

Parliamentary committees

The principal purpose of parliamentary committees is to perform functions which the Houses themselves are not well fitted to perform, that is, finding out the facts of a case or issue, examining witnesses, sifting evidence, and drawing up reasoned conclusions. Because of their composition and method of procedure, which is structured but generally informal compared with the Houses, committees are well suited to the gathering of evidence from expert groups or individuals. In a sense they ‘take Parliament to the people’ and allow direct contact between members of the public by representative groups of Members of the House. Not only do committee inquiries enable Members to be better informed about community views but in simply undertaking an inquiry committees may promote public debate on the subject at issue. The all-party composition of most committees and their propensity to operate across party lines are important features. This bipartisan approach generally manifests itself throughout the conduct of inquiries and the drawing up of conclusions. Committees oversee and scrutinise the Executive and are able to contribute towards a better informed administration and government policy-making process. In respect of their formal proceedings committees are microcosms and extensions of the Houses themselves, limited in their power of inquiry by the extent of the authority delegated to them and governed for the most part in their proceedings by procedures and practice which reflect those which prevail in the House by which they were appointed.¹

AUTHORITY FOR THE APPOINTMENT OF COMMITTEES

The power of the House to appoint committees is not in doubt but the source of this power, particularly in regard to investigatory committees, cannot be stated precisely. The following three sources have been suggested:

- section 49 of the Constitution on the basis that the power to appoint committees of inquiry was one of the ‘powers’ or ‘privileges’ of the House of Commons as at 1901 within the meaning of that section;
- section 50 of the Constitution on the basis that to provide by standing orders for the setting up of committees of inquiry is to regulate the conduct of the business and proceedings of the House; and
- that by virtue of the common law, the establishment of a legislative chamber carried with it, by implication, powers which are necessary to the proper exercise of the functions given to it.

¹ However, joint committees operate under Senate procedures when the procedures of the two Houses differ, *see* p. 611. Any instruction to a joint committee can only be effected by resolution agreed to by both Houses. This should be remembered when reference is made in this chapter to resolutions affecting committees and to the responsibility of committees to report. Unless otherwise indicated it can be assumed that in any instance in which the House would be involved in the case of House committees, both Houses would be involved in the case of joint committees. Further, where the Speaker may be required to be involved, the President would also be involved where joint committees are concerned. For a list of committees since 1901 *see* Appendix 24.

As there is no doubt about the power of the House of Commons to appoint committees,² section 49 of the Constitution appears to be a clear source of power, with extensive ambit, for the Houses of the Parliament to appoint committees of inquiry. The other sources 'could be called in aid to extend its breadth or to sustain what otherwise might be uncertain about it'.³

TYPES OF COMMITTEES

Parliamentary committees

Committees appointed by the House, or by both Houses, can be categorised as follows (a particular committee may fall into more than one category):

Standing committees are committees created for the life of a Parliament and are usually re-established in successive Parliaments. They have a continuing role.

General purpose standing committees are a specific type of standing committee. They are investigatory or scrutiny committees, established by the House at the commencement of each Parliament to inquire into and report upon any matters referred to them, including legislation. These committees specialise by subject area, between them covering most government activity (*see* p. 607).

Select committees are created as the need arises, for a specific purpose, and thus have a more limited life which is normally specified in the resolution of appointment. Once a select committee has carried out its investigation and presented its final report, it ceases to exist.

Joint committees draw their membership from, and report to, both Houses of Parliament, enabling Members and Senators to work together (*see* p. 611).

Statutory committees are those established by Act of Parliament, that is, by statute. All existing statutory committees are joint committees (*see* p. 612).

Domestic or internal committees are those whose functions are concerned with the powers and procedures of the House or the administration of Parliament (*see* p. 608).

The Main Committee is a committee established to be an alternative venue to the Chamber for debate of a restricted range of business (i.e. the second reading and consideration in detail stages of bills, committee and delegation reports, and papers presented to the House). It is not an investigatory committee and cannot hear witnesses or take evidence. (*See* Chapters on 'Motions' and 'Legislation' for detail of Main Committee procedures.)

Unofficial committees

In addition to the parliamentary committees described above there are further categories of committees consisting of Members and Senators which operate within the Parliament. However, although their members are Members of Parliament, these committees are not appointed by either House. They are therefore not committees of the

² Committees were appointed by the Commons at least as early as 1571. The term 'committee' originally signified an individual (i.e. to whom a bill had been committed). Lord Campion, *An Introduction to the Procedure of the House of Commons*, 3rd edn, Macmillan, London, 1958, p. 26.

³ 'Parliamentary committees: powers over and protection afforded to witnesses', Paper prepared by I. J. Greenwood and R. J. Ellicott, PP 168 (1972) 3.

Parliament, and do not enjoy the special powers and privileges of such committees, nor do they necessarily operate in accordance with parliamentary procedures and practice.

In earlier years unofficial committees consisting of Members and Senators were appointed by the Government of the day.⁴ Membership included members of the Opposition. The committees' reports were submitted to the Government and subsequently tabled in one or both Houses. The practice of appointing such committees has not been continued.

In more recent years informal committees consisting of Members and Senators have been established to assist the Presiding Officers in respect of the information systems needs of Members and Senators, to advise them in respect of the Parliamentary Education Office, and to advise in respect of accommodation matters in the provisional Parliament House. In the 36th and 37th Parliaments a group of Members and Senators, including the Presiding Officers, formed a working group to consider issues relating to standards of conduct for Members of Parliament, including Ministers (*see* Chapter on 'Members').

The government and opposition parties each have committees of private Members to assist them in the consideration of legislative proposals and other issues of political significance allied to each committee's function. These party committees are referred to in the Chapter on 'House, Government and Opposition'.

HOUSE STANDING COMMITTEES

General purpose standing committees

In 1987 the House established a comprehensive committee system by setting up eight general purpose standing committees. At the same time, the functions of the Joint Committee on Foreign Affairs and Defence were extended, thus giving the House the capacity to monitor or to 'shadow' the work of all federal government departments and instrumentalities. The number of general purpose standing committees was increased to nine in 1996.

The committees are appointed at the commencement of each Parliament pursuant to standing order 324. The names of the committees have varied. In the 39th Parliament the following were appointed:

- Standing Committee on Aboriginal and Torres Strait Islander Affairs;
- Standing Committee on Communications, Transport and the Arts;
- Standing Committee on Economics, Finance and Public Administration;
- Standing Committee on Employment, Education and Workplace Relations;
- Standing Committee on Environment and Heritage;
- Standing Committee on Family and Community Affairs;
- Standing Committee on Industry, Science and Resources;
- Standing Committee on Legal and Constitutional Affairs; and
- Standing Committee on Primary Industries and Regional Services.

The general purpose standing committees are so called because they are established (or stand) for the duration of the Parliament and have the power to inquire into and report on any matter referred to them by the House or a Minister. Matters referred may

⁴ VP 1905/73; PP 36 (1906).

include any pre-legislation proposal, bill, motion, petition, vote or expenditure, other financial matter, report or paper.

In addition, annual reports of government departments and authorities and reports of the Auditor-General tabled in the House are automatically referred to the committees for any inquiry they may wish to make.⁵ Reports are referred to particular committees in accordance with a schedule tabled by the Speaker recording the areas of responsibilities of each committee. The Speaker is empowered to determine any question should responsibility be unclear or disputed in respect of a report or a part of a report. The period during which an inquiry concerning an annual report can be commenced ends on the day on which the next annual report of the department or authority is presented to the House.⁶

As part of the legislative process, under standing order 217A, bills may be referred for advisory reports to a general purpose standing committee, or to a committee formed of the House members of a joint committee, in which case the committee operates under the provisions applying to general purpose standing committees.⁷ (*See* Chapter on 'Legislation'.)

Committees concerned with the operations of the House

The following standing committees are appointed at the commencement of each Parliament, pursuant to standing orders:

- Committee of Privileges;
- Library Committee;
- House Committee;
- Procedure Committee;
- Selection Committee;
- Publications Committee; and
- Committee of Members' Interests.

The roles of these committees largely relate to the operations of the House but in the cases of the Committee of Privileges and the Publications Committee a broader, investigatory role is also involved.

Library and House Committees

The Library Committee is concerned with the operation of the Parliamentary Library services, while the House Committee is concerned with the provision of services and amenities to Members in Parliament House. The Speaker is a member of both committees.⁸

These committees have an advisory role only. Executive responsibility lies with the Speaker and the President, who are not bound by the decisions of the committees. The limited powers of members of the House Committee, particularly concerning the appointment of officers of the Joint House Department, was raised as a matter of privilege in the House in 1927.⁹ The Speaker made a statement in which he drew

⁵ The Joint Committee of Public Accounts and Audit is informed of any inquiry into an Auditor-General's report.

⁶ S.O. 324.

⁷ S.O. 361.

⁸ S.O.s 326, 327.

⁹ VP 1926–28/385.

attention to the statutory responsibilities of the Speaker and the President under the Public Service Act.¹⁰ A brief debate followed but no further action was taken.

Both the House and Library Committees regularly exercise their power to confer with similar committees of the Senate. For many years the Speaker has been chair of the Joint House Committee and the President has been chair of the Joint Library Committee.

When the two House committees are sitting together as the Joint House Committee, they should, generally speaking, only consider those matters which affect joint services, as each House is responsible for its own affairs. Recommendations affecting only one House should properly be made by the appropriate House Committee independently. In 1956 and in 1959 the House of Representatives House Committee considered and reported informally on Members' accommodation. Reports are seldom made to the House.¹¹

Publications Committee

The Publications Committee of each House when conferring together form the Joint Committee on Publications which has the dual role:

- of recommending to the Houses from time to time as to what petitions and papers, which have not been ordered to be printed by either House, ought to be printed; and
- to inquire into and report on the printing, publication and distribution of parliamentary and government publications, and on such matters as are referred to it by the relevant Minister.¹²

The committee is discussed in more detail in the Chapter on 'Papers and documents'.

Committee of Privileges

The Committee of Privileges is established to inquire into and report on complaints of breach of privilege or contempt or on any other matters which may be referred to it.¹³ The committee has no power to initiate inquiries. The House has referred to the committee matters of a general nature, such as the use of House records in the courts, the issue of public interest immunity, and the legal status of the records and correspondence of Members.¹⁴ The committee also considers applications from citizens for the publication of responses to statements referring to them.

The procedure for raising and dealing with questions of privilege and details of the functions and procedures of the committee are discussed in detail in the Chapter on 'Parliamentary privilege'.

Committee of Members' Interests

The Committee of Members' Interests is established to inquire into and report upon the arrangements made for the compilation, maintenance and accessibility of a Register of Members' Interests, and various related matters.¹⁵ The committee's functions are discussed in more detail in the Chapter on 'Members'.

¹⁰ H.R. Deb. (21.10.27) 700.

¹¹ *But see* report by Joint House Committee on accommodation for Members of Parliament at Canberra, VP 1926–28/181; *see also* reports by the Senate House Committee concerning Senators' dress in the Senate Chamber, PP 235 (1971), and provision of staff and other facilities for Members of Parliament, PP 34 (1972), and the Joint House Department. The Joint Library Committee reported regularly until 1926.

¹² S.O. 328.

¹³ S.O. 325.

¹⁴ VP 1978–80/975; VP 1993–95/1107; VP 1998–2001/483.

¹⁵ S.O. 329.

Procedure Committee

The Standing Committee on Procedure is appointed ‘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’.¹⁶ As a result of reports of the Procedure Committee a number of initiatives have been taken relating to the business of the House, including significant developments relating to private Members’ business and the associated establishment of the Selection Committee (*see below*). Major changes in the procedures for the consideration of legislation, including the establishment of the Main Committee, also followed recommendations of the Procedure Committee. In 1998 the committee undertook a review of the House of Representatives committee system, resulting in the extensive changes to the standing orders reflected in this edition.

Selection Committee

The basic responsibility of the Selection Committee is ‘to arrange the timetable and order of business for private Members’ business and committee and delegation reports on each sitting Monday pursuant to standing order 101’.¹⁷ The committee’s functions are discussed in detail in the Chapter on ‘Non-government business’.

HOUSE SELECT COMMITTEES

Select committees are appointed, as the need arises, by a resolution of the House.¹⁸ Select committees, in Australian practice, have a limited life which should be defined in the resolution of appointment. The creation of a select committee is seen as a measure to meet a particular and perhaps short-term need. The House has not found it necessary, since the first establishment of the general purpose standing committees in 1987, to establish select committees on a regular basis.

The standing orders provide that, at the appointment of every select committee, a day is to be fixed by which it is to bring up its final report unless an extension of time is moved and granted in the House.¹⁹ However, practice has not always accorded with this provision as select committees have been appointed with the provision to report ‘as soon as possible’.²⁰ This occurs when a committee undertakes an inquiry which can be seen to be longer-term, perhaps even extending over the life of more than one Parliament. When a select committee is directed to report by a specific date or as soon as possible, its corporate existence comes to an end as soon as it does so.²¹

The standing orders also give committees leave to report from time to time.²² This authorisation means that a committee is at liberty to make progress reports during the course of the consideration of the matter referred to it.²³ The following provision has been included in the resolution of appointment of some select committees:

16 S.O. 330.

17 S.O. 331.

18 S.O. 355.

19 S.O. 356.

20 Select Committee on Road Safety, VP 1970–72/1030.

21 Select Committees on Tourism, VP 1976–77/510, and on Pharmaceutical Benefits, VP 1970–72/304, were required to report as soon as possible. The Joint Select Committees on Aboriginal Land Rights in the Northern Territory, VP 1976–77/558, and on the Family Law Act, VP 1978–80/355, were required to report by a specified date.

22 S.O. 347.

23 The Select Committees on Aboriginal Education and Aircraft Noise had power to report from time to time, VP 1985–87/59, 60.

That the committee have leave to report from time to time but so that its final recommendations be presented on or before [date].²⁴

On presenting its final report the committee ceases to exist.

If a select committee finds it difficult or impossible to table a satisfactory final report by the specified date, it may be given an extension of time by the House, prior to, or on, the specified reporting date, by amendment of its resolution of appointment.²⁵

The terms of reference of select committees tend to be narrow and specific and have traditionally been based on the assumption of a single inquiry and report. Nevertheless, the resolutions of appointment of some select committees have given the relevant Minister power to refer additional matters to them—that is, before they report and cease to exist.²⁶ A select committee with an unqualified power to report from time to time can elect to present a series of reports on particular aspects of its terms of reference.

JOINT COMMITTEES

Joint committees are established by resolution or legislation agreed to by both Houses, and membership consists of both Members and Senators.

In current practice all committees of the House appointed by standing order are given power to confer with similar committees of the Senate,²⁷ but they exist independently of the Senate committees, and the committees in question never operate as joint committees. However, a procedure was followed in the early years of the Parliament in respect of some committees which were established by resolution by each House independently but which in the conduct of inquiries became in effect joint committees. For example, the House, having appointed a Select Committee in relation to Procedure in Cases of Privilege, sent a message to the Senate ‘requesting it to appoint a similar Committee empowered to act conjointly with the Committee of this House’ to which the Senate agreed; the joint select committee reported as a single entity.²⁸

Creatures of both Houses

It is essential to an understanding of joint committees to recognise that they are the creatures of both Houses. Neither House may give instructions to a joint committee independently of the other unless both Houses expressly agree to the contrary. However, it is often provided in resolutions appointing joint committees that either House may refer matters for investigation by those committees.²⁹

The standing orders of both Houses are largely silent on the procedures to be followed by joint committees. Therefore it has become the established practice for such committees to follow Senate committee procedures when such procedures differ from those of the House,³⁰ subject to any particular variations, necessitated for example by the provisions of the resolutions appointing them and any further instructions agreed to by

²⁴ Joint Select Committee on Aboriginal Land Rights in the Northern Territory, VP 1977/12.

²⁵ Select Committee on Specific Learning Difficulties, VP 1976–77/273; Joint Select Committee on an Australia Card, VP 1985–87/764, 886; Joint Select Committee on Certain Family Law Issues, VP 1993–95/2058.

²⁶ Joint Select Committees on Aboriginal Land Rights in the Northern Territory (VP 1977/12) and on the Family Law Act (VP 1978–80/354–5).

²⁷ S.O. 342.

²⁸ VP 1907–08/299, 302, 505, 515, 516; *see also* VP 1907–08/370 for order of the House giving extended power to its members on the committee.

²⁹ VP 1993–95/80, 82; VP 1998–2001/164, 166.

³⁰ This practice is based on that of the United Kingdom whereby joint committees follow House of Lords select committee procedures when such procedures differ from those of Commons select committees, *May*, 22nd edn, p. 728.

both Houses. However, chairs of joint committees, when seeking procedural advice, may approach the Presiding Officers or the Clerks of both Houses.

Joint committees appointed by resolution

Joint committees may be described as ‘joint standing committees’ or ‘joint select committees’. Like select committees of the House the latter are seen to have an ad hoc role and generally cease to exist upon reporting, while the former have a longer-term role and members hold office for the life of a Parliament. Some committees have simply been called ‘joint committees’ (for example, the former Joint Committee on the Australian Capital Territory) which could equally have been called joint standing committees. While members of the Joint Committee on Pecuniary Interests of Members of Parliament were appointed for the life of the Parliament, the committee was strictly a joint select committee in that it had a definite and limited purpose and was required to report ‘within the shortest reasonable period, not later than 90 days after the members of the committee are appointed’.³¹

The number and names of joint standing committees appointed by resolution varies from Parliament to Parliament. The following joint standing committees were appointed by resolution at the start of the 39th Parliament in 1998:

- Joint Committee on the National Capital and External Territories
- Joint Committee on Foreign Affairs, Defence and Trade
- Joint Committee on Electoral Matters
- Joint Committee on Migration
- Joint Committee on Treaties.

Joint select committees may also be appointed for a specific purpose by resolutions of both Houses—for example, the Joint Select Committee on the Republic Referendum established in 1999.

The functions, membership, powers and procedures of these committees are determined by the resolutions establishing them.

Joint statutory committees

The following committees are required by Acts of Parliament to be established at the commencement of each Parliament. In some cases the establishing Acts leave the detail of the membership, powers and procedures of the committees to the Parliament to determine. This is done by resolution of each House at the start of every Parliament.

Joint Committee of Public Accounts and Audit

The Joint Committee of Public Accounts and Audit³² is established by the *Public Accounts and Audit Committee Act 1951*. The functions of the committee are set out in sections 8 and 8A of the Act. In general terms they are to:

- examine the financial affairs of authorities of the Commonwealth to which the Act applies;
- review all reports of the Auditor-General that are tabled in each House of the Parliament;
- consider the operations and resources of the Australian National Audit Office;

³¹ VP 1974–75/173–4, 208–9.

³² Formerly Joint Committee of Public Accounts.

- approve or reject the recommendation for appointment of the Auditor-General or Independent Auditor; and
- increase parliamentary and public awareness of the financial and related operations of government.

The committee is also responsible, under the Public Service Act, for approving annual report requirements of Commonwealth departments.

Responses to ‘administrative’ matters raised in a report of the committee are made by way of an Executive Minute,³³ which is expected to be provided to the committee by the relevant Minister within six months of the report’s tabling. The chair of the committee tables the Executive Minute in the Parliament as soon as practicable after it has been received.

Bills dealing with subjects related to the committee’s functions—for example, major changes in Commonwealth financial controls, management and audit and bills dealing with taxation law—have been referred to the committee and reported on. In each case the bills were referred by the House, standing orders having been suspended to allow it.³⁴

The ability to consider and report on any circumstances connected with reports of the Auditor-General or with the financial accounts and statements of Commonwealth agencies is one of the main sources of the committee’s authority—it gives the committee the capacity to initiate its own references and, to a large extent, to determine its own work priorities. This power is unique among parliamentary committees and gives the committee a significant degree of independence from the executive arm of government.

The secretariat of the committee is administered by the Department of the House of Representatives.

Parliamentary Standing Committee on Public Works

The Parliamentary Standing Committee on Public Works is established by the *Public Works Committee Act 1969*. The committee’s function is to consider each public work referred to it, and report to both Houses concerning the expedience of carrying out the work. It may also report on any other matters related to the work where the committee thinks it desirable that its views should be reported to the Houses. In its report the committee may recommend any alterations to the work which it thinks necessary or desirable to ensure that the most effective use is made of public moneys.

A motion may be moved in either House that a public work be referred to the committee for consideration and report.³⁵ If the Parliament is not in session or the House is adjourned for more than a month or for an indefinite period, the Governor-General (in council) may refer a work to the committee for consideration and report.

If the estimated cost of a public work exceeds a specified amount, that work cannot be commenced unless it has been referred to the committee; or the House of Representatives has resolved that, because of the urgency of the work, it is expedient that the work be carried out without having been referred to the committee; or it is a work of an authority that has been exempted by regulation; or the Governor-General has declared that the work is for defence purposes and reference of it to the committee would be contrary to the public interest; or it has, with the agreement of the committee, been

³³ This replaces the Finance Minute previously prepared by the Department of Finance and Administration in response to all the committee’s reports.

³⁴ VP 1993–95/1145, 1327; 2678; VP 1996–98/266, 389.

³⁵ VP 1987–89/830; VP 1998–2001/1141.

declared to be work of a repetitive nature. A public work referred to the committee cannot be commenced unless, after the report of the committee has been presented to both Houses, the House of Representatives has resolved that it is expedient to carry out the work.³⁶

The secretariat of the committee is administered by the Department of the House of Representatives.

Joint Committee on the Broadcasting of Parliamentary Proceedings

The Joint Committee on the Broadcasting of Parliamentary Proceedings is established pursuant to the *Parliamentary Proceedings Broadcasting Act 1946*. The committee's function is to regulate the radio broadcast of the proceedings of the Parliament, as described in the Chapter on 'Parliament House and access to proceedings.'

The secretariat of the committee is administered by the Department of the House of Representatives.

Parliamentary Joint Committee on the Australian Security Intelligence Organisation

The Parliamentary Joint Committee on the Australian Security Intelligence Organisation is established by the *Australian Security Intelligence Organisation Act 1979*. The functions of the committee are:

- to review aspects of the activities of the Australian Security Intelligence Organisation (ASIO) that are referred to the committee; and
- to report to the Minister and, subject to certain conditions prescribed in the Act, to each House of the Parliament, the committee's comments and recommendations following such a review.

The secretariat of the committee is administered by the Department of the House of Representatives.

Other statutory committees

In the 39th Parliament three other joint statutory committees operated:

- the Joint Committee on Corporations and Securities established by the *Australian Securities Commission Act 1989*;
- the Joint Committee on the National Crime Authority established by the *National Crime Authority Act 1984*; and
- the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, established by the *Native Title Act 1993*.

The secretariats of these committees are administered by the Department of the Senate.

APPOINTMENT AND DURATION

Committees of the House

The standing orders do not prevent any Member moving a motion for the appointment of a committee, but most motions brought to a successful vote are moved by a Minister.³⁷

³⁶ VP 1987–89/985; VP 1998–2001/1140.

³⁷ E.g. VP 1998–2001/164–74. The Select Committee on Specific Learning Difficulties was appointed on motion moved by the Leader of the Opposition, VP 1974–75/286. See also VP 1970–72/147–8; VP 1962–63/549.

A standing committee may be appointed by sessional or standing orders or by resolution of the House. It has not been the practice to require a resolution for the appointment of the standing committees appointed under the standing orders. They commence to operate when Members are appointed to them and cease to exist only upon dissolution or expiry of the House.

A select committee is appointed by resolution of the House. The committee ceases to exist on the presentation of its final report.

Joint committees appointed by resolution

A joint committee (other than a statutory committee) is established by a motion originating in one House and agreed to in the same terms by the other House. A proposal for a joint committee may originate in either House.

A resolution by the House proposing the establishment of a joint committee defines the nature and limits of the authority delegated to the committee in the same way as a resolution appointing a committee of the House. However, it also includes a paragraph stating:

That a message be sent to the Senate House acquainting it of this resolution and requesting that it concur and take action accordingly.³⁸

The Senate considers the resolution and may agree to its provisions, suggest modifications or reject the proposal altogether. Its decision is conveyed to the House by message. Where modifications are proposed, the House may choose to:

- accept them;³⁹
- accept them and add modifications of its own;
- reject them;
- reject them and request the Senate to reconsider them;⁴⁰ or
- reject them and suggest an alternative.⁴¹

In the case of a total rejection, or a failure to respond to a message, the House may choose to appoint a committee of the House with the same purposes instead.⁴²

Joint committees may be standing committees, usually established at the start of a Parliament, or select committees established for a specific short term purpose.

Joint statutory committees

A committee established under an Act of Parliament is required to be appointed as soon as practicable after the commencement of each Parliament. In practice this action is usually taken within the first few sitting days of the opening of the Parliament, when a motion appointing members to the committee is moved by a Minister in each House. If provided for by the relevant Act, a motion relating to the powers and procedures of the committee may also be moved. The committee continues in existence until the House of Representatives is dissolved or expires.

³⁸ VP 1998–2001/164.

³⁹ VP 1987–89/150.

⁴⁰ VP 1974–75/828–9, 870.

⁴¹ VP 1973–74/139, 149.

⁴² In 1973 a Joint Committee on Environment and Conservation was proposed by the House, rejected by the Senate, and a House Standing Committee on Environment and Conservation established, VP 1973–74/124–5, 247; J 1973–74/216.

Avoidance of duplication of inquiries

Committees of the House and the Senate endeavour to avoid duplication with the work of other committees—for example, in inquiries by the House Standing Committee on Aboriginal Affairs and a Senate select committee in 1988, there was considerable potential for duplication, but the two committees concentrated on different matters. Such considerations also apply in respect of joint committees—for example, in the 36th Parliament the Joint Committee of Public Accounts and the Joint Committee on Migration Regulations were careful to avoid duplication in their respective inquiries into the Business Migration Program and the control of visitor entry.

If a general purpose standing committee intends to inquire into all or part of a report of the Auditor-General, it is required to notify its intention to the Joint Committee of Public Accounts and Audit.⁴³

Effects of dissolution and prorogation on committees

Upon dissolution of the House all committees, including joint committees, cease to exist. Even if a committee is appointed in the next Parliament with the same terms of reference, powers and title, it is in fact a different committee. Consequently, the House must expressly authorise such a committee to have access to the records of and evidence taken by the previous committee. Standing authorisation is now provided by S.O. 341.⁴⁴

For constitutional reasons, committees of the House and joint committees appointed by standing order or by resolution for the life of the Parliament continue in existence but may not meet and transact business following prorogation.⁴⁵ Committees whose tenure is on a sessional basis cease to exist.

Committees appointed by standing or sessional order or by resolution of the House, or both Houses, for the life of the Parliament may meet again in the new session of the same Parliament. If the subject of inquiry was referred to the committee by the House in the previous session, the effect of the reference ceases and the subject must be again referred by resolution of the House.⁴⁶ Other inquiries commenced in the previous session are resumed without action by the House.

A committee which is appointed on a sessional basis—that is, not for the life of a Parliament—ceases to exist upon prorogation. If the committee is to continue its activities in the new session, the committee and its membership must be re-appointed by resolution and its terms of reference renewed.⁴⁷ A committee may use the minutes of evidence and records of the previous committee.⁴⁸

The provisions of the Acts establishing each of the joint statutory committees determine that the committees are to be appointed at the commencement of each Parliament, and that their members may hold office until the House of Representatives

43 S.O. 324(b)(iii).

44 Since 3.12.1998.

45 See Ch. on 'The parliamentary calendar' for more detail; and see *Odgers*, 6th edn, pp. 972–82 and 9th edn, pp. 176, 495–503 (argument to the effect that prorogation does not prevent committees of the Senate from continuing their activities); but see also Geoffrey Lindell, 'Parliamentary inquiries and government witnesses', *Melbourne University Law Review*, vol. 20, 1995, p. 399, expressing agreement with a conclusion by Commonwealth Law Officers to the effect that prorogation (and dissolution) means that committees should not continue to operate.

46 Standing Committee on Aboriginal Affairs: initial reference, VP 1976–77/512; re-referred, VP 1977/13. Committee of Privileges: initial reference, VP 1973–74/619; re-referred, VP 1974/34.

47 See VP 1977/10–11, 16, for the re-appointment of the Select Committee on Tourism, and VP 1977/12, 16, for the re-appointment of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory.

48 S.O. 341.

expires by dissolution or effluxion of time. Provision is also made for these committees to meet and transact business notwithstanding any prorogation of the Parliament.

Further comment—different positions taken by the two Houses

The effect of prorogation on committees has been a matter of some debate, and as noted below, the position traditionally taken by the House has not been adopted by the Senate. The practice of the House is reinforced by the following parliamentary authorities:

The effect of a prorogation is at once to suspend all business, including committee proceedings, until Parliament shall be summoned again.⁴⁹

Committees appointed by standing order for a parliament are terminated by a dissolution. In the case of committees appointed on a sessional basis, orders appointing them cease to have effect at prorogation.⁵⁰

... a committee only exists, and only has power to act, so far as expressly directed by the order of the House which brings it into being. This order of reference is a firm bond, subjecting the committee to the will of the House; the reference is always treated with exactness and must be strictly interpreted ... The House may at any time dissolve a committee or recall its mandate, and it follows from the principle laid down that the work of every committee comes to an absolute end with the close of the session.⁵¹

Even though the standing orders appointing the Library and House Committees until 1998 contained the words 'shall have power to act during recess', it is considered that the House alone has no authority to grant such power. There have been a number of instances where a resolution appointing a committee has purportedly empowered the committee to sit during any recess. However, as the resolution of appointment in each case lapsed at prorogation, the purported power was not valid.

On 18 February 1954 the chairman of the Joint Committee on Foreign Affairs was advised by the Minister for External Affairs by letter:

I have had the matter you raised in your letter of the 2nd February looked into—that is, the status of the Joint Committee on Foreign Affairs following on the prorogation of Parliament.

I find that the Solicitor-General's view is that the Foreign Affairs Committee ceases to exist when Parliament is prorogued.

Despite this view of the Solicitor-General, it was given the power to act during recess when it was appointed for the life of the Parliament in 1959.⁵²

When the Joint Committee on the Australian Capital Territory was first established as a sessional committee in 1956, it was given power to sit during recess,⁵³ but the power was not included in the terms of the resolution when it was re-appointed in the new session in 1957.⁵⁴ It was once again given the power to sit during recess when it was appointed for the life of the Parliament in 1959.⁵⁵

In 1957 the House agreed to a Senate modification to the resolution re-appointing the Joint Committee on Constitution Review, which empowered the committee to sit during any recess. In speaking to the modification the Leader of the House, while acknowledging the correct constitutional position, made the following observations:

49 *May*, 22nd edn, p. 233.

50 *May*, 22nd edn, p. 669. Since 1975 the House of Commons has adopted the practice of appointing the members of many of its committees for the life of the Parliament but they may not meet after prorogation, 'Dissolution and prorogation: answers to questionnaire', *The Table XLIII*, 1975, p. 76.

51 Josef Redlich, *The Procedure of the House of Commons*, vol. II, Archibald Constable, London, 1908, p. 196.

52 VP 1959–60/25.

53 VP 1956–57/368–9.

54 VP 1957–58/12–13.

55 VP 1959–60/27–8.

When the resolution was drafted in its original form, we followed the practice which had been established in the House of Commons, for which there are quite obvious and constitutional reasons, that if a session is terminated by prorogation, then it was natural to expect and to provide that committees of Parliament should also come to an end, and there are precedents in the House of Commons which suggest that this has been the regular practice there. But I think that there is some practical merit in the suggestion that has come to us from the Senate . . . We having decided that henceforth we shall have a session of the Parliament annually, and it being the desire, I think, of all members of the Parliament that committees such as the Constitution Review Committee, which has a valuable public service to perform, should continue to function in any period of recess between the prorogation of one session of the Parliament and the formal opening of another, there is sound practical sense in the suggestion that these committees be enabled to continue during any such recess.⁵⁶

The power to sit during any recess was renewed on the re-appointment of the committee in 1958,⁵⁷ but not in 1959.⁵⁸

In considering the question of Senate committees having the power to meet after a dissolution of the House of Representatives, a Solicitor-General's opinion of 23 October 1972 states, in part:

During a session each House can control its own proceedings, exercise its powers and privileges and adjourn from time to time. However, once the Parliament is prorogued, I think each House would be effected [*sic*] in the same way as the House of Commons. Section 49 of the Constitution, in my view, has this effect, because it provides (there being no legislation of the Commonwealth Parliament on the subject) that the powers, privileges and immunities of the Senate and the House of Representatives and the members and the committees of each House shall be those of the Commons House of Parliament of the United Kingdom and of its members and committees, at the establishment of the Commonwealth. However, quite apart from s. 49, I think support for this view is found in ss. 1 and 5 of the Constitution and the constitutional theory which underlies them. The Houses are called together to exercise their functions as part of the Federal Parliament. At the discretion of the Crown and subject to certain constitutional safeguards the Crown can terminate the session. With the termination of the session, this power to deliberate and pass bills and their ability to exercise these powers as part of the Parliament ceases until they are called together again. It is consistent with this clear position, that between sessions neither they nor their committees should be able to exercise any powers. This could be found inconvenient to the work of committees but I think it is the effect of the provisions of the Commonwealth Constitution.

The same opinion drew attention to possible consequences of committees meeting without having the constitutional authority to do so:

. . . witnesses who gave evidence would not be entitled to the protection of the House and their evidence could be actionable at the suit of third parties or could be used to incriminate them. Likewise statements by [committee members] during hearings would lack the protection which the privileges of the House normally afford to [Members]. In camera hearings may be no protection. Witnesses who were summoned to give evidence would, of course, be well advised to refuse to do so. If they did, the [House] clearly could not meet to punish them. When ultimately it did meet there may be little purpose served in committing them for contempt because by then the [House's] authority and protection would be available and they would, no doubt, willingly answer questions.

However, other legal authorities have taken a different view of the effect of prorogation on committees. A number of opinions relevant to this matter were tabled in the Senate on 19 and 22 October 1984 when the Senate passed a resolution concerning meetings of the Senate or its committees after dissolution of the House.⁵⁹ Senate standing orders and resolutions of appointment give most Senate committees the power to meet during recess or following dissolution of the House, and they have done so.⁶⁰

⁵⁶ VP 1957–58/24; H.R. Deb. (28.3.57) 339–40.

⁵⁷ VP 1958/9–11.

⁵⁸ VP 1959–60/111–12.

⁵⁹ See *Odgers*, 9th edn, pp. 501–2.

⁶⁰ See *Odgers*, 9th edn, pp. 502–3.

MEMBERSHIP

Eligibility to serve on committees

Committee service is considered to be one of the parliamentary duties of private Members. Office holders and Ministers have not normally served on committees except in an ex officio capacity on committees concerned with the operations of the House or the Parliament (*see below*).⁶¹ Given their role of scrutinising the Executive it has been considered inappropriate for Ministers or Parliamentary Secretaries to serve on investigatory committees.

Except with their consent, or as specified in a standing or sessional order, the Speaker, the Deputy Speaker or the Second Deputy Speaker may not be appointed to serve on any committee.⁶² In the case of some statutory committees certain office holders, such as the Speaker and the Deputy Speaker, are not able to be appointed to the committee.

Personal interest

A Member may not sit on a committee if he or she has any direct pecuniary interest in a matter which is the subject of an inquiry before the committee.⁶³ ‘Personal interest’ has been interpreted in the very narrow sense of an interest peculiar to a particular person. If, for example, a Member were a producer of beef he or she would not, for that reason alone, be under any obligation to disqualify himself or herself from serving on a committee inquiring into beef prices, as the interest would be one held in common with many other people in the community. In the first instance it is a matter for individual committee members to judge whether they may have a conflict of interest in an inquiry.

The provision of the standing orders was given proper effect in 1955 when a member of the Committee of Privileges took no active part during an inquiry in which he was personally interested in that he was the Member who had raised the complaint. The House has resolved that a member of the Committee of Privileges be discharged from attendance on the committee during its consideration of particular matters. Another Member has been appointed to the committee in such cases.⁶⁴ In the 37th Parliament a member of the Committee of Privileges did not participate in an inquiry concerning the unauthorised disclosure of information from another committee on which he served.⁶⁵ In another inquiry by the committee in the same Parliament a Member who had spoken in the House when the matter was raised withdrew from the committee for the duration of the inquiry.⁶⁶

On the appointment of members to the Select Committee on Grievances of Yirrkala Aborigines, a Minister on a point of order asked whether a Member, who had been nominated to serve on the committee should be excluded from the committee because the Member was a litigant in related court proceedings. The Speaker stated:

... the Chair is not able to determine whether or not a member is personally interested in a committee’s inquiry and cannot properly be called upon to so decide. A member must be guided by his own feelings in the matter and by the dictates of respect due to the House and to himself. Having

61 The Chairman of Committees was chair of the Joint Committee on the Parliamentary Committee System and was a member of several general purpose standing committees in the 35th Parliament.

62 S.O. 334.

63 S.O. 335. Between 1984 and 1988 an obligation was imposed on Members to declare ‘relevant interests’ at the beginning of a speech in the House or in a committee, or after a division in which the Member proposed to vote was called.

64 VP 1978–80/35; *see also* H.R. Deb. (7.4.59) 903; H.R. Deb. (18.3.59) 772–3.

65 VP 1993–95/546.

66 VP 1993–95/605.

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regard to the existence of the standing order and its terms, it is likely that if a matter of this kind is brought to issue it will be one for the House to decide.⁶⁷

The Member served on the committee.

In other instances members of committees have decided not to participate in an inquiry or a facet of an inquiry because of conflict of interest considerations. In 1977 a member of the Joint Committee on the Australian Capital Territory chose not to take part in proceedings of the committee whilst items in which that member had an investment interest were under discussion. In 1981 a member of the Joint Committee of Public Accounts did not take part in that part of an inquiry dealing with the ACT Schools Authority because the member had chaired the Authority in the past.⁶⁸

Where there may be the possibility of a conflict of interest of some kind, or of the perception of such a conflict, Members have made an oral declaration in the form of a statement or a written statement on the matter at a meeting of the committee at an early stage of the particular inquiry, even though, technically, there may have been no question of an infringement of the standing order.⁶⁹

If the right of a Member to sit on a committee is challenged, the committee may report the matter to the House for resolution.⁷⁰

Suspension from the House

A Member suspended from the service of the House may take part in committee proceedings (other than of the Main Committee) during the period of suspension.⁷¹

Ex officio members

The Speaker is a member of the House and Library Committees ex officio and the Deputy Speaker is a member of the Selection Committee. The Deputy Speaker (together with the Deputy Senate President) have been ex officio members of the Joint Standing Committee on the National Capital and External Territories. Ex officio members of the Joint Standing Committee on the New Parliament House included the Speaker and President of the Senate and the Minister responsible for administering the Parliament House Construction Authority Act.⁷²

Other ex officio members of the Selection Committee are the Chief Government Whip, the Chief Opposition Whip and the Third Party Whip. The Leader of the House and the Deputy Leader of the Opposition are ex officio members of the Committee of Privileges but may nominate other Members to serve in their place.

Provision is rarely made for ex officio membership of committees other than committees concerned with the operations of the House or the Parliament. However, the chair of the Standing Committee on Expenditure (1976) was an ex officio member of the Joint Committee of Public Accounts and vice versa.⁷³ This arrangement was intended to ensure adequate liaison between the two committees.⁷⁴

⁶⁷ VP 1962–63/559; H.R. Deb. (19.9.63) 1176–9.

⁶⁸ *Report 193 of the Joint Committee of Public Accounts*, PP 84 (1982) vii.

⁶⁹ E.g. Committee of Privileges, minutes 5.5.94, PP 136 (1994); Standing Committee on Finance and Public Administration, minutes 18.2.91; Standing Committee on Primary Industries and Regional Services, minutes 13.10.99.

⁷⁰ S.O. 335.

⁷¹ See Ch. on 'Control and conduct of debate'.

⁷² VP 1987–89/39–40.

⁷³ The chair of the Joint Committee of Public Accounts could nominate in his place a member of that committee who was a Member of the House of Representatives.

⁷⁴ H.R. Deb. (27.6.76) 2613.

Number of members and party composition

The number of members of a committee is determined by the standing orders, by resolution, or by the Act establishing the committee.

In some cases provision may be made for numbers to be supplemented for individual inquiries, or for members to be substituted, to allow Members with particular expertise or interests to participate. A general purpose standing committee may be supplemented with other Members for an inquiry (up to three in the 38th Parliament, up to two in the 39th Parliament).⁷⁵ For the purposes of the consideration of a bill referred to a committee for an advisory report under the provisions of standing order 217A, one or more members of the committee may be replaced by other Members by motion on notice.⁷⁶

From time to time the number of members of a committee may be increased. In the case of committees appointed by standing or sessional order it is necessary to suspend (or amend) standing (and sessional) orders to enable this to be done.⁷⁷

In most cases the standing order or resolution establishing a committee of the House will also determine the party composition of its membership—that is, by specifying the numbers of Members to be drawn from government and from non-government parties. In practice each party's representation on a committee is equated as nearly as possible to its numerical strength in the House, and consequently the relevant standing orders may change from Parliament to Parliament to reflect election results. Special provision may also be made for any independent Members—for example, in the 38th Parliament the relevant standing order was amended by sessional order to provide that one independent Member be appointed to the Selection Committee.⁷⁸

Appointment of Members

The Members to be appointed are normally elected or selected within their respective parties. The process is organised by the whips. Independent Members liaise with the opposition whips in respect of non-government positions.

Members are now formally appointed to or discharged from all committees on motion moved on notice or by leave. When the House is not sitting, and not expected to meet for at least two weeks, party whips may write to the Speaker nominating the appointment or discharge of a member. The change operates from the time the nomination is received by the Speaker. The Speaker reports the change to the House at the next sitting when it is confirmed by resolution.⁷⁹

The practice before December 1998, outlined in earlier editions, was not uniform. In many cases the standing orders or resolutions of appointment provided for Members to be nominated. There was no motion put to the House—Members were deemed to be appointed as soon as the Speaker had been advised of nominations.

An unusual situation arose in 1952 because of the Opposition's declared intention not to nominate members to serve on the proposed Joint Committee on Foreign Affairs. The resolution of appointment transmitted from the House was amended by the Senate to provide:

⁷⁵ S.O. 324 (a maximum of one government and one non-government member).

⁷⁶ S.O. 333.

⁷⁷ VP 1962–63/39, VP 1954–55/202.

⁷⁸ VP 1996–98/65.

⁷⁹ S.O. 333.

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That the persons appointed for the time being to serve on the Committee shall constitute the Committee notwithstanding any failure by the Senate or the House of Representatives to appoint the full number of Senators or Members referred to in these resolutions.

The House agreed to the modification.⁸⁰

On several occasions a resolution of appointment of a committee has specified that the membership be identical to that of its predecessor in the previous Parliament.⁸¹

Vacancies

A vacancy on a committee may occur for the following reasons:

- resignation for personal reasons;
- resignation on appointment as a Minister or Parliamentary Secretary or to any other office that may preclude membership of a committee—for example, election to the office of Speaker or Deputy Speaker;
- resignation due to personal interest in an inquiry;
- resignation from the House; or
- death.

If a Member no longer wishes to serve on a committee, the Member informs the whip of his or her party and should advise the chair of the committee in writing. A motion is then moved in the House by a Minister to discharge the Member from attendance on the committee. A replacement is also appointed by motion. Normally, both the discharge and the appointment are moved simultaneously in the one motion.⁸² A Member may not simply resign; the Member must be discharged by a motion moved in the House.⁸³

CHAIR

Election

Standing order 336 provides that: ‘A committee, before the commencement of business, shall elect a government member as its chair.’

Some resolutions of appointment have provided that the Prime Minister ‘nominate’ or ‘appoint’ one of the government members of the committee as chair.⁸⁴ The resolution of appointment of the Joint Standing Committee on the New Parliament House provided for the Speaker and the President of the Senate to be joint chairs of the committee.⁸⁵

In conducting the election of the chair, the committee secretary, having drawn attention to any special provision in the standing orders or resolution of appointment (such as a requirement that the committee elect a government member as chair), should call for nominations, each of which must be seconded. If only one member is nominated, as is usually the case, the secretary declares the member elected as chair and invites that member to take the chair. If more than one member is nominated, the election is conducted by secret ballot in accordance with the procedures set down for the election of the Speaker in similar circumstances.⁸⁶

⁸⁰ J 1951–53/145–6; VP 1951–53/273, 278.

⁸¹ Joint Select Committee on Parliamentary and Government Publications, VP 1964–66/25–6, 27.

⁸² VP 1993–95/1769; VP 1998–2001/618.

⁸³ H.R. Deb. (5.9.05) 1919.

⁸⁴ VP 1973–74/123–4; *see also* VP 1970–72/33; VP 1961/48.

⁸⁵ VP 1987–89/39–40.

⁸⁶ S.O. 12. *See* Ch. on ‘The Speaker, Deputy Speakers and Officers’. In the 32nd Parliament a ballot was conducted for the election of the chair of the Standing Committee on Expenditure and in respect of the Joint Select Committee on Parliamentary Privilege.

In 1974 the Select Committee on Specific Learning Difficulties was appointed without any provision in the resolution of appointment for the election or nomination of the chair.⁸⁷ Under the standing orders at that time any member of the committee, including an opposition member, could have been elected chair. The committee had six members, three each from the government and opposition parties, which raised the possibility of a deadlock in the event of both a government and an opposition member being nominated and being supported on party lines. Before the committee held its first meeting, the House amended its resolution of appointment to increase its membership to seven by providing for an additional member to be nominated by the Prime Minister, thus giving the government party a majority. If the committee had met before this amendment had been agreed to and had elected a government member as chair, the opposition members would have had a majority of three to two in any division taken on party lines because the chair was only empowered to exercise a casting vote.

In 1976 the Joint Committee on the Parliamentary Committee System, in a special report to the House, sought an amendment of that part of the resolution of appointment which provided that the chair be elected by the committee from the members nominated by the Prime Minister or the Leader of the Government in the Senate. The committee wished to re-elect as chair the member who had been chair in the previous Parliament but who was now an opposition member. The committee argued that continuity would facilitate finalisation of the committee's report.⁸⁸ The House took no action on the proposal.

Usually the resolutions of appointment of joint standing committees⁸⁹ or the resolutions supplementing statutory provisions⁹⁰ provide that committees elect either a government member or a member nominated by the Government Whip or Leader of the Government in the Senate as chair, but this practice has not always been followed. For example, the Joint Select Committee on Parliamentary Privilege had such a provision in its first resolution of appointment in 1982. The provision was omitted when the committee was re-established in 1983 following a change of government, thus allowing the previous Chair, by then an opposition Member, to be re-elected.⁹¹ In respect of the Joint Standing Committee on the New Parliament House, the resolution provided for the Speaker and President to be joint chairs.⁹²

In 1941 the chairs of several joint committees were appointed by name in the resolution establishing the committees.⁹³ In some instances the House requested the Senate to appoint a Senator as chair, which it did.⁹⁴ Such a request was again made and agreed to in 1957 in relation to the Joint Committee on Constitutional Review.⁹⁵

Resolutions of appointment have at times specified that the deputy chair be a member of a different House from the chair.⁹⁶

87 VP 1974–75/286–7. For an explanation *see* H.R. Deb. (28.11.74) 4233.

88 VP 1976–77/119; PP 78 (1976).

89 VP 1998–2001/164–74.

90 VP 1998–2001/160–4.

91 VP 1980–83/805–6; VP 1983–84/52–3.

92 VP 1987–89/39–40.

93 Joint Committee on Social Security, VP 1940–43/158, 161–2.

94 Joint Committee on Profits, VP 1940–43/158–9, 162.

95 VP 1956–57/168–9 (committee originally named Joint Committee on Constitutional Change) 171, 341.

96 Joint Committee on the Parliamentary Committee System, VP 1976–77/59, 74, 82.

Procedural authority

The powers of a chair of a select committee have been described as being substantially the same as those of the chair of a committee of the whole House.⁹⁷ As, under the former procedures, no appeal could be made to the Speaker regarding the decisions and rulings of the Chairman of Committees in a committee of the whole, it was considered that no appeal could be made regarding the decisions and rulings of a chair of a select or standing committee. Within the framework set by the House (in terms of the provisions of the standing orders and any resolution of appointment), formal authority over select and standing committee procedures therefore lies with the chair and the committee itself, and the Speaker may not take formal notice of committee proceedings in so far as purely procedural matters are concerned. A chair's procedural authority in a committee is as exclusive as that of the Speaker in the House.

While the Speaker's advice is occasionally sought on complex procedural matters, there is rarely any scope for the Speaker to intervene on committee procedures. The Speaker would normally interfere in such matters only if they were of general significance or affected the allocation of resources to a committee, which is largely the Speaker's responsibility. Nevertheless, Speakers' rulings on procedural matters are significant as precedents. Further, committee chairs must have regard to the practice of the House where this is applicable to committee proceedings—for example, in respect of the sub judice convention (*see* p. 649).

Any concern about committee procedure or authority can be brought to the attention of the House in a special report, a dissenting report or in a debate on a motion that the House take note of a report. While these courses have been adopted, no action has been taken by the House.⁹⁸ It is doubtful as to whether the Speaker, rather than the House, could exercise any authority in such a situation. In 1955 the Speaker replied to questioning on the extent of the powers and functions of the Committee of Privileges:

Such questions should not be directed to the Speaker; they are matters for the House, not for me. I am not a member of the Committee of Privileges. As the House appointed the committee, the House must answer questions in relation to it.⁹⁹

Unlike the Speaker, the chair of a committee takes part in the substance of discussions, as well as playing a procedural role at hearings and deliberative meetings. A chair's rights to take part in proceedings are no less than those of other members, except that in divisions the chair may only exercise a casting vote.¹⁰⁰

Administrative authority

Prior to the 33rd Parliament resolutions of appointment of committees included a paragraph 'That the committee be provided with all necessary staff, facilities and resources'. The Speaker's statutory powers made the occupant of that office the final arbiter, subject to the will of the House itself, of what constituted a 'necessary' provision. The Speaker's statutory powers are clearly exclusive in these areas and a lack of a reference to the Speaker in resolutions of appointment or sessional orders does not

⁹⁷ *May*, 22nd edn, p. 638. While the Committee of the Whole no longer exists in the House, where appropriate, relevant precedents are considered to continue to apply.

⁹⁸ *See* for example the dissent of A. J. Forbes in 'A proposed system of committees for the Australian Parliament', *Interim Report of the Joint Committee on the Parliamentary Committee System*, PP 275 (1975) 95–7; *see also* the dissent of G. M. Bryant and L. R. Johnson in *Report of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory*, PP 351 (1977) 72; H.R. Deb. (18.8.77) 419, 423; dissenting reports to Committee of Privileges report on allegations by a Member, PP 498 (1989).

⁹⁹ H.R. Deb. (7.6.55) 1438.

¹⁰⁰ S.O. 336.

diminish either the Speaker's authority or obligations. In exercising these responsibilities it is considered that the Speaker would be obliged to intervene in committee operations where it was believed that a committee was using or seeking resources for activities which exceeded its delegated authority.

The Speaker, or an officer appointed by the Speaker, has exclusive authority to approve expenditure for the running of the House.¹⁰¹ In 1944 three members of the Joint Committee on Social Security resigned from the committee in protest at the Speaker's insistence that a parliamentary officer replace an officer of the public service who had earlier been seconded to serve as clerk to the committee (i.e. committee secretary) with the consent of the Speaker and on the recommendation of the committee. No action was taken by the House to question the Speaker's exercise of his authority to appoint committee staff but some Members expressed disapproval.¹⁰² (The power of employment is now possessed by the Clerk of the House.¹⁰³)

The Speaker is not involved in normal day-to-day administrative decisions in respect of committees, although a continual oversight of operations, administration and expenditure is maintained, and in instances involving unusual or large expenditures the Speaker's approval may be sought. In the case of a proposed overseas visit by the members of a committee, the Speaker's support is first sought. If the Speaker endorses the proposal, an approach is then made to the Prime Minister. Subject to the provision of additional funding by the Government, the Speaker has supported travel to regional countries, such as New Zealand, Papua New Guinea, Indonesia and Thailand, and, with parliamentary funding, South America. These visits (apart from an annual committee exchange with New Zealand) have been directly related to inquiries by the Joint Standing Committee on Foreign Affairs, Defence and Trade. It has not been considered appropriate for other committees to travel internationally. In visiting other countries a committee cannot formally meet or formally take evidence, as it has no legal authority to operate outside Australia—instead the members of the committee conduct informal discussions in relation to its inquiry.

The chair of a committee has a responsibility for administration arising from committee operations but the committee itself may be involved in significant decisions or actions involving matters of principle. Within the framework set by relevant regulations and directions, and subject to the ultimate authority of the Speaker, technically decisions to authorise expenditure and in relation to staffing matters fall to the responsible parliamentary staff members.

Some joint committees are serviced by the Department of the Senate. In those instances the role and powers of the President of the Senate are similar to those of the Speaker, although in the case of the Senate the Appropriations and Staffing Committee may also be involved in some aspects.

Deputy chair

Standing order 336 and most resolutions of appointment provide for a deputy chair to be elected by each committee. In the past, it has been provided on some occasions that the chair appoint a member of the committee as deputy chair 'from time to time'—that

101 *Financial Management and Accountability Act 1997*, s. 36.

102 H.R. Deb. (29.3.44) 2203–24; S. Deb. (30.3.44) 2281–91.

103 *Parliamentary Service Act 1999*, s. 22.

is, as circumstances demanded. In such cases the same member was not necessarily appointed each time.¹⁰⁴

In practice the deputy chair is normally an opposition member. The resolution of appointment of the Joint Committee on the Parliamentary Committee System directed that the committee elect as deputy chair one of the members nominated by the Leader of the Opposition. The deputy chair was also to be a member from a different House from the chair.¹⁰⁵

Immediately upon election at the committee's first meeting, the chair conducts the election of a deputy chair. It is considered that the provisions of standing order 22B, which provide for the filling of a vacancy in the office of Deputy Speaker or Second Deputy Speaker should be followed as appropriate.

The deputy chair acts as chair at any time when the chair is not present at a meeting of the committee. At any time when the chair and deputy chair are not present the committee is required to elect another member to perform the duties of the chair at that meeting.¹⁰⁶

STAFF AND ADVISERS

Committee secretariats have three basic functions:

- advising on committee procedure and practice;
- providing administrative and clerical support; and
- undertaking research and analytical work related to the terms of reference and content of particular inquiries.

The Department of the House of Representatives provides secretariats for committees of the House, and most joint committees appointed by resolution of the Houses that have an investigatory role. Three of the joint statutory committees, Australian Security Intelligence Organisation, Public Accounts and Audit, and Public Works, are also staffed by the Department of the House of Representatives. The standing committees concerned with domestic or internal matters are usually staffed on a part-time basis.

The arrangements for secretariat support provided to investigatory committees serviced by the Department of the House of Representatives vary. A typical arrangement might comprise a committee secretary, perhaps a project/research officer and one or more support staff. Committee secretaries and other staff are often required to support more than one committee. Allocation of additional staffing depends on the availability of funds and personnel, each committee's terms of reference, the number of inquiries a committee is conducting, the nature of its operations, its reporting targets and the incidence of subcommittee operations.

Committees may be assisted by specialist advisers who are remunerated at agreed rates and receive reimbursement for travelling and incidental expenses. While witnesses are rarely paid a fee, this may be approved if a committee seeks from an expert witness evidence which, because of the time and effort required for its preparation, the committee could not reasonably expect the witness to produce without remuneration. However, it is more likely that a committee will employ specialist advisers, whose function equates more closely to that of the committee secretariat than to that of

¹⁰⁴ Standing Committee on Road Safety, VP 1974–75/51–2; Select Committee on Aircraft Noise, VP 1970–72/33–4.

¹⁰⁵ VP 1976–77/59–60.

¹⁰⁶ S.O. 336.

witnesses. Most are engaged only for the duration of a particular inquiry or even to perform a specific task of limited scope and they normally work on a part-time basis as required. Proposals to employ and pay expert witnesses or advisers must be submitted to an officer authorised to approve such expenditure, who may approve them subject to the availability of funds. Many committees have employed expert advisers from time to time. Officers of the public service or the defence force may be seconded to the Department of the House of Representatives on a full-time or part-time basis to provide specialist advice to committees and this form of support is frequently utilised.

Special arrangements made in 1984 in connection with the Senate Select Committee on the Conduct of a Judge are worthy of note. A senior member of the Brisbane Bar and President of the Law Council of Australia, Mr C. W. Pincus, QC, was appointed as counsel to advise the committee. In September 1984 the Senate Select Committee on Allegations Concerning a Judge was appointed, and the resolution of appointment provided that two Commissioners Assisting the Committee be appointed by resolution of the Senate. Each Commissioner was a recently retired Supreme Court judge, and they were permitted to be present at meetings of the committee and were able to participate in the committee's deliberations and examine witnesses before the committee. The committee also appointed counsel to assist it.¹⁰⁷

POWERS OF COMMITTEES

Source of power

Section 49 of the Constitution confers on both Houses the powers, privileges and immunities possessed by the United Kingdom House of Commons in 1901. Section 50 confers on each House the right to make rules or orders concerning its powers and conduct of business. This power extends to committees and is delegated to a committee by the standing orders, by the resolution of appointment, or by the relevant statute.

A committee possesses no authority except that which it derives by delegation from the House or Houses appointing it, or which has been specifically bestowed by legislation in the case of statutory committees. The power of a House or joint committee is determined by the power possessed by the House or Houses and the degree to which this has been delegated.

'Powers' explicitly granted by the standing orders are:

- the power to appoint subcommittees (S.O. 338);
- the power to call witnesses and require that documents be produced (S.O. 340);
- the power to consider and make use of the evidence and records of similar committees appointed during previous Parliaments (S.O. 341);
- the power to confer orally or in writing with a similar committee of the Senate (S.O. 342);
- the power to authorise publication of any evidence given before it or any document presented to it (S.O. 346); and
- the power to report from time to time (S.O. 347).

Committees are also authorised:

- to conduct proceedings using approved means (S.O. 339(a)); and

¹⁰⁷ 'Report to the Senate', *Senate Select Committee on the Conduct of a Judge*, PP 168 (1984); 'Report to the Senate', *Senate Select Committee on Allegations Concerning a Judge*, PP 279 (1984).

- to adjourn from time to time, move from place to place and sit during any sittings or adjournment of the House (S.O. 339(b)).¹⁰⁸

While the use of the word ‘power’ is traditional, most of these matters can be regarded as authorisations. The real power possessed by a committee, as the word is more usually understood, is the power to order the attendance of witnesses and the production of documents.

These powers and authorisations apply to all committees of the House,¹⁰⁹ except as provided in another standing or sessional order, or as otherwise ordered by the House. Similar powers are also generally included in resolutions establishing joint committees.

A committee’s powers should not be taken for granted. To determine the extent of the authority delegated to any committee, recourse must be had to the standing and sessional orders, and if applicable, to a committee’s resolution of appointment and any later amendments, and any other orders agreed to by the House subsequent to the committee’s appointment.

In the case of a statutory committee, the constituting Act must be consulted. In some cases the Act makes provisions for terms of reference, powers and procedures. This is the case in respect of the Joint Committee on Public Works, the Joint Committee of Public Accounts and Audit, and the Joint Committee on the Australian Security Intelligence Organisation. In some other cases, such as the Joint Committees on Corporations and Securities, the National Crime Authority, and Native Title and the Aboriginal and Torres Strait Islander Land Fund, it is provided that matters relating to the powers and proceedings of the committee shall be determined by resolution of both Houses of the Parliament.¹¹⁰ This approach may be seen as avoiding some of the practical and theoretical difficulties that could be associated with complex and detailed statutory provision for committees.

Investigatory powers of committees

Derivation and extent

Some doubts have been expressed as to the precise extent of the investigatory powers which the Houses may exercise or delegate to committees. By virtue of section 49 of the Constitution the powers of the House and of committees to which it delegates these powers are those of the House of Commons at 1901. Based on this there could be a claim of unlimited powers. In 1845 Lord Coleridge said that as the ‘general inquisitors of the realm’ the Commons could inquire into anything it wanted to. A corollary of this was the authority to compel the attendance of witnesses.¹¹¹ The Commons exercised these powers in aid of both its legislative responsibilities and of its responsibility as the ‘Grand Inquest of the Nation’. There was no limit to the subject matters on which the Commons could legislate and as the ‘Grand Inquest of the Nation’ it considered itself entitled to advise or remonstrate with the Crown on all affairs of State and in regard to any grievance of the monarch’s subjects. Thus, there was no practical limit to the subject matters into which the House of Commons could inquire at 1901.

In *R. v. Richards: ex parte Fitzpatrick and Browne* the High Court held in unequivocal terms that section 49 is incapable of a restricted meaning and that the House

¹⁰⁸ Previously also referred to as a ‘power’.

¹⁰⁹ The situation prior to the amendment of standing orders on 3.12.1998 is covered in previous editions.

¹¹⁰ VP 1993–95/78–9, 131, 150, 901–2; VP 1998–2001/160–4.

¹¹¹ *Howard v. Gosset* (1845) 10 QB 359 at 379–80, quoted in PP 168 (1972) 3.

of Representatives, until such time as it declares otherwise, enjoys the full powers, privileges and immunities of the United Kingdom House of Commons.¹¹² If such is the case, either House of the Commonwealth Parliament, or its committees, could be said to have the power to conduct any inquiry into any matter in the public interest and to exercise, if necessary, compulsive powers to obtain evidence in any such inquiry.

On the other hand, there is the view that the compulsive investigatory powers which the House may delegate to its committees is limited to matters on which the Parliament may legislate. This view was argued on the basis of a judgment by the Judicial Committee of the Privy Council in 1914. It was held that the Commonwealth Parliament could not legislate to grant a royal commission, appointed by the Commonwealth Government, power to compel witnesses to attend and give evidence before it unless the royal commission's terms of reference were limited to matters on which the Parliament could legislate.¹¹³ It has been suggested that neither House could achieve by resolution that which it could not achieve by statute and that consequently the limitations on the granting of compulsive powers to royal commissions must apply equally to the delegation of such powers to parliamentary committees.¹¹⁴ However, there must be some doubt as to whether a court would find the so-called *Royal Commissions Case* relevant to the question of the powers of parliamentary committees, as that case was concerned with a different form of inquiring body and the exercise of a different head of constitutional power.¹¹⁵

Attorney-General Greenwood and Solicitor-General Ellicott did not accept that the House has unlimited power of inquiry:

Although, for the time being, s. 49 of the Constitution has conferred on each House the powers of the Commons as at 1901, it does not, in our view, enlarge the functions which either House can exercise. In considering the effect of s. 49, it is important to bear in mind that there is a distinction between 'powers' and 'functions'. The section, as we construe it, is intended to enable the Commonwealth Parliament to declare what the powers, privileges and immunities of its Houses and their members and committees shall be for the purpose of enabling them to discharge the functions committed to them under the Constitution. What the Commons did as 'the Grand Inquest' was not done in aid of its legislative function but represented the exercise of an independent and separate function said to be as important as that which it exercised as part of the legislature. However, it would not, in our view, be proper to construe s. 49 as conferring such an important and independent function on the Australian Houses of Parliament. Not only is it unlikely that such a function would be left to implication and then only until Parliament provided otherwise but the exercise of such a function by the House of Representatives or the Senate would in some respects be inconsistent with the Constitution. For instance, the notion that either House could impeach a person for trial before the other is inconsistent with the notion that judicial power is to be exercised by the Courts as provided in Chapter III. Again, the Commons could as the Grand Inquest inquire into any matter or grievance. It would surely be inconsistent with the federal nature of our Constitution that a House of the Commonwealth Parliament could inquire into a grievance which a citizen had in relation to the execution of a law wholly within State competence.

It is our view, therefore, that neither of the Houses of the Commonwealth Parliament has been vested with the function which the Commons exercised as the Grand Inquest of the Nation. This view was also expressed by Forster J. in *Attorney-General v. Macfarlane & Ors.*¹¹⁶

Nevertheless, the law officers differentiated between the virtually unlimited power of inquiry and the legal limitations of the inquiry power, which would arise only when it was sought to enforce that power, for example, by compelling persons to attend a

112 (1955) 92 CLR 157 at 164–70.

113 *A.G. (Commonwealth) v. Colonial Sugar Refining Company Ltd* (1914) AC 237.

114 Enid Campbell, *Parliamentary Privilege in Australia*, 1966, pp. 163–4; see also G. Sawyer, 'Like a Host of Archangels', in the *Canberra Times*, 7 April 1971.

115 The existence of doubt is acknowledged in D. C. Pearce, *Inquiries by Senate Committees* (1971) 45 ALJ 659.

116 PP 168 (1972) 6–7.

parliamentary committee. A similar view was taken by Fullagar J. in *Lockwood v. The Commonwealth*.¹¹⁷

Even though Greenwood and Ellicott stated that there are legal limits to the facts and matters into which the Houses can, by compulsion, conduct an inquiry, for practical purposes they also noted that these limits are extremely wide, as a consideration of the various heads of Commonwealth legislative power will quickly reveal.¹¹⁸ They added that each House:

... is entitled to investigate executive action for the purpose of determining whether to advise, censure or withdraw confidence. It would indeed be odd if a House could not inquire into the administration of a department of State by a Minister in order to judge his competence before determining whether to advise him, censure him or withdraw its confidence in him. Each House of the Commonwealth Parliament can, therefore, in our view, as a necessary consequence of the existence of responsible government, exercise investigatory powers through committees in order to exercise what might broadly be called an advisory function.¹¹⁹

More recently a recognised authority on constitutional law, Professor Geoffrey Lindell, has reviewed these issues. Professor Lindell has observed that even if the power to establish parliamentary committees is federally limited, two factors would lessen the practical significance of such a limitation: the limitation may not come into play unless a committee was armed with compulsory powers to compel the attendance of witnesses and the production of documents, and the difficulty of establishing that a matter may never be relevant to the Commonwealth's legislative powers.¹²⁰

It may be a very long time before the courts make any authoritative judgment on the limits on the Houses in these matters. First, committees rarely use their compulsive powers but rather rely on voluntary assistance and co-operation. Secondly, political realities, conventions and courtesies arising from the federal framework of the Constitution are likely to continue to inhibit the House and its committees from pressing hard for information on matters wholly, or even largely, within the constitutional jurisdiction of the States (*see* 'Evidence from State public servants and State Members' at page 638). Thirdly, the courts have been reluctant to intervene in the affairs of the Parliament, particularly with respect to parliamentary privilege and the Houses' powers to investigate and deal with alleged contempt, which underpin the Houses' powers to compel the giving of evidence.

Delegation of investigatory power

Without authority from the House a committee has no power to compel witnesses to give oral or documentary evidence. The power to call witnesses and require that documents be produced is now given to all House committees by standing order 340,¹²¹ but may be limited by another standing order (as in the case of the Committee of Members' Interests) or by resolution.

When first appointing the Joint Committee on Foreign Affairs in 1952, the Houses imposed an unusual qualification on the committee's power to send for persons, papers and records in the resolution:

117 (1954) 90 CLR 177 at 182.

118 PP 168 (1972) 9.

119 PP 168 (1972) 7.

120 Geoffrey Lindell, 'Parliamentary committees and government witnesses', *Melbourne University Law Review*, vol. 20, 1995, pp. 384–91, at 388.

121 Prior to 3.12.1998 this power was granted to committees individually.

... the Committee shall have no power to send for persons, papers or records without the concurrence of the Minister for External Affairs and all evidence submitted to the Committee shall be regarded as confidential to the Committee ...¹²²

The Committee of Members' Interests has power to send for persons, papers and records but it may not exercise that power (nor undertake an investigation of the private interests of any person) unless approved by not less than four members of the committee other than the chair.¹²³

The Parliamentary Joint Committee on the Australian Security Intelligence Organisation has, by virtue of the Act establishing the committee, some limitations in respect of the gathering and use of evidence.

A committee has no authority to consider or use the evidence and records of a similar committee appointed in previous Parliaments or sessions unless specific authority is included in a constituting Act or granted by the House. Standing authority in relation to House committees is now granted by standing order 341,¹²⁴ but previously was granted to committees on an individual basis by the sessional or standing orders or resolution of appointment.

A committee may only exercise compulsive powers in relation to the matters which the House has delegated to the committee to investigate by way of its terms of reference.

Powers of joint committees

Doubts have been expressed as to whether joint committees are invested with the same powers, privileges and immunities as the committees of the individual Houses.¹²⁵ These doubts have been expressed because section 49 of the Constitution invests the two Houses and the committees of each House with the powers, privileges and immunities of the House of Commons at the time of Federation. No express mention is made of joint committees. If joint committees were not covered by section 49, the implications could have far-reaching and significant effects for those without relevant statutory provisions. However, it is relevant that section 3 of the *Parliamentary Privileges Act 1987* provides that, in the Act, 'committee' means a committee of a House or of both Houses (and subcommittees).

In response to a request by the Joint Committee on War Expenditure in 1941, the Solicitor-General advised that in his opinion absolute privilege attached to evidence given before a joint committee just as it did to evidence given before a select committee of one House. He also gave the opinion that a joint committee authorised to send for persons, papers and records had power to summon witnesses. He suggested that it was doubtful, however, whether a joint committee had the power to administer oaths to witnesses.¹²⁶

Statutory secrecy provisions

A number of provisions in Commonwealth Acts prohibit the disclosure of certain information and create criminal offences for disclosure in contravention of the provisions. Examples are to be found in the Income Tax Assessment Act and the Family

122 VP 1951–53/129. In later Parliaments the restrictions on the committee's power to call for evidence were gradually eased, VP 1957–58/13–14, VP 1959–60/25–6, VP 1973–74/52–3. The powers of the modern Joint Standing Committee on Foreign Affairs, Defence and Trade are unqualified in this respect, VP 1998–2001/168.

123 S.O. 329.

124 Since 3.12.98.

125 See *Oggers*, 9th edn, p. 378; but see also Geoffrey Lindell, 'Parliamentary inquiries and government witnesses', *Melbourne University Law Review*, vol. 20, 1995, pp. 392–3, expressing the view that such doubts are not well founded.

126 Opinion of Solicitor-General, dated 8 August 1941.

Law Act. The application of such provisions could become an issue in respect of either House directly, but is more likely to arise in respect of committee inquiries, and did so in 1990 and 1991. Different views were expressed as to whether such provisions prevented the provision of such information to a committee, but in August 1991 the Solicitor-General advised as follows:

Although express words are not required, a sufficiently clear intention that the provision is a declaration under section 49 must be discernible. Accordingly, a general and almost unqualified prohibition on disclosure is, in my view, insufficient to embrace disclosure to Committees. The nature of section 49 requires something more specific.¹²⁷

(The advice went on to state that certain provisions in the National Crime Authority Act which limited activities of the Joint Committee on the National Crime Authority were sufficient to fetter the otherwise wide powers of the committee.)

It is also to be noted that should information prohibited from disclosure under a general secrecy provision be disclosed in a submission received by a committee or in oral evidence to a committee, the law of parliamentary privilege would prevent any action or prosecution because the disclosure would have occurred as part of ‘proceedings in Parliament’.¹²⁸

CONDUCT OF INQUIRIES

Referral of matters for inquiry

The range of matters a committee is able to investigate or inquire into is restricted by the terms of reference contained in the relevant standing or sessional orders or resolution of appointment (or Act, in the case of a statutory committee). A committee may have no power of inquiry (e.g. Selection Committee) or it may be free to determine its own inquiries within a general subject area (e.g. Procedure Committee). However, for most committees, inquiries are referred by the House, a Minister, or in some cases the Speaker. A matter may also be referred to a committee by legislation.¹²⁹

Although technically the general purpose standing committees cannot initiate their own references, in practice they may either take the initiative and seek a reference or at least be involved in considering and negotiating suitable terms of reference.¹³⁰ In addition, the ability to consider annual reports and Auditor-General’s reports enables these committees on their own initiative to address matters dealt with in such reports, and this may lead to informal discussions with officials, or to formal hearings. Such consideration may cause a committee to recommend that a reference be given to it on a particular subject,¹³¹ or it may pursue the issues through its own resolution within the ambit of the annual or Auditor-General’s report.

127 Opinion of Solicitor-General Griffith, 12 August 1991. This view was consistent with a joint opinion given in 1985 by the Attorney-General and the Solicitor-General, although in 1990 differing views were put forward by officers of the Attorney-General’s Department. In a 1984 report the House of Lords Committee of Privileges published an opinion by three Law Lords to the effect that general legislative provisions override previously existing parliamentary privileges (HL 254 (1984)). And see *Odgers*, 9th edn, pp. 47–50 and Geoffrey Lindell, ‘Parliamentary inquiries and government witnesses’, *Melbourne University Law Review*, vol. 20, 1995, pp. 408–9.

128 *Parliamentary Privileges Act 1987*, s. 16.

129 Not necessarily to a statutory committee—for example, s. 8F of the *International Monetary Agreements Act 1947* provides that ‘A national interest statement tabled in the Parliament under section 8D shall stand referred for inquiry and report within two months of the reference to the Joint Standing Committee on Foreign Affairs, Defence and Trade constituted under resolutions of the Senate and the House of Representatives’.

130 E.g. Standing Committee on Community Affairs, minutes 5.9.89, 24.7.90; Standing Committee on Transport, Communications and Infrastructure, minutes 27.6.90.

131 E.g. Standing Committee on Banking, Finance and Public Administration reports on annual reports of the Reserve Bank, PP 158 (1994); and of the Insurance and Superannuation Commissioner, PP 174 (1995).

When a matter is referred, a committee would normally formally resolve to accept the reference.¹³² It has been considered that, although a Minister may refer a matter to a committee, a Minister is not able to withdraw a reference from a committee.

Scope of inquiry and procedures

The standing or sessional orders or resolution of appointment define the nature and limits of the authority delegated to each committee by the House. They contain the committee's terms of reference and powers and may contain directions which the House wishes to give, for example, in relation to procedures. A resolution may modify or extend the provisions of the standing orders and in these cases it is standard practice to include the following paragraph:

That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

Change to scope of inquiry or procedures

The standing orders provide that the original resolution of appointment of a committee may subsequently be amended by the House by way of instruction.¹³³ However, this method has never been used and amendments have usually been initiated directly or indirectly by the committee itself. Normally a committee seeks an amendment through the Leader of the House or the Minister associated with the committee's field of inquiry. If the proposed amendment has the Government's support, the Leader of the House or the responsible Minister then moves for its adoption by the House.¹³⁴ It is rare for the chair of the committee to move such an amendment.¹³⁵ Motions for controversial or unusual amendments have occasionally been preceded by the tabling of a special report by the committee in which the need for the amendment has been explained.¹³⁶ Amendments have included extension of time for reporting,¹³⁷ alteration of quorum size,¹³⁸ extension of powers,¹³⁹ change in the number of Members,¹⁴⁰ and extension of the terms of reference.¹⁴¹

Obtaining evidence

Invitation of submissions

It needs to be stressed that most witnesses, far from needing to be compelled to give evidence, welcome the opportunity to do so. Soon after subjects are adopted for inquiry, committees usually advertise their terms of reference and their desire to receive submissions from interested individuals or organisations. In addition, letters inviting submissions may be sent directly to those who are thought to have a special interest or expertise in the field under investigation. It is completely within a committee's discretion

132 E.g. Standing Committee on Transport, Communications and Infrastructure, minutes 24.11.93.

133 S.O. 302.

134 VP 1974–75/380 (change in number of Members appointed to Select Committee on Specific Learning Difficulties); VP 1993–95/131 (amendment of resolution of power of Joint Committee on Corporations and Securities).

135 VP 1920–21/377 (time of reporting extended for Select Committee on Sea Carriage).

136 VP 1954–55/225 (special report from the Committee of Privileges seeking power for committee to investigate matters not referred to it by the House) *see also* 'Resolution of appointment of the Committee', *Special Report by the Joint Committee on the Parliamentary Committee System*, PP 78 (1976) 5, which sought power to retain as chair the chair of the committee in the previous Parliament (the report was not adopted by the House).

137 VP 1983–84/156; 1985–87/764, 886; VP 1993–95/2058.

138 VP 1987–89/123.

139 VP 1974–75/358.

140 VP 1987–89/123.

141 VP 1983–84/124; 1985–87/87, 675.

to decide whether or not a person who has lodged a submission should be invited to appear as a witness. When persons give oral evidence their examination is usually substantially based on their written submissions, although it is not considered that committee members must confine their questions to matters dealt with in submissions. Sometimes oral evidence is thought unnecessary and no invitation is issued. (See page 646 for further commentary on submissions and exhibits.)

Sometimes, depending on the particular circumstances, a person who has not lodged a written submission is granted the opportunity to give evidence at a hearing. Committees need to have some knowledge of the nature of evidence to be presented so that they can determine in advance, for example:

- whether the prospective witness is acting in good faith;
- whether the evidence is likely to be relevant and/or useful in the inquiry;
- what lines of questioning they would like to adopt; and
- whether the evidence should be taken in camera.

Occasionally committees have sent questionnaires to appropriate organisations and used the responses to these questionnaires to form the basis for questioning at hearings. In 1971 the Select Committee on Pharmaceutical Benefits issued a questionnaire to manufacturers who co-operated with the committee after satisfactory arrangements had been negotiated to ensure security of the responses. The Standing Committee on Expenditure frequently obtained information from departments and authorities by questionnaire.¹⁴²

Compulsory attendance

If a person declines an invitation to give evidence, a committee invested with power to send for persons, papers and records may issue a summons, signed by the committee secretary, ordering the person to attend before it and to bring such documents as the committee specifies.¹⁴³ The form of the summons is not prescribed by standing orders or by statute.

It appears to have been the practice of committees established in the early years of the Parliament to issue what were called ‘summonses’ to prospective witnesses, whether or not they had shown any reluctance to appear. Contemporary practice is for prospective witnesses to be invited to attend on the committee. The Procedure Committee has proposed the adoption of the following provision:

A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.¹⁴⁴

In 1963 the Joint Select Committee on Parliamentary and Government Publications summonsed two witnesses to appear before it. The witnesses were required to give evidence in relation to alleged threats to a witness because of evidence he had given to the committee. Each summons, which was signed by the clerk to the committee (i.e. committee secretary), showed the full name, designation and address of the person being summonsed. In a further case a witness, while willing to give evidence before a particular committee, was concerned that the type of evidence that he would give might affect his future employment prospects. On that basis the witness was concerned that it

¹⁴² PP 244 (1977) 16–17.

¹⁴³ S.O. 362; *May*, 22nd edn, p. 646.

¹⁴⁴ *Committee Procedures for Dealing with Witnesses*, PP 100 (1989). Recommendation repeated PP 91 (1998).

should not appear as if he was appearing of his own volition. Accordingly the committee resolved to assist the witness by summoning him to appear before it.

On relatively rare occasions, committees intent upon obtaining evidence from particular individuals or organisations reluctant to provide it have drawn attention to their powers to compel the giving of evidence and to the possibility that failure to comply with their orders might be dealt with as a contempt of the House. This approach has successfully avoided the necessity of resorting to the issue of a summons.

It is unlikely that the House would take any action against, or in relation to, a recusant witness until that witness had refused or neglected to obey a formal summons. Failure to accept an invitation or request to appear before a committee could not be interpreted as a failure to obey an order of the committee. This view was supported by the Attorney-General in 1951 when the Senate Select Committee on National Service in the Defence Force reported to the Senate the failure of the Chiefs of Staff of the armed services and other specified officers of the Commonwealth service to appear before it (*see* p. 644).¹⁴⁵

In 2000 a witness was summonsed to appear before the Joint Standing Committee on Electoral Matters after he had been invited and had agreed to appear at a public hearing, but had failed to appear. The witness also failed to appear in response to the summons. However, he contacted the committee secretariat to explain his reasons for not attending, and appeared before a subsequent public hearing, and the committee did not take the matter of the failure to respond to the summons further.¹⁴⁶

Witness in prison

There is no longer an explicit House standing order relating to a witness in custody. According to *May*, when a witness is in prison, the person responsible for the prisoner's custody may be directed by warrant issued by the Speaker to bring the witness to be examined.¹⁴⁷ If a joint committee were to require a witness to be brought from prison, it would appear to be desirable that the warrant be issued jointly by the Speaker and the President. In 2000 a witness serving a sentence appeared before a joint committee, but she did so voluntarily and with the co-operation of the prison authorities.

Answers to questions, provision of information

A committee may demand that witnesses answer questions. *May* states that witnesses are bound to answer all questions put to them and cannot be excused on grounds such as that:

- they may become subject to a civil action;
- they have taken an oath not to disclose a matter;
- a matter was a privileged communication (for example by a client to a solicitor);
- they have been advised that they cannot answer without the risk of incriminating themselves or being exposed to a civil suit; or
- they would be prejudiced as defendants in pending litigation.

It is acknowledged that some of these grounds would be accepted in a court of law. Section 10 of the *Evidence Act 1995* provides that that Act does not affect the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament. It is also noted that a witness cannot refuse to produce documents in his or

¹⁴⁵ S. Deb. (8.3.51) 155–7.

¹⁴⁶ H.R. Deb. (6.2.2001) 23906–7.

¹⁴⁷ *May*, 22nd edn, p. 647. *See also* Senate S.O. 180; former House S.O. 361; *Parliamentary Privileges Act 1987*, s. 14, and 'Bankstown Observer (Browne/Fitzpatrick) Case' in the Ch. on 'Parliamentary privilege'.

her possession on the ground that they are under the control of a client who has given instructions that they not be disclosed without the client's authority.¹⁴⁸

As a committee may only exercise compulsive powers in relation to matters which the House has delegated to the committee by way of its terms of reference, a witness may object to a question on the grounds that it is outside the committee's terms of reference or that the terms of reference are outside the House's constitutional powers.

If a witness objects to a question the committee may, and frequently does, exercise its discretion in the witness's favour. If the objection is overruled, the witness is required to present the oral or documentary evidence required. Failure to provide such evidence may be reported to the House and the witness may be punished for contempt.

The Standing Committee on Procedure has proposed the adoption of the following provisions:

The Chair of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.

Where a witness objects to answering any question put to him or her on any ground, including the grounds that it is not relevant, or that it may tend to incriminate him or her, he or she shall be invited to state the ground upon which he or she objects to answering the question. The committee may then consider, in camera, whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination, and of the reasons for it, and shall be required to answer the question in camera, unless the committee resolves that it is essential that it be answered in public. Where a witness declines to answer a question to which a committee has required an answer, the committee may report the facts to the House.¹⁴⁹

(See also comments at p. 631 about statutory secrecy provisions.)

In 1982 the Joint Committee of Public Accounts summonsed the Commonwealth Crown Solicitor to appear before it with a number of files the committee considered would be pertinent to an inquiry. The Crown Solicitor refused to produce the documents sought by the committee, and in answer to a question without notice the Attorney-General stated that the reason the Crown Solicitor would not produce the documents was on the ground of legal professional privilege.¹⁵⁰ On the following day the chair of the committee, by leave, made a statement to the House to the effect that the Commonwealth Crown Solicitor's claim was inappropriate. In addition, the chair incorporated a legal opinion supporting the committee's argument and the chair also drew attention to the Greenwood and Ellicott paper which stated:

It also follows from the wide powers which committees can exercise that, if ordered to produce a document which contained communications which were privileged before Courts of law (e.g. between solicitor and client), a person would be in contempt if he did not do so.

Although these privileged communications are usually respected by committees, committees are not restricted in the same way as the Courts.¹⁵¹

Committees have at times had to negotiate with witnesses who were reluctant to provide specified evidence. The success of committees in such negotiations has been largely due to them being able to draw attention to their undoubted powers and the means by which they may be enforced.

In 1975 a witness representing his employer before the Standing Committee on Road Safety indicated that a document sought by the committee would be provided only on

148 *May*, 22nd edn, p. 651.

149 *Committee Procedures for Dealing with Witnesses*, PP 100 (1989). Recommendation repeated PP 91 (1998).

150 H.R. Deb. (19.10.82) 2163.

151 PP 168 (1972) 33.

the condition that it be kept confidential. The committee was not prepared to give that undertaking as it believed it to be in the public interest that the document be published. The witness persisted in his refusal. The committee resolved to call for the document pursuant to its power to call for persons, papers and records. The committee secretary, on the committee's authority, wrote to the managing director of the company acquainting him of the circumstances and drawing his attention to the committee's resolution. The managing director was informed that, if the document requested was not provided within seven days of the date of the secretary's letter, the secretary would have no alternative but to implement the committee's resolution and summons him to appear before the committee with the document. The document was subsequently provided and was published in the committee's report.¹⁵²

The Procedure Committee has proposed the adoption of the following resolution to be observed by committees:

Where a committee desires that a witness produce documents or records relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents or records be produced shall be made (whether or not an invitation to produce documents or records has previously been made) only where the committee has made a decision that the circumstances warrant such an order.¹⁵³

Evidence from Commonwealth public servants

In 1989 a government paper entitled *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* was presented to the House.¹⁵⁴ This paper set down similar guidelines to those originally presented in 1978 and updated in 1984.¹⁵⁵ As the title suggests the guidelines are intended to provide general guidance, and not inflexible rules to cover every possible contingency. Basically their purpose is to assist Commonwealth public servants appearing before parliamentary committees, by informing them of the principles they are required by the Government to follow. However, the guidelines state that they must be read in conjunction with relevant parliamentary and statutory provisions.¹⁵⁶

The guidelines set out the Government's views on matters such as: attendance at committee hearings; the Government's expectations in the content of submissions; privilege considerations; aspects which might give rise to claims for public interest immunity; publication provisions; means of correcting evidence; and discretions relating to the extent to which the guidelines are applied.

Whilst these guidelines have not been accepted or endorsed by either House, they were issued after consultation with parliamentary staff and may be regarded as an attempt to assist government personnel and the Parliament by setting down the basic position of the Executive on a wide range of detailed matters connected with the operations of committees.

In 1969 the Joint Committee of Public Accounts set down its practice on questions to public servants about government policy. This practice, while to some extent reflecting the particular concerns of a Public Accounts Committee, nevertheless represents a sensible balance between meeting the needs of most investigatory committees and recognising the role and responsibility of public servants. The joint committee said:

¹⁵² PP 156 (1976).

¹⁵³ *Committee Procedures for Dealing with Witnesses*, PP 100 (1989). Recommendation repeated PP 91 (1998).

¹⁵⁴ The guidelines were incorporated in Hansard, H.R. Deb. (28.11.89) 3011–22. The guidelines were being revised in 2000–01.

¹⁵⁵ VP 1987–89/1662. The guidelines were being revised in 2000–01.

¹⁵⁶ Guidelines, paras. 2–3.

This Committee does not examine public servants on matters of Government policy. The understanding of Government policy, however, is itself essential to the effective operation of the Committee during specific inquiries as the Committee is concerned with the administrative out-workings of such policy. In these circumstances, the Committee has normally proceeded on the basis of asking public servants to outline for it the particular policy of the Government which is being administered by them. It does not ask public servants, however, to comment on the adequacy of such policies. It is not unusual to find that in the implementation of Government policy, departments and authorities develop administrative policies. In the past, the Committee has regarded this type of policy as within its purview and has examined public servants in the administrative policy field.¹⁵⁷

This practice is acknowledged in the 1989 government guidelines.

The Standing Committee on Procedure has recommended the adoption of the following provision to be observed by committees of the House:

A departmental officer shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of him or her to superior officers or to the appropriate Minister.¹⁵⁸

(See also 'Public interest immunity' at p. 642.)

Evidence from State public servants and State Members

State public servants have appeared before House and joint committees in response to an invitation. The need to have due regard to the position and responsibilities of State and Territory Governments is recognised. Most recent practice has been for committee chairs to write to the relevant State or Territory Premiers or Chief Ministers seeking co-operation with inquiries. Subsequently contact may occur at officer level. Co-operation is usually forthcoming but in some cases State Governments have been seen as unhelpful because of either refusal to co-operate or failure to contribute to an inquiry.¹⁵⁹

As with Commonwealth officials it is accepted practice that State officials will not be asked to comment on government policy. In fact, State authorities have often insisted on agreement to this condition before permitting their officials to give evidence. Requests for personal appearances before committees by State officers are usually directed to the relevant Minister, unless a contact officer has been nominated, and adequate notice of the need for attendance is given.

The question of State public servants being compelled to give evidence before committees of the House of Representatives poses special problems, as constitutional issues are added to those relating to the role and responsibilities of government officials.

As noted at page 628, it is unclear in law as to whether the Commonwealth Houses and their committees have the full investigatory powers of the House of Commons or whether they are limited to those matters on which the Commonwealth Parliament may legislate. If the latter were the case, committees of the House could not expect that any demand that witnesses attend before them and give evidence on matters outside these constitutional limits could be enforced; beyond those limits evidence could be sought only on a voluntary basis from any person, including State Ministers and officials.

No committee of the Commonwealth Parliament has been prepared to summons a State public servant or Minister to give documentary or oral evidence which they have been unwilling to provide. If such a summons were issued, a State Government could seek to challenge it in the High Court or simply claim public interest immunity. In the

¹⁵⁷ *Joint Committee of Public Accounts, 114th Report*, PP 162 (1969) 3.

¹⁵⁸ *Committee Procedures for Dealing with Witnesses*, PP 100 (1989). Recommendation repeated PP 91 (1998). The recommendation had not been adopted formally at the time of publication, but in practice committees operate on this basis.

¹⁵⁹ 'Lack of co-operation by the Queensland Government', *House of Representatives Standing Committee on Aboriginal Affairs*, PP 282 (1982); 'Telecommunications interception, dated 20 November 1986, incorporating dissenting report', *Joint Select Committee on Telecommunications Interception*, PP 306 (1986).

highly unlikely event of either House of the Commonwealth Parliament attempting to deal with a State Minister or Government for contempt, the matter would appear to be one to be decided by the High Court.

In 1953 the Parliamentary Standing Committee on Public Works sought the Solicitor-General's advice as to its power to summons a State official to give evidence before it. The Solicitor-General considered the matter so doubtful that the advice given was against making a test case by summoning a State officer.¹⁶⁰ The relevance of this opinion to the powers of other committees is unclear as the Public Works Committee derives its power from statute, whereas committees appointed by resolution or pursuant to standing or sessional orders, given the appropriate authority, enjoy the powers of committees of the House of Commons as at 1901 by virtue of section 49 of the Constitution.

In light of the unclear constitutional situation, a committee would be wise not to assume it would be found to have authority to summons State officials or State Ministers to provide oral or documentary evidence, where such persons have not provided material requested. Advice can be sought in particular cases, and this was done in 1982 when the Standing Committee on Aboriginal Affairs was concerned over what it regarded as a lack of co-operation by a State Government in two of its inquiries. The committee sought the Attorney-General's advice, which confirmed that the committee did not have the power to require the attendance of State officers. If the resolution of appointment of the committee was to be amended to give the committee this power, then the Attorney-General's advice was that serious constitutional questions would arise. The committee felt that it was being hampered in making worthwhile recommendations and it reported its view that the State Government deserved strong condemnation for its lack of willingness to co-operate with the committee.¹⁶¹

During the course of an inquiry into the Australian Loan Council in 1993 a Senate select committee sought to receive evidence from five Members of State Parliaments. The committee recommended in a special report that the Senate ask the State Houses involved to require the attendance of the Members in question. The Senate passed such a motion.¹⁶² *Odgers* reports that the Houses of the Victorian Parliament did not agree to require their Members to attend, but gave leave for them to appear if they thought fit and the Legislative Assembly of New South Wales accepted a statement by its Speaker that it did not have the power to compel its Members to appear before the committee.¹⁶³ In the event none of the Members listed in the motion gave evidence.¹⁶⁴

Evidence from Members, Senators and parliamentary officers

Members or Senators may appear as witnesses before committees of the House. If a Member, including a Minister, volunteers to appear before a House committee the Member may do so and does not need to seek leave of the House. Ministers, including a Prime Minister, have appeared before committees of the House, and Ministers have briefed general purpose standing committees at the commencement of inquiries.

May states:

160 Opinion by Solicitor-General, to the Secretary of the Parliamentary Standing Committee on Public Works, dated 16 September 1953.

161 VP 1980-83/1161; PP 282 (1982).

162 J 1993-95/565-6. The resolution also requested the House of Representatives to require the Commonwealth Treasurer's attendance, see p. 641.

163 *Odgers*, 9th edn, pp. 429-30.

164 PP 449 (1993).

A Member who has submitted himself to examination without any order of the House is treated like any other witness.¹⁶⁵

If a committee desires a Member to appear as a witness, the chair must request in writing the attendance of the Member. If the Member refuses to attend or to give evidence or information as a witness, the committee is required to acquaint the House of the circumstances and may not summon the Member again to attend the committee.¹⁶⁶ It is then for the House to determine the matter. These procedures have never had to be implemented in the House of Representatives. In appearing before the Committee of Privileges, Members (and Senators) have been required to swear an oath or make an affirmation and have been dealt with in the same manner as other witnesses.¹⁶⁷

In 1920 a Senator of his own volition sought consent of the Senate to appear before a House of Representatives committee. The Senate, by motion, granted the Senator leave to attend and give evidence to the committee if he thought fit.¹⁶⁸ However, in 1973 and 1976 Senators appeared before the House of Representatives Standing Committee on Environment and Conservation without seeking leave of the Senate. Their appearance was at their own request.

There have been several instances of Members of the House who have appeared, as Ministers, before Senate committees.¹⁶⁹ In 1981 the Speaker appeared voluntarily before the Senate Select Committee on Parliament's Appropriations and Staffing. In the same year the chair of the Senate Standing Committee on Finance and Government Operations wrote to a former Minister regarding an apparent conflict in evidence given to the committee during the course of its inquiry into the Australian Dairy Corporation and its Asian subsidiaries.¹⁷⁰ The former Minister, who at the time had another portfolio, wrote to the committee. There was still a discrepancy between the sworn evidence of one witness and the recollections of the Minister as expressed in the letter. As a result of further correspondence the Minister made a personal explanation in the House of Representatives. During the course of this personal explanation the Minister stated:

I do not believe it appropriate that a Minister of this House should appear and give sworn evidence before a committee of the other House.¹⁷¹

A copy of this personal explanation was forwarded to the committee and the chair made a statement to the Senate shortly afterwards.

Standing orders of both Houses set down procedures to be followed if a member of the other House is to be called to give evidence before a committee. If a committee of the House wishes to call before it a Senator who has not volunteered to appear before it as a witness, a message is sent to the Senate by the House requesting the Senate to give leave to the Senator to attend for examination.¹⁷² Upon receiving such a request the Senate may authorise the Senator to attend.¹⁷³ In 1901 the Senate ordered that a Senator have leave to give evidence before the Select Committee on Coinage if that Senator thought fit¹⁷⁴ and, in response to a request from the House of Representatives,¹⁷⁵ the

165 *May*, 22nd edn, p. 648.

166 S.O. 363.

167 PP 77 (1994) 3.

168 J 1920–21/153; S. Deb. (15.9.20) 4531.

169 *Odgers*, 6th edn, pp. 871–2, and 9th edn, pp. 428–9.

170 'The Australian Dairy Corporation and its Asian subsidiaries', *Senate Standing Committee on Finance and Government Operations*, PP 153 (1981) 149–51, 166.

171 H. R. Deb. (7.5.81) 2110.

172 S.O. 365; e.g. VP 1993–95/596; VP 1998–2001/2075.

173 E.g. J 1993–95/1077–8.

174 VP 1901–02/109, 113; J 1901–02/88.

175 VP 1985–87/1365; VP 1993–95/596.

Senate granted leave to authorised Senators to attend and give evidence before the House of Representatives Committee of Privileges.¹⁷⁶ The Senators appeared and gave evidence having sworn oaths/made affirmations.¹⁷⁷

The same procedures are followed if an officer of the Senate is to be requested to give evidence.¹⁷⁸ Upon receiving such a request the Senate may authorise the officer to attend the committee.¹⁷⁹ If a Senate committee were to formally seek the attendance before it of an officer of the House,¹⁸⁰ the House could instruct its officers to attend the Senate or any Senate committee.¹⁸¹

Using similar procedures to those followed by the House,¹⁸² the Senate has requested that Members of the House be given leave to attend and be examined by Senate committees. The House has several times resolved to grant such leave to Members, adding the qualification that the Member may attend and give evidence if the Member thinks fit.¹⁸³ In 1913 the House considered a request from the Senate that six named Members, including the Prime Minister, be granted leave to be examined as witnesses before the Senate Select Committee on General Elections. On motion moved by the Prime Minister, the House resolved to grant such leave only to three of the Members, all of them opposition Members. The Prime Minister explained that the three government Members whose attendance had been requested were not included in the motion because they did not desire to attend.¹⁸⁴ After the receipt of the message from the House was announced in the Senate, the President stated in answer to a question:

The Senate sent a request to the House of Representatives; but it is no part of our duty, nor have we any right to dictate to the House of Representatives as to what it should or should not do. We have no right to ask it to give reasons as to why it has complied with a part and not the whole of our request.¹⁸⁵

A similar request for the attendance of Members before another Senate committee was received later on the same day and was dealt with in the same manner.¹⁸⁶

In 1993 the Senate requested the House to require the attendance of the Treasurer before a Senate select committee.¹⁸⁷ The request was considered by the House, but rejected, in the following terms:

That the House of Representatives . . . :

- (a) notes that the Senate's request that the House require the attendance of a Member of the House before a committee of the Senate does not conform with the practice of requesting the House to give leave for a Member to attend;
- (b) resolves that it is not appropriate that a Minister of this House should appear and give evidence before a committee of the Senate against the Minister's will;
- (c) further resolves that it is not appropriate that any Member of the House of Representatives be required to appear before a committee of the Senate against the Member's will;
- (d) confirms that it is for each Member to determine whether the Member thinks fit to appear before a committee of the Senate; and

176 VP 1985–87/1430; H.R. Deb. (17.2.87) 147; J 1993–95/1077–8.

177 E.g. PP 77 (1994) 3.

178 S.O. 365.

179 Senate S.O. 179.

180 Senate S.O. 178.

181 S.O. 366.

182 Senate S.O. 178.

183 S.O. 366; VP 1904/100, 114; VP 1909/189.

184 VP 1913/130; H.R. Deb. (31.10.13) 2830–1.

185 S. Deb. (31.10.13) 2824.

186 VP 1913/134; H.R. Deb. (31.10.13) 2843.

187 J 1993–95/565–6.

(e) declines to require the Honourable John Dawkins MP to attend before the Senate Select Committee on the Functions, Powers and Operation of the Australian Loan Council.¹⁸⁸

In 1901 the House granted a Member leave, if he thought fit, to attend and be examined by a select committee of the Victorian Legislative Assembly.¹⁸⁹

In 1975 the Joint Committee on the Parliamentary Committee System formally sought the agreement of the Clerk of the House to the appearance before it of two officers of his department. It was noted that the standing orders concerning the appearance of parliamentary officers before committees were always interpreted liberally. Formal approval was sought in this case because the officers concerned sought to present personal views rather than to speak on behalf of the department. The Clerk gave his approval.

In 1971, at the request of the Committee of Privileges, the Clerk Assistant and the Serjeant-at-Arms appeared before the committee to give their account of the proceedings referred to in the article in the *Daily Telegraph* which had been referred to the committee for examination.¹⁹⁰ In 1973 the Secretary of the Joint Committee on Prices appeared before the Committee of Privileges and in 1987 members of a select committee secretariat gave evidence to the committee. In 1978 the Clerk of the House and the Serjeant-at-Arms appeared before the Senate Committee of Privileges to give evidence in relation to the security of Parliament House.¹⁹¹ The Clerk and other officers have appeared informally before the Broadcasting Committee and the Procedure Committee to discuss matters being considered by the committee.¹⁹² At the request of the Standing Committee on Community Affairs, the Assistant Secretary (Committees) appeared at a public hearing of the committee in 1995 in relation to its inquiry into migrant access and equity.¹⁹³

Public interest immunity

The Executive Government may seek to claim immunity from requests or orders by a committee for the production of certain oral or documentary evidence on the grounds that the disclosure of the evidence would be prejudicial to the public interest. (More general aspects of the doctrine of ‘public interest immunity’, sometimes described as ‘crown privilege’, are covered in the Chapter on ‘Papers and Documents’.)

The Government’s strong position

Commonwealth public servants appearing before committees as private individuals to give evidence unrelated to their past or present duties as public servants, are bound by orders of a committee. They are open to the same penalties as any other citizen if they do not obey. While in principle they are equally bound when summoned to give evidence relating to their official duties, in practice their position is somewhat different. This is particularly so with respect to failure or refusal to answer a committee’s questions. They may, under certain circumstances and on behalf of their Minister, claim public interest immunity. It is doubtful, however, whether a public servant, even on instructions from a

188 VP 1993–95/342–3.

189 VP 1901–02/149.

190 ‘Article published in *Daily Telegraph*, 27 August 1971’, *House of Representatives Committee of Privileges*, PP 242 (1971) 39–45.

191 ‘Appropriate means of ensuring the security of Parliament House’, *Report of Senate Standing Committee of Privileges*, PP 22 (1978).

192 E.g. PP 364 (1994), PP 108 (1995) and PP 158 (2000).

193 PP 24 (1996) 130.

Minister or the Government, could refuse or fail to obey a summons to attend before a committee.¹⁹⁴

The Joint Committee on the Parliamentary Committee System reported that the application of the rules of public interest immunity was ‘one of the most vexed questions of committee procedure’. It concluded:

Notwithstanding the authoritative literature and knowledge of the application of the rule in other Commonwealth Parliaments the Committee finds itself unable to offer any clarification of the rules.¹⁹⁵

Public interest immunity in relation to parliamentary proceedings involves the following considerations:

- the belief that the House’s power to require the production of documents and giving of evidence is, for all practical purposes, unlimited;
- the view that it would be contrary to the public interest for certain information held by the Government to be disclosed; and
- the fact that the Government, by definition, has the support of the majority in the House and, in practice, on its committees.

There is obvious potential for Governments, by use of their strong position in this regard, to undermine the efforts of the House and its committees to call Governments to account. The Joint Committee on the Parliamentary Committee System commented:

It is clear that crown privilege is relied on by governments to protect themselves. The protection of the confidentiality of advice to Ministers or security matters is a shield behind which witnesses sometimes retreat.¹⁹⁶

Government guidelines

The principles upon which Governments have proceeded to deal with public interest immunity were summarised by Greenwood and Ellicott. They drew on two documents in particular, namely, a letter of November 1953 to the Joint Committee of Public Accounts from the Prime Minister and a letter of September 1956 from the Solicitor-General to the Senate Regulations and Ordinances Committee.¹⁹⁷ These principles have been substantially incorporated in the Government’s *Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*. Key points in the guidelines include the following:

- the privilege involved is not that of the witness but that of the Crown;
- if a witness attends to give evidence on any matter in which it appears that issues of public interest immunity may be concerned, the witness should endeavour to obtain instructions from a Minister beforehand as to the questions, if any, which the witness should not answer;
- if questions arise unexpectedly in the course of an inquiry, the witness should request postponement of the taking of evidence to enable the Minister to be consulted;
- if the Minister decides to claim immunity, normally the Minister should write to the committee chair to that effect;

194 See Campbell, ‘Parliament and the Executive’, in Leslie Zines (ed), *Commentaries on the Australian Constitution*, Butterworths, 1977, p. 100.

195 ‘A new parliamentary committee system’, *Report from the Joint Committee on the Parliamentary Committee System*, PP 128 (1976) 87.

196 PP 128 (1976) 87.

197 Both are quoted in full in *Odgers*, 6th edn, pp. 830–44.

- should the committee regard information about which a claim for public interest immunity may be made as necessary, consideration should be given to agreeing on a means of making it available in some other form, such as in camera evidence; and
- before deciding whether to grant a certificate, the Minister should carefully consider the matter in the light of the relevant principles.¹⁹⁸

It needs to be emphasised that the fourth point, regarding a letter from a Minister to a committee, simply recognises that it is the Minister, not an officer, who may claim public interest immunity. In this respect it therefore represents sound practice. However, as already indicated, a committee may negotiate further with a Minister¹⁹⁹ or the Prime Minister. Ultimately it is, in principle, open to the committee to challenge the Minister's claim in the House by raising the Minister's or the Government's behaviour as a contempt of the House.²⁰⁰

Committee practice

The reality of the Government's effective capacity to refuse to disclose information or documents to the House or its committees, no matter how important they might be for an investigation, is not lost on Members. Neither the House nor the Senate has ever persisted in its demands for government documents or oral evidence to the point where a charge of contempt has been laid.

In 1951 the Government directed that the Chiefs of Staff of the armed forces and other officials should not attend before a Senate select committee inquiry into national service. The grounds upon which the Government based its direction are of interest. In the first instance the Prime Minister indicated that permanent officers of the armed services or the public service should not be expected to comment on government policy, and that they would have no alternative but to claim privilege if such opinions were sought. He therefore saw little purpose in their attendance. The committee chair responded to the Acting Prime Minister that the committee was primarily concerned with factual evidence, not with comment and opinions on government policy, and that it would therefore invite the officials to give evidence. After the officials had received letters inviting them to attend to give evidence the Acting Prime Minister informed the committee that Cabinet considered the officials' participation in the inquiry 'would be against the public interest'. He stated further:

It is quite impossible to draw the line between what your Committee may call "factual" and what is "policy", and it should not be for any official or for the Committee, in the view of the Government on matters which may touch security, to decide whether it is either one or the other.²⁰¹

The failure of the committee to summons the officials was not mentioned but the Attorney-General subsequently referred to it in debate.²⁰²

In its report to the Senate the committee acknowledged that it was for the Senate itself to decide on any action to be taken. The committee, nevertheless, drew attention to established practice that neither House of the Parliament could punish any breach or contempt offered to it by any member of the other House. It recommended therefore that in so far as House of Representatives members of Cabinet were concerned, a statement

¹⁹⁸ PP 168 (1972) 37–8.

¹⁹⁹ See for example efforts by the Joint Committee on Migration Regulations to gain access to departmental information and the compromise whereby the committee chair and deputy chair were given access to the papers. Committee minutes of proceedings 19.7.90, 4.9.90, 18.10.90.

²⁰⁰ And see Senator Greenwood's later view on the conclusiveness of a Minister's certificate, PP 215 (1975) 51.

²⁰¹ S 2 (1950–51) 8.

²⁰² S. Deb. (8.3.51) 154–7.

of the facts should be forwarded to that House for its consideration. As to the Senate members of Cabinet the committee recommended:

... if the Senate decides that a breach of privilege has been committed, the action to be taken by the Senate should be aimed at asserting and upholding the cherished principle of the right of the Senate to the free exercise of its authority without interference from the Cabinet.²⁰³

The special report was presented to the Senate and a motion for its adoption was moved.²⁰⁴ The debate on the motion was not concluded when the Senate was dissolved on 19 March 1951. As the matter was not revived the issues were left unresolved. It could be argued, as the committee did, that the failure to issue a summons was not the central issue, as this was not given as a ground for the Government's refusal to permit the officers to attend.

Significant factors in the case were that the committee consisted entirely of opposition Senators, and also that the Opposition held a majority in the Senate at the time. If this had not been so, it can be surmised that events would have been very different—indeed the committee may not have been appointed. The case perhaps best illustrates the importance of party-political realities in any consideration of parliamentary access to information held by the Government.

In 1975 the Senate Committee of Privileges reported on the refusal of officials, at the direction of the Government, to give oral or documentary evidence at the Bar of the Senate on the Whitlam Government's overseas loans negotiations. The committee divided on party lines.²⁰⁵

In 1967 the Joint Committee on the Australian Capital Territory requested the Department of the Interior to produce all relevant papers in connection with applications to subdivide rural land in the Australian Capital Territory and certain acquisitions. The department, on the advice of the Attorney-General, replied:

Advice now received is that the Minister can properly object to produce to a Parliamentary Committee Departmental documents that disclose the nature of recommendations or advice given by officials, either directly to Ministers or to other officials, in the course of policy making and administration. If it were otherwise, there would be a danger that officials would be deterred from giving full and frank advice to the Government.

On the basis of this advice, the Minister has personally considered what documents should be given to your Committee; he has decided that he must object to the production of documents to the Committee that represent recommendations or advice given or to be given to the Government by public officials, for the reason that these are a class of document which it would be contrary to the public interest to disclose.

However, documents that do not come within this category and are relevant to the matters mentioned in your letters of 28th and 30th November, are produced for the Committee's examination. These papers provide the factual information requested by the Committee.²⁰⁶

The committee did not press for the other papers requested.

While objections by officials to presenting certain evidence have sometimes been readily accepted, the evidence has at times been so important that a committee has persisted. This persistence has taken the form of requiring the witness or prospective witness to consult with the departmental secretary or Minister, or of the committee or its chair negotiating with the departmental secretary or the Minister.

In 1977 a subcommittee of the Standing Committee on Expenditure was able to obtain important information, initially refused, after the chair talked to a witness's

203 S 2 (1950–51) 16.

204 J 1950–51/215, 220.

205 'Matters referred by Senate resolution of 17 July 1975', *Report of Senate Standing Committee of Privileges*, PP 215 (1975).

206 Letter from the Secretary, Department of the Interior, dated 21 December 1967.

superior officer who in turn sought the Minister's approval. No objection was raised to the committee's subsequent publication of the evidence. The same committee was unsuccessful in certain other attempts to obtain information from the Government and brought this to the attention of the House in a report describing its first year of operation. The committee indicated that the Prime Minister had refused to provide it with two sets of documents, even on a confidential basis, on the ground that they were internal working documents. Attention was drawn to the fact that the documents would have helped the committee to determine which matters under investigation it should concentrate upon and in turn would have enabled it to use its limited resources to greater advantage. The committee urged Governments, if necessary, to find ways of minimising restrictions on information to be made available to committees, for example, by providing documents with offending material removed.²⁰⁷ This latter course has in fact been followed on occasions.

The subject of relations between committees and the Executive arose in 1992–3 in respect of a Senate select committee inquiry into the Australian Loan Council. This case is referred to at pages 639 and 641 in relation to evidence from State Members and Members of the House. In 1994, in relation to a Senate select committee inquiry concerning the print media, the Treasurer instructed officials not to give evidence or to provide certain documents to the committee.²⁰⁸

The course mostly followed by committees in an attempt to circumvent the possibility of public interest immunity being claimed is to undertake to treat oral or documentary evidence as confidential. This confidentiality can create difficulties when the committee comes to drafting its report, for it runs the risk of publishing conclusions and recommendations which on the published evidence may appear unjustified. Apart from this, the public is prevented from drawing its own conclusions on the basis of all the material evidence.

Documentary evidence—additional considerations

Documentary evidence, by its very nature, raises issues which do not arise in the case of oral evidence. These separate issues are considered here.

Submissions and exhibits

The provision of written material to committees is a basic feature of modern practice. There is no fixed form or format for submissions, although it assists if they are in typewritten or printed form. A single page letter and a large elaborately presented document can each be accepted as a submission. Distinguishing features of a submission are that it is:

- prepared for the purposes of presentation to a committee;
- prepared solely for the purposes of the inquiry;
- relevant to the terms of reference of the inquiry;
- sent ('submitted') to the committee; and
- received by it.

There is no obligation on the author of a submission to address the full terms of reference of an inquiry. Comments or information may be provided on one or some

²⁰⁷ PP 244 (1977) 20.

²⁰⁸ *And see Odgers*, 9th edn, pp. 476–7.

aspects only. Submissions may be received electronically, but the submitter must provide a contact postal address.

The protection of parliamentary privilege (for example, in conferring immunity from action for defamation) applies to the preparation of a document for the purposes of or incidental to the transacting of the business of a committee and the presentation or submission of a document to a committee.²⁰⁹ In addition, committees may authorise the publication of submissions, thus conferring privilege on their wider publication. In the absence of such motions submissions remain confidential and any wider publication would not be protected and may give rise to a matter of contempt. In addition, if a committee directs that a submission be treated as evidence taken in camera (*see* p. 659) the provisions of section 13 of the Parliamentary Privileges Act in respect of unauthorised publication are available.

Witnesses are protected by section 12 of the Parliamentary Privileges Act from penalty or injury on account of evidence given or to be given to a House or a committee. For the purposes of the Act the submission of a written statement by a person is, if so ordered, deemed to be the giving of evidence. Because of this, committees may choose at the first available opportunity to resolve to receive submissions they wish to receive. Committees may order that submissions or other documents be returned if they are not considered relevant.²¹⁰

Exhibits are items (most commonly documents) presented to committees or obtained by them during an inquiry—either by being sent in or by presentation during a hearing. 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. Typically, an exhibit would be a copy of a document or record—perhaps held by a person, organisation or department for other purposes but seen as relevant to the inquiry. Sometimes persons may seek to tender as exhibits copies of material published elsewhere. When such material is readily available, there is less point in receiving and retaining it as an exhibit. 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.²¹¹ Sometimes committees have, however, authorised the publication of exhibits.²¹² Committees have sometimes received exhibits as confidential exhibits.²¹³ 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.²¹⁴

Search for documents

Greenwood and Ellicott suggested that it would be within the competence of the House ‘to authorise an officer to search for specified documents or classes of documents in a particular place and order that they be inspected or copied or brought before the House’.²¹⁵ They considered the power to give such an order was conferred on a

209 *Parliamentary Privileges Act 1987*, s. 16.

210 Standing Committee on Finance and Public Administration, minutes 14.11.92.

211 *Parliamentary Privileges Act 1987*, s. 16.

212 Standing Committee on Transport, Communications and Infrastructure, minutes 17.11.94.

213 Standing Committee on Finance and Public Administration, minutes 10.10.91.

214 Standing Committee on Finance and Public Administration, minutes 25.9.91.

215 PP 168 (1972) 31–2.

committee by reason of a power to send for documents. They conceded that this view was arguable and felt that it was a power which should only be used in exceptional circumstances. Even if this power is conferred in the way stated, the most appropriate course of action for a committee faced with a refusal by a witness to produce specified documents would be to acquaint the House of the refusal so that it may make a determination (as with oral evidence²¹⁶). It would be inappropriate for a committee to take direct action to search for a copy or take possession of documents without first informing the House and seeking a determination from it. *May* cites disobedience to or frustration of committee orders for the production of papers as an instance of contempt.²¹⁷

Withdrawal, alteration, destruction or return of documents

No submission received by the secretary of a committee may be withdrawn or altered without the knowledge and approval of the committee.²¹⁸ A submission becomes the property of a committee as soon as it is received by the secretary or by a member of the committee itself. Normally, unless a committee did not wish to receive a submission (for example, on the grounds that it was not relevant to the committee's inquiry—*see below*) the committee would resolve formally to receive written submissions as evidence at an early opportunity.

It is standard practice for committee chairs to ask a witness at a hearing whether the witness wishes to amend his or her submission in any way. Witnesses may use this opportunity to draw attention to inaccuracies or omissions. A committee secretary may not change the substance of a submission at the request of the originator, or on the secretary's own initiative, without the express approval of the committee.

Committees may agree to return documents to witnesses. In 1977 the Standing Committee on Expenditure agreed to return voluminous confidential documents to a department which was concerned about their security. The documents were returned only after the department gave an undertaking that the committee would be granted ready access to them whenever it decided it needed to see them. This action is in accord with the spirit of standing order 39 which states in part:

... on the application of a department any original document laid on the Table, if not likely to be further required by Members, may in the Speaker's discretion be returned to such department.

The Standing Committee on Aboriginal Affairs has returned documents to witnesses on two occasions. In 1984 the secretary received a large number of documents from a witness in the committee's inquiry into the effects of asbestos mining on the Baryulgil community. As the documents arrived after the committee had completed its public hearings and was about to report, the material forwarded was brought to the attention of the committee, but returned to the witness without further investigation. The documents were not admitted into the records of the inquiry and consequently had no status in relation to the inquiry. In 1987 a witness had provided a document to the committee at a public hearing. It was later established that the document was an official document of the Department of Aboriginal Affairs. Having made this discovery the committee requested the document from the department and returned the copy obtained from the witness to the witness. The committee then proceeded to authorise publication of the official departmental copy of the document.

216 S.O. 362.

217 *May*, 22nd edn, p. 110.

218 *May*, 22nd edn, p. 658.

In 1971 the Select Committee on Pharmaceutical Benefits considered destroying highly confidential documents for which it had no further likely use. The committee was advised that caution should be exercised because of problems which might arise if, for example, the House recommitted the committee's report for reasons which related to papers previously destroyed. There is no record in the committee's minutes of any resolution for the destruction of the documents.

It is a sound principle that the House, in considering a committee's report, should have ready access to the evidence upon which the report was based. This would suggest the need for a committee to exercise the utmost caution in considering the destruction of evidence presented to it, even after the House has considered the committee's report.

A committee could resolve to return a submission or other document lodged with it if, for example, the submission was considered irrelevant to the committee's inquiry²¹⁹ or if it contained offensive or possibly scurrilous material. A rejected submission would cease to be the property of the committee and any further circulation of it would not attract privilege. In most circumstances it would be more appropriate for the committee to retain the document, not use it in its deliberations and not authorise its publication. By virtue of standing order 346, the fact that the document has not been published by the committee or, subsequently, by the House would preclude anyone from publishing the document without the risk of being in contempt of the House. Anyone who published a submission which had not been authorised for publication would not have the protection this would confer, and would therefore not be immune from any legal proceedings for such publication. Whether or not qualified privilege would apply is uncertain. It is highly unlikely that the House would give its protection in legal proceedings to a person who had ignored the desire of a committee that a defamatory document remain unpublished.

Sub judice convention

In the case of a matter awaiting or under adjudication in a court of law the House imposes a restriction upon itself to avoid setting itself up as an alternative forum to the courts and to ensure that its proceedings are not permitted to interfere with the course of justice. This restriction is known as the sub judice convention and is described more fully in the Chapter on 'Control and conduct of debate'.

Committees are bound by the convention. The chair of a committee, like the Speaker, may exercise discretion as to whether the convention should apply in a given situation, but the chair must have regard to the principles followed by the Speaker in the House and to the option open to a committee to take evidence in camera, an option which is not readily open to the House.

If a chair decides the sub judice convention should apply to evidence being given, he or she may direct that the line of questioning and evidence be discontinued or that the evidence be taken in camera. A chair would normally wish to consult committee members on such a matter. It would also be open to any other member to require the withdrawal of visitors.²²⁰

If the evidence is taken in camera and it subsequently becomes clear that it does not warrant the application of the sub judice convention, the committee can authorise publication. Equally, a committee may publish such in camera evidence once the possibility of its publication interfering with the course of justice has passed.

219 Standing Committee on Finance and Public Administration, minutes 14.11.90.

220 S.O. 344.

In 1975 a witness before a subcommittee of the Standing Committee on Environment and Conservation sought to give evidence relating to the circumstances of a legal action against him in the High Court. The evidence was taken in camera.²²¹ In the 37th Parliament the Standing Committee on Transport, Communications and Infrastructure conducted an inquiry into aviation safety. At the time of the inquiry a coronial inquest was taking place into one aircraft accident and a judicial inquiry was being conducted into another. Having regard to the sub judice convention, the committee agreed to a resolution that it should take no evidence on either matter unless the resolution was rescinded, and it completed the inquiry without changing this decision.²²² In 2000 care was taken to try to ensure, by taking evidence in camera, that a committee inquiry concerning military justice did not cause any interference with actions being taken within the Defence Forces.²²³

Charges against Members

Unless another committee is so directed by the House, only the Committee of Privileges and the Committee of Members' Interests may inquire into, or make findings in respect of, the conduct of a Member of the House. If a committee other than the Committee of Privileges and the Committee of Members' Interests receives information or an allegation charging a Member, the committee must inform the Member concerned of the details of the charge and give him or her an opportunity to make a statement on the matter to the committee. Unless the committee considers the matter is without substance, it must report the matter to the House and may not proceed further on the information or allegation without being directed by the House to do so.²²⁴

In 1975 a witness before the Joint Committee on Pecuniary Interests of Members of Parliament alleged that a Senator, who was a member of the committee, was ineligible under paragraph 44(v) of the Constitution to serve as a Senator. It was claimed that the Senator was a director, manager, secretary and substantial shareholder in a company which had a number of contracts with Commonwealth government departments. The committee resolved that, in accordance with standing orders, the Senate should be acquainted with the relevant evidence. The chair wrote to the President describing the information brought before the committee and enclosing a copy of the relevant transcript of evidence. The President reported to the Senate, read the committee chair's letter and tabled the letter and transcript of evidence.²²⁵ The Senator was given leave to make a statement in which the allegations were denied and it was indicated that the Senator had resigned from the committee as the nature of the allegations was such as to place in question the Senator's objectivity in dealing with the issues before the committee.²²⁶ The Senate resolved to refer the matter to the High Court of Australia, in its jurisdiction as the Court of Disputed Returns, and to grant the Senator two months' leave of absence.²²⁷ The Court upheld the Senator's eligibility to serve as a Senator.²²⁸

221 A Senate committee in 1973 decided not to take evidence from a witness in similar circumstances, see *Odgers*, 6th edn, p. 361.

222 PP 480 (1995) 5.

223 H.R. Deb. (9.11.2000) 22635–6.

224 S.O. 364.

225 J 1974–75/597.

226 S. Deb. (15.4.75) 981–4.

227 J 1974–75/628–9.

228 For a detailed discussion of pecuniary and personal interest see Ch. on 'Members', and for a more detailed description of the case see *Odgers*, 6th edn, pp. 172–4.

Swearing of witnesses

There are no provisions in the standing orders for the swearing of witnesses. Committees of the House which have the power to call for persons, papers and records have the power to administer an oath to witnesses. This power is derived from the House of Commons by virtue of section 49 of the Constitution and on the basis that the United Kingdom Parliamentary Witnesses Act 1871 empowered the House of Commons and its committees to administer oaths to witnesses and attaches to false evidence the penalties of perjury.²²⁹ There has been some doubt cast on whether joint committees have this power²³⁰ but some, such as the Joint Committee on Foreign Affairs, Defence and Trade, have sworn witnesses. According to *May*, a witness who refuses to submit to an oath may be dealt with by the House for contempt.²³¹

The practice of swearing witnesses has become less common in recent years. Committees may exercise their discretion as to whether they require a witness to take an oath. In some situations it may be regarded by a committee as unnecessary in view of the House's power to punish a witness who gives false evidence even when not under oath. If witnesses are not sworn, the committee should formally warn that the deliberate misleading of the committee may be regarded as a contempt of the House.

A reluctant witness, especially one who has been summonsed, should probably be sworn to impress upon him or her the importance and solemnity of the occasion and to ensure that an obligation to tell the whole truth is understood.

A witness who does not wish to take an oath is given the opportunity to make a solemn affirmation. The oath or affirmation is administered to the witness by the committee secretary. The oath and affirmation used by committees of the House take the following form:

Oath

Secretary: Please take the Bible in your right hand. Do you swear that the evidence you shall give on this examination shall be the truth, the whole truth, and nothing but the truth. So help you God.

Witness: I do. So help me God.

Affirmation

Secretary: Do you solemnly and sincerely affirm and declare that the evidence you shall give on this examination shall be the truth, the whole truth, and nothing but the truth.

Witness: I do.

An oath need not necessarily be made on the authorised version of the Bible. Every witness taking an oath should take it in a manner which affects his or her conscience regardless of whether a holy book is used or not.²³²

Offences by witnesses

Conduct by a witness which improperly interferes with the free exercise by a committee of its authority or functions may be found to constitute contempt of the House. Such an offence may be punished by the House and penalties can include fine

229 Opinion of Solicitor-General, dated 8 August 1941. This view was supported by the Solicitor-General in 1958 in an opinion given to the Senate Select Committee on Payments to Maritime Unions. Greenwood and Ellicott believed there was 'room for doubt' as to whether this was the correct view as the precise limits of section 49 had not been determined, PP 168 (1972) 12.

230 Opinion of Solicitor-General, dated 8 August 1941.

231 *May*, 22nd edn, p. 109.

232 Advice of Attorney-General's Department, dated 16 February 1962, on the swearing in of Members (*see* Ch. on 'Members').

and imprisonment. These matters are discussed in more detail in the Chapter on 'Parliamentary privilege'.

Examples of contempt cited by *May* in relation to witnesses include:

- refusing to answer questions;
- destroying material evidence;
- disobedience to orders for attendance made by committees with the requisite authority;
- disobedience to orders for the production before a committee of papers or other documents;
- prevaricating;
- giving false evidence;
- interrupting or disrupting the proceedings of a committee;
- offering bribes or persuading or inducing another person to procure evidence;
- molestation of witnesses during their evidence in committee;
- refusing to permit books or papers to be inspected when required by order of a committee;
- presenting documents with a view to deceiving a committee;
- wilfully suppressing the truth;
- persistently misleading a committee;
- avoiding or assisting someone else to avoid being served with a summons;
- removing any record or document from the Clerk's custody or falsifying or improperly altering such records or documents;
- arresting or procuring the arrest on civil process of witnesses or other persons summoned to attend a committee while going to, attending or returning from, such committee; and
- refusing to be sworn or to take some corresponding obligation to speak the truth.²³³

Standing order 362 specifically provides that if a witness who is summonsed fails or refuses to attend before a committee, or to give evidence before it, the committee may draw the circumstances to the attention of the House, which shall deal with the matter. Other contempts are in practice dealt with in a similar way, using the procedures established for raising a matter of privilege in the House.

A committee's report to the House on an alleged contempt must be made at the earliest opportunity if the matter is to be given precedence.²³⁴ The report, therefore, might be in the form of a statement to the House by the chair. Despite this requirement it is considered that a committee should seek to form some preliminary view on a matter, and that a matter should be identified in specific terms, before bringing it before the House, and unless the committee has done so the Speaker may direct it to consider the matter further. In order to inform itself on the matter a committee would take such steps as writing to the person or organisation suspected of offending or alleged to have offended, indicating the nature of the concern and seeking a response. By such means a committee can seek to have the essential allegations clarified so that it can make an informed decision as to whether to proceed with a complaint to the House.²³⁵

²³³ *May*, 22nd edn, pp. 108–11, 126–8.

²³⁴ S.O. 96; *see also* Ch. on 'Parliamentary privilege'.

²³⁵ E.g. H.R. Deb. (7.9.00) 20385–7.

Protection of witnesses

Confidentiality

A straightforward protection which can be afforded a witness who wishes to give evidence in confidence is that of taking evidence in camera and treating documents as confidential. These matters are covered at pages 659 to 662.

Counsel or advisers

There is no provision in the standing orders nor any statutory provision for a witness before a committee of the House to be represented by counsel. Furthermore, there is no precedent for such representation before the House of Representatives or its committees. Applications by witnesses to be represented by counsel have been rejected, for example, by the Committee of Privileges²³⁶ and the Standing Committee on Environment and Conservation.

There are precedents, however, for House of Representatives committees to permit witnesses to have counsel or advisers present in an advisory capacity during hearings. On several occasions the Committee of Privileges has permitted witnesses to be accompanied by, and to confer with, counsel or advisers but, save for seeking clarification on and making submissions concerning their own involvement, counsel have not been permitted to address the committee directly (*and see* Chapter on 'Parliamentary privilege').²³⁷

Persons permitted to accompany and assist witnesses need not be lawyers—for example, Members appearing before the Committee of Privileges have been accompanied by research assistants.²³⁸ On another occasion a Member appearing before the Committee of Privileges was accompanied by another Member.²³⁹ The role of such persons is emphatically that of adviser rather than representative. Witnesses have been permitted to converse freely with such advisers, but the advisers have not been permitted, for example, to:

- present evidence in support of a witness or the witness's submission;
- object themselves to procedures or lines of questioning pursued by the committee;
- or
- ask questions of witnesses.

On one occasion a committee intervened to prevent what it saw as an attempt to avoid these restrictions by the passing of notes to a witness or providing the witness with written responses to questions.²⁴⁰ These limitations attempt to ensure that the witness answers the questions and presents his or her own evidence while at the same time allowing the witness to readily obtain, for example, advice or help as to legal or other issues arising in the giving of evidence. Counsel or advisers may be permitted, at the committee's discretion, to attend an in camera hearing of a client's evidence.

In 1973 a representative of the Yirrkala people indicated to the Standing Committee on Aboriginal Affairs that they wished to be assisted in the preparation of their submission by a nominated barrister and solicitor, who had special ties with, and

236 See Ch. on 'Parliamentary privilege'.

237 E.g. PP 135 (1987)—minutes 5.3.87; PP 77 (1994)—minutes 17.12.93; PP 78 (1994)—minutes 14 and 17.12.93; PP 407 (1994)—minutes 1.9.94.

238 PP 77 (1994)—minutes 17.12.93.

239 PP 498 (1989)—minutes 28.11.89.

240 *Standing Committee on Aboriginal Affairs*, transcript of evidence 2.12.83, 1362.

knowledge of, the Yirrkala people. The committee considered it essential to the success of its inquiry that the assistance be granted. The solicitor sought reimbursement for the cost of necessary air travel and accommodation and a daily fee, and the Speaker agreed to these costs being met. The solicitor was permitted to address the committee.

In 1970 the Joint Committee on the Australian Capital Territory permitted a firm of solicitors to prepare a submission on behalf of certain licensed grocers because there was no organisation then in existence which could adequately represent them and because of their limited command of English. The grocers alone were permitted to address the committee but were permitted, when necessary, to consult counsel.

In 1985, during the conduct of the Transport Safety Committee's inquiry into passenger coach safety, a solicitor, whose firm had been given the responsibility for preparing and conducting a coach company's case before the Arbitration Commission in a particular award matter, helped prepare that company's submission to the committee. The solicitor was permitted to appear before the committee, together with representatives of the company, as a witness having specialist knowledge of the award provisions, their history and the implications for that company.²⁴¹

During the course of the inquiry of the Standing Committee on Aboriginal Affairs into the effect of asbestos mining on the Baryulgil community, former miners and residents of that community had their submissions to the committee prepared for them by the New South Wales Aboriginal Legal Service. Officers of that service also appeared before the committee.

In 1985 the House of Representatives Select Committee on Aircraft Noise received a submission which was prepared by a solicitor on behalf of a client.

The House of Representatives Procedure Committee has proposed the adoption of the following rule:

A witness may make application to be accompanied by counsel or an adviser or advisers and to consult counsel or the adviser(s) in the course of the meeting at which he or she appears. If such an application is not granted, the witness shall be notified of reasons for that decision. A witness accompanied by counsel or an adviser or advisers shall be given reasonable opportunity to consult with counsel or the adviser(s) during a meeting at which he or she appears.²⁴²

Special arrangements were made during the inquiries of two Senate select committees appointed in 1984 to inquire into matters concerning a judge. During the first inquiry witnesses were permitted to be accompanied by counsel and were given all reasonable opportunity to consult counsel during their appearance. Counsel were allowed to make statements to the committee in writing or orally, but were not able to cross-examine other witnesses. During the second inquiry more detailed rules were adopted. Amongst other things, counsel assisting and counsel for the judge were able to cross examine witnesses (with certain qualifications) and counsel for other witnesses had a similar right, although the committee's statement of rules and procedures included provision that it could stop any secondary cross-examination if it considered it repetitive or oppressive.²⁴³

May describes the House of Commons practice:

By leave of the House, parties whose conduct forms the subject, or one of the subjects, of an investigation by a select committee, or whose rights and interests, as distinct from those of the general public, are directly affected by a public bill or other matter which has been referred to the

241 *Standing Committee on Transport Safety*, transcript of evidence 5.6.85, 253–328

242 *Committee Procedures for Dealing with Witnesses*, PP 100 (1989). Recommendation repeated PP 91 (1998).

243 For more details see 'Report to the Senate', *Senate Select Committee on the Conduct of a Judge*, PP 168 (1984); 'Report to the Senate', *Senate Select Committee on Allegations Concerning a Judge*, PP 279 (1984).

consideration of such a committee, are sometimes allowed to be heard in person or by counsel before the committee.²⁴⁴

Orders of the House of Commons giving leave for counsel to be heard may be made on the appointment of the committee, or later as a result of a special report from the committee, or simply on the motion of the committee chair moved in the House. Orders for the hearing of parties have also been made on the petition of the interested party ‘praying to be heard’. The most modern type of order, specifying the forms of representation open to parties before a select committee, is that which gives the committee leave to ‘hear counsel to such extent as it shall see fit; or to hear parties by themselves, their counsel or agents’.²⁴⁵ In some cases parties have been given leave to examine witnesses before committees through their counsel or agents. A party given the right to be heard may adduce evidence; but may not do so where the hearing is at the discretion of the committee.²⁴⁶

Protection in legal proceedings

Standing order 367 states ‘All witnesses giving evidence to the House, or any of its committees, are entitled to the protection of the House in respect of anything that may be stated by them in their evidence’. The protection available to witnesses however also has another source—it derives from Article 9 of the Bill of Rights (applying by virtue of section 49 of the Constitution and re-asserted by the *Parliamentary Privileges Act 1987*) which declares that . . . ‘proceedings in Parliament ought not to be impeached or questioned in any court . . .’. The term ‘proceedings in Parliament’ includes committee proceedings,²⁴⁷ and witnesses giving evidence to a committee are protected from legal proceedings on account of that evidence (for a more complete coverage *see* Chapter on ‘Parliamentary privilege’). However, it is important that a committee is properly constituted at the time of a hearing, to remove any possible concerns as to the protection of parliamentary privilege.

The protection afforded a witness in relation to oral evidence given before a committee also applies to documentary evidence that the witness may give.²⁴⁸ This protection is now conferred explicitly under the *Parliamentary Privileges Act*. The protection of parliamentary privilege applies as equally to the evidence of a voluntary witness as it does to the evidence of a witness summonsed by the committee. It is immaterial whether the evidence is given on oath or not.²⁴⁹

The absolute privilege derived from the Bill of Rights and enhanced by the *Parliamentary Privileges Act* applies essentially only to oral or written statements which form part of parliamentary proceedings, although some related actions may also be covered. The *Parliamentary Papers Act* provides absolute protection to the publisher of documents, including submissions and transcripts, whose publication is authorised by the House or its committees. While a statement made by a witness in the course of committee proceedings is absolutely privileged, the same statement repeated by that witness elsewhere is not. Similarly, the separate publication of a document presented to a

244 *May*, 22nd edn, p. 652.

245 *May*, 22nd edn, p. 652.

246 *May*, 22nd edn, p. 653.

247 *Parliamentary Privileges Act 1987*, s. 16(2). The enactment of the *Parliamentary Privileges Act* followed, and sought to reverse, judicial decisions which had allowed witnesses before Senate committees to be examined in court as to their committee evidence. *See also May*, 22nd edn, pp. 95–7.

248 PP 168 (1972) 31.

249 Opinion of Solicitor-General, dated 8 August 1941.

committee is not absolutely privileged unless publication has been authorised by the House or the committee.

Protection from improper interference, arrest and molestation

Witnesses are protected from arrest (other than on criminal charges), molestation, tampering or other acts aimed at deterring them from giving evidence before a committee or punishing or penalising them for having given such evidence under the traditional power of the House to punish contempts. These matters are described in detail in the Chapter on ‘Parliamentary Privilege’.

Witnesses are also protected by the *Parliamentary Privileges Act 1987*. Section 12 of the Act provides for substantial penalties to be imposed against persons or corporations who by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence a person in respect of evidence given or to be given before a committee or who induce another person to refrain from giving evidence. The section creates a further statutory offence in respect of persons who inflict any penalty or injury upon, or who deprive of any benefit, a person on account of the giving or proposed giving of any evidence, or any evidence given or to be given, before a committee. For the purposes of the Act the submission of a written statement is, if so ordered by the House or a committee, deemed to be the giving of evidence, and thus the protection of section 12 can be gained.

Under section 14 of the *Parliamentary Privileges Act*, a person who is required to attend before a House or a committee on a particular day may not be required to attend before a court or a tribunal, or arrested or detained in a civil cause, on that day.

House of Commons committees have occasionally taken evidence from witnesses whose names are not divulged where it is thought that ‘private injury or vengeance might result from publication’.²⁵⁰

If a committee becomes aware of allegations that an offence or contempt may have been committed against a witness or a prospective witness, it should take all reasonable steps to ascertain the facts of the matter. This could include publishing details of the allegation to the person alleged to have offended, so that the person is able to respond.²⁵¹

The Standing Committee on Procedure has proposed the adoption of the following provision:

Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which has been or may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given or in respect of prospective evidence, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the House.²⁵²

Other proposals for protection of witnesses or other persons

In addition to the recommendations on particular issues quoted in this chapter, the Procedure Committee has recommended that the following provisions be adopted for the assistance or protection of witnesses or other persons:

²⁵⁰ *May*, 22nd edn, p. 654.

²⁵¹ E.g. Standing Committee on Transport, Communications and Infrastructure, minutes 31.5.95; and see H.R. Deb. (7.9.00) 20385–7.

²⁵² *Committee Procedures for Dealing with Witnesses*, PP 100 (1989) 9. Recommendation repeated PP 91 (1998).

Reasonable opportunity shall be afforded to witnesses to request corrections in the transcript of their evidence and to put before a committee additional written material supplementary to their evidence. Witnesses may also request the opportunity to give further oral evidence.

Where a committee has reason to believe that evidence about to be given may reflect on a person, the committee shall give consideration to hearing that evidence in camera.

Where evidence is given which reflects upon a person, the committee may provide a reasonable opportunity for the person reflected upon to have access to that evidence and to respond to that evidence by written submission or appearance before the committee.²⁵³

While these recommendations have not been formally adopted by the House, in practice committees do have regard to such considerations.

Protection of witnesses—joint committees

In 1988 the Senate adopted a detailed resolution to govern the way in which Senate committees deal with witnesses. Provisions included a requirement that witnesses be invited, in the first instance, to give evidence, that they be given an opportunity to make a submission in writing before appearing, that they be given a reasonable opportunity to raise matters of concern before appearing, that they be given the opportunity to apply to give evidence in camera, to object to questions and to apply to be accompanied by counsel.²⁵⁴ While these rules were set for Senate committees, regard should be had to them by joint committees.

Payment to witnesses

At the discretion of the committee, payments may be made to witnesses. Payments would normally cover only witnesses' travel and accommodation costs regarded as reasonable.

Evidence as to proceedings

An officer of the House, or other person employed to take minutes of evidence of a committee (i.e. parliamentary reporter), may not give evidence elsewhere in respect of any proceedings or examination of any witness, without the leave of the House.²⁵⁵

In 1974 an inquiry was conducted by the Australian Broadcasting Control Board into allegations that certain television stations had suppressed television news coverage of a report tabled by the Joint Committee on Prices.²⁵⁶ The Clerk of the House received a request for the clerk to the committee (i.e. committee secretary) to make a statement and, if necessary, to give evidence before the board of inquiry. In giving permission for the officer to make a statement it was made clear that the officer could not give evidence in respect of any proceedings before the committee without the leave of the House, and that this restriction was imposed by the standing orders of both Houses.²⁵⁷ The clerk to the committee appeared before the inquiry and read a statement in which no reference was made to any proceedings of the committee and which contained only factual information as to when and to whom copies of the committee's report had been distributed after it had been tabled in the Senate and ordered to be printed.

Subsection 16(6) of the *Parliamentary Privileges Act 1987* provides that neither the section nor the Bill of Rights prevents or restricts the admission in evidence and examination of proceedings in connection with the prosecution for an offence against an

²⁵³ *Committee Procedures for Dealing with Witnesses*, PP 100 (1989) 9. Recommendation repeated PP 91 (1998).

²⁵⁴ J 1987–89/517–9, 534–6.

²⁵⁵ S.O. 368B. See Ch. on 'Papers and documents'.

²⁵⁶ PP 326 (1974); VP 1974–75/177.

²⁵⁷ S.O. 368B; Senate S.O. 183.

Act establishing a committee. Section 17 of the Act provides, inter alia, that a certificate signed by or on behalf of the Speaker or President, or a committee chair, in relation to committee records, evidence, etc. is evidence of the matters contained in the certificate. (*And see* Chapter on ‘Parliamentary Privilege’.)

Publication of evidence

Authorisation for publication of evidence

Standing order 346 provides for committees to authorise publication of evidence:

- (a) A committee or subcommittee has power to authorise publication of any evidence given before it or any document presented to it.
- (b) The evidence taken by a committee or subcommittee and documents presented to it, and proceedings and reports of it, which have not been reported to the House, must not, unless authorised by the House or the committee or subcommittee, be disclosed or published to any person other than a member or officer of the committee.

Provided that a committee may resolve to:

- (i) publish press releases, discussion or other papers or preliminary findings for the purpose of seeking further input to an inquiry;
- (ii) divulge any evidence, documents, proceedings or report on a confidential basis to any person or persons for comment for the purpose of assisting the committee in its inquiry or for any administrative purpose associated with the inquiry; or
- (iii) authorise any member or members of the committee to provide such public briefings on matters related to an inquiry as the committee sees fit. The committee may impose restrictions on such authorisation and in any case a member so authorised must not disclose evidence or documents which have not been specifically authorised for publication.

The *Parliamentary Papers Act 1908*, inter alia, makes it lawful for a committee of either or both Houses to authorise the publication of any document laid before it or of any evidence given before it. It also grants protection from civil or criminal proceedings to any person publishing any document or evidence published under an authority given pursuant to the provisions of the Act. Section 16 of the *Parliamentary Privileges Act* provides that the term ‘proceedings in Parliament’ includes ‘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’. This means that absolute privilege attaches to such actions and documents and, by virtue of section 3 of the Act, the reference to a committee includes a subcommittee. A practical difference between the two statutory provisions is that motions to authorise publication under the *Parliamentary Papers Act* can only be moved in respect to evidence which has been given or papers which have been laid before a committee (or a House). This limitation does not apply in respect of action under section 16 of the *Parliamentary Privileges Act*.

A committee may limit the publication of confidential documents or evidence to particular individuals. This approach may be adopted, for example, to enable individuals to respond to allegations made against them in a submission or at an in camera hearing by another witness.²⁵⁸ In other cases committees have authorised the publication of submissions or other documents with certain information deleted (for example, to allow views or facts to be disclosed while still protecting the privacy of persons).²⁵⁹

258 E.g., Committee of Privileges, minutes 25.11.93 (publication of transcript of in camera evidence to another party (PP 78 (1994))); minutes 24.8.95 (publication of submission to another party, (PP 376 (1995))).

259 E.g. Standing Committee on Finance and Public Administration, minutes 19.12.90.

Media coverage

Committees have a responsibility to ensure that inaccurate media reports of their proceedings which may adversely affect witnesses, or the committee or its members, are corrected.

A notable instance occurred in 1972, when the Joint Committee on the Australian Capital Territory insisted that a newspaper correct an article in which it was alleged, *inter alia*, that an officer of the Department of the Interior had written the committee's report. The newspaper published on its front page a correction, withdrawal and apology. It apologised unreservedly 'for any reflection that may have been cast upon members and officers of the committee, the Department of the Interior, and officers of the department'.²⁶⁰ No further action was taken by the committee.

Section 10 of the *Parliamentary Privileges Act 1987* provides that it is a defence to an action for defamation that the defamatory matter was published by a defendant without any adoption by the defendant of the substance of the matter and was contained in a fair and accurate report of proceedings at a meeting of a committee.

In camera hearings

In camera hearing of evidence is explicitly provided for by standing order 339 as follows: 'A committee or any subcommittee may conduct proceedings . . . by hearing witnesses, either in public or in private'. The standing orders also provide that visitors and other Members who are not members of the committee must withdraw when a committee or subcommittee is taking evidence in camera.²⁶¹

Witnesses may request an in camera hearing but a committee will agree only for compelling reasons. Evidence which committees would normally take in camera and not publish because of possibly adverse effects includes: evidence which might incriminate the witness, industrial secrets, classified material, medical records and evidence which may bring advantage to a witness's prospective adversary in litigation. In the last case the witness could be disadvantaged by having the details of a case made known to an adversary or by informing the adversary of the existence of certain evidence relevant to the witness's case and even how the evidence might be obtained. Other reasons for in camera hearings could include evidence likely to involve serious allegations against third parties, a matter which is sub judice (*see* p. 649) or a matter on which a Minister may otherwise claim public interest immunity (*see* p. 642). 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 publication of the evidence.

The Standing Committee on Expenditure held in camera hearings towards the end of its inquiries to test its preliminary conclusions with relevant government departments.²⁶² The hearings were held in camera to avoid speculation about the committee's recommendations. Departments were informed that the evidence would be published when the committee's report had been tabled.

It is an offence under the *Parliamentary Privileges Act 1987*, as well as a contempt of the House, for any person to disclose or publish a document or evidence taken in camera without the authority of the House or a committee. The *Parliamentary Privileges Act* also provides that a court or tribunal may not require the production of, or admit into

²⁶⁰ *Canberra Times*, 16 September 1972.

²⁶¹ S.O.s 344, 345.

²⁶² E.g. Standing Committee on Expenditure, PP 244 (1977) 18–19.

evidence, such documents or evidence.²⁶³ The Parliamentary Privileges Act, however, does not prevent disclosure during the course of proceedings in Parliament, and the House has the power, which is delegated to committees by standing order, to authorise the publication of any evidence given or any document presented²⁶⁴ even if it has initially been taken in camera. The final authority in the publication of in camera evidence rests with the House itself.²⁶⁵ 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 (*but see* paragraph (c) of the 1998 resolution noted below).

Witnesses granted permission to give their evidence in camera should be warned that it is within the committee's (or the House's) discretion to publish the evidence subsequently, if it thinks fit. For obvious reasons a committee should authorise publication of in camera evidence only when there is a real and justifiable need or when subsequent events have removed the need for confidentiality, or when the evidence given does not warrant the confidential treatment which it was originally thought might be necessary. For example, having heard the evidence the committee might form the opinion that the arguments in favour of publication in the public interest carry more weight than the grounds of confidentiality claimed, or that a claim that the evidence is sub judice (*see* p. 649) cannot be sustained. Committees, while not authorising publication of evidence generally, may in some cases need to authorise publication of the evidence to a person named in it, so that the person may be informed of statements made and given the opportunity to respond.²⁶⁶

In the 34th and 35th Parliaments petitions were received from solicitors requesting leave to take possession of certain 'confidential' committee documents in order that they might be produced in court. In each case the House referred the matter to the appropriate committee to determine whether the documents should be presented to the House by the committee for the purpose of the House's granting leave for a subpoena to be issued and served for the production of the documents in court. In the first case the committee recommended that the action proposed be taken and the documents were subsequently presented to the House, the subpoena was served and the House approved the documents being passed to the appropriate court. In the second case, while the matter for which the documents were originally required was settled out of court before the committee reported, the committee nevertheless advanced two propositions to the House, namely, that:

- there was a strong presumption that evidence taken in camera, or documents treated as confidential by parliamentary committees should not be released; and
- this presumption was related to the effectiveness in the working of parliamentary committees.²⁶⁷

If a committee does want to publish in camera evidence, it should inform the witness and consider any objections raised. Resolutions making this mandatory were passed by the Senate and put before the House in 1987.²⁶⁸

263 *Parliamentary Privileges Act 1987*, ss. 13, 16.

264 S.O. 346.

265 *May*, 22nd edn, p. 657.

266 This course has been followed by the Committee of Privileges, e.g. minutes 14.12.93, PP 78 (1994).

267 'Release of Tyre Safety Inquiry documents', *Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure*, PP 41 (1989) 6.

268 Again presented and recommended to the House by the Standing Committee on Procedure in its report *Ten Years On: A Review of the House of Representatives Committee System*, May 1998. PP 91 (1998). Appendix 2, pp. 38–39.

The Speaker has the authority to permit access to unpublished in camera evidence after 30 years, subject to certain conditions (*see* page 662).

RESOLUTION ON DISCLOSURE OF IN CAMERA EVIDENCE

The Standing Committee on Procedure reviewed the question of the disclosure of in camera evidence in 1991 and concluded that a rigorous mechanism should be put in place to ensure that in camera evidence could only be disclosed in the most outstanding circumstances.²⁶⁹ The committee repeated this recommendation when it reviewed the committee system in 1998.²⁷⁰ As a result of the committee's recommendations the House agreed to a resolution on the disclosure of in camera evidence on 3 December 1998. The resolution was introduced as a trial, effective initially for a year and later extended to the end of the session.

The resolution applied the following conditions to the disclosure of evidence taken in camera by a committee of the House:

- (a) Committees may take evidence in the following manner:
 - (i) By written submissions, whether in hard copy or electronic form;
 - (ii) By oral evidence taken in public; and
 - (iii) In private session.
- (b) 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 it would only be disclosed if the majority of the committee so decided by resolution.
- (c) 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.
- (d) Where a Member of the House of Representatives discloses *in camera* evidence other than as prescribed, the House may impose a penalty on the Member following investigation and report of the matter by the Committee of Privileges.
- (e) 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.
- (f) 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.
- (g) If a motion is to be moved in the House to release evidence taken *in camera* by one of its committees, notice must be given. 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.

Confidential documents

The principles applying to requests for hearing evidence in camera apply equally to requests for non-publication of documents. Section 13 of the *Parliamentary Privileges Act 1987* applies to documents prepared for the purpose of submission, and submitted, to a committee and directed to be treated as evidence taken in camera.

A request by a witness that evidence given remain confidential is often granted but on occasions a committee may consider that the public interest outweighs the private interest of the witness and choose not to accede to the request. In 1975 the Select Committee on Road Safety refused to accept documentary evidence from a witness on a confidential basis, insisting that it was in the public interest that the evidence be

269 Standing Committee on Procedure, *Disclosure of In Camera Evidence*, November 1991. PP 295 (1991).

270 Standing Committee on Procedure, *Ten Years On: A Review of the House of Representatives Committee System*, May 1998. PP 91 (1998) 32–3.

published. After protracted negotiations the evidence was provided and was published in the committee's report (*see* page 636 for details).

Steps are taken to retrieve confidential documents from members of committees of previous Parliaments and from members of any committees which cease to exist, or requests are made that the documents be destroyed. Similar action is taken when a Member ceases to be a member of a committee or a Member of the House. After the House is dissolved former committee members are not given access to such documents, unless they have been authorised for publication.

In 1987, in order to produce documents in court, the Aboriginal Legal Service petitioned the House to obtain access to the evidence presented in an earlier Aboriginal Affairs Committee inquiry. The House resolved that the evidence authorised for publication could be accessed by the Aboriginal Legal Service and used in court (subject to the usual conditions) and that the committee should advise the House on the release of confidential materials provided to the committee during the course of that inquiry. That aspect was referred to the committee and it recommended that the House grant leave to the petitioners or their legal representatives to issue and serve subpoenas for the production to a court of documents tendered by a witness and the Aboriginal Legal Service Ltd during the course of the inquiry. The House took the committee's advice and these documents were passed on to the Supreme Court of New South Wales for use during the hearing as detailed in the petition.²⁷¹

Access to old evidence and documents

Pursuant to a resolution of the House, the Speaker may permit any person to examine and copy evidence submitted to, or documents of, committees, which are in the custody of the House, which have not already been published by the House or its committees and which have been in the custody of the House for at least 10 years. However, if such evidence or documents were taken in camera or submitted on a confidential or restricted basis, disclosure shall not take place unless the evidence or documents have been in the custody of the House for at least 30 years, and, in the opinion of the Speaker, it is appropriate that such evidence or documents be disclosed. The Speaker must report to the House the nature of any evidence or documents made available under the resolution and the persons to whom they have been made available. Subject to the same conditions, the Speaker and the President of the Senate have been authorised to release records of joint committees. Any such release must be reported to both Houses.²⁷² This procedure applies to papers which have not been made public.

In 2000 the House agreed to a resolution in relation to in camera evidence of the Privileges Committee, making specific provision for release after 30 years.²⁷³

Unusual secrecy provisions

For considerations of national security unusual secrecy provisions were applied to the Joint Committee on Foreign Affairs when it was appointed in 1952. The committee's resolution of appointment required that it sit in camera, that its proceedings be secret, and that it report only to the Minister for External Affairs.²⁷⁴ Whenever it reported to the Minister the committee was to inform the Parliament that it had reported. The Minister

271 'Certain documents tendered to the committee during the Baryulgil Community Inquiry', *House of Representatives Standing Committee on Aboriginal Affairs*, PP 355 (1986) 13; and *see* Ch. on 'Parliamentary privilege'.

272 Resolution of 11 October 1984, VP 1983–84/988–9; e.g. VP 1993–95/2027; J 1995/2942–3.

273 VP 1998–2001/2021, *see* Ch. on 'Parliamentary privilege'.

274 VP 1951–53/129.

decided whether or not the reports should be tabled in the Parliament and printed. These restrictions were modified and ultimately removed from the resolutions of appointment of the committee's successors in subsequent Parliaments. Because of these restrictions and other limitations imposed on the committee, the Opposition refused until 1967 to nominate members to the committee.²⁷⁵

Section 92N of the *Australian Security Intelligence Organisation Act 1979* places restrictions on the disclosure to Parliament of certain matters. In a report to a House the committee shall not disclose the identity of a person who is or has been an officer, employee or agent of ASIO or any information from which the identity of such a person could reasonably be inferred. In addition the committee shall not, in a report to either House, disclose classified material or information on the methods, sources, targets or results of the operations or procedures of ASIO, the public disclosure of which would, or would be likely to, prejudice the performance by ASIO of its functions. The section also requires the committee, before presenting a report to either House, to obtain advice of the Minister as to whether the disclosure of any part of the report would, or would be likely to, disclose the identity of a current or former ASIO officer or employee or classified material or information.

Unauthorised disclosure or publication of evidence

Subject to section 4 of the *Parliamentary Privileges Act 1987*, it may be regarded as a contempt for any person, including the originator, to publish or disclose oral or documentary evidence received by a committee before the evidence has been reported to the House or its publication has been authorised by the committee or the House.²⁷⁶ The restriction on publication of a document, including a submission, applies once the document comes into the committee's possession—that is, when it is received by the committee, or by the secretary of the committee. In addition, section 13 of the *Parliamentary Privileges Act 1987* enables substantial penalties to be imposed for the publication or disclosure of documents directed by a committee to be treated as evidence taken in camera or oral evidence taken in camera or a report of such oral evidence.

Committees exercise discretion in dealing with breaches of these provisions, and it has not been common for cases of unauthorised publication of evidence to be reported to the House.²⁷⁷ However, committees have at times deemed it necessary to stress to those concerned the seriousness of their action. A complaint is more likely to be made if the disclosure is seen as particularly damaging or as indicating possible impropriety of some kind.

An instance of the discretion used by committees arose in 1975. A subcommittee of the Standing Committee on Environment and Conservation acceded to a request by two witnesses that their evidence be taken in camera because of their fears of physical harm from persons whom they wished to name in their evidence. One of the witnesses subsequently disclosed the transcript of evidence to a journalist who published parts of it. The other witness, who had not been consulted on disclosure of the evidence, informed the committee that publication of the evidence may have placed him in jeopardy. The Speaker was informed of the circumstances and advice was sought. The Australian Federal Police were asked to investigate the possible need for the witnesses to

²⁷⁵ 'Observations and history of the committee', *Report of the Joint Committee on Foreign Affairs and Defence*, PP 4 (1978) ii.

²⁷⁶ *And see May*, 22nd edn, p. 658.

²⁷⁷ The cases that have been reported on by the Committee of Privileges are noted in the Chapter on 'Parliamentary privilege' and Appendix 25.

be given protection, but this was found to be unnecessary. The Speaker advised against the incident being raised as a matter of privilege because of concern that further publicity might lead to a greater risk of harm to the witnesses. The Speaker wrote to the witness who had disclosed the evidence and to the editor of the newspaper which had published it. The Speaker stressed the seriousness of the disclosure, indicated that under normal circumstances the incident may have been raised as a matter of privilege, and stated why no further action had been taken.

It is standard practice for an acknowledgment of receipt of a submission by the committee secretary to give advice to the effect that submissions should not be published or disclosed unless or until such time as the committee has authorised their publication. From time to time publication has preceded receipt of this warning. In 1979, after considering an apology by prospective witnesses who had published their submission before receiving the warning, the Joint Select Committee on the Family Law Act resolved that a statement on the status of submissions be included in any future advertisements on the committee's inquiry. In 1986, in making a submission to the Joint Select Committee on Electoral Reform, a witness sent the same submission to a newspaper and material from the submission was published before it was received by the committee. 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.

If witnesses are examined in public, but publication of the evidence is not authorised, no objection is usually taken to the publication by the press of evidence taken at the hearing, provided the reports are fair and accurate. Because it is now standard practice for committees, at the end of each public hearing, to authorise publication of all evidence taken, except confidential documents, this qualification of the non-disclosure provisions now has little relevance.

Expunging of material from evidence

Part or all of the evidence given by a witness, or questions or statements by committee members, has been expunged from the transcript of evidence and an order made that any such material expunged be disregarded by the press. Advice on this matter to the Joint Committee on Pecuniary Interests of Members of Parliament relied on the provisions of the standing orders of each House, subsection 2(2) of the *Parliamentary Papers Act 1908*, *May* and *Odgers*. Instances cited of evidence which might be expunged included unfair allegations, use of improper language and hearsay. The advice noted that in all cases the references were to the authority of the committee and not of the chair and therefore recommended that any direction that material be struck out and be disregarded by the press be by order of the committee.²⁷⁸

In its report on procedures for dealing with witnesses in 1989,²⁷⁹ the Procedure Committee recognised the difficulties that could be encountered in respect of orders for material to be expunged if, for example, the act of publication occurred prior to or in ignorance of an order that it be expunged. It considered that it would be better practice for committees to consider the evidence being given and that, where it was felt that the evidence was of such a nature that immediate publication would not be appropriate, a committee should give consideration to taking further evidence in camera.

²⁷⁸ S.O. 346; Senate S.O. 37; *May*, 21st edn, p. 634–5; *Odgers*, 9th edn, p. 424—see also Senate privilege resolution 1 (12).

²⁷⁹ *Committee Procedures for Dealing with Witnesses*, PP 100 (1989). Recommendation repeated PP 91 (1998).

Reports

Frequency of reporting

The frequency with which a committee may report is determined by standing or sessional orders or its resolution of appointment. Standing committees are authorised to report from time to time—that is, as the need arises. Select committees have had various limits placed on their power to report but they are usually required to report by a specified date or as soon as possible, in which case they may submit only one report (whereupon they cease to exist).

A committee without the power to report from time to time may, however, seek leave of the House to submit an ‘interim’ or ‘special’ report. A special report is one in which a committee draws attention to matters incidental to its inquiry and which relates to its powers, functions or proceedings. For example, the Committee of Privileges has submitted special reports seeking an extension of its reference²⁸⁰ and recommending that the House ask the Senate to grant leave to named Senators to appear before it.²⁸¹ In 1976 the Joint Committee on the Parliamentary Committee System presented a special report seeking an amendment to its powers to elect a chair and deputy chair.²⁸² In 1987 and again in 1988 the Joint Committee of Public Accounts felt compelled to report on the issue of whether it was able to sit while the Senate was sitting.²⁸³ In 1988 the Joint Committee of Public Accounts also reported on revised procedures for its reports.²⁸⁴

Instead of presenting a single report on a wide-ranging inquiry, a committee, properly authorised, may submit one or more interim reports. Such reports may deal with the committee’s method of inquiry, or report progress on the inquiry as a whole and/or contain the committee’s recommendations on facets of the inquiry.²⁸⁵

From time to time committees have reported to the House without a formal inquiry reference or without following the normal procedures of advertising, inviting submissions and public hearings. Circumstances in which committees have decided to report without following the normal inquiry processes have included situations:

- when a need to report quickly had been identified;
- where a committee wished to comment on aspects of the Government’s response to previous reports;
- where the issues were felt to have little public interest;
- where costs and other resource limitations had prevented a full inquiry;
- where extensive published material, letters and other documents were available; and
- where a report naturally flowed from informal briefings or inspections.

This procedure provides a cost and time-effective way for a committee’s views to be placed before the Parliament, but should be used with care, as the committee could leave itself open to criticism that some community, government and other interest groups have been excluded from the decision-making processes. In addition the committee runs the risk that its conclusions and recommendations could be based on incomplete or incorrect information.

280 VP 1954–55/225–6, 239.

281 VP 1985–87/1361; H.R. Deb. (26.11.86) 3778.

282 VP 1976–77/119.

283 Reports 264 and 292 of the Joint Committee of Public Accounts, PP 75 (1987) and PP 317 (1988)—see p. 672.

284 Report 291 of the Joint Committee of Public Accounts, PP 146 (1988).

285 ‘Effectiveness of support services for Aboriginal and Torres Strait Island communities’, *House of Representatives Standing Committee on Aboriginal Affairs, Interim Report*, PP 197 (1988).

Committees have also presented annual reports.²⁸⁶ The annual report of the Department of the House of Representatives also contains some information on committees serviced by the department.

Drafting and consideration of reports

Technically, it is the duty of the chair of a committee to prepare a draft report.²⁸⁷ In order to pave the way for the preparation of a report after evidence has been received and reviewed, it is normal for members to discuss possible conclusions and recommendations at deliberative meetings. This process is normally assisted by advice and documentation from committee staff. In light of such discussions secretariats are able to develop draft report material for consideration, in the first instance, by the chair.

If, at the meeting at which the chair formally brings up his or her draft report for the committee's consideration, any other member submits a draft report, the committee must first decide upon which report it will proceed.²⁸⁸

The procedures for the consideration of a draft report are set down in standing order 349:

At a meeting convened for the purpose, the chair shall present his or her draft report to the committee. The report may be considered at once, provided copies have been circulated in advance to each member of the committee. The report shall be considered paragraph by paragraph, and appendixes shall be considered in order at the conclusion of consideration of the report itself.

A member objecting to any portion of the report shall vote against it or move an amendment at the time the particular paragraph or appendix is under consideration.

If any member dissents from all or part of the report or wishes to attach a protest to a report, the member may add a protest or dissenting report to the main report.

The committee may consider groups of paragraphs together, by leave. Amendments may be proposed by any member and are determined in the same way as amendments to a bill during the consideration in detail stage. The committee may divide on any question. After the draft report has been considered, all or part of it may be reconsidered and amended.²⁸⁹

When all paragraphs and appendixes have been agreed to, with or without amendment, the question is proposed 'That the draft report (as amended) be the report of the committee'. The date which appears under the chair's signature in the report is the date on which the report was adopted.

The procedures for the drafting, consideration, adoption, tabling and correction of inquiry reports apply equally to all committee reports, including special and interim reports.

Protest or dissent

Since 1978 the standing orders have permitted committee members to add a protest or dissent to a committee's report.²⁹⁰ The difference, if any, between a 'protest' and a 'dissent' is not strictly defined. A possible distinction between protest and dissent would be to associate a protest with procedural matters, and dissent with opposition to a committee's conclusions or recommendations. In dissenting from a report by the Standing Committee on Environment and Conservation in August 1984,²⁹¹ three

286 VP 1987-89/435-6, 987; VP 1995-95/2449.

287 S.O. 348.

288 S.O. 350.

289 S.O. 351.

290 S.O. 349.

291 'Protection of the Greater Daintree', *House of Representatives Standing Committee on Environment and Conservation*, PP 199 (1984) 21-2.

members of the committee, while not disagreeing with some of the report recommendations, stated that they had serious reservations about reporting without conducting a thorough investigation. They also considered it premature to report at that particular time. This action appeared to be more of a protest at the way in which the committee had gone about reporting on the reference.

A member who proposes to present a protest or dissent is not required to seek authorisation from the committee, as this power resides with individual members, not with the committee. Accordingly, the protest or dissent need not be shown by its author to the chair or other members of the committee, although not to do so would be regarded as a discourtesy. On 22 November 1995 the Senate passed a motion to the effect that prior to the printing of a committee report a member or a group of members is not required to disclose to the committee any minority or dissenting report, or any relevant conclusions and recommendations, proposed to be added or attached to the report after it had been agreed.²⁹² This has not been considered to preclude action by a committee to direct the circulation of dissenting reports to committee members on their receipt by the secretariat.

A protest or dissent must be relevant to the committee's reference, as the authority delegated to the committee and its members is limited to those areas defined by the terms of the inquiry. The words 'protest' and 'dissent' imply some relationship with the committee's report. A protest (which is a rarely used form) or dissent is attached to the committee's report, and signed by the dissenting or protesting members.²⁹³

In its 1989 report on procedures for dealing with witnesses, the Standing Committee on Procedure argued that in camera evidence should not be disclosed by members in dissenting reports, unless authorised by the committee. It proposed the inclusion of a provision to enforce this prohibition in resolutions to be adopted by the House to guide committees in dealings with witnesses.²⁹⁴ However, although it does not mention dissenting reports specifically, the 1998 resolution on the disclosure of in camera evidence (*see* page 661) applies.

Alternative methods of recording dissent are:

- moving amendments to the draft report, the voting on which is recorded in the minutes which are subsequently tabled and thereby become public;²⁹⁵
- submitting an alternative draft report to the committee;²⁹⁶
- making a statement in the House, by leave, when the report is tabled; or
- stating the dissent or protest in debate on any motion moved in relation to the report.

(For earlier precedents *see* pages 612–3 of the second edition.)

In extreme circumstances members may record their dissent by resigning from the committee. In such instances members have no automatic right to explain their resignation in the House but could do so in a statement made by leave.

If a committee is unable to agree upon a report, it may present a special report to that effect, with its minutes and the transcript of evidence.²⁹⁷ Even if the circumstances of the

292 J 1993–95/4198.

293 PP 264 (1977) 71–2. In this instance one member added, separately, a protest *and* a dissent.

294 *Committee Procedures for Dealing with Witnesses*, PP 100 (1989). Recommendation repeated PP 91 (1998).

295 S.O.s 349, 320. Members of the Select Committee on Pharmaceutical Benefits had no power to add a protest or dissent to the committee's report. Their dissent was shown in the minutes which were printed as part of the report, PP 73 (1972) 95–147.

296 S.O. 350.

297 *And see May*, 22nd edn, p. 666.

committee's inability to agree are widely known, the committee should still report the circumstances to the House, if only as a matter of form and to place them on record.

Presentation of reports

The standing orders permit committee reports to be presented at any time when other business is not before the House.²⁹⁸ However, a period is allocated each sitting Monday for the presentation of parliamentary committee and delegation reports.²⁹⁹ A copy of the report, signed by the chair, and the committee's minutes of proceedings are tabled in the House by the chair or a member of the committee.³⁰⁰ Copies of the submissions to the inquiry and the corrected copy of the transcript of evidence, other than confidential evidence, should also be tabled.

It is normal practice for the Member who presents a report to move that the report, with or without the accompanying documents, be printed. If a Member presents a report from a committee during the period allocated on Monday, then, subject to any determination of the Selection Committee, he or she and other members of the committee can each be accorded priority in making a statement to the House for a period not exceeding 10 minutes. After the statements a specific motion in connection with the report can be moved without notice by the Member presenting it, and the debate on the question is then adjourned until a future day to be determined by the Selection Committee.³⁰¹ Debate on a report can also be resumed in the Main Committee.

A Member presenting a committee report at times other than the period allocated on Monday may be granted leave to make a brief statement on the report and this may be followed by statements, by leave, from other Members. If at this time a Minister wishes to move a motion that the House take note of the report, or if a Minister or Member wishes to move that the report be adopted or agreed to, leave is required. The standing order states that, upon the presentation of a report, the consideration of the report may be set down for a subsequent sitting, when a specific motion without notice in connection with it may be moved.³⁰²

In 1955 the House ordered that the Clerk read to the House the special report of the Committee of Privileges relating to the *Bankstown Observer Case*.³⁰³

Tabling of reports and minutes—joint committees

The standing orders provide that the proceedings of a joint committee shall be reported to the House by one of the Members appointed by it to serve on the committee.³⁰⁴ The provision of the Senate standing orders is similar except that one of the Senators appointed to the committee is required to report.³⁰⁵ Reports by joint committees are dealt with in the same manner as the reports of House or Senate committees except that joint committee reports are directed to, and presented in, both Houses. Senate standing orders do not require the tabling of minutes of proceedings with a committee's report.³⁰⁶

298 S.O. 102.

299 S.O. 102A.

300 S.O.s 352, 353.

301 S.O. 102B.

302 S.O. 354.

303 VP 1954–55/225.

304 S.O. 360.

305 Senate S.O. 42.

306 Although when they are available a more complete understanding of the Senate committee process is possible, e.g. PP 449 (1993) 225–7, 271–3.

Usually reports are presented to both Houses on the same day but occasionally this is not possible, for example, when only one House is sitting and there is an urgent need for the report to be presented and published.³⁰⁷ A motion for the printing of a report need only be moved in one House.

Amendment of tabled reports

Minor amendments to tabled copies of committee reports may be made with the approval of the Clerk of the House. Amendments are initialled by the committee secretary. The committee chair, or even the whole committee, would have to approve more substantial, even if still relatively technical, amendments. In the case of amendments of substance a further report would have to be presented³⁰⁸ or, in the case of a select committee, recommitment of the report, by the House to the committee, would have to be sought. Alternatively, the chair could make a statement in the House.

Premature disclosure or publication

Standing order 346 provides that the evidence taken by a committee or subcommittee and documents presented to it, and proceedings and reports of it, which have not been reported to the House, must not, unless authorised by the House or the committee or subcommittee, be disclosed or published to any person other than a member or officer of the committee. This is a blanket prohibition which precludes unauthorised disclosure of all or part of a report, or of its contents.

Until recently the rule was that such disclosure or publication had to be authorised by the House.³⁰⁹ The present rule allows authorisation to be given by a committee or subcommittee, and in addition, specifically permits committees to resolve to:

- publish press releases, discussion or other papers or preliminary findings for the purpose of seeking further input to an inquiry; or
- divulge any evidence, documents, proceedings or report on a confidential basis to any person or persons for comment for the purpose of assisting the committee in its inquiry or for any administrative purpose associated with the inquiry.
- authorise any member or members of the committee to provide such public briefings on matters related to an inquiry as the committee sees fit. The committee may impose restrictions on such authorisation and in any case a member so authorised must not disclose evidence or documents which have not been specifically authorised for publication.

In accordance with these provisions a number of committees have adopted the practice of releasing their reports, before tabling, to the media under embargo. This early release gives the media advance information about a committee's recommendations and enables more effective questioning of the committee at press conferences held after tabling. The practice also encourages greater media coverage of committee reports. Release under embargo is authorised by resolution of the committee.

Contravention of the rule on premature disclosure may be found to be a contempt.³¹⁰ However, committees have chosen, from time to time, to take no action on unauthorised press articles partially disclosing the contents of their reports or commenting on

307 'Prices of household soaps and detergents', *Report from the Joint Committee on Prices*, PP 326 (1974), tabled in the Senate and ordered to be printed on 15 August 1974, J 1974-75/155; tabled in the House on 19 September 1974, VP 1974-75/177.

308 VP 1980-83/1220.

309 Former S.O. 340 (until 3.12.98).

310 PP 135 (1987). *Parliamentary Privileges Act 1987*, s. 13 deals with in camera evidence, see Ch. on 'Parliamentary privilege'.

committee deliberations during the drafting of reports; it has sometimes been thought counter-productive to give further publicity and credence to such articles.³¹¹

On rare occasions a committee has been authorised or directed to disclose its report to Ministers before its presentation to the House. The resolution of appointment of the Joint Committee on War Expenditure provided that:

The Committee have power, in cases where considerations of National Security preclude the publication of any recommendations and of the arguments on which they are based, or both, to address a memorandum to the Prime Minister for the consideration of the War Cabinet, but, on every occasion when the Committee exercises this power, the Committee shall report to the Parliament accordingly.³¹²

In 1952 the Joint Committee on Foreign Affairs was directed by its resolution of appointment to forward its reports to the Minister for External Affairs. On every occasion when it did so, the committee was required to inform the Parliament that it had reported.³¹³ In later Parliaments the committee's resolution of appointment added that, in the case of inquiries not initiated by the Minister, the committee was not authorised to report, either to the Minister or to the Parliament, without the Minister's consent. It was further provided that, if opposition Members were represented on the committee, copies of its reports to the Minister were to be forwarded to the Leader of the Opposition for his confidential information.³¹⁴ It was left to the Minister to decide whether or not the committee's reports would be published.³¹⁵ These arrangements were justified on the ground of national security.

An important provision on disclosure is to be found in section 92N of the *Australian Security Intelligence Organisation Act 1979*. The Joint Committee on the Australian Security Intelligence Organisation is not permitted to present a report until the advice of the Minister has been obtained as to whether the disclosure of any part of the report would, or would be likely to, disclose the identity of a person employed by or an agent of the organisation or classified material or information on the methods, sources, targets or results of the operations or procedures of the organisation.

Authority for release when House not sitting

If the House is not sitting when a committee has completed a report of an inquiry, the committee may send the report to the Speaker, or in the absence or unavailability of the Speaker, to the Deputy Speaker. The publication of the report is authorised on its receipt by the Speaker or the Deputy Speaker. The Speaker or the Deputy Speaker are authorised to give directions for the report's printing and circulation. As soon as possible after the House resumes sitting the report is presented to the House in the usual way.³¹⁶ This procedure would normally be used only during a lengthy break when the House is not due to sit for some time.

311 VP 1985–87/899; H.R. Deb. (1.5.86) 2890—statement by deputy chair of the Joint Select Committee on an Australia Card; H.R. Deb. (20.10.86), 2331–2—personal explanation by a committee member regarding a newspaper report of the member's dissenting report (presented 25.11.86).

312 VP 1940–43/157–8, 161. In 1955 attempts were made to have one of the committee's reports and related documents published. The report concerned allegations of fraudulent practices during the years of World War II. The Prime Minister having first agreed to table the report later declined to do so on the grounds of justice to the individuals concerned, VP 1954–55/293–4, 301; H.R. Deb. (6.9.55) 360–75; H.R. Deb. (13.9.55) 572–6.

313 VP 1951–53/129.

314 VP 1954–55/94–5.

315 The Minister tabled the committee's first report on 11 September 1952; VP 1951–53/417.

316 S.O. 353.

Recommittal

All or part of a report may be recommitted to a committee by the House, or it may be recommitted and the resolution of appointment amended. *May* has stated:

A recommittal generally takes place for some cause which sufficiently indicates to the committee what it is expected to do, and, hence, it is not usual for instructions to be given on recommittal; but the committee is to gather from the sense of the House in such proceedings what method it is to pursue. When a report is thus recommitted, the committee, with all its powers, is thereby revived.³¹⁷

However, a later edition of *May* notes that the procedure has not been used for many years.³¹⁸

Government responses to reports

Since 1978 Governments have followed a practice of responding formally to committee reports by way of a statement to the House(s).³¹⁹ The original commitment was to respond within six months of the tabling of the report, but in 1983 this period was reduced to three months.³²⁰

These procedures do not apply to reports by the Joint Committee of Public Accounts and Audit and the Parliamentary Standing Committee on Public Works, and to advisory reports on proposed legislation. Government responses are made to reports by the Joint Committee on Publications resulting from inquiries, and reports by the Procedure Committee, but not to reports by other committees concerned with 'internal' matters, such as the House Committee. The Presiding Officers have also provided responses to reports by the Joint Committee on Publications.³²¹

Speakers have followed the practice of presenting to the House at approximately six-monthly intervals a schedule listing government responses to House of Representatives and joint committee reports as well as responses outstanding.³²² Subsequently the Leader of the House tables a list of parliamentary committee reports showing the stage reached with the government response in each case.³²³ This list does not constitute the formal response, nor does correspondence from a Minister directly to a committee chair. The Government's response to a committee report is considered to have been formally made only when presented directly to the House(s).

MEETING PROCEDURES

The following sections describe procedures applying to committees of the House, although particular considerations applying to joint committees are also covered. It should be noted that, by convention, joint committees have followed established Senate committee practices and procedures to the extent that these differ from those of the House.³²⁴ Senate committee procedures are outlined in *Odgers*.

First meeting

The first meeting cannot be held until the Members have been formally appointed by the House. If, as is normally the case, it is left to a committee to elect its own chair, the

317 *May*, 21st edn, p. 652.

318 *May*, 22nd edn, p. 684.

319 H.R. Deb. (25.5.78) 2465–6.

320 S. Deb. (24.8.83) 141–2.

321 VP 1978–80/1237.

322 E.g. VP 1993–95/2687; VP 1996–98/95; VP 1998–2001/1156.

323 E.g. VP 1993–95/1683; VP 1996–98/340; VP 1998–2001/1595.

324 See p. 611.

committee secretary must call the first meeting. It is the secretary's responsibility to inform the members in writing of the time and place of the first meeting. If the chair is appointed, for example by the Prime Minister, it is technically the chair's responsibility to call the first meeting.

Unless the chair has been appointed, the committee secretary takes the chair at the commencement of the first committee meeting. The first item on the agenda is the formal announcement by the committee secretary of the formation of a duly constituted committee and of its membership. The second item is the election of a chair, which is conducted by the committee secretary, as described at page 622. The chair, upon election, takes the chair and conducts the election, if required, of the deputy chair. The remainder of the agenda is at the committee's discretion.

Time and place of meeting

Standing order 339 provides that a committee may adjourn from time to time—in other words a committee's schedule of meetings is a matter for the committee itself to determine. Some committees have regular meeting times, but others may meet only as required by the work at hand. Formal notice of each meeting is issued by the committee secretary. The time and place of the next meeting is routinely included on the agenda for each meeting.

Committees normally adjourn to an agreed date or to a date to be fixed by the chair or presiding member. If a meeting is known to be the committee's last, it adjourns sine die. If the committee adjourns to a specific date, and a change in the date is subsequently found to be necessary, it is incumbent upon the chair to ensure that members are notified and given reasonable notice of the new date which is fixed by the chair.

If there is disagreement within a committee concerning the appropriateness of adjourning at a particular time, the matter should be determined by resolution of the committee. However, in circumstances of grave disorder, the chair may suspend or adjourn the meeting without putting a question. These practices reflect those of the House itself.³²⁵

The following provisions of Senate standing order 30 for the convening of meetings apply to joint committees:

Notice of meetings subsequent to the first meeting shall be given by the secretary attending the committee (a) pursuant to resolution of the committee, (b) on instruction from the Chair or (c) upon a request by a quorum of members of the committee.

Meetings during sittings of the House

A House committee may sit during any sittings or adjournment of the House.³²⁶ Committees of the House make much use of meetings during sittings of the House (although interrupted from time to time by calls for divisions or quorums in the House).

Joint committees—meetings during sittings of the Senate

Senate standing order 33, providing for the circumstances in which Senate committees may meet during sittings of the Senate, is also expressed to apply to joint committees. It states:

- (1) A committee of the Senate and a joint committee of both Houses of the Parliament may meet during sittings of the Senate for the purpose of deliberating in private session, but shall not make a decision at such a meeting unless:

³²⁵ S.O.s 49, 308.

³²⁶ S.O. 339.

- (a) all members of the committee are present; or
 - (b) a member appointed to the committee on the nomination of the Leader of the Government in the Senate and a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate are present, and the decision is agreed to unanimously by the members present.
- (2) A committee shall not otherwise meet during sittings of the Senate except by order of the Senate.
- (3) Proceedings of a committee at a meeting contrary to this standing order shall be void.

Until 1987 the Senate imposed a general prohibition on committees meeting during its sittings (the view being held that the primary duty of Senators was to the plenary), although leave to sit during sittings of the Senate had been granted on motion.³²⁷ The attitude was taken that leave was required only of the Senate because House of Representatives committees are permitted to meet during sittings of the House. Occasionally resolutions of appointment have authorised joint committees to sit during the sittings of either House of the Parliament.³²⁸

In 1987 and again in 1988 the Joint Committee of Public Accounts felt compelled to report on the issue of whether it was able to sit while the Senate was sitting, the committee maintaining that it had a statutory right to meet contrary to the provisions of Senate standing orders and the wish of the Senate.³²⁹ However, more recent practice has been for the committee to seek the permission of the Senate to sit while the Senate is sitting.³³⁰

Meetings outside Parliament House

Standing order 339 now provides standing authorisation for committees of the House to move from place to place.³³¹ Without this authorisation, in the past it was considered that a committee could only meet outside Parliament House, Canberra, by special order of the House. In 1968 two such orders had to be made by both Houses in relation to the Joint Committee on the Australian Capital Territory whose resolution of appointment did not contain this authorisation. Each motion passed by the Houses limited the authorisation to the committee's current inquiry.³³² The committee's resolution of appointment was amended soon afterwards to avoid the need for these cumbersome procedures.³³³

Meetings overseas

On relatively rare occasions committees or their subcommittees have been permitted to travel overseas. The main principle to be considered, in relation to a committee travelling overseas, is that the House, and therefore its committees, has no jurisdiction outside Australia. Where approval has been given, it has been considered proper for members of a committee, as a group, to make inquiries abroad and to have regard to the results of those inquiries, provided they do not purport to sit as a committee and exercise the powers delegated by the House.

It would appear that provided a committee did not attempt to exercise its powers to administer oaths, compel the giving of evidence, and so on, it could sit as a committee

³²⁷ J 1974–75/655.

³²⁸ Joint Committee on Profits, VP 1940–43/158–9, 162; Joint Committee on Constitutional Review, VP 1956–57/168–9, 171 (the name of the committee was altered from Joint Committee on Constitutional Change *see* PP 50 (1957–58) 4).

³²⁹ Reports 264 and 292 of the Joint Committee of Public Accounts, PP 75 (1987) and PP 317 (1988). *See also* reports of the Senate Standing Orders Committee, PP 117 (1983) and PP 169 (1987); and J 1987–89/1050.

³³⁰ *See also Odgers*, 9th edn, pp. 405–6.

³³¹ S.O. 339.

³³² VP 1968–69/44, 53, 329, 339.

³³³ VP 1968–69/344, 356.

overseas and, with the consent of witnesses, have proceedings transcribed and published.³³⁴ As proceedings would almost certainly not be privileged (in terms of the law of the country concerned), witnesses would need to be informed accordingly. In addition, committees would be unable to have orders enforced and to protect witnesses against intimidation or penalty. It would seem improper for a committee to sit, as a committee, in a foreign country without first seeking the consent of that country's government. Committees which are allowed to travel overseas are therefore more likely to conduct inspections and hold meetings and discussions of an informal nature.

House committees have taken evidence in Australian external territories on several occasions, sometimes on oath.

Inspections, etc

In addition to gathering formal evidence, committees frequently undertake visits or inspections at which informal discussions take place. Such inspections permit members to familiarise themselves with places, processes, and matters which are important to their inquiries but which cannot be adequately described in formal evidence. If a quorum is present, these are formal proceedings (private meetings), and the committee's minutes will reflect the nature of the inspections, as with private briefings.

Quorum

The proceedings of a committee which meets in public or in private without a quorum are invalid. Consequently, decisions taken are not binding and, more seriously, words spoken by members and witnesses are not assumed to be privileged. Any order by committee members has no legal authority in this circumstance.

In the absence of a quorum at the commencement of a meeting the following procedures provided for in the standing orders are followed:

If, after the lapse of 15 minutes from the time appointed for the meeting of a committee, a quorum is not present, the members present may retire, and their names shall be entered in the minutes. The secretary of the committee shall notify members of the next meeting.³³⁵

The reference to 'minutes' is in practice taken to mean the committee secretary's rough minutes. If, after a committee has proceeded to business, the number of members present falls below a quorum, the chair must suspend the proceedings until a quorum is present or, after a reasonable period, adjourn the meeting.³³⁶ This requirement is applied with common sense, and a meeting is not suspended if the quorum lapses when members leave the room for short periods. However, no vote can be taken during these periods.

The quorum of a committee of the House is three, unless otherwise ordered.³³⁷ The standing orders are silent on the quorum for meetings at which a committee of the House confers (sits jointly) with a similar committee of the Senate. In the absence of any provision, the Library, House and Publications Committees, when conferring, have fixed their quorums at five, provided that each House is represented in the quorum.

The quorum of a subcommittee of a House committee is two.³³⁸

334 See Sir Barnett Cocks, 'Parliament goes abroad', *Parliamentarian*, LII, no. 1, 1971, p. 10. For House of Commons practice see *May*, 22nd edn, pp. 643–4. And see *Odgers*, 6th edn, p. 756–7.

335 S.O. 337.

336 S.O. 337.

337 S.O. 337.

338 S.O. 338.

Quorum—joint committees

The House may fix the quorum of its members required to constitute a meeting of a joint committee.³³⁹ Normally the quorum is stated in the resolution of appointment and no specific provision is made as to the number of Senators or Members, respectively, required to form a quorum. The effect has been that a quorum may be maintained by Members of one House only. This has not prevented some joint committees, such as the Joint Committee on Publications, from maintaining an informal quorum arrangement where the committee agrees that it is not properly constituted unless there is at least one representative from each House.

Quorum requirements may vary between committees and for the same committee in different Parliaments. In the 37th Parliament the Joint Standing Committee on Foreign Affairs, Defence and Trade, with 32 members, had a quorum requirement of 10, while the joint standing committees on Electoral Matters and Migration, each with a membership of 10, had quorum requirements of four.³⁴⁰ In the 38th and 39th Parliaments these committees, with the same number of members as before, had quorum requirements of six, three and three, respectively. In the later Parliaments the quorum provisions also included a requirement for the presence of one government and one non-government member (from either House) at deliberative meetings.³⁴¹ The resolution of appointment of the Joint Standing Committee on the New Parliament House provided that five members of the committee, one of whom was either the Speaker or the President, constituted a quorum of the committee.³⁴² The Joint Standing Committee on the National Capital and External Territories has had a quorum of three, one of whom must be the Deputy Speaker or the Deputy President when matters affecting the parliamentary zone were under consideration.³⁴³

Presence at meetings of Members who are not members of the committee

A Member of the House who is not a member of a particular committee may be present when it is examining witnesses, but must withdraw if requested to do so by the chair or any member of the committee, and must always withdraw when the committee is deliberating or taking evidence in camera.³⁴⁴ When present at a hearing the Member cannot put questions to witnesses or take any other part in the formal proceedings. These restrictions can only be removed by a provision in the committee's resolution of appointment or by special order of the House. By comparison, the relevant Senate standing order relating to its legislative and general purpose standing committees allows Senators to be nominated as 'participating members' of committees, although while such members have all the rights of committee members and may participate in the hearing of evidence and deliberations, they may not vote on any question before the committee.³⁴⁵

Standing order 324 allows a general purpose standing committee to be supplemented by up to two additional members for a particular inquiry. In addition, when a committee is considering a bill referred to it under the provisions of standing order 217A, one or

339 S.O. 358. The Senate could also set such a requirement by resolution or by standing order. The last occasion the Houses fixed the quorum of their respective Members was for the Joint Select Committee of Public Accounts for which the quorum included at least one Member of each House, VP 1932–34/118–19; J 1932–34/45, 46; *see also* Joint Select Committee on the Moving-Picture Industry, VP 1926–28/294, 303.

340 VP 1993–95/81–3.

341 VP 1996–98/227–235; VP 1998–2001/164–74.

342 VP 1987–89/39–40.

343 VP 1993–95/85; VP 1996–98/131; VP 1998–2001/172.

344 S.O. 345.

345 Senate S.O. 25(7) (a)–(c).

more members of the committee may be replaced by other Members.³⁴⁶ In these cases, however, the Members in question become full members of the committees for the purposes of those inquiries, and are not to be regarded as ‘observers’ or ‘participating Members’.

Visitors

Standing order 344 provides:

When a committee or subcommittee is examining a witness, or engaged in other proceedings for the purpose of gathering information, visitors may be admitted. They shall withdraw if requested by the chair or if any member of the committee or subcommittee asks the chair to request their withdrawal. All visitors must withdraw when the committee or subcommittee is deliberating or taking evidence in camera.

The question of whether committee members’ personal staff may attend private meetings of committees has arisen. In 1976 the Speaker wrote to all chairs of committees discouraging the attendance of members’ staff at other than public meetings of a committee or at committee inspections. The Speaker indicated that the provisions of the standing orders concerning the confidentiality of committee proceedings³⁴⁷ militated against any person, other than a member of a committee or an officer of the House, being involved in committee proceedings which are not open to the public. More recently, the practice of excluding such staff members from private meetings has been mentioned at the first meeting of a committee in each Parliament.

Senate standing order 36, which is relevant to joint committees, states that persons other than members and officers of a committee may attend a public meeting of a joint committee, but such persons shall not attend a private meeting except by express invitation of the committee and they must be excluded when the committee is deliberating.

Procedures at hearings

Hearings are normally held in public but at the committee’s discretion they may be held in camera. The authority to conduct public hearings is contained in standing order 339, which provides that a committee or any subcommittee may conduct proceedings by hearing witnesses, either in public or in private. This authorisation is reflected in the standing order which provides that when a committee is examining witnesses or engaged in other proceedings for the purpose of gathering information, visitors may be admitted.³⁴⁸ Hearings are frequently attended by the general public and by media representatives. It is standard practice for the committee secretariat to notify the media in advance of proposed hearings and to advise individuals or organisations who have asked to be informed.

The chair or presiding member may open a hearing with a brief statement of its purpose and background, and may also outline the procedures to be followed by the committee. The first witness or witnesses are called to the table and may be required to make an oath or affirmation (*see* p. 651). The witness then sits at the table and is usually asked to state his or her full name and the capacity in which he or she is appearing before the committee, the part the witness played in preparation of the submission on which the examination is occurring, and whether the witness wishes to propose any amendment to

346 S.O. 333.

347 Current S.O.s 344, 345, 346.

348 S.O. 344.

the submission (*see* p. 648). Before questions are put by committee members, it is usual for the chair to invite the witness to make a short statement to the committee.

The examination of witnesses before a committee or a subcommittee is conducted according to the mode of procedure agreed on by the committee.³⁴⁹ While procedures vary to some extent between committees, all operate on the principle that questions are asked and answered through the chair and in an orderly manner. All members should be given an equal opportunity to put questions to a witness. Questions put to witnesses are normally substantially focussed on the witnesses' written submissions, but it is considered that committees are not confined to questioning witnesses only about matters raised in their submissions.

A member of the committee or a witness may object to a question, in which case the chair decides whether the witness should answer. If there is any dissent from the chair's decision, the chair may suspend the public hearing and have the witness (and other visitors) withdraw while the committee determines the matter in private, by vote if necessary. The committee may insist on the question being answered (*see* p. 635).

In 1989 the Standing Committee on Procedure proposed the adoption of the following provisions to be observed by committees of the House:

The Chair of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.

Where a witness objects to answering any question put to him or her on any ground, including the grounds that it is not relevant, or that it may tend to incriminate him or her, he or she shall be invited to state the ground upon which he or she objects to answering the question. The committee may then consider, *in camera*, whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination, and of the reasons for it, and shall be required to answer the question *in camera*, unless the committee resolves that it is essential that it be answered in public. Where a witness declines to answer a question to which a committee has required an answer, the committee may report the facts to the House.

Other parts of the proposed statement are quoted elsewhere in this chapter, although three other provisions should be noted here:

A witness shall be given notice of a meeting at which he or she is to appear, and shall be supplied with a copy of the committee's terms of reference and an indication of the matters expected to be dealt with during the appearance. Where appropriate a witness may be supplied with a transcript of relevant evidence already taken in public.

A witness may be given the opportunity to make a submission in writing before appearing to give oral evidence.

A witness shall be given reasonable access to any documents or records that the witness has produced to a committee.³⁵⁰

The Procedure Committee repeated its recommendation for a resolution containing the above provisions in its 1998 report on the House committee system,³⁵¹ with the additional provision that:

Witnesses shall be treated with respect and dignity at all times.

However, the proposed resolution for dealing with witnesses was not put to the House when other matters recommended in the report were debated and agreed to, the Leader of the House commenting that, while the Government supported the recommendation in

349 S.O. 368A.

350 *Committee Procedures for Dealing with Witnesses*, PP 100 (1989).

351 Standing Committee on Procedure, *Ten Years On: A Review of the House of Representatives Committee System*, May 1998. PP 91 (1998).

principle, 'fixing those guidelines in a resolution may attract issues of arguments and interpretation over committee procedure, adding to the time and cost of inquiries and distracting from the business of the committee'.³⁵²

During a hearing a witness may be asked to provide information or a document which is not immediately available. In such cases the witness may be asked or may volunteer to provide the information later in writing or, less often, at a subsequent hearing.

No person other than a member of the committee may question a witness during examination. No witness may question a member or any other person present, but a witness may ask for clarification of a question. In 1971 the Speaker made a private ruling that specialist advisers (such as committee staff) must not be permitted to question witnesses, comment on their evidence or otherwise intervene directly in formal proceedings at a public hearing.

Documents provided to a committee, including maps, diagrams, or other illustrated and written material, are normally included in the committee's records as exhibits (*see* p. 647). Where it is necessary to incorporate material in the transcript and there is no objection to this course, the chair usually so orders, although modern practice is that the transcript is regarded as a record of oral evidence only, and the incorporation of material is kept at a minimum. Hansard prepares a written transcript of evidence taken at hearings. Witnesses are given an opportunity to correct errors of fact in the transcript.

It is customary at the conclusion of public hearings for motions to be passed authorising the publication of the evidence taken (*see* p. 658), thus conferring privilege on the publication of the transcript. Witnesses may request that their evidence be taken in camera and that documents submitted be treated as confidential. Such requests are usually but not necessarily granted (*see* p. 659).

Seminars, informal discussions, public meetings and workshops

Sometimes committees may consider informal discussions, public meetings, seminars or workshops more appropriate for their purposes than formal hearings. Such procedures, now formally provided for by standing order 339, have been used:

- to conduct preliminary discussions prior to the adoption of a formal reference;
- to permit general background discussions at the beginning of an inquiry;
- as a device for discussions on matters of interest to the committee but not the subject of a formal inquiry;
- to obtain general community views at public meetings; and
- to obtain expert advice and scrutinise it with the experts collectively.

Committees have made use of public meetings where there is widespread community interest in an inquiry and where, because of the large number of persons involved, the formal public hearing approach may be time-consuming and repetitive, yet still exclude many from the committee's decision-making process. Public meetings not only enable committee members to be exposed to community attitudes but also provide an opportunity for a large number of private citizens to put views to the committee.

Seminars and workshops can allow committee members to question experts and others, and such persons can also question each other directly. This process provides immediate opportunities to both clarify the issues and explain particular opinions.

352 H.R. Deb. (3.12.98) 1302.

The Standing Committee on Aboriginal and Torres Strait Islander Affairs has followed a practice of conducting informal discussions with Aboriginal communities and groups and a range of other community organisations during field trips in connection with its inquiries. As these discussions are not conducted under standing orders they are much more informal and allow for a much freer interchange of views than is normally possible in a public hearing context. In particular, they enable people who may be unwilling to submit themselves to the more formal procedures of a public hearing to express themselves openly. Hansard produces a precis of the informal discussions which is not published by the committee.

Although alternative processes of this nature can be helpful in particular inquiries, they are not regarded as a substitute for the normal hearing process under which witnesses may be questioned as fully as necessary to allow committee members to inform themselves on a matter. The information obtained in this manner does not have either the forensic value nor the technical status of formal evidence, although it can be used in committee reports, provided that the report indicates the manner in which the information has been obtained. Depending on the circumstances, such informal proceedings may not be found to enjoy parliamentary privilege.

Minutes or a report, or both, on public meetings or seminars can be included in the committee's records as an exhibit. The Hansard record of such proceedings is often not authorised for publication although it may be incorporated into the committee's records as an exhibit.

Video and teleconferencing

Committees are authorised to use electronic communication devices in order to take oral evidence from a witness who is not in attendance at a meeting of the committee, and to enable committee members not in attendance to participate in a public or private meeting. Standing order 339 provides:

- (b) A committee may resolve to conduct proceedings using audio visual or audio links with members of the committee or witnesses not present in one place. If an audio visual or audio link is used committee members and witnesses must be able to speak to and hear each other at the same time regardless of location.

The following guidelines have been issued by the Procedure Committee to assist committees in deciding whether to conduct meetings using audio visual or audio links. They are to be used by each committee as it sees fit.

1. Audio visual or audio links may be used for deliberative meetings or for hearing oral evidence from witnesses or for any other proceeding described in standing order 339.
2. Audio visual or audio links should only be used to hear evidence in camera if the committee is satisfied that the evidence will not be overheard or recorded by any unauthorised person and that the transmission is secure.
3. The following factors should be considered by a committee in deciding whether an audio visual or audio link is suitable for use in any particular circumstance:
 - (a) whether use of the link will confer any benefit not available using traditional meeting processes eg cost or time savings, access to evidence not otherwise obtainable;
 - (b) any benefit of traditional methods which may be lost. These may include the value of the committee being present at a location away from Canberra; the benefit of including regional, rural and remote areas in the work of the committee; the value of the public being able to observe the committee at work; or possible restrictions on the committee being able to interact freely with a witness;
 - (c) real cost comparisons of alternative means of evidence collection;
 - (d) the type of evidence to be heard. Specialist or expert evidence may be suited to hearing in this way. Audio visual or audio links may make it feasible to hear evidence from witnesses

- located outside Australia, however, the committee should take into account the fact that the protection afforded by parliamentary privilege would not extend beyond Australia; and
- (e) whether evidence is likely to be contentious or a witness needs to be tested rigorously for truthfulness or there is any concern about the identification of the witness. If the committee wishes to administer an oath an authorised officer must be present with the witness to administer it.
4. Any other factors which the committee considers relevant should be taken into account and a decision made appropriate to the particular circumstances of the proceeding, inquiry or witness.³⁵³

Standing order 339 does not preclude committees from using other types of electronic communication—for example, fax, email, internet chat facilities—for purposes other than conducting formal proceedings.

Disorder

Disorderly or disrespectful conduct by visitors, including witnesses, during a public or private meeting of a committee may be considered a contempt (*but see* Chapter on ‘Parliamentary privilege’). In this regard a Member who is not a member of the committee is on the same footing as a visitor. Examples of disorderly or disrespectful conduct could include:

- interrupting or disturbing committee proceedings;
- remaining after visitors have been ordered to withdraw;
- appearing before a committee in a state of intoxication; and
- using offensive language before a committee.³⁵⁴

The manner in which a committee chooses to deal with disorderly behaviour will obviously depend upon the circumstances. If a simple direction is insufficient to restore order, the committee may order visitors to withdraw or suspend its proceedings. The assistance of the Serjeant-at-Arms and staff from the Serjeant-at-Arms’ office may have to be sought. If the committee is meeting outside Parliament House, it may have to adjourn its proceedings.

At a public hearing on 3 December 1981, the proceedings of the Public Works Committee were continually interrupted by interjections by members of the public attending the meeting. The chair made a plea to those persons interjecting to indicate in writing the opinions they wished to express and then suspended the meeting for lunch. During the lunch break the chair gave a radio interview where he indicated that if the interjections continued the meeting would continue in private. There were few interjections at the resumed meeting.

A committee may not punish a person considered guilty of contempt; it may only draw the circumstances to the attention of the House by special report or a statement by the chair. The House may then deal with the matter as it thinks fit.³⁵⁵

Motions and voting

The standing orders are silent on the moving of motions and amendments and voting in committees, except to state that the chair has a casting vote only³⁵⁶ and to provide for voting during the consideration of draft reports.³⁵⁷

353 VP 1998–2001/1985.

354 *And see* May, 22nd edn, pp. 108–11.

355 *And see* p. 604 of the second edition for details of a case referred by the House of Commons to its Committee of Privileges.

356 S.O. 336.

357 S.O. 349.

Following the procedure of the former committee of the whole, motions and amendments do not require a seconder. The one exception is the nomination of a member for election as chair (*see* p. 622). An amendment may be moved to an amendment.³⁵⁸

As in the former committee of the whole, a division is not proceeded with unless more than one member has called for a division. In such instances the member may inform the chair that the member wishes his or her dissent to be recorded in the minutes. This request is automatically granted.³⁵⁹

Questions are determined by a majority of votes. While the chair of a House of Representatives committee exercises a casting vote only,³⁶⁰ the voting rights of chairs of joint committees can vary. It is common to include in the resolution of appointment of joint committees the following paragraph:

In the event of an equality in voting, the chair, or the deputy chair when acting as chair, shall have a casting vote.³⁶¹

This is in effect a second vote which is in addition to the chair's deliberative vote. If special provisions are not made for a casting vote, the chair of a joint committee has a deliberative vote only in accordance with Senate standing orders.³⁶² Thus, when the votes are equal the question will pass in the negative. This rule is applied to the relatively few joint committees whose resolutions of appointment do not determine the chair's voting powers.³⁶³ The resolution of appointment of the Joint Committee on Foreign Affairs, Defence and Trade in the 37th Parliament did not have a provision covering an equality of voting, hence the provision in the Senate standing order applied.³⁶⁴

The Joint Standing Committee on the New Parliament House had joint chairs. Its resolution of appointment provided that in matters of procedure, each of the chairs, whether or not occupying the chair, had a deliberative vote and, in the event of an equality of voting, the chair occupying the chair had a casting vote. In matters other than those of procedure, each of the chairs, whether or not occupying the chair, had a deliberative vote only.³⁶⁵

Minutes of proceedings

The minutes of a committee record the names of members attending each meeting, every motion or amendment moved in the committee and the name of the mover, and the names of members voting in a division, indicating on which side of the question they have each voted. The minutes also record the time, date and place of each meeting, the names of any witnesses examined, the documents formally received and any action taken in relation to them, and the time, date and place of the next proposed meeting. The attendance of specialist advisers may also be recorded.

As far as possible the style of committee minutes conforms to the style of the Votes and Proceedings of the House. They do not summarise deliberations but record matters of fact and any resolutions resulting from the committee's deliberations.

358 Committee of Privileges, minutes 21.12.93, PP 78 (1994).

359 S.O. 193.

360 For an exception *see* Select Committee on Aircraft Noise where the chair had a deliberative vote and, in the event of an equality of votes, also had a casting vote, VP 1969–70/15–17.

361 VP 1996–98/126–135; VP 1998–2001/171.

362 Senate S.O. 31.

363 Joint Committee on the Australian Capital Territory, VP 1980–83/54–5, 69.

364 VP 1993–95/82. In the 38th and 39th Parliaments the resolution did so provide, VP 1996–98/127; VP 1998–2001/167.

365 VP 1987–89/39–40.

The chair confirms the minutes of a preceding meeting by signing them after the committee has adopted them and agreed to any necessary amendments. The committee secretary may certify as correct the unconfirmed minutes of a final meeting of a committee.

Minutes are required to be tabled in the House with the relevant report.³⁶⁶ If a committee is conducting more than one inquiry, extracts from its minutes relating only to the inquiry on which it is reporting should be tabled.

If the minutes show disagreement or division on the content of a report, there are advantages in having them printed as an appendix to the report. Publication of minutes is one method of drawing attention to dissent, and may overcome the need for a separate dissenting report. Some reports by the Committee of Privileges and the report by the Select Committee on Pharmaceutical Benefits exemplify this approach.³⁶⁷

Minutes, like all papers and documents presented to the House, are authorised for publication once they are tabled.³⁶⁸ Transcripts of evidence and copies of submissions tabled with the minutes are subject to the same provisions. Therefore a committee should not table evidence which it does not want to be made public.

Confidentiality of proceedings and records

The confidentiality made possible by a committee's power to meet in private is bolstered by the provision in the standing orders that the evidence taken by a committee or subcommittee and documents presented to it, and proceedings and reports of it, which have not been reported to the House, shall not, unless authorised by the House or the committee or subcommittee, be disclosed or published to any person other than a member or officer of the committee.³⁶⁹ This provision covers private committee deliberations, the minutes which record them and committee files. Any unauthorised breach of this confidentiality may be dealt with by the House as a contempt.³⁷⁰

The files and other records of a committee are confidential to it and may be made available to others only by order of the committee, or of the House itself or, in the limited circumstances noted below, by authority of the Speaker. Standing order 341 provides that committees and any of their subcommittees shall have power to consider and make use of the evidence and records of the relevant committees appointed during previous Parliaments.

The Speaker has the authority to permit any person to examine and copy committee documents which have not already been published by the House or its committees and which have been in the custody of the House for at least 10 years. A 30 year rule applies to confidential documents or in camera evidence (*see* page 662).³⁷¹

Televising, filming and recording of proceedings

Committees of the House are permitted to allow the recording of their proceedings for broadcasting or televising. A number of conditions apply and access is on the basis of an undertaking to observe them. Among the conditions are the following:

366 S.O. 353.

367 'Pharmaceutical Benefits', *Report from the Select Committee*, PP 73 (1972).

368 S.O. 320. *See* Ch. on 'Papers and documents'.

369 S.O. 346 and *see also* the *Parliamentary Privileges Act 1987*, s. 13. Standing order 346 and resolutions of appointment authorise committees to publish any evidence given before them and any document presented to them.

370 Subject to the provisions of the *Parliamentary Privileges Act 1987*. (*See also* Ch. on 'Parliamentary privilege', and *May*, 22nd edn, pp. 118–20, 670–1.)

371 Resolution of 11 October 1984, VP 1983–84/988–9.

- only public hearings may be covered;
- in all cases it is for the committee to decide whether to allow access (and approval may be withdrawn at any time);
- fairness and accuracy and a general overall balance must be observed;
- excerpts may be taken but must be placed in context; and
- excerpts may not be used for political party advertising etc. or for the purposes of satire or ridicule.³⁷²

Public hearings in Parliament House are regularly televised for the House monitoring system, thus allowing them to be viewed live by occupants of Parliament House and to be webcast on the Parliament's internet site. The signal is also available to the networks for rebroadcast.

Important questions of principle arise in respect of the rights and legitimate interests of witnesses and of third parties who may be the subject of comment in proceedings conducted under privilege. The atmosphere in which the televised proceedings are held might also affect a witness significantly in some cases, as experience of the televising of committee proceedings in some jurisdictions would seem to suggest. Such considerations are recognised in the conditions followed by committees: where a committee intends to permit coverage of proceedings, witnesses must be given reasonable opportunity to object and to state the ground of the objection. Committees must then consider the objection, having regard to the proper protection of the witness and the public interest in the proceedings. If the committee decides to proceed notwithstanding the objections, the witness must be informed accordingly before appearing. While the concerns of witnesses must be recognised, committees have been encouraged to permit televising of their proceedings to increase awareness of the activities of committees.

Because these matters are not covered by the Parliamentary Proceedings Broadcasting Act, the protection attaching to a television or film company may be found to be similar to that enjoyed by any person who, with the approval of the committee, published a report of its proceedings—that is, qualified privilege only may apply. Members of a committee and witnesses appearing before it would have the usual protection from action in respect of statements made by them during the proceedings. The fact that the proceedings were telecast or filmed would not alter their legal position.³⁷³

Mainly because of the potential distraction to members and witnesses, photographs of committee proceedings are not permitted without the committee's authority. Committees may agree to pose for photographs before or after a hearing or during a suspension of proceedings, or may permit photographs to be taken during proceedings.

People taking film, video or still photographs should have regard to the powers of each House to deal with any act which may be held to be a contempt or a breach of the rules applying to the taking of photographs in Parliament House.

Any person permitted by a committee to attend a hearing may make an audio recording of the proceedings. It is the responsibility of the person concerned to ensure that the recording is not used improperly or in contravention of the Parliamentary Proceedings Broadcasting Act or any other statute. Further, such a recording of

³⁷² The authority for this action is a resolution of the House of 16 October 1991, VP 1990–93/1084–5. On 23 August 1990 the Senate agreed to a detailed resolution concerning the broadcasting, including the televising, of committee proceedings, J 1990–93/237.

³⁷³ Advice of the Attorney-General to the President of the Senate, dated 23 May 1963.

proceedings has no special standing in terms of the laws governing the broadcasting of proceedings or the laws of parliamentary privilege.

SUBCOMMITTEES

Subcommittees may be appointed to:

- undertake ad hoc tasks such as taking evidence or conducting inspections on a particular day;
- investigate and report on a specified aspect of a broader inquiry; or
- conduct a full scale inquiry.

A committee cannot delegate any of its powers or functions to a subcommittee unless so authorised by the House. Without this authority committees may only appoint subcommittees for purposes which do not constitute a delegation of authority, such as the drafting of reports.³⁷⁴ Standing authorisation for committees of the House to appoint subcommittees is now given by standing order 338, which provides that a committee shall have power to appoint subcommittees consisting of three or more of its members and to refer to any subcommittee any matter which the committee is empowered to examine.³⁷⁵ It is considered that a committee is responsible for the activities of its subcommittee(s) and that a subcommittee is accountable to its committee.

The chair of a subcommittee is appointed by its parent committee, and has a casting vote only. If the chair of a subcommittee is not present at a meeting of the subcommittee the members of the subcommittee present elect another member of the subcommittee to act as chair at that meeting. The quorum of a subcommittee is two members of the subcommittee. Members of the committee who are not members of a subcommittee may participate in the public proceedings of the subcommittee but cannot vote, move any motion or be counted for the purpose of a quorum.³⁷⁶

The following powers and authorisations granted to committees by the standing orders are now also expressly granted to subcommittees:

- to call witnesses and require that documents be produced (S.O. 340);
- to consider and make use of the evidence and records of similar committees appointed during previous Parliaments (S.O. 341);
- to authorise publication of any evidence given before it or any document presented to it (S.O. 346);
- to conduct proceedings using approved means (S.O. 339(a));
- to adjourn from time to time, move from place to place and sit during any sittings or adjournment of the House (S.O. 339(b)).

Section 3 of the *Parliamentary Privileges Act 1987* provides that, in the Act, a reference to a 'committee' includes a subcommittee.

A subcommittee is required to keep minutes of each meeting³⁷⁷ and submit them with its report to the committee by which it was appointed. A subcommittee may not report directly to the House but only to its parent committee³⁷⁸ which in turn reports to the House in terms of its reference. This requirement applies to matters which may arise in

³⁷⁴ *May*, 22nd edn, p. 659.

³⁷⁵ Prior to 3.12.1998 such authorisation was granted to individual committees by standing order or resolution of appointment.

³⁷⁶ S.O. 338.

³⁷⁷ S.O. 343.

³⁷⁸ *May*, 22nd edn, p. 661.

the course of an inquiry—for example, unauthorised disclosure of evidence or possible intimidation of a witness³⁷⁹—as well as to reports.

In general practice reports by subcommittees are prepared and considered in the same manner as committee reports. The chair of the subcommittee presents the report and minutes of the subcommittee to the full committee. If the report is for tabling in the House, the committee then considers the report, makes any amendments it requires and resolves that the report, as amended, be the report of the committee.

There is no provision for protest or dissent to be added to a subcommittee report. Committee practice is that formal protest or dissent is moved and recorded only at the committee consideration stage. A member of a subcommittee, or any other committee member, can disagree to a subcommittee report or portions of it when the committee is considering the matter and this will be recorded in the committee's minutes of proceedings.

In 1975 the Joint Committee on the Parliamentary Committee System appointed a subcommittee to travel overseas in connection with its inquiry. The subcommittee submitted to the committee a report which drew together the evidence which was taken by the full committee in Australia and information obtained by the subcommittee in its discussions and observations overseas. On the subcommittee's recommendation the committee tabled this lengthy report, in effect as an appendix to the committee's two-page report. The committee did not express any view on the subcommittee's conclusions and recommendations. The purpose of the arrangement was to seek comment on the report for the consideration of the full committee.³⁸⁰ A member of the committee presented a dissenting report in which he stated:

It is my opinion, and I suspect that it is the opinion shared by many members of the Committee, that when a subcommittee is sent to perform a task it should not be obliged to report as an isolated unit; rather it should present its findings to its parent body, have them ratified and then present them to the Parliament.

The Member concluded that the committee had 'abrogated its responsibilities'.³⁸¹

On other occasions, when inquiries have not been reported on at the dissolution of the House, in the new Parliament the opportunity has sometimes been taken for the new committee, or another appropriate committee, to have the inquiry completed by use of a subcommittee. It has been pointed out that while, for the purpose of enabling a report to go forward, a committee may adopt a subcommittee's report in such circumstances, the report does not necessarily convey the views of committee members who did not serve on the subcommittee.³⁸²

CONFERRAL WITH COMMITTEES OF THE SENATE

All committees of the House are now empowered 'to confer orally or in writing with a similar committee of the Senate'.³⁸³ Using this power, the Library, House and Publications Committees and their Senate counterparts operate in practice as joint committees (*see* p. 608).

379 H.R. Deb. (9.1.2000) 22635–6.

380 PP 275 (1975) xi.

381 PP 275 (1975) 95–7.

382 'Passenger motor vehicle safety', *House of Representatives Standing Committee on Road Safety*, PP 156 (1976) xii.
'Constructing and restructuring Australia's public infrastructure', *House of Representatives Standing Committee on Transport, Communications and Infrastructure*, PP 284 (1987) x.

383 S.O. 342.

Until recently this authorisation was granted to individual committees on a case by case basis, with the general rule being that committees had no power to confer with committees of the Senate without leave of the House.³⁸⁴ Senate standing orders still contain similar provisions. These provide that a committee of the Senate may not confer or sit with a committee of the House except by order of the Senate; that committees permitted or directed to confer with House committees may confer by writing or orally and that proceedings of a conference or joint sitting with a House committee must be reported to the Senate by its committee.³⁸⁵

In 1994 the House authorised the Standing Committee on Legal and Constitutional Affairs to meet concurrently with its Senate counterpart for the purposes of examining and taking evidence in connection with inquiries being held by each committee into aspects of section 53 of the Constitution. The resolution provided for meetings to be jointly chaired and for the procedures of the Senate as set out in its privilege resolution 1 of February 1988 to be followed to the extent that they were applicable.³⁸⁶ The Senate, by resolution, noted that its standing committee had power to confer with its counterpart, and directed its committee to confer accordingly.³⁸⁷ In the event no formal meetings were held between the two committees, although two informal meetings took place between their members.³⁸⁸

When a Joint Committee on the Australian Capital Territory was not appointed in the 35th Parliament the House resolved to refer all proposed variations of the plan of lay-out of the city of Canberra and its environs to the Standing Committees on Infrastructure of each House (later renamed Transport, Communications and Infrastructure). The Senate concurred and also resolved that:

- the two committees meeting as a joint committee should either appoint the chair of the Senate committee or the chair of the House of Representatives committee as its chair;
- the quorum of the joint committee be two Senators and two Members of the House of Representatives;
- a subcommittee of the Senate committee be empowered to sit with a subcommittee of the House of Representatives committee, as a subcommittee of the joint committee, when considering the variations; and
- a Senator, who was not a member of the Senate committee be permitted to attend meetings of the joint committee or a subcommittee and participate in the proceedings and deliberations, but not vote.

The House of Representatives agreed to the Senate's resolution and also empowered the joint committee to consider and make use of the evidence and records of the Joint Committees on the Australian Capital Territory appointed during previous Parliaments.

384 Former S.O. 350. Current provision has applied since 3.12.98.

385 Senate S.O. 40.

386 VP 1993–95/1165.

387 J 1993–95/1677. Note that the Senate standing orders on this matter changed during 1994.

388 PP 307 (1995).