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SELECT COMMITTEE OF PRIVILEGE

REPORT

Presented by Hon Nick Griffiths MLC (Chairman)

October 1997

SELECT COMMITTEE OF PRIVILEGE

Members of the Committee

Hon Nick Griffiths MLC (Chairman)
Hon Bruce Donaldson MLC
Hon Norm Kelly MLC

Advisory Officers

L B Marquet, Clerk of the Legislative Council
Ian Allnutt, Deputy Clerk
Stuart Kay, Deputy Clerk

Committee Clerk

Jan Paniperis

Terms of Reference Tuesday August 26 1997:

That the Order of the Day for consideration of the report of the Public Administration Committee tabled on Thursday 21 August be discharged and the report be referred to a Select Committee of Privilege, with power to send for persons, papers and records and the committee to report not later than 11 September 1997.

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

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REPORT OF A SELECT COMMITTEE OF PRIVILEGE

ON

PUBLIC ADMINISTRATION COMMITTEE - DRAFT REPORT UNAUTHORIZED DISCLOSURE

1. Order of Reference

By resolution on August 26 1997, this committee was appointed to inquire into a matter raised in a report of the Public Administration Committee presented on August 21 1997.

2. Public Administration Committee's Report

The report suggested that a breach of privilege ("breach of standing orders") had occurred in relation to the disclosure of a draft report then under consideration by the PAC. This committee accepted its officers' advice¹ that an unauthorized disclosure of a standing committee's draft report is a breach of privilege and, being satisfied that the PAC had not authorized any release or disclosure of the draft report, proceeded to inquire into the circumstances surrounding the disclosure of certain pages of the draft report on the *UWA/Rindos* inquiry to Professor Oxnard (UWA). Each of the pages mentioned Professor Oxnard.

3. The Inquiry

This committee examined the members and officers of the Public Administration Committee. On the basis of a PAC member's evidence, the inquiry was widened leading to the examination of an additional 4 witnesses².

4. The Evidence

The evidence established that:

- Professor Oxnard received the pages of the draft report in a UWA internal mail envelope on Friday August 8 1997;
- on Monday August 11, Professor Oxnard contacted the Committee Office of the Legislative Council. What followed is described accurately in the memorandum³ signed by the Clerk to the Public Administration Committee;
- a series of unauthorized disclosures of the draft report occurred, originating with instructions given by Hon Barbara Scott to her research officer. The member's instructions included making a copy of the draft report and providing it to Professor Neville Bruce (UWA) for his comment.

The evidence does not establish how pages of the draft came into the possession of Professor

¹ *cf Memorandum of Advice* appended to this report.

² List of witnesses is appended to this report

³ Appended

Oxnard. Because the other disclosures were not the subject of the PAC's report, this committee did not pursue them.

There was a conflict of evidence between witnesses on some issues of fact, but none that had bearing on, or that was related directly to, the matter under inquiry.

This committee believes Professor Oxnard when he says that he received the selected pages of the draft report in a UWA internal mail envelope addressed to him and that accordingly, he is unable to identify the sender.

5. Findings

This committee finds:

- that there was an unauthorized disclosure to Professor Oxnard (UWA) of part of a draft report then under consideration by the Public Administration Committee;
- that the unauthorized disclosure constitutes a breach of privilege;
- that it is unable to identify the person or persons responsible for the disclosure constituting the breach which initially gave rise to this inquiry;
- that the evidence shows further unauthorized disclosures of the same draft report.

Chairman

SELECT COMMITTEE OF PRIVILEGE

PUBLIC ADMINISTRATION COMMITTEE - DRAFT REPORT
UNAUTHORIZED DISCLOSURE

MEMORANDUM OF ADVICE

1. Facts

The Public Administration Committee has reported to the House that:

- there has been a disclosure of parts of a draft report at some time while the report was under consideration by the Committee;
- in its view, the disclosure is in breach of standing orders.

2. Questions for determination

The first question is whether a draft report of a standing committee is a restricted document. Relatedly, if such a report is a restricted document, what is the nature of, and basis for, that status? If the committee decides that a draft report is a restricted document, the further question is whether its publication or disclosure in this case was properly authorized. It is only if the committee finds that the disclosure was not properly authorized that the question of whether the disclosure was a breach of privilege arises.

3. Principles governing disclosure of standing committee proceedings

The publication or non-publication of committee proceedings is governed by SOs 322-328. The primary principle is that the taking of evidence is to be a public matter and the evidence can be published by any person, including the news media, at the time at which it is given (SO 322). As an exception to that rule, a committee may take evidence in private session on the grounds given in SO 323. As well, SO 330 (d) enables a witness to request a private hearing, or for an ongoing suppression order. Such an order operates independently of SO 324 and survives any release of evidence taken in private session.

In summary:

- evidence is to be given openly and can be disclosed, published or commented on at the time that it is given;
- 5 • a committee may order that evidence be heard in private session on 1 of 2 grounds stated in SO 323;
- on application by a witness under SO 330 (d), the committee may order that the witness be heard in private session;
- 10 • evidence taken in private session may be disclosed/published on report from a committee on a matter to which that evidence relates unless the House agrees to a specific recommendation from the committee that that evidence not be disclosed or published;
- 15 • a suppression order made under SO 330 (d) is only affected by a proceeding under SO 324 relating to the disclosure or non-disclosure of evidence given in private session to the extent that the House modifies or extinguishes that order by making a subsequent, inconsistent order in accordance with a committee's recommendation.
- 20

3. Deliberation

25 While the taking of evidence is in public, the preparation and consideration of a committee's findings and report are done privately; they are part of a committee's deliberations.

In its recent report (TP 720/1997), the *Committee to Review the Committee System* defined a committee's deliberation as:

30 *any proceeding, excluding the hearing of evidence whether publicly or in private, that arises from, or relates to, the resolution of a question put to the committee.*

35 That view is reinforced by SO 332 (a) which provides that a committee's deliberation is based on a draft report. Standing orders 322 and 326 clearly intend that deliberation is a matter for the committee alone.

40 However, the House did not impose on standing committees the all-encompassing strictures applied to select committees by SO 361 which precludes a select committee, as part of its deliberations, from circulating a draft report, or part of it, to persons who are not members of the committee, unless the House first agrees.

By contrast, standing committees may, and in some circumstances must¹, invite comment on evidence or draft reports from persons who are not members or officers of the committee. Accordingly, there is no rule for standing committees equivalent to select committee SO 361.

5 4. Disclosure

10 Because the rules applicable to a standing committee's deliberation contemplate a desire or necessity to disclose draft reports or other committee documents to non-members as part of those deliberations, a committee is necessarily empowered to authorize disclosure on terms and conditions it believes will achieve its objective without compromising the integrity of its proceedings.

15 The point must be emphasized that the power of authorization is the committee's and not that of individual members or committee officers. From the content of the Committee's report on this matter, it must be assumed that the disclosure was made without an authorizing resolution.

20 Neither can it be said that authorization to disclose can be given by the chairman unless the committee has previously delegated that power. Again, relying on the Committee's report, there does not appear to have been a delegation or a purported authorization by the Chairman.

25 It might be argued that, absent a standing order governing disclosure, there was no reason to suppose that such disclosure required any kind of authorization by the Committee or the Chairman. In view of the scheme established by the rules referred to earlier, that argument is untenable. In my opinion, if the facts stated by the Committee are correct, the disclosure in this instance was unauthorized.

30 5. Unauthorized disclosure - whether breach of privilege

35 The disclosure in this case was unauthorized and premature. A primary reason for the outright prohibition against premature publishing or disclosing a committee's deliberations is the right of the House to be the initial, sole recipient of a committee's findings and recommendations². The House of Commons and this House have adapted and modified the rule to suit changing conditions, but not to the extent that the principle is devoid of meaning and application.

40 Any premature, unauthorized disclosure is a breach of privilege. The intent, or lack of it, behind the disclosure is not a factor that weighs against a finding that there has been a breach of privilege. Whether the disclosure was made deliberately or inadvertently is a matter that should be taken into account when recommending what penalty (if any) the House might impose.

¹ eg SO 330 (a), (g), (i).

² This forms the basis of the Commons' 1837 Resolution (*cf Erskine May* 21st ed, 123) and the identical language of SO 361.

6. Conclusion

Question 1 Is a draft report of a standing committee a restricted document?

Yes

Question 2 What is the nature of, and basis for, that status?

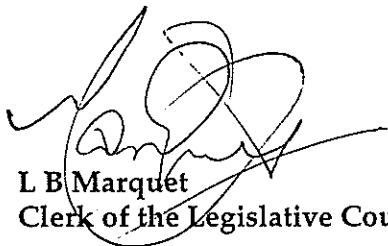
A draft report is the basis of a standing committee's deliberations. A committee's deliberations must be conducted in the absence of all persons other than the members and officers of the committee.

Question 3 Was disclosure in this case properly authorized?

No

Question 4 Was the disclosure a breach of privilege?

Yes.


L B Marquet
Clerk of the Legislative Council

September 10 1997

Chairman and Members
Select Committee of Privilege re PAC

LIST OF WITNESSES FOR THE PRIVILEGE COMMITTEE

Monday September 8 1997

Hon Kim Chance MLC
Mr Jason Agar, Committee Clerk to the Public Administration Committee
Mr Stuart Kay, Deputy Clerk (Committees)
Professor Charles Oxnard, University of WA

Monday September 15 1997

Hon Barry House MLC
Hon Helen Hodgson MLC
Hon Cheryl Davenport MLC
Ms Elizabeth Lawton, ARO to the Public Administration Committee
Hon Barbara Scott MLC Hon Murray Criddle MLC

Monday September 22 1997

Mr Christopher Burger, Research Officer to Hon Barbara Scott MLC
Ms Diane Goodman, Electorate Officer for Hon Barbara Scott MLC
Professor Neville Bruce, Head, Department of Anatomy & Human Biology, University
of Western Australia
Professor Charles Oxnard, University of WA

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INTERNAL MEMORANDUM

TO: File

CC: Ms Elizabeth Lawton (ARO)
Mr Stuart Kay (DCC)

FROM: Jason Agar
Committee Clerk

SUBJECT: Draft Report - UWA

DATE: 11 August 1997

Telephone Conversation with Professor Charles Oxnard

At 9:15am Professor Charles Oxnard informed me that he had received an extract of the Committee's draft report on its inquiry into the University of Western Australia. Professor Oxnard said that he was unhappy with page 51, paragraph 5; and page 52, paragraph 9 of the draft report. Professor Oxnard said that while it was correct that he did not inform Dr Rindos of his perceived weaknesses as expressed by Professor Bowdler, the Committee should note that there was no need too as he, as Dr Rindos' supervisor, had concluded that Dr Rindos' performance was satisfactory (i.e. positive). Professor Oxnard said it could be construed from the draft report that as he did not give Dr Rindos a summary of Professor Bowdler's negative views of his performance, he was not doing his job properly. Professor Oxnard said that he feared that a journalist might use the Committee's findings against him. Professor Oxnard added that Dr Rindos should have been given a copy of Professor Bowdler's views (of his performance) when they were taken into account when deciding on his tenure. Professor Oxnard said that as he did not take them into account there was therefore no need for him to provide Dr Rindos with a summary.

I asked Professor Oxnard how he came about having an extract of the draft report. Professor Oxnard said that it had appeared in his pigeon hole at the University of Western Australia. Professor Oxnard said he was unaware who had placed there. I said that this was a serious matter as the release of a draft report was possibly a contempt of Parliament. Professor Oxnard said that he was aware of this and that was why he contacted me as soon as possible.

I thanked Professor Oxnard for informing me of this rather delicate matter and said that his views would be noted and forwarded to the Committee.

Meeting with Deputy Clerk (Committees)

I immediately informed Mr Kay of my conversation with Professor Oxnard. I asked Mr Kay if

I should inform the Chairman of the Committee.

Mr Kay advised me to inform the Chairman of what Professor Oxnard had said. Mr Kay said that this was a serious matter as it involved a possible breach of Parliamentary Privelege.

Telephone conversation with the Chairman of the Public Administration Committee

At approximately 10:15am I telephoned Mr Chance and informed him that Professor Oxnard had an extract of the Committee's draft report on its inquiry into the University of Western Australia. In addition, I informed him that Professor Oxnard was unhappy with Page 51, paragraph 5; and page 52, paragraph 9 of the draft report (for the reasons outlined on page 1).

Mr Chance said he was astounded that Professor Oxnard had an extract of the draft report. He said that in relation to the points raised by Professor Oxnard he agreed with him, and would move to have them changed at the next available meeting. Mr Chance instructed me to telephone Professor Oxnard and inform him that he had agreed with his views regarding pages 51 & 52, and also that he was not to tell anyone that he had an extract of the draft report.

Telephone conversation with Professor Oxnard at 10:40am

I informed Professor Oxnard that Mr Chance agreed with him that changes needed to be made to page 51 and 52 of the draft report. I also informed Professor Oxnard that he should not let anyone know that he had an extract of the draft report.

Professor Oxnard was relieved to know that Mr Chance had agreed that pages 51 and 52 of the draft report could be construed as being adverse to his performance as an administrator at the time. Professor Oxnard said that other than his wife, nobody knew he had an extract of the draft report and that is how it would remain.

Meeting with Deputy Clerk (Committees)

Mr Kay informed me that I was to contact Professor Oxnard and request that he hand over his extract of the Committee's draft report on the University of Western Australia.

Telephone Conversation with Professor Charles Oxnard

I telephoned Professor Oxnard at approximately 12:00pm and requested that he deliver to me his extract of the Committee's draft report on the University of Western Australia.

Professor Oxnard said that he would come to the Committee Office immediately with his extract of the draft report.

Meeting with Professor Oxnard

Professor Oxnard delivered to me at approximately 1:30pm his extract of the Committees draft report on its inquiry into the University of Western Australia.

Jan Lager
11/8/97

