Chapter 17

WITNESSES

ONE OF THE PRINCIPAL functions of the Senate, perhaps more important than the functions of making laws and debating matters of public interest, is to conduct inquiries into such matters of public interest and into the conduct of government. Inquiries assist the Senate to obtain information which is necessary to enable it to legislate effectively and to inform the public of the manner in which government is conducted so that the electors will also be capable of making informed decisions.

Inquiries are conducted principally by seeking information and opinions from persons who possess the information and whose views are likely to be significant. The formal method whereby this information-gathering is conducted is through hearings of evidence at which witnesses attend and provide information by making submissions and answering questions.

Inquiries and witnesses

In order that this information-gathering process may be effective, the Senate has the power to require persons to attend and give evidence and to produce documents, and may punish any default as a contempt of Parliament, although, as is noted below, these powers are in practice seldom used. (See also Chapter 2, Parliamentary Privilege, particularly under Power to conduct inquiries.)

The necessity of the inquiry function and of the power to compel evidence and documents as an essential attribute of the legislative power was well expressed by the United States Supreme Court in 1927:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. (*McGrain v Daugherty* 1927 273 US 135 at 174-5)

Inquiries are normally conducted through the medium of Senate committees, which are appointed by the Senate and are given the task to inquire into particular matters on behalf of the Senate and report to the Senate on those matters (see Chapter 16, Committees). The Senate may, however, conduct inquiries and hear evidence directly, and has occasionally done so by requiring witnesses to appear before the Senate. The considerations applying in relation to witnesses apply

equally to witnesses before the Senate and witnesses before committees, and are therefore analysed in this chapter.

In practice, the power to compel the attendance of witnesses and the production of documents is normally not used in the conduct of inquiries. Senate inquiries proceed on a voluntary basis, with witnesses invited to make submissions, to produce other documents and to appear and give oral evidence. Witnesses are normally very willing to place their views and the information they possess before the Senate to assist in an understanding of issues and in the framing of legislation. On rare occasions, however, witnesses are summoned to give evidence and required to produce documents where the Senate or its committees believe that the proper conduct of inquiries entails the exercise of those inquiry powers. Some witnesses ask to be summoned in the mistaken belief that this gives them greater legal protection (see under Protection of Witnesses, below), and committees accede to such requests.

The Senate may order particular witnesses to appear before committees and give evidence. For precedents, see 7/2/1995, J.2895-7; 6/6/1995, J.3364-5; 22/10/1997, J.2673; 21/10/1999, J.1966; 10/4/2000, J.2582-3, 2585; 28/11/2000, J.3594-5; 19/6/2001, J.4322; 12/3/2002, J.154-6; 25/11/2003, J.2709-10. In all cases the orders were complied with (witnesses duly appeared, or, in one case, required documents were produced). They were all public office-holders; this procedure has not been used in respect of private citizens. (See Supplement)

Protection of witnesses

The formal power possessed by the Senate in relation to witnesses is therefore very great: witnesses may be summoned to appear to give evidence and produce documents and any failure to do so may be punished as a contempt. There are no explicit legal limitations to these powers, except that a person punished for a contempt may seek judicial review of the penalty on the basis that a refusal to attend, produce documents or give evidence did not amount to an obstruction of the Senate (see Chapter 2, Parliamentary Privilege), but such an application would be unlikely to succeed.

The corollary of the great power over witnesses possessed by the Senate, however, is that witnesses possess extensive legal protection in respect of their cooperation with Senate inquiries. Moreover, to ensure that its powers over witnesses are not used oppressively, the Senate has adopted significant procedural protections of the rights of witnesses.

(a) legal protection

Under the *Parliamentary Privileges Act 1987*, the giving of evidence and the production of documents by a witness has the same legal status as a senator's participation in Senate proceedings, and therefore attracts the very wide protection which is given to proceedings in Parliament against prosecution, suit, examination or question before any court or tribunal (see Chapter 2, Parliamentary Privilege). The action of a witness in giving evidence and producing documents and the evidence given therefore cannot be used against the witness in any sense in subsequent proceedings before a court or tribunal.

It must be emphasised that a person is protected in the act of submitting a document to the Senate or a committee even if they do not accept the document. The act of submitting the document also cannot be used as evidence against the person in any action relating to the composition or acquisition of the document. If the document is composed or acquired for the purpose of submission to the Senate or a committee, the composition or acquisition of the document is also protected.

Witnesses occasionally submit statutory declarations to committees, apparently to add credibility to their statements. If such a declaration is prepared for the purpose of submission to a committee, however, making it is an empty gesture; because of parliamentary privilege no prosecution for a false declaration, under the laws relating to such declarations, can proceed. Committees deal with such declarations as normal submissions.

Standing order 181 declares that "A witness examined before the Senate or a committee is entitled to the protection of the Senate in respect of the evidence of the witness.". This is a declaration by the Senate that it will use its powers to protect witnesses against any adverse consequences arising from their giving evidence. The Privilege Resolutions of the Senate of 25 February 1988 (see also Chapter 2, Parliamentary Privilege) declare that any interference with a witness and the infliction of any penalty on a witness in consequence of their giving evidence may be treated as a contempt (Resolution 6, paragraphs (10) and (11)). In 1984, after apparent threats to a witness engaged in a particular inquiry, the Senate had occasion to issue a reminder that interference with witnesses could be dealt with as a contempt. The following resolution was passed:

> That the Senate —
>
> (a) reaffirms the long-established principle that it is a serious contempt for any person to attempt to deter or hinder any witness from giving evidence before the Senate or a Senate Committee, or to improperly influence a witness in respect of such evidence; and
>
> (b) warns all persons against taking any action which might amount to attempting to improperly influence a witness in respect of such evidence. *(13 September 1984 J.1129)*

Committees have also issued general warnings against interference with witnesses. In April 2005 the Finance and Public Administration References Committee placed advertisements in local newspapers containing such warnings.

The Senate and its Privileges Committee have always taken very seriously, and investigated thoroughly, any suggestion that witnesses have been interfered with in any way in respect of their evidence, and in several cases persons have been adjudged guilty of contempt for that offence; usually remedial action by the offenders has avoided the imposition of penalties (for particular cases, see Chapter 2, Parliamentary Privilege, under Matters constituting contempts, and Appendix 3).

Interference with witnesses may also be prosecuted as a criminal offence under section 12 of the *Parliamentary Privileges Act 1987*.

(b) procedural protection

The Senate has adopted a number of procedures for the protection of its witnesses. These procedural measures for the protection of witnesses are mainly contained in Privilege Resolution 1, which is shown in full in appendix 2. This resolution provides rules which all Senate committees are obliged to observe in their dealings with witnesses. If the Senate were to conduct an inquiry directly, with witnesses appearing before the Senate, the Senate would also follow these rules so far as they were applicable.

The principal procedural rules contained in Resolution 1 are as follows:

- Witnesses are normally invited to appear, and are summoned (ie, formally ordered to appear) only where a committee makes a deliberate decision that the circumstances warrant the issue of a summons.

- Similarly, a formal order for the production of documents is made only if a committee makes a deliberate decision that such an order is warranted.

- Witnesses are given reasonable notice of a meeting at which they are to appear, and are supplied with a copy of the committee's terms of reference, a statement of the matters to be dealt with during the witness's appearance, a copy of Resolution 1 and a copy of any relevant evidence already taken.

- Witnesses are given an opportunity to make a submission in writing before appearing to given oral evidence.

- Witnesses are offered the opportunity to give their evidence in private session (in camera), and any application to do so must be considered by a committee.

- Witnesses are to be informed whether any evidence given in camera is to be published.

- Committees are enjoined to ask only relevant questions necessary for their inquiries.

- Witnesses may object to answering any questions on any grounds, and committees must consider and determine any objections by a witness.

- Persons must be given reasonable opportunity to respond to any evidence adversely reflecting on them.

- Where appropriate witnesses may be accompanied by, and may consult, an adviser.

- Committees are required to investigate, and report to the Senate on any evidence that a witness may have been interfered with or penalised in respect of their evidence.

Special procedural protections are provided for witnesses involved in investigations by the Privileges Committee into allegations of contempt of the Senate (Resolution 2; see Chapter 2, Parliamentary Privilege, under Proceedings before the Privileges Committee). The reason for this

is that the Privileges Committee investigates in particular cases whether contempts have been committed. If a finding of contempt is adopted by the Senate, the consequences for the person or persons concerned are very serious. A finding of contempt may in itself damage a person's reputation or professional standing, and it is open to the Senate to impose a penalty of up to 6 months' imprisonment or a fine of up to $5 000 for a natural person and $25 000 for a corporation. Witnesses before the Privileges Committee are therefore given all the rights of persons involved in legal proceedings, and additional rights not available to such persons.

It is in practice rare for a committee to order the attendance of a witness because it is rare for anyone to refuse a committee's invitation to give evidence. A summons may be issued whether or not an invitation has been issued. This is necessary because an obligation to invite in every instance could conceivably result in an essential but reluctant witness refusing an invitation and then becoming incommunicado. In such a situation a summons might not be capable of effective delivery and a failure to answer it may not therefore be justly punished. Where this is anticipated a committee may issue a summons in the first instance. These principles also apply where a committee wishes to order the production of documents.

Before a witness is invited to attend before a committee to give oral evidence they must be given a reasonable opportunity to make a written submission (Resolution 1(4)). This does not mean that no witness may appear unless they have made a submission. The rule is to ensure that witnesses have an opportunity to make a considered written statement about the matters before a committee. Witnesses often appear, at the committee's invitation, without first submitting a document. This can occur, for example, when time is short. A witness ordered to attend, however, must be given reasonable opportunity to formulate a written submission before an order to attend would be enforced by the Senate.

Where a witness has supplied documents to a committee, whether in response to an invitation or a summons, reasonable access must be given to the witness to consult those documents (Resolution 1(6)). Documents received by legislative and general purpose standing committees remain in the custody of the Senate after the completion of an inquiry (SO 25(15)). An original submission received from a submitter will not be returned, although where necessary a copy may be provided to them. Where a committee insists on examining original documentary evidence in relation to a matter and receives and accepts this material in response to its invitation or order, the documents may not be returned to the sender without an order of the Senate to that effect (precedent: 16/5/1990, J.90-1). This circumstance in which original documents are required seldom arises. Photocopies of relevant documents are normally adequate for most committee purposes.

A witness must be given reasonable notice of the meeting at which they are to appear (Resolution 1(3)). Every effort is made by committees to give such reasonable notice. However, there are occasions when a committee will seek the cooperation and tolerance of witnesses given very late notice of a hearing at which their evidence would be helpful. For example, when bills have been referred to committees for inquiry and report within extremely short times, witnesses may receive no more than 72 or even 48 hours notice. In many cases, the witnesses concerned are keen to ensure that the committee is made aware of their views and hears their evidence and committees are appreciative of their cooperation in making themselves available.

A witness has a right to certain information and documents about a committee. This information usually accompanies the committee's invitation to attend. A witness must receive a copy of the committee's terms of reference, a statement of the particular matters expected to be dealt with during the appearance of the witness and a copy of Resolution 1. Where appropriate a witness is provided with a transcript of relevant evidence already taken. There is a committee discretion here: not every witness receives as a matter of course every transcript. The requirement is designed to ensure fairness to a witness whose proposed evidence may be affected by, or has already been referred to during, an earlier committee hearing.

Evidence which reflects adversely on another person, including a person who is not a witness, must be made known to that person and reasonable opportunity to respond given. The committee must consider whether to hear the evidence, publish it, and seek a response to it from another person. These rules, in Resolution 1(11) to (13), do not define the meaning of evidence which reflects adversely on another person. However, certain general principles of interpretation apply.

Evidence given to a committee encompasses written statements or submissions accepted by the committee as well as oral presentations at hearings. The rules do not apply to evidence merely on the basis that it is contrary to other evidence. For the purposes of its inquiry, a committee will seek as many considered views on the subject matter as is reasonably possible. In many cases, the views offered will, and should, differ, contradicting each other and criticising the rationality, accuracy or acceptability of alternative or competing opinions. Thus, evidence adverse to another witness's case does not fall within the application of the rules. The rules deal with adverse "reflections", that is, evidence which reflects adversely "on a person" (including an organisation) rather than on the merits or reliability of an argument or opinion. To bring the rules into operation, a reflection on a person must be reasonably serious, for example, of a kind which would, in other circumstances, usually be successfully pursued in an action for defamation. Generally, a reflection of poor performance (for example, that relevant matters have been overlooked) is not likely to be viewed as adverse. On the other hand, a statement that a professional person lacks the ability to understand an important conceptual or practical aspect of their profession and, therefore, is not a reliable witness, would be regarded as an adverse reflection. Reflections involving allegations of incompetence, negligence, corruption, deception or prejudice, rather than lesser forms of oversight or inability which are the subject of criticism in general terms, are regarded as adverse reflections. Mere disagreement with another person's views, methodology or premises is not considered as an adverse reflection.

If during a public hearing a committee believes it is about to hear evidence which "may reflect adversely on a person", the committee must consider whether it would be more appropriate to hear that evidence in private session. On so resolving, the committee meets in camera and the transcript of evidence then taken must not be published except in accordance with procedures for the disclosure of in camera evidence (see below). In some circumstances, a committee might realise that evidence adverse to a person is about to be given and that it is likely to be irrelevant to the inquiry. In this case the committee may direct the witness to say no more. In most cases, however, a committee does not know in advance that an adverse reflection will be made in oral evidence and a problematic statement may be made by a witness, the acceptability of which the committee must determine. In such cases, the committee must initially decide whether the statement is an adverse reflection. If it is considered to be such, the committee must then decide whether it amounts to relevant evidence for the purpose of the inquiry. If it is so considered, the

committee may continue to hear it in public because of its potential significance to the inquiry, or may decide to proceed in camera.

If the committee considers some evidence to be an adverse reflection and irrelevant to the inquiry, the committee must consider whether it would be proper to expunge that evidence from the transcript of evidence and to forbid the publication of it by anyone including, for example, members of the public or media at the hearing.

Committees are very reluctant to expunge any material from transcripts of evidence. Expungement results in the public record of proceedings not being a complete and accurate record. In considering expungement a committee must balance the need to protect persons from unnecessary or irrelevant defamatory evidence, perhaps by witnesses intent on misusing the privileged environment of a committee, against the need to maintain an accurate record of its proceedings and evidence. A committee may properly conclude that irrelevant adverse reflections by a witness about others should remain on the record where this provides an insight into the witness's credibility and responsibility.

In relation to written evidence, if it is not relevant to a committee's inquiry, the committee may determine that the evidence is to be treated as not received and returned to the submittor, or retained but not considered by the committee. If either of those courses is followed, there is no occasion for the application of the adverse reflections rule.

If evidence contains allegations of criminal conduct, and those allegations could be investigated, or contains matter relevant to a criminal investigation in progress, the committee may invite the submittor to provide the evidence to the police or other investigating authority. If the evidence contains matter relevant to a criminal trial or a civil action in progress, the submittor may be invited to have the evidence put before the courts. In these circumstances, the adverse reflections procedures need not be followed. In making such decisions a committee should have regard to the nature of its inquiry and to the risk of creating more material which is unexaminable in court proceedings because of parliamentary privilege and which may thereby cause difficulties in those proceedings (see Chapter 16, Committees, under Privilege of proceedings). It is preferable for the evidence concerned not to be published.

The fact that a person against whom adverse evidence is given is notorious, or has had ample opportunity to respond to allegations through public controversy, does not affect the application of the right-of-reply procedure (see, for example, report of the Legal and Constitutional Legislation Committee on additional estimates 2004-05, PP 64/2005, p. 165).

Where evidence is given which reflects adversely on a person and which is relevant to an inquiry, the committee must provide the person reflected on with a reasonable opportunity to have access to that evidence and to respond to it in writing and by appearing before the committee. In practice, access to the evidence means obtaining a copy of the relevant submission or hearing transcript. In the case of in camera evidence the committee will disclose only the adverse reflection and such other contextual evidence as it considers to be reasonably necessary to enable the person to respond.

While the person reflected on has a right to be notified of the evidence and to make a written response, they have no automatic right of audience before the committee on the matter. The committee must provide a "reasonable opportunity" for the person to write and appear. "Reasonable opportunity" means that the person must have a proper and timely opportunity to consider the matter and respond to it. The circumstances of the inquiry, including the nature and seriousness of the reflection, its significance to the inquiry, the other demands on committee members' time, the ability of the committee or a subcommittee to meet the person, and the person's resources and ability to travel to Canberra or elsewhere, must all be considered in deciding what would amount to a "reasonable opportunity". In the first instance what is a reasonable opportunity is a matter for the committee to determine. It would, however, be a matter for the Senate to consider if an aggrieved person contended that a reasonable opportunity to respond in person to an adverse reflection had not been afforded and that, therefore, the order of the Senate had not been complied with by the committee. A written response is now regarded as affording a reasonable opportunity to respond in most cases, even where an oral hearing is requested.

If the adverse reflections are on a group of persons, for example, on a company, whether relevant persons are invited to make a response will be a matter of judgment. For example, if it is an existing company the principals of the company may be invited to make a response, but if it is an obscure company no longer registered such an invitation need not be issued.

In the interests of fairness, the process of informing a person of an adverse reflection should not be delayed but should proceed as soon as possible, to enable the person concerned to respond as soon as possible.

The fact that evidence contains adverse reflections is not, of itself, a reason for not publishing the evidence in the usual way. However, immediately prior to releasing unpublished evidence, for example, a submission containing an adverse reflection, the person reflected on should be notified that the evidence is to be published and advised of their rights under the Privilege Resolutions.

It would not be viewed as fair practice for a committee not to publish a person's response to an adverse reflection, if the person requests it, at least to the same degree as the adverse reflection was published.

If a response goes beyond responding to the original evidence and contains new and irrelevant adverse reflections on persons, the committee has the option of not accepting the response and directing that it be reframed so as to confine it to a relevant response to the original evidence. If a response is accepted and contains new adverse reflections on persons other than the person who provided the original evidence, it should be treated as new evidence. If multiple exchanges of adverse reflections, in responses to responses, ensue or appear likely, the committee at any time may indicate to the parties that the subject is closed and that the committee will not receive any further responses.

Responses by persons to evidence adversely reflecting on them may be presented to the Senate where the committee concerned has concluded the relevant inquiry (by the President: 25/11/1993, J.895; by report of the committee: Standing Committee on Rural and Regional

Affairs, report on a matter arising from the committee's consideration of the Plant Breeder's Rights Bill 1994, 2 June 1994, PP 183/1994; see also document tabled by that committee, 9/2/1995, J.2927; by the former chair of a select committee: 9/5/1996, J.138). In 1999 the Community Affairs References Committee presented to the Senate responses by witnesses to a document which, although prepared as a result of a recommendation by the committee, had not been published by the committee (29/4/1999, J.814).

Privilege Resolution No. 1 provides in paragraph (13) a right of witnesses to respond to adverse references to them in *evidence*. Although this could be interpreted as allowing responses only to remarks by other witnesses, it has been taken to refer to any remarks made at a committee hearing (9/8/2001, J.4642).

Any proposal to take evidence in private session is always considered carefully by a committee. In camera hearings defeat the purpose of parliamentary inquiries of informing the public. The other main purpose of gathering evidence is that the evidence may be used to support conclusions and recommendations, and may be seen by the public to support those conclusions and recommendations. The vast majority of hearings of evidence by committees are therefore in public. When they occur in Parliament House they are all sound broadcast and many are also televised. In camera hearings, however, are occasionally used as a means of protecting witnesses and their interests which may be harmed by disclosure of information.

A witness must be informed of, and be offered, the opportunity to apply at any time for their evidence to be heard in camera. The witness will be asked for reasons, the statement of which may itself be heard by the committee in public or in private. The committee then must consider the application. It may do so either in public or in private, in the presence of the witness or in their absence, as the committee considers appropriate. Where the application to proceed in camera is refused, the committee must notify the witness of its reasons. As a matter of practice and interpretation, while an immediate explanation may be given orally to the witness by the chair, a written statement repeating or elaborating on them must be supplied to the witness within a reasonable time to comply with the requirement of notification (Resolution 1(7)).

The grounds on which a witness may ask to be heard in camera include the grounds on which objection may be taken to a question (see below).

There is no obligation on a committee to publish the fact that a witness has applied for their evidence to be received or heard in camera or to publish the reasons for the application or the committee's reasons for its decision. Where an application is made during the course of a public hearing, the fact, the reasons and the outcome may be on the public record. Where an application is made in writing for a written submission or oral evidence to be received or heard in camera, the matter may not come to light. Public disclosure that a witness desired their evidence to be treated in secret could be prejudicial to the witness. As a matter of principle the same approach is adopted for this question and its determination as is applied to the question whether the substantive evidence should be received or heard in camera.

Before giving evidence in camera, a witness must also be informed that the committee, and the Senate itself, have the power subsequently to publish the evidence if they so decide. The witness must also be informed whether in fact the committee intends to publish all or any of the in

camera evidence (Resolution 1(8)). This second requirement can present a committee with a dilemma, as it may be difficult to assess at that stage the overall value for the inquiry and the report of the particular evidence. In practice, the rule is interpreted to mean that a witness must be informed of the committee's intention where this has been decided, or that no decision has been made. The purpose of the rule is to ensure that the witness is as fully informed of the committee's intentions as possible. (For the publication of in camera evidence, see below.)

Apart from taking evidence in camera, committees may take other precautions to protect witnesses; for example, their identity may be concealed by not including their names in transcripts of evidence and in reports (see Economics References Committee, inquiry into operations of the Australian Taxation Office, published transcripts of in camera evidence, report PP 37/2000).

The provisions whereby a committee must consider and determine any objection by a witness to answering any question (Resolution 1(10)) is seldom in practice formally invoked. If witnesses have some difficulty in answering a question, they usually indicate that difficulty and the committee does not press the question or seeks the desired information by an alternative form of questioning. Where a witness raises a formal objection to answering a question, it is normal for the committee, having followed the procedures set out in the resolution, to adopt the same methods of overcoming the objection. It is for a committee to decide whether a particular objection will be sustained and whether a question will be pressed. Where a committee considers that the answer to the question is essential for the purposes of its inquiry, or that the objection to answering the question is not well founded, the committee insists on an answer to the question, and reports any refusal to answer to the Senate.

Grounds on which a witness may object to answering a question include:

- The question is not relevant to the committee's inquiry. It is for the chair of the committee in the first instance and the committee ultimately to determine whether a question is relevant (Resolution 1(9)).

- Answering the question may incriminate a witness. As has been noted, witnesses are completely protected against any use of their evidence against them in any legal proceedings. An answer to a question may, however, incriminate a witness in the non-technical sense that it may make publicly known offences or improprieties committed by the witness, which may affect the witness's dealings with others, or may lead to investigations of the witness by other agencies (other than by making direct use of the witness's evidence).

- The information required by a question is otherwise protected from disclosure, and the committee ought not to disclose it. Committees are not bound to observe prohibitions on disclosure of information which operate elsewhere (see Chapter 2, Parliamentary Privilege, under Parliamentary privilege and statutory secrets provisions), but a committee may consider that the fact that information is protected from disclosure elsewhere should persuade the committee not to disclose the information in its public hearings.

- The disclosure of information required by a question would be prejudicial to the privacy or the rights of other persons, particularly parties in legal proceedings.

In some cases the difficulty a witness has in answering questions may be overcome by hearing the answers in camera (see above).

For the grounds on which the executive government may seek to withhold information from a parliamentary inquiry see Chapter 19, Relations with the Executive Government, under Public interest immunity.

Witnesses do not normally apply to be accompanied by counsel, and a committee would not normally grant such an application unless its inquiry involved contentious and complex matters in relation to which a witness might seriously prejudice their interests by ill-advised or hasty answers. Such inquiries are rare. The Privileges Committee, however, is required to extend to witnesses the right to be represented by counsel (Resolution 2).

Witnesses are not paid fees, but committees normally meet the travel costs and other reasonable expenses of witnesses other than public officials. In 1999 the Senate, adopting a report of the Procedure Committee, resolved that committees should be informed of any payment of witnesses' expenses by others, the rationale being that a committee may need to assess whether evidence is influenced by such payment (29/4/1999, J.815).

In carrying out the requirement in Resolution 1(18) to investigate possible interferences with witnesses, committees may take their investigations as far as they consider necessary, and may resolve such matters themselves or recommend to the Senate that they be referred to the Privileges Committee (for an example see report by the Environment, Communications, Information Technology and the Arts Committee on two privilege matters, PP 176/2007).

Summoning of witnesses

Where the Senate or a committee makes a decision to summon a witness, a summons is issued by the Clerk of the Senate or the secretary of the committee, respectively. In the case of a committee, the failure of a witness to respond to a summons is reported to the Senate (SO 176). This requirement for committees to report any failure to comply with a summons arises from the fact that only the Senate can deal with any contempt (see Chapter 2, Parliamentary Privilege).

The Senate may order particular witnesses to appear before committees (7/2/1995, J.2895-7; 6/6/1995, J.3364-5; 22/10/1997, J.2673; 21/10/1999, J.1966; 10/4/2000, J.2582-3, 2585; 28/11/2000, J.3594-5; 19/6/2001, J.4322; 12/3/2002, J.154-6; 25/11/2003, J.2709-10). (See Supplement)

Where a committee with power to do so resolves to order the attendance of a witness a summons is prepared, signed by the secretary and delivered to the person by a means which satisfies the committee that the person will receive it. In the past, summonses have been personally delivered by a committee's secretary or faxed to a business or legal adviser's address and receipt confirmed by telephone. The important element is not the means of delivery but the certainty of receipt.

Immunity from summons

It has not been established as a matter of law that any category of persons has any immunity from summons by the Senate or its committees, although theses have been advanced that various officer-holders should be recognised as having such an immunity on grounds of constitutional propriety. (See Supplement). Possible and mooted limitations on the Senate's power to compel witnesses are summarised in 'The Senate's power to obtain evidence and parliamentary "conventions"', paper by the Clerk of the Senate, published by the Finance and Public Administration References Committee, September 2003.

The procedures of the Senate acknowledge that special considerations apply to two categories of office-holders: senators and members and officers of other houses.

Senators as witnesses

Where the Senate conducts an inquiry directly it may order one of its members to appear (SO 177(1)). A committee, however, has no power to summon a senator. In case of refusal by a senator of a request to attend a committee, the committee must report the refusal to the Senate, and the Senate may order the senator to attend the committee (SO 177(2) and (3)). In practice, these procedures are not used; senators often voluntarily offer their views and information to committees. (See Supplement)

Members or officers of other Houses

As noted in Chapter 2, under Power to conduct inquiries, as a matter of comity between legislatures, and perhaps as a matter of law, the Senate may not summon members of the House of Representatives or of state and territory legislatures. Senate procedures reflect this rule.

If the Senate or one of its committees requires the attendance of a member or officer of the House of Representatives, standing order 178 requires a message to be sent to that House. The message is framed as a request that the House give leave for the member or officer to attend. A similar provision is in the standing orders of the House of Representatives and is referred to in standing order 179, which provides that, on receipt of a message from the House of Representatives, the Senate may authorise the attendance of a senator or Senate officer before a House committee.

The standing orders are interpreted as not preventing the voluntary appearance by invitation of members and officers of one House before the committees of the other. It is quite common for members of the House of Representatives or of state parliaments to appear before Senate committees by invitation, and many have done so. In 1981, a Speaker of the House of Representatives appeared before a Senate committee for the first time, the Select Committee on Parliament's Appropriations and Staffing (see SD, 19/11/1981, p. 2409). On several occasions, House of Representatives ministers have appeared before Senate committees, rather than following the usual practice of being represented by a Senate minister. The Senate Industry, Science and Technology Committee, for example, during its inquiry into the Australian Nuclear

Science and Technology Organisation Amendment Bill 1992 in May 1992, heard evidence from the Minister for Science and Technology who was a member of the House of Representatives, the New South Wales Minister for the Environment and a state member. The systematic consideration of bills by Senate committees has resulted in more frequent appearances by state parliamentarians representing their interests in relation to bills affecting Commonwealth-State relationships, such as the Forest Conservation and Development Bill 1991, the Medicare Agreements Bill 1992 and the Native Title Bill 1993. The Community Affairs Legislation Committee on 5 May 1998 heard evidence from most state and territory health ministers simultaneously in relation to the Health Legislation (Health Care Amendments) Bill 1998. The Select Committee on Medicare in 2003 heard several state health ministers. The New South Wales Minister for Justice represented all his state and territory counterparts at the hearing of the Legal and Constitutional Legislation Committee into the Anti-terrorism Bill (No. 2) 2004. State and territory ministers appeared before the Employment, Workplace Relations and Education Legislation Committee in its inquiry into workplace agreements and workplace relations legislation in October and November 2005.

This informal procedure of appearance by invitation is used only in cases where members are offering their views on matters of policy or administration under inquiry by Senate committees. The procedure has not been used in cases where the conduct of individuals may be examined, adverse findings may be made against individuals or disputed matters of fact may be under inquiry. For such cases it is considered that the formal process of message and authorisation to appear should be employed. This procedure was invoked in December 1993 when the House requested the appearance of a senator before its Committee of Privileges in relation to an investigation of an alleged unauthorised disclosure of the draft report of a joint committee of which the senator was a member. The Senate authorised the appearance of the senator before the House Committee of Privileges (16/12/1993, J.1077; see also 5/12/1986, J.1576; 7/3/2001, J.4043).

The standing orders are also not regarded as preventing the Privileges Committee of one House seeking the written comments of a member of the other House on a matter under inquiry. This has been done by the Senate Privileges Committee on occasions when it has conducted inquiries into unauthorised disclosures of documents of joint committees. The committee has, on these occasions, written to members of the House of Representatives and asked them whether they have any relevant knowledge about the matter under inquiry. To have members of one House attend for examination before a committee of the other, however, would require the formal process of a message. The rationale of this distinction between providing written information and giving oral evidence is that a written inquiry is in the nature of a preliminary step to see whether a full formal hearing is warranted, whereas submitting a member to examination before a committee is a more formal and rigorous inquiry process which also involves a much greater possibility of inquiry into the conduct of the member. (By contrast, see report of the United Kingdom House of Commons Standards and Privileges Committee, HC 447 2003-04, for a contempt found, against a minister (the Lord Chancellor), in the absence of a culpable intention, after he gave evidence voluntarily before the committee.)

Although the standing orders refer to the House to which a request is made giving permission for its member to appear, it is open to that House to compel the member to appear. As either House

may compel its members to appear for the purposes of its own inquiries, it follows that a House can compel its members to appear in an inquiry by another House.

The granting of permission for members of one House to appear before the other House or its committees does not, however, suspend the rule that one House may not inquire into or adjudge the conduct of a member of the other House, other than the conduct of a minister in that capacity. The Senate so declared in granting permission for senators to appear before the House Privileges Committee in an inquiry into the unauthorised disclosure of joint committee documents in 2001 (7/3/2001, J.4043). (See also Chapter 19, Relations with the Executive Government, under Ministerial accountability and censure motions, for material on censure of private members of the other House.)

One of the rare occasions of the use of the procedure under standing order 178 highlights this principle, as well as a probable limitation on the Senate's power to compel evidence. The Select Committee on the Powers, Functions and Operation of the Australian Loan Council was appointed on 3 November 1992 to investigate reports that the state of Victoria had exceeded its borrowing limits with the knowledge of the federal Treasurer. The committee's invitations to appear were met with refusals from several witnesses, including members of state parliaments and the House of Representatives. The committee sought advice from the Clerk of the Senate on whether the Senate could compel members of the House of Representatives and members of state parliaments to appear.

The Clerk's advice was that the Senate did not possess this power. Two bases for the advice were given. The first was that it is a parliamentary rule that a house of parliament does not seek to compel the attendance of members of the other house, as a matter of comity between the houses and of respect for the equality of their powers. This rule is embodied in standing order 178. The Clerk advised that this parliamentary rule should be regarded as extending to the houses of state and territory parliaments, as a matter of comity with those houses and respect for their powers of inquiry.

Secondly, it was advised that, should the matter ever be adjudicated by the courts, the courts could find that as a matter of law the Senate does not possess this power. The courts could arrive at such a finding by reading the parliamentary rule as a rule of law, as courts have done with other parliamentary rules in the past, or, more probably, could find in the Constitution an implied limitation on the powers of the federal Houses in respect of each other and the state houses, on the basis of the doctrine of integrity of state institutions which has been expounded in other judgments. The committee was also advised that the House of Representatives and the state houses could, at the request of the Senate, compel their members to attend before a Senate committee if they considered it was in the public interest to do so. (The advice is contained in the interim report of the committee, March 1993, PP 78/1993.)

The committee presented a report to the Senate on 30 September 1993 (Second Report, PP 153/1993), recommending that the Senate request the House of Representatives and certain state houses to require the attendance of certain of their members before the committee to give evidence. The Senate agreed to a resolution to make the various requests on 5 October (J.566). A message from the House of Representatives, declining to accede to the request in respect of the Treasurer, was received on 7 October. Responses from the Victorian Houses were received on 20

and 21 October. The Victorian Houses did not accede to the requests to require their members to appear, but passed resolutions giving the members leave to appear if they thought fit. As these resolutions were passed without debate, it is not clear whether the view was taken that the Houses do not have the power to require their members to appear before a committee of another house, or whether the Senate's requests were declined for other reasons. The New South Wales Legislative Assembly accepted a statement by its Speaker that it did not have the power to compel its members to appear before a Senate committee.

The Select Committee on Unresolved Whistleblower Cases (report, PP 344/1995, pp 138-40) and the Select Committee on the Victorian Casino Inquiry (report, PP 359/1996) received and accepted similar advice.

For an instruction by the Senate to a committee to invite the Prime Minister and another minister to give evidence, see 9/3/1995, J.3063-4.

In the course of its inquiry into the regional partnerships program in 2005, the Finance and Public Administration References Committee received evidence about the conduct of members of the House of Representatives, but did not consider such evidence except to the extent that it was relevant to the matter under inquiry by the committee (statement by Senator Forshaw, chair of the committee, transcript of hearing 3/2/2005, pp 26-7).

The Privileges Committee in 2007 refrained from finding the contempt of improper refusal to provide evidence on the part of a person because a full hearing of the matter would have involved allowing the person to question a member of the House of Representatives (131st report of the committee, PP 171/2007, endorsed by the Senate 20/9/2007, J.4463).

This probable immunity of members of other houses does not apply to former members. During the course of an inquiry by the Select Committee on Certain Foreign Ownership Decisions in relation to the Print Media in 1994, evidence was taken from two former Treasurers and a former Prime Minister, all of whom had ceased to be members of the House of Representatives. One former Treasurer appeared voluntarily but the other two former members appeared only in response to summonses. The former Prime Minister subsequently reappeared before the committee voluntarily.

In 2002, in the context of the Senate Select Committee on a Certain Maritime Incident, which investigated, amongst other things, the role of ministers and former ministers in election publicity about refugees, a claim was raised by the Clerk of the House of Representatives that former House of Representatives ministers, and ministerial staff (see below), possess some kind of immunity against being summoned by a Senate committee. This was based on a notion of a supposed exclusive right of the House, and inability of the Senate, to hold ministers accountable, a notion which, given rigid executive government control of the House, amounts to a rejection of parliamentary accountability. Advice provided by the Clerk of the Senate and a senior barrister experienced in parliamentary privilege law and litigation made it clear that there is no constitutional or legal basis for any such immunity. The claim was not accepted by any members of the committee, although they disagreed about whether a former minister should be summoned. (report of the committee, 23/10/2002, PP 498/2002; SD, 23/10/2002, pp 5756-7)

The question has occasionally arisen as to whether Senate committees may summon ministerial staff and departmental liaison officers to appear before them and give evidence. Such persons have no immunity against being summoned to attend and give evidence, either under the rules of the Senate or as a matter of law. Departmental liaison officers are not in any different category from other departmental officers. From time to time it has been suggested that ministerial staff are in a special category and should not give evidence before parliamentary committees (Senator Collins, SD 30/5/1996, p. 1391). Such staff have, however, appeared before Senate committees and given evidence, both voluntarily and under summons. In February 1995 the then Minister for Finance, Mr Beazley, declined to allow the Director of the National Media Liaison Service (NMLS) to appear before a Senate committee to give evidence about the activities of the NMLS on the ground that that person was a member of ministerial staff. The Senate passed a resolution directing that person to appear before the committee, and he subsequently appeared and gave evidence accordingly (7/2/1995, J.2895-7). The preamble to the Senate's resolution pointed out that the NMLS was provided with public funds, and it was stated in debate that the resolution did not set a precedent for summoning ministerial staff, but the passage of the resolution indicates a view on the part of the Senate at that time that such persons can be summoned in appropriate circumstances. A report by the Finance and Public Administration References Committee on the role and accountability of ministerial staff recommended measures to increase their accountability (16/10/2003, J.2591, PP 266/2003).

In 1975 the private secretary to the Prime Minister and the private secretary to the Minister for Labour and Immigration appeared before the Senate Standing Committee on Foreign Affairs and Defence in the course of its inquiry into the contentious matter of South Vietnamese refugees.

In other jurisdictions governments have resisted the appearance of ministerial staff and advisers before legislative committees, but the legislatures and their committees have asserted their right to summon such persons. (See the Fourth Report of the Transport, Local Government and the Regions Committee of the United Kingdom House of Commons, HC 655 2001-02; First Special Report of 2005-06 of the United Kingdom House of Commons Select Committee on Public Administration, HC 690 2005-06.) In the United States various administrations have claimed that it is not appropriate for presidential staff and advisers to give evidence to congressional committees, but many such persons have appeared, both voluntarily and under summons. A judgment of a District Court in 2008 held that they have no immunity (*Committee on the Judiciary v Miers*, 31/7/2008, not reported).

A ministerial staff member appeared under summons before a committee of the New South Wales Legislative Council (the Orange Grove inquiry) in August 2004, among others attending voluntarily.

In June 2008 the government issued a code of conduct for ministerial staff (J.656). The code seeks to overcome problems with the lack of accountability of ministerial staff, particularly by prescribing that such staff do not have executive functions or the power to direct public servants.

Public servants as witnesses

Special rules are provided in Privilege Resolution 1(16) in relation to public servants as witnesses. An officer of the Commonwealth or state public service must not be asked to give opinions on matters of policy and must be given reasonable opportunity to refer questions to a superior officer or to a minister.

The rule relating to the giving of opinions on matters of policy is designed to avoid public servants becoming involved in discussion or disputation with committee members about the merits of government policy as determined by ministers. Public servants may explain government policy, describe how it differs from alternative policies, and provide information on the process by which a particular policy was selected, but may not be asked to express opinions on the relative merits of alternative policies.

The rule concerning reasonable opportunity to refer questions to a superior officer or to a minister is designed to ensure that an officer is not required to answer a question where all the necessary information may not be available to the officer, and that, if there is any difficulty in answering a question, the difficulty is referred to a superior officer, and, if necessary, ultimately to a minister, for resolution. It is not the role of a public service witness to refuse to provide information to a committee. If there is some difficulty in providing information the officer states that there is a difficulty and indicates its nature to the committee, and asks that a superior officer or a minister consider the matter. If a superior officer considers that the information should not be supplied, the matter is referred to the minister. A decision to decline to provide information to a committee is thereby made only at ministerial level by the office-holder who can accept political responsibility for any dispute between a committee and the executive government.

In adopting a report by the Privileges Committee in 1993 the Senate resolved that public servants should receive training in accountability to Parliament (42nd report, PP 85/1993, 21/10/1993, J.684; resolution reaffirmed, with requirement that departments report on compliance, 1/12/1998, J.225-6; see also 64th and 73rd reports, PP 40/1997, 118/1998).

In 1999 the Senate endorsed the Procedure Committee's condemnation of public service witnesses giving evidence on legislation bringing with them private persons in support of the legislation (29/4/1999, J.815). The committee considered that such a practice violated a committee's right to select witnesses. There was also concern arising from the payment of the private witnesses' expenses (see above, under Protection of witnesses).

The government issues a document, entitled 'Guidelines for official witnesses appearing before parliamentary committees', which sets out practices and principles to be followed by public service witnesses (for text of guidelines, see SD, 30/11/1989, pp 3693-3702). The guidelines are based on the principle that public servants have a duty to assist parliamentary inquiries, and are generally consistent with the rules laid down by the Senate, but have no status in proceedings of Senate committees other than as persuasive principles. (See Supplement)

For claims by the executive government to public interest immunity from giving evidence to committees, see Chapter 19, Relations with the Executive Government, under that heading.

Statutory office-holders as witnesses

On several occasions the Senate has, by resolution, asserted the principle that, while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities (9/12/1971, J.846; 23/10/1974, J.283, 18/9/1980, J.1563; 4/6/1984, J.902; 19/11/1986, J.1424; see also report of the Standing Committee on Finance and Government Operations on ABC Employment Contracts and their Confidentiality, 3 December 1986, PP 432/1986, and the government's response to the committee's report, SD, 17/11/1987, pp 1840-4; Privileges Committee, 64th report, PP 40/1997, and 29/5/1997, J.2042).

Officers of statutory authorities, therefore, so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees. (See Supplement)

Foreigners as witnesses

Evidence may be taken from foreigners. When in the jurisdiction of Australia they are liable to be summoned and to be required to produce documents, and may be dealt with for any contempt (unless, of course, they have diplomatic immunity as official representatives of their countries). This applies to corporations with foreign "parents" as well as to individuals. Australian law cannot protect them, however, in respect of the publication of their evidence in another country, and if they give evidence from overseas they are subject to the law of the country they are in as it may apply to the giving of their evidence, for example, where a foreign law forbids the communication of particular information.

The issue of a legislative subpoena to an official of an organisation possessing diplomatic immunity came before a US district court in 2005 (*United Nations v Parton*, not reported). The court in effect suspended the operation of the subpoena to allow the parties to reach agreement.

Evidence from overseas

The same consideration applies to Australian citizens or residents who give evidence from overseas, by submitting documents or providing oral evidence by telephone or video conference. While fully protected in Australia in respect of their giving evidence, they cannot be protected by Australian law in another country. Such witnesses are informed by committees of this situation.

Because of this lack of protection, it would not be fair for a committee to summon a witness to give evidence from overseas, or to seek to take action against them in Australia for any lack of co-operation.

Witnesses in custody

Standing order 180 applies to witnesses who are in prison. It provides that a person in charge of the prison may be ordered to bring the witness, in safe custody, to be examined. The President may be ordered by the Senate to issue a warrant accordingly.

Use of this procedure would give rise to a difficulty if prisoners are held in state or territory prisons, which, in the absence of any federal prison, is invariably the case. As noted above and in Chapter 2, Parliamentary Privilege, under Power to conduct inquiries, the Commonwealth Houses and their committees do not, as a matter of comity between governments in a federal system, and perhaps as a matter of law, exercise a power to summon state office-holders, and this rule is extended to self-governing territories. The Senate and its committees would not, therefore, issue an order to a state or territory officer in charge of a prison, but would seek the co-operation of the state or territory government. Prisoners, of course, are liable to be summoned regardless of who has them in custody and regardless of whether they are convicted of a state or territory or federal offence. If it appeared that a state or territory government sought without justification to shield a prisoner from a Senate inquiry, a summons to the prisoner could be issued and left at the place of imprisonment, and the Senate could then test any refusal to produce the prisoner, perhaps by means of a writ of habeas corpus.

There has been no occasion to use the procedure in the standing order, but Senate committees have otherwise had access to witnesses in custody by virtue of their general powers of inquiry. In 1989 the Standing Committee on Environment, Recreation and the Arts met at the Brisbane Correctional Centre in order to obtain evidence from two prisoners in relation to its inquiry into drugs in sport. Although media representation was permitted at the hearing, the public was excluded for security reasons and the meeting could not therefore be regarded as a public hearing. The committee held a special private meeting at which a transcript of evidence was taken, and subsequently published the transcript, other than those parts containing in camera evidence. The Parliamentary Joint Committee on the National Crime Authority in 1988 took evidence from persons in custody in relation to its inquiry on witness protection. Prisoners were brought to committee hearings at venues such as Commonwealth Parliamentary Offices in State capitals, but the hearings were in camera.

Swearing in of witnesses

With the exception of hearings before the Privileges Committee, there is no requirement in the standing or other orders of the Senate for witnesses before the Senate or a committee to be sworn. The power to take evidence on oath, however, is one of the undoubted powers of the Houses and their committees under section 49 of the Constitution (see Chapter 2, Parliamentary Privilege).

Standing order 35 provides for the examination of witnesses to be conducted by a committee in accordance with procedures agreed to by the committee, subject to the rules of the Senate. It is open to a committee to decide that witnesses should be sworn but in most cases this is not required. The swearing in of a witness has no effect on the witness's obligation to provide truthful answers to a committee or on the Senate's ability to deal with a recalcitrant or untruthful

witness. Nor does it affect the privileged status of committee proceedings. A witness who gives false or misleading evidence, or evidence which the witness does not believe on reasonable grounds to be true or substantially true, may be guilty of a contempt regardless of whether the witness was sworn. If a committee requires a witness to be sworn, however, it is a contempt for a witness, without reasonable excuse, to refuse to make an oath or affirmation or give some similar undertaking to tell the truth (Privilege Resolution 6(12)).

Privilege Resolution 2 requires that witnesses before the Privileges Committee be heard on oath or affirmation. As the Privileges Committee performs something like a judicial function, it is considered necessary that evidence is taken by the committee on oath.

Committees usually do not exercise their power to take evidence on oath. Where witnesses provide committees with their views or opinions on the subject of the inquiry, the taking of evidence on oath may not be appropriate and, indeed, may inhibit the free flow of information to a committee. It may also create invidious distinctions between witnesses if some are sworn and some are not. On the other hand, it may serve to remind witnesses of the gravity of the proceedings and the need to be truthful, particularly where inquiries involve contentious issues of fact and it may have been necessary to compel witnesses to attend by summons.

A witness may take an oath on the Bible or other religious text, such as the Koran, or may make an affirmation. The following forms are used:

Oath

I swear that the evidence I shall give before this Committee shall be the truth, the whole truth and nothing but the truth, so help me God.

Affirmation

I sincerely and solemnly affirm and declare that the evidence I shall give before this Committee shall be the truth, the whole truth and nothing but the truth.

The oath or affirmation is administered in a committee by the secretary to the committee.

Procedures for the examination of witnesses

The standing orders allow the Senate and its committees to formulate procedures for the giving of evidence before them (SO 35, 182; for rules adopted by the Senate for the examination of certain witnesses in 1975, see 16/7/1975, J.832-3). This allows maximum flexibility in the conduct of hearings of evidence. Any procedures adopted by committees, however, must be consistent with the rules laid down by the Senate.

Standing order 35 requires that the examination of witnesses before a committee be conducted by members of the committee. It is therefore not open to a committee to provide procedures whereby other persons put questions to witnesses. Such a procedure would require the authorisation of the Senate. The committee appointed in 1984 to inquire into allegations concerning a justice of the High Court was so authorised: see Chapter 20, Relations with the Judiciary. The Privileges Committee, under Privilege Resolution 2, is also excepted from this

rule because of the character of its proceedings, and witnesses before that committee may be examined by counsel for the committee and counsel for other witnesses.

Committees are able to overcome any disadvantage arising from this restriction on the procedures for formal hearings of evidence by adopting information-gathering techniques other than formal hearings. Committees often arrange seminars, symposia or round table discussions to be heard in their presence, whereby witnesses can more freely discuss issues and put questions to each other (see also Chapter 16, Committees, under Evidence gathering).

Publication of in camera evidence

As has been noted above, it is open to a committee and to the Senate to publish evidence which has been taken in camera. (See also Chapter 16, Committees, under Disclosure of evidence and documents.)

Normally such evidence is not published by either the committee or the Senate. Evidence is usually taken in camera only when a committee has made a deliberate decision that it is appropriate to do so for the protection of a witness. It may subsequently be decided, however, that the appropriate protection of a witness does not require that the evidence be kept confidential. As has also been noted above, witnesses are completely protected against any use of their evidence against them in subsequent proceedings in a court or tribunal, and against penalty or injury in consequence of their evidence. A committee may decide that this protection is sufficient to ensure that a witness is unharmed by the publication of their evidence. If evidence has been taken in camera to protect a witness against extra-legal difficulties, however, that decision is normally sustained by the committee and the Senate subsequently.

Standing order 37(3) provides for the disclosure by the President of unpublished evidence and documents which have been in the custody of the Senate for 10 years, and in camera evidence and documents which have been in the custody of the Senate for 30 years. This provides for access to material for the purposes of historical research.

In 1991 the Senate, with the advice of the Procedure Committee, gave consideration to the question of whether senators who added a dissenting report to a report of a committee may refer to evidence taken in camera by the committee. This question involved competing considerations. It is desirable that in camera evidence not be disclosed except by a deliberate decision by a committee, but there is a possibility of a majority of a committee suppressing evidence which is essential for a senator to make out the senator's case in a dissenting report. As noted above, the purpose of gathering evidence is to support conclusions and recommendations, and this applies equally to a dissent. The Senate therefore adopted a resolution which requires that a committee and any dissenting senator seek to reach agreement on the disclosure of any relevant in camera evidence, but provides a residual ability of a dissenting senator to use in camera evidence for making out a dissent. The relevant provisions are now contained in standing order 37 (2):

> A senator who wishes to refer to in camera evidence or unpublished committee documents in a dissenting report shall advise the committee of the evidence or documents concerned, and all reasonable effort shall be made by the committee to reach agreement on the disclosure of the evidence or documents for that purpose. If agreement is not reached, the senator may refer to the in camera evidence or unpublished documents in the dissent only to the extent

> necessary to support the reasoning of the dissent. Witnesses who gave the evidence or provided the documents in question shall, if practicable, be informed in advance of the proposed disclosure of the evidence or documents and shall be given reasonable opportunity to object to the disclosure and to ask that particular parts of the evidence or documents not be disclosed. The committee shall give careful consideration to any objection by a witness before making its decision. Consideration shall be given to disclosing the evidence or documents in such a way as to conceal the identity of persons who gave the evidence or provided the documents or who are referred to in the evidence or documents.

The publication of evidence taken in camera except by the authorisation of the Senate or a committee is declared to be a contempt punishable by the Senate (Privilege Resolution 6(16)). Such publication may also be prosecuted as a criminal offence under section 13 of the *Parliamentary Privileges Act 1987*. These provisions reinforce the protection of witnesses by the taking of evidence in camera.

Offences by witnesses

The Senate's Privilege Resolutions set out actions by witnesses which may have the tendency or effect of obstructing the Senate or its committees in conducting inquiries, and which may therefore be treated as contempts (Resolution 6(12), (13), (14) and (15)). These offences include:

- refusing to make an oath or affirmation or to give some similar undertaking to tell the truth when required to do so
- refusing without reasonable excuse to answer a question
- giving false or misleading evidence
- failing to attend or to produce documents when required to do so
- avoiding service of an order by the Senate or a committee
- destroying or tampering with documents required by the Senate or a committee.

It is extremely rare for witnesses to be charged with any of these offences. Most cases of alleged contempts involving witnesses concern allegations that witnesses have been interfered with (see Chapter 2, Parliamentary Privilege, for cases investigated). This is an indication that the main concern of the Senate in conducting inquiries is to ensure that its witnesses are protected rather than to coerce witnesses.

It would not be fair for a witness who appears voluntarily by invitation to be required to answer a question; only witnesses under summons should be so required. In 1971 when a witness appearing voluntarily before the Select Committee on Securities and Exchange declined to answer a question, the witness was subsequently summoned to appear and then required to answer the question.

For observations on the destruction of documents by witnesses, see Chapter 2, Parliamentary Privilege, under Should the power to deal with contempts be transferred to the courts?

Evidence given elsewhere by senators or officers

Senators or officers of the Senate may not give evidence before any other body in respect of proceedings of the Senate or its committees without the permission of the Senate, or, if the President is authorised by the Senate to give permission, of the President (SO 183). The rationale of this rule is that the Senate should know of any evidence given elsewhere in relation to its proceedings so that it may ensure that such evidence is not given contrary to the law relating to the protection of parliamentary proceedings from question in other bodies. (For precedent see 27/6/1996, J.423.)

Witnesses as participants in the legislative process

The legal status of witnesses as participants in proceedings in Parliament has been noted above. Apart from the technical legal situation, by providing information to the Senate and its committees witnesses assist in the process of informing the legislators and the public and of framing the laws. Public hearings of evidence are a powerful means not only of discovering, sifting and testing information, but of allowing citizens to participate in government, which is why they are an important feature of legislatures in all free countries.