

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON PROCEDURE

DISCLOSURE OF IN CAMERA EVIDENCE

Report

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Terms of reference of the committee

To inquire into and report on the practices and procedures of the House generally with a view to making recommendations for their improvement or change and for the development of new procedures.

Members of the committee

Chairman: Hon. G G D Scholes, MP

Deputy Chairman: Mr P D Shack, MP

Members: Mr R F Edwards, MP
Mr E L Grace, MP
Mr C Hollis, MP
Mr A C Rocher, MP
Mr W E Truss, MP
Hon. F J Walker, QC, MP

Acting Secretary: Mr M Kiermaier

DISCLOSURE OF IN CAMERA EVIDENCE

Ability to take in camera evidence

1. As a general principle, committees undertake their activities in public. However, the provisions of standing orders 337 and 338 enable committees to examine witnesses privately, that is, in camera.
2. Standing order 337 provides that:

When a committee is examining witnesses, strangers may be admitted, but shall be excluded at the request of any Member, or at the discretion of the chairman of the committee, and shall always be excluded when the committee is deliberating.
3. Standing order 338 provides a similar mechanism for the exclusion of Members who are not members of the committee.
4. In camera hearings are usually, but not necessarily, granted following a request from a witness for his or her evidence to be treated as confidential. In other cases, the initiative will come from the committee itself.
5. When a witness makes an application for an in camera hearing, the committee decides the issue on the balance of the public interest and any disadvantage the witness, or a third party, may suffer through disclosure of the evidence.
6. A committee will only agree to a witness's request for an in camera hearing for compelling reasons, such as industrial secrets, classified material, self-incriminating evidence, evidence likely to involve serious allegations against third parties or a sub judice matter.

Power to publish in camera evidence

7. Through the provisions of the *Parliamentary Papers Act 1908* committees (and the House) have the power to authorise the publication of evidence and documents which have been received, irrespective of whether the material was obtained in open session or in camera. In deciding whether or not to publish evidence taken in camera a committee must again weigh its concerns of providing adequate protection for witnesses against the wider public interest. This may involve making a judgment on whether the need to publish is real and justifiable, or subsequent events have removed the need for confidentiality (eg a matter is no longer sub judice).
8. In order for a committee to exercise its right to authorise the disclosure of

evidence, including in camera evidence, it is the practice in the House of Representatives that a motion to this effect must be moved and carried with the support of a majority of the committee members.

9. The final authority in the publication of in camera evidence rests with the House itself. *May* has stated:

When evidence has not been reported, or if the evidence as reported should not be deemed sufficiently full or complete, the House may order the minutes of evidence to be laid before it. When the evidence is presented in pursuance of such an order, it is usually ordered to be printed.¹

10. Although it is highly improbable that the House would insist on the publication of evidence received in camera, a committee cannot give a witness an absolute guarantee that the witness's evidence will not be published.

11. Thus, although a witness may have his or her evidence taken in camera, no binding guarantee of confidentiality can be given.

Constraints on the disclosure of evidence

12. The confidentiality of evidence taken by committees is provided for in standing order 340 which states that:

The evidence taken by any select committee of the House and documents presented to and proceedings and reports of such committee, which have not been reported to the House, shall not, unless authorised by the House, be disclosed or published by any Member of such committee, or by any other person.

13. In some cases (eg, the Parliamentary Joint Committee on the National Crime Authority) non-disclosure provisions are contained in the resolution of appointment, while committees appointed pursuant to statute usually have similar obligations in their enabling Acts.

14. Furthermore, section 13 of the *Parliamentary Privileges Act 1987* makes it an offence for a person to disclose or publish a document or evidence taken in camera by the House or a committee, without the authority of the House or a committee.

15. Thus, it is both a contempt of Parliament and a criminal offence to disclose evidence which has not been authorised appropriately. However, as section 16 of the

¹ Sir D. Lidderdale (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 19th ed, London Butterworths, 1976, p.651.

Parliamentary Privileges Act makes clear, these provisions have no application to the disclosure of evidence in the course of proceedings in Parliament, and since committee reports are 'proceedings', no court action can be taken in relation to the unauthorised disclosure of evidence contained in a report (for example, a dissenting report).

Statutory and other provisions

16. As mentioned above there are some statutory provisions relating to disclosure of in camera evidence by certain committees. In the cases of the Joint Committee of Public Accounts and the Parliamentary Standing Committee on Public Works (both established by Acts of Parliament) the prior approval of the witness is required before in camera evidence taken at the request of that witness can be published. As well, in camera evidence taken by the Parliamentary Joint Committee on the Australian Security Intelligence Organisation cannot be disclosed or published without the written authority of the person who gave the evidence.

17. Additionally, in 1984 the House passed a resolution which authorised the Speaker to release, inter alia, evidence and documents which had been taken in camera and which had been in the custody of the House for 30 years. (In the case of joint committees, disclosure is authorised by both the Speaker and the President of the Senate).²

Prior Procedure Committee examination

18. In its 1989 report *Committee procedures for dealing with witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following resolutions:

A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in camera, and shall be invited to give reasons for any such application. The witness may give reasons in camera. If the application is not granted, the witness shall be notified of reasons for that decision.

Before giving any evidence in camera a witness shall be informed whether it is the intention of the committee to publish or present to the House all or part of that evidence, that it is within the power of the committee to do so, and that the House has the authority to order the production and publication of undisclosed evidence. Should the committee decide to publish or present to the House all or part of the evidence taken in camera, the witness shall be advised in advance. A member, in a protest or dissent added to a report, shall

² *Votes and Proceedings* 1983-84/988-9.

not disclose evidence taken in camera unless so authorised by the committee.³

19. The committee reiterated its views in a further report that year.⁴

20. No action has been taken by the House nor has the Government formally responded to the reports.

Concern over dissenting reports

21. In recent times concern has been expressed over the use of in camera evidence in dissenting reports without any authorisation by the committee concerned.⁵ There have been no instances of disclosure in dissenting reports of House committees, however, recent instances have occurred in joint committees, which operate under Senate standing orders.

22. Advice given to the Senate in 1988 supports the view that since the standing orders specifically allow for dissenting reports as part of the reporting process, the use of in camera evidence in such dissenting reports should be allowed.⁶ It was argued that such material may be central to the point of the dissent and merely to include a statement in the dissent to the effect that it was supported by undisclosed evidence would be unsatisfactory. Further, it was also seen as objectionable if a majority of members of a committee could withhold evidence from use by other members and effectively prevent them from exercising their right to present a reasoned dissent.

23. The differences in opinion expressed in the two Houses, and the implications on the operations of joint committees, were raised with the Speaker by the Chairman of the Procedure Committee in November 1990,⁷ who undertook to write to the President in an endeavour to reach a mutually acceptable resolution, but the matter remains unresolved.

³ House of Representatives Standing Committee on Procedure, 35th Parliament, Fourth report, *Committee procedures for dealing with witnesses*, April 1989, p.8. (Parliamentary Paper No. 100 of 1989)

⁴ House of Representatives Standing Committee on Procedure, 35th Parliament, Sixth report, *The standing orders governing the conduct of committees of the House*, November 1989, p.6. (Parliamentary Paper No. 458 of 1989)

⁵ H.R. Debates (18.10.90) p. 3271.

⁶ Sen. Debates (10.11.88) p. 2431.

⁷ H.R. Debates (14.11.90) p.4025.

24. Despite the contrary view offered in the Senate, the Committee does not resile from the opinion expressed in its April 1989 report, namely, "that a committee member should not have the power to disclose in camera evidence in a dissent to a report without the authorisation of the full committee".⁸

Recent Procedure Committee examination

25. As noted above, concerns have been expressed in the House about the disclosure of in camera evidence, particularly as a result of evidence disclosed in a dissenting report of the Parliamentary Joint Committee on the National Crime Authority tabled in October 1990.

26. Mr Daryl Melham, MP, a member of that committee, wrote to the Procedure Committee on 6 November 1990 raising concerns in relation to the above matter and made reference to the recommendations contained in the two earlier reports of the Procedure Committee on this subject. Consequently, earlier this year the Procedure Committee wrote to the Chair and Deputy Chair of all House investigative committees seeking their views on whether there should be any provision for the disclosure of in camera evidence and, if so, under what circumstances should such evidence be disclosed.

27. The responses received illustrated the difficult nature of the subject matter. One respondent advocated that there should not be any provision whatsoever for the disclosure of in camera evidence, while others could see circumstances in which it would be acceptable to authorise the disclosure of evidence taken in camera.

28. One aspect of the issue on which some respondents commented concerned the obligation placed on a committee when a witness is advised that the committee will not publish his or her evidence. The opinion was expressed that such advice should bind the committee and the confidentiality commitment should always be honoured. The Procedure Committee shares this view.

29. The Procedure Committee does not propose that the principles guiding current practice be altered radically. However, it does believe that a rigorous mechanism should be put in place to ensure that in camera evidence could only be disclosed in the most outstanding circumstances, especially in cases where a committee has given an undertaking to a witness not to disclose his or her evidence.

30. It is recognised that as a general principle, evidence taken in camera should not be disclosed unless warranted by compelling reasons. Notwithstanding the pre-eminence of the House, a decision to disclose such evidence should be the prerogative of the committee which took the evidence, and any decision to publish should be made by resolution and require the support of a majority of that committee.

⁸ op. cit. pp.5-6.

31. This reflects the current practice in the House of Representatives and, as stated in *House of Representatives Practice*, witnesses giving evidence in camera should be warned that their evidence may be disclosed subsequently.⁹

32. Nonetheless, a quintessential factor affecting a parliamentary committee's ability to adduce evidence of quality is its ability to afford witnesses utmost protection from any public or private persecution which may arise out of their appearance before a committee.

33. Circumstances do occur where a witness will be prepared to give evidence only on the understanding that such evidence will not be disclosed. While recognising that the House will always retain the right to authorise the disclosure of evidence should it think fit to do so, the Procedure Committee believes that if a parliamentary committee gives an undertaking to a witness that his or her evidence will not be disclosed, the seriousness of that undertaking should be recognised by the House and by all committee members. Accordingly, mechanisms should be established which pay due regard to the wishes of the committee and witnesses.

Recommendations

34. It is recommended that the House adopt the following resolutions:

- (1) Committees may take evidence in the following manner:
 - (a) By written submissions;
 - (b) By oral evidence taken in public; and
 - (c) In private session.
- (2) A committee may, on its own initiative or at the request of, or on behalf of, a witness or organisation, hear evidence in private session. A witness shall be informed that it is within the power of the committee and the House to disclose all or part of the evidence subsequently. Publication of evidence would be the prerogative of the committee and would only be disclosed if the majority of the committee so decided by resolution.
- (3) Where a committee has agreed to take evidence in camera, and has given an undertaking to a witness that his or her evidence will not be disclosed, such evidence will not be disclosed by the Committee or any other person, including the witness. With the written agreement of the witness, the committee may release such evidence in whole or in part.
- (4) Where a Member of the House of Representatives discloses in camera evidence other than as prescribed, the Member immediately will be discharged from the committee and excluded from all committees of the House of Representatives for the remainder of the parliamentary session. The Member

⁹ A.R. Browning (ed), *House of Representatives Practice*, 2nd ed, AGPS, Canberra, 1989, p.669.

will also be suspended for 21 sitting days or such longer period as the House may determine.

- (5) Evidence taken in camera which discloses a serious crime may in respect to that part be conveyed to the Speaker for appropriate action by the Chair, with the committee's approval.
- (6) No person not being an officer of the committee when the evidence was given will have access to evidence taken in camera, unless authorised by the full committee.
- (7) Notice must be given of a motion in the House to release evidence taken in camera. Such notice will not be placed on the *Notice Paper* without the approval of the Speaker, who must consult the Attorney-General, the Chair of the relevant committee, the Prime Minister and the Leader of the Opposition and report the outcome of that consultation to the House.

35. Since the purpose of the above recommendations is to ensure that evidence taken in camera should only be disclosed for the most compelling reasons, the Procedure Committee believes it would be inappropriate for a Member to move a motion to suspend standing orders to circumvent the procedure outlined in part (7).

GORDON SCHOLLES, MP
Chairman
12 November 1991

