Unauthorised diversion and receipt of a Member's e-mails

Report of the Select Committee on Privileges

November 2002

Legislative Assembly for the Australian Capital Territory

Committee membership

Kerrie Tucker MLA, Chair

John Hargreaves MLA

Brendan Smyth MLA

Secretary: Derek Abbott

Administration: Judy Moutia

Resolution of appointment

(1) Notwithstanding the provisions of Standing Order 71, a Select Committee on Privileges be appointed to examine whether the unauthorised receipt of e-mails from Mr Wood's office was a breach of privilege and whether a contempt was committed.

(2) The Committee be composed of..

(a) one member to be nominated by the Government;

(b) one member to be nominated by the Opposition; and

(c) one member to be nominated by the A.C.T. Greens or the Australian Democrats; to be notified in writing to the Speaker by 15 minutes after the motion is agreed to by the Assembly.

(3) The Committee report by 20 August 2002.

(4) Should the Committee complete its deliberations before 20 August 2002, the Committee may send its report to the Speaker, or in the absence of the Speaker, the Deputy Speaker who is authorised to give directions for its printing, circulation and publication.[1]

[1] ACT Legislative Assembly, Minutes of Proceedings, No 22, 6 June 2002, para 20.

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Summary of conclusions and recommendations

On the basis that the diversion [of Mr Wood's e-mails] was serious, improper and interfered with Mr Wood's duties it would be open to the committee to make a finding of contempt. However in the absence of an identified perpetrator the committee is unable to determine intent and thus to make a finding on this matter. Para 4.21

The committee recommends that the role of InTACT as the Legislative Assembly's IT service provider be reviewed by the Standing Committee on Administration and Procedure. Para 4.31

The committee does believe that the status of volunteers working in member's offices needs to be clarified. In the absence of any contract of employment their rights and obligations are not defined. **The committee recommends that the Administration and Procedure Committee examine this matter. Para 4.32**

The committee also recommends that the Administration and Procedure Committee examine whether it would be appropriate to develop a more detailed code of conduct for members' and ministers' staff. Para 4.33

The committee believes that Mr Strokowsky's actions meet the criteria of impropriety, seriousness, and intent and directly relate to Mr Wood's duties as a member. Therefore the committee concludes that Mr Strokowsky is guilty of contempt of the Legislative Assembly. Para 5.40

The committee recommends that Mr Strokowsky make a prompt and unreserved apology for his conduct in this matter to the Legislative Assembly in writing through the Speaker. Para 5.41

In view of the adverse effect that this finding of contempt will have on Mr Strokowsky's professional reputation the committee makes no further recommendation for the imposition of a penalty on Mr Strokowsky. Para 5.42

The committee found no evidence to suggest that any member of the Assembly had any knowledge of Mr Strokowsky's access to Mr Wood's e-mails. Nor did it find evidence that any other member of the Opposition's staff in the Assembly had sufficient knowledge of the access and use being made of the e-mails to suggest that any other staff member could also be in contempt of the Assembly. Para 5.43

1. Introduction

1.1. On 6 June 2002 the Legislative Assembly resolved that:

> … a Select Committee on Privileges be appointed to examine whether the unauthorised receipt of e-mails from Mr Wood's office was a breach of privilege and whether a contempt was committed.[1]

On 20 August 2002 the committee was given an extension of time to report until 12 November 2002

1.2. The terms of reference do not refer to any named individual. While they do refer specifically to the receipt of the e-mails the committee interpreted the terms of reference as requiring it to examine the whole process – the diversion, receipt and any use that may have been made of the e-mails in question. Thus in the course of its inquiry the committee has sought to establish who was responsible for the diversion and who received the e-mails either directly or indirectly.

1.3. The committee has held four public hearings, details of which are in appendix I to this report, and also heard witnesses in-camera. The committee has also had access to the brief prepared by the Australian Federal Police (AFP) and the statements taken by it during the course of its inquiry.

1.4. This matter was the subject of an investigation by the AFP between February and June 2002. On the basis of the AFP inquiry, the Director of Public Prosecutions concluded that:

> After careful review of the [AFP] brief by a senior prosecutor in my Office and myself, I have determined that no criminal offence is disclosed by the evidence. Whether disciplinary or other action is warranted is a matter for the relevant Members of the Legislative Assembly to consider.[2]

In a separate letter to the AFP Commissioner the Director of Public Prosecutions noted that the recipient of the e-mails 'may have acted in an inappropriate or perhaps dishonest way'.[3]

1.5. It is important to distinguish here between the role of the AFP and the role of this committee. The AFP and the DPP were required to investigate and decide whether a criminal offence had been committed. Their investigation concluded that no criminal offence had been committed.

1.6. That finding did not preclude an investigation by the Assembly itself. Matters which might be found to be contempts are not necessarily breaches of the ordinary law. Thus the impression put about that the matter was closed with the completion of the police inquiry was false. This committee's inquiry did not seek to second-guess the criminal investigation. It was a separate investigation into possible breaches of the law of parliaments.

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[1] ACT Legislative Assembly, Minutes of Proceedings No.22, 6 June 2002 para 20.
[2] Office of the Director of Public Prosecutions, ACT, Statement, 6 June 2002.
[3] ibid., letter to the Commissioner of the AFP, 6 June 2002

2. Privilege and Contempt

Sources of the Legislative Assembly's Privileges

2.1. The powers and privileges of the ACT Legislative Assembly derive from the *Australian Capital Territory (Self Government) Act 1988* which states at section 24 that:

> (2) … the Assembly may make laws:
>
> (a) declaring the powers of the Assembly and of its members and committees, but so that the powers so declared do not exceed the powers for the time being of the House of Representatives …
>
> (3) 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 …

2.2. The Assembly has not made a law under this section. Thus the powers and immunities of the Assembly are the same as those of the House of Representatives with one exception – that, as a result of section 24 (4) of the Self Government Act, it has no power to imprison or fine a person.

2.3. The privileges of the House derive in turn from those of the British House of Commons as at 1901 via section 49 of the Australian Constitution, which states that:

> 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.

2.4. The privileges of the Commonwealth Parliament are further defined in the *Parliamentary Privileges Act 1987.*

2.5. Decisions of the House of Representatives and the Senate on privilege matters are important sources on the law and practice of privilege and contempt. The Senate's privileges resolutions have also been a valuable guide to this committee in conducting this inquiry.

Privilege

2.6. The privileges of parliament are better thought of as a range of immunities from legal action in respect of certain activities related to the parliament and powers available to the parliament to protect itself,

> conferred in order to ensure that the duties of members as representatives of their constituents may be carried out without fear of intimidation or punishment, and without improper impediment. … These immunities … are

> limited in number and effect. They relate only to those matters … recognised as crucial to the operation of a fearless Parliament …[1]

The immunities are recognised, and generally defended, by the law.

2.7. Perhaps the best known and most significant immunities are 'the right of free speech in Parliament without liability to action or impeachment for anything spoken therein' and the immunity of members from legal proceedings for anything said by them in the course of parliamentary debates and proceedings. [2] This immunity derives from the English Bill of Rights which refers to 'debates and proceedings' in Parliament.

2.8. The Parliamentary Privileges Act provides a guide to what constitutes proceedings:

> … all words spoken and acts done in the course of, or for purposes of, or incidental to, the transacting of the business of a House or a committee, and … includes-
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> (a) the giving of evidence before a House or committee, and the evidence so given;
> (b) the presentation of a submission or document to a House or Committee;
> (c) the preparation of a document for purposes of or incidental to the transacting of such business; and
> (d) the formulation, making or publication of a document, including report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.[3]

2.9. Thus proceedings in parliament can encompass a broad range of activities and can include the evidence of witnesses before committees and documents prepared by third parties for use by members in the course of their parliamentary business.

2.10. In considering this section *House of Representatives Practice* notes that, while what constitutes a parliamentary proceeding is subject to continuing debate, '…citizens communicating with a Member in normal correspondence would not enjoy absolute privilege in this matter.'[4]

2.11. The powers of parliament are, principally, those necessary to control its own members and to punish breaches of its privileges or contempts. Those of the ACT Legislative Assembly are limited, as mentioned above, by the Self-Government Act.

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[1] Senate Committee on Privileges, 62nd Report, *1966-1996, History, Practices and Procedure*, August 1996, para 1.1.
[2] J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) pp. 501-2
[3] *Parliamentary Privileges Act (C'wealth) 1987*, s.16.
[4] *House of Representatives Practice*, 4rd edn, (2001), p.693.

Contempt

2.12. A legislature's power with regard to contempt is analogous to that of the courts and reflects the need of a legislature, or a court, to '… protect themselves from acts which directly or indirectly impede them in the performance of their functions.'[5] Note that 'the power [to punish contempts] does not depend on the acts judged and punished being violations of particular immunities'[6].

2.13. The relationship between immunities and the power to punish contempts is best described in Odgers:

> The power of the Houses in respect of contempts … is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law.[7]

2.14. Erskine May, the guide to British parliamentary practice, describes contempt as,

> … any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent to the offence. It is therefore impossible to list every act which might be considered to amount to a contempt.[8]

2.15. Contempt of parliament is further defined in the *Parliamentary Privileges Act 1987(C'wealth)*, section 4:

> 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 a committee of its authority or functions, or with the free performance by a member of a member's duties as a member.

2.16. The Privileges Resolutions of the Senate include a guide to acts that may be considered contempts. For the purposes of this inquiry the first of these is relevant:

> A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of a Senator's duties as a Senator.[9]

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[5] *Odger's Australian Senate Practice*, 10th edition, p.58.
[6] *Odger's*, op cit, p. 58
[7] *Odger's*, op cit, p.30-31.
[8] Erskine May, *Treatise on the Law,Privileges, Proceedings and Usages of Parliament*, 21st edition, (1989), p.115.
[9] Parliamentary Privilege. Resolutions agreed to by the Senate on 25 February 1988. No. 6 – Matters constituting contempts, paragraph 1. Odgers, op cit, p. 579.

2.17. The Houses of the Commonwealth Parliament while treating contempt seriously have tended to exercise their powers 'with great circumspection'. The Senate Privileges Committee has generally confined its investigations to 'serious matters potentially involving significant obstruction of the Senate…' and '… now regards a culpable intention on the part of the person concerned as essential for the establishment of contempt.'[10]

2.18. Two examples from the House of Representatives Privileges Committee, with some similarity to the issue before this committee, illustrate the contemporary approach to the use of the contempt powers.

2.19. In 1994 the committee reported on whether general industrial action which interrupted the flow of mail to and from members offices constituted a contempt. It found that the work of Members' offices was disrupted to a significant extent and that the ' … actions complained of impeded the ability of constituents of a number of Members of the House to communicate with those Members'. However since the industrial action was not specifically intended ' … to infringe the law concerning the protection of Parliament' no finding of contempt should be made.[11]

2.20. The following year the committee considered whether the execution of a search warrant in a Member's electorate office, by seriously disrupting the work of the office, constituted a contempt. The committee found that ' … the disruption caused to the work of … [the] electorate office amounted to interference with the free performance by [the Member] of his duties as a Member'. The committee also found that there was '… no evidence [of] … any intention to infringe against the law concerning the protection of Parliament', nor could not the interference be considered improper. The committee concluded that no contempt had occurred.[12]

2.21. It is reasonable to conclude from the above that for an action to constitute a contempt it should include the following:

(i) *improper interference* in the free performance by a member of his or her duties as a member;
(ii) *serious interference* with a member's ability to perform his or her duties as a member;
(iii) an *intention* by the person responsible for the action to improperly interfere with the free performance by a member of his or her duties as a member; and
(iv) *that the interference related to the member's duties as a member* of the Assembly not to any other area of responsibility or activity.

2.22. In concluding this chapter it is important to distinguish between the ordinary meaning of contempt and its use in a parliamentary or legal context. Contempt, in the ordinary sense of holding something in extremely low regard or finding it despicable,

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[10] For discussion of this see *Odger's*, op cit, pp.61-63.
[11] *House of Representatives Practice*, op cit, pp. 839-40
[12] *ibid.*, p. 843. See also page 710 for discussion of these cases.

is not relevant here. In a parliamentary context contempt is as defined above. Thus a person may find an action contemptible in the ordinary sense without that action raising an issue of contempt in the parliamentary sense.

3. The matters under investigation

Diversion of Mr Wood's e-mails

3.1. On 26 November 2001, shortly after the change of government following the election of that year, the e-mail system in the office of Mr Bill Wood MLA, a newly appointed Minister in the ACT Government, 'crashed'. It was restored by InTACT, the Legislative Assembly's (and ACT Public Service) service provider.

3.2. Police statements from InTACT officials and a copy of InTACT's internal case report provided to the committee indicate that the restoration process commenced on 27 November 2001 and was completed on 5 December 2001. As part of the restoration process two e-mail boxes were provided with the names WOOD@act.gov.au and bill.wood@act.gov.au.[1]

3.3. Prior to the election Mr Wood had used only the 'WOOD' mailbox. The 'bill.wood' address had been cancelled at a much earlier time. Mr Wood and his senior adviser Ms Watt were unaware of the existence of the new 'bill.wood' mailbox, had not requested it and did not use it.[2] For technical reasons[3] this mailbox was not displayed in Mr Wood's Microsoft Outlook home page.

3.4. The type of diversion put in place had the effect of deleting mail from the bill.wood mailbox when it was transferred to the unauthorised recipient's mailbox.

3.5. InTACT have advised the committee that the second mailbox was created in accordance with what they believed to be the normal practice of the Assembly to provide members two e-mail addresses.[4] Because they were re-establishing, rather than creating, a system it does not appear that InTACT were acting on any specific instructions from Mr Wood's office. Nor did InTACT seek any specific authority from Mr Wood or his office to provide the second mailbox.

3.6. The 'bill.wood' mailbox was used by some members of Mr Wood's staff and was given out to members of the public by at least one of Mr Wood's staff. It also appeared in the Global Address List of the ACT Public Service. Thus it was available to anybody having access to that list and, since it was in the standard format for all ACT public sector employees, anybody familiar with that format might have used it to communicate with Mr Wood.

3.7. InTACT has provided the committee with copies of e-mails sent to the 'bill.wood' mailbox during the relevant period. The first e-mail is dated 27 November 2001. Thus it reasonable to assume that the process of diversion occurred simultaneously with the re-establishment process.

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[1] InTACT (M. Anderson) statement to the Australian Federal Police (AFP), 26 March 2002
[2] Margaret Watt, committee transcript, 23 September 2002, p.36
[3] See para 4.24
[4] Richard Hart, InTACT, committee transcript, 23 August 2002, p.2

3.8. The process of diversion was not accidental. It could not, plausibly, have happened as a result of a random conjunction of keystrokes. Nor is there any evidence of hacking into the InTACT system from outside having occurred.[5]

3.9. The subsequent Australian Federal Police (AFP) investigation into the diversion and misuse of e-mails sent to Mr Wood concluded that:

- the modification of M[icro] S[oft] Exchange Server settings requires system administration rights, and access to the appropriate software tools;

- Accordingly the person responsible for this diversion being created is almost certainly an InTACT employee; …[6]

3.10. The police also found that because of the way InTACT backups are kept it was not possible to identify either the source of the diversion or the date it occurred with any more accuracy.[7] However, as noted above, the recovery of the e-mails addressed to the 'bill.wood' mailbox indicate that it occurred on 27 November 2001.

3.11. The committee has been advised by InTACT that, at the time in question, between sixty-seven and seventy-three InTACT staff had the levels of authorisation necessary to access the system and instigate the diversion. The AFP interviewed the InTACT officers responsible for the re-establishment of Mr Wood's mailbox and other InTACT officials. Neither the AFP nor InTACT was able to identify the person responsible for the diversion.

3.12. The unauthorised recipient of Mr Wood's e-mails was Michael Strokowsky, formerly employed as a ministerial staff member by Mr Bill Stefaniak MLA. Mr Strokowsky had, since the change of government, worked as a volunteer for the Liberal Party and was located in an office in the suite of the Leader of the Opposition, Mr Humphries. Mr Strokowsky returned to a salaried position on the Liberal Party's staff on 26 February 2002.

The unauthorised receipt and use of the e-mails

3.13. Between 27 November 2001 and 28 February 2002 e-mails addressed to Mr Wood at bill.wood@act.gov.au were diverted to Mr Strokowsky's mailbox. In a statement Mr Strokowsky made to the AFP on 7 March 2002 he notes that he was on leave from 17 December 2001 to 17 January 2002.[8] Mr Strokowsky also stated in evidence to the committee that, prior to 17 December 2001, he had not used his own mailbox.[9]

3.14. However, the committee notes that InTACT provided evidence that Mr Strokowsky's mailbox had been accessed, with the user name Michael Strokowsky,

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[5] Statements to the AFP by various employees of InTACT, 26 March 2002
[6] Detective Senior Constable Frank Gill to Mr Ken Archer, Office of the Director of Public Prosecutions, 8 May 2002, page 2
[7] ibid., DSC Gill
[8] Michael Strokowsky, statement to the AFP, 7 March 2002, p1-2
[9] Michael Strokowsky, committee transcript, 23 September 2002, p.75

on 14 January 2002 and a message was sent from it. The committee also notes that Mr Strokowsky acknowledges that he may have been mistaken about the precise date on which he returned to work in January 2002 and accessed his e-mail system.[10]

3.15. Mr Strokowsky stated that when he returned to work there were 'about 400 messages in my e-mail' many of which were for his former employer Mr Stefaniak. It should be noted that Mr Stefaniak's mail was in a separate mailbox to which Mr Strokowsky had access thus Mr Stefaniak's mail was not confused with Mr Strokowsky's own mail. InTACT records do confirm that approximate figure for the contents of the 'Michael Strokowsky' mailbox.

3.16. Mr Strokowsky stated to the AFP that:

> Between about 17 January 2002 and mid-February 2002 I received about 5 or 6 e-mails which had been addressed to Mr Wood. I do not recall the e-mail address relating to those e-mails… .[11]

Mr Strokowsky maintained that approximate figure for the number of Mr Wood's e-mails he was aware of having received throughout the committee's inquiry

3.17. InTACT has since provided the committee with copies of e-mails sent to Mr Wood and diverted to Mr Strokowsky. This list includes only e-mails that were not 'purged' – completely deleted - from the system and provides a minimum number of thirty-eight e-mails addressed or copied to the 'bill.wood' mailbox and diverted to Mr Strokowsky.

3.18. It does not include "Whole of Government Messages" or other notices distributed through the ACT government e-mail system which were sent to the bill.wood mailbox. InTACT has advised the committee that, as part of the diversion the Microsoft Exchange network would 'weed out' duplicates of circular messages.

3.19. Mr Strokowsky stated to the police that 'I thought there was an inconsequential but explainable glitch in the computer system …'.[12] His evidence to this committee differs from that statement in that he suggests that he thought he may have been the intended recipient of 'blind copies' of some of Mr Wood's mail as some sort of political leak.[13]

3.20. Mr Strokowsky notes that, with regard to Mr Wood's e-mails:

> …between 19 and 21 February 2002 there was some sort of electrical surge which caused problems with my computer and others. … After that time I do not recall receiving any emails for Mr Wood … .[14]

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[10] InTACT provided the committee with a print out of Mr Strokowsky's sent items box for 14 January 2002. Mr Strokowsky acknowledged the possibility of a mistaken recollection in a letter to the committee dated 4 November 2002

[11] Michael Strokowsky, AFP, 7 March 2002, p.2.

[12] ibid., page 2.

[13] Michael Strokowsky, committee transcript, 23 September 2002, p.75

[14] Michael Strokowsky, statement to the AFP, page 3.

3.21. However it is clear from other evidence that Mr Strokowsky continued to receive e-mail intended for Mr Wood until 27 February 2002 when the matter became public. In fact the diversion continued, at the request of the police, until 11 March 2002.

3.22. Mr Strokowsky notes in his statement that he had had authorised access to Mr Stefaniak's mailbox when he had been employed by Mr Stefaniak, that that access was not cancelled after he resigned from Mr Stefaniak's staff and that he continued to receive e-mails addressed to Mr Stefaniak after 17 January 2002. This is corroborated by the statements of other Liberal staff members. Mr Strokowsky claims in his statement that he advised Mr Stefaniak's staff of this on or about 17 January 2002 and that access to Mr Stefaniak's mailbox ceased shortly thereafter.[15]

3.23. Other statements from Liberal members' staff state that Mr Strokowsky was aware that he had access to Mr Stefaniak's mail prior to 17 December 2001, had opened and read it and had made no effort to cancel it. These statements suggest that staff members thought it improper that Mr Strokowsky had this access and had done nothing about it. It is also implied that the initiative to cancel access came from Mr Stefaniak's staff.[16]

3.24. Taken as a whole Mr Strokowsky's statement to the police in March 2002 suggests that he took a casual attitude to the whole matter believing that his access to Mr Wood's e-mail was part of a continuing pattern of problems and 'glitches' with the system. He claimed that the number of e-mails involved was small and their appearance in his inbox random. Thus he saw no need to report the problem.

3.25. Mr Strokowsky further stated that, at the change of government, there were a number of problems with computer systems. This is supported by the experience of other members and staff of the Assembly. He implied that his receipt of Mr Wood's e-mails was a part of those continuing problems.

3.26. Mr Strokowsky has stressed that, because of the arrangement with Mr Stefaniak, he was familiar with the appearance of his Inbox screen when a person's mailbox was diverted to him. In the case of Mr Stefaniak's mail he had had a separate inbox for that mail. Because Mr Wood's mail was appearing in his own inbox Mr Strokowsky did not think a diversion was involved.[17]

3.27. The committee has received no evidence to suggest that Mr Strokowsky was aware that his receipt of a number of Mr Wood's e-mails meant that Mr Wood was not receiving them.

What use was made of the e-mails?

3.28. The committee has restricted itself to statements which fit in with the timing of the diversion and receipt of the e-mails as indicated by INTACT's records, are otherwise corroborated, are consistent with Mr Strokowsky's own statement to the

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[15] ibid., p.2
[16] Mary Elliott, statements to the AFP, 2 March 2002, p.3-4 & Sue Whittaker, statement to the AFP, 1 March 2002, p.1
[17] Michael Strokowsky, transcript, 23 September 2002, p.79

AFP or were made at public hearings of the committee and have not been disputed. Thus the committee has not given any weight to a number of the statements made to the AFP or at its own hearings.

3.29. This is not to imply that the persons making those statements were unreliable. The committee has adopted this course, given the potential seriousness of its findings, to ensure fair treatment of those involved.

3.30. In his statement to the police Mr Strokowsky acknowledged discussing his access with one other Liberal Party staff member.

> I recall at some stage after I initially received an e-mail addressed to Mr Wood, I had a casual conversation with Dr Amalia Matheson who is also a fellow Liberal staffer. I mentioned I had inadvertently received an e-mail directed to Bill Wood. At that time I would have given the impression the e-mail or e-mails I had received were innocuous in content ….[18]

3.31. Dr Matheson, Chief of Staff to Gary Humphries MLA, mentions in her police statement that Mr Strokowsky, on 4 February 2002, discussed the receipt of "a couple" of Mr Wood's e-mails and passing "a number of printed pages, maybe 2" to her. Dr Matheson was, in her own words, "very agitated, quite upset and concerned" about Mr Strokowsky having access to Mr Wood's e-mails. She considered it "totally inappropriate". Dr Matheson returned the printed pages to him a few days later.[19]

3.32. In her evidence to the committee Dr Matheson offered a slight clarification of this statement. She received one e-mail consisting of a series of forwarded messages. She also stated her clear view with regard to the unauthorised receipt of another person's mail:

> If a party inadvertently comes into possession of an e-mail, or indeed fax or other communication, which it appears was not intended for that recipient, it is my view that it is inappropriate to act on the information contained therein.[20]

3.33. In the week of 12 February Mr David Moore, a staff member of Mrs Cross MLA, received a copy of one of Mr Wood's e-mails from Mr Strokowsky with the comment that, '…it might be of interest. Why don't you keep it on file'.[21] Mr Moore retained the document, intending to shred it. He made no use of it and subsequently passed it to the AFP. It is an e-mail to Mr Wood, forwarded by his staff member Mr Stanwell, on 12 February 2002.

3.34. Mr Strokowsky has stated in evidence to the committee that the message seen by Dr Matheson was the same one he subsequently gave to Mr Moore.[22] However this is not possible. Dr Matheson's police statement clearly states that she received the e-

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[18] Michael Strokowsky, statement to the AFP, 7 March 2002, page 3.
[19] Dr Amalia Matheson, statement to AFP, 2 March 2002, p.2
[20] Dr Matheson, transcript, 27 September 2002, p8
[21] David Moore, statement to AFP, 11 March 2002, p.3.
[22] Michael Strokowsky,, transcript, 23 September 2002, p75

mail from Mr Strokowsky on 4 February 2002 while the e-mail given to Mr Moore, which he subsequently provided to the police was dated 12 February 2002.

3.35. In evidence to this committee Mr Strokowsky stated that he did not recall showing those, or other e-mails, to any other person.[23] The committee has received no evidence indicating that other e-mails were copied or distributed by Mr Strokowsky.

3.36. On 14 February 2002 Ms Whittaker, a staff member in the office of Greg Cornwell MLA, told Mr Wood's senior adviser, Ms Watt, that Mr Strokowsky had access to Mr Wood's e-mail.[24] Ms Whittaker and Mr Strokowsky would concede that they are not close confidants. Ms Whittaker's knowledge of Mr Strokowsky's access to Mr Wood's e-mails suggests that knowledge of it was not restricted to those staff members who had received copies.

3.37. Mr Strokowsky noted in his evidence to the committee that:

> I have not conceded the fact that that there were several people with whom I discussed the fact that I had received an e-mail [however] there are other people who also – staffers I'm talking about – who also realised that I had received an e-mail that was addressed to Bill Wood.[25]

3.38. Ms Watt raised the matter with InTACT but, neither she nor Mr Wood were, at that stage, prepared to provide the name of the unauthorised recipient to InTACT. An investigation by InTACT at this time failed to discover the diversion.

3.39. On 19 February 2002 Mrs Cross MLA had a discussion with Mr Strokowsky with regard to a draft question to the Chief Minister about Ministers' delay in answering correspondence. Mrs Cross indicated that she thought the question pointless. She only agreed to ask it after Mr Strokowsky confirmed that he had evidence to support the substance of the question. He provided no details of the evidence. Mrs Cross's statement makes no mention of access to Mr Wood's e-mail or the nature of the evidence to which Mr Strokowsky referred, beyond the comment that he 'pointed to his computer …'.[26]

3.40. Mr Humphries' statement to the AFP noted that one of Mr Strokowsky's tasks for the Opposition was to edit draft questions. However he (Mr Humphries) stated that the question on the failure of ministers to answer correspondence had not originated with Mr Strokowsky.[27] Mr Humphries confirmed this statement in his appearance before the committee on 1 November 2002.

3.41. A staff member of Mrs Dunne MLA has written to the committee indicating that he prepared the question, that it was not directed against Mr Wood and that it was not based on any complaints against Mr Wood or on intercepted e-mails.[28] The

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[23] Michael Strokowsky, transcript, 23 September 2002, p75
[24] Sue Whittaker, statement AFP, 1 March 2002, p.2 and Margaret Watt, statement AFP, 8 March 2002, p.3
[25] Michael Strokowsky, transcript, 23 September 2002, p67
[26] Helen Cross MLA, statement AFP, 3 April 2002, p.3
[27] Gary Humphries MLA, statement AFP, 27 March 2002, p.2
[28] Norman Abjornson, e-mail to the committee, 24 September 2002

wording and context of the question suggests that Mr Wood was not the target of the question. The question was not directed to Mr Wood, did not refer to Mr Wood or to e-mails or to a particular piece of correspondence.

3.42. The committee concludes that the material obtained by Mr Strokowsky did not form the basis for the question asked in the Assembly.

3.43. It has been suggested that the committee exceeded its term of reference in investigating the preparation of a question to be asked in the Legislative Assembly and discussions which may have taken place at a Liberal Party retreat on the weekend of 9 and 10 February 2002. However, it was perfectly reasonable for the committee to investigate matters including the provenance of the draft question with regard to the issue of contempt.

3.44. Had any of Mr Wood's e-mails formed the basis of the question it would have *further* indicated the use being made of the e-mails, the extent of knowledge of their receipt and also Mr Strokowsky's intent in retaining copies of some of the e-mails. Evidence of more widespread discussion of the topic may also have indicated that other people had specific knowledge of the unauthorised receipt and use of the e-mails.

3.45. On 26 February 2002 a Liberal Party staff meeting discussed Ministers' delay in answering correspondence from constituents. Various participants have slightly differing recollections of the meeting. Three remember Mr Strokowsky mentioning that he had seen an e-mail or e-mails of Mr Wood, one remembers mention of e-mails only, while three others remember mention of information only.[29]

3.46. The committee does not believe that, given the varying recollection of participants, the discussion at this meeting should be accepted as an indication of wide knowledge among opposition party staff of Mr Strokowsky's on-going access to Mr Wood's e-mail or of the use being made of some of them.

3.47. On 27 February Ms Whittaker, who had remained concerned about the unauthorised access, sent an e-mail to both of Mr Wood's mailboxes with a "read receipt" attached – the one addressed to bill.wood@act.gov.au was received and the "read receipt" returned using Mr Strokowsky's mailbox within two minutes of being sent.[30] Thereafter the matter was drawn to the attention of the Clerk of the Legislative Assembly and became the subject of the police investigation.

[29] Various statements given to the AFP, March 2002

[30] Sue Whittaker, statement AFP, 1 March 2002, p.3. The committee has a copy of the e-mail and the reply.

4. The committee's findings – diversion of Mr Wood's e-mails

Breach of Privilege

4.1. None of the actions investigated by the committee was a breach of Mr Wood's privileges as a member of the Legislative Assembly. No attempt was made to prevent him participating in the proceedings of the Assembly or a committee nor was any action taken to penalise him for any thing said in the Assembly or a committee.

Contempt

4.2. The possible grounds for contempt that the committee considered are that:

(i) if the e-mails were part of the proceedings of the Assembly their opening by the unauthorised recipient and distribution to third parties was unauthorised publication of Assembly documents; and

(ii) the diversion of Mr Wood's e-mails to another recipient was an improper interference in his ability to carry out his duties as a member; and

(iii) the continued receipt, opening, retention, distribution and use of Mr Wood's e-mails by an unauthorised recipient was also an improper interference.

Unauthorised Publication of Proceedings of the Legislative Assembly

4.3. The first possible ground cannot be sustained. The e-mails were not proceedings in the Assembly or a committee.[1] They were not explicitly provided to Mr Wood with the expectation that they would form part of a proceeding in the Assembly. For the most part the e-mails were ordinary correspondence from constituents, officials and colleagues. Therefore no privilege attached to them.

Improper interference

4.4. The committee does believe that the other grounds for contempt *can* be sustained. In seeking to determine whether the conduct the committee has examined might constitute a contempt of the Assembly, the committee has had regard to the criteria it set out in chapter II; that,

- an action was an improper interference in a member's ability to discharge his duties;

- it was serious interference;

[1] See the Deputy Clerk's letter to the Speaker – tabled 25 June 2002

- the person responsible intended to interfere with the member's ability to discharge their duties; and

- the improper interference related to the member's duties as a member.

The status of e-mails

4.5. The committee considered what standards should apply to the e-mails. They are an inherently less secure and more transient form of communication than an ordinary letter. However this does not mean that they should be treated with less care and respect than a written letter inside a sealed envelope. The warnings commonly appended to e-mails advising a recipient who is not the intended recipient of his or her responsibilities clearly indicate the community's expectations.

4.6. The committee[2] believes that an e-mail received in error imposes on the unintended recipient an obligation to advise the author or the intended recipient or another appropriate person of the matter. Nor is it acceptable to make any use of the contents of such an e-mail.

4.7. This is clearly the view commonly held within the Legislative Assembly. It was a view put quite clearly to the committee by Mr Wood[3] and Dr Matheson[4]. The concerns expressed by Ms Elliott and Ms Whittaker, and the latter's action in advising Mr Wood's office and, finally demonstrating that the diversion was occurring, clearly indicate that they believed that continuing unauthorised access was improper.

4.8. Mr Strokowsky made it clear in evidence that he too shared these generally accepted standards:

> I believe that my ethical and moral standards are as high as anyone else in this place. Had I known that the e-mails that I was receiving that were addressed to Bill Wood were not intended for me, I would have acted … I would have contacted his office and let him know.[5]

4.9. The committee has, therefore proceeded on the basis that the standards applying to the confidentiality of e-mails are generally understood and accepted. The committee also notes that the standard employment contract for staff of members of the Legislative Assembly requires that act with 'propriety, honesty and integrity'.[6]

4.10. The committee does acknowledge that, while the standards may be generally accepted, e-mails do pose particular issues with regard to their treatment. An ordinary letter, sealed in an envelope and addressed to a specific recipient, leaves no room for doubt or uncertainty as to the intended recipient.

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[2] At various places throughout this report views of 'the committee' are expressed. Readers should note that there is a dissenting report by Mr Brendan Smyth MLA at the end of chapter 5 and that references to 'the committee' may reflect the views of a majority of members only.
[3] Bill Wood MLA, transcript, 23 September 2002. p.24
[4] Dr Amalia Matheson, transcript, 27 September 2002, p.8 – see para 3.32
[5] Michael Strokowsky, Select Committee on Privileges, transcript, 23 September 2002, p 69
[6] Section 4.3(b)

4.11. An e-mail, occurring in an electronic list offers no such certainty. There is an indication of who it is from, the date and the subject. Depending on how the recipient's inbox is configured, the lower half of the screen will show the first eight or ten lines of an e-mail and may provide sufficient information to identify whether the recipient is in fact an intended recipient.

4.12. To be certain, particularly where an e-mail has been copied to a number of recipients, it is often necessary to open an e-mail and even read the text. Thus, opening and even reading the contents of an e-mail will not necessarily represent a breach of the appropriate standards that should apply to their treatment. In the case of a 'blind copy' there will be no indication of whether the recipient is an intended recipient.

4.13. The committee believes that if there is reasonable doubt as to whether a person is an intended recipient then that person has an obligation to check with the sender whether he or she is, in fact, an intended recipient. For example if a person's name does not appear on the e-mail, if the named intended recipients suggest that the person is unlikely to be an intended recipient or if the content suggests that it is unlikely that the person is an intended recipient, then that person should clarify the status of the e-mail.

4.14. When it is clear that a person is not the intended recipient then the range of obligations that apply to other forms of misdirected or intercepted communication clearly apply.

4.15. Does a breach of this accepted standard necessarily constitute a contempt of the Assembly? As indicated above a matter which improperly interferes with a member's ability to discharge his duties as a member may be a contempt. E-mails are now an accepted means of communication thus any deliberate interference with a member's e-mails is not different from interference with other more traditional means of communication.

4.16. The committee concluded the secure and free communication with a member's constituents is necessary for a member to be able to discharge his or her duties[7] and deliberate and improper interference with that free communication would constitute a contempt.

The Diversion of Mr Wood's e-mail

4.17. The diversion of the contents of the bill.wood mailbox was clearly unauthorised and appears to have been deliberate and therefore improper. The process of diversion requires a sequence of actions which make it highly unlikely that the diversion could have been carried out by accident.

4.18. The diversion was probably not accidental, but it may have been undertaken as a result of a mistake or confusion within InTACT. Various theories were put to the committee as to how such a mistake might have occurred ranging from confusion of

[7] For example, *House of Representatives Practice, op cit,* p.839 para 144 & p.843 para 160

names to malice on the part of an InTACT employee. No evidence was presented in support of any theory and none of the theories was convincing.

4.19. The police concluded that Mr Michael Strokowsky was not responsible for the diversion. The committee agrees with that conclusion. Both the AFP and InTACT have concluded that it is almost certain that the person responsible was an employee of InTACT. However neither InTACT nor the AFP have been able to identify the person responsible.

4.20. The committee is advised that the system logs maintained by InTACT at the time of the diversion did not enable it to identify the person responsible for the diversion. InTACT also acknowledged that, at that time, too many InTACT officers had the access necessary to perform the diversion. The committee has been assured that rights of access have been significantly restricted and security vetting of staff has been considerably improved.

4.21. **On the basis that the diversion was serious, improper and interfered with Mr Wood's duties it would be open to the committee to make a finding of contempt. However in the absence of an identified perpetrator the committee is unable to determine intent and thus to make a finding on this matter.**

4.22. This whole process reflects very badly on InTACT. At almost every step their processes seem to have failed either because staff ignored them or their procedures were inadequate.

4.23. The establishment of Mr Wood's second mailbox seems to have been initiated without written authorisation from Mr Wood's office. The decisions about the number of mailboxes to be created were taken in InTACT without consultation or authorisation. The internal record of the restoration process shows that even when no trace of a back-up of the bill.wood mailbox could be found InTACT officers did not question the need for it.

4.24. Having established the mailbox InTACT then failed to advise Mr Wood's office of its existence and thus the mailbox was never accessed:

> … [the second mailbox] wouldn't have appeared in Mr Wood's inbox when the inbox was first opened by him, because there is an extra set of steps that the end user has to take show up a second mailbox …[8]

4.25. When advised in mid- February 2002 that somebody in the Legislative Assembly had unauthorised access to Mr Wood's mailbox, InTACT was unable to discover the diversion.

4.26. InTACT has acknowledged problems at two levels. Access to the necessary protocols to arrange diversion was far too widespread within InTACT and checks into the backgrounds of employees in sensitive areas of the organisation were inadequate. InTACT also failed to maintain backups and logs which would have enabled it to trace improper interference with the services it provided to clients.

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[8] InTACT, Mr Richard Hart, transcript, 26 August 2002, p.4

4.27. InTACT acknowledged at its final hearing with the committee that its system was, relatively speaking, insecure. For example Commonwealth materials classified *as* restricted or above cannot be carried on the InTACT network. InTACT has, since the events under investigation, introduced a significant number of changes to its procedures.

4.28. On a number of occasions the committee found InTACT's explanations of matters within their competence less than helpful. In a technical area such as computing it is reasonable to expect that experts, particularly in a public agency, will interpret laymens' language constructively. For example, InTACT's failure to provide the committee with the e-mails involved at an early stage seriously inhibited the committee's inquiry.

4.29. The committee sought information on the number of e-mails involved in June 2002. In response it was advised that,

> It is not possible to determine exactly how many e-mails were diverted, as the Exchange mail system does not keep track of how many messages are transferred internally within a particular system.[9]

This may have been technically correct with regard to that system but it failed to respond to the committee's request which was couched in general terms.

4.30. The committee was provided with a rough estimate extrapolated from two days activity in Mr Strokowsky's mailbox. Not until October did InTACT identify a method of recovering Mr Wood's e-mails and actually provide them to the committee.

4.31. The committee believes that this episode has revealed deficiencies in the Services provided by InTACT to the Legislative Assembly. It thus considers it appropriate that a review of those services be conducted. **The committee recommends that the role of InTACT as the Legislative Assembly's IT service provider be reviewed by the Standing Committee on Administration and Procedure.**

General comments

4.32. Throughout the period under examination Mr Strokowsky was a volunteer worker for the Liberal Party in the Assembly. The committee does not question that he had authorised access to the Assembly's computer systems. However the committee does believe that the status of volunteers working in member's offices needs to be clarified. In the absence of any contract of employment their rights and obligations are not defined. **The committee recommends that the Administration and Procedure Committee examine this matter.**

4.33. The committee also recommends that the Administration and Procedure Committee examine whether it would be appropriate to develop a more detailed code of conduct for members' and ministers' staff.

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[9] InTACT, letter to the committee, 9 July 2002

5. The committee's findings – the continued receipt, copying and distribution of Mr Wood's e-mail

5.1. With regard to the last matter, whether the continued receipt and use of Mr Wood's e-mails constituted a contempt, the committee considered the implications of the four criteria identified in paragraph 4.4 at some length.

Improper interference

5.2. In judging whether the interference was improper the committee had regard to the accepted standards of the Legislative Assembly in dealing with confidential correspondence discussed above (paras 4.5-4.15). It concluded that the continued unauthorised receipt of e-mails, their copying and distribution would be improper.

5.3. The committee also sought to distinguish "improper" interference - breaches of accepted standards and practices whose maintenance is fundamental to the functioning of the Assembly - from interference that might be described as an acceptable part of the rough and tumble of adversarial politics.

5.4. It was put to the committee that the situation under investigation – the unsolicited receipt of confidential information which is subsequently used by the unauthorised recipient – is analogous to the use of documents 'falling off the back of a truck', a not uncommon practice in adversarial politics which, generally, does not raise issues of contempt.

5.5. The committee does not consider this analogy provides an excuse for improper action. The unauthorised publication or use of a document, covered by privilege or other laws, which 'fell off the back of a truck' would raise a question of contempt or, potentially, criminality.[10] Nor is the recipient of such documents absolved from ethical responsibility in the use made of them.

5.6. The committee also considers that continued receipt of information or documents to which the recipient has no right, and where no conceivable public interest attaches to that receipt, is a quite different situation from a one-off leak which may be justified as 'whistleblowing'.

5.7. The committee considered the question of what constitutes interference with a person's correspondence. It concluded that interference goes beyond preventing the intended recipient from receiving his or her mail. It includes breaching the

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[10] The Commonwealth Parliament has regularly made findings that unauthorised publication of committee reports to newspapers were 'serious breach[es] of the prohibitions'. See, for example, House of Representatives Practice, 4th edn, p. 838, para 139; p. 840, para 146; p.846, para 177, and the Senate Committee of Privileges, 76th Report, *Parliamentary Privilege Precedents, Procedures and Practices in the Australian Senate 1966-1999*, Appendix G, paras 1,7, 54, and 74.

confidentiality of that correspondence by 'eavesdropping' on it, by copying it and by distributing it to others.

Seriousness

5.8. With regard to seriousness, the committee is sensitive to the various comments mentioned in Chapter 2 to the effect that the powers of a legislature should be used with great circumspection.[11] The committee agreed that the seriousness of an action is not measured exclusively by its actual consequences. The Parliamentary Privileges Act also makes it clear that 'conduct …[that] is intended or likely to amount to an improper interference' can constitute a contempt.[12] (emphasis added)

5.9. A breach of a fundamental right, principle or practice is serious irrespective of the consequences of that breach. Thus, in considering seriousness the committee is not required to reach a decision based solely on whether any significant harm to Mr Wood resulted from the diversion of his e-mails.

5.10. The content of the e-mails is not necessarily relevant to the question of seriousness. The breach of the privacy of a member's mail is a serious matter even if no significant information is obtained as a result. The suggestion by Mr Strokowsky, presumably in mitigation, that the content of the e-mails was "mainly inconsequential" was not a matter for him to decide.

Intent

5.11. Intent may be discerned from express words or inferred from a person's actions. The committee may draw conclusions from a course of action in a particular context. In this case the committee is entitled to infer from Mr Strokowsky's actions in copying Mr Wood's e-mails, the distribution of some of them to party colleagues and comments that he made, that Mr Strokowsky intended to make use of the e-mails if the opportunity arose.

A member's duty

5.12. The committee is aware that distinctions may be drawn between a member's duties as a member and his or her private life. However, in this case the mailbox was provided to Mr Wood in his capacity as a member of the Assembly and the content of the overwhelming majority of the e-mails diverted to Mr Strokowsky clearly related to Mr Wood's public duties.

5.13. The distinction between a minister's duties as a minister and as a member of the Legislative Assembly was also considered. It was agreed that this distinction was not relevant here. While that distinction may be argued in other jurisdictions, where ministers are appointed by the Governor-General or a Governor to an executive council, in the ACT ministers derive their authority from the Legislative Assembly.

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[11] see para 2.18

[12] Parliamentary Privileges Act 1987 (C'wlth), s.4

The Receipt of Mr Wood's e-mails by Mr Strokowsky

5.14. Mr Strokowsky was not responsible for the diversion of Mr Wood's e-mails. Thus the issue of contempt with regard to him is whether his *continuing* receipt of Mr Wood's e-mails, his failure to act to end that receipt and the retention and use of the e-mails might constitute a contempt.

5.15. Unauthorised but unsolicited receipt and opening of the e-mails *in the first instance* cannot be considered an improper interference. As discussed above, it is often not possible to identify whether you are a proper recipient of an e-mail until you open it and ascertain whether it has been copied to you. If the e-mail has been deliberately 'blind copied' to you there will be no indication that you are an intended recipient. Thus even opening and reading an e-mail not obviously intended for you might not be considered improper.

5.16. A reasonable person will, however, be expected to draw some inferences from the source, the content and the identity of the proper recipient and reach a conclusion as to whether or not he was an intended recipient. Having received a few e-mails it is reasonable to assume that Mr Strokowsky was aware that he had unauthorised access to Mr Wood's e-mails. His use of phrases in his statement to the police such as 'inadvertently received' and 'received as a result of a glitch in the system'[13] suggest that he was so aware. The statements of some of his colleagues support the conclusion that he knew his access was not authorised.[14]

5.17. The committee does not accept that Mr Strokowsky was only aware of a very small number of e-mails, insufficient to alert him to the fact that he was receiving Mr Wood's e-mails on a regular basis. Thirty of the thirty-eight diverted e-mails provided to the committee by InTACT were specifically addressed to Mr Wood.

5.18. These e-mails show that on 14 January 2002 there would have been at least twenty-three e-mails for Mr Wood in Mr Strokowsky's mailbox. The e-mails included one dealing with a case before the Management Assessment Panel containing highly confidential client information. This e-mail carried a warning that "It was for the named addressee/s only …"; it went on to warn against any unauthorised use and required an unauthorised recipient to inform the Office of the Community Advocate immediately.

5.19. Other e-mails were from the Cabinet Office of the Chief Minister's Department, a range of other government agencies and community groups clearly relevant to Mr Wood's duties as a minister and a member.

5.20. Material provided by InTACT shows that with one exception the e-mails received prior to 14 January 2002 had been sent to the 'deleted items' file on Mr Strokowsky's system. However, one dated 13 December 2001 had been retained in Mr Strokowsky's inbox. This e-mail is clearly identified as being for Mr Wood.

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[13] Mr M Strokowsky, statement AFP, 7 March 2002, pp2 and 3.

[14] For example, Mr Moore reports a conversation in which Mr Strokowsky said to him that he had "received it by accident" and intended to tell Mr Wood. Dr Matheson believed the e-mails had been "accidentally misdirected to him".

5.21. The retention of this e-mail and the selection of other e-mails to show to colleagues does suggest that Mr Strokowsky was reading the e-mails with sufficient care to identify those that he considered of interest.

5.22. On 14 January 2002 it appears that there were twenty-three e-mails, nineteen of which were specifically addressed to Mr Wood, out of a total of approximately three hundred in Mr Strokowsky's mailbox dating from late November 2001. All twenty-three appear to have been opened. Five, delivered on 3 and 4 December 2001 would have been sitting in a solid block in the inbox when it was first opened.

5.23. In view of this it is it is difficult to accept that Mr Strokowsky was aware of only five or six over the whole period from mid-January to the end of February. The committee believes that Mr Strokowsky could have been in no doubt that he was receiving, without authority, e-mails intended for Mr Wood. As noted above Mr Strokowsky's own words and his comments as reported by colleagues lend support to this view.

5.24. As an alternative explanation Mr Strokowsky suggested in evidence to this committee that it was reasonable for him to believe that he was deliberately being sent blind copies, i.e. that he was an intended recipient of at least some of the e-mails.[15] The majority of committee members consider this explanation to be disingenuous. It is in conflict with the statement Mr Strokowsky made to the police and other evidence received by the committee. As an explanation it would, however, remove any moral obligation to advise Mr Wood or InTACT that he was receiving Mr Wood's e-mails.

5.25. Mr Strokowsky stated that, generally, he merely scanned that part of the text of each e-mail as it appeared in the lower half of his Inbox screen and deleted those of no interest to him. In the case of a number of the e-mails that were copied to Mr Wood or were addressed to a number of people a brief perusal of the opening lines would not, necessarily, reveal who the intended recipient was. However, many of the e-mails were short and clearly for Mr Wood. This would have been apparent even from a brief perusal

5.26. It is difficult to accept that an experienced public servant and political staff member would casually delete e-mails after a brief scan of their opening lines, particularly given that a large proportion of the e-mails were actually opened. Correspondence with the electorate is one of the mainstays of a politician's professional activity and failure to manage it can have serious political consequences.

5.27. It seems improbable that Mr Strokowsky did not, at the least, read them through to ensure that they did not require action on his behalf. Having read them he could be in no doubt that they were not intended for him and that he had an obligation to advise the authors, Mr Wood or InTACT of the problem.

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[15] Michael Strokowsky, transcript, 23 September 2002, pp.79 & 84

5.28. The authors of many of the e-mails and the content suggest that it was highly unlikely that a reasonable person could conclude that Mr Strokowsky was an intended recipient. Mr Strokowsky made it clear both to the police and the committee that he considered many of the e-mails inconsequential and of no interest. He also stressed to the committee that the names of the senders meant nothing to him. It is reasonable to conclude that inconsequential e-mails from and about complete strangers, having no political significance whatsoever, are very unlikely to have been deliberately blind copied to him.

5.29. At the other extreme, those e-mails from official sources, for example the Cabinet Office in the Chief Minister's Department, that were clearly about matters of current politics and related directly to Mr Wood's ministerial duties, were highly unlikely to have been leaked to an opposition staff member.

5.30. Mr Strokowsky has argued before the committee that the difference between his claim that his access to Mr Wood's e-mail was accidental and later suggestions that he was an intended recipient of blind copies is unimportant - just a semantic point.[16] The committee cannot agree.

5.31. The committee accepts Mr Strokowsky's statement to the police, which was made close to the events under scrutiny and with his lawyer's advice. It is fair to assume that the words were carefully chosen and were an accurate reflection of what he believed. The distinction between unauthorised access as a result of a technical glitch on the one hand and authorised access as the result of a blind copy on the other, and the obligations that flow from making that distinction, is clear.

Use of the e-mails

5.32. With regard to the use he made of the e-mails, Mr Strokowsky had access to Mr Wood's e-mails between 17 January (which he admits) and 27 February 2002 (which Ms Whittaker's test e-mail demonstrates[17]). He may have had access from mid-December 2001 but there is only one statement supporting this and it is imprecise about the date.

5.33. Mr Strokowsky opened e-mails intended for Mr Wood (on his own admission)[18], printed off two e-mails of which this committee is aware in this period (Dr Matheson's and Mr Moore's statements)[19], discussed them with colleagues (various statements by Liberal members' staff)[20] and gave copies to at least two people (Dr Matheson and Mr Moore)[21].

5.34. Those e-mails that Mr Strokowsky actually opened and printed are clearly intended for Mr Wood and their sources and content suggest that they were not

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[16] John Hargreaves MLA & Michael Strokowsky, transcript, 23 September 2002, pp.81, 85
[17] see para 3.34 above
[18] Michael Strokowsky, statement AFP, 7 March 2002, p2
[19] Dr Amalia Matheson, statement AFP, 2 March 2002, p2; David Moore, statement AFP, 11 March 2002, p.2
[20] Mary Elliott, Sue Whittaker, statements AFP, op cit; Emma Sweetapple, statement AFP, quoted Mr Hargreaves MLA in transcript, 23 September 2002, p.76
[21] See note 65.

deliberate blind copies. As noted above the 'blind copy' explanation is in conflict with Mr Strokowsky's earlier police statement and comments reported by colleagues, which clearly suggest that he knew he was not an intended recipient of the e-mails.

5.35. The committee can also conclude that Mr Strokowsky's continued receipt of the e-mails and indicated willingness to use them for political purposes may have "been likely to" or "had the potential to" interfere with Mr Wood's ability to perform his duties as a member of the Legislative Assembly particularly by interfering in his communication with his electorate and departmental officials.

Conclusion

5.36. Mr Strokowsky knowingly received, and without a reasonable excuse, retained and used e-mails destined for a member of the Legislative Assembly, Mr Bill Wood MLA. He also knew that he had no right to receive the e-mails. He took no steps to end his unauthorised access to Mr Wood's e-mail.

5.37. The committee can certainly conclude that Mr Strokowsky's 'eavesdropping' on and use of the e-mails was an improper breach of Mr Wood's privacy and an improper interference with his communication with his constituents and colleagues and thus Mr Wood's work as an MLA.

5.38. It was also a serious interference. Free and, where necessary, confidential communication between a member and the electorate, colleagues and officials is an essential part of a member's capacity to discharge his or her duties in a democracy. Most of the e-mails are clearly related to Mr Wood's discharge of his duties as a member of the Assembly.

5.39. The improper interference was clearly intentional. The committee believes that Mr Strokowsky was fully aware that he was receiving e-mails to which he had no right and that his failure to advise Mr Wood of this shows that he was happy to let that access continue. His actions in copying, retaining electronically and distributing some of the e-mails to his colleagues demonstrate that he was prepared to make use of them.

5.40. **The committee believes that Mr Strokowsky's actions meet the criteria of impropriety, seriousness, and intent and directly relate to Mr Wood's duties as a member. Therefore the committee concludes that Mr Strokowsky is guilty of contempt of the Legislative Assembly.**

5.41. **The committee recommends that Mr Strokowsky make a prompt and unreserved apology for his conduct in this matter to the Legislative Assembly in writing through the Speaker.**

5.42. In view of the adverse effect that this finding of contempt will have on Mr Strokowsky's professional reputation the committee makes no further recommendation for the imposition of a penalty on Mr Strokowsky.

5.43. The committee found no evidence to suggest that any member of the Assembly had any knowledge of Mr Strokowsky's access to Mr Wood's e-mails. Nor

did it find evidence that any other member of the Opposition's staff in the Assembly had sufficient knowledge of the access and use being made of the e-mails to suggest that any other staff member could also be in contempt of the Assembly.

Kerrie Tucker MLA
Chair

13 November 2002

Unauthorised diversion and receipt of a Member's e-mails

Dissenting Report of the Select Committee on Privileges

November 2002

Legislative Assembly for the Australian Capital Territory

DISSENTING REPORT

1. Has a Contempt Been Committed?

> The privileges of the House are precious rights which must be preserved. The collateral obligation to this privilege of freedom of speech in the Parliament will be challenged unless all members exercise the most stringent responsibilities in relation to them.
>
> - *Speaker Snedden, House of Representatives 8 November 1979, quoted in 4th Edition House of Representatives Practice* at 732

1.1. The 4th edition of *House of Representatives Practice* suggests it is the duty of each member, and the House of Representatives as a whole, to refrain from any course of action prejudicial to continued respect for its rights and immunities.

1.2. This means not only exercising responsibilities in the stringent manner referred to in the quotation from Speaker Snedden above, but to:

- exercise or invoke its powers when exercising its penal jurisdiction– and that's what proceedings relating to whether someone has committed a contempt is - an exercise of the Assembly's penal jurisdiction- in a sparing fashion, and

- that where a penalty is handed out, the penalty is appropriate to the offence committed.[1]

1.3. Part and parcel of this responsibility is applying the law of contempt as it is, and not how people would like it to be.

Contempt and the Legislative Assembly

1.4. The *Australian Capital Territory (Self-Government) Act 1988* provides:

24 Powers, privileges and immunities of Assembly

(1) In this section:

powers includes privileges and immunities, but does not include legislative powers.

(2) Without limiting the generality of section 22, the Assembly may also make laws:

(a) declaring the powers of the Assembly and of its members and committees, but so that the powers so declared do not exceed the powers for the time being of the House of Representatives or of its members or committees; and

(b) providing for the manner in which powers so declared may be exercised or upheld.

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[1] See generally *House of Representative Practice* at pages 732-3. See p.706 of *House of Representatives Practice* for a characterisation of contempt proceedings as an exercise of the House's penal jurisdiction

(3) 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.

(4) Nothing in this section empowers the Assembly to imprison or fine a person.

1.5. The Legislative Assembly has not declared its powers. However, the Federal Parliament has passed the *Parliamentary Privileges Act 1987*.

1.6. Pages 59 and 60 of Odger's *Australian Senate Practice*, 10th edition, advises:

Statutory definition of contempt

The 1987 Act contains what amounts to a statutory definition of contempt of Parliament:

> 4. 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.
>
> Enactment of this provision means that it is no longer open to a House, as it was under the previous law, to treat any act as a contempt. The provision restricts the category of acts which may be treated as contempts, and it is subject to judicial interpretation. A person punished for a contempt of Parliament could bring an action to attempt to establish that the conduct for which the person was punished did not fall within the statutory definition. This could lead to a court overturning a punishment imposed by a House for a contempt of Parliament. (My emphasis)[2]

1.7. To retain community respect for the institution of the Assembly, and its ability to penalise contempt rigorous application of the law should be applied. Otherwise:

- the Privileges Committee stands the risk of being considered nothing more than a kangaroo court, as will the Assembly, if the majority report is endorsed;
- community respect for the Assembly as an institution will be diminished.

1.8. In each case, the Committee is obliged to ask itself: does the action of the person accused of contempt fall within the formula set out in section 4 of the *Parliamentary Privileges Act*?

Has There Been Contempt Committed in This Case?

1.9. The principal issues in this matter are whether:

- the passive receipt of unsolicited e-mails constitutes a contempt of the Assembly; and

[2] *House of Representative Practice* suggests that whilst the House has a degree of flexibility in the way it deals with contempts, section 4 of the *Parliamentary Privileges Act* "imposes a significant qualification": see page 706

- whether a person has committed a contempt by failing to tell another that (apparently) their e-mail has been misdirected.

1.10. Section 4 of the *Parliamentary Privileges Act* seems to suggest that before anyone can be said to have committed a contempt, a person needs to have done something positive, that subsequently has the effect of interfering (or may interfere) with the free performance of his or her duties as a member.

1.11. In context, if anyone had hypothetically taken action to redirect e-mail from Mr Wood's office, it would probably constitute contempt, as would the behaviour of inciting someone to do such a thing.

1.12. However, passively receiving unsolicited information doesn't appear to fall within this definition. You can't help receiving e-mails that are directed to your computer.

1.13. As to the second major issue, the majority report seems to suggest that the continued receipt of e-mail in error imposes on the recipient an obligation to advise the author of the intended receipt of the matter, and that failure to do so can be regarded as being a contempt of the Assembly.

1.14 Section 4 of the *Parliamentary Privileges Act* doesn't require someone to do something positive to correct a particular course of action and it does not cover an act of omission.

1.15 It only constitutes as a contempt things falling within the ambit of the section that people actually do which does, or may, interfere with the free performance of an MLA from doing their duty.

1.16. It therefore follows that passive receipt of unsolicited information, and a failure to tell someone about a (possible) misdirection of e-mails can't be regarded as contempts of the Assembly.

1.17. As the majority report recognises at paragraph 2.23, there is a distinction between contemptible behaviour, and behaviour that is contempt of the Assembly.

1.18. Given the different nature of e-mail as a method of communication and the lack of established rules as to its use, should the Assembly wish to:

- make rules about e-mail etiquette (including the use of information gained from misdirected e-mails);

- provide sanctions for breaking them

it is open for the Assembly to do so, as anticipated by paragraph 24(2)(a) of the *Self-Government Act 1988*.

1.19 However, for the Committee to:

- formulate a standard of behaviour for the first time; then

- apply that (unannounced) standard to someone, without appropriate reference to section 4 of the *Parliamentary Privileges Act*, when conducting an inquiry in exercise of the Assembly's penal jurisdiction

is tantamount to applying legislation retrospectively. It is wrong.

2. The Importance of Restraint in the Exercise of the Assembly's Penal Jurisdiction

2.1 As previously noted, it's a well established principle that a Parliament exercising its contempt jurisdiction is something it should do sparingly. As this case shows, this is a sound principle.

2.2 The majority report displays a degree of preciousness when attempting to distinguish between unsolicited information received because of computer error, and unsolicited information received because someone wanted a politician to receive it: information that has "fallen off the back of a truck", or a leak.

2.3 The fact is that in each case, a politician (or their office) received unsolicited information without authority of the person to whom the communication is directed.

2.4 Now, assume the information received by means of computer error revealed:

- a Member was involved in the commission of a criminal offence; or
- was engaged in behaviour designed to advance the cause of a political party, or a supporter; or
- revealed Government actions (or inactions) so egregious that it was in the public interest to draw it to the attention of the Assembly.

2.5 What would any non-government party do? Ignore the information? Pretend it had never seen it because it was received by e-mail error?

2.6 Put another way: is there a material difference between receiving information over a period of time by computer error, or information received, over a period of time, from:

- a political staffer; or
- a journalist; or
- a public servant; or
- a member of the general community?

2.7 In some circumstances, Oppositions are only able to perform their function because of receipt of confidential information.

2.8 Before deciding that this matter is a contempt of the Assembly, the committee must be sure that it is not seen as being hypocritical for not equally regarding as a contempt receipt of *any* communication directed personally to a Member which is not

covered by Parliamentary privilege, and thus placing the standing of the Assembly, as an institution, at risk. [3]

How the House of Representatives Handles Contempt Cases

2.9 There have been 2 cases of a similar nature that has been dealt with in the House of Representatives. [Perhaps it might be relevant to note that one preceded the Privileges Act, but one occurred after its enactment]

2.10 One dealt with a black ban on mail delivered to MPs by the Communication Workers union, called in the report the *Mail Services Case*.

2.11 The second dealt with placing a MPs electorate office phone numbers in classified advertisements, with the intent to block the MPs phone, called in this report the *Telephone Case*.

2.12 They provide examples of how a parliamentary body with experience in dealing with privilege matters deals with such matters in a political environment.

2.13 Summaries of each case form an appendix to this report.

2.14 In each case, the House of Representatives Privileges Committee noted the need to display restraint in the exercise of the House of Representatives' penal jurisdiction, and took no further action.

2.15 This was even so in the *Mail Services Case,* where a trade union took a positive act to black ban the delivery of parliamentary mail. There, great weight was given to the fact that there was no intention to offend against the law protecting the House.[4]

2.16 Indeed, in the *Telephone Case,* the Privileges Committee decided it would be inconsistent with the dignity of the House to take the matter any further.

2.17 The Assembly shares with the House of Representatives the same rules relating to privilege. So that each institution can continue to draw on decisions of the other, it is highly desirable to ensure, as far as possible, consistency of approach.

The Lack of Available Sanctions Available to the Assembly to Punish Contempt

2.18 Unlike other jurisdictions (such as the Federal Parliament), the Assembly can't fine or gaol anyone for committing contempt.

2.19 2.19 Nor can it refer them to the DPP to be prosecuted for committing a contempt of the Assembly. There is no relevant offence.

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[3] This obviously excludes documents copied to others by the addressee, or is not already in the public domain

[4] Paragraph 18 of the House of Representatives Committee of Privileges *Report Concerning Disruption of Mail Services to Members Electorate Offices* Parliamentary Paper 122, 1994

2.20 Practically speaking, all it can really do is:

- ban them from the precincts of the Assembly; or
- censure them; or
- admonish them; or
- by resolution, make a statement commenting on their behaviour.

2.21 To hand out a positive finding that someone is in contempt in any circumstance where there is a *possibility* that a finding of contempt can be made, rather than in a sparing way, means the shame of denunciation (the only effective sanction the Assembly has) is diminished.

3. Conclusion

In assessing the matter, the committee was aware of the widely held view that Parliament should exercise its penal jurisdiction as sparingly as possible, and only when satisfied that to do so is essential to provide reasonable protection for the House, its Members or officers from improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions. This is not merely a widely held view but one which has been adopted as a guiding principle and one which guides the Speaker, the Committee of Privileges and Members of the House. This principle has not been formally adopted in the Commonwealth Parliament. Despite this, the Committee acknowledges that it is supported by many, and it is a principle which commends itself to this Committee. It was also recommended by the Joint Select Committee on Parliamentary Privilege for adoption by the Parliament.

- House of Representatives Committee of Privileges *Disruption Caused to the work of the Electorate Office of the Honourable Member for Wentworth* at pp. 4-5

3.1 The Federal Houses of Parliament use their powers to find contempt in a sparing manner. In the *Mail Services Case* (discussed in the Attachment), the positive act of black banning politicians' mail was seen not to be a contempt, because of the:

- recognised philosophy of restraint in finding contempt; and
- absence of any intention to offend the law that protects the House; and
- disruption was of limited duration.

3.2 It also required the presence of substantial interference with the performance of a function.

3.3 Applying these standards to the present case, there is no evidence that anyone intended breaching any law protecting the operation of the Assembly, and that access to Mr Wood's e-mail by a Liberal Party staffer was only for a limited period. Moreover, the general flow of communications to Mr Wood continued. There wasn't, nor could there be, a significant impediment to the work of the Minister. No significant impediment to the work of the member has been proven.

3.4 The Senate has also passed a number of resolutions, to assist the chamber in deciding whether matters should be dealt with as a breach of privilege, and how such matters are to be conducted.

3.5 In Privileges Resolution 3 (Criteria to be taken into account when determining matters relating to contempt) the Senate declared that it would take into account when, inter alia, determining whether a contempt has been committed, the existence of any remedy other than that power (to judge and deal with contempts) for any act which may be held to be a contempt.

3.6 In this case there was a remedy: once the Assembly secretariat was informed of the situation, the e-mails were routed to the correct office.

3.7 No grand political conspiracy was discovered.

3.8 All that was proved was that for a period a volunteer, subsequently employed as a staffer, received e-mails that properly should have been received by Minister Wood, as a result of a technical bungle by INTACT.

3.9 Even assuming the presence of behaviour that falls within the terms of section 4 of the *Parliamentary Privileges Act* (which is doubtful), to make such a finding in such a situation will simply:

- lead to a reduction in the respect of the Assembly as an institution; as well as
- reducing the effect of being impugned as being in contempt of the Assembly where there is a real case for such condemnation.

3.10 The Assembly should consult its dignity, and decide not to take the matter any further. The resulting effect being that the community might welcome signs of restraint in such a matter as evidence of the maturity of the Assembly as an institution, an institution which could look at a problem but have the wisdom to use its powers judiciously and only when necessary.

Brendan Smyth MLA
Member

13 November 2002

ATTACHMENT

House of Representatives Committee of Privileges

Report Concerning Disruption of Mail Services to Members' Electorate Offices

In 1993, the Communication Workers' Union banned the delivery of mail to Members' offices. In many cases a ban had also been placed on the despatch of mail.

The ban was put on to express "dismay" at the Cabinet decision in relation to the Industry Commission Inquiry into mail, courier and parcels services.[5]

The Committee decided the issue for determination was to consider the effect of these actions, and then to determine whether or not a contempt had been committed by any of those responsible.

It noted that for many years there had been a good deal of support for the belief that the House's penal jurisdiction should be exercised sparingly and only in those cases where it is necessary to protect the House or its members from actions found to be substantial interference.[6]

It noted the Commonwealth Parliament could punish contempts that would enable a House to act in respect of an action which was found to obstruct or impede a Member in the performance of duties as a Member.[7]

It concluded that regard should be had to the well recognised philosophy of restraint in these matters. Secondly, although technically it is not necessary to have regard to intent, it is appropriate to have regard to the intention of those involved and to any knowledge they may have of the relevant parliamentary law. Finally, it is necessary to consider the consequences of actions complained of.[8]

It accepted no real substantial harm or damage was caused, but that there was a potential that a serious problem could be caused – and in any case any obstruction which prevents constituents from communicating with Members is serious.[9]

Nevertheless, having regard to the apparent ignorance of the relevant law on the part of those responsible for the actions complained of, to the apparent absence of any intention to offend against the law which protects the House and its members and to the fact that the disruption caused was of a limited duration, a finding of contempt should not be made.[10]

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[5] House of Representatives Committee of Privileges *Report Concerning Disruption of Mail Services to Members Electorate Offices* Parliamentary Paper 122, 1994 at 5
[6] Ibid. at 6
[7] Ibid.
[8] Ibid. at 7
[9] Ibid.
[10] Ibid.

This was despite the fact that:

- the actions complained of ought not be regarded as an acceptable means of expression and are to be deprecated; and

- it would be open to make adverse findings in respect of those responsible. [11]

House of Representatives Committee of Privileges

Disruption Caused to the Work of the Honourable Member for Wentworth Made in Response to False Advertisements in The Sydney Morning Herald of 20 September 1986

In 1986, people unknown to the Member for Wentworth has inserted his electorate office telephone in a number of classified advertisements contained in the *Sydney Morning Herald*. The Member said the volume of inquiries in response to the advertisements was obstructing the work of his electorate office.

The Committee said:

> 10 In assessing the matter, the committee was aware of the widely held view that Parliament should exercise its penal jurisdiction as sparingly as possible, and only when satisfied that to do so is essential to provide reasonable protection for the House, its Members of officers from improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions. This is not merely a widely held view but one which has been adopted as a guiding principle and one which guides the Speaker, the Committee of Privileges and Members of the House. This principle has not been formally been adopted in the Commonwealth Parliament. Despite this, the Committee acknowledges that it is supported by many, and it is a principle which commends itself to this Committee. It was also recommended by the Joint Select Committee on Parliamentary Privilege for adoption by the Parliament.

It concluded that in the particular case, no further action should be taken, although harassment of a Member in the performance of his work by means of repeated, or nuisance or orchestrated telephone calls could be judged a contempt.

Relevantly, the Committee concluded that in all the circumstances further action would be inconsistent with the dignity of the House.[12]

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[11] Ibid at 8

[12] House of Representatives Committee of Privileges *Disruption Caused to the work of the Electorate Office of the Honourable Member for Wentworth Made in Response to False Advertisements in The Sydney Morning Herald of 20 September 1986* Parliamentary Paper 282/1986 at 6.

Appendix 1 – the committee's hearings

The committee conducted hearings as follows:

26 August 2002	Graham Dowell, General Manager, InTACT
	Richard Hart Director Service Delivery
23 September 2002	Bill Wood MLA, Minister for Urban Services
	Margaret Watt, senior adviser to Mr Wood
	John Stanwell, adviser to Mr Wood
	Marie Henderson, former office manager, Helen Cross MLA
	Sue Whittaker, staff of Mr Cornwell MLA
	Mary Elliott, private secretary to Bill Stefaniak MLA
	Michael Strkowsky, adviser to the Liberal Party in the ACT Legislative Assembly
27 September 2002	Helen Cross MLA
	Dr Amalia Matheson, chief of staff, Gary Humphries MLA
28 October 2002	In-camera hearing
	Mr Dowell and Mr Hart, InTACT
	David Moore, formerly adviser to Helen Cross MLA
1 November 2002	Gary Humphries MLA