UNAUTHORISED RELEASE OF COMMITTEE DOCUMENTS

SELECT COMMITTEE ON PRIVILEGES 2019

REPORT
THE COMMITTEE

COMMITTEE MEMBERSHIP
Mr Michael Pettersson MLA (Chair)
Mr Andrew Wall MLA (Deputy Chair)
Mr Shane Rattenbury MLA

SECRETARY
Mr Max Kiermaier

ADMINISTRATIVE SUPPORT
Ms Lydia Chung
Ms Karen McKell
Ms Anne Shannon

CONTACT INFORMATION
Telephone 02 6205 0173
Post GPO Box 1020, CANBERRA ACT 2601
Email ola@parliament.act.gov.au
Website www.parliament.act.gov.au
RESOLUTION OF APPOINTMENT

"That:

(1) pursuant to standing order 277, a Select Committee on Privileges be established to examine whether there has been a breach of privilege relating to the Standing Committee on Health, Ageing and Community Services in the release of unauthorised committee documents;

(2) the Privileges Committee shall report back to the Assembly on the first sitting day of July 2019; and

(3) the Committee shall be composed of:
   (a) one member to be nominated by the Government; and
   (b) one member to be nominated by the Opposition; and
   (c) one member to be nominated by the Crossbench;

   to be notified in writing to the Speaker by 5pm, Thursday, 4 April 2019."
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RECOMMENDATION 1

4.15 The Committee recommends that the Chief Minister, Treasury and Economic Development Directorate:

(1) review relevant sections of its publication Guidelines for Officials on Participation in Legislative Assembly and Other Inquiries, with a view ensuring that the guidelines make it clear that privilege may attach to any document provided to an Assembly committee; and

(2) remind all ACT Public Service Directorates and agencies of the existence of the guidelines.

RECOMMENDATION 2

5.10 The Committee recommends that standing orders 242 and 276 be amended as follows:

(1) Omit paragraph 242(a)(iii), substitute:

(iii) if the committee concludes that there has been potential or actual substantial interference it shall present a special report to the Assembly, detailing:

(A) the nature of the alleged unauthorised disclosure;

(B) the action it has taken to discover the source of the unauthorised disclosure and the conclusion it has reached;

(C) how it has arrived at the conclusion that the disclosure has had a tendency to substantially interfere with the work of the Committee or of the Assembly, or actually caused substantial interference; and;

(D) any other relevant matter.

The issues raised in the special report may be raised with the Speaker by the Chair of the committee, in accordance with standing order 276;

(2) In paragraph 276(e)), after “purpose” add “or, in the case of the unauthorised disclosure of proceedings of a committee, that committee”.

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1 CONTEMPT OF THE LEGISLATIVE ASSEMBLY

1.1 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 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...

(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...."

1.2 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 subsection 24 (4) of the Self Government Act, it has no power to imprison or fine a person who might be found to be in contempt of the Assembly or its committees.

1.3 The powers of the Assembly include those necessary to assert and to protect its privileges. The privileges of the Legislative Assembly comprise those immunities and powers necessary for the conduct of the business of the legislature. Immunities are exemptions from the ordinary law which enable Members to carry out their duties. Arguably the best known of these is the exemption from the laws of defamation or libel in regard to the proceedings of the Assembly and its committees. This is considered essential for the protection of Members' (and witnesses') freedom of speech in the Assembly.

1.4 The privileges of the Commonwealth Parliament are defined in the *Parliamentary Privileges Act 1987* (Cwlth). At section 16 of that Act is a definition of what constitutes "proceedings in Parliament", which are:

"all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;"

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1 The privileges of the House of Representatives derive in turn from those of the British House of Commons as at 1901 via section 49 of the Australian Constitution.
(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published."

1.5 All persons participating in "proceedings" as defined above are covered by "privilege".

1.6 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 duties.

CONTEMPT

1.7 The powers of the Assembly to examine and, if necessary, to punish, contems are analogous to that of the courts to punish contems of court, and reflect the need of a legislature "to protect themselves from acts which directly or indirectly impede them in the performance of their functions." They are the powers necessary to enable the institution and its members to discharge their responsibilities. Note that "the power [to punish contems] does not depend on the acts judged and punished being violations of particular immunities".

1.8 There is no exhaustive list of what may constitute contempt of a legislature, although the New Zealand House of Representatives has attempted, at standing order 410, to list a number of actions which may be treated as contems. It was emphasised "that these examples were illustrative rather than exhaustive, and that new situations might arise that the House might wish to treat as contems". Of note is:

"(b) deliberately attempting to mislead the House or a committee (by way of statement, evidence, or petition).".

1.9 While Parliaments have great freedom and flexibility to judge matters of privilege and contempt, the Parliamentary Privileges Act 1987 and the proceedings of the Commonwealth Parliament provide relevant guidance. Significantly, under "what amounts to a statutory definition", contempt of Parliament is qualified in the Parliamentary Privileges Act 1987 at section 4:

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2 Odgers' Australian Senate Practice, 14th edition, p. 83.
3 Odgers', op cit, p. 83.
5 Odgers', op cit, p. 84.
"Essential element of offences

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."

1.10 Consequently, 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."6 Similarly, the practice of the House of Representatives is to "exercise or invoke its powers in respect of matters of contempt and privilege sparingly..." and "...the Joint Select Committee on Parliamentary Privilege recommended the adoption by the House of a policy of restraint in these matters. Although this recommendation has not been formally adopted by the House, the Committee of Privileges and Speakers have had regard to the policy."7

1.11 In determining whether a charge of contempt can be sustained, many jurisdictions have adopted the civil law test of on the balance of probabilities, but one of a high degree of probability.8

1.12 It is reasonable to conclude from the above that for an action to constitute a finding of contempt it should include (a) an improper interference with the free exercise by a committee of its authority or functions; and (b) an intention by the person responsible for the action to improperly interfere with the free performance of a committee's responsibilities. [emphasis added]

ASSEMBLY PRACTICE

DISCLOSURE OF PROCEEDINGS, EVIDENCE AND DOCUMENTS

1.13 Standing order 241 (b) provides that:

"(b) a committee’s evidence, documents, proceedings and reports may not be disclosed or published to a person (other than a Member of the committee or

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6 Odgers', op cit, p. 88.
8 For example, House of Commons, Commonwealth Parliament, New Zealand, Queensland, Victoria.
Assembly employee if necessary in the course of their duties) unless they have been:

(i) reported to the Assembly; or

(ii) authorised by the Assembly or the committee;"

and standing order 242 outlines the procedures to be followed when raising claims of unauthorised disclosures:

"242. The Assembly adopts the following procedures to be followed by committees in respect of matters on which such committees may wish action to be taken:

(a) (i) a committee affected by any unauthorised disclosure of proceedings or documents of, or evidence before, that committee shall seek to discover the source of the disclosure, including by the Chair of the committee writing to all Members and staff asking them if they can explain the disclosure;

(ii) the committee concerned should come to a conclusion as to whether the disclosure had a tendency substantially to interfere with the work of the committee or of the Assembly, or actually caused substantial interference;

(iii) if the committee concludes that there has been potential or actual substantial interference it shall report to the Assembly and the matter may be raised with the Speaker by the Chair of the committee, in accordance with standing order 276;

(b) nothing in this resolution affects the right of a Member to raise a matter of privilege under standing order 276."

PRIVILEGES COMMITTEE CONSIDERATION

1.14 Reports of previous privileges inquiries by Assembly committees also provide precedents, and the Assembly has, at standing order 277, identified some matters which may constitute contempt. Of relevance to this Committee's inquiry are:

"(a) Interference with the Assembly

A person shall not improperly interfere with the free exercise by the Assembly or a committee of its authority, or with the free performance by a Member of the Member's duties as a Member."
Unauthorised Release of Committee Documents

(p) Unauthorized disclosure of evidence etc

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

i. a document that has been prepared for the purpose of submission, and submitted, to the Assembly or a committee and has been directed by the Assembly or a committee to be treated as evidence taken in private session or as a document confidential to the Assembly or the committee;

ii. any oral evidence taken by the Assembly or a committee in private session, or a report of any such oral evidence; or

iii. any proceedings in private session of the Assembly or a committee or any report of such proceedings;

unless the Assembly or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings."

1.15 Standing order 278 provides direction for the Committee when dealing with possible contempts. [emphasis has been added]

"278 The Assembly will take into account the following criteria when determining whether matters possibly involving contempt should be referred to a Select Committee on Privilege and whether a contempt has been committed, and requires the committee to take these criteria into account when inquiring into any matter referred to it:

(a) the principle that the Assembly's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Assembly and its committees and for Members against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Assembly;

(b) the existence of any remedy other than that power for any act which may be held to be a contempt; and

(c) whether a person who committed any act which may be held to be a contempt:

(i) knowingly committed that act, or

(ii) had any reasonable excuse for the commission of that act."
2 BACKGROUND TO THE INQUIRY

2.1 In late 2018 the Standing Committee on Health, Ageing and Community Services (HACS Committee) resolved to conduct an inquiry into maternity services in the ACT.

2.2 On Monday, 11 February 2019, the HACS Committee received a submission (Submission 39) from a midwife outlining a number of concerns that impact women, their babies and staff. Specifically, the submission made claims regarding staffing, interventions and non-adherence to hospital policies, as well as culture concerns. The submission was published on the committee’s website, with standard redactions to preserve requested anonymity details.

2.3 The issues raised in the submission received significant media and Assembly attention in March, with particular emphasis being placed on the disclosure that unauthorised vaginal examinations had occurred.

2.4 As a result of the media coverage, Canberra Health Services (CHS) released a statement on 13 March in which concern was expressed at “unsubstantiated claims made by anonymous individuals in submissions to the Legislative Assembly Inquiry into Maternity Services in the ACT being presented as facts in media reports”.

2.5 Following the statement, Ms Bernadette McDonald, Chief Executive Officer of CHS wrote a letter, dated 21 March 2019, to the HACS Committee requesting that further redactions be made to Submission 39. The letter was provided via email. (Appendix A)

2.6 The letter was formally received by the HACS Committee at a meeting on 26 March, where it resolved to write to Ms McDonald and inform her of the procedures and protocols relating to redactions in committee submissions.

2.7 On 4 April, an article was published in The Canberra Times which appeared to contain quotes attributed to Ms McDonald in identical terms to that used in her 21 March letter to the HACS Committee. (Appendix B).

2.8 After reading the article, Ms Bec Cody MLA was of the belief that the article contained quotes directly drawn from Ms McDonald’s letter. As the HACS Committee had not authorised publication of that letter, any disclosure of it would have contravened standing order 241(b). Ms Cody wrote to the Speaker with her concerns and sought the Speaker’s guidance as to whether the matter could be raised as a matter of privilege.

2.9 Subsequently, the Speaker wrote to Ms Cody as Chair of the HACS Committee requesting the committee to determine whether the matter that had been raised was a matter of privilege relating to a current inquiry being undertaken by the committee. The Speaker requested that the Committee seek to discover the source of the disclosure and come to a conclusion as to whether the disclosure had a tendency substantially to interfere with the work of the committee or actually caused substantial interference.
2.10 The Committee met at lunchtime on 4 April to consider the Speaker’s letter. It determined that there had been an unauthorised disclosure of a document relating to a current inquiry. As the matter was perceived to be urgent and requiring a response prior to the Assembly resuming at 2 pm, the Chair was unable to formally write to each Member of the Committee to ascertain a possible source of the disclosure or explanation for the disclosure. In lieu, the Chair verbally requested Committee members to state to the Committee on the record if they or their staff were able to ascertain a possible source of the disclosure or provide explanation for the disclosure. All members of the Committee and the Committee Secretary informed the Committee that their inquiries within the Secretariat, their offices and their staff prior to the meeting were unable to identify the source or ascertain an explanation for the disclosure. Committee Members were also adamant that they, as individuals, had no involvement in the disclosure of the documents.

2.11 Further, the committee considered the status of the inquiry into maternity services, the nature of the content of the letter from the CEO of CHS, the perceived, actual or potential impact that the content of the letter in the public domain could have on the inquiry and the perceived, actual or potential impact that the release of this information could have on those involved with the inquiry, including submitters, witnesses, parliamentary officers and Members of the Legislative Assembly. The Committee concluded that the disclosure of this correspondence had a tendency substantially to interfere with the work of the Committee.

2.12 The Committee informed the Speaker accordingly, who then advised the Assembly that later that afternoon Ms Cody would be granted precedence to move a motion to have the matter considered by a select committee on privileges.

2.13 Ms Cody duly moved the motion, making a short statement to the Assembly in doing so. The motion was agreed to and forms this Committee’s terms of reference.
3 CONDUCT OF THE INQUIRY

3.1 The Select Committee on Privileges 2019 (Privileges Committee) wrote to Ms Cody both as the Member initially raising the issue and as Chair of the HACS Committee, seeking details relating to the alleged disclosure.

3.2 Both Ms Cody and the HACS Committee provided responses, giving relevant background to assist the inquiry.

3.3 As a result, the Committee sought further written responses from:
   - Members of the HACS Committee;
   - The Chief Executive Officer of CHS;
   - Other CHS staff identifiable in email correspondence; and
   - Relevant Assembly committee office staff

RESPONSES RECEIVED BY THE COMMITTEE

HACS COMMITTEE MEMBERS AND STAFF

3.4 Members of the HACS Committee were asked if they, or relevant staff within their offices who may have had access to the document, provided a copy of the letter to any person, and if so, to whom and why. Relevant staff of the Assembly’s committee office were asked a similar question.

3.5 All HACS Committee members, their relevant staff and committee office staff replied, assuring the Committee that they had not provided the document to anyone.

CHIEF EXECUTIVE OFFICER OF CHS

3.6 The Chief Executive Officer of CHS was asked:
   - Did you, or anyone you are aware of, brief The Canberra Times in relation to the abovementioned article?
   - If so, what was the nature of the briefing and did you, or anyone you are aware of, provide The Canberra Times with a copy of the correspondence you had provided to the HACS Committee?
   - Apart from those cc’d into the forwarding email to the HACS Committee, was the correspondence provided to any other person; if so, to whom and why?
3.7 The CEO of CHS, Ms McDonald, advised that:

"The Canberra Health Services Communications and Government Relations team sent email correspondence to *The Canberra Times* on 3 April 2019 in response to questions from *The Canberra Times* journalist. This email was dot point information, and did not include information that was included in my letter to the HACS. I attach a copy for your reference.

To the best of my knowledge, the correspondence referred to in [the Privileges Committee letter] has not been forwarded on to any other person other than those copied into the original email."

3.8 The Committee notes that the dot points provided by CHS Media were in response to a follow-up series of questions from a journalist "doing a story on the maternity inquiry and the CEO’s decision to write to committee (sic) to ask them to redact certain information" and hence the request for information must have been made after *The Canberra Times* had knowledge of the approach by the CEO to the HACS Committee.

**OTHER CHS STAFF**

3.9 In material provided to the Committee, it was evident that four CHS staff members had access to the original email to the HACS Committee. The Committee wrote to those CHS staff, asking:

- To your knowledge, was the attached correspondence provided to any other person; if so, to whom and why?

3.10 Three members of staff responded that they did not share the correspondence with any other party, or, to the best of their knowledge, the correspondence had not been shared, while the fourth wrote that she had forwarded the attachment on to some senior maternity management staff as:

"the correspondence was an action arising from an all staff maternity staff meeting and I forwarded to demonstrate to the senior maternity management team that this action had been completed."

**THE CANBERRA TIMES**

3.11 The Committee also wrote to *The Canberra Times* journalist who wrote the article, asking:

- Can you detail the circumstances by which you obtained the material referred to in the abovementioned article?
- In particular, how did you obtain the quote attributed to Ms McDonald?
Were you provided with any document(s) for use in the article; if so;
- did it include a copy of a letter from Ms McDonald to the HACS Committee, dated 21 March 2019; and
- who provided that letter to you?

3.12 *The Canberra Times* declined to answer any of the questions in any meaningful detail, instead saying:

"The answer to each of the queries ...is that [the journalist] relied upon information given to her by a confidential source.".

3.13 The newspaper went on to cite the journalist code of ethics, privacy principal 5 of the Press Council of Australia’s statement of general principles (anonymity of sources), and the spirit of journalist privilege provided under the Evidence Act.

3.14 The failure to provide its source was not unexpected. The Committee, however, notes the commentary in past House of Representatives Privileges Committee reports “that neither House has accepted the existence of such professional rules or conventions as justifying the refusal to reveal sources”\(^9\) and “the Parliament has enacted legislation to provide protection to journalists’ sources in relation to court proceedings. However, that protection does not extend to the powers that parliamentary committees have to compel journalists to reveal their sources”\(^10\).

3.15 Despite this, the Committee has chosen not to explore this matter further on this occasion.

3.16 Correspondence received by the Committee is available on the Committee’s [website](#). Some identifying and contact details have been redacted.

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4 FINDINGS AND RECOMMENDATIONS

4.1 The HACS Committee provided the Committee with a copy of the letter which allegedly had been disclosed to *The Canberra Times* (Appendix A). The letter was brief, with the salient sentences being:

> "It has been brought to my attention that a Canberra Health Services staff member has been easily identified through a submission that has been published and we are requesting this information is redacted. I am incredibly proud of the great work our maternity staff do each day and am disappointed that they are subject to publication of unsubstantiated claims about their professional practice.".

4.2 The above two sentences were reproduced word-for-word in *The Canberra Times* article (Appendix B), giving rise to the suspicion that the newspaper had access to the original letter.

4.3 In order to determine if a contempt had occurred, the committee needed to satisfy itself of a number of factors, including, but not limited to:

- Was the letter written by the CEO of CHS to the HACS Committee also provided to *The Canberra Times*?
- Was someone responsible for the disclosure, and if so, was the action intentional and designed to interfere, or have the effect of interfering, with the deliberations of the HACS Committee?; and
- Did the action cause substantial interference with the work of the HACS Committee?

WAS THERE AN UNAUTHORISED DISCLOSURE?

4.4 The Committee's endeavours to investigate the alleged unauthorised disclosure failed to unearth robust evidence to support the contention. *The Canberra Times* would only concede that it was the recipient of "information given...by a confidential source".

4.5 Given that the words appearing in *The Canberra Times* article were identical to that in the letter to the HACS Committee, the Committee concludes that there was a high probability that the letter, or its contents, had been disclosed to the newspaper.

WHO WAS RESPONSIBLE FOR THE UNAUTHORISED DISCLOSURE?

4.6 The Committee's inquiries have failed to reveal a source for the purported disclosure. Those approached have given written assurances that they were not responsible for any disclosure,
nor did they have any knowledge of who may have done so. Those who had provided a copy of
the letter to other parties within CHS offered reasons for doing so.

4.7 As noted above, copies of the letter were circulated via email to a limited number of staff,
ostensibly for legitimate reasons. With the relative ease with which emails can be circulated,
and further distributed, the Committee chose not to pursue this line of investigation further as
it would be unlikely to identify an ultimate source. This position was bolstered by information
provided to the Committee by Mrs Dunne MLA, in which it was evident that the fact that the
CEO of CHS had written to the HACS Committee was well known amongst CHS staff, prior to
the article appearing in *The Canberra Times*.

4.8 As it was unable to determine the source of the disclosure, it was not possible for the
Committee to attribute motive, and hence it was not possible to determine if the action was
deliberate and designed to interfere with the HACS Committee inquiry, key elements for a
finding of contempt to be sustained. In light of this, and the absence of compelling evidence,
the Privileges Committee is **unable to find that a contempt has been committed**.

**DID THE ACTION CAUSE SUBSTANTIAL INTERFERENCE?**

4.9 The HACS Committee maintained that the disclosure caused substantial interference with the
work of the committee. It said that:

"the publication of this correspondence could be perceived by the public as a situation
where ACT Government officials have attempted to impede an inquiry that is meant to
be an impartial and public process. The Committee further believes that the
publication of this correspondence gives the impression that there has been an actual
or potential attempt to influence or intimidate a witness by ACT Government officials.
The Committee also believes that these actions can be perceived as an actual or
potential attempt at influencing or intimidation and attempted manipulation of
Committee processes, which could have a negative impact on the public’s perception
of what is meant to be an impartial and public process. Key concerns for the
Committee are that:

- The public will view this inquiry and possibly future inquiries as a biased process,
  which is influenced by external interventions;
- The public and future submitters to Committee inquiries will not feel comfortable
  providing evidence to the Committee due to fear of retribution and public
  vilification by ACT Government officials.
- As the Committee is yet to hold public hearings, the Committee does fear that
certain members of the public will not feel comfortable providing evidence in a
public hearing due to the attitude adopted by the CEO of Canberra Health Services
and her attempts to interfere with the Committee’s inquiry.
- The public will no longer trust that the Committee inquiry process is a fair process."
• As the Committee is yet to table its report, the Committee does fear that the public may scrutinise the recommendations presented and question whether there has been any pressure influencing the recommendations."

4.10 While acknowledging the concerns of the HACS Committee, given that it is unable to find that a contempt has been committed, the Privileges Committee refrains from commenting on the HACS Committee assertions.

RECOMMENDATION

4.11 Nonetheless, the unauthorised release of a committee document may constitute a contempt and all parties interacting with the activities of the Assembly need to be aware of that possibility. Persons holding senior positions in the ACT Public Service, in particular, must recognise the privilege implications attaching to documents provided to committees, and take steps to minimise the possibility for the disclosure of documents which have not been authorised for publication by the Assembly or its committees.

4.12 In the ACTPS Guidelines for Officials on Participation in Legislative Assembly and Other Inquiries\textsuperscript{11}, in sections on parliamentary privilege and interaction with MLAs, the following points are made:

"2.9 Once they have been delivered, submissions belong to the committee and further distribution could constitute an unauthorised disclosure. Material provided to a committee cannot be altered or withdrawn without the approval of the committee. (Assembly Standing Order 244).

2.10 The unauthorised disclosure of a document or evidence given to a committee may be treated as contempt. Where such disclosure is able to be attributed to an official, it may be considered a breach of the ethical requirements of the PSM Act in addition to any sanction imposed by the Assembly.

8.4. In all cases, officials interacting with non-government MLAs should be appropriately courteous and conscious of the rights and privileges of MLAs and the provisions of Standing Orders 277 and 278 in relation to contempt and interference with MLAs' discharge of their duties.".

4.13 The Committee believes that the above paragraphs should be reviewed to make it clear that, until authorised for publication (if at all), privilege attaches to all documents provided to an Assembly committee, not just submissions, and that those working within the ACT Public Service who may have cause to interact with committees be reminded of this.

\textsuperscript{11} Guidelines for Officials on Participation in Legislative Assembly and Other Inquiries, ACT Government, January 2017, p 6 and p14.
4.14 Further, Directorates and agencies should consider modifying internal practices which involve the proliferation and dissemination of multiple copies of documents which have been provided to a committee, particularly via email.

**Recommendation 1**

4.15 The Committee recommends that the Chief Minister, Treasury and Economic Development Directorate:

(1) review relevant sections of its publication *Guidelines for Officials on Participation in Legislative Assembly and Other Inquiries*, with a view ensuring that the guidelines make it clear that privilege may attach to any document provided to an Assembly committee; and

(2) remind all ACT Public Service Directorates and agencies of the existence of the guidelines.
5 Procedures for Investigating Potential Unauthorised Disclosures

5.1 Determining whether a contempt has occurred in regard to an alleged unauthorised disclosure of a document often presents problems for investigating bodies. This Committee’s experience has been no different from that encountered in other jurisdictions.

5.2 While the Assembly has procedures for investigating instances of unauthorised disclosures, this inquiry has highlighted to the Committee areas where it believes that there is scope for further refinement.

5.3 The current procedures are detailed in standing order 242:

Unauthorised disclosure of proceedings, documents or evidence

242. The Assembly adopts the following procedures to be followed by committees in respect of matters on which such committees may wish action to be taken:

(a) (i) a committee affected by any unauthorised disclosure of proceedings or documents of, or evidence before, that committee shall seek to discover the source of the disclosure, including by the Chair of the committee writing to all Members and staff asking them if they can explain the disclosure;

(ii) the committee concerned should come to a conclusion as to whether the disclosure had a tendency substantially to interfere with the work of the committee or of the Assembly, or actually caused substantial interference;

(iii) if the committee concludes that there has been potential or actual substantial interference it shall report to the Assembly and the matter may be raised with the Speaker by the Chair of the committee, in accordance with standing order 276;

(b) nothing in this resolution affects the right of a Member to raise a matter of privilege under standing order 276.

5.4 In its comprehensive 2005 report, the Senate Committee of Privileges\(^\text{12}\) reviewed the practices adopted in all Australasian and many international legislatures to deal with unauthorised disclosures of committee proceedings. A common theme among the Westminster parliaments was the greater onus placed on the committee purportedly affected by an unauthorised disclosure to take a more significant role during the initial stages of the investigation. This approach seems still to be the case among the Australian jurisdictions, given the responses the Office of the Legislative Assembly received to a short survey it conducted.

\(^{12}\) Parliamentary privilege-unauthorised disclosure of committee proceedings, Senate Committee of Privileges, 122nd report, June 2005.
5.5 Specifically, most jurisdictions require the affected committee to present a “special report” to the legislature before any consideration is given to the disclosure being subsequently investigated as a matter of privilege.

5.6 Indeed, in the Canadian House of Representatives “the Speaker has repeatedly declined to rule on questions of privilege arising from committee business when the committee in question has not reported on the matter.”  

5.7 The Privileges Committee sees merit in having an affected committee more involved in the process, particularly during the initial investigatory phase. Such a committee is far better placed to know the circumstances surrounding the disclosure, the potential sources of a disclosure, and to assess the impact that a disclosure may have had on its activities. All this can be done expeditiously.

5.8 The Privileges Committee sees no impediment to committees reporting on these matters. The role of a Privileges Committee, if one was established subsequently, would be reserved to examining the privilege issues on the matters identified in a committee’s special report.

5.9 To ensure that any Member of the Assembly may be able to raise an unauthorised disclosure as a privilege matter, the Committee also proposes a slight change to standing order 276.

Recommendation 2

5.10 The Committee recommends that standing orders 242 and 276 be amended as follows:

(1) Omit paragraph 242(a)(iii), substitute:

(iii) if the committee concludes that there has been potential or actual substantial interference it shall present a special report to the Assembly, detailing:

(A) the nature of the alleged unauthorised disclosure;
(B) the action it has taken to discover the source of the unauthorised disclosure and the conclusion it has reached;
(C) how it has arrived at the conclusion that the disclosure has had a tendency to substantially interfere with the work of the Committee or of the Assembly, or actually caused substantial interference; and;
(D) any other relevant matter.

The issues raised in the special report may be raised with the Speaker by the Chair of the committee, in accordance with standing order 276;”

13 Ibid, pp16-17:
(2) In paragraph 276(e)), after “purpose” add “or, in the case of the unauthorised disclosure of proceedings of a committee, that committee”.

5.11 The Committee notes that the sentiment expressed in the recommendation is not new to the Assembly. A similar recommendation was made by the then Administration and Procedures Committee in 1993. It is not clear why the recommendation was not adopted at the time.

5.12 The Privileges Committee believes that all standing committees would be able to comply with the revised standing orders, although it does acknowledge that, depending on the stage reached during an inquiry, the same may not be said of select committees. Nonetheless, compliance would be a matter for the Assembly itself to consider should an unauthorised disclosure occur during a select committee inquiry.

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6 MATTERS TO BE CONSIDERED BY COMMITTEES INVESTIGATING UNAUTHORISED DISCLOSURES

6.1 To help shape consideration by committees of some of the issues which arise when investigating unauthorised disclosures, the Privileges Committee offers the following insights. Committees should also be aware of the requirements of standing order 278, particularly the necessity to invoke privilege powers only when necessary, and to consider whether any remedy exists, other than to hold an action to be in contempt.

6.2 As a prelude, a committee should establish first up whether a disclosure has occurred and decide whether it is significant enough to justify further inquiry.

WHAT IS “SUBSTANTIAL INTERFERENCE”?

6.3 Among other elements, for a contempt to have occurred it must be shown that the action not only happened but it must have caused substantial interference, actual or otherwise. Unless the actions can be shown demonstrably to have caused actual substantial interference (eg caused the abandonment of an inquiry), perceptions of what amounts to be, and the degree to which they have “a tendency substantially to interfere” will be subjective and thus difficult to confirm.

6.4 What constitutes substantial interference cannot be enunciated in any definitive list, and this Committee does not propose to do so. Each instance has to be examined in its own context. But to assist any committee considering how it has been affected by an improper disclosure and how to deal with it, it might find useful the suggestion of the President of the Senate that a three-tier method be followed, categorising disclosures into “things which:

- indisputably substantially undermine a committee inquiry (ie have a fatal or significantly compromising effect on the eventual report), and have the ingredients to constitute a contempt;
- are detrimental and might deserve some censure (say by a statement by the President); or
- are regrettable, but which when looked at objectively do not themselves really amount to substantial interference. 15

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15 Senate Privileges Committee, 122nd report, p31.
CAN THE SOURCE OF THE DISCLOSURE BE IDENTIFIED?

6.5 A committee should take as many steps as it considers necessary to identify the source of a disclosure. However, the experience in many jurisdictions is that the source is unlikely to be identified. Committees should then consider the value that would be attained by persevering with its inquiries.

6.6 Despite this, a committee may determine that the impact of a disclosure was of such moment that it caused substantial damage to its inquiry, to the committee or to the Assembly, and therefore should be pursued as a matter of privilege.

6.7 It is pertinent to note the attitude that has been taken by the Senate Privileges Committee in instances where the source of an unauthorised disclosure has been unable to be determined. It has stated, apart from some limited exceptions, if committees “cannot find the source of the unauthorised disclosure, this [Privileges] committee will not be willing to pursue the matter further”. 16

6.8 The Privileges Committee endorses this position. If an Assembly standing committee with its intimate knowledge of the circumstances surrounding a disclosure, and possessing all the powers conferred upon it by the Assembly, cannot determine the source of a disclosure, it is unlikely a select committee on privileges will fare any better.

THE NATURE OF THE MATERIAL DISCLOSED

6.9 A committee affected by a disclosure may wish to consider the type of information that has been disclosed against a hierarchy of material that could or should be protected.

6.10 At the apex would be the disclosure of evidence taken in camera and, as the Senate Privileges Committee has noted, such action may expect a finding of contempt, regardless of the circumstances. 17

6.11 Next may be the disclosure of unpublished submissions. Committees may have very good reasons for not publishing submissions, for example, those containing private or confidential details, or containing intentionally false or legally actionable material. However, the majority of submissions contain information which may actually benefit from having wide exposure, and a committee may decide that their disclosure, while containing the elements of contempt, may not have substantially affected the inquiry.

16 Ibid, p47.
17 Ibid, p43.
6.12 Similarly, a committee may consider that the unauthorised release of a draft report may be more serious than that of a final report, with the former divulging the decision reaching process and compromise associated with the collegiate approach of parliamentary committees, rather than the settled view of a final report.

6.13 The disclosure of documents associated with committee proceedings (e.g., correspondence, notes for file, background papers) may also be viewed as posing less chance of substantial interference, although of course, the circumstances of each case would need to be considered at the time.

6.14 On this last category, it is worth noting the attitude of the Senate Privileges Committee that “unless unauthorised revelations of proceedings are of such moment that they make impossible the continuation of an inquiry, such revelations will not be considered by the Committee of Privileges as raising a question of contempt on the basis that they constitute unauthorised disclosure”\textsuperscript{18}.

\textsuperscript{18} Ibid, p45.
APPENDIX A - LETTER TO THE HACS COMMITTEE
FROM THE CEO OF CHS\textsuperscript{19}

\textsuperscript{19} This document is an image and may not meet document accessibility guidelines.
Ms Bec Cody MLA  
Chair  
Standing Committee on Health, Ageing and Community Services  
Email: LACommitteeHACS@parliament.act.gov.au  

Dear Ms Cody  

**Inquiry into Maternity Services in the ACT**  

I am writing in relation to the publication of submissions received for the Inquiry into Maternity Services in the ACT. I ask for the Committee’s consideration in redacting information in the submissions prior to publication that may easily identify an individual.  

It has been brought to my attention that a Canberra Health Services staff member has been easily identified through a submission that has been published and we are requesting this information is redacted. I am incredibly proud of the great work our maternity staff do each day and am disappointed that they are subjected to publication of unsubstantiated claims about their professional practice.  

I have encouraged all staff to contribute to this Inquiry and others where relevant, as we are all passionate about the care we provide to our patients.  

I am happy to discuss this further with the Committee should it be required.  

Yours sincerely  

[Signature]  

Bernadette McDonald  
Chief Executive Officer  
Canberra Health Services  

21 March 2019
APPENDIX B – ARTICLE IN THE CANBERRA TIMES, 4 APRIL 2019

20 This document is an image and may not meet document accessibility guidelines.
Canberra hospital boss asked for redactions from inquiry submissions

By Daniella White
April 4, 2019 -- 12.00am

Canberra Health Service's CEO Bernadette McDonald contacted a committee undertaking an inquiry into maternity services and asked it to redact certain information in public submissions.

She said she was concerned for the welfare of her staff who were potentially identifiable and denied attempting to influence the committee.

Ms McDonald asked for the redaction the week after Canberra Health Services sent out a statement fiercely denying claims a midwife made in a submission, labelling them misleading and unfair and criticising The Canberra Times' story about the submission.

The midwife's submission to a current Legislative Assembly inquiry into ACT's maternity services alleged vaginal examinations were at times performed without a woman's informed consent.

Health Minister Meegan Fitzharris was in March told by Canberra Hospital no patient complaint about the matter existed, only for one to be anonymously emailed to her at the weekend.

The Legislative Assembly committee determines what submissions, which are protected under privilege, should be made public and what information within them should be redacted.

A Canberra Health Services spokesman said Ms McDonald was not attempting to influence the committee but she had concern for what was made public and how it impacted on staff.

The spokesman said staff had raised concerns that some submissions made medical and midwifery staff potentially identifiable.
Ms McDonald wrote to the committee in March asking it to redact information in submissions to be published and one that had already been published.

"It has been brought to my attention that a Canberra Health Services staff member has been easily identified through a submission that has been published and we are requesting this information is redacted," she said.

"I am incredibly proud of the great work out maternity staff do each day and am disappointed that they are subjected to publication of unsubstantiated claims about their professional practice."

Ms Fitzharris came under pressure during question time on Wednesday about her involvement with the Canberra Health Services statement about the midwife's submissions and media coverage.

"Canberra Health Services wished to make the statement, I was aware of it but did not have a role in approving it," she said.

"All complaints are taken seriously."

She said she would make a full statement to the Assembly on a range of matters on the issue in May.

Ms Fitzharris said she previously told the Assembly that no consumer feedback had been received on the matter based on a verbal briefing with Canberra Health Services on March 13.

She was, however, made aware of an anonymous consumer complaint made in February via email on the weekend.

Ms Fitzharris said she would guarantee midwives who made complaints about the issue would not face retribution, under questioning from opposition spokeswoman for health Vicki Dunne during question time on Wednesday.

Daniella White

Daniella White is a reporter for The Canberra Times with a special focus on health issues