

The Subsequent Use by an Author of Their Written Submission to a Parliamentary Committee: Issues of Ownership, Law, Privilege, Contempt and Practicality[#]

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Introduction

The information sheets for potential committee witnesses published on the websites of each of the Australian Parliaments contain similarly-worded instructions regarding the status of written submissions lodged with committees, such as:

Once you have sent your submission to a committee, it becomes the property of the committee and is subject to parliamentary privilege. This means that you should not publish or release your submission after you have given it to the committee.¹ (Western Australia, Legislative Council)

All written submissions to the Committee become the sole property of the Committee when received by the Committee Secretariat. As such, they are confidential documents and may not be given to any other persons, including the media, unless permission of the Committee to do so has been sought and obtained.² (Parliament of Australia, Joint Standing Committee on Public Works)

Once a submission has been received by a committee it must not be published or disclosed to any other person in that form without the committee's authorisation. If its publication is not authorised, not only is it not protected by parliamentary privilege but publication may also be a contempt of Parliament.³ (Parliament of Tasmania)

[#] ANZACATT Parliamentary Law Practice and Procedure Course 2006. This paper has been fully refereed.

¹ 'Making a Submission to a Committee of the Legislative Council', Legislative Council, Western Australia, p3: http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframeweb_pages/Committees (viewed on 8 March 2007).

² Joint Standing Committee on Public Works, Parliament of Australia, para 13, <http://www.aph.gov.au/house/committee/pwc/role.htm> (viewed on 8 March 2007).

³ 'Notes to Assist in the Preparation of Submissions to Committee Inquiries', undated: www.parliament.tas.gov.au/Ctee/CTEEnotes.htm (viewed on 8 March 2007).

Such strongly-worded statements may tend to confuse, intimidate and perhaps even deter members of the public from making written submissions to parliamentary committees. This may consequently impact on public participation in the work of parliamentary committees and lessen the relevance and quality of committee inquiries and reports. There is also a query as to whether such statements accurately reflect the law, given the nature of copyright protection and particularly noting developments in the Australian courts over the past two decades in the area of freedom of communication on government and political matters.

One of the most common and quite understandable ways that members of the public may inadvertently transgress Parliament's long-standing 'rules' with respect to the status of written submissions is the 'unauthorised use' by authors of their written submission. This may occur by way of simultaneous publication of a submission in separate forums. In the modern technological age such publication can occur instantaneously over the Internet as soon as the author has lodged the submission with a committee's secretariat.

The following exchange took place on an Australian National University Internet forum on 10 and 11 April 1997:

[Ms Janet Whitaker:] This is a posting ... citing two very interesting aspects of the rules governing submissions to Parliament ... I'm most interested in views on the second one which states that submissions cannot be published anywhere else without the committee's permission. I'm not so concerned about losing the Parliamentary Privilege aspect, but to be held in contempt of Parliament [however ludicrous that might seem], it's still a frightening aspect of the rules.

What does that mean for submissions that are posted to web sites?⁴

...

[Mr Stewart Fist, technical writer and journalist:] I've always taken the position of sending in my submission, sub-editing it quickly, and flogging it off to any magazine that will buy. Otherwise I'm doing months of work for those Canberra bastards without payment. I also put it up on the Web so that others can read, and I often send off copies to journalists who may be interested.

I also take the position [sic] that if they want to haul me up before the Senate and charge me with contempt, my ultimate dream would come true. Remember, that when you are before the senate, you can say anything you like without being charged for defamation — its all priviledged [sic].

That would be worth a week or two in the clink. And it would be front page on every newspaper and the lead story in every TV or radio bulletin.

Charge me with contempt — Please!⁵

The question arises as to whether such premature or unauthorised publication or use by witnesses of their written evidence to a parliamentary committee is more

⁴ <http://www.anu.edu.au/mail-archives/link/link9704/0208.html> (viewed on 28 March 2007).

⁵ <http://www.anu.edu.au/mail-archives/link/link9704/0231.html> (viewed on 28 March 2007).

properly characterised as either a simple lack of courtesy towards the Parliament; a breach of a committee's proprietary rights over the document; an express or implied waiver by the witness of parliamentary privilege; or a contempt of the Parliament?

The primary aim of this paper is to identify the relevant legal and administrative issues arising from a witness's subsequent use of their written evidence to a parliamentary committee. A secondary objective is to develop some practical suggestions which could form the framework of policy guidelines and updated witness information sheets to clarify these issues for both the Western Australian and other State Parliaments.

Parliamentary Privilege and Written Submissions

Members of Parliament and other participants in the parliamentary process enjoy in certain situations a special absolute immunity from interference or other action by the executive and the courts. This is arguably the 'single most important'⁶ aspect of the wider collection of immunities and powers known as 'parliamentary privilege', and is derived from Article 9 of the *Bill of Rights 1689* (UK), which states that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.'

This immunity only covers certain core activities connected to the work of a Parliament. For instance meetings of political parties will not be covered by the article 9 immunity even when held within the precincts of a Parliament.⁷ However, Professor Enid Campbell has suggested that the Article 9 immunity probably extends to the preparation and lodgement of written submissions to parliamentary committees even where the author of the submission does not actually appear before the committee and possibly also even where the submission is not relevant to any matter before the committee.⁸ The correctness of such a view depends upon whether the acts of preparing a submission and lodging it with a committee properly fall within the description of 'proceedings in Parliament'.

Some guidance as to what may constitute 'proceedings in Parliament' may be found in various statutes defining the limits of parliamentary privilege. This phrase has been defined for the purposes of the Commonwealth Parliament in s 16(2) of the *Parliamentary Privileges Act 1987* (Cth) to include the following:

... 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 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;

⁶ Joint Committee on Parliamentary Privilege, United Kingdom Parliament, *First Report* (House of Lords 43-I, House of Commons 214-I, Session 1998–99), para 36, cited in Professor Enid Campbell, *Parliamentary Privilege*, The Federation Press, Sydney, 2003, p10.

⁷ Professor Enid Campbell, *Parliamentary Privilege*, The Federation Press, Sydney, 2003, p12.

⁸ *Ibid*, p166.

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

The making of a submission to a Commonwealth parliamentary committee therefore attracts parliamentary privilege and cannot be called into question in any proceedings before a court, a tribunal or any other 'place out of Parliament'.

The situation is not as clear at the State level where only Queensland has an equivalent express statutory provision.⁹ The Uniform Legislation and Statutes Review Committee of the Legislative Council of Western Australia noted in its report on the Defamation Bill 2005 that, in Western Australia as at October 2005:

Whilst there is support for the view that the simple submission of a document to a House or parliamentary committee would be absolutely privileged, the position has been uncertain in the absence of judicial authority and statutory provision. Given the uncertainty, the mere presentation or submission of a document to a committee of the Legislative Council has not been stipulated as clothing the document with parliamentary privilege (or absolute privilege).¹⁰

There was the possibility however that even if absolute privilege did not apply to the act of making a submission, a form of qualified privilege (which may be set aside in any subsequent defamation action on proof of malice) may nevertheless have applied to offer some protection to authors in the preparation of submissions.

The situation has changed to some extent in the States following the introduction of uniform defamation legislation in 2005. Statutory provisions now confer absolute privilege on the act of making a submission to a parliamentary committee for the specific purposes of the law of defamation:

Defence of absolute privilege

- (1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.
- (2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if —
 - (a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to) —
 - ...
 - (iii) the publication of matter while giving evidence before the body; and

⁹ Section 9, *Parliament of Queensland Act 2001* (Qld).

¹⁰ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report 4, *Defamation Bill 2005*, October 2005, pp9–10.

- (iv) the publication of matter while presenting or submitting a document to the body;¹¹

It is noted that neither s 16 of the *Parliamentary Privileges Act 1987* (Cth)¹² nor s 27 of the *Defamation Act 2005* (WA) make a distinction between submissions that have been invited by a committee and unsolicited submissions; both are equally protected.

Administrative Issues

Administrative procedures for the receipt, acceptance and granting of status to submissions vary depending upon the jurisdiction and the committee involved. Generally submissions are lodged with a committee's staff in hardcopy or electronic format. At this point some committee secretariats will send out an acknowledgement of receipt and possibly a warning in the following terms:

It is a serious matter to publish or disclose any document or portion of any evidence, given to a parliamentary committee, before such document or evidence has been reported to the House or until the committee authorises its publication.¹³

The committee's staff will then ensure that the committee gives consideration to formally accepting or rejecting the submission at the next available properly constituted meeting of the committee. A committee can decide to accept the whole of a submission, part only of a submission or reject a submission completely. A rejection may be based on a lack of relevance to a committee's inquiry or terms of reference, or because of inappropriate content.

As noted above, even a rejected submission has some protection under parliamentary privilege with respect to the drafting and lodgement of the submission. However the rejected submission will not be covered by this immunity if it is published elsewhere. It is arguably possible that qualified privilege may continue to apply to a rejected submission — that is, the re-publication may still be covered if it was inadvertent or not actuated by malice. At any rate it may be difficult for a third party to challenge the application of parliamentary privilege to a submission at this stage. A court is likely to be reluctant to inquire into the minutes or correspondence of a parliamentary committee in order to determine when and why a submission was accepted or rejected. In this respect I note the recent Canadian case of *Knopf v Speaker of the House of Commons and Attorney General of Canada*¹⁴ in which a Judge of the Federal Court of Canada held that the Court not look into the circumstances surrounding the rejection of a submission by a parliamentary committee, as the procedures of the committee were shielded by parliamentary privilege.

¹¹ Section 27, *Defamation Act 2005* (WA). See also the following equivalent provisions: Section 27, *Defamation Act 2005* (NSW); s 27, *Defamation Act 2005* (Vic); s 25, *Defamation Act 2005* (SA); s 27, *Defamation Act 2005* (Tas); s 27, *Defamation Act 2005* (Qld); s 24, *Defamation Act* (NT).

¹² Professor Enid Campbell, *Parliamentary Privilege*, The Federation Press, Sydney, 2003, p167.

¹³ A.R. Browning, *House of Representatives Practice*, Second Edition, Australian Government Publishing Service, Canberra, 1989, p680.

¹⁴ 2006 FC 808 (26 June 2006).

Many Parliaments have taken the additional step of converting received submissions into an electronic format and placing them on the Internet for easier access by the public. This practice has raised concerns regarding the application of parliamentary privilege to: electronic copies of a submission; and a document that is instantaneously accessible in, and thereby subject to the laws of another jurisdiction.

To some extent, the second issue (prompted in part by concerns over the possible impact of the decision in *Dow Jones and Company Inc v Gutnick*¹⁵) has been addressed within Australia by the above-mentioned uniform defamation legislation. The first issue, however, remains problematic.

An interesting development has occurred recently in the House of Lords. In January 2007 the House of Lords Procedure Committee recommended that:

Henceforth select committees should be given power to ‘publish’ evidence, rather than ‘print’ it. This will allow them to place on line evidence which is not intended for printing, while making it clear that such material is privileged under the Parliamentary Papers Act 1840.¹⁶

This recommendation may prompt other parliaments to consider giving express authorisation to committees, either through legislation or standing orders, to ‘publish’ material electronically. In the case of the Legislative Council of Western Australia, the *Parliamentary Papers Act 1891* (WA) exempts from actions in the courts any ‘*publication of any report, paper, votes or proceedings*’ of the Parliament made by or under the authority of the Parliament.¹⁷ Standing Order 323 then provides that written evidence received by standing committees may be ‘*disclosed or published in a manner and to an extent (if any) determined by a committee*’. Standing Order 323 may therefore be sufficient to authorise a committee, of its own initiative, to place a submission on the Internet — although the matter is not beyond doubt.

This is a live issue for parliaments throughout the world.

A Parliamentary Committee’s Ownership of a Written Submission

Authors of written submissions are occasionally taken aback by a parliamentary committee’s claim to ownership of the author’s work.

¹⁵ (2002) 194 ALR 433. See also: Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report 4, *Defamation Bill 2005*, October 2005, p9.

¹⁶ United Kingdom, House of Lords, Procedure Committee, 2nd Report of Session 2006–07, *Companion to Standing Orders*, 15 January 2007, p1: <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldprohse/25/25.pdf> (viewed on 12 April 2007).

¹⁷ Section 1, *Parliamentary Papers Act 1891* (WA).

The 22nd Edition of *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (Erskine May)* states that: 'Once received by the Committee as evidence, papers prepared for a Committee become its property and may not be published without the express authority of the Committee.'¹⁸

The general rule under copyright law as to the ownership of letters and other written documents is that a distinction is made between the document itself (that is, the physical piece of paper) and the words written on the paper. The ownership of the paper and the ink, as opposed to the words, lies with the person who received the document,¹⁹ whilst 'The author (or employer, if it's written on their behalf) owns the intellectual property in the letter. When you send the letter you don't necessarily relinquish the copyright: you merely give away the paper.'²⁰

There are, however, the following exceptions contained in the *Copyright Act 1968* (Cth) to this general rule:²¹

- a) the author has signed a document which says that someone else will own copyright; or
- b) there has been no agreement about ownership of copyright, and
 - i) the author was an employee (rather than a freelancer or volunteer) and created the work as part of his or her usual duties; or
 - ii) the work is a commissioned photograph, portrait or engraving; or
 - iii) the work was made by, or under the direction or control of, the Commonwealth Government, or a State or Territory government; or
 - iv) the work was first published by, or under the direction or control of, the Commonwealth Government, or a State or Territory government.

It is noted that agreements to transfer the copyright in a document are common in the private sector. For instance, in the music industry songwriters often make agreements with music publishers that the music publisher will be the owner of copyright in all future songs, in return for an agreed percentage of the income from the songs.²² Similarly, a writing competition may have as one of its terms of entry to the competition that copyright in a piece of submitted written work is transferred to the organisers of the competition.

However, in the ordinary course of events, it could not be said that there has been a clear written or verbal agreement between the author of a submission and the parliamentary committee that receives the submission that copyright in the submission will be transferred from the author to the committee along with the

¹⁸ Sir Donald Limon and W.R. McKay (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd Edition, Butterworths, London, 1997, p650.

¹⁹ 'Who owns a letter once you've sent it?' <http://news.bbc.co.uk/1/hi/magazine/3204121.stm> (viewed on 14 March 2007).

²⁰ <http://www.caslon.com.au/ipguide19.htm> (viewed on 13 March 2007).

²¹ Australian Copyright Council Information Sheet G58: 'Ownership of copyright', February 2006, p2.

²² Ibid.

physical document. This is particularly so in those cases where a submission has been sent to a committee unsolicited. The only public document referring to such a claim of ownership tends to be the information sheet or guide for preparing written submissions. It is not clear what percentage of written submissions received by committees is prepared after the author has read the relevant information sheet.

Notwithstanding the above, it has been noted that ‘The impact of parliamentary privilege on copyright law is rarely, if ever, discussed, in all probability for the good reason that immunity from prosecution can be assumed to be granted under Article 9 of the Bill of Rights 1689’.²³

As noted above, it is clear at the Commonwealth level by virtue of s 16(2) of the *Parliamentary Privileges Act 1987* (Cth) (and in relation to the Queensland Parliament by virtue of s 9 of the *Parliament of Queensland Act 2001* (Qld)), and in the States and Territories at least to the extent of the application of the law of defamation, that the writing of a submission for presentation to a parliamentary committee is a matter covered by absolute privilege as a ‘*proceeding in Parliament*’.

It seems that the nature or character of a document may change upon its preparation for submission to a parliamentary committee. Once parliamentary privilege applies, the law of copyright has no effective operation. This is a matter that is not clearly understood by the general public.

It is therefore arguably not entirely correct to view a parliamentary committee that receives a written submission as the ‘owner’ of that submission. It may be more correct to state that the act of making a submission to a parliamentary committee is a proceeding in Parliament and is accordingly captured by the immunities of parliamentary privilege and Parliament’s control over the publication of its proceedings. Ownership in the submission has not been transferred to the committee — it has simply been rendered effectively irrelevant. This view best fits in with the Parliament’s interest in protecting its privileges.

Waiver of Privilege

Although authors of submissions are sometimes dismissive of the value of parliamentary privilege and are quite prepared to forego it to retain some control over their submission, there is, in fact, no means by which parliamentary privilege can be waived. The Australian Capital Territory Court of Appeal has recently noted that:

... there is strong authority for the proposition that the prohibition on the tender or receipt of proceedings in Parliament, being a privilege of the Parliament, cannot be

²³ Gareth Griffith, *Copyright, Privilege and Members of Parliament*, Briefing Paper 13/2000: <http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/1E76B6CF2023341DCA256ECF0008BE54> (viewed on 26 March 2007).

waived or consented to by either party. This was made clear in *Rann v Olsen* (2000) 172 ALR 395 where Prior J said at [226]:

The principle is that courts will not allow any challenge to be made to what is said or done within the walls of parliament in performance of its legislative functions. It therefore extends to things said by witnesses before its committees. It is not capable of waiver or exception in favour of the maker of the statement, nor can it be confined to proceedings seeking to assert legal consequences against the maker of the statement for making the statement.²⁴

Section 13 of the *Defamation Act* (UK) was an unusual piece of legislation enacted in 1996 to allow individual members of the United Kingdom Parliament and other participants in parliamentary proceedings (such as witnesses) to waive parliamentary privilege so as to permit admission of evidence of parliamentary proceedings in actions for defamation. In the case of *Hamilton v Al Fayed*,²⁵ Lord Browne-Wilkinson observed:

Before the passing of the Act of 1996, it was generally considered that parliamentary privilege could not be waived either by the Member whose parliamentary conduct was in issue or by the House itself. All parliamentary privilege exists for the better discharge of the function of Parliament as a whole and belongs to Parliament as a whole. Under section 13, the individual Member bringing defamation proceedings is given power to waive for the purposes of those proceedings the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.²⁶

Section 13 was passed in extraordinary circumstances and in the context of a single case. There is no equivalent provision applying to the Australian parliaments.

It would therefore appear that it is not possible for an author of a submission to waive the parliamentary privilege attaching to the submission. The author may, however, divest the submission of absolute privilege for the purposes of a subsequent re-publication of the submission by making an unauthorised/premature re-publication.

²⁴ *Commonwealth of Australia & Air Marshal McCormack in his capacity as Chief of Air Force v Vance* [2005] ACTCA 35 (23 August 2005), paras 40–41 (per Gray, Connolly and Tamberlin JJ). See also the Privy Council's judgment in *Prebble v Television New Zealand Limited* [1995] 1 AC 321.

²⁵ House of Lords, 27 March 2000: <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000323/alfaye-1.htm> (viewed on 11 April 2007).

²⁶ <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000323/alfaye-2.htm> (viewed on 11 April 2007).

Unauthorised Disclosure of Committee Proceedings as a Contempt of Parliament

The 20th Edition of *Erskine May*²⁷ defines ‘contempt of Parliament’ 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 of the offence.²⁸

It is an ancient custom of the English Parliament that ‘no act done at any committee should be divulged before the same be reported to the House’.²⁹ This unwritten custom was given formal recognition when the House of Commons resolved on 21 April 1837:

That the evidence taken by any select committee of this House, and the documents presented to such committee, and which have not been reported to the House, ought not to be published by any member of such committee or by any other person.³⁰

The application of this resolution has, over time, been partially relaxed (although not formally so until 1980³¹) in relation to the reporting of evidence taken during public hearings.³² Furthermore, under standing orders each House of Commons select committee has itself also been able to authorise witnesses to publish evidence which has been submitted to the committee.³³ *Erskine May* also notes that ‘In the Lords, committees regularly authorise publication by witnesses of evidence, which they have submitted, in advance of the evidence being reported to the House or published by the committee.’³⁴

In Australia, parliamentary committees are generally authorised by the standing orders of their House to determine the publication status (that is, generally, ‘public’, ‘private’ or ‘*in camera*’) of the evidence they receive. By way of example, Standing Order 323 of the Legislative Council of Western Australia relevantly states the following with respect to the publication of evidence by standing committees:

Evidence may be disclosed or published

323. (1) The proceedings of a committee when taking oral evidence are open to accredited news media representatives and the public.

²⁷ Sir Charles Gordon (ed.), *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 20th Edition, Butterworths, London, 1983.

²⁸ *Ibid*, p143.

²⁹ *Ibid*, p153.

³⁰ *Ibid*, pp153-154.

³¹ *Ibid*, p704.

³² *Ibid*, p154.

³³ *Ibid*, Commons Standing Orders Nos. 135 and 136.

³⁴ Sir Charles Gordon (ed.), *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 20th Edition, Butterworths, London, 1983, p154.

(2) Written evidence not subject to subclause (4) may be disclosed or published in a manner and to an extent (if any) determined by a committee of its own motion or so as to meet a request made by the person providing that evidence.

When evidence may be taken in private session

(3) Despite subclause (1), a committee may take oral evidence in private session of its own motion, or at the request of the witness, where it is satisfied that the nature of the evidence or the identity of the witness requires it.

Private session evidence not to be disclosed or published

(4) Evidence, including written evidence, taken under subclause (3) must not be disclosed or published except by leave of the House or the committee before which the evidence was given.

...

Standing orders of similar effect (to varying degrees) apply in the other Australian Houses and in the New Zealand House of Representatives.³⁵

With respect to the Commonwealth Parliament, s 13 of the *Parliamentary Privileges Act 1987* (Cth) is noteworthy:

Unauthorised disclosure of evidence

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

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; ...

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

Penalty:

(a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or
 (b) in the case of a corporation, \$25,000.

Section 13 of the *Parliamentary Privileges Act 1987* (Cth) was introduced as a direct result of concerns regarding the number and seriousness of unauthorised disclosures (that is, a disclosure not authorised by the committee or the House concerned) from Commonwealth parliamentary committees.³⁶ The unauthorised disclosure of an *in camera* document of a Commonwealth parliamentary committee

³⁵ Commonwealth: Senate, SO 37; House of Representatives, SOs 340, 346; New South Wales: Legislative Council, SOs 252 and 257B; Legislative Assembly, SO 367; Victoria: Legislative Council, SO 207; Legislative Assembly, SO 208; Queensland: Legislative Assembly, SO 197; South Australia: Legislative Council, SO 398; House of Assembly, SO 339; Western Australia: Legislative Assembly SO 271 and resolution of 25 September 1990; Tasmania: Legislative Council, SOs 265, 267 and 268; House of Assembly: SOs 364, 365 and 366; Northern Territory: Legislative Assembly, SO 274; Australian Capital Territory: Legislative Assembly, SOs 241 and 242; New Zealand: House of Representatives, SOs 240–243.

³⁶ Commonwealth, Senate, Committee of Privileges, Report No. 122, *Parliamentary privilege - unauthorised disclosure of committee proceedings*, June 2005, p2.

may either be treated as a criminal offence under s 13 of the *Parliamentary Privileges Act 1987* (Cth) or as a contempt of the Parliament, or both.³⁷ In June 2005 the Senate Committee of Privileges proposed a new procedure for dealing with the unauthorised disclosure of *in camera* evidence to a parliamentary committee:

Anyone who divulges or publishes such in camera evidence may expect a finding of contempt, regardless of the circumstances. The committee may then wish to establish whether the offence is of such gravity that it should recommend to the Senate that a prosecution under section 13 of the Parliamentary Privileges Act 1987 be proceeded with. Inadvertent unauthorised disclosure or publication of readily-identified in camera evidence will be included as in effect a 'strict liability' offence, although the inadvertence will be taken into account in the determination of penalty.³⁸

To date it does not appear that an author of a submission to a committee has been punished by a Parliament, or prosecuted in the courts, for the unauthorised disclosure of their submission. The Fourth Edition of *House of Representatives Practice* notes the following two occasions where an author of a written submission to a Commonwealth parliamentary committee has published the submission elsewhere prior to receiving authorisation to do so from the committee:³⁹

In 1979, after the unauthorised disclosure of a submission, the Joint Select Committee on the Family Law Act resolved that a statement regarding the status of submissions be included in any future advertisements relating to the committee's inquiry; and

In 1986 a witness sent copies of a submission to both the Joint Select Committee on Electoral Reform and a newspaper. The newspaper published parts of the submission before the committee had received the submission. It was noted in *House of Representatives Practice* that: 'The committee corresponded with the witness on the subject of this discourtesy and subsequently resolved to agree to the witness's request that the submission be withdrawn and returned.'⁴⁰

The Second Edition of *House of Representatives Practice* (1989) included the observation that: 'of the occasional cases of unauthorised publication of evidence has been reported to the House. However, committees have at times deemed it necessary to stress to those concerned the seriousness of their action.'⁴¹

It should be noted that there have been a number of occasions where the details of private submissions to parliamentary committees have been leaked to the media and

³⁷ Standing Order 242 of the House of Representatives and Resolution 6(16) of the Senate. See also: *Guidelines for Submissions and responses to Inquiries*, Department of the Premier and Cabinet, Victoria, September 2002, p16.

³⁸ Australia, Senate, Committee of Privileges, Report 122, *Parliamentary privilege — unauthorised disclosure of committee proceedings*, June 2005, pp42–45, paras 3.24–3.25.

³⁹ I.C. Harris (ed.), *House of Representatives Practice*, Fourth Edition, Department of the House of Representatives, Canberra, 2001, p664.

⁴⁰ *Ibid.*

⁴¹ A.R. Browning, *House of Representatives Practice*, Second Edition, Australian Government Publishing Service, Canberra, 1989, p680.

the journalist or media outlet involved has been found in contempt or has been warned, although the source of the leak to the media has not been identified:

September 1990, Parliament of Australia, House of Representatives — an article in the Melbourne *Sunday Herald* newspaper revealed a confidential submission to the Joint Standing Committee on Migration Regulations. Whilst it was found that a contempt may have occurred, it was determined that it was not deliberate and so no further action was taken.⁴²

1995, Parliament of Australia, Senate — an *in camera* submission from a police officer to the Joint Committee on the National Crime Authority was tabled in the South Australian Parliament. The Committee of Privileges found the publication constituted 'a serious contempt', but was unable to identify the source of the leak. The Committee recommended that, if the source of the leak was found, the matter should be returned to the Committee of Privileges so that the discloser could be prosecuted under the *Parliamentary Privileges Act 1987* (Cth).⁴³

1999, Parliament of Australia, Senate — an *in camera* submission to the Joint Committee on Corporations and Securities was cited in a newspaper article. The source of the leak was not identified. The Committee of Privileges recommended that the publishers be formally reprimanded by the Senate and that, if the source of the leak was found, the discloser of the information be subject to a fine or prosecution under the *Parliamentary Privileges Act 1987* (Cth).⁴⁴

It appears unlikely that an author would be found to have committed a contempt against a Parliament where there was no evidence of deliberate intent to publish a submission without appropriate committee authorisation. However, based on the above cases, the approach of the Parliament may be entirely different where the submission has been made private (or *in camera*) and, knowing this to be the case, the author has provided the submission to the media.

I also note that in some Australian jurisdictions, such as Western Australia, the express power of the Parliament to summarily punish a contempt by fine or imprisonment is limited to a few specified offences, which do not include the unauthorised disclosure of committee evidence.⁴⁵

⁴² House of Representatives, Privileges Committee, *Article in the Melbourne Sunday Herald of 16 September 1990 concerning the Joint Standing Committee on Migration Regulations*, 4 December 1990.

⁴³ Senate Committee of Privileges, 54th report, 1995, reported in the Senate Committee of Privileges' 107th report: *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996–2002*, p40.

⁴⁴ Senate, Committee of Privileges, 99th report, 2001, reported in the Senate Committee of Privileges' 107th report: *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate, 1996–2002*, p42.

⁴⁵ Professor Enid Campbell, *Parliamentary Privilege*, The Federation Press, Sydney, 2003, p166 and p189; and s 8, *Parliamentary Privileges Act 1891* (WA).

Freedom of Communication About Government or Political Matters

A number of decisions of the High Court of Australia in the 1990s raises the issue as to whether the purported control by parliamentary committees over the subsequent use of written evidence by witnesses (such as by punishment for contempt or prosecution under s 13 of the *Parliamentary Privileges Act 1987* (Cth)) is contrary to an implied qualified freedom contained in the Commonwealth *Constitution* to discuss government and political matters.⁴⁶

The two-part test as originally expressed by the High Court of Australia in *Lange v Australian Broadcasting Corporation*⁴⁷ is as follows:

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by s 7, s 24, s 64 or s 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively ‘the system of government prescribed by the Constitution’). If the first question is answered ‘yes’ and the second is answered ‘no’, the law is invalid.⁴⁸

In *Nationwide News Ltd v Wills*⁴⁹ Deane and Toohey JJ described the implied freedom as one:

... to communicate information, opinions and ideas about all aspects of the government of the Commonwealth, including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of government which are ultimately derived from the people themselves.⁵⁰

The implied freedom of political communication has so far generally been confined to federal matters, and its application to the privileges of the State parliaments is still unclear.⁵¹ There is, however, a view expressed by judges in a number of cases that the implied freedom extends to communications concerning State political

⁴⁶ *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁴⁷ (1997) 189 CLR 520.

⁴⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567–568.

⁴⁹ (1992) 177 CLR 1.

⁵⁰ *Ibid* at 74.

⁵¹ Dr Gerard Carney, ‘Lifting the Veil of Mystery: Freedom of Speech Under Parliamentary Privilege’, pp145–168, *Public Law Intersections: Papers Presented at the Public Law Weekend — 2000 and 2001*, p163.

matters, on the grounds that Commonwealth and State political matters are often intertwined.⁵² In *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*⁵³ a majority of the New South Wales Court of Appeal was of the view that the implied constitutional freedom could be used to challenge the validity of secrecy provisions relating to the institution and conduct of proceedings by a State Attorney-General under s 101A of the *Supreme Court Act 1970* (NSW). In that case, Spigelman CJ stated:

The interconnection between the systems of government and the overlapping of issues between the levels of government is such that the Court must not approach these matters with any rigid conception of the respective responsibilities of the Commonwealth and the States.⁵⁴

In *Lange v Australian Broadcasting Corporation* the High Court of Australia held that the implied constitutional freedom of political communication applies to both the common law and statute law. Professor Enid Campbell has noted that: 'If a Parliament's legislative powers are restricted by the implied constitutional freedom, it must surely follow that the disciplinary powers of its Houses must be subject to the same restriction.'⁵⁵

Similarly, Dr Gerard Carney has observed that any exercise of the Commonwealth Parliament's contempt power should conform to the implied freedom of political communication.⁵⁶

International Agreements in Relation to Freedom of Speech

Australia is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 19 states:

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless

⁵² See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 76 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ), 168–9 (Deane and Toohey JJ), 216–7 (Gaudron J). See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 and *Levy v Victoria* (1997) 189 CLR 579. Note also: (2003) 8 *Media & Arts Law Review* 77, *Criticism of Judges and Freedom of Expression*, Professor Enid Campbell and H.P. Lee, Abstract, p2: <http://www.law.unimelb.edu.au/cmcl/malr/8-2-1%20Campbell%20Lee%20Criticism%20of%20Judges%20formatted%20for%20web.pdf>

⁵³ [2000] NSWCA 198 (2 August 2000), per Spigelman CJ.

⁵⁴ *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*, [2000] NSWCA 198 (2 August 2000), per Spigelman CJ, at para 87.

⁵⁵ Professor Enid Campbell, 'Contempt of Parliament and the Implied Freedom of Political Communication', *Public Law Review*, Volume 10, September 1999, pp196–208, p203.

⁵⁶ Dr Gerard Carney, 'Lifting the Veil of Mystery: Freedom of Speech Under Parliamentary Privilege', pp145–168, *Public Law Intersections: Papers Presented at the Public Law Weekend — 2000 and 2001*, p163.

of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.⁵⁷

Even if governmental acts are in accordance with Australian law, they may still be the subject of complaint to the United Nations' Human Rights Committee on the ground that they violate the ICCPR.⁵⁸

Professor Enid Campbell has stated that:

Domestic laws which immunise participants in parliamentary proceedings against legal liabilities on account of what they have said in the course of those proceedings cannot be regarded as inconsistent with Article 19. On the other hand domestic laws which operate so as to inhibit the freedom of members of the public to express opinions on parliamentary affairs and proceedings may be seen to be restrictive in ways not permitted by Article 19.⁵⁹

It therefore appears that a case could be argued that an attempt by the Parliament to exercise its contempt powers against an author for the unauthorised disclosure of a submission to a parliamentary committee may conflict with the implied freedom of political communication identified by the Australian courts. Whether a court (or international tribunal) would entertain an action against a Parliament for breach of the implied freedom is another matter. It would, it is submitted, be more likely that a challenge would succeed against an attempted prosecution under s 13 of the *Parliamentary Privileges Act 1987* (Cth); such a prosecution being in the nature of a statutory offence prosecuted by the Executive rather than purely an internal proceeding of the Parliament to protect its own privileges.

Some Practical Problems ***Simultaneous Publication of a Submission***

As stated in the introduction to this paper, perhaps the most obvious potential for premature publication of submissions is in the case of large government agencies and industry stakeholder bodies that seek to keep their client and membership groups informed. For instance, a standing committee of the Legislative Council of Western Australia, which had formally received the bulk of submissions for a recent inquiry on the same day (noting that many of these submissions were actually

⁵⁷ <http://www.ohchr.org/english/law/ccpr.htm> (viewed on 11 April 2007).

⁵⁸ Research Paper 1 2000–01, 'Parliamentary Privileges', Professor Enid Campbell, Consultant, Politics and Public Administration Group, 27 July 2000: <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP01.htm> (viewed on 8 March 2007).

⁵⁹ *Ibid.*

lodged with the committee secretariat well beforehand over a summer recess), observed that: ‘... many of the submissions from the local government authorities were in similar terms to [*the Western Australian Local Government Association’s*] submission to this inquiry.’⁶⁰

There is a view, which has been expressed by Senate Clerk, Mr Harry Evans, that it is permissible if a submission of a department or government agency is circulated to officers of the department or agency, or a submission intended to express the views of the government is circulated to various government departments and agencies.⁶¹ The argument being that such circulation effectively amounts to circulation among the persons who are collectively the authors of the submission, and does not constitute an unauthorised disclosure. This same approach would also apply to submissions made on behalf of societies or associations and circulated to their members.⁶²

***Documents that are to be Used for another Purpose —
for example, Draft Manuscripts or Draft Government Reports***

An issue that sometimes arises concerns the status that a committee should give to a written submission that is either intended to also be lodged elsewhere (perhaps to another committee or body investigating a similar matter); that incorporates a ‘sneak peak’ at a draft report of a government agency; or effectively constitutes an author’s draft academic thesis or book manuscript. In such circumstances authors may be understandably horrified to find that the effect of parliamentary privilege may be to limit the author’s future use of the document as their own and leave further publication at the discretion of the committee. The situation may be particularly complicated if the committee concerned decides to keep the document private or *in camera*, and where the committee is a select committee that ceases to exist shortly after having determined the status of submissions and reported back to the House.

Professor Enid Campbell has noted that as a result of the operation of s 13 of the *Parliamentary Privileges Act 1987* (Cth):

A person who has presented a submission on some question of law reform risks prosecution if he or she uses the submission as a basis for a journal article without first obtaining a clearance from the committee to which the submission was made.⁶³

⁶⁰ Western Australia, Legislative Council, Environment and Public Affairs, Report 8, *Local Government Amendment Bill (No. 2) 2006*, April 2007, p2.

⁶¹ Advices to the Senate Committee of Privileges from the Clerk of the Senate, March 1988 to April 2002, p23. See also: Commonwealth, Senate, Committee of Privileges, Report 122, *Parliamentary privilege — unauthorised disclosure of committee proceedings*, June 2005, pp42–45.

⁶² *Ibid*, p23.

⁶³ Professor Enid Campbell, ‘Contempt of Parliament and the Implied Freedom of Political Communication’, *Public Law Review*, Volume 10, September 1999, pp196–208, p204.

The issue was faced by a standing committee of the Legislative Council of Western Australia in November 2002 when a submission doubling as a planning application was handed to the Committee Members by a witness during a hearing:

The CHAIRMAN: This is very much a live proposal. It was only lodged on 11 November.

Mr James Ferguson: The document you have there will be lodged [with the Western Australian Planning Commission] in two hours.

...

The CHAIRMAN: The committee will have to agree to this document being released, otherwise you will be unable to lodge that exact document with another authority in two hours. If you want to request that, I am sure the committee will consider it at the end of the evidence.

Hon KEN TRAVERS: If you do not submit it now, it could be sent to us later.

The CHAIRMAN: That is a better idea. You can take this document back now and not submit it to the committee at this stage, but submit it tomorrow after you have lodged it with the other authority; otherwise there will be the issue of privilege of which I am sure you are aware.

Hon KEN TRAVERS: Particularly if you want to submit the identical document. You do not want to make life harder than it is.

Mr James Ferguson: I will lodge it this afternoon and come back to the committee with it this afternoon.

The CHAIRMAN: You can do that as soon as it is lodged with another authority. We would not want you to be disadvantaged by the committee's rules on privilege.⁶⁴

The following 1994 Internet article also considers this issue:

Committee bans academic's submission

Queensland academic yesterday expressed her dismay at a parliamentary committee's decision to ban her submission from its deliberations on the future of the Criminal Justice Commission.

In April the Parliamentary Criminal Justice Committee — responsible for overseeing the CJC — advertised for public submissions as part of its three-year review of the CJC's functions and powers, and former Griffith University justice administration lecturer Ms Colleen Lewis responded with a 15-page submission in June.

However this month the committee wrote back to Ms Lewis, and returned her submission on the ground she intended publishing it in an academic journal.

Ms Lewis yesterday hit back, saying the committee had rejected her submission because it had strongly criticised the committee's inquiry into the leaking of the CJC's November monthly report.

⁶⁴ Mr James Ferguson *et al*, inquiry into *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Standing Committee on Public Administration and Finance, Legislative Council, Western Australia, *Transcript of Evidence*, 27 November 2002, p5.

The committee's letter to Ms Lewis said: 'A submission cannot be withdrawn or altered without the knowledge and approval of the committee, nor may it or any portion of it be published or disclosed until the Legislative Assembly or committee authorises its publication.

'In the present circumstances, the committee has agreed to return your submission as it does not want to interfere in your post-graduate studies or academic research,' it said.

That was August 9 — three days before the committee publicly released other submissions, making all — except Ms Lewis's — freely available for quotation in the media and elsewhere.

At last week's public hearing on the CJC's future, commission chairman Rob O'Regan, QC, asked committee chairman Ken Davies why Ms Lewis's submission could not now be accepted, and said he was 'mystified' why Mr Davies had persisted with rejecting it.

Ms Lewis is a former university lecturer and author in justice administration and a former senior lecturer at the Queensland Police Academy. She has been researching Queensland criminal justice issues since 1989 and is completing a doctoral thesis on the CJC.

'To return mine three days before releasing publicly everybody else's is very disconcerting,' she said yesterday. 'I am a researcher with something positive to contribute to an important debate but have been denied the opportunity so far,' she said.⁶⁵

It would appear, however, that the wider use of the classification of a document as an 'exhibit' may resolve some of these problems. The concept of exhibits in the parliamentary setting is explained in the Fifth Edition of *House of Representatives Practice*:

Exhibits are items (most commonly documents) presented to committees or obtained by them during an inquiry While a submission is a document prepared solely for the purposes of an inquiry, an exhibit is not. An exhibit is a document or item created or existing for another purpose but presented to a committee or obtained by it because of its perceived relevance to an inquiry or to a matter under consideration. . . . The act of presenting an exhibit to a committee would normally be protected by parliamentary privilege, although it would not be expected that committees would authorise the publication of exhibits, so any wider publication would not be protected. Sometimes committees have, however, authorised the publication of exhibits. Committees have sometimes received exhibits as confidential exhibits. A submission to another committee has been received as an exhibit — a course which may be seen as minimising the burden on the authors of the document.⁶⁶

However, it is not always clear to a committee that a submission is intended to also be published elsewhere. Some jurisdictions may also require an amendment to their

⁶⁵ By Chris Griffith, freelance journalist : <http://www.chrisgriffith.org/1994/colleen1.html> (viewed on 10 April 2007).

⁶⁶ I.C. Harris (ed.), *House of Representatives Practice*, Fifth Edition, 2005, p665.

standing orders to allow for the use of exhibits. For instance, under the Standing Orders of the Legislative Council of Western Australia, any information provided to a committee, written or verbal, is given the status of 'evidence'.⁶⁷

A Possible Solution — Instantaneous and Open Publication of all Committee Documents

There is an argument (notably most often put forward by the media⁶⁸) that parliamentary committee proceedings should be more open and flexible. In a 2005 submission to the Senate Committee of Privileges inquiry into unauthorised disclosures, John Fairfax Holdings Limited argued that:

... any party who makes a submission to a Committee of Parliament should have the right to disclose their submission publicly, without the permission of the Committee.

We do not understand why we — or any other citizen, association, interest group or corporation — should be subject to a contempt proceeding for seeking dissemination of our views without waiting for the Committee's approval. Such an enforced period of silence is a denial of free speech. We believe these rules harm the public interest by inhibiting the free flow of information and debate on important public policy issues.⁶⁹

In response to such demands, the Senate Committee of Privileges has put forward the following persuasive arguments, which reflect ongoing concerns about the possible abuse of parliamentary privilege:

As matters stand, the publication of submissions without the authority of a parliamentary committee comes within the category of contempts. In some written and oral evidence, notably that from the representatives of John Fairfax, it was suggested that persons should have the right to publish their submissions at any time, regardless of the views of the relevant committee. The implication appeared to be that the persons publishing would be given the protection of parliamentary privilege without any input from the committee concerned. Furthermore, there was the implication that other persons who happened to receive the submission, by whatever method, would also be entitled to publish without the permission of either the submitter or the relevant committee.

This approach has some attractions, in that most submissions are general submissions on topics of either broad or specialised interest which it is in the public

⁶⁷ Standing Order 322.

⁶⁸ See, for instance: Australian Press Council, *Australian Press Council Submission to the Senate Committee of Privileges on its review of unauthorised disclosures from parliamentary committees*, 27 April 2005, at internet site: http://www.presscouncil.org.au/pcsite/fop/fop_subs/privilege.html, (viewed on 10 January 2007); and Commonwealth, Senate, Committee of Privileges, Report No. 99, *Possible Unauthorised Disclosure of a Submission to the Parliamentary Joint Committee on Corporations and Securities*, August 2001, p7.

⁶⁹ Submission by John Fairfax Holdings Limited to the Senate Committee of Privileges, 3 May 2005, p2, at: <http://www.fxj.com.au/announcements/may05/Fairfax-SenatePrivilegesCte-MScottStatement-MAY05.pdf> (viewed on 9 January 2006).

interest for the information to be shared. Most particularly, often submissions are written on behalf of organisations, including the Commonwealth Public Service in which departments and agencies have either a participatory or direct interest. It was put to the Committee of Privileges several years ago that such submissions should be circulated without fear of the contempt jurisdiction, even if they were not covered by absolute privilege. The suggestions of some witnesses go further, to enable their dissemination at will, under privilege.

In the case of publication of general submissions, the Committee of Privileges considers that the parliamentary committees concerned should deal with the matter. To a great degree, this approach is allowed for already by the capacity of a parliamentary committee in effect to authorise blanket publication of submissions on receipt. There is, however, a danger that a general understanding that submissions are automatically published can lead innocent or inexperienced submitters into a potential trap.

If persons or organisations make a submission to a committee which contains either deliberate or inadvertent adverse comment, and publish it themselves without permission thinking it is covered by parliamentary privilege, they could be separately sued by an independent party. Both they and any media which may disseminate the submission may not be protected by parliamentary privilege. Conversely, to allow persons to make accusations, even if ultimately justified, under privilege without enabling a person who may be adversely affected by those comments to have an opportunity to reply at the same time and in the same forum would, in the committee's view, be irresponsible and improper.

It is, in the Privileges Committee's view, imperative that potential submitters to an inquiry be made aware, from the moment a parliamentary committee calls for submissions, of what its practice will be in dealing with submissions received. It is committees which must take responsibility for the publication of adverse comment. It is these committees which must give careful consideration as to whether submissions of this nature should even be received as evidence, let alone disseminated publicly ...

What is clear, however, is that, in keeping with committees' obligations to protect their sources of information, at the least a program of education is necessary to ensure that persons submitting material in good faith are not inadvertently caught in either a legal or a parliamentary trap.

Parliamentary committees themselves must take due care to authorise — or, as the case may be, refuse to authorise — publication as soon as possible after receipt of a submission.⁷⁰

The view expressed by the Senate Committee of Privileges reinforces the need for committees to deal with the status of documents in a timely manner and for the information available to the public on the status of submissions to be clear and practical.

⁷⁰ Commonwealth, Senate, Committee of Privileges, Report 122, *Parliamentary privilege — unauthorised disclosure of committee proceedings*, June 2005, pp42–45.

To date, I am not aware of any parliamentary committee having resolved at the start of an inquiry to authorise blanket publication of submissions by authors upon the committee's receipt of the submissions, and to have advertised that fact to potential authors. The closest to such a resolution in practice has probably been a general statement in an inquiry advertisement seeking submissions that indicates that all submissions are likely to be made public at some stage.

United Kingdom Practice

House of Commons

The practice of the House of Commons committees with respect to written submissions appears to correspond to that of Australian committees, although the House of Commons' *Guide for Witnesses* is perhaps even more intimidating than its Australian counterparts in that it suggests that an author is taking a risk publishing their submission **even with the prior authorisation of the relevant committee**. It states:

What happens to your evidence, once submitted

Submitting evidence to Parliament is generally a **public process**. Your written evidence will become public either when the committee publishes it or at such time as you give oral evidence to a committee—whichever takes place first. **If you wish to distribute or publish your evidence earlier, you will need the committee's permission, for which purpose you should contact the Clerk of the committee.** If you are given permission by the committee to publish your evidence separately, you should nonetheless **be aware that you do so at your own risk.**⁷¹

The House of Commons Environment and Audit Committee advises potential witnesses that:

Making Public Use of Your Evidence

17. The right to publish, or make public use of, evidence submitted to the Committee rests solely with the Committee. In most cases, making public use of evidence you have submitted is fine, provided prior consent has been given by the Committee. If you wish to make public use of your evidence, please contact the Clerk of the Committee in good time. In no circumstances will such consent be given until three working days have elapsed since the Committee received the evidence.⁷²

It is interesting to note that it has been suggested in the United Kingdom that an attempt by the House of Commons to punish an unauthorised disclosure as a contempt of the House may fall foul of Article 10 of the *European Convention on Human Rights 1950* (that is, the right to 'freedom of expression'):

⁷¹ House of Commons, *Guide for witnesses: giving written or oral evidence to a House of Commons select committee*, undated, pp5 and 9:

<http://www.parliament.uk/documents/upload/witnessguide.pdf> (viewed on 13 March 2007).

⁷² Environmental Audit Committee Brief Note on the Submission of Written Evidence, http://www.parliament.uk/parliamentary_committees/environmental_audit_committee/submission_of_written_evidence.cfm

Publication by an outside person or body of private Parliamentary proceedings (eg, a report of proceedings of a Select Committee which the Committee had deemed appropriate to take place in private) would thus prima facie constitute a breach of privilege, and accordingly invite sanction by Parliament. In the event of the House instituting sanctions for such behaviour, conflict would inevitably arise between parliamentary privilege and Article 10 ECHR, which guarantees the right to receive and impart information and ideas.⁷³

This is a debate which involves similar arguments to those put forward in Australia with respect to the implied freedom of communication contained in the Commonwealth *Constitution* and under the ICCPR.

House of Lords

The practice of the House of Lords and certain United Kingdom Parliament joint committees with respect to written submissions is significantly different to that of the House of Commons and the Australian Parliaments. A United Kingdom Government guide for dealing with House of Lords committees states:

House of Lords Committees treat evidence in a quite different way. Once received by the Committee, it is treated as being in the public domain unless other arrangements have been made. It may be reproduced freely, provided the fact that it was originally prepared for the Committee is acknowledged.⁷⁴

The House of Lords European Union Committee advises potential witnesses that:

Evidence becomes the property of the Committee, and may be printed or circulated by the Committee at any stage. You may publicise or publish your evidence yourself, but in doing so you must indicate that it was prepared for the Committee.⁷⁵

It is not immediately clear as to the purpose of this remarkably public-friendly approach to submissions. Two possible justifications for this approach may be that:

the express statement that the document has been submitted to a parliamentary committee somehow confers absolute parliamentary privilege on any re-publication by the author (that is, it gives effect to some prior blanket order of the committee conferring absolute privilege for any re-publication following the lodgement of the submission); or

⁷³ Letter and Opinion from Liberty (The National Council for Civil Liberties), 30 March 1998, para 38: <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/43ap21.htm> (viewed on 8 March 2007).

⁷⁴ Departmental Evidence and Response to Select Committees (the 'Osmotherley Rules'), Propriety and Ethics Team, Cabinet Office, 21 November 2005 (updated 6/2/2007), http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/osmotherly_rules/4c.asp (viewed on 8 March 2007).

⁷⁵ House of Lords, European Union Committee, Economic and Financial Affairs, and International Trade (Sub-Committee A), http://www.parliament.uk/parliamentary_committees/s_comm_a.cfm (viewed on 8 March 2007).

the express statement that the document has been submitted to a parliamentary committee simply serves as a potential warning to third parties that the submission **may** be protected by some form of parliamentary privilege (even if only some form of qualified privilege — displaceable in the event of proof of malicious publication), whilst effectively still leaving the author to publish at their own risk.

New Zealand Practice

In New Zealand, the premature publication by a witness of their written submission is also treated quite differently than in the Australian parliaments. A 2000 guide to making submissions to the New Zealand Parliament advised that:

Status of submissions

While submissions can be discussed freely during their preparation, once a submission has been sent to a committee it becomes the property of that committee. Committees usually release submissions when they start hearing evidence. It is not a breach of parliamentary privilege for you to release your submission before the committee has received it. However, such a release may be seen to be discourteous by the committee. Should you wish to release your submission, to the press for example, before it has been heard by the committee you should contact the Clerk of the Committee beforehand.⁷⁶

Standing Order 218(3) of the New Zealand Parliament procedurally enshrines the right of a witness to re-publish their submission:

218 Release of submissions

- (1) A select committee may make a written submission to it available to the public at any time after receiving it.
- (2) A submission (if not already made available) becomes available to the public on the committee hearing oral evidence from the witness who made the submission.
- (3) This Standing Order does not prevent the release of a submission by the person who submitted it.

It is noted, however, that this approach has been to some extent modified as a result of the somewhat surprising decision of the Privy Council in *Jennings v Buchanan*,⁷⁷ relating to the liability of Members of Parliament to defamation action for the affirming (without repetition) in public of prior statements made in circumstances of absolute immunity. In 2007, and with the decision of the Privy Council freshly in mind, the advice to potential authors of submissions is now slightly more circumspect:

You are not prevented from releasing your own submission

⁷⁶ Making a Submission to a Parliamentary Select Committee, Office of the Clerk of the House of Representatives, Parliament House, Wellington, New Zealand, 2000, pp12–13, <http://www.morst.govt.nz/Documents/Making-a-submission-to-a-Parliamentary-Select-Committee.pdf>.

⁷⁷ (New Zealand) [2004] UKPC 36 (14 July 2004).

It is not a contempt of the House for you to release your submission before the committee has received it. However, if you decide to do this, you will not have the protection of parliamentary privilege for any statements made in your submission.

‘Effective repetition’ of defamatory statements

Further to this, a recent court ruling has held that a person may be liable in defamation if that person makes a defamatory statement in a situation that is protected by parliamentary privilege (such as an oral presentation to a select committee) and later affirms that statement (without actually repeating it) on an occasion that is not protected by parliamentary privilege.⁷⁸

The New Zealand approach is far less intimidating to potential witnesses than any of the Australian jurisdictions, although it still seeks to provide a degree of measured warning to potential witnesses that they must carefully consider the possible ramifications of self-publication of submissions.

Conclusion

There are a number of concerns regarding the advice provided by the Australian parliaments to the public on the status of written submissions. The main concern is perhaps not that authors of submissions may inadvertently commit a contempt of Parliament (noting that the actual risk of being found in contempt is low), but that potential authors will be deterred from making submissions at all through a sense of intimidation or confusion. Increasing public participation in the parliamentary process is an ongoing challenge for parliaments around the world, and any obstacles to such participation, both real and perceived, should be identified and removed.

It is acknowledged however that parliaments must continue to tread a cautious path in view of the uncertainty still surrounding the extent of parliamentary privilege and the authority for subsequent publication by both committees and third parties of hard and electronic copies of privileged evidence. Nevertheless, there may still be some leeway for the development of more encouraging advice to the public regarding the making of submissions to parliamentary committees.

From the above, the following points emerge, which may form the basis for clearer, more welcoming, policy guidelines and information sheets for potential participants in parliamentary committee proceedings:

As is the practice with House of Lords committees, potential witnesses should be advised to make it clear on written submissions that the submission was prepared for the purposes of submission to a parliamentary committee. This will serve to expressly alert third parties to the privileges that apply (or may apply, as the case may be) to the submission.

⁷⁸ Making a Submission to a Parliamentary Select Committee, Office of the Clerk of the House of Representatives, NZ, 2007, p18, <http://www.parliament.nz/NR/rdonlyres/6092F83E-CE78-4C66-A50A-CC4490DC9034/50985/4makingasubmission5.pdf> (viewed on 8 March 2007).

The premature publication by an author of their submission to individuals within the same agency or organisation (including member groups of an umbrella organisation) for the purposes of the author's work should not be regarded as an unauthorised disclosure, but rather as effectively consultation between the 'collective authors' or stakeholders of the submission.

It would only be in a very extreme case that an author's subsequent use of their written submission to a parliamentary committee would constitute a contempt; such as, for example, the deliberate leaking of a submission made private by a committee to the media. There is also a question as to the validity of any such contempt proceedings (or prosecution of a witness under s 13 of the *Parliamentary Privileges Act 1987* (Cth)) given the implied freedom of speech found in cases such as *Lange v Australian Broadcasting Corporation*. As such, the New Zealand approach is preferred, where it is made clear that a witness's unauthorised use of their submission is not a contempt of Parliament; and therefore the author may provide copies of their submission to whomever they wish without first approaching the committee; but re-publication of a submission without the express authority of the relevant committee may nevertheless have implications as to the level of immunity (parliamentary privilege), if any, that will be conferred on the re-publication.

It is probably incorrect at law for a committee to claim the 'ownership' of a submission. Due to the likelihood of such statements deterring potential authors of submissions from proceeding, such wording should be avoided in information sheets for witnesses. It is probably more correct to simply advise potential witnesses that the making of a submission to a committee is a proceeding in Parliament, and as such is subject to the control of the Parliament.

Parliamentary privilege cannot be waived by an individual, although the premature re-publication of a submission before its formal receipt by a committee may effectively remove the protection of absolute privilege for that particular re-publication.

In non-contentious inquiries, parliamentary committees should, wherever practical and in non-contentious inquiries, make use of general blanket authorisations as to the re-publication of submissions by authors, effective upon the receipt of the submissions by the committee.

Parliamentary committees should make wider use of the practical device of conferring the status of '*exhibit*' upon those documents provided to a committee that clearly relate to another inquiry/proceeding or are draft academic manuscripts or draft agency reports. Committee staff will need to make it clear to the authors that absolute immunity only applies to the lodging of such documents with the committee, and that no immunity applies to any subsequent use of the document. This practice may require the amendment of standing orders or enabling legislation so as to permit the designation of evidence as an '*exhibit*'. ▲