

**REPORT ON ARTICLE IN
THE CANBERRA TIMES
DATED 12 NOVEMBER 1993
CONCERNING THE DRAFT REPORT OF THE
SELECT COMMITTEE ON ESTIMATES 1993-94**

**Report of the Standing Committee
on Administration and Procedures
December 1993**

MEMBERSHIP OF THE COMMITTEE

Ms Roberta McRae, OAM, MLA - Presiding Member

Mr Gary Humphries, MLA

Mr David Lamont, MLA

Mr Michael Moore, MLA

Inquiry staff

Mr Tom Duncan

Ms Maureen Weeks

Introduction

1. On Friday 12 November 1993 Helen Szuty, MLA, the then Chairperson of the Select Committee on Estimates 1993-94 wrote to the Speaker raising, as a matter of privilege, an article in *The Canberra Times* of 12 November 1993 which Ms Szuty advised, appeared to reveal a knowledge of the contents of the draft report by the journalist who wrote the article, Mr Ian Davis. Ms Szuty stated in her letter to the Speaker that she was deeply concerned that this event had occurred as she believed it undermined the integrity of the Assembly and the work of its committees in the Canberra community.
2. In accordance with standing order 71, the Speaker considered the complaint and reported to the Assembly on 24 November 1993. The Speaker presented the letter, together with a copy of the relevant article, from Ms Szuty and stated that she was prepared to grant precedence to a motion in respect of the matter and on the motion of Ms Szuty, the Assembly agreed to the following resolution:

That the matter of the article in *The Canberra Times* of 12 November 1993 referring to the recommendations of the draft report of the Select Committee on Estimates 1993-94 be referred to the Standing Committee on Administration and Procedures as a matter relating to the privilege of the Assembly.

Standing orders 241 and 242

3. Standing orders 241 and 242 of the Legislative Assembly which are those relevant to the inquiry provide:
 241. The evidence taken by any committee and documents presented to and proceedings and reports of the committee shall be strictly confidential and shall not be published or divulged by any member of the committee or by any other person, until the report of the committee has been presented to the Assembly: Provided always that the publication or divulging of any evidence, documents, proceedings or report confidentially to any person or persons by the committee or by any member of the committee for the execution of any clerical work or printing, or to the Speaker, a Member, or, if it be necessary, in the course of their duties, to the Clerk or other officers of the Assembly, shall not be deemed to be a breach of this standing order.
 242. Standing order 241 shall not apply to:
 - (a) proceedings of a committee that are public;
 - (b) any press release or public statement made by the Presiding Member of a committee relating to an inquiry;
 - (c) submissions, exhibits or oral evidence received by a committee that have been authorised for publication by that committee; and
 - (d) any submission which the Presiding Member may refer to any person for comment for the purpose of assisting the committee in its inquiries.

Privilege

4. The definition of parliamentary privilege is discussed in standard works on parliamentary practice and procedure. *May* describes Parliamentary privilege as:

.... the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. (*May*, 21st edn, p 69.)

5. *May* goes on to point out that certain rights and immunities such as freedom of speech and freedom from arrest belong primarily to individual Members and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity.

6. The source of the privilege powers of the Assembly is section 24 of the *Australian Capital Territory (Self-Government) Act 1988*, subsection (3) of which states:

Until the Assembly makes a law with respect to its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees.

"Powers" includes privileges and immunities, but does not include legislative powers. The Assembly may make laws declaring its powers (as long as they do not exceed those for the time being held by the House of Representatives, its members and committees) but has not done so. Also it should be noted that the Assembly does not have the power to imprison or fine a person because of subsection 24(4) of the *Australian Capital Territory (Self-Government) Act 1988*.

7. The House of Representatives derives its privilege powers from section 49 of the Australian Constitution which states:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

8. In addition, section 50 of the Constitution provides that:

Each House of the Parliament may make rules and orders with respect to—

- (i) The mode in which its powers, privileges, and immunities may be exercised and upheld;
- (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

9. The Federal Parliament enacted comprehensive privilege legislation in 1987. The *Parliamentary Privileges Act 1987* provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House (of the Federal Parliament) and of their Members and committees as in force under section

49 of the Australian Constitution immediately before the commencement of the Act, continue in force.

Contempt

10. *House of Representatives Practice* (p. 679-80) states:

It has been regarded as a contempt for any person, including the originator, to publish or disclose oral or documentary evidence received by a committee until the evidence has been reported to the House or its publication has been authorised by the committee or the House. The restriction on publication of a document, including a submission, applies once the document comes into the committee's possession, that is, when it is received by the committee, or by the secretary of the committee.

Committees exercise discretion in dealing with breaches of these provisions. Indeed, none of the occasional cases of unauthorised publication of evidence has been reported to the House. However, committees have at times deemed it necessary to stress to those concerned the seriousness of their action.

Conduct of inquiry

11. The Committee held 4 meetings to consider the matter referred on 24 November 1993. At its first meeting the membership of the Committee to inquire into the matter was considered. Temporary order 16A provides that the Standing Committee on Administration and Procedures inquire into and report on, as appropriate:

... (ii) matters relating to the privileges of the Assembly which may be referred to it by the Assembly;.

12. Three members of the Administration and Procedures Committee were also members of the Select Committee on Estimates 1993-94. Whilst the Committee recognised the potential conflict of interest that could arise, it considered that in an Assembly of only 17 Members of which 11 had been members of the Estimates Committee and 4 Members are Ministers, it is exceedingly difficult to appoint a workable committee that has had no involvement with the Select Committee that prepared the report. Accordingly, it was resolved that the current members of the Standing Committee on Administration and Procedures should examine the matter of privilege, but in the consideration of any responses of those members, the respective member who responded would absent himself for that part of the Committee's deliberation. Thus, each of those members would not be placed in a position where he had to deliberate over his own evidence to the Committee.

13. The Committee agreed to write to all Members of the Select Committee on Estimates 1993-94 asking the following question:

Did you make available to a reporter or reporters, either directly, or indirectly a copy of the draft report of the Select Committee on Estimates 1993-94 inquiry into the Appropriation Bill 1993-94, or any of its findings or recommendations prior to the time of its authorised publication on Friday 12 November 1993?

14. In addition, letters were written to the journalist of *The Canberra Times* who wrote the article, as well as the Editor of that newspaper, asking the following question:

Could you inform the Committee of both the source of the material you [your newspaper] obtained for your [the] article in *The Canberra Times* of 12 November 1993 entitled "Call for urgent action on buses" and the manner by which the material for the article was obtained?

15. The Committee also wrote to the Clerk of the Legislative Assembly seeking information concerning the arrangements that were made by Secretariat staff to ensure the confidentiality of the draft report, and to ascertain whether any staff member had made available to a reporter or reporters either directly or indirectly a copy of the draft report or any of its findings or recommendations.
16. The Committee also sought written advice from the Clerk of the Legislative Assembly exploring the constitutional and legislative provisions relevant to the complaint raised by Ms Szuty.

Evidence received by the Committee

17. All members of the Select Committee on Estimates 1993-94 responded to the question posed by the Committee, and none of them were able to identify or indicate the source of the release of part or all of the draft report. The Clerk of the Legislative Assembly informed the Committee of the arrangements that were followed by Secretariat staff to ensure that the draft report was kept confidential prior to its presentation to the Deputy Speaker on 12 November 1993. The Clerk also informed the Committee that, other than the copies that were given to 4 journalists under strict embargo conditions on the morning of 12 November 1993, no copies of the draft report or the report was made available by Secretariat staff to anyone either directly or indirectly, nor were any findings or recommendations disclosed. The memorandum from the Clerk relating to constitutional and legislative provisions also summarised precedents from the House of Representatives, the Senate and the House of Commons (United Kingdom).
18. Mr Ian Davis, the reporter who wrote the article, responded to the Committee's question by refusing to detail the source of the material or the manner by which the material was obtained. Mr Jack Waterford, Deputy Editor of *The Canberra Times* responded in a similar fashion, adding that the Committee should not reach any determination on the matter of whether publication of the article was a breach of privilege or contempt unless or until interested parties were heard.

Observations on the evidence

19. The Committee considers that the journalist who wrote the article did have a knowledge of the contents of the draft report of the Select Committee on Estimates 1993-94. The detail of the article was such that it could not have been obtained by attendance of the Committee's public hearings. It noted the advice of the Clerk of the Legislative Assembly on the matter where he stated, after considering the relevant precedents on the matter; that:

The matter raised by Ms Szuty would not, if it was established, constitute a breach of any specific right or immunity enjoyed by the Assembly, its Members or committees. It may, however, constitute a contempt." (Memorandum of the Clerk of the Legislative Assembly p. 7).

20. It also noted the further advice of the Clerk in relation to the effect of the release and publication of the draft report when he stated:

The Administration and Procedures Committee must consider whether the report of the Estimates Committee 1993-94 has been published or divulged

in an unauthorised manner and, if so, what is the effect of the **divulgence** and/or **publication**. That is, did the divulgence and/or publication amount or were they likely to amount, to an improper interference with the free exercise by the Assembly or the committee of its authority and functions or with the free performance by any Member of his or her functions. These questions should be put separately in relation to any disclosure and in relation to any publication.

21. The Committee considers that a contempt has been committed. The contempt has been made by the person or persons who made available, either directly or indirectly the findings and recommendations or a copy of the draft report of the Select Committee on Estimates 1993-94 to a reporter from *The Canberra Times*. Regrettably, the Committee has been unable to ascertain the identities of the person or persons who disclosed the information. In the absence of such information the Committee is unable to recommend that the Assembly take any further action in relation to that person or persons on the matter. However, it takes a serious view of such action, which display a disregard for the Committee system, and ultimately a disregard for the important Standing Orders and conventions of the Legislative Assembly.
22. The Committee draws the attention of members to the gravity of committing a contempt and their responsibility to safeguard committee reports prior to their presentation to the Assembly and to observe the spirit and content of standing orders 241 and 242.
23. The Committee noted the advice of the Clerk in relation to the damage that can be caused by the unauthorised disclosure or publication of a report of a committee. The Clerk referred to a 1985 House of Commons' committee report which outlined a number of considerations and argued that the nature of any damage caused fell within 3 categories:
 - (1) the damage that could be done to the process of seeking agreement, or as much agreement as possible, in a select committee, noting that attempts might sometimes be made to deliberately seek through publicity to influence a committee's decisions;
 - (2) a danger to the committee system as a whole - 'if Members of committees are shown to be incapable of treating their proceedings as confidential, those who give evidence in confidence to select committees ... might become more reluctant to do so'; and
 - (3) damage by undermining the trust and goodwill among members of committees.
24. The Committee considers that the damage caused by the contempt committed is mostly related to (3) above, that is, undermining the trust and goodwill among members of committees. This is especially the case in the Legislative Assembly where there are a large number of committees (currently 8 standing and 2 select) and only 13 Members eligible to serve on them. The operation of the Committee system since Self-Government has been founded on this trust and goodwill and to undermine it could seriously damage the major contribution Committees make to the Territory.
25. With regard to the journalist that published the article, the Committee considers that he also committed a contempt. However, the Committee is of the view that the contempt committed by the journalist is not the primary one but rather of a secondary nature. As the Committee has been unable to ascertain the identity of the person or persons who caused the primary contempt and thus make them accountable, it considers it would be unfair to recommend that action be taken against the journalist involved.

Recommendations

26. The Committee considers that the conduct of this inquiry has heightened the awareness of members of the Committee of the issues involved with parliamentary privilege, as well as all members and their staff who have been asked to respond to the Committee's questions. It has come as a timely reminder to all concerned of the importance of the Assembly's committee system. It would be beneficial if new members elected to the Assembly were made aware of the issues involved so that they can effectively participate in the activities of Assembly committees. The Committee also believes that the Members have a responsibility to advise any staff members they may have working in their office of the obligations that Parliamentary Privilege places on them when working with committee documentation. Accordingly, the Committee recommends:
 - (1) That at the new Members seminar conducted at the commencement of each Assembly new Members (and their staff) be advised of their obligations and responsibilities as a member of a committee, with particular regard to the confidentiality of draft reports.
27. The Committee also considered the advice provided to the Committee by the Clerk which outlined the recent developments of other Parliaments in relation to dealing with matters of privilege, and in particular the new procedures that were adopted by the United Kingdom House of Commons in 1986 and used subsequently by the House of Representatives in Australia on at least one occasion. These procedures are:
 - (1) The committee should carry out its own investigation to try to discover the source of a leak, in particular by formally asking all members of the committee and the committee's staff if they can explain how the leak came about;
 - (2) the committee should decide whether or not the leak constitutes a substantial interference, or the likelihood of such, with the work of the committee, with the select committee system or the functions of the House;
 - (3) it should inform the Liaison Committee, so that it may take a view;
 - (4) in the light of the views of the Liaison Committee it should make a special report to the House to that effect, outlining the action it has taken and the conclusions it has reached;
 - (5) such a special report would automatically be referred to the Privileges Committee without a debate in the House: it is then for that committee to consider the matter and make a report to the House, whereupon the House would consider its recommendations. (*May*, p. 649)
28. The Committee saw merit in this procedure, in that the relevant committee that has had the premature release of information is tasked with taking steps to ascertain the source of the disclosure, and to assess whether it constitutes or is likely to constitute a substantial interference with the Committee and/or the committee system. Accordingly, it recommends that:

- (2) **The Legislative Assembly adopt a similar practice to that followed by the House of Commons in the United Kingdom since 1986, and more recently by the House of Representatives in their procedures for dealing with improper disclosure of committee evidence or proceedings and that this practice be adopted by way of a continuing resolution of the Assembly.**

Roberta McRae OAM MLA
Presiding Member

16 December 1993

