had been made available to the journalist. Mr Hawker expressed the view of the JSCFADT that the apparent leaking of the in camera evidence had substantially interfered with the work of the Committee. He indicated a number of concerns including
- the possible prejudice to forthcoming legal proceedings that were being pursued by the Department of Defence in relation to allegations arising out of events in 3rd Battalion Royal Australian Regiment (3RAR);
 - the possible damage to the future careers of witnesses; and
 - the possible damage to the Sub-Committee’s relationship with the Department of Defence which had cooperated with the Sub-Committee’s work.

¹ H. R. Deb. (6.11.000) 22164

Mr Hawker also informed the House that, after investigation, the Committee was not able to assist on the source or sources of the leaked documents.² A copy of Mr Hawker's statement is at Appendix B.

- 1.3 The Speaker responded that, in light of the Committee's conclusion and having regard to the precedents and practices of the House, he was willing to give precedence to a motion to refer the matter to the Committee of Privileges. The House, on the motion of Mr Hawker, referred the following matter to the Committee of Privileges for inquiry and report:

That, having regard to an article by Mr Michael Ware in *Time* Magazine of 6 November 2000, the matter of whether there was an unauthorised disclosure of in camera evidence taken by, or confidential information provided to, the Defence subcommittee of the Joint Standing Committee on Foreign Affairs Defence and Trade be referred to the Committee of Privileges.

Relevant law and practice

- 1.4 This section of the report draws heavily on a memorandum provided by the Clerk of the House outlining the relevant law, practice and precedents (copy at Appendix C).
- 1.5 It is established practice for joint committees to follow Senate select committee procedures when such procedures differ from those of the House.³
- 1.6 The resolution of appointment of the JSCFADT does not contain a specific provision relating to the disclosure of evidence taken by it. The Standing Orders of both Houses cover the area of disclosure of evidence. House Standing Order 346 (b) provides that:

The evidence taken by a committee or subcommittee...must not, unless authorised by the House or the committee or subcommittee, be disclosed or published to any person other than a member or officer of the committee.

Senate Standing Order 37(1) is in similar terms.

² H. R. Deb (9.11.00) 22635

³ Barlin, LM, ed., *House of Representatives Practice*, 3 ed., 1997, (*House of Representatives Practice*), pp. 623-24.

1.7 Instances of unauthorised disclosure of evidence taken in camera by committees have been regarded as contempts.⁴ *May* states:

The publication or disclosure of debates or proceedings of committees conducted behind closed doors...will ...constitute a breach of privilege or a contempt.⁵

In addition, section 13 of the *Parliamentary Privileges Act 1987* (the Act) creates a specific offence in respect of the unauthorised disclosure of oral evidence taken in camera:

A person shall not, without the authority of a House or a committee, publish or disclose: ...

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

1.8 Section 4 of the Act establishes a threshold test for a finding of contempt:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

1.9 As section 4 refers to conduct that '...amounts, or is intended or likely to amount, to an improper interference...' it is not strictly necessary to establish that there was an intent to cause improper interference. In determining whether a contempt has been committed it is sufficient to establish that the conduct amounted to or was likely to amount to improper interference.

1.10 In his memorandum to the Committee, the Clerk suggested that the issues on which the Committee may wish to inform itself included:

- the disclosure of the in camera transcript;
- the publication of the in camera evidence; and
- the effect of the disclosure and publication.

⁴ *House of Representatives Practice*, pp. 706 and 674-75.

⁵ Limon Sir Donald, McKay WR, eds, *Erskine May's Treatise on Law, Privileges, Proceedings and Usage of Parliament*, 22 ed., 1997, (*May*), p. 120.

The Committee also considered it should look at whether any disclosure was deliberate or inadvertent.

Conduct of inquiry

- 1.11 The then Chair of the JSCFDAT, Mr Nugent, made a written submission on 22 November 2000 on the matter. In addition as noted earlier, the Clerk of the House of Representatives provided a memorandum to the Committee.
- 1.12 The Committee also sought to either take oral evidence, or seek written responses, from all those who had access to the in camera evidence and may have been involved in its alleged unauthorised disclosure. Thus the Committee took evidence at in camera hearings on 5 and 26 March 2001. The Committee examined all members of the Defence Sub-Committee, the staff who supported the Sub-Committee and Department of the Parliamentary Reporting Staff (DPRS) management on the handling of the transcript. As a number of the members of the Sub-Committee are Senators, leave was sought from the Senate to have Senators give evidence. The Senate gave leave on 7 March 2001 to the seven Senators who are members of the Sub-Committee to give evidence.
- 1.13 The Committee also sought responses in writing to questions put to the Department of the House of Representatives printing officer who copied the transcript and from staff of DPRS who attended the hearing or transcribed the evidence. Following the receipt of certain evidence, the Committee took evidence from the former Director Personnel, Army. The Committee also received written statements from the JSCFADT Committee Secretary, the former Defence Adviser and the Office Manager. Finally, the Committee requested the author of the article, Mr Michael Ware, to give evidence, but he declined to appear.
- 1.14 The Committee does not propose to release its in camera evidence as it canvassed extensively the in camera evidence given to the Defence Sub-Committee and its release could prejudice current or possible legal proceedings.

The evidence

The disclosure

- 1.15 The submission from Mr Nugent and subsequent oral and written evidence outlined the sequence of events relating to the handling of the in camera evidence.
- 1.16 On 6 October 2000, the Defence Sub-Committee conducted an in camera hearing as part of its inquiry into the Department of Defence Annual Report 1998-99. The Sub-Committee also took evidence in public that day. The purpose of the hearing was to obtain evidence on allegations of brutality in 3RAR.
- 1.17 The Group Manager, Client Services in the Department of the Parliamentary Reporting Staff (DPRS) described the process for handling in camera hearings within Hansard. The process will not be described, but the Committee is satisfied that the long established procedures are satisfactory in ensuring the confidentiality of in camera material whilst transcription is taking place. In addition, the Committee received a signed response from all DPRS staff who were either involved in the hearing or handled the transcript. All denied having played any part in any unauthorised disclosure of the evidence.
- 1.18 After being processed by Hansard, the proof in camera transcript was received in the secretariat on 11 October and that day the Office Manager took the transcript to the Committee Office print room to order copies to be made. On 12 October, 20 copies of the transcript were returned to the secretariat. This information was confirmed by the printing officer who, in a written response, denied having played a part in any unauthorised disclosure.
- 1.19 The distribution of the transcript as at 27 October 2000 initially identified by the secretariat was as follows:
- 6 copies sent for correction to Committee members present at the hearing - Mr D Hawker MP, Hon R Price MP, Hon Dr S Martin MP, Mr L Ferguson MP, Hon W Snowdon MP and Senator Gibbs
 - 6 copies distributed to witnesses for correction - each witness got only his/her section
 - 1 copy to Hon R Price MP, collected by him from the secretariat on 12 October 2000

- 3 copies to the then Defence Adviser
 - 1 copy to the Committee Secretary
 - 1 copy to a consultant to the Sub-Committee (returned and so not counted in the 20 copies)
 - 1 copy on file
 - 2 copies spare - still in filing cabinet
- 1.20 The Committee sought to clarify this distribution in its evidence in an effort to identify the possible source of disclosure.
- 1.21 It became apparent to the Committee subsequently that staff of the JSCFADT secretariat knew at the time they first gave evidence to the Committee on 5 March 2001 that this initial record of distribution was not correct. A copy of the in camera transcript also had been sent to the Director Personnel, Army in the Department of Defence. The consequences of this will be discussed below.
- 1.22 Spare copies of the transcript were kept in an unlocked cabinet of the secretariat. Other staff in the secretariat had access to this area and it could have been accessed after hours by cleaning and security staff. However, as noted by the Committee Secretary, the dispersed nature of the secretariat and its records meant that a person would have needed specific knowledge or considerable searching to locate the transcript. All in camera transcripts are now held in a locked cabinet.
- 1.23 As noted in the distribution list above, a consultant to the Sub-Committee received a copy of the transcript on 13 October which he returned on 20 October. Subsequent evidence indicated that the copy of the transcript that went to the consultant was one of the copies that had been received by the Defence Adviser and was returned to him.
- 1.24 It was confirmed by Mr Price that he collected a copy of the in camera evidence on 12 October before departing for overseas on 13 October. According to Mr Price, this copy was then placed with other documentation relating to 3RAR and was taken to Mr Price's electorate office after the sittings concluded on 12 October.
- 1.25 On 12 or 13 October Mr Michael Ware of *Time* magazine obtained from the secretariat a proof copy of the transcript of evidence given in public on 6 October. The JSCFADT secretariat considered that there was no possibility that Mr Ware was, at the same time, accidentally given a copy of the in camera transcript. However, this possibility cannot be excluded.
- 1.26 On 17 October their sections of the transcript of evidence were sent to witnesses at the in camera hearing; these were stamped 'confidential' and

were accompanied by a letter confirming their status. The remaining sections of the in camera evidence were placed in a classified waste bag for destruction. The Committee tested whether portions of the evidence of other persons may have been attached to the evidence sent to witnesses. While this cannot be excluded as a possibility, it seems unlikely and there was no other evidence linking any such possibility to an unauthorised disclosure giving rise to material in Mr Ware's article. In addition, as Mr Ware's article had cited evidence from a number of witnesses, it seemed improbable that Mr Ware had obtained the information from the witnesses.

- 1.27 On 30 October the article in *Time* magazine, which appeared to disclose evidence taken in camera from a number of witnesses, was published.
- 1.28 Also on 30 October, transcripts of the in camera and public evidence of 6 October were sent via the internal mail to the Parliament House offices of members who attended the hearing on 6 October: Mr Hawker, Mr Price, Dr Martin, Mr L Ferguson, Mr Snowdon and Senator Gibbs. The submission from Mr Nugent noted that only members who attended in camera hearings received a transcript. Other members of the Committee would have received a transcript if they asked for one and none had requested a copy. Transcripts were stamped 'confidential' and accompanied by a letter confirming the status of the transcript. These details were confirmed in oral evidence. No members of the Sub-Committee, other than Mr Price, are on record as receiving a copy of the transcript prior to the publication of the article in *Time* magazine.
- 1.29 The Committee took oral evidence under oath or affirmation from all members of the Sub-Committee and the secretariat staff who had access to the in camera evidence or the transcript of the in camera evidence. All denied having played any part in the unauthorised disclosure of the in camera evidence to Mr Ware. The Committee was unable to find any other evidence linking members of the Sub-Committee or JSCFADT secretariat staff to an unauthorised disclosure to Mr Ware.
- 1.30 However, the Committee also was advised in oral evidence that a copy of the in camera transcript had been delivered without authorisation to the Director Personnel, Army. It was not possible to confirm how an in camera transcript came to be received in the office of the Director Personnel, Army.
- 1.31 However, as noted earlier, the fact that a copy of the in camera evidence had been received by the Director Personnel, Army was not identified in the initial distribution list compiled by the JSCFADT secretariat. The circumstances surrounding the receipt of a copy of the in camera evidence

by the Director Personnel, Army, and its return to the JSCFADT secretariat, as best can be established from the evidence, is as follows:

- the in camera transcript was received in the office of the Director Personnel, Army in the middle or third week of October 2000. It arrived in an envelope from Parliament House and most likely was personally addressed to the Director Personnel, Army.
- the Director Personnel, Army opened the envelope but did not look at the contents closely. Mistakenly thinking that it was a copy of the evidence given in public by Defence officials to the Defence Sub-Committee, the Director Personnel, Army put the transcript back in the envelope and into a B-Class safe in his office.
- the Director Personnel, Army opened the envelope again in late October and at that stage realised it was the transcript of the in camera evidence to the Defence Sub-Committee. He advised the then Defence Adviser by telephone that the transcript had been received and sought advice about what to do with it. The Defence Adviser advised the Director Personnel, Army by e-mail on 2 November to 'bin' the copy.
- the Director Personnel, Army did not consider it appropriate to destroy the copy of the transcript and asked the Defence Adviser to retrieve it. This occurred about a week later. In the meantime, the Director Personnel, Army kept the transcript in his B-Class safe. He indicated he did not read or copy the transcript, nor did he transmit it to any other person.

1.32 The circumstances by which the Committee of Privileges became aware that a copy of the in camera transcript had been received by the Director Personnel, Army's office are as follows:

- the Defence Adviser advised the Committee Secretary that a copy of the in camera transcript had been received by the Director Personnel, Army's office. The advice was given after Mr Nugent's submission had been presented to the Committee, that is the Committee Secretary was advised in late November/December 2000.
- the Committee Secretary advised the Chair of the Defence Sub-Committee of the receipt of a copy of the in camera transcript by the Director Personnel, Army's office a few weeks before the Committee of Privileges commenced its hearings (that is, 3-4 weeks before 5 March 2001). There is no written record to identify the date of that advice.
- The secretariat staff, having reviewed the initial distribution list of late October 2000, had come to the hearing on 5 March 2001 with a revised

distribution list which now included reference to a copy having been sent to the Director Personnel, Army.

- the Committee of Privileges was not informed of this matter before it commenced its hearings nor in the initial oral evidence on 5 March 2001 from the Chair of the Defence Sub-Committee, the Committee Secretary and the former Defence Adviser.
- the Committee was informed by the Office Manager, in her initial evidence on 5 March 2001, that a copy of the in camera evidence had been sent to the Director Personnel, Army.
- the Committee recalled the Chair of the Defence Sub-Committee, the Committee Secretary and the former Defence Adviser to seek clarification and they related the sequence of events outlined above.

1.33 The Committee was unable to establish any connection between the receipt of a copy of the in camera evidence by the Director Personnel, Army and the apparent citing from the transcript of in camera evidence in Mr Ware's article.

1.34 The distribution of the in camera transcripts as can be best established by the Committee was:

- 6 copies sent on 30 October for correction to Committee members present at the hearing - Mr D Hawker MP, Hon R Price MP, Hon Dr S Martin MP, Mr L Ferguson MP, Hon W Snowdon MP and Senator Gibbs
- 6 copies distributed to witnesses on 17 October for correction - each witness got only his/her section and the remainder was disposed of in a classified waste bag
- 1 copy to Hon R Price MP, collected by him from the secretariat on 12 October 2000
- 3 copies to the then Defence Adviser - one of these was sent to the consultant to the Sub-Committee on 13 October and returned on 17 October and one of which was given to Mr Price's office on 30 October
- 1 copy to the Committee Secretary
- 1 copy on file
- 1 copy spare - still in filing cabinet
- 1 copy sent to the Director Personnel, Army in mid October and returned end October or early November (presumably then held as a spare in the secretariat)

The publication

- 1.35 The submission from Mr Nugent noted three references in the article which were direct quotations of the in camera evidence taken by the Sub-Committee. The Committee's examination of the transcript of 6 October confirmed this. The evidence is from three separate witnesses. The way in which the information is cited by Mr Ware would indicate that access to the transcript was the most probable source of the quotations.

The effect of the disclosure and publication

- 1.36 In his memorandum to the Committee, the Clerk emphasised the importance of the prohibitions against the unauthorised disclosure of in camera evidence to ensure the protection of witnesses, both for their own sake and to support the effective functioning of committees. He stated:

The dangers of unauthorised disclosures to the integrity and work of committees is clear. I believe members feel a particularly serious obligation to witnesses who come forward to give frank and comprehensive evidence on the basis of assurances that the committee concerned would respect their wish and need for confidentiality, so that their personal and legal rights would not be placed in jeopardy.

- 1.37 The major potential effects of the disclosure and publication of Mr Ware's article were outlined in the submission from Mr Nugent and in the statement made to the House by Mr Hawker on 9 November 2000. In summary these effects were:
- The undermining of the credibility and integrity of the Defence Sub-Committee with witnesses to whom it had given assurances and with the Department of Defence which had cooperated closely with the Sub-Committee in undertaking the inquiry and the in camera hearing;
 - The potential impact on the lives and career prospects of the witnesses; and
 - The threat to the continued prosecution of offences in relation to 3RAR by ensuring that there was no publication of evidence that might be seen to prejudice a fair trial. This was seen as the primary reason for holding the hearing in camera.

- 1.38 In relation to the first effect, the Committee was advised that it was considered the Defence Sub-Committee and other committees may have

difficulty in having witnesses give evidence in camera as committees could not ensure the evidence would remain confidential. Also the Committee heard evidence that in the opinion of some witnesses there had been damage to the Sub-Committee's relationship with the Department of Defence.

- 1.39 The Committee received no evidence to indicate that there had been any adverse impact on witnesses as a result of their evidence to the Defence Sub-Committee. However, the Committee was informed of circumstances where there was the potential for careers of witnesses to be affected.
- 1.40 The Committee is not aware that any possible prosecutions have been aborted as a result of the publication of in camera evidence. However, the potential for damage in this area was very considerable. Not only might there have been an impeding of the proper operation of the system of justice, there could have been further undermining of the perception of parliamentary committee processes.
- 1.41 In summary, while there was no direct and immediate evidence of an adverse impact of the publication of the article, there was considerable evidence of potential and long term impacts. The Committee is particularly concerned about the possible impact on the committee system generally.
- 1.42 In relation to the disclosure of the in camera transcript to the Director Personnel, Army, the Committee received evidence that there could have been an adverse impact on the careers of witnesses as a result of the comments they made during the in camera hearing. Other evidence indicated that the Department of Defence already knew about these cases in detail and any evidence given would have been familiar to it. In the event, however, there is presently no evidence that the transcript was disclosed within the Department of Defence to have had any impact on the careers of witnesses. If evidence subsequently comes forward, the Committee will revisit the issue.

Findings

- 1.43 On the basis of the evidence, the Committee cannot rule out any of a number of possibilities as to how the unauthorised disclosure of the proof transcript of evidence of an in camera hearing of the Defence Sub-Committee of 6 October 2000 occurred. Nor can the Committee conclude whether there was more than one unauthorised disclosure.
- 1.44 Nevertheless, the Committee finds that a person or persons with access to the proof transcript of in camera evidence inadvertently or deliberately

disclosed such information so that Mr Michael Ware, a journalist with *Time* magazine, had access to the evidence. Mr Ware published extracts from the evidence disclosed to him in an article he published in *Time* magazine in the issue dated 6 November 2000 entitled “Attacking the Flaws”. The Committee further finds that the disclosure and the publication of the in camera evidence created the potential for there to be damage to witnesses, to substantially interfere with the work of the Defence Sub-Committee in being able to assure witnesses about the confidentiality of in camera evidence and potentially to cause damage to the parliamentary committee system generally. The Committee views the unauthorised disclosure of in camera evidence as being particularly serious, and this case as amongst the most serious. If such person or persons responsible for the disclosure acted deliberately, then he or she (or they) were guilty of a serious breach of the prohibition against the disclosure of in camera evidence. Unfortunately, it has not been possible to ascertain the identity of the person or persons responsible. However, if further evidence becomes available about the source of the disclosure, the Committee considers the matter should be referred again for further investigation.

- 1.45 In addition the Committee finds that there was an unauthorised disclosure to an officer in the Department of Defence of a copy of the proof transcript of in camera evidence given to the Defence Sub-Committee on 6 October 2000. While the Committee had no evidence to connect the unauthorised disclosure with the publication by Mr Ware in his article of quotations from the in camera evidence, this possibility cannot be ruled out. The unauthorised disclosure is a serious matter and regrettable, but the Committee has no evidence that the disclosure caused damage to witnesses or caused interference with the work of the Sub-Committee.
- 1.46 Notwithstanding that there is no evidence the disclosure caused damage, the Committee concludes that there should have been advice about the disclosure at the earliest opportunity. The former Defence Adviser should have advised the Committee Secretary at the earliest opportunity of the disclosure. The Committee Secretary should have advised the Chair of the Defence Sub-Committee at the earliest opportunity of the disclosure and, in turn, the Chair of the Sub-Committee should have told the Chair of the Committee of Privileges. At the very least, the Committee should have been informed by them of the disclosure at their initial appearances before the Committee. The failure to inform the Committee was a considerable error of judgement as the disclosure was material to how (or whether) this matter of an unauthorised disclosure was to be investigated.
- 1.47 The Committee commends the Office Manager for her frankness in advising the Committee that she, the Committee Secretary and the

Defence Adviser had met prior to giving their initial evidence and refreshed their memories about the disclosure of the in camera evidence to the Director Personnel, Army. The Committee is particularly concerned that the Committee Secretary and the Defence Adviser were not frank with the Committee regarding the disclosure of the in camera evidence to the Director Personnel, Army. The Committee places a high level of importance on evidence given to it by senior officers of the Department of the House of Representatives and considers the failure of the Committee Secretary and the Defence Adviser to be a serious breach of their duty. This concern is reinforced by the fact that the Committee Secretary and the Defence Adviser were under oath.

- 1.48 The Committee is also concerned about the circumstances surrounding the retrieval of the copy of the in camera transcript from the Director Personnel, Army. The Committee considers that matters of committee procedure should be handled by committee staff who have an understanding of committee procedure. That means that advisers attached to committee secretariats either need to be made aware of committee procedure, or these matters should be handled by the committee secretary or other experienced parliamentary officers. In this case, the Committee notes that the Committee Secretary was overseas at the time.
- 1.49 Again it is not clear whether the disclosure to the Director Personnel, Army was accidental or deliberate. If such person or persons responsible for the disclosure acted deliberately, then he or she (or they) were guilty of a serious breach of the prohibition against the disclosure of in camera evidence. Unfortunately, it has not been possible again to ascertain the identity of the person or persons responsible. However, if further evidence becomes available about the source of the disclosure, the Committee considers the matter should be referred again for further investigation.
- 1.50 The Committee is unable to make any recommendation on the particular matters complained of, although in the sections that follow it makes some observations on general matters raised by this case.

Observations

- 1.51 The Committee makes observations on the following matters:
- handling of in camera evidence by committee secretariats and Members;
 - unauthorised disclosure investigations; and
 - investigations into matters involving joint committees.

Handling of in camera evidence by secretariats and Members

1.52 In camera evidence is the most sensitive information that committees receive. The decision to take evidence in camera is not taken lightly and there usually is very good reason to ensure that in camera evidence is carefully protected. The Committee considers that House and joint committees administered by the Department of the House of Representatives should adopt standard procedures for the handling of in camera evidence.

Recommendation

1.53 **The Committee recommends that the following procedures be adopted in the handling of in camera transcripts:**

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

Unauthorised disclosure investigations

1.54 The Committee has referred in earlier reports to the difficulties it faces in undertaking inquiries into unauthorised disclosures and in particular in identifying the source of disclosures. In this case, even an exhaustive investigation by the Committee, the taking of evidence under oath or the seeking of signed written responses from all those with access to the transcript has not revealed the source of an unauthorised disclosure linked

to the publication of an article by Mr Ware. The Committee has identified a second unauthorised disclosure and, without diminishing the seriousness of any unauthorised disclosure, it does not appear to have been related to the publication of the article in *Time* magazine which has caused the damage. The identification of this unauthorised disclosure was fortuitous and in fact should have been identified much earlier in the process.

- 1.55 The failure of the Committee to identify the source of the damaging unauthorised disclosure that resulted in this inquiry is a matter of considerable concern to the Committee and should be a matter of concern to the House. The potential for damage to the JSCFADT, to the committee system and to the lives and careers of witnesses from the unauthorised disclosure was substantial. The Committee hopes that, at the very least, the thorough investigation it has undertaken will give pause to others who may be tempted to release undisclosed committee information without authorisation by the Committee or the House. While the Committee is frustrated that it has not been able to find the source of the damaging disclosure on this occasion, it makes clear that it will investigate thoroughly those instances of unauthorised disclosure that have the potential to cause significant damage to the committee system and to witnesses. It also should be made very clear that the House should be prepared to act against Members or others responsible for disclosure—should they be identified.
- 1.56 Having noted that, the Committee again makes a plea for the implementation of procedures, that it has recommended in earlier reports, for handling matters that arise in relation to the unauthorised disclosure of committee information⁶ (copy at Appendix D). In particular, the Committee considers that every effort should be made by the affected committee itself to seek to ascertain the source of the disclosure and to reach a conclusion as to whether substantial interference has occurred. Also, before a matter is referred, regard needs to be had to there being sufficient evidence that will enable the Committee of Privileges to ascertain the source or sources of the disclosure(s). The Committee has made a recommendation in this report specifically for the handling of in camera evidence that should assist both in preventing future unauthorised

⁶ Proposed resolutions are at Appendix D of House of Representatives Standing 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 and at Attachment A of *Report concerning the unauthorised publication of material concerning an inquiry by the Standing Committee on Environment, Recreation and the Arts*, March 1995.

disclosure of in camera evidence and in undertaking an investigation if there is a disclosure.

- 1.57 In summary, the Committee notes that this case again highlights the difficulties of resolving matters surrounding the unauthorised disclosure and publication of committee material and demonstrates that these matters are best assessed, in the first instance, by the committee concerned. The Committee again asks that the House adopt procedures that would place the initial onus to assess an unauthorised disclosure or publication concerning a committee on the committee itself. It would also give the Speaker discretion to determine whether precedence should be given to a motion to refer the matter to the Committee of Privileges.

Inquiries into matters involving joint committees

- 1.58 The difficulties of investigating instances of unauthorised disclosure are compounded when they involve a joint committee. The Senate Committee of Privileges has noted that some of the more egregious offences in relation to unauthorised disclosure have arisen from the proceedings of joint committees. It stated that:

Both the Senate and the Committee of Privileges have recognised that it is beyond power for the committee to inquire into actions of members of the House of Representatives and of other legislatures. As a result the committee has been inhibited in pursuing the question of unauthorised disclosure as far as it would wish.⁷

- 1.59 In authorising Senators who were members of the Defence Sub-Committee to appear before the Committee, the Senate resolved that this was:

...subject to the rule, applied in the Senate by rulings of the President, that one House of the Parliament may not inquire into or adjudge the conduct of a member of the other House.⁸

- 1.60 In the event, as noted earlier, the Senators agreed to appear and were questioned by the Committee about their access to the in camera transcript. There was not a need to inquire further in relation to the actions of the Senators. However, the limitations imposed by the Senate may have significantly inhibited a full inquiry by the Committee into the actions of Senators should that have been necessary. The Committee does not question the limitations imposed by the Senate, but it notes, along with the

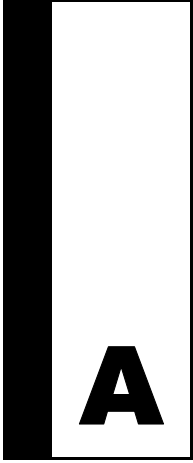
⁷ Senate Committee of Privileges, *Parliamentary privilege - Precedents, procedures and practice in the Australian Senate 1966-1999*, 76th Report, June 1999, p. 30.

⁸ Senate Journals, No. 175, p. 3.

Senate Committee of Privileges, that this creates significant barriers to the investigation of matters involving joint committees. The Committee proposes to discuss with the Senate Committee of Privileges ways in which these barriers can be diminished without affecting the comity of the two Houses.

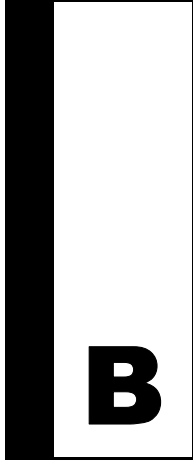
Hon Alex Somlyay MP
Chair

June 2001



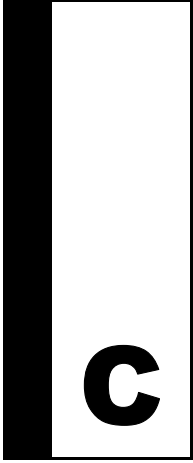
Appendix A

'Attacking the Flaws', *Time* article by Michael Ware



Appendix B

**Statement by Mr David Hawker MP to the House on
9 November 2000**



Appendix C

Clerk's Memorandum



Appendix D

Suggested resolution concerning the consideration of the unauthorised disclosure or publication of committee evidence or proceedings

- (1) That the House adopt the following resolution concerning the consideration of the unauthorised disclosure or publication of committee evidence or proceedings:
 - (a) Notwithstanding the provisions of standing orders 95, 96 and 97A, a complaint concerning the unauthorised disclosure or publication of evidence taken by a committee, or proceedings of a committee or documents concerning a committee, must be raised at the first opportunity at a meeting of the committee in question; and the House must be advised that the matter is to be raised, or has been raised, with the committee.
 - (b) A committee concerning which a complaint of unauthorised disclosure or publication has been made must consider whether the matter has caused substantial interference with its work, with the committee system or with the work of either House, or whether it is likely to have such an effect.
 - (c) If a committee wishes to consider such a matter further, it must seek to ascertain the source of any unauthorised disclosure and in order to do so letters must be written to all members of the committee and its staff asking if they have any knowledge as to the source of the disclosure.

- (d) If a committee concludes that the unauthorised disclosure or publication in question has caused substantial interference, or is likely to do so, and it wishes the matter to be proceeded with, it must set out its findings in a Special Report which must be presented to the House at the first available opportunity. Such a Special Report should spell out precisely what facts constitute substantial interference and precisely what has led the committee to conclude that substantial interference has occurred, details of the steps the committee has taken to ascertain the source of any unauthorised disclosure, the committee's views as to the benefits of any further action on the matter, and its views as to the prospects of the source(s) of the disclosure(s) being discovered.
- (e) In considering complaints in this area, and notwithstanding the provisions of standing order 96, the Speaker should not allow precedence to a motion on such a matter unless, in the light of the information presented to the Speaker, he or she is of the opinion:
 - (i) that there is sufficient evidence that will enable the Committee of Privileges to ascertain the source or sources of the disclosure(s); or
 - (ii) that the circumstances of the case are such that the issues of the protection of the committee system, or the protection of committee sources or witnesses are such as would warrant reference to the Committee of Privileges.