

## CHAPTER 16

### Committees

Like most representative legislative assemblies in free countries, the Senate delegates some of its tasks, and the powers to carry out those tasks, to committees of its members.

#### Role of committees

The task most often given to committees is that of conducting inquiries: of inquiring into specified matters, particularly by taking submissions and hearing evidence, and reporting findings on those matters to the Senate. Although the Senate may conduct inquiries directly, committees are a more convenient vehicle for this activity.<sup>1</sup>

Apart from conducting inquiries, committees may be required to perform any of the functions of the Senate, including its primary legislative function of considering proposed laws, the scrutiny of the conduct of public administration and the consideration of policy issues.

The Constitution recognises committees as essential instruments of the Houses of the Parliament by referring in section 49 to: “The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House ...”.

The Senate makes extensive use of committees which specialise in a range of subject areas. The expertise built up by those committees enables them to be multi-purpose bodies, capable of undertaking policy-related inquiries, examining the performance of government agencies and programs or considering the detail of proposed legislation in the light of evidence given by interested organisations and individuals. The scrutiny of policy, legislative and financial measures is a principal role of committees.

Most significantly, committees provide a means of access for citizens to participate in law making and policy review. Anyone may make a submission to a committee inquiry and committees will normally take oral evidence from a selection of witnesses who have made written submissions. Committees frequently meet outside Canberra, thereby taking the Senate to the people and gaining

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1 See also Chapter 17, Witnesses.

first hand knowledge of and exposure to issues of concern to the public.

Inquiries by committees allow citizens to air grievances about government and bring to light mistreatment of citizens by government.<sup>2</sup>

Specialist committees support the Senate's ability to monitor delegated legislation made by the executive government and to ensure that all proposals for legislation do not trespass against fundamental personal rights and liberties. In the Australian Parliament, only Senate committees perform this role.

An important outcome of committee work is the opportunity senators gain to pursue special interests and build up expertise in aspects of public policy, enhancing the quality of debate and providing a solid grounding for backbenchers who may go on to be committee chairs, shadow ministers, party spokespeople or ministers.

The characteristic multi-partisan composition and approach of committees also provides opportunity for proponents of divergent views to find common ground. The orderly gathering of evidence by committees and the provision of a forum for all views can often result in the dissipation of political heat, consideration of issues on their merits and the development of recommendations that are acceptable to all sides:

It is in the conference [i.e., committee] room that careful, calm consideration can be brought to bear upon a subject, and [senators] can work harmoniously in spite of party differences. It is there that the qualities and experience of the individual can be applied to matters under discussion. It is there that opportunity is provided for vision, judgment and experience to be applied and, later, brought before the Senate for open discussion and action.<sup>3</sup>

## **Types of committees**

Leaving aside committees of the whole,<sup>4</sup> committees are of two main types: standing committees, which remain in existence and inquire into matters within their areas of responsibility referred to them by the Senate; and select committees, which are appointed to inquire into particular matters and which cease to exist when they have finally reported on those matters.

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2 For an investigation of oppression of persons by a government agency, see the report of a standing committee on the Casualties of Telstra, 11/3/1999, J.555-6. For other inquiries of this nature, see reports of the Community Affairs References Committee, *Forgotten Australians*, PP 207/2004, *Lost Innocents and Forgotten Australians Revisited*, PP 145/209.

3 Chairman of the Select Committee on the Standing Committee System, Senator R D Elliott, SD, 14/5/1931, pp. 1912-3.

4 See Chapter 14, Committee of the whole proceedings.

Standing committees may be subclassified according to their functions. Joint committees, committees of both Houses, are best treated as a separate category. This produces the following classification, which is employed in this chapter:

- (a) standing domestic committees;
- (b) standing legislative scrutiny committees;
- (c) legislative and general purpose standing committees;
- (d) estimates committees;
- (e) select committees; and
- (f) joint committees.

### Evolution of the committee system

The Senate's first standing orders provided for the establishment of both standing and select committees. The standing or domestic committees were concerned with the Senate's own affairs and support services and included a Standing Orders Committee, Library Committee, House Committee, Printing Committee and Elections and Qualifications Committee. The first committee reports in 1901 were made by the Elections and Qualifications Committee and the Standing Orders Committee.<sup>5</sup> Select committees were used to inquire into particular matters the Senate considered worthy of inquiry. Such committees were given powers to summon witnesses and require the production of documents, and procedures for examining witnesses were set out in the standing orders. The first select committee report presented to the Senate examined steamship communication between Tasmania and the mainland. Other select committees were appointed as required.

In 1932, the Regulations and Ordinances Committee was established following a report of the select committee appointed in 1929 to consider, report and make recommendations upon the advisability or otherwise of establishing standing committees of the Senate upon:

- (a) statutory rules and ordinances
- (b) international relations
- (c) finance
- (d) private members bills

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<sup>5</sup> For the early history of these domestic committees, see *Annotated Standing Orders of the Australian Senate*, under SOs 17-22 and 207, pp. 87-108, 561-3.

and such other subjects as were deemed advisable.<sup>6</sup>

The select committee was of the view that a standing committee system, to be successful and bearing in mind the small number of senators available (then 36), would need to grow from modest beginnings.<sup>7</sup> Although the select committee originally recommended the establishment of regulations and ordinances and external affairs committees, and the modification of the standing orders to facilitate the reference of bills to committees, the matter was recommitted and the committee's second report<sup>8</sup> recommended that only a regulations and ordinances committee be established. There had been government fears that an external affairs committee might use its powers to obtain access to sensitive documents on Australia's external affairs and the proposal for a committee in this area was not pursued at that time. The significant volume of delegated legislation made without parliamentary scrutiny was of concern to all sides of politics, however, and the establishment of a regulations and ordinances committee was therefore seen as a priority. In 1982 that committee was joined by the second of the standing legislative scrutiny committees, the Scrutiny of Bills Committee, charged with ensuring that all bills and Acts observed similar fundamental principles as those applying to delegated legislation.

The modern committee system dates from 1970, when the Senate agreed to the appointment of seven legislative and general purpose standing committees, standing ready to inquire into any matters referred by the Senate in a range of subject areas, and five estimates committees to examine the annual estimates of departments in a more orderly and effective manner.<sup>9</sup>

With this development, the evolution of the main types of committees on which senators have served was complete.

A major refinement occurred with the adoption of resolutions by the Senate on 5 December 1989 providing for the systematic referral of bills to legislative and general purpose standing committees. These orders came into effect in the latter half of 1990 and facilitated the realisation of a long-held ideal, that Senate committees should have a greater role in the consideration of legislation.

In 1994, as a result of a Procedure Committee report on the committee system,<sup>10</sup> the estimates and legislative and general purpose committees were amalgamated. A scheme of paired committees,

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6 PP S1/1929-31.

7 SD, 1/5/1930, p. 1311.

8 PP S2/1929-31.

9 For accounts of events leading to the establishment of the committee system in 1970, see *ASP*, 6th ed., pp. 728-44; *Annotated Standing Orders of the Australian Senate*, Introduction, pp. 16-20; *Senate Committees and Responsible Government: Papers on Parliament No. 12*, Department of the Senate, August 1991.

10 First Report of 1994, PP 146/1994. For discussion of the background to the restructure, see *Annotated Standing Orders of the Australian Senate*, Introduction, pp. 28-9.

incorporating the functions of estimates and legislative and general purpose standing committees in each subject area, a references committee and a legislation committee, was adopted. The chairs of other committees were reorganised so that the distribution of chairs approximated the representation of parties in the Senate. In 2006 the pairs of committees in each subject area were amalgamated, returning to pre-1994 arrangement for the legislative and general purpose standing committees until 2009 when the post-1994 structure was restored.<sup>11</sup>

## Standing domestic committees

There are eight standing domestic committees established by standing order. They are:

- Procedure
- Privileges
- Appropriations and Staffing
- Library
- House
- Publications
- Senators' Interests
- Selection of Bills

### *Procedure Committee*

A descendant of the 1901 Standing Orders Committee, the Procedure Committee is established under standing order 17 and has been in operation under its present name since 1987.

The committee has four ex officio members, the President, Deputy President, Leader of the Government in the Senate and Leader of the Opposition in the Senate. It is chaired by the Deputy President, a provision adopted in 1994. Its remaining six members are appointed from the Senate without any prescribed allocation of places to government or non-government senators. This formula allows as wide a representation of senators as is considered appropriate at any time. The Leaders of the Government and of the Opposition in the Senate are authorised to appoint substitute members when they are unable to attend meetings.<sup>12</sup>

The committee's terms of reference are "any matter relating to the procedures of the Senate referred

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11 13/5/2009, J. 1943-6.

12 SO 17(2).

to it by the Senate or by the President".<sup>13</sup> The standing orders do not confer formal inquiry powers upon the committee as they are not considered necessary. Most of the matters considered by the Procedure Committee are referred by the Senate. Although it does not formally gather evidence, the committee sometimes invites submissions from senators. A 1993 reference to the committee on the hours of sitting and routine of business included an instruction that the committee invite submissions from all parties in the Senate and independent senators and consult with the Procedure Committee of the House of Representatives, which was undertaking a similar inquiry.<sup>14</sup> In most cases reports are developed following discussions and consideration of issues papers. The committee cannot meet other than in Parliament House without authorisation by the Senate.<sup>15</sup>

Reports of the committee may be considered in committee of the whole to facilitate free discussion of detailed matters, but may also be considered by the Senate. Consideration of the reports may be listed under Government Business orders of the day because, following the presentation of a report, a minister moves the motion to provide for its consideration, or may be listed as an order of the day under Business of the Senate, either by order contained in the reference to the Procedure Committee<sup>16</sup> or following a motion moved on presentation of the report.<sup>17</sup> The designation of Procedure Committee reports as Business of the Senate orders of the day gives priority to their consideration, as befits significant matters of relevance to the conduct of the business of the Senate.<sup>18</sup>

### *Committee of Privileges*

The Committee of Privileges is established by standing order 18, which provides:

- (1) A Committee of Privileges, consisting of 7 senators, shall be appointed at the commencement of each Parliament to inquire into and report upon matters of privilege referred to it by the Senate.
- (2) The Committee shall have power to send for persons and documents, to move from place to place and to sit during recess.
- (3) The Committee shall consist of 7 senators, 4 nominated by the Leader of the Government in the Senate and 3 nominated by the Leader of the Opposition in the Senate.
- (4) The Committee shall elect as its chair a member nominated by the Leader of the Opposition in the Senate.

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13 SO 17(3).

14 18/8/1993, J.357.

15 22/6/2006, J.2345.

16 9/3/1989, J.1459.

17 15/6/1989, J.1891; 21/12/1990, J.686; 12/9/1991, J.1512; 24/3/1992, J.2097.

18 See Standing Orders Committee, 1st Report, 62nd Session, PP 504/1985 pp. 1-3.

(See supplement) As well as inquiring into privilege matters referred by the Senate, which mainly relate to cases of alleged interference with senators or committees, the committee also reports on matters raised with the President of the Senate under Resolution 5 of the Privilege Resolutions, that is, responses by persons to statements made about them in the Senate.<sup>19</sup>

Apart from Resolution 5 matters, inquiries referred have chiefly been of three types: possible unauthorised disclosure of evidence or draft reports; possible misleading evidence given to a committee; or possible interference with, or adverse treatment of, witnesses as a result of their having given evidence. A list of the committee's reports since its establishment in 1966 and consequent action by the Senate is in appendix 3.

In addition to Resolution 5 matters and individual privilege cases referred by the Senate, the committee has also participated in the legislative function of the Senate. In 1994, the committee examined and reported on a private senator's bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994. The bill provided a mechanism for resolving conflicts between the Senate and the executive by providing for questions relating to the failure of ministers and public servants to comply with lawful orders of the Senate, and related issues of public interest immunity, to be resolved by the Federal Court. In its 49th report,<sup>20</sup> the committee concluded that such a bill was not necessary and that the Senate already possessed the powers required to resolve such conflicts. The committee also examined the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 recommending the removal of provisions purporting to criminalise the provision of information to parliamentary committees in certain circumstances.<sup>21</sup>

The committee acts as an essential safeguard of the rights of senators and the Senate, and the rights and obligations of witnesses appearing before the Senate and its committees.

### *Appropriations and Staffing Committee*

Standing order 19 provides for the appointment of a Standing Committee on Appropriations and Staffing whose role is to inquire into:

- (a) proposals for the annual estimates and the additional estimates for the Senate;
- (b) proposals to vary the staff structure of the Senate, and staffing and recruitment policies; and

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19 See Chapter 2, Parliamentary Privilege, for a detailed analysis of these resolutions and the work of the committee.

20 PP 171/1994.

21 See chapter 2, Parliamentary Privilege, under Parliamentary privilege and statutory secrecy provisions.

- (c) such other matters as are referred to it by the Senate.

The committee is responsible for determining the amounts for inclusion in the parliamentary appropriation bills for the annual and additional appropriations for the Senate and for reporting to the Senate on its determinations prior to the Senate's consideration of the relevant parliamentary appropriation bill. In relation to staffing, the committee is responsible for making recommendations to the President and reporting to the Senate on any matter. It is required to make an annual report to the Senate on the operations of the Senate's appropriations and staffing and related matters. The committee also oversees the funding and administration of security measures affecting the Senate.

The President, the Leader of the Government in the Senate and the Leader of the Opposition in the Senate are *ex officio* members of the committee. The Leader of the Government in the Senate may nominate another Senate minister as a representative, thereby ensuring that the government retains a presence on the committee to represent its views. The Leader of the Opposition in the Senate may also nominate a representative. There are six other members, three nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators. Originally, the committee had seven members but the number was increased to nine when the committee was re-established in May 1983.<sup>22</sup>

The President is the committee's chair and has the power to appoint a deputy chair from time to time. The chair, and deputy chair when acting as chair, has a casting vote when the votes are equally divided.<sup>23</sup> Senators who are not members of the committee may attend and participate in its deliberations and question witnesses but may not vote.<sup>24</sup>

Unlike the other domestic standing committees, the Appropriations and Staffing Committee has power to appoint subcommittees.<sup>25</sup> Like the Committee of Privileges, it also has power to summon witnesses and to require the production of documents.

See also Chapter 5, Officers of the Senate: Parliamentary Administration, under Senate's appropriations and staffing, and Chapter 13, Financial Legislation, under Parliamentary appropriations.

### ***Library Committee***

The Library Committee is established by standing order 20 as follows:

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22 11/5/1983, J.80.

23 SO 19(7).

24 SO 19(8).

25 SO 19(5).



- (1) Library Committee, consisting of the President and 6 senators, shall be appointed at the commencement of each Parliament, with power to act during recess, and to confer and sit as a joint committee with a similar committee of the House of Representatives.
- (2) The Committee may consider any matter relating to the provision of library services to senators.

The President is the chair of the committee.

In 2008 a joint resolution of the two Houses established a joint standing committee and detailed provisions for its composition and proceedings.<sup>26</sup> The standing President and Speaker are not members of the joint standing committee whose functions arise partly from the enactment of the *Parliamentary Service Amendment Act 2005* which established the office of Parliamentary Librarian. Senators appointed under standing order 20, other than the President, are also appointed to the joint standing committee.

The committee invariably sits as a joint committee. Having no powers of inquiry, the committee generally functions as a forum in which to raise and consider matters of relevance to the operations and administration of the Parliamentary Library. It is an advisory committee and the Presiding Officers, with joint responsibility for the Library, are not bound to follow the advice of the committee.

### *House Committee*

The House Committee, established under standing order 21, sits as a joint committee with the House of Representatives House Committee. The committee's terms of reference are "any matter relating to the provision of facilities in Parliament House referred to it by the Senate or the President". Its membership comprises the President, Deputy President and five senators. When it meets as a joint committee arrangements exist for the rotation of the chair between the President and the Speaker. The committee does not possess inquiry powers.

In 1981 the Senate House Committee conducted an inquiry into the organisation, operation, functions and financial administration of the Joint House Department. A resolution conferred powers to summon witnesses and require the production of documents for the purposes of the inquiry. After presentation of the committee's report on 26 August 1982,<sup>27</sup> a follow-up inquiry was referred to the committee which was again given inquiry powers for the purpose.<sup>28</sup> The reference having been renewed, the committee presented an interim report in May 1983.<sup>29</sup>

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26 13/2/2008, J.121-2, 14/2/2008, J.156; resolution varied 17/11/2010, J. 327.

27 PP 163/1982; J.1030.

28 22/9/1982, J.1093.

29 17/5/1983, J.93. For other reports, see *Annotated Standing Orders of the Australian Senate*, p. 100.

In 1994, the committee received a reference from the Senate to inquire into the future treatment and use of old Parliament House.<sup>30</sup> A subsequent resolution authorised the committee to summon witnesses and require the production of documents.<sup>31</sup>

### ***Publications Committee***

The Publications Committee, established by standing order 22, also normally sits as a joint committee with its House of Representatives counterpart. The committee has seven members but there are no formal conditions attaching to the representation of government and non-government senators.

The committee makes recommendations to the Senate on the printing of documents presented to the Senate and which have not already been ordered to be printed. An order to print a document ensures its inclusion in the series of parliamentary papers; all documents presented to the Senate are ordered to be published.<sup>32</sup> It is usual upon the presentation of committee reports to the Senate for a motion to be moved that the report be printed. The motion is not commonly moved when other documents such as petitions, government documents, delegation reports or reports of the Auditor-General are presented, and it is these which are considered by the Publications Committee at regular meetings in accordance with guidelines determined by the committee. When the Publications Committee reports to the Senate, recommending the printing of certain documents, a motion is moved, by leave, that the report be adopted (leave is required for a motion that would otherwise require notice to be given). The motion may be amended; for example, to provide for the printing of a document not recommended for printing by the committee.

When sitting as a joint committee with the Publications Committee of the House of Representatives, the committee has the following additional powers:

- (a) to inquire into and report on the printing, publication and distribution of parliamentary and government publications and on such related matters as are referred to it by the relevant Minister; and
- (b) to send for persons and documents.<sup>33</sup>

This additional role of the joint committee arose from recommendations of the Joint Select Committee on Parliamentary and Government Publications<sup>34</sup> which were adopted in 1970. The investigatory function is invoked when the committee considers matters relating to Commonwealth

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30 19/10/1994, J.2323.

31 19/10/1994, J.2328.

32 SO 167.

33 SO 22(3).

34 PP 32/1964-6.

publishing. The committee has undertaken inquiries under this function and presented several reports, most recently recommending electronic distribution of the series of parliamentary papers.<sup>35</sup>

In 1993 the committee criticised the presentation of large numbers of annual reports of departments and agencies in the last sitting week before the end of the year. The basis for this criticism was that:

[t]he Committee believes that this situation diminishes Parliament's role in ensuring the accountability of these organisations through their annual reports to Parliament by reducing the opportunity for Members and Senators to critically review and debate matters contained in the reports.<sup>36</sup>

Requirements for annual reports stipulate 31 October as the deadline for tabling. The requirements were part of the revision of accountability documentation stemming from the altered Budget timetable introduced in 1994 and provided under the *Public Service Act 1999*.<sup>37</sup>

### ***Senators' Interests Committee***

Under standing order 22A(1), the functions of this committee are:

- (a) to inquire into and report upon the arrangements made for the compilation, maintenance and accessibility of a Register of Senators' Interests;
- (b) to consider any proposals made by senators and others as to the form and content of the Register;
- (c) to consider any submissions made in relation to the registering or declaring of interests;
- (d) to consider what classes of person, if any, other than senators ought to be required to register and declare their interests; and
- (e) to make recommendations upon these and any other matters which are relevant.

Its membership is required to reflect as closely as possible the composition of the Senate. The committee has a specified membership, which may be varied, of eight senators, three nominated by the Leader of the Government in the Senate, four nominated by the Leader of the Opposition in the Senate and one nominated by any minority groups or independent senators. The chair of the committee is a member of the committee nominated by the Leader of the Opposition in the Senate. Provision is made for the appointment of a deputy chair and for the chair (or deputy when

35 PP 160/2010.

36 27th report, 4/5/1993, J.36.

37 See below, Conduct of inquiries, Referral of matters to committees, Estimates.

acting as chair) to have a casting vote when the votes are equally divided.

The committee has power to send for persons and documents and to confer with a similar committee of the House of Representatives. It does not have power to move from place to place. Its inquiry power is qualified by a requirement that any exercise of the power to send for persons and documents, or any investigation of the private interests of any person, must be agreed to by not fewer than three members other than the chair. This is intended to be a safeguard against use of the committee's powers for partisan political purposes. (See supplement)

The committee is required to present an annual report and may also report from time to time. Its main role is to oversee arrangements for the register which is now also published online.<sup>38</sup>

The committee was first established on 17 March 1994 following a commitment given by the government as part of a package of "accountability measures" to be pursued in the wake of the forced resignation of the Minister for Environment, Sport and Territories over the administration of the Community Cultural, Recreation and Sporting Facilities Program. The package was announced by the Leader of the Government in the Senate, Senator Gareth Evans, on 3 March 1994.<sup>39</sup> Notices of motion to establish such a committee had languished on the Notice Paper for years through the 1980s and early 1990s.<sup>40</sup>

### ***Selection of Bills Committee***

The Selection of Bills Committee, which is established by standing order 24A, makes recommendations to the Senate for the referral of bills to committees. The committee considers bills introduced into the Senate or received from the House of Representatives and reports to the Senate on whether any bills should be referred to legislative and general purpose standing or select committees.

Membership of the committee is based on an informal committee of party whips which meets each sitting day to confer on the day's program. The committee consists of the Government Whip and two other senators nominated by the Leader of the Government, the Opposition Whip and two other senators nominated by the Leader of the Opposition, together with the whips of any minority groups. The chair of the committee is the Government Whip who may from time to time appoint a deputy chair to act as chair when the chair is not present at a meeting. The chair, or deputy chair when acting as chair, has a casting vote when the votes are equally divided.

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38 PP 366/2009; PP 159/2011.

39 SD, pp. 1453-4.

40 See also Chapter 6, Senators, under Pecuniary interests; *Annotated Standing Orders of the Australian Senate*, pp. 106-8.

The standing order establishing the committee does not contain any criteria which the committee is required to follow in making recommendations in relation to bills. This allows the committee to take into account any grounds advanced by senators for the submission of bills to committee scrutiny.

Although few of the committee's reports have indicated the basis on which the committee has made its recommendations, the committee has commented on particular referrals and given reasons why a decision has been made or changed. In its 4th report of 1990, for example, the committee indicated that there was a difference of views about which standing committee a package of social welfare bills should be referred to. Although the committee recommended that the bills be referred to the Community Affairs Committee, an amendment was moved to the motion that the report be adopted, which would have had the effect of referring parts of one of the bills to two different committees. The President ruled on a point of order that a bill could be referred to more than one committee because, although the order of the Senate referred to bills being referred to "a committee", as a matter of interpretation the singular number is taken to include the plural. The amendment was then agreed to.<sup>41</sup> In its 6th report of 1990, the committee indicated that its decisions not to refer two bills to committees as proposed by the Opposition and Australian Democrats, respectively, had been taken by a majority. One of these recommendations was subsequently overturned by an amendment to the motion that the report be adopted.<sup>42</sup> The committee reviewed an earlier recommendation not to refer a bill in light of comments on the bill by the Scrutiny of Bills Committee.<sup>43</sup> The committee now reserves disagreements for resolution by the Senate.<sup>44</sup> The committee has also reviewed recommendations not to refer bills on other grounds, including the circulation of a large number of government amendments to a bill<sup>45</sup> and representations by individual senators.<sup>46</sup> The committee has also reviewed its recommendations on the timing of referrals in view of the demands of a heavy legislative program.<sup>47</sup>

In practice the committee recommends the referral of a bill if a significant group in the Senate ask for the bill to be referred. Submissions seeking the referral of particular bills and identifying issues to be examined are published with the reports. Amendments to motions to adopt the committee's reports, however, are still relatively common.

The committee is required to examine all bills received from the House of Representatives or

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41 11/10/1990, J.322.

42 17/10/1990, J.351.

43 7th report of 1990, 8/11/1990, J.397.

44 2nd report of 2002, 20/3/2002, J.240.

45 1st report of 1991, 14/2/1991, J.747.

46 3rd report of 1992, 26/3/1992, J.2124; 9th report of 2004, 23/6/2004, J.3651.

47 9th report of 1990, 28/11/1990, J.487.

introduced into the Senate, except for bills containing no provisions other than provisions appropriating money, and, in respect of each bill, recommend whether it should be referred to a legislative and general purpose standing committee. The committee may also refer bills to appropriate select committees. When the committee decides that a bill should be referred to a committee, it is required to recommend which committee should receive the bill, the stage at which it should be referred and the date on which that committee should report.

An unusual order passed by the Senate on 14 May 2009, in referring budget-related legislation to committees before its introduction into either House, empowered the Selection of Bills Committee to vary the references.<sup>48</sup> A further refinement to the order, agreed to on 13 May 2010<sup>49</sup> (and reprised on 12 May 2011 with further streamlining<sup>50</sup>) removed the Selection of Bills Committee from the process and left it to individual committees to determine, by unanimous resolution, which bills did not require examination because they raised no substantive issues.<sup>51</sup>

The committee's reports are presented after the giving of notices of motion, or at other times by leave. Amendments may be moved to the motion that the report of the committee be adopted and these may include amendments to refer additional bills to committees. Debate on the reports is limited to 30 minutes with a 5 minute limit on individual contributions.

The committee recommends the referral to committees of a significant proportion of all bills considered by the Senate.

## **Legislative Scrutiny Committees**

### ***Regulations and Ordinances Committee***

The oldest standing committee, apart from the domestic or internal committees, the Regulations and Ordinances Committee undertakes the important function on behalf of the Senate of scrutinising delegated legislation to ensure that it complies with principles of personal freedom and parliamentary propriety. Established under standing order 23, the committee is charged with considering and, if necessary, reporting on, all regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character.<sup>52</sup> For the nature of delegated legislation and the statutory provisions for its disallowance by the Senate, see Chapter 15, Delegated Legislation.

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48 14/5/2009, J.1957-8; 15/6/2009, J.1989-90.

49 J.3485-86.

50 J.911.

51 For examples of reports to this effect see 15/6/2010, J.3530-33, 3557-59; 14/6/2011, J.950.

52 SO 23(2).

The committee is required to scrutinise each piece of delegated legislation to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

The membership of the committee is set at six, with three members nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate or by minority groups or independent senators. The chair of the committee is elected from the members nominated by the Leader of the Government. The chair is empowered by standing order 23(7) to appoint a deputy chair to act as chair when there is no chair or the chair is not present at a meeting. By convention, the deputy chair is a non-government senator, reinforcing the high degree of non-partisanship under which the committee operates. The chair, or deputy chair when acting as chair, has a casting vote but this has been a matter of little significance in the history of the committee.

The committee has power to send for persons and documents and to sit during recess.<sup>53</sup>

The committee may recommend the disallowance by the Senate of any delegated legislation not in accordance with the committee's principles. The Senate has never rejected a committee recommendation that an offending instrument should be disallowed. Because its scrutiny is confined to its criteria, the committee avoids debates on the merits of policy. This, together with its endurance, ensures that it maintains a high reputation in supporting the Senate's legislative review function.

In carrying out its role, the committee is assisted by a legal adviser appointed, with the approval of the President, pursuant to standing order 23(9). The legal adviser assists the committee to identify instruments which may offend against the committee's principles. When such an instrument is identified, the usual practice is for the chair to give notice of a motion to disallow the instrument. In accordance with the Legislative Instruments Act, notices of motion for disallowance must be given within 15 sitting days after the instrument has been tabled and the Senate has a further 15 sitting days in which to deal with the notice; if the motion is not by then disposed of, the instrument is automatically disallowed. Many notices to disallow instruments are protective notices in that they are given pending the receipt of a satisfactory explanation or undertaking from the relevant

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53 SO 23(5).

minister. Once such an explanation or undertaking is received, the chair withdraws the notice of motion, having previously notified an intention to do so. At this point, it is open to any senator to take over the notice, in accordance with standing order 78, and therefore to pursue any other issues involved in the instrument. For a more detailed exposition of this process, see Chapter 15, Delegated Legislation.

As well as scrutinising many thousands of instruments and contributing to the evolution and refinement of executive law-making, the committee has had an important role in strengthening the procedures governing the making and scrutiny of delegated legislation. In its 80th report to the Senate, for example, it gave detailed guidelines on how the committee applies its four principles.<sup>54</sup> These guidelines were further developed in the 83rd report,<sup>55</sup> which also contained a strong recommendation that all delegated legislation subject to tabling and disallowance in the Senate be accompanied by adequate explanatory statements (not then statutorily required), a theme continued in the 85th report.<sup>56</sup> The 82nd report<sup>57</sup> considered proposed amendments to the disallowance scheme contained in the legislation which were referred to the committee. The report recommended that the legislation be amended to eliminate the possibility that the statutory disallowance scheme could be by-passed by a sequence of instruments, each one repealing and remaking its predecessor. Provisions to prevent this were enacted in 1988. In 1994 and subsequently, under the Senate's procedures for referring bills to committees, the Legislative Instruments Bill 1994 was referred to the committee for inquiry and report. This bill proposed, among other things, to reform the law relating to delegated legislative instruments and to establish an electronic register of existing and future delegated legislation. The committee endorsed the objectives of the bill and generally supported its main principles, but several concerns were enumerated and the committee recommended amendments.<sup>58</sup>

A comprehensive account of the committee's first 56 years of operation and the development of its approach to issues of personal rights and liberties may be found in a statement by the then chair, Senator Collins, reproduced as appendix 2 to the committee's 85th report, referred to above. Further information on the committee's work may be found in its subsequent general reports and in Chapter 15, Delegated Legislation under Regulations and Ordinances Committee.

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54 PP 241/1986; see Chapter 3 of the report.

55 PP 377/1988.

56 PP 464/1989.

57 PP 311/1987.

58 99th report, PP 176/1994; 111th report, PP 264/2003.



### *Scrutiny of Bills Committee*

The Senate Standing Committee for the Scrutiny of Bills is established pursuant to standing order 24, which provides (in part):

At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The committee has six members, three nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators. A senator nominated by the Leader of the Opposition in the Senate is the chair. In the event of an equality of votes the chair has a casting vote. The committee's history, however, shows that the question of which party has a majority has been of no significance to the operation of the committee.

Standing order 24 provides for the appointment of subcommittees and the committee's power to send for persons and documents. The committee also has power to move from place to place and to meet in private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives. The committee is authorised to appoint a legal adviser to assist the committee. Since its inception, the committee has always taken up the opportunity to engage such assistance.

When a bill is introduced in either House of the Parliament, copies are provided to the committee and to the committee's legal adviser for examination and report. The legal adviser examines each bill and provides a written report to the committee in respect of each of the bills, advising whether or not they offend (or may offend) against the committee's principles and, if so, in what way.

On the basis of the legal adviser's report, the committee's Alert Digest is drafted. That document,

which is generally tabled on Wednesday of each sitting week, deals with all bills introduced in the preceding week and sets out the committee's comments on each bill. Adverse comments are set out by reference to the relevant principle. When the Alert Digest is tabled in the Senate, any comments on a bill are also formally drawn to the attention of the minister responsible for the bill, who is invited to make a response to the committee's comments. Given the time constraints which the legislative process generates, these comments are requested by the following Tuesday, in order that the committee can consider them on the following day, at its regular weekly meeting.

If the committee receives a response from a minister, that response is reproduced in a subsequent report. In its reports, which are also tabled on a weekly basis during sitting periods, the committee re-states its concerns about a bill, refers to the relevant ministerial response and then makes any comments it considers appropriate, including any differences between the committee's view and that of the minister. In reporting to the Senate, the committee expresses no concluded view on whether any provisions offend against its principles or should be amended. These are regarded as matters for the Senate to decide. The committee may report that ministers have given undertakings to initiate amendments of legislation to conform with the committee's principles.

The committee may act on requests by senators to examine particular aspects of bills before the Senate, but does not consider amendments moved to bills unless they are made.<sup>59</sup> The committee also identifies bills that give effect to national schemes of legislation and bills containing standing appropriations.

Amendments are often made to bills in the Senate as a result of the committee's comments.

Particular inquiries relating to the content of legislation may be referred to the committee by the Senate.<sup>60</sup> For the purposes of such inquiries the Senate may authorise the committee to hold public hearings.<sup>61</sup> The committee may also make special reports on aspects of legislation.<sup>62</sup>

For further information on the early history and operation of the committee, see *Ten Years of Scrutiny*, the proceedings of a seminar to mark the committee's tenth anniversary.<sup>63</sup>

For the difficulty presented by national uniform legislation, see Chapter 15, *Delegated Legislation*, under that heading.

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59 Statement by the chair of the committee, SD, 19/11/2002, pp. 6744-5.

60 For examples, see 3/9/1997, J.2419; 10/12/1998, J.374; 28/6/2001, J.4439; 25/3/2004, J.3230-1; 29/11/2004, J.123.

61 29/9/1997, J.2537; 1/9/1999, J.1626; 21/3/2002, J.269; 22/6/2004, J.3611.

62 24/3/2004, J.3220 (quality of explanatory memoranda); 30/11/2005, J.1460 (accountability and standing appropriations, PP 461/2005); 4/12/2006, J.3226 (entry, search and seizure provisions, PP 438/2006).

63 14/10/1992, J.2907.

## Legislative and general purpose standing committees

The legislative and general purpose standing committees, appointed under standing order 25, are the engines of the Senate's committee system. First established in 1970, together with a system of estimates committees, these committees, specialised by subject, inquire into and report on matters referred to them by the Senate. The committees have been restructured on three occasions since 1970 with major restructuring occurring in 1994 when a system of paired legislation and references committee was adopted. After a brief return to a unitary system in 2006 (coinciding with the then government's majority in the Senate), the paired system was restored on 13 May 2009.<sup>64</sup>

The committees cover between them all areas of government responsibility and subjects of inquiry. Specific matters, within their subject areas, are referred to them by the Senate. Some "watching briefs" are also referred to them, for oversight of areas of government activity. They have the task of scrutinising annual reports of government departments and agencies and bills referred to them. (See supplement)

The main features of the committees are:

- eight pairs of committees are established under standing order 25 with a references committee and a legislation committee in each subject area
- references committees inquire into matters referred to them by the Senate, other than matters to be referred to legislation committees
- legislation committees inquire into bills, estimates, annual reports and performance of agencies
- each pair of committees is allocated a group of government departments and agencies
- each committee has six members, with the government party having the chairs and majorities on legislation committees and non-government parties having the chairs and majorities on references committees
- seven of eight references committees have opposition chairs while the remaining is from the largest minority party; allocation of these chairs is determined by agreement between the opposition and the largest minority party and, in the absence of agreement, is determined by the Senate
- committees with government party chairs elect non-government deputy chairs and those with non-government chairs elect government deputy chairs; the chair, or the deputy chair when acting as chair, may appoint another member of a committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting
- chairs have a casting vote when the votes are equally divided, as do deputy chairs when acting

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64 J.1942-6.

as chairs

- the chair, or the deputy chair when acting as chair, may appoint another member of a committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting
- senators may also be appointed as substitute members, replacing other senators on committees for specific purposes, or as participating members, who have all the rights of members except the right to vote
- provisions authorising other senators who are not members of committees to attend and participate in public hearings apply only to estimates hearings
- committees may appoint subcommittees with a minimum of three members
- subcommittees have the same powers as the full committees, including the power to send for persons and documents, travel from place to place and meet in public or in private and notwithstanding any prorogation of Parliament or dissolution of the House of Representatives
- the pairs of committees may confer together to coordinate their work, and the chairs of these and any select committees form the Chairs' Committee, which meets with the Deputy President in the chair, to consider and report to the Senate on any matter affecting the operations of the committees
- each pair of committees is supported by a single secretariat unit.

The committees therefore have the capacity to perform any of the Senate's roles on its behalf.

The operations of the committees are considered below under Appointment and membership of committees, Powers of committees and Conduct of inquiries.

For further detail on the reference of annual reports and legislation to committees, see below under Conduct of inquiries, Referral of matters to committees. Reports of the legislative and general purpose standing committees are listed in the Department of the Senate's Consolidated Register of Senate Committee Reports. A supplement to the Register is produced annually and a consolidated version prepared at the end of each Parliament. Other information about committees may be found in the following publications:

*Senate Legislative and General Purpose Standing Committees: The First 20 Years 1970-1990*, Senate Committee Office.<sup>65</sup>

*Senate Standing Committee on Legal and Constitutional Affairs, The Twentieth Anniversary*

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65 Tabled 20/8/1991, J.1392.

*of the Committee*, December 1991.<sup>66</sup>

Department of the Senate, *Annual Report*, various<sup>\*67</sup>

Committee Office Information Bulletin, Nos 1-20\*

Work of Committees (published biannually from 1994; supersedes items marked \*)

Senate Committees and Government Accountability, Proceedings of the conference to mark the 40th anniversary of the Senate's legislation and general purpose standing committee system, Papers on Parliament No. 54, Department of the Senate, December 2010.

## Select committees

Since 1901, select committees have provided the Senate with the ability to conduct ad hoc inquiries. Select committees are inherently responsive to the needs and composition of the Senate at any time and they can react quickly to the Senate's requirements. Unlike standing committees, they cease to exist when they have reported upon the matters referred to them.<sup>68</sup>

In 1970 there was an expectation that the standing committees then established would avoid the need for many select committees. With the emergence and maturing of the legislative and general purpose standing committees, it was expected that most matters would be referred to standing committees because of their readiness and expertise. In its report on the committee system in 1994, the Procedure Committee observed that select committees and their chairs would continue to be appointed on an ad hoc basis, depending on the needs of the Senate. The committee suggested, however, that the Senate might have "as a goal the existence of no more than two select committees at any time".<sup>69</sup> At the time the report was presented there were four select committees. Within a month of the Senate's agreeing to adopt new standing and other orders giving effect to the Procedure Committee's report, a further select committee was appointed.

The Senate has continued to make use of both standing and select committees, although there have been informal attempts to limit the number of select committees operating at any one time

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66 PP 298/1991.

67 See particularly Work of Committees: Supplement to the Department of the Senate Annual Report 1992-93.

68 For a select committee appointed for the term of a parliament, however, see the Select Committee on Regional and Remote Indigenous Communities, 19/3/2008, J.293-5.

69 PP 146/1994, p. 5.

to two.<sup>70</sup> Appendix 8, Committees on which senators served, shows the numbers of committees operating in the Senate, and indicates that select committee activity has remained vigorous.

There are several reasons for this. Select committees are an extremely versatile inquiry vehicle. Because they examine single issues, select committees permit a concentration of focus and effort on those issues. While they may undertake short, sharp inquiries, select committees are also appropriate vehicles for lengthy and sustained inquiries. Whereas many legislative and general purpose committee inquiries proceed on a multi-partisan basis and result in unanimous reports, select committees often function in a highly politically charged environment in which a great deal of political heat is generated and unanimous reports are unlikely and unlooked for. Select committees can also be the vehicles for relatively uncontroversial, wide-ranging and effective inquiries into subjects which do not fit readily into existing committee arrangements.

A list of select committees from 1901-1985 may be found in ASP, 6th ed., at pp 745-6. Since 1985 (the currency of the 6th ed.), select committees have been appointed by the Senate as shown in appendix 9.

Usually the powers and procedures of select committees are provided for in their resolutions of appointment. Otherwise, the general provisions relating to committees in standing orders 27 to 42 apply. Select committees are required to have a specific reporting date, which may be varied by agreement of the Senate.<sup>71</sup> Unless otherwise provided in the resolution of appointment, a select committee chair has a deliberative vote only. The Senate may give a committee inquiry powers, including the power to call for persons and documents.

For a select committee to commence its inquiry on the publication of a treaty, see the Select Committee on the Free Trade Agreement Between Australia and the United States.<sup>72</sup>

The standard resolution of appointment for select committees usually contains the following elements:

- (1) That a select committee, to be known as the Select Committee on .....  
be established to inquire into and report upon:
  - (a) .....
  - (b) .....; and

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70 When recommending the restoration of the paired committee system in 2009, the Procedure Committee recommended an understanding that there should be no more than three select committees in existence at any time; PP 62/2009, p. 2.

71 SO 28.

72 11/2/2004, J.29978.

- (c) .....
- (2) That the Committee present its final report on or before .....
- (3) That the Committee consist of X Senators, as follows:
- (a) X to be nominated by the Leader of the Government in the Senate;
- (b) X to be nominated by the Leader of the Opposition in the Senate; and
- (c) X to be nominated by minority groups or independents.
- (4) That the committee may proceed to the dispatch of business notwithstanding that all members have not been duly nominated and appointed and notwithstanding any vacancy.
- (5) That the committee elect as chair one of the members nominated by the ..... and, as deputy chair, a member nominated by .....
- (6) That the deputy chair shall act chair when the chair is absent from a meeting of the committee or the position of chair is temporarily vacant.
- (7) That, in the event of an equality of voting, the chair, or the deputy-chair when acting as chair, have a casting vote. [If not specified, SO 31 applies.]
- (8) That the committee and any subcommittee have power to send for and examine persons and documents, to move from place to place, to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and have leave to report from time to time its proceedings and the evidence taken and such interim recommendations as it may deem fit.
- (9) That the committee have power to appoint subcommittees consisting of X or more of its members, and to refer to any such subcommittee any of the matters which the committee is empowered to consider.
- (10) That the committee be provided with all necessary staff, facilities and resources and be empowered to appoint persons with specialist knowledge for the purposes of the committee with the approval of the President.
- (11) That the committee be empowered to print from day to day such papers and evidence as may be ordered by it, and a daily Hansard be published of such proceedings as take place in public.

There are few specific requirements relating to the membership of select committees. The standing orders retain the provision for committee members to be nominated by the mover of the committee but this provision is rarely used to select named senators to serve on the committee. The more common approach is for the mover of a committee to nominate a membership formula along the lines of paragraph (3) of the model resolution of appointment above. It is also increasingly

common for select committees to have participating members. If this is required, a provisions based on standing order 25(7)(b) to (d) are added to the resolution. Specific quorum provisions are now unusual, the quorum for committees and subcommittees being provided for by standing order 29.

The number of senators on select committees has varied between five<sup>73</sup> and nine.<sup>74</sup> On six- or eight-member select committees, which were once the norm, the chair was usually a government party senator with the ability to exercise a casting vote, giving the government party an effective majority. The use of an odd number membership formula tends, on the other hand, to give the balance of power on committees to minority groups who hold the balance of power in the Senate. The balance of power on a select committee is significant only when the issues under consideration are contentious and divisive. The five-member Select Committee on Public Interest Whistleblowing in 1994, for example, with two government, two opposition and one minority party senator, reported unanimously on a very sensitive issue without dividing along party lines.

Until 1994 select committee chairs were usually government senators. Exceptions were those select committees to which the government of the day failed to nominate members, leaving the chair by default to the opposition.<sup>75</sup> In 1982, the independent Senator Harradine chaired the seven-member Select Committee on Industrial Relations Legislation<sup>76</sup> and in 1983 Senator Peter Rae, who had been the chair of the Finance and Government Operations Committee before the change of government that year, chaired the Select Committee on Statutory Authority Financing, which was appointed to complete an inquiry begun by the standing committee under Senator Rae's chairmanship.<sup>77</sup> Whereas the resolution appointing the Select Committee on Industrial Relations Legislation provided for the chair to be elected from the members of the committee, the resolution appointing the Select Committee on Statutory Authority Financing named Senator Rae as chair of the committee. The chair of the Select Committee on Superannuation and Financial Services was appointed by the Senate in 1999.<sup>78</sup> In 1992 Australian Democrat Senator Coulter was elected chair of the Select Committee on the Functions, Powers and Operation of the Australian Loan Council.<sup>79</sup> In 1993, opposition chairs were elected to the select committees on Public Interest Whistleblowing, and Certain Foreign Ownership Decisions in relation to the Print Media. Also in that year, in anticipation of the government chair of the Select Committee on Superannuation

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73 Select Committee on Public Interest Whistleblowing, 2/9/1993, J.449.

74 Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media, 9/12/1993, J.965.

75 Select Committee on National Service in the Defence Force, appointed 7/12/1950, J.203; Select Committee on Canberra Abattoir, appointed 3/6/1969, J.516-7, J.526; Select Committee on Shipping Services between King Island, Stanley and Melbourne, appointed 3/5/1973, J.145-7.

76 Appointed 5/5/1982, J.898-901.

77 Appointed 22/4/1983, J.38-9.

78 30/9/1999, J.1800.

79 3/11/1992, J.2936.



standing down from the position, a resolution was agreed to by the Senate providing for his successor and the deputy chair of the committee to be “allocated among the members of the committee by agreement between the Leader of the Government in the Senate and the Leader of the Opposition in the Senate and the Leader of the Australian Democrats, and, in the absence of agreement duly notified to the President, the allocation of the chair and deputy chair shall be determined by the Senate”.<sup>80</sup> In the event, determination by the Senate was unnecessary as the Leaders agreed that the new chair should be an opposition senator who had previously been deputy chair of the committee. In 1995 the committees on ABC Management, Aircraft Noise, Land Fund Bill and Land Fund Matters all had non-government chairs. The Select Committee on the Victorian Casino Inquiry, appointed in 1996, had a non-government majority and elected an opposition senator as chair. Six select committees established in 2008, on agriculture and related industries, state government financial management, housing affordability, regional and remote indigenous communities, fuel and energy and the national broadband network, had non-government majorities and Opposition chairs.<sup>81</sup>

Following the adoption of recommendations in the Procedure Committee’s First Report of 1994,<sup>82</sup> the sharing of select committee chairs and deputy chairs became a standard practice, reflecting formal arrangements for the sharing of standing committee chairs and deputy chairs.

Since the restructuring of the committee system in 1994, there has been an unofficial agreement about the number of select committees in operation at any one time. Though non-binding, the agreement was reiterated in 2009 when the committee structure returned to the 1994 arrangements.<sup>83</sup>

In acknowledgement of this informal understanding, the Select Committee on the Reform of the Australian Federation was established on 17 March 2010<sup>84</sup> to be appointed at the conclusion of the Select Committee on the National Broadband Network (which presented its final report on 17 June 2010).<sup>85</sup>

## Estimates committees

Estimates committees no longer exist as a separate category of committee, but the estimates scrutiny functions they performed are carried out by the legislative and general purpose standing

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80 13/5/1993, J.150.

81 14/2/2008, J.145-8; 19/3/2008, J.293-5; 25/6/2008, J.626-32.

82 PP 146/1994.

83 See reports of the Procedure Committee: First report of 1994, PP 146/1994; Second report of 2009, PP No. 62/2009.

84 J.3362-63.

85 See remarks by Senator Milne regarding the pressure of committee work in relation to a motion extending the reporting date of the former committee, SD, 17/11/2010, p. 1512.

committees. When performing those functions the committees are still commonly referred to as estimates committees. Like legislative and general purpose standing committees, estimates committees came into existence on 11 June 1970 as part of the modern committee system in the Senate. The estimates scrutiny role of the committees is provided by standing order 26, under which the old estimates committees used to be established.

Estimates scrutiny is an important part of the Senate's calendar and a key element of the Senate's role as a check on government. The estimates process provides the major opportunity for the Senate to assess the performance of the public service and its administration of government policy and programs. It has evolved from early efforts by senators to elicit basic information about government expenditure to inform their decisions about appropriation bills, to a wide-ranging examination of expenditure with an increasing focus on performance. Its effect is cumulative, in that an individual question may not have any significant impact, but the sum of questions and the process as a whole, as it has developed, help to keep executive government accountable and place a great deal of information on the public record on which judgments may be based.

Procedures currently applying to the consideration of estimates are as follows. Twice each year, particulars of proposed expenditure and tax expenditure statements are referred to the committees. The particulars are derived from the two sets of appropriation bills normally introduced twice each year. Portfolio Budget Statements, tabled in May, and Portfolio Additional Estimates Statements, tabled in February, assist the committees in their examination of the particulars. Statements of expenditure from the Advance to the Minister for Finance are also referred to the committees. For the consideration of additional estimates in February, committees also have access to other budget statements such as the final budget outcome for the previous financial year. Annual reports of agencies, required to be tabled by 31 October, are also available for consideration in the context of an agency's performance over the previous financial year.

Supporting documentation provided by departments is significant to the estimates scrutiny process, and has evolved with the process. From the early 1970s, departments provided explanatory notes to the committees examining estimates. These notes were rudimentary at first and were provided informally to members of estimates committees. As a result of pressure from committees the documents were formally tabled in the Senate from 1976. The introduction of program budgeting in the public sector in the 1980s saw the documents transformed from explanatory notes to program performance statements which provided explanations according to the new program structure and which were also promoted by the Department of Finance as an accountability tool, used for improving program management and evaluation, as well as for providing information to the Senate. Documentation underwent a further change in 1994, when the movement of the Budget from August to May meant that documentation provided for Budget estimates (Portfolio Budget Statements) could not provide the extent of performance information that the Senate was used to. Performance information is now found in annual reports of agencies, required to be tabled by

31 October each year, and which may be examined by the committees when considering estimates. The move to output-based accrual budgeting reinforced the requirement for detailed explanatory material on departmental activities. The committees considering estimates have thus encouraged improvements in the quality, nature and transparency of information presented to Parliament.<sup>86</sup>

Committees hold initial hearings at which the responsible minister, or representative, and officers appear to answer questions on their respective programs.<sup>87</sup> Although the Senate permitted parliamentary secretaries to appear before estimates committees in the past, an increase in the number of ministers in the Senate following the 1993 election led the Senate to agree to an order ending this practice.<sup>88</sup> This prohibition was subsequently relaxed to allow parliamentary secretaries to represent ministers other than Senate ministers in relation to the latter's own responsibilities.<sup>89</sup> Although it is desirable that a minister be present at the hearings, it is not required by standing orders.

Days are set aside for examination of the estimates and on such days the Senate usually does not sit (in earlier years it adjourned early) to enable the committees to meet. On occasions committees considering estimates have been authorised to meet while the Senate was sitting.<sup>90</sup> When the Senate was "recalled" under standing order 55 on 3 November 2005, scheduled estimates hearings were authorised to proceed.<sup>91</sup>

The committees are free to set additional times for estimates hearings if they so choose. Any such additional hearings would have to occur before the time set by the Senate for the committees to report. As there is no requirement for the committees to report after the supplementary hearings (see below) such additional hearings could be held at any time up to the next round of regular hearings. Thus, in the supplementary hearings in early November 2006, the Economics Committee decided to hold an additional hearing later in November.

Committees have been directed by the Senate to hold supplementary hearings on estimates.<sup>92</sup> In 2008 the Community Affairs Committee was directed to hold "cross-portfolio" estimates hearings on Indigenous affairs.<sup>93</sup> Such hearings are now a regular feature of the estimates cycle.

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86 See also below, under Referral of Matters to committees – estimates.

87 For membership arrangements, see below.

88 Sessional order 6/5/1993, J.100; permanent order 11/11/1998, J.54.

89 6/2/2001, J.3860.

90 29/5/1973, J.208; 23/3/1994, J.1474; 12/5/2011, J.912, 928.

91 3/11/2005, J.1300-1.

92 7/2/1995, J.2895-7; 4/11/1996, J.836; 10/4/2000, J.2582-3, 2585; 28/6/2000, J.2958; 28/11/2000, J.3594-5; 12/3/2002, J.154-6; 25/11/2003, J.2709-10; 16/6/2004, J.3473.

93 26/8/2008, J.683.

The committees have power to call for persons and documents and may also move from place to place, although no committee considering estimates has yet done so.

Estimates hearings are required to be in public and the committees when considering estimates are not empowered to receive confidential material in the absence of a specific resolution of the Senate to that effect. All such material received by a committee is automatically published.<sup>94</sup> Although the Senate in 1981 agreed to consider whether estimates committees should be able to take evidence in camera,<sup>95</sup> the Procedure Committee has on several occasions recommended against such a change, and the Senate has accepted those recommendations.<sup>96</sup>

Similarly, because estimates hearings are required by standing order 26 to proceed by way of calling on items of proposed expenditure and seeking explanations from ministers and officers, the committees are not empowered, in the course of estimates inquiries, to adopt inquiry techniques which are available to them in their other activities, such as showing video recordings, participating in product demonstrations or undertaking on-site inspections.

No more than four committees may meet in public simultaneously. This provision is intended reasonably to accommodate the interests of senators in the estimates of several departments.

Procedures applying to Senate committees generally apply to estimates hearings in so far as those procedures are consistent with standing order 26. For example, the procedures for the protection of witnesses in Senate Privilege Resolution No. 1<sup>97</sup> apply to estimates hearings, but as standing order 26 requires that estimates hearings be held in public, the provisions in those procedures relating to taking evidence in camera cannot apply to estimates hearings. Similarly, standing order 25(13) which discourages legislative and general purpose standing committees from inquiring into matters being examined by select committees cannot prevent questions being asked at estimates hearings about such matters because such questions are not, in themselves, inquiries and the estimates hearings are intended to cover “particulars of proposed expenditure”, subject only to the test of relevance.

At each hearing, the committee chair calls on the items of proposed expenditure, usually by reference to the programs and subprograms for which funding is described in the Portfolio Budget Statements or Portfolio Additional Estimates Statements. The estimates are then open for examination.<sup>98</sup> Committees may also consider the annual reports of departments and budget-funded agencies in

94 See also below, under Power to take evidence in private.

95 11/3/1981, J.142-3; 28/4/1981, J.214.

96 Standing Orders Committee, report of March 1980, PP 50/1980, p. 3; Procedure Committee, 1st report of 1995, PP 171/1995, pp 4-5; 2nd report of 1997, PP 460/1997, p. 1.

97 See Chapter 17, Witnesses, under Protection of witnesses.

98 SO 26(4).

conjunction with their consideration of estimates.

### *Questions taken on notice at estimates hearings*

Most questions are answered at the hearings, but witnesses may also choose to take questions on notice and provide written responses after the hearing. Members and participating members may also place questions on notice. Such questions are lodged with the secretaries of the committees, and are distributed to members of the committees and to relevant departments.<sup>99</sup> As any senator may participate in estimates proceedings, any senator may place questions on notice. Once questions are lodged they are in the possession of the committees and cannot be withdrawn by the senators who lodged them. There is limited time for estimates questions on notice to be lodged, and the withdrawal of questions after they are lodged could deprive other senators of the right to have the questions answered.

Questions may be lodged only while there are estimates proceedings in process, that is, from the time of the reference of the main or additional estimates to the committees to the time when the committees report, or, in the case of the supplementary hearings on the main estimates (see below), from the expiration of the deadline for the notification of matters to the time when the committees conclude their hearings or report if they present reports. Questions lodged during the supplementary hearings must relate to matters notified for consideration in those hearings.

A senator, on any day after question time in the Senate, may seek an explanation of, and initiate a debate on, any failure to answer an estimates question on notice within 30 days after the deadline set by the committee for answering such questions.<sup>100</sup>

In November 2004 the Senate adopted a special procedure whereby questions on notice were substituted for supplementary estimates hearings.<sup>101</sup>

The committees when considering estimates are authorised to ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure. Usually the committees leave it to the minister to determine which witnesses attend, although they have the power to call particular witnesses if they so choose. On many occasions in the past, however, ministers have cooperated with committees in agreeing to the attendance of particular witnesses.

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99 SO 26(14).

100 SO 74(5), as amended on 9 November 2005.

101 18/11/2004, J.78. This was because of the timing of the election that year.

### ***Scope of questions at estimates hearings***

Although the reference in standing order 26(5) to ministers or officers might be taken to limit estimates hearings to public bodies and office-holders, nongovernment bodies in receipt of public funds have appeared by agreement to answer questions.

The only substantive rule of the Senate relating to the scope of questions is that questions must be relevant to the matters referred to the committees, namely the estimates of expenditure. Any questions going to the operations or financial positions of departments or agencies are relevant questions. The Senate on 22 November 1999 endorsed the views of the Procedure Committee on the relevance of questions at estimates hearings. This followed earlier disputes between committee members and ministers about relevance of questions. The Procedure Committee adopted advice provided to those members by the Clerk of the Senate.<sup>102</sup> As the estimates represent departments' and agencies' claims on the Commonwealth for funds, any questions going to the operations or financial positions of the departments and agencies which shape those claims are relevant. Annual reports are statements to Parliament of the manner in which departments use the resources made available to them, and therefore references to annual reports are relevant. When the budget cycle was changed so that the main estimates were presented in May instead of August, this necessarily involved the most relevant annual reports not being available at the time of the main estimates hearings but becoming available at the time of the additional estimates hearings. It was therefore accepted that annual reports would be referred to during the additional estimates hearings. In effect, annual reports disclose the financial positions of departments and their activities leading to their financial positions at the very time when departments are seeking additional funds as a result of their financial positions.

### ***Role of the Australian National Audit Office***

An important factor is the availability of audit reports and the participation of officers of the Australian National Audit Office (ANAO) in committees' examination of programs which have been subject to efficiency and project audits by ANAO. Guidelines for provision of assistance by the Auditor-General to committees considering estimates were drawn up in 1986 following a meeting between the Auditor-General and the President and chairs of the former estimates committees. The Auditor-General produces regular reports on departments and their financial statements, on individual efficiency and project audits, and special audits. The chief assistance provided by the Auditor-General is by way of briefings for committees on reports, and throughout the estimates process if required. Although ANAO staff do not attend estimates hearings as a matter of course, it is open to committees to invite the Auditor-General to provide comment, or

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102 22/11/1999, J.2008-9; supplementary estimates report of the Rural and Regional Affairs and Transport Legislation Committee, 30/6/1999, PP 154/1999; for further developments in this case, see 6/4/2000, J.2567; 13/4/2000, J.2637-9; 19/6/2000, J.2802.

nominate ANAO officers to provide comment, on matters relevant to audit reports raised during committee hearings. On three occasions, this assistance has taken the form of ANAO officers appearing as witnesses before committees considering estimates, to provide comment on audits conducted within the relevant program. During its consideration of the 1993 Budget estimates, Estimates Committee A invited ANAO officers to give evidence on two separate organisations, the Australian Quarantine and Inspection Service and the Aboriginal and Torres Strait Islander Commission, both of which had been subject to recent audits. In its report to the Senate, tabled on 7 October 1993, the committee commented that the provision of public evidence by ANAO officers had been helpful to the consideration of the proposed estimates. On another occasion, in 1989, ANAO officers gave evidence to Estimates Committee E on audits conducted on the Aboriginal Development Commission and Department of Aboriginal Affairs.<sup>103</sup>

### *Supplementary estimates hearings*

After initial hearings have been completed, the committees present reports to the Senate. They are also required to set a date for receipt of answers to questions taken on notice prior to and at the hearings. In relation to the annual estimates, but not the additional estimates, the committees are required to set a date or dates for supplementary hearings to consider answers to questions on notice or any other matters relating to the proposed expenditure of which members and participating members have given notice that they wish to pursue. The date set for the commencement of supplementary meetings must not be less than 10 days after the date set for receipt of answers to questions taken on notice. In practice in recent years, the Senate has set the dates for supplementary hearings. Senators must give notice of matters they wish to pursue not less than three working days before the date for commencement of the supplementary meetings.<sup>104</sup>

Matters considered at supplementary hearings are confined to those matters of which notice has been given. Committees may present further reports to the Senate containing recommendations for further action by the Senate, although they are not required to do so. There is no limit to the number of supplementary hearings a committee may hold, but after the time for giving notice of matters to be raised at supplementary meetings has expired, there is no further opportunity to give notice of additional matters. In a report on its supplementary meetings in November 1993, Estimates Committee F recommended that the Procedure Committee examine a system for giving notice of matters in respect of a particular portfolio not less than three days before the commencement of supplementary hearings on that portfolio. The recommendation was adopted by the Senate after it had been moved as a second reading amendment to the appropriation bills by the chair of Estimates Committee F.<sup>105</sup> The Procedure Committee declined to recommend a

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103 Estimates Committees Debates, 3/5/1989, pp. E201-20.

104 For a resolution of the Senate criticising delay in answering questions on notice, see 29/4/1999, J.809.

105 18/11/1993, J.821.

change to the procedures on the grounds that the existing arrangements offered clarity and simplicity and the proposed change would make programming of supplementary meetings more difficult.<sup>106</sup>

In 2001, on the recommendation of the Procedure Committee, supplementary hearings were confined to the annual appropriation bills, and abolished in respect of the additional appropriation bills. The rationale of this change was that, as the budget cycle had developed, the supplementary hearings for the additional appropriation bills were occurring very near to the main round of the annual appropriation hearings, when unlimited questioning of departments and agencies is possible.

It is not necessary for the committees to have completed their supplementary hearings before debate on the appropriation bills resumes, or, indeed, before the bills are passed. Normally, however, the hearings are completed before the bills proceed.

For the history of changes to the estimates scrutiny process, see *OASP* 12th ed., Chapter 13, Financial Legislation, pp. 313-16, under History of expenditure scrutiny.

## **Joint committees**

Joint committees are committees consisting of members of both Houses appointed by both Houses. They are established where it is considered that matters should be the subject of simultaneous inquiry by both Houses.

Joint committees have some potential difficulties in a bicameral legislature. In the Australian situation, in which one House is rigidly controlled by the ministry, the use of joint committees tends to prevent the Senate exercising a review and second opinion function and thereby subvert the concept of bicameralism. The effect is worse when there is unequal representation of the Houses; many of the joint committees on which senators serve have unequal numbers of senators and members. Their value to the Senate must, on that ground alone, be queried.<sup>107</sup>

The Constitution does not mention joint committees and, by referring in section 49 to the powers, privileges and immunities of each House, may exclude joint committees from the inheritance of the powers, privileges and immunities provided by that section. For this reason, when the Parliament contemplated the establishment of joint committees in 1913 to examine public works proposals and government accounts, it was thought to be necessary for them to be established by legislation so that the committees could, among other things, be empowered to take evidence

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106 3rd Report of 1993, PP 450/1993, p. 4.

107 For the repeated refusal of a joint committee, the Joint Standing Committee on Treaties, to consider a matter referred to it by the Senate, see SD, 20/6/2005, pp. 61-4.



on oath.<sup>108</sup> The establishment of joint committees by statute, however, brought with it further difficulties. The inclusion in statutes of provisions relating to the functions, composition, powers and proceedings of the committees may make their operations justiciable. In the case of the early joint statutory committees, the Public Works and Public Accounts Committees, the enabling statutes make provision for such details as the quorums and voting procedures of the committees. This may mean that the operations of the committees are vulnerable to legal challenge.<sup>109</sup> The inflexibility of providing parliamentary procedures by statute also gives rise to difficulties. An example is a legal opinion given in respect of the Public Accounts Committee in 1982 which supported the view, rejected by the Senate, that the committee did not need the permission of the Senate to meet while the Senate was sitting, notwithstanding a general prohibition to this effect in the Senate standing orders.<sup>110</sup>

The difficulties generated by the early models of statutory committees have been ameliorated to a large extent by the adoption of a different approach to statutory committees in later models. In these models, committees are established by statute and provisions for membership and committee functions are contained in the statute. The statute also provides, however, that all matters relating to the powers and proceedings of the committee shall be determined by resolution of both Houses. This approach reduces the matters relating to joint committees that may be justiciable and reserves for the Houses the appropriate task of determining the powers and proceedings of their committees which are therefore probably not justiciable.

It is apparent that notwithstanding their problematic character, joint committees will continue to be used. There is now a significant group of joint statutory committees whose role is to monitor the operations of sensitive agencies or complex areas of the law. The joint committees on which senators serve are:

*Joint statutory committees*

Australian Commission for Law Enforcement Integrity

Broadcasting of Parliamentary Proceedings

Corporations and Financial Services

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108 The doubt about the legal status of joint committees was cleared up by the *Parliamentary Privileges Act 1987*: see Chapter 2, Parliamentary Privilege.

109 In this connection, see *Corrigan v Parliamentary Criminal Justice Committee* [2001] 2 Qd R 23; although the matter there raised was held to be non-justiciable, other actions by a committee under statutory authority may be amenable to judicial review.

110 Report of Standing Orders Committee, October 1983, PP 117/1983, pp.1-4; 1/3/1984, J.687.

Human Rights  
Intelligence and Security  
Law Enforcement  
Public Accounts and Audit  
Public Works

*Joint standing committees*

Electoral Matters  
Foreign Affairs, Defence and Trade  
Migration  
National Broadband Network  
National Capital and External Territories  
Parliamentary Library  
Treaties

Joint select committees are listed in appendix 9.

By convention, joint committees follow Senate standing orders where their statutes or resolutions of appointment are silent. Procedures applying to joint committees are therefore referred to throughout the remainder of this chapter under appropriate headings.

## **Appointment and membership of committees**

Standing committees are appointed at the beginning of each Parliament pursuant to standing orders. The life of a Parliament is determined by a general election for the House of Representatives, which usually also corresponds with a periodical election for the Senate.<sup>111</sup>

### ***Membership of committees***

Members are appointed to committees in accordance with any membership formula contained in the relevant standing order or resolution, on motion, usually by a minister, following nomination by party leaders in letters to the President. Membership of the legislative and general purpose standing committees is equally shared between government and non-government senators but

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111 See Chapter 4, Elections, and Chapter 7, Meetings of the Senate.

the chair has a casting vote when the votes are equally divided.

Membership of committees to which the Leader of the Opposition or any minority groups or independent senators may nominate members is normally determined by agreement. Where agreement cannot be reached the question of representation on a committee is determined by the Senate using the provisions in standing orders 25(6), 27(1) and (2), as appropriate, in conjunction with standing order 163 which sets out the mechanism for holding a ballot. Where other standing orders do not apply, standing order 27(1) provides a general mechanism for senators to be nominated for places on committees and, if one senator so requires, to be selected by ballot. Standing order 27(2) provides that a ballot may be held in selecting a senator to replace a senator discharged from a committee. Although the ballot provisions are occasionally used, membership is determined in most cases by agreement.

Membership of committees may change during their life. When this occurs a motion is moved, usually by a minister by leave without notice, discharging the former member and appointing a new member nominated by the relevant party leader or independent in a letter to the President. If a place becomes vacant by virtue of a committee member ceasing to be a senator, there is no requirement for a motion to discharge the former member.

### *Chairs and deputy chairs of committees*

The provisions governing the appointment of committees usually provide for the chair to be elected by the committee, subject to the prescription as to the party from which the chair is to come. Occasionally the chair is designated by the Senate.<sup>112</sup>

A committee may at any time replace its chair, subject to the governing requirements of the Senate. If a senator is appointed to a committee as a substitute for a particular inquiry for the senator who is the chair<sup>113</sup> the committee may substitute another of its members (not necessarily the senator substituted by the Senate) for the chair for that inquiry. The same applies to the deputy chair. This does not mean that there are two chairs or deputy chairs at any time, but that there are different chairs or deputy chairs for the period of the committee's consideration of the different inquiries.

In the legislative and general purpose standing committees the chair, or the deputy chair when acting as chair, may appoint another member of the committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting (SO 25(9)).

Under standing order 25 the chairs of the legislation committees must be chosen from the

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112 30/9/1999, J.1800. (See [supplement](#))

113 See below, under Substitute and participating membership.

government party members, and the chairs of the references committees from the non-government members.<sup>114</sup> The contrary arrangements apply to the position of deputy chair. Non-government chairs and deputy chairs are determined by agreement between non-government groups and independent senators. In the absence of agreement the allocation determined by the Senate.<sup>115</sup>

For procedures for electing chairs and deputy chairs, see below under Conduct of proceedings, Meeting and election of chair.

### ***Substitute and participating membership***

Substitute members are members appointed to committees in substitution for other members in relation to particular inquiries.<sup>116</sup>

The practice of substitute membership developed, particularly in respect of estimates committees, to enable senators with a special interest in certain policy areas to contribute to the work of committees of which they were not members. Although the standing orders governing the operation of legislative and general purpose standing committees and estimates committees provided for senators who were not members of committees to participate in their public meetings (in the case of legislative and general purpose standing committees) and deliberations (in the case of estimates committees), their role was limited to asking questions and they were precluded from voting. Substitute membership, on the other hand, although not defined in standing orders, conferred full membership rights on the senator for the purposes of the matter for which they were a member, including the right to attend private meetings, make contributions to reports and vote. Mainly used by the Opposition to enable wide participation of its members in estimates committees, these practices have also been used to enable senators to participate in particular inquiries by legislative and general purpose standing committees.

The procedure for participating membership was written into standing order 25 in 1994.

A difficulty arose in 1993 when the standing committee on Industry, Science, Technology, Transport, Communications and Infrastructure considered a matter of privilege arising from one of its inquiries in which there were two substitute members participating. On advice by the Clerk of the Senate, the standing committee excluded the substitute members from consideration of the matter of privilege, acting on the principle that substitute members should act as members of a committee only in respect of matters that were wholly part of the inquiry for which they

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114 SO 25(9)(a), (b).

115 SO 25(9)(a)(c). For an example of an absence of agreement notified to the Senate, see correspondence from the Australian Greens Whip to the President, tabled on 31/10/2011, J.1658 and motion agreed to on 2/11/2011, J.1708-10, after debate, SD pp. 7905-46.

116 SO 25(7).

were substitute members. The matter of privilege was not wholly part of the inquiry but related to the general operations of the committee, governed by Privilege Resolution 1(18), and should therefore be determined by the permanent membership. In its 3rd report of 1993,<sup>117</sup> the Procedure Committee supported these principles, emphasising that it was open to the committee to consult with substitute members on any matter, regardless of their right to vote.

In respect of the matters for which the substitute member is appointed, the substitute member replaces the other member, who ceases to be a member of the committee for those matters. It is not open to the other member then to participate in committee proceedings on those matters, unless he or she is appointed as a participating member (see below).

As well as formalising the practice of substitute membership, the 1994 amendments of the standing orders introduced the concept of participating membership. These amendments replaced the former provisions relating to legislative and general purpose committees, allowing any senator to participate in public meetings, with a regime under which only members or participating members can take part in committee proceedings. Whereas substitute members have full membership rights in respect of the matter for which they are a member, participating members have all the rights of members in relation to all matters before the committees except the right to vote. They do not possess any rights which members of a committee do not possess; for example, they may not participate in the proceedings of a subcommittee unless the committee has conferred that right on all its members. Participating membership, like substitute membership, does not alter the balance of party numbers on a committee as provided in the standing orders.

Participating membership was initially conceived as a means of facilitating participation in selected inquiries by independents and members of minor parties. It was argued that the opportunities for government and opposition senators to make substitute arrangements were not available to the independents and minor parties.<sup>118</sup> In debate on the changes to standing orders relating to committees on 24 August 1994, the opportunity for participating members to contribute to reports was particularly emphasised. Concern was expressed, however, that participating members may attach conclusions and recommendations to reports without having participated significantly in the committee's evidence-gathering and analysis; and that unanimous and delicately negotiated reports could therefore be compromised. In view of these concerns, a possible review of these arrangements was foreshadowed should any difficulties arise, but the review has not proved necessary.

Soon after the implementation of this system it became apparent that the Opposition, rather than using substitute arrangements, intended to use the concept of participating membership to compensate for the loss of the ability of non-members to attend hearings and ask questions. With

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117 PP 450/1993.

118 SD, 24/8/1994, pp. 171-2, 178, 189.

many senators nominating as participating members of a large number of committees, the system threatened to become unwieldy and the fundamental features and benefits of committees as small and flexible bodies were challenged. In its First Report of 1995,<sup>119</sup> the Procedure Committee recommended that the former rule, allowing any senator to participate, be restored for estimates hearings.

Participating membership does not now have effect for estimates inquiries. In relation to estimates hearings, senators who are not members and who attend meetings of the committees may question witnesses and participate in the deliberations of a meeting, but this does not empower them to move motions at meetings.<sup>120</sup> On the other hand, in relation to committees' proceedings other than in respect of estimates hearings, participating members have all the rights of members of committees, except the right to vote, and therefore may move motions in the committees.<sup>121</sup>

Participating members are counted for the purpose of forming a quorum if a majority of members of a committee is not present.

Participating or substitute membership on committees other than legislative and general purpose standing committees may be arranged through a special resolution of the Senate. In May 1994, for example, Senator Kernot was appointed as an additional non-voting member of the Committee of Privileges for its inquiry into her private member's bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994.<sup>122</sup> In September 1994, Senator Vanstone was appointed as a substitute member of the Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies for its inquiry into the Classification (Publications, Films and Computer Games) Bill 1994,<sup>123</sup> the first time this select committee had received a bill under the selection of bills procedures. Participating membership was extended to select committees established in 2008<sup>124</sup> and is now a common feature of select committees. In the 43rd Parliament, the concept of participating membership (sometimes on a limited basis) was extended to certain joint standing and joint select committees, with the agreement of the House of Representatives.<sup>125</sup>

A temporary order agreed to on 14 August 2006, and subsequently incorporated in standing order 25, allows a member of a legislative and general purpose standing committee who is unavailable for a meeting to appoint a participating member as a temporary substitute. If a member is incapacitated

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119 PP 171/1995.

120 SO 26(8).

121 SO 25(7)(c).

122 12/5/1994, J.1684.

123 21/9/1994, J.2202.

124 14/2/2008, J.145-8; 15/5/2008, J.419-20; 25/6/2008, J.626-32.

125 30/9/2010, J.141-3; 12/5/2011, J.918; 16/6/2011, J.1014-6.

or unavailable, the relevant party or group leader may make the temporary appointment.<sup>126</sup>

The standing order relating to the Appropriations and Staffing Committee allows senators who are not members of the committee to attend meetings, participate in deliberations and question witnesses but not vote. This provision recognises senators' rights to participate without restriction in deliberations involving the affairs of the Department of the Senate.

### *President and Deputy President on committees*

The President is excluded from membership of committees other than those of which the President is an ex officio member.<sup>127</sup> Thus, a senator upon election as President ceases to be a member of any committees other than those of which the President is an ex officio member. There is no such restriction on the Deputy President. If the Deputy President is elected to serve on any committee but declines to do so, another senator shall be elected.<sup>128</sup> The Deputy President chairs the Committee of Chairs established under standing order 25(10).

### *Senators on committees before taking their seats*

Arrangements for membership may also take into account the forthcoming commencement of terms of new senators. A period of four to six weeks frequently elapses between the commencement of senators' terms on 1 July and the date on which they are sworn, and the question arises whether a senator who has not taken the oath or affirmation pursuant to section 42 of the Constitution may participate in the proceedings of a committee, and may be appointed, prospectively, as a member of a committee. The view taken and the practice followed by the Senate is that, while a senator cannot participate in the proceedings of the Senate until that senator has taken the oath or affirmation under the Constitution, a senator can participate in the proceedings of a Senate committee from the date of becoming a senator and may be prospectively appointed by the Senate as a member of the committee.<sup>129</sup>

### *Ministers and parliamentary secretaries on committees*

There is nothing in the rules of the Senate to prevent ministers or parliamentary secretaries serving on committees. Ministers usually do not do so, and parliamentary secretaries only occasionally. Their presence on committees could give rise to questions of conflict of interest or bias (see below), for example, where committees are inquiring into actions of government for which ministers and

126 14/8/2006, J.2482; 10/3/2009, J.1657-8.

127 SO 27(3).

128 SO 27(4).

129 See, for example, 27/5/1993, J.293-4; 28/6/1996, J.446-7; 30/6/1999, J.1402-4; 27/6/2002, J.546-50; 23/6/2011, J.1119-23.

parliamentary secretaries, as members of the executive government, are individually or collectively responsible.

### *Conflict of interest*

Standing order 27(5) provides that a senator shall not sit on a committee if the senator has a conflict of interest in relation to the inquiry of the committee. This standing order was the subject of a statement by President Beahan on 24 February 1994.<sup>130</sup> It had been suggested that a senator had a conflict of interest because he had written newspaper articles critical of a committee of which he was a member, without identifying himself as such. The President indicated that the standing order applies to a situation in which a senator has a private interest in the subject of the committee's inquiry which conflicts with the duty of the senator to participate conscientiously in the conduct of the inquiry, an example being a senator holding shares in a company, the activities of which are under inquiry. There is no precedent of the Senate enforcing this rule by removing a chair or member of a committee, or disagreeing with an appointment.

### *Disqualification for bias*

Occasionally it is suggested that senators should not serve on committees because it may appear that they have prejudged matters under inquiry or cannot bring an unbiased mind to those matters.

The question of whether members of the Committee of Privileges should be disqualified because, having been involved in earlier inquiries relevant to the committee's current inquiries, they may have pre-judged the issues, arose in relation to the committee's 17th and 18th reports. In its 18th report, the committee reaffirmed the principle that it was for individual senators to determine for themselves whether they should disqualify themselves in any particular circumstances.<sup>131</sup> Advice from the Clerk of the Senate, tabled with the report, cited several cases where members and senators had withdrawn or not withdrawn from inquiries in response to suggestions that they may have pre-judged the issues before those inquiries, and concluded "that questions concerning the service of members on a committee where they may be regarded as not entirely impartial should be decided by the individual members concerned, and that there is no general rule or convention which may be applied to all cases".<sup>132</sup> In the advice provided to the committee, the following examples were cited:

- A challenge was foreshadowed to three members of the Select Committee on Allegations

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130 SD, 24/2/1994, pp. 1036-7.

131 p. 129, PP 461/1989.

132 Advice dated 1/2/89, published in Volume 3 of committee documents tabled with the 18th report of the Committee of Privileges, 16/6/1989, J.1921; see also advice dated 18/1/1989. This advice, together with a further advice on this subject, dated 20/10/2010, is published on the committee's website.



Concerning a Judge who had been members of the earlier Select Committee on the Conduct of a Judge. The three members did not disqualify themselves and the committee reported that the members considered their previous service “did not preclude them from making a proper and unbiased judgment on the matters before this committee on the basis of the evidence to be heard by it, or that they had any sense of vested interest in maintaining their earlier decision”.<sup>133</sup> The challenge did not eventuate, nor was the report queried because the three senators had participated in the inquiry.

- Senator Wheeldon did not participate in a Committee of Privileges inquiry into the unauthorised publication of a proposed report by a select committee of which he was a member, but another member of the select committee, Senator Branson, served on the Committee of Privileges, stating that he did not think it necessary for him to withdraw unless something arose to alter that decision.<sup>134</sup>

As was pointed out in the advice to the Privileges Committee, senators are called upon to express views and make decisions on many matters, and it would be too restrictive to expect them to disqualify themselves from any inquiry into matters on which they had expressed views or made decisions.

In 2012, Senator Brandis excused himself from participating in a Privileges Committee inquiry into a matter on which he had previously expressed strong views publicly.<sup>135</sup>

### *Suspension from the sittings of the Senate*

There is nothing in the standing orders to prevent a senator who has been suspended from the sittings of the Senate from attending a committee meeting.<sup>136</sup>

### **Powers of committees**

The power of each House of the Parliament to conduct inquiries is recognised as intrinsic to and essential for a legislature.<sup>137</sup> For the most part, the Senate does not conduct its own inquiries but delegates this function, along with the necessary powers, to committees.

Committee powers normally include the following:

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133 Select Committee on Allegations Concerning a Judge, report, PP 271/1984, p. 3.

134 Committee of Privileges, 1st report, PP 163/1971, p. 4.

135 See personal explanation by Senator Brandis, 20/3/2012, J. 2304, SD, pp. 2283-4.

136 See Chapter 10, Debate, under Disorder.

137 See Chapter 2, Parliamentary Privilege, under Power to conduct inquiries.

- to send for persons and documents (that is, to summon witnesses and require the production of documents);
- to move from place to place;
- to take evidence in public or private session;
- to meet and transact business notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives; and
- to appoint subcommittees.

Committees possess some or all of these powers, depending on their functions. Legislative and general purpose standing committees, for example, when conducting estimates hearings may hear evidence only in public and may not take evidence in camera.

### ***Power to call for persons and documents***

Legislative and general purpose standing committees and most select committees possess the full range of inquiry powers, enabling them, if necessary, to summon witnesses and order the production of documents. A person failing to comply with a lawful order of a committee to this effect may be found to be in contempt of the Senate and, in accordance with section 7 of the *Parliamentary Privileges Act 1987*, subject to a penalty of up to six months' imprisonment or a fine not exceeding \$5 000 for a natural person or \$25 000 for a corporation. While committees have power to send for persons and documents, they do not have power to deal with the consequences of a failure to comply with such an order. The committee's role ends with reporting the matter to the Senate to deal with the possible contempt. For a detailed discussion of how the Senate deals with such matters, see Chapter 2, Parliamentary Privilege.

The power of the Senate and its committees to compel the attendance of witnesses, the giving of evidence and the production of documents is virtually unlimited, subject to some possible qualifications. As discussed in Chapter 2 and Chapter 17, there is probably an implicit limitation on the power of the Senate to summon members of the other House or of a state or territory legislature, and this limitation may extend also to all state officers. It may also be held that the investigatory power of committees is limited to matters within Commonwealth legislative power as delineated by the Constitution. These possible limitations have not been adjudicated. These aside, the extent of the power has been frequently restated although the power itself has been seldom used.<sup>138</sup>

Major consideration of the extent of the powers of the Senate and its committees to compel evidence occurred in relation to the efforts of two select committees in 1993 and 1994. The Select

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138 See, for example, the 49th report of the Committee of Privileges, PP 171/1994.

Committee on the Functions, Powers and Operation of the Australian Loan Council reported to the Senate in its second report in September 1993 that it had met with “considerable resistance on the part of some prospective witnesses”.<sup>139</sup> There followed a list of members of state parliaments who had declined invitations to appear before the committee. The Treasurer, a member of the House of Representatives, had also declined an invitation. The committee had earlier received advice from the Clerk of the Senate that it could not summon as witnesses members of the House of Representatives and of the houses of state parliaments. In its second report, the committee recommended that the Senate request the various houses to require the attendance of their members before the committee to give evidence. A resolution was agreed to but the requests were declined (see Chapter 17, Witnesses, under Members or officers of other Houses).

The Select Committee on Foreign Ownership Decisions in Relation to the Print Media was established on 9 December 1993 to examine government decisions in 1991 and 1993 in relation to the percentage of foreign ownership of newspapers, and the role of the Foreign Investment Review Board (FIRB). In pursuing its inquiry the committee encountered government claims of public interest immunity, formerly known as executive or crown privilege.<sup>140</sup> The Treasurer refused to release key documents prepared by FIRB and also issued directions to certain current and former FIRB officers not to give information to the committee about the 1991 and 1993 decisions. The committee issued a former Prime Minister and a former Treasurer with summonses to appear; another former Treasurer responded to an invitation to appear and the former Prime Minister appeared a second time at his own request. The documents were not produced to the committee.

The use by committees of inquiry powers through the issuing of a summons for a person to appear or a document to be produced is the exception rather than the rule. Committees usually invite witnesses to attend and give evidence, and witnesses usually attend voluntarily. Resolution 1 of the Senate’s Privilege Resolutions of 1988 require committees to proceed by way of invitation unless circumstances warrant otherwise.

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.

The Senate may order particular witnesses to appear before committees.<sup>141</sup>

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139 Second Report, PP 153/1993, p. 1.

140 For the major discussion of this topic, see Chapter 19, Relations with the Executive Government, under Claims by the executive of public interest immunity.

141 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; 28/10/2009, J.2661-62; 13/5/2010, J.3494.

The procedures contained in Privilege Resolution 1 for the protection of witnesses are analysed in Chapter 17, Witnesses.

### ***Power to take evidence in private***

Most committees are empowered to hear evidence in public or in private. It is open to a committee to decide not to pursue a matter because it would be contrary to the public interest for reasons including possible prejudice to court proceedings, national security or individual privacy. In making such decisions, however, most committees have an option not in practice available to the Senate itself, and that is the power to take evidence in camera.

By hearing evidence in private and agreeing to orders forbidding publication of the evidence, a committee may inform itself fully on an issue and at the same time minimise any risk arising from the publication of evidence. A committee may decide to publish the in camera evidence at a later date when the risk of harm has passed, or may decide on partial publication in order to balance competing concerns. For further material on the taking of evidence in camera and other measures to protect witnesses, see Chapter 17, Witnesses, under Protection of Witnesses: (b) procedural protection. The report of the Senate Standing Committee on Foreign Affairs, Defence and Trade, *Sexual Harassment in the Australian Defence Force: Facing the Future Together*, contains a useful discussion of some of the issues involved in taking evidence in camera and releasing it at a later date, particularly in the context of individual privacy and the right to natural justice of an individual against whom allegations are made.<sup>142</sup>

Committees considering estimates must take all their evidence in public. Documents submitted to a committee considering estimates may not be withheld from publication; nor may evidence be taken in camera.<sup>143</sup> Matters which arise during the consideration of estimates may be the subject of reference to a legislative and general purpose standing committee in possession of the full range of committee powers. For example, on two occasions, in 1985 and 2009, when questions were asked at estimates about the salaries of ABC television presenters, this information, regarded as commercially sensitive, was subsequently provided as in camera evidence in the course of other inquiries.<sup>144</sup>

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142 August 1994, PP 147/1994, Annex 1, Evidence, pp. 327-30.

143 See above, under Estimates committees.

144 See *ABC Employment Contracts and their Confidentiality*, PP No. 432/1986.

### ***Power to meet and transact business notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives***

Most Senate committees are empowered to continue their operations regardless of the prorogation of the Parliament or the dissolution of the House of Representatives, either of which occurrences terminates a session of Parliament. Committees formed for the life of a parliament continue in existence until the day before the next Parliament first meets.

On many occasions, Senate committees have continued their activities after the dissolution of the House of Representatives or prorogation of Parliament, including by taking evidence and presenting reports. The absolute privilege of these activities has not been called into question and the practice is now firmly entrenched in standing orders as well as being confirmed by declaratory resolution.<sup>145</sup> The power of the Senate to authorise its committees to meet derives from the Senate's character as a continuing House and from the Constitution.<sup>146</sup>

### ***Power to appoint subcommittees***

Some committees are authorised by the Senate to appoint subcommittees to assist in carrying out the business of committees. These committees include the Appropriations and Staffing Committee,<sup>147</sup> the Scrutiny of Bills Committee<sup>148</sup> and the legislative and general purpose standing committees.<sup>149</sup> Resolutions for the establishment of select committees may also contain provision for the appointment of subcommittees.

Senate committees which have inquiry powers but which do not have the power to appoint subcommittees include the Regulations and Ordinances Committee, the Publications Committee and the Committee of Privileges. In the case of the first two committees listed, the absence of the power may be attributed largely to historical reasons. The use of subcommittees by the Committee of Privileges, however, is considered inappropriate given its role.

Subcommittees are usually provided with the same powers as their parent committees. Standing order 25(14), for example, empowers legislative and general purpose standing committees and any subcommittees to send for persons and documents, to move from place to place and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives. Subcommittees may conduct any business which the

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145 22/10/1984, J.1276.

146 For the major discussion of the effects of prorogation, see Chapter 19, Relations with the Executive Government, under Effect of prorogation.

147 SO 19(5).

148 SO 24(3).

149 SO 25(8).

committee itself may perform, but only in consequence of a committee resolution of appointment. Subcommittees may not report to the Senate, however, other than through their parent committees which may adopt the report of a subcommittee. Generally, the use of subcommittees increases a committee's flexibility and enables it to pursue several tasks simultaneously.

A subcommittee is an agent of the committee and not the committee itself, even in the presence of members who might otherwise constitute a quorum of the committee capable of meeting in the presence of the chair. A transformation from subcommittee to committee is not permissible in these circumstances, as absent members could not have been given proper notice of a committee meeting. However, the absence of sufficient notice is the only impediment to a formal meeting of the full committee in such circumstances and if this can be overcome, a subcommittee meeting may be transformed into a committee meeting.

It is not permissible for a committee to appoint a subcommittee comprised of whichever senators attend a particular meeting or hearing. The full membership of a subcommittee must be specified by name and specific matters referred to it. The resolution of appointment may specify a chair and deputy chair or provide that the members of the subcommittee may elect their own chair and deputy chair. In any event, the subcommittee must exist and function in accordance with the standing orders of the Senate and a committee resolution of appointment that is consistent with the standing orders.

Subcommittees are required to have at least one government and one opposition senator.<sup>150</sup>

### **Access to other committees' documents**

Committees are occasionally given the power to consider the documents of other committees or of their predecessor committees. This is done where committees would not otherwise have access to such documents.

The legislative and general purpose standing committees have the power to consider the documents of their predecessor committees.<sup>151</sup> This, however, is only a transitional provision consequent on past restructurings of the committees and designed to carry inquiries over the restructuring. When the committees conclude inquiries the documents they have received in the course of those inquiries are in the custody of the Senate,<sup>152</sup> so that an order of the Senate would be necessary to

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150 SO 27(6).

151 SO 25(4).

152 SO 25(15) ([See supplement](#)).

enable them to use such material, but published evidence and documents may be freely cited.<sup>153</sup>

Select committees are sometimes given access to the documents of earlier committees to provide a bridge between inquiries or to conclude unfinished inquiries. If a select committee replicates a predecessor it may be taken that it has access to the documents of the earlier committee.

Committees which have continuing functions, such as the legislative scrutiny committees, are taken to have continuing access to documents acquired in earlier parliaments.

As most committees publish their evidence and submissions, which are therefore freely available for reference, access to the documents of other committees is significant only in relation to unpublished evidence and submissions, correspondence, minutes, working papers and the like. (See supplement)

### **Instructions to committees**

Committees being bodies appointed by the Senate for its purposes, they may be given instructions by the Senate.

Instructions to committees are covered in Chapter 22 of the standing orders and apply both to committees of the whole and other committees. The application of these standing orders to committees of the whole dealing with bills is covered in Chapter 12, Legislation, under Instructions to committee of the whole.

The purpose of an instruction to a committee is to empower it to undertake an action it would not otherwise have power to undertake. As indicated in Chapter 12, an instruction may also require a committee to do something which is within its power and which the Senate requires to be done, for example, in the cases of standing and select committees, to hear particular witnesses (see below). An instruction also binds a committee to undertake the action determined by the Senate. It may have application, for example, where the non-government majority of the Senate seeks to direct a committee with a government party majority. An instruction may also be used to extend or restrict the order of reference to a committee but, in practice, this is invariably achieved by an ordinary resolution altering the terms of reference.

Instructions to committees, other than committee of the whole, have been invoked only rarely. In June 1991 a motion to refer matters relating to the administration of the Department of Foreign Affairs and Trade to a committee was the subject of some disputation. The reference was originally intended to be to the Foreign Affairs, Defence and Trade Committee but was changed

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153 For a legislative and general purpose standing committee presenting to the Senate documents of a completed inquiry closely related to material in its report, see additional information tabled by Finance and Administration Committee, 8/8/2006, J.2390.

to the Finance and Public Administration Committee on the basis that the matters related to general questions of public administration. The chair of the Finance and Public Administration Committee moved an amendment to alter the motion to an instruction to the Foreign Affairs, Defence and Trade Committee to consider the particular matters listed in the proposed reference as part of its scrutiny of the department's annual report, considered by the committee under a standing reference of all annual reports to the relevant committee.<sup>154</sup> The amendment was defeated and the Finance and Public Administration Committee subsequently presented a significant and substantial report on the management and operations of the department. Normally, an instruction to a committee requires notice.<sup>155</sup> In this case, although the amendment would have had the effect of instructing the committee, it was moved not as an instruction per se but as an amendment to a motion and therefore did not require notice.

An instruction was given to the Procedure Committee in 1993 in relation to a reference on the hours of sitting and routine of business. Although the committee has no formal evidence gathering powers it was instructed by the Senate to invite submissions from all parties in the Senate and independent senators.<sup>156</sup>

Committees may be directed by the Senate to hear evidence on particular matters or from particular witnesses.<sup>157</sup>

Sometimes, the Senate instructs committees to hold hearings in particular places.

The legislative and general purpose standing committees to which the Telstra (Dilution of Public Ownership) Bill 1996 and the Workplace Relations Bill 1996 were referred were instructed to hold public hearings in each state and territory capital city.<sup>158</sup> In 2008, the Economics Committee was referred the Tax Laws Amendment (Medicare Levy Surcharge Thresholds) Bill with an instruction that it hear evidence in all capital cities. This was interpreted as a requirement to seek such evidence. There were no submission from Darwin and on that basis no hearing held there.<sup>159</sup> For an inquiry into state government infrastructure insurance following the 2011 Queensland floods, the Economics References Committee was directed to hold at least three days of public

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154 19/6/1991, J.1229.

155 SO 151.

156 18/8/1993, J.357.

157 7/2/1995, J.2895-7; 6/6/1995, J.3364-5; 4/11/1996, J.836; 22/10/1997, J.2673; 21/10/1999, J.1966; 10/4/2000, J.2582-3; 2585; 28/6/2000, J.2958; 28/11/2000, J.3594-5; 19/6/2001, J.4322; 12/3/2002, J.154-6; 18/9/2002, J.760; 25/11/2003, J.2709-10; 16/6/2004, J.3473; 26/8/2008, J.683; 28/10/2009, J.2661-62; 13/5/2010, J.3494. For a direction to invite the Prime Minister and another minister to give evidence, see 9/3/1995, J.3063-4.

158 21/5/1996, J.173-6; 23/5/1996, J.214-5, 217-8.

159 18/6/2008, J.510, 514-5.



hearings in Queensland.<sup>160</sup>

## Conduct of inquiries

### *Referral of matters to committees*

Committees may inquire into and report upon only such matters as are referred to them by the Senate. The terms of reference may be contained in the standing order or resolution establishing the committee.

Legislative and general purpose standing committees receive references from the Senate by specific resolutions referring subjects for inquiry or particular bills. Estimates of expenditure are referred to them in accordance with standing order 26. The committees have continuing references to consider annual reports and the performance of departments and agencies allocated to them.

The standing orders declare that references to legislative and general purpose standing committees should relate to subjects which can be dealt with expeditiously and committees should take care not to inquire into matters which are being examined by a Senate select committee.<sup>161</sup> This provision is designed to discourage duplication of inquiries.<sup>162</sup>

Unlike select committees (see above), there is no requirement that a reporting date be fixed when a matter is referred to a legislative and general purpose standing committee but, in practice, most motions do include a reporting date. Where a matter is referred to a committee and the resolution specifies a reporting date, a senator may, after notice or by leave, move to modify the resolution to extend or otherwise alter the reporting date.<sup>163</sup> The Senate seldom refuses an application for an extension of time, particularly when a reasonable explanation is given for the delay.

### ◇ General references

Matters for inquiry by the legislative and general purpose standing committees are usually referred in accordance with the procedure outlined in standing order 25(11). Notice of a proposed reference may be given by a senator at the usual time for the giving of notices or at any other time, without requiring leave of the Senate, when there is no other business before the chair. Alternatively, a copy of the notice may be delivered to the Clerk, who reports it to the Senate at the first opportunity.

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160 3/3/2011, J.669-70.

161 SO 25(12) and (13).

162 See advice attached to the Legal and Constitutional Affairs Committee report on the budget estimates 2008-09, PP 309/2008.

163 SO 28

Motions to refer matters to standing committees are characterised as Business of the Senate<sup>164</sup> and therefore take precedence over Government and General Business on the day for which they are given. Motions to refer matters to select committees are characterised as General Business and do not take precedence. Motions to modify references to standing committees by altering the terms of references are treated as equivalent to references to standing committees and are therefore placed on the Notice Paper as Business of the Senate. Notice of such motions, if relating to legislative and general purpose standing committees, may be given at any time without leave in accordance with the procedure set out in standing order 25(11). Motions which merely alter the reporting dates for references, however expressed, are not regarded as modifications of references and therefore are not treated as Business of the Senate, and notice of such motions may be given only at the time provided for notices or at other times only by leave. Similarly, a motion to transfer a reference from one committee to another is treated as general business unless there is some change in the terms of the reference.

Matters may also be referred to committees by way of an amendment to a motion during the consideration of a bill. During the consideration of appropriation bills an amendment may be moved at any stage of the proceedings, other than in committee of the whole, arising from a recommendation of a committee.<sup>165</sup>

In many cases, notice of a motion to refer a general inquiry to a committee is given by the chair of the committee after a proposal for terms of reference has been developed at the committee's instructions by the secretariat. Such notices are usually taken as formal on the day for which they are given; that is, they are determined without debate. In a significant number of cases, however, references are developed outside the committee and may be debated extensively before being agreed to or disagreed to. The debate on a reference provides a useful guide to the reasons for and scope of the inquiry, as envisaged by the senators supporting it.

## ◇ **Legislation**

The reference of bills to the committees may be achieved by one of several methods. Bills may be referred by ordinary resolution following the giving of a notice in the manner described above for general inquiries. An amendment may be moved to the motion that a particular bill be read a second time to refer the bill to a committee as an alternative to giving it a second reading or in consequence of it being given a second reading.<sup>166</sup> Immediately after a bill has been read a second time, a motion may be moved without notice referring the bill to a committee.<sup>167</sup>

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164 SO 58.

165 SO 115(4).

166 SO 114(3).

167 SO 115(2).

An amendment to refer a bill to a committee may also be moved to the motion to adopt the report of the committee of the whole, although such amendments are rare given the late stage in proceedings on a bill that this represents. The most common method is for a bill to be referred to a committee as a consequence of the adoption of a report by the Selection of Bills Committee.<sup>168</sup> This committee, comprising the whips of the major and minority parties and four other senators, meets weekly when the Senate is sitting to consider which bills introduced into the Senate or due for introduction should be referred to committees for inquiry and report. The committee decides which bills should be referred, to which committee, at what stage and on what date the committee should present its report.

This system for the referral of bills leaves it open to individual committees to determine their own procedures. Committees are able to determine the most appropriate method of dealing with particular bills. The most common approach adopted by committees is for evidence to be sought from as wide a range of witnesses as practicable in the time available, including by written submission and by oral evidence at public hearings. Although most legislation inquiries occur in Canberra, some committees travel to obtain evidence. Committees may consider in detail or in principle amendments to bills that have been circulated or foreshadowed and make recommendations to the Senate accordingly. Alternatively, it may not be until all the evidence has been gathered that unintended consequences or unforeseen problems with a bill emerge. A committee may recommend that particular amendments be agreed to but the bill itself may be amended only by the Senate.<sup>169</sup>

In 2009, the Senate tried an unusual method of referring bills before their introduction in either House to provide for adequate consideration of bills introduced in the House of Representatives during the Budget estimates hearings that were required to come into operation on or before 1 July.<sup>170</sup> A modified arrangement was tried in 2010 and 2011 with individual committees able to determine unanimously which bills did not warrant inquiry and to report to the Senate accordingly. While unusual, these orders allowed legislation committees to maximise the opportunities for consideration of time critical bills.

## ◇ Estimates

For considering estimates, committees receive their references in accordance with standing order 26. Usually following the introduction of the relevant appropriation bills, a minister moves that the particulars of proposed expenditure be referred to the committees for inquiry and report by a nominated date. These references are usually moved twice a year in relation to the main Budget bills (Appropriation Bills Nos 1 and 2 and the Appropriation (Parliamentary Departments) Bill)

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168 SO 24A.

169 See also Chapter 12, Legislation.

170 See under ‘Selection of Bills Committee’.

and the additional estimates contained in Appropriation Bills Nos 3 and 4 and Appropriation (Parliamentary Departments) Bill (No. 2). Statements of expenditure from the Advance to the Minister for Finance and tax expenditure statements are also referred to the committees.

Further appropriation bills to accommodate specific additional expenditure requirements may be introduced. On occasion, the particulars of this expenditure have been referred to estimates committees. In the 1982-83 financial year there were six appropriation bills, the second pair of which were passed by the Senate on the second day of the new Parliament in order to accommodate the new government's pressing requirement for funds in advance of the usual additional estimates due for introduction later in the Autumn sittings.<sup>171</sup> The funds in Appropriation Bill (No. 4) 1982-83, for example, were required to respond to the disastrous bushfires of that year. An amendment was moved to the motion for the second reading of both bills to provide for the schedules of expenditure in the bills to be referred to the appropriate estimates committee for examination and report at the same time as the additional estimates for the 1982-83 financial year. In other words, the estimates committees were to examine the proposed appropriations after they became law.

Estimates committees also reported on a bill after it had passed in 1991-92. A fifth appropriation bill was introduced in March 1992 before the third and fourth bills had been agreed to by both Houses. It contained provision for expenditure on three programs which had already been provided for in Appropriation Bill No. 3 but whose urgency was such that the government could not wait for Appropriation Bill No. 3 to undergo the usual lengthy scrutiny. The relevant funds were subsequently omitted from Appropriation Bill No. 3 by amendment in the House of Representatives and the particulars of the expenditure covered by the resulting Appropriation Bill No. 5 were referred to estimates committees.<sup>172</sup> An attempt to postpone consideration of the bill until the estimates committees had reported was unsuccessful as was an attempt to refer the bill to three standing committees for consideration.<sup>173</sup> The relevant estimates committees reported on the particulars after the bill became law and in conjunction with their examination of additional estimates for that year.<sup>174</sup>

In the 1993-94 financial year three sets of particulars were referred to estimates committees as a consequence of the bringing forward of the Budget from August to May. In 2003-04 there were two extra appropriation bills (Nos 5 and 6) which were referred to legislation committees for estimates hearings.<sup>175</sup> Two extra appropriation bills (Nos 5 and 6 of 2004-05, 2005-06, 2006-07 and 2007-08) were also referred for estimates hearings with the annual appropriation bills of

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171 22/4/1983, J.40-42; SD, 22/4/1983, pp. 85-6.

172 26/3/1992, J.2128.

173 30/3/1992, J.2144-5.

174 29/4/1992, J.2207-8; 5/5/1992, J.2255.

175 11/5/2004, J.3382.

2005-06, 2006-07, 2007-08 and 2008-09.<sup>176</sup>

The particulars of proposed expenditure are detailed in three documents, known as Documents A, B and C, tabled by a minister. Each of the documents refers to one of the bills, with Document A, for example, giving details in relation to Appropriation Bill (No. 1) and Document C giving details in relation to the Appropriation (Parliamentary Departments) Bill. With these documents, another set of documents is tabled, giving a breakdown of expenditure and proposed expenditure, with accompanying explanations, according to the output structure of agencies.

Departmental explanations of the estimates are tabled in the Senate and used by the committees. They were originally known as Explanatory Notes. The name changed briefly to Program Performance Statements (PPS) between 1991 and 1994 to reflect program budgeting, and yet another change of name occurred in 1994 when the Budget was introduced in May. The documents then became known as Portfolio Budget Statements (for the main Budget round of estimates) and Portfolio Additional Estimates Statements (for the additional estimates). These documents were significantly shorter than the former PPSs and attracted adverse comment from all estimates committees when they first appeared in relation to the 1994-95 Budget estimates considered in May-June 1994. The reason provided for the diminution in information was that in the absence of full year performance information, which would not be available before the end of the financial year, the statements focused only on new budget measures and significant variations in expenditure, the latter defined as variations in excess of \$10 million and 5 percent of an agency's budget. The focus of the documents was therefore designed to be prospective. Retrospective information would be provided in the annual reports of agencies, now required to be tabled by 31 October each year and to contain information about the year's performance which had previously been provided in the PPSs.

Under previous arrangements for an August Budget, PPSs provided a comprehensive picture on a program basis of departmental expenditure from all sources including the appropriation bills and any special or standing appropriations (which now account for over 85 percent of government expenditure). The documents provided an effective agenda for the full consideration in September-October of an agency's performance over the previous year and its expenditure proposals for the current financial year. Estimates committee scrutiny of additional estimates in February-March was confined to those programs for which additional moneys were being sought<sup>177</sup> in light of performance information provided in annual reports at the end of October. Orders of the Senate of 24 August 1994 (now in SO 25(20)) provide explicitly for committees to examine annual reports in conjunction with their consideration of estimates, thus opening up the agenda, particularly

176 10/5/2005, J.594; 9/5/2006, J.2133-4; 9/5/2007, J.3753-4; 13/5/2008, J.365-6.

177 See Procedure Committee, First and Third Reports of 1992, PP 527/1992 and 510/1992). Changes in timing now mean that the fuller examination of performance occurs in the context of additional estimates (now November-February).

for additional estimates.

In 1999 the government converted the Commonwealth's budget to an output-based accrual as distinct from a cash flow basis, the main change being full accounting for liabilities, assets and depreciation. This change affected the content of the appropriation bills and the documents now called Portfolio Budget Statements. It also potentially widened the scope of inquiry at estimates hearings. An inquiry by the Standing Committee on Finance and Public Administration in 2007 recommended more detailed reporting on numerous aspects of appropriations and expenditure, including the restoration of reporting on expenditure at the program level to enhance transparency.<sup>178</sup>

### ◇ **Annual Reports**

Annual Reports of government departments and agencies are examined by committees in accordance with standing order 25(20) and an order of the Senate allocating portfolios to committees.

Under the procedure, committees are required to consider in more detail those reports which are apparently not satisfactory and may select other annual reports for more detailed consideration. In their examination of the reports, the committees are also required to note late receipt of any reports and to take into account any relevant remarks about the report made in debate in the Senate and to draw to the Senate's attention any significant matters relating to the operations and performance of bodies furnishing annual reports. As well as the 'normal' consideration of annual reports, committees may also consider the annual reports of departments and budget-related agencies in conjunction with their examination of estimates. Reports on annual reports tabled by 31 October each year are due by the tenth sitting day of the following year. Reports on annual reports tabled by 30 April each year are due by the tenth sitting day after 30 June that year. This timetable ensures regular and timely information on annual reports. Finally, committees are required to report to the Senate each year whether there are any bodies which do not present annual reports to the Senate but which should do so.

Although it is still rare for committees to hold public hearings on annual reports as such, scrutiny of annual reports is important for the assessment of an agency's performance.

The systematic evaluation of annual reports by committees has its origin in a report by the Standing Committee on Finance and Public Administration in 1989, entitled *The Timeliness and Quality of Annual Reports*.<sup>179</sup> The committee envisaged that examination of annual reports would go further than mere examination of style, format and compliance with guidelines. The reviews would focus on the operation and performance of executive agencies and would complement the

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178 *Transparency and accountability of Commonwealth funding and expenditure*, PP 47/2007.

179 PP 468/1989.

work of estimates committees.

Before 1989, committees dealt with annual reports on an ad hoc basis in a variety of ways ranging from simple examination to the seeking of submissions and holding of hearings. From 1973, successive resolutions of the Senate had the effect of referring all annual reports of departments, authorities and statutory corporations to the relevant legislative and general purpose standing committee. Committees had a discretion to pursue or not pursue inquiries into the reports. Orders of 14 December 1989 and 13 May 1993 formalised the process, until incorporation in the standing orders in 1997.

### ◇ Performance of government agencies

Another element of the committees' work is scrutiny of the performance of departments and agencies allocated to the committees.<sup>180</sup> There is no requirement in the standing orders for committees to report separately on this function, although they may do so. Committees may also report on performance in the context of their examination of annual reports or estimates of departments and agencies.

During the 1980s and 1990s, the Standing Committee on Finance and Public Administration had several standing references dealing with the accountability of statutory and non-statutory bodies and Commonwealth-owned companies, culminating in the completion and publication of lists of Commonwealth bodies, in effect a map of Commonwealth administration.<sup>181</sup> The list is now published by the Department of Finance and Deregulation.<sup>182</sup>

### ◇ Petitions

All petitions presented to the Senate are provided to the appropriate standing committee for consideration. This practice arose in 1982 from a suggestion that there should be some mechanism for following up petitions if appropriate. Committees have occasionally reported on petitions which have relevance to their standing references, for example the performance of government agencies. If a committee wished to pursue other matters raised in a petition, it would need to seek the reference of the matter by the Senate. In its 3rd Report of 1995<sup>183</sup> the Procedure Committee recommended against a suggestion that the reference of petitions be formalised.

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180 SO 25(2)(b).

181 For reports on these matters, see PP 1/1979, 285/1979, 2/1980, 107/1980, 197/1982, 198/1982, 304/1984, 313/1984, 503/1985, 441/1986, 175/1987, 110/1988, 90/1990, 460/1991, 86/1993, 151/1995, 66/1996.

182 Editions were published in 2003, 2005 and 2009.

183 PP 477/1995.

## ***Evidence gathering***

### **◇ Advertising the reference**

Many, but by no means all, committee inquiries are publicised in appropriate media, including through the Internet and paid advertisements in the press. Given the ubiquity of the internet, most advertising occurs through that medium but press advertisements are run on a regular basis and specialised advertising may occur in exceptional circumstances if the cost is warranted.

### **◇ Inviting submissions**

In addition to advertising, all committees maintain mailing lists or lists of contacts who may be a vital source of input to committee inquiries. At the beginning of each inquiry, submissions are routinely invited from the relevant government agencies and non-government organisations known to have an interest in the matter under examination. Invitations may also be issued to individuals with a special interest or expertise in the field.

In advertisements and in information supplied to assist people in making submissions, prospective witnesses are advised of their rights and obligations. For example, it is stressed that a submission made to a committee becomes a committee document, and it is for the committee to decide whether to receive it as evidence and whether to publish it. Unless there are strong reasons to withhold publication, committees normally authorise the publication of submissions received. Authors of submissions are advised that they should not publish or disclose their submissions to others until the committee has authorised publication. Notes to assist in the preparation of submissions and for the advice of witnesses appearing before committees are provided. Witnesses are informed of their rights under the Senate's Privilege Resolutions.<sup>184</sup>

### **◇ Selecting witnesses**

Committees normally select witnesses from those people and organisations who have made submissions, but they may also seek out additional witnesses, for example, if an important issue or aspect of the inquiry is not addressed by the submissions received. The analysis of submissions and the testing of such material at public hearings is the chief means by which committees conduct inquiries. Where time is too short to seek written submissions, which often is the case with inquiries into legislation, the public hearing is the main vehicle for the inquiry and the selection of witnesses is of paramount importance. While most committees attempt to hear from a cross section of witnesses in such circumstances, other approaches have also been used. The Standing Committee on Finance and Public Administration, for example, in its inquiry into the ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994, took evidence

184 See Chapter 17, Witnesses.



from witnesses who had difficulties with the bill in order that those problems could be tested. Although this approach attracted some criticism in the minority report, it nonetheless enabled the committee to make effective use of limited time.<sup>185</sup>

### ◇ Public hearings

It is usual for witnesses to be invited to attend committee hearings, in the first instance.<sup>186</sup> The taking of evidence at public hearings is a key element of most Senate committee inquiries and is an opportunity to test, in public, views expressed in the written submissions already received by the committee.

Many public hearings held by Senate committees are held outside Canberra. This enables committees to “take the Senate to the people” and to obtain first hand experience of the issues under consideration through inspections and briefings that are often undertaken in conjunction with public hearings.<sup>187</sup>

Public hearings are governed by rules relating to the conduct of proceedings (see below) and resolutions of the Senate for the protection of witnesses.<sup>188</sup> The examination of witnesses is conducted by the members of a committee in accordance with procedures agreed to by the committee, subject to the rules of the Senate.<sup>189</sup> From time to time the question has arisen whether persons other than members of the committee may question witnesses. Privilege Resolution 2(9) explicitly authorises counsel appointed to assist the committee of Privileges to examine witnesses before the committee. In all other cases only members of the committee may examine witnesses. Exceptions to this rule must be authorised by the Senate. The only explicit authorisation for this practice occurred in relation to the Select Committee on Allegations Concerning a Judge whose resolution of appointment included provision for commissioners, counsel appointed to assist the committee and counsel for witnesses to examine witnesses before the committee.<sup>190</sup>

In most cases the procedures for examining witnesses at public hearings are relatively informal, but relevant rules of the Senate also apply to committees to the extent that this is necessary to maintain order and expedite business.<sup>191</sup>

Committees may hear several witnesses together and may allow witnesses to exchange views in

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185 SD, 17/10/1994, pp. 1817-9.

186 Privilege Resolution 1(1); see Chapter 17, Witnesses.

187 Statistics on the location of hearings are published in annual reports of the Department of the Senate.

188 See Chapter 17, Witnesses.

189 SO 35(1).

190 6/9/1984, J.1078, J.1080.

191 See below under Role of chair in maintaining order.

the course of a hearing.<sup>192</sup>

### ◇ **Briefings, inspections and seminars**

Committees may choose to augment their formal evidence-taking by informal briefings and inspections which provide committee members with valuable contextual and background information. One of the more unusual site inspections to have occurred was undertaken by members of the Standing Committee on Foreign Affairs, Defence and Trade who spent a day at sea on the HMAS Swan, which had been the setting for alleged incidents of sexual harassment into which the committee was inquiring. The committee reported that these “experiences made an invaluable contribution to the committee’s understanding of the issues and circumstances surrounding the incidents on the Swan”.<sup>193</sup> Many other site inspections have occurred in the context of committee inquiries into rural and regional issues, technology, environmental issues and transport matters, among others. Site visits to agencies being scrutinised are also relatively common.

The term briefings is used to describe two different arrangements. If a briefing takes place at a meeting of a committee, this is simply an in camera hearing in another guise. Committees are prevented from hearing evidence in camera on estimates,<sup>194</sup> so that kind of briefing is not available to committees in relation to estimates. If a briefing occurs at a gathering which is not a committee meeting but simply an informal gathering of senators who happen also to be members of a committee, the standing orders do not authorise any of the processes available to a committee, such as taking a transcript, receiving documents or citing the information provided in a report. This limits the utility of briefings.

Another means of information gathering is the seminar or conference, sponsored or co-sponsored by a committee, which brings together experts in a field for presentation of papers and discussions with committee members. The Standing Committee on Finance and Public Administration, for example, held a conference in association with the Centre for Research in Public Sector Management, University of Canberra, on public service reform. The committee had a standing reference on the central administration of the Australian Government under which it reviewed a government report. Rather than proceeding by way of public hearings, the committee decided to co-host a conference involving senior public servants, past and present, unionists, academics, consultants and journalists. The committee presented the conference papers and proceedings as a report of the committee in order to contribute to better informed debate on the subject but without drawing conclusions from the conference information or making recommendations.<sup>195</sup>

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192 See statement by President Reid, SD, 18/3/1997, p. 1655.

193 *Sexual Harassment in the Australian Defence Force: Facing the Future Together*, PP 147/1994, p. iii.

194 SO 26(2).

195 Public Service Reform, PP 149/1994, 150/1994.

Such proceedings are usually not conducted as formal meetings of committees and there would be some doubt that they fall within the definition of “proceedings in parliament” which attract parliamentary privilege. A speaker presenting a paper may not have the protection afforded to a witness giving evidence before the committee. Committees have held such informal proceedings on the basis that doubt on whether the discussions would be covered by parliamentary privilege was not a significant issue in the circumstances.

### ◇ Hansard

Standing order 35(2) requires that the examination of witnesses be recorded in a transcript of evidence. The standing orders relating to the Appropriations and Staffing Committee, legislative and general purpose standing committees and committees considering estimates all provide for a daily Hansard to be published of the public proceedings of a committee.<sup>196</sup> For committees considering estimates, the Hansard report is to be circulated in a manner similar to the daily Senate Hansards, as soon as practicable after each day’s proceedings.<sup>197</sup>

A provision requiring the publication of a daily Hansard of a committee’s public proceedings is a standard inclusion in resolutions establishing select committees. Most committees may also take evidence in camera and a Hansard record is made of this evidence but not published. Committees may, however, decide to publish such evidence at a later date and witnesses are required to be warned, before giving evidence in camera, that this may occur.<sup>198</sup>

Hansard is initially produced as a proof version and is supplied to members and witnesses for correction. Corrections are restricted to typographical errors and errors of transcription or fact. New material may not be introduced; nor may the sense of evidence be altered. A witness who wishes to provide additional material may do so by way of a supplementary submission, as required by Privilege Resolution 1(17). A committee may decide what wider circulation the uncorrected proof should have. Many committees prefer to have the evidence distributed as soon as possible, albeit in proof form, rather than some weeks later when the corrected transcript becomes available. Uncorrected proofs carry a warning that the document may contain errors and should not be quoted in public without acknowledging that the source is an uncorrected proof. Committees usually authorise the secretary to distribute copies of the transcript by an appropriate resolution.

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196 SO 19(10), 25(16) and 26(7) respectively.

197 SO 26(7).

198 Privilege Resolution 1(8); for use of in camera evidence, see Chapter 17, Witnesses, under Publication of in camera evidence.

### ***Broadcasting of committee proceedings***

A committee may authorise the broadcasting of its public hearings, in accordance with any rules provided by the Senate.<sup>199</sup> The following order governs the broadcasting of committee proceedings:

The following rules apply in relation to broadcasting, including rebroadcasting, in sound or visual images, or in combined sound and visual images, of the proceedings of a committee.

- (1) Recording and broadcasting of proceedings of a committee may occur only in accordance with the authorisation of the committee by a deliberate decision of the committee.
- (2) A committee may authorise the broadcasting of only its public proceedings.
- (3) A committee may determine conditions, not inconsistent with these rules, for the recording and broadcasting of its proceedings, may order that any part of its proceedings not be recorded or broadcast, and may give instructions for the observance of conditions so determined and orders so made. A committee shall report to the Senate any wilful breach of such conditions, orders or instructions.
- (4) Broadcasting of committee proceedings shall be for the purpose only of making fair and accurate reports of those proceedings, and, in particular:
  - (a) shall not be the subject of commercial sponsorship or be used for commercial advertising; and
  - (b) shall not be used for election advertising.
- (5) Recording and broadcasting of proceedings of a committee shall not be such as to interfere with the conduct of those proceedings.
- (6) Where a committee intends to permit the broadcasting of its proceedings, a witness who is to appear in those proceedings shall be given reasonable opportunity, before appearing in the proceedings, to object to the broadcasting of the proceedings and to state the ground of the objection. The committee shall consider any such objection, having regard to the proper protection of the witness and the public interest in the proceedings, and if the committee decides to permit broadcasting of the proceedings notwithstanding the witness' objection, the witness shall be so informed before appearing in the proceedings.<sup>200</sup>

Committees may impose conditions on the recording and broadcasting of their proceedings. Such conditions are usually designed to minimise disruption to the committee's proceedings caused by

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199 SO 25(19).

200 23/8/1990, J.237; incorporated in consolidated order 13/2/1997, J.1447.

intrusive lighting, movement of equipment or an excessive number of camera operators in the hearing room. A discussion of this issue occurred at a supplementary hearing of Estimates Committee D in November 1993. The committee chair had received requests from three television networks to bring cameras into the hearing room to obtain coverage of a controversial issue, notwithstanding that the committee's proceedings were being televised by the parliamentary television system and that it was standard practice for networks to take footage from the parliamentary service. The chair suggested that the networks follow this standard practice and also advised still photographers that only one photographer would be permitted into the hearing at a time, for a maximum period of five minutes each. These proposed arrangements were discussed during the hearing and a private meeting of the committee was held in which the chair's suggestions were upheld. In conveying the committee's decision to the hearing, the chair emphasised the distractions caused by multiple television cameras as the basis for the committee's decision.<sup>201</sup> In making such decisions, committees have needed to balance the detrimental effects of potential distraction against the value of having the committees' proceedings disseminated as widely as possible.<sup>202</sup> The need for committees to make such decisions has increased with expansion in the number and range of media outlets and the common appearance of high profile or otherwise controversial witnesses.

Witnesses whose evidence is to be broadcast are given the opportunity to object. A committee considers any such objection having regard to the protection of the witness and the public interest in the proceedings. Although a committee is not required by the order of the Senate to give reasons for its decision, as a matter of practice they are given and made public. Witnesses, the vast majority of whom attend voluntarily in response to committee invitations to appear, almost never object to the televising of their evidence, but in the face of an objection, a committee must balance competing principles of open proceedings, public interest, committee effectiveness and fairness to the individual witnesses.

When considering estimates committees are covered by a provision of an order which provides:

The public proceedings of committees when considering estimates may be relayed within Parliament House and broadcast by radio and television stations in accordance with the conditions contained in paragraphs (4) and (5) of the order of the Senate relating to the broadcasting of committee proceedings, and in accordance with any further conditions, not inconsistent with the conditions contained in those paragraphs, determined by a committee in relation to the proceedings of that committee.<sup>203</sup>

In all other cases a deliberate committee decision is required to broadcast committee proceedings.

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201 Estimates Committee D transcript, 9/11/1993, pp. D443-6.

202 Also see Committee of Privileges, 142nd report, PP No. 396/2009, pp. 29-34.

203 Consolidated order, 13/2/1997, J.1447.

Committees may choose, however, to pass wide-ranging resolutions covering all hearings in relation to a particular inquiry, for example. In accordance with the order of 23 August 1990, the committee must nonetheless take into account any objections to the practice by individual witnesses.

## ***Reports***

It is the chair's responsibility to prepare a draft report and submit it to the committee.<sup>204</sup> The usual practice is for the chair to give drafting instructions to the secretary who prepares a draft for the chair. When the chair is satisfied with the draft it is circulated to other members of the committee.

Other committee members have two options to frame their own reports. A committee member other than the chair may submit a draft report to the committee and the committee decides on which report to proceed.<sup>205</sup> After a report has been agreed to by the committee, a minority or dissenting report may be added to the report by any member or group of members, and any member or participating member may attach relevant conclusions and recommendations to the report. Individual members may otherwise influence the content of the report by proposing amendments to it either during the initial deliberative phase or upon reconsideration.<sup>206</sup>

In 1995 the Senate passed a resolution asserting the right of senators who add dissenting or minority reports to committee reports not to disclose their reports to committee majorities until the reports have been printed. This motion arose out of past difficulties with committees, particularly the Joint Foreign Affairs, Defence and Trade Committee, with complaints by those submitting dissenting or minority reports that majority reports were subsequently rewritten to respond to dissenting or minority reports.<sup>207</sup>

In 1989, Senator Alston gave an unusual notice of motion, alleging that Opposition members of the former Standing Committee on Legal and Constitutional Affairs had not been given sufficient opportunity to consider a final draft of the committee's report on the duties and responsibilities of company directors. The motion would have directed the committee to reconsider the draft report and to provide opportunity for all members of the committee to consider it fully.<sup>208</sup> On 1 November 1989, statements were made by the chair of the committee and Senator Alston indicating that the matter had been resolved. The notice of motion was then withdrawn.<sup>209</sup>

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204 SO 38(1).

205 SO 38(3).

206 SO 38(2), (4).

207 22/11/1995, J.4198.

208 25/10/1989, J.2145.

209 SD, 1/11/1989, p. 2760.

Legislative and general purpose standing committees are required to make regular reports to the Senate on the progress of their proceedings.<sup>210</sup> Such general progress reports are rare, as committees usually present their substantive reports in a timely manner, or in stages where appropriate, thus fulfilling their obligation to report regularly. Select committees are required to comply with the reporting dates fixed at their establishment, unless an extension is sought and granted.<sup>211</sup> A select committee is usually empowered on appointment to report from time to time. If it is not, it will need to seek the agreement of the Senate to make an interim report.<sup>212</sup>

A committee may include in camera evidence in its report after a formal decision to that effect, although before doing so it will have regard to any assurance it may have given to the witness at the time the evidence was heard.<sup>213</sup> Although not formally required to do so, a committee should inform the witness of its intention and provide an opportunity to respond. A possible course is to edit the evidence so as to permit the committee's objectives to be met while preserving as much as possible of what the witness considers should not be disclosed. On 13 February 1991, the Senate agreed to an order regulating the use of in camera evidence in dissenting reports.<sup>214</sup> If a committee cannot reach agreement on the disclosure of the evidence, the dissenting senator may refer to the evidence only to the extent necessary to support the reasoning of the dissent. If practicable, the witnesses involved should be informed in advance of the proposed disclosure and given reasonable opportunity to object to the disclosure and ask that particular parts not be disclosed. The order also obliges committees to give careful consideration to a witness's objections and to disclosing the evidence in a way that would conceal the identities of the witness or persons referred to in the evidence.

The report of a committee is a record of an inquiry but does more than merely record the evidence taken by the committee. The main purpose of a report is to make recommendations for future action. Senators may be required to make forward-looking political judgments which tend to lead rather than follow public opinion. Some committee reports may therefore break new policy ground, while others provide definitive reviews of existing policies, organisations, programs or legislation and contain recommendations for their development.

Successive governments have undertaken to respond to the recommendations of committees, and the current undertaking is for a response within three months. The Senate indicated its view

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210 SO 25(18).

211 SO 28.

212 For select committees with a requirement for periodic or interim reports built into its terms of reference, see below under Presentation of reports.

213 For an example of a general report on proceedings, see Report on References Not Disposed of by the Standing Committee on Foreign Affairs and Defence During the 34th Parliament, November 1987, PP 218/1987, see Privilege Resolution 1(8) and Chapter 17, Witnesses.

214 Now in SO 37(2).

that the government should provide such responses not only to recommendations in the majority report of a committee but also to any minority or dissenting report or any additional material attached by members or participating members.<sup>215</sup>

### ***Uncompleted inquiries and a new Parliament***

References to the legislative and general purpose standing committees lapse at the commencement of a new Parliament, apart from references which are automatically made under the standing and other orders, such as the references of annual reports and the performance of departments and agencies. The committees therefore report in a new Parliament on references which they consider should be continued, with any modifications or changes in reporting dates, and references which should not be continued, and seek the endorsement of the Senate of their proposed courses by means of motions to adopt those reports. Special references to the legislative scrutiny committees are treated in the same way.<sup>216</sup>

## **Conduct of proceedings**

### ***Meeting and election of chair***

The first meeting of a committee is usually decided upon by agreement among the members in communication with the committee secretary who liaises informally with them and the senator who is likely to be elected chair. However, the mover of a committee, if a member of it, is entitled to fix a time for the first meeting of a committee. Where the mover of a committee is not a member the secretary is authorised to fix a time for the first meeting.<sup>217</sup>

At the first meeting the secretary takes the chair until a chair has been elected. At the appointed time and when a quorum is present the secretary calls the meeting to order and refers to the resolution of the Senate establishing the committee and appointing its members. The secretary normally circulates copies of these resolutions to members prior to the meeting as part of the documents for the meeting. The secretary calls for nominations for the position of chair, drawing attention to any provisions in the standing orders or resolution establishing the committee which require the chair to be a member nominated by the Leader of the Government in the Senate, Leader of the Opposition in the Senate or minority groups or independents.

It is customary for only one nomination to be received for chair, in which case the secretary declares

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215 See below, under Consideration of committee reports.

216 29/11/2004, J.123. For reports presented and adopted at the commencement of the 43rd Parliament, see 30/9/2010, J.159-62.

217 SO 30(1).



the nominated senator elected. If two or more senators are nominated, the procedure for election follows that for a President of the Senate, provided for in standing order 7, and a ballot is held. After declaring the result of the election, the secretary hands over the chair to the senator elected.

The election or appointment of a deputy chair may also need to be dealt with at the first meeting, depending on the terms of the relevant standing order or resolution. Legislative and general purpose standing committees are required to elect a deputy chair to act as chair when the chair is absent from a meeting or the position of chair is temporarily vacant.<sup>218</sup> There is no requirement for the deputy chair to be elected immediately after the chair is elected, although committees find it convenient to do so. Deputy chairs of those committees are required to be from non-government parties. Other committees have varying requirements in relation to the deputy chair. Most of the standing domestic committees have no formal requirements.<sup>219</sup> Another group of committees is governed by orders providing that the chair may from time to time appoint another senator as deputy chair, to act as chair when the chair is absent from a meeting or when there is no chair. This group includes the Appropriations and Staffing Committee, the Committee of Senators' Interests, the Regulations and Ordinances Committee, the Scrutiny of Bills Committee and the Selection of Bills Committee.<sup>220</sup> There is no requirement for such committees to have a deputy chair from a different party, although in practice most do.<sup>221</sup>

One case in which the question of deputy chair needs to be resolved at the first meeting is when a committee is governed by a resolution requiring the appointment of a deputy chair immediately after the election of the chair. Such provisions are included from time to time in resolutions establishing select committees.<sup>222</sup>

In the legislative and general purpose standing committees, the chair, or the deputy chair when acting as chair, may appoint another member of a committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting.<sup>223</sup>

Meetings subsequent to the first meeting are notified to each member by the secretary. The secretary acts in response to resolutions of the committee determining meeting times, or in accordance

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218 SO 25(9)(d).

219 See SO 17, 18 and 20-22 relating to the Procedure, Privileges, Library, House and Publications Committees, respectively.

220 SOs 19(6), 22A(5), 23(7), 24(5), 24A(2)(c).

221 For precedent for a deputy chair appointed from time to time required to be of a different party to the chair, see 14/8/1991, J.1366.

222 See, for example, 25/6/1992, J.2635 (Sales Tax Legislation); 25/6/1992, J.2640 (Subscription Television Broadcasting Services); 2/9/1993, J.450 (Whistleblowing); and 9/12/1993, J.965 (Print Media). Another variation is apparent in 13/5/1993, J.150 (Superannuation).

223 SO 25(9)(f).

with instructions from the chair who may fix the time and place of committee meetings, or on request from a quorum of members who duly notify the secretary, either personally, in writing or through some authorised agent.<sup>224</sup> A meeting held in response to a request from a quorum of members must be presided over by the chair or, in the chair's absence, the deputy chair.

Where the standing orders and the resolution of appointment of a committee are silent, the procedures of the Senate apply so far as they are applicable.

### ***Role of chair in maintaining order***

Order in a committee is maintained by the chair but may be enforced only by the Senate on receipt of a report of an offence. The rules of debate also apply to committee proceedings; for example, in relation to offensive language and personal reflections.<sup>225</sup> Points of order and privilege may be raised<sup>226</sup> and objections to a chair's ruling may be taken.<sup>227</sup> Privilege Resolution 1(9) requires that discussion of a ruling of the chair on the relevance of questions shall occur in private session.

A chair of a committee may make a ruling on any question of order relating to the proceedings of the committee. Rulings must conform with the rules of the Senate. In particular, it is not open to a chair of a committee to impose restrictions on senators which are not imposed by some known rule prescribed by the Senate. A member of a committee may move a motion that the chair's ruling be dissented from, and, if this motion is passed, the decision of the committee is substituted for the ruling of the chair for the time being, subject to any decision by the Senate. If the motion is not passed, the chair's ruling stands, also subject to any decision by the Senate.

When a motion of dissent is moved, there is no requirement for the chair to be vacated and taken by another senator. The chair may vote on the motion of dissent, and exercise a casting vote where such a vote is provided for in the terms of appointment of the committee. This is the procedure which applies in the Senate, but of course the President does not have a casting vote.

The standing orders contain no provisions about how a committee is to proceed in a case of disorderly conduct by a senator in a committee, such as a senator using offensive words and refusing to withdraw them. This is one of the areas in which committees follow the procedures of the Senate in so far as they are applicable. Following those procedures, if a senator is asked to withdraw offensive words and refuses, the chair may report ("name") the senator and a motion

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224 SO 30(2).

225 SO 193(2) and (3); see statement by President Hogg, SD, 23/3/11, p. 1642 and correspondence to the Chair of the Legal and Constitutional Affairs Legislation Committee, tabled on 23/3/11, J.754.

226 SO 197.

227 SO 198, although as a matter of practice there is no requirement in a committee for the objection to be in writing.

may be moved that the senator be directed to withdraw from the meeting of the committee. Before that stage is reached, it is within the discretion of the chair to ask a disorderly senator to withdraw from the meeting. If a senator were to refuse to withdraw from a meeting after the committee has ordered his or her withdrawal, the committee would not be able to take any action other than to terminate the meeting and report the matter to the Senate.

### *Quorum*

Apart from the requirement that either the chair or deputy chair be present, a committee may not meet without a quorum. The following provisions apply to every Senate committee and subcommittee:

In each committee and subcommittee, unless otherwise provided, a quorum shall be

- (a) a majority of the members of the committee or subcommittee; or
- (b) two members, where one member present was appointed to the committee on the nomination of the Leader of the Government in the Senate and one member present was appointed to the committee on the nomination of the Leader of the Opposition in the Senate.<sup>228</sup>

A majority of members on a committee with an even number of members is defined as half the members of the committee plus one. Thus on six member committees a majority is four. On a subcommittee of three members, a majority is two. The fact that a chair has a casting vote is of no relevance in establishing a quorum: a chair does not count as two members towards a quorum. On committees with chairs from minority groups, the lesser quorum would be constituted by the chair, a member nominated by the Leader of the Government in the Senate and a member nominated by the Leader of the Opposition in the Senate. The requirement would remain at two on such committees only if the deputy chair (a government or Opposition senator) were in the chair for that meeting.

Participating members of the legislative and general purpose standing committees are counted for the purpose of forming a quorum if a majority of members of a committee is not present.<sup>229</sup>

A meeting may not commence in the absence of a quorum. If a quorum is not present, the chair suspends the proceedings until a quorum is present, or adjourns the committee. If a quorum has not formed within 15 minutes after the time appointed for the commencement of the meeting, the senators present may retire, after entering their names in the minutes, and the secretary convenes

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228 SO 29.

229 SO 25(7)(d).

a meeting for another time.<sup>230</sup>

If a senator draws attention to the absence of a quorum during a meeting the proceedings are suspended until a quorum is present, or, if no quorum is present after 15 minutes, the committee is then adjourned.<sup>231</sup>

For the question of whether an inquorate committee meeting is protected by parliamentary privilege, see below, under Privilege of proceedings.

### ***Equally divided votes***

On the legislative and general purpose standing committees, the Appropriations and Staffing Committee, the Committee of Senators' Interests, the legislative scrutiny committees and the Selection of Bills Committee, the chair, or deputy chair when acting as chair, in addition to a deliberative vote, has a casting vote when the votes are equally divided. Most select committee resolutions also include a provision to this effect. In all other cases, standing order 31 applies, whereby a chair has a deliberative vote only, and in that situation, where the votes for and against a motion are tied, the question is resolved in the negative.<sup>232</sup>

A chair is not obliged to exercise a casting vote. Where such a vote is provided, however, this prevents standing order 32(1) applying, and a tied vote leaves the question in issue unresolved.

### ***Meetings during sittings***

Meetings of committees during sittings of the Senate are regulated by standing order 33:

- 33.(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:
- (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) The restrictions on meetings of committees contained in paragraph (1) do not apply

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230 SO 29(2) and (3).

231 SO 29(2).

232 SO 32(1).

after the question for the adjournment of the Senate has been proposed by the President at the time provided on any day.

- (3) A committee shall not otherwise meet during sittings of the Senate except by order of the Senate.
- (4) Proceedings of a committee at a meeting contrary to this standing order shall be void.

Originally there was a complete prohibition on committees meeting while the Senate was sitting, but this was significantly modified. The prohibition was based on two principles: that a senator's duty lay first with the Senate and should not be subordinated to a lesser duty; and that it was an infringement of the rights of individual senators to participate in debates in the Senate and meetings of committees if the two were scheduled concurrently. From early days, however, the Senate granted permission, in certain circumstances, for committees to meet while the Senate was sitting. In 1987 the prohibition was modified to allow committees to deliberate in private session provided that decisions were not taken unless all members were present. The current provision was adopted in 1994.

Not every private meeting of a committee falls within the category of deliberating in private session. Generally, a deliberative meeting is one where a draft report is being considered or other committee business, such as the settling of inquiry programs, is being undertaken. No one other than the members and officers of a committee may be present when the committee is deliberating.<sup>233</sup> Thus, a briefing involving persons other than committee members or officers is not a deliberative meeting and may not occur while the Senate is sitting in the absence of express authority from the Senate.

The rule in the standing order applies to Senate committees and joint committees on which senators serve. It provides sufficient flexibility for committees to proceed with their business during sittings without having to reconvene in non-sitting periods to take decisions formally.

Committees must seek the agreement of the Senate to hear evidence in private session or to hold public hearings while the Senate is sitting. This is usually done by giving notice of a motion to that effect, but may also be done by motion moved by leave in emergencies. The Select Committee on Political Broadcasts and Political Disclosures, for example, did not complete its examination of an interstate witness before the Senate convened on 14 November 1991. A motion was moved by leave authorising the committee to take further evidence later that day.<sup>234</sup> Such motions are now common. There have been many occasions when the Senate has authorised committees to take evidence during the sittings of the Senate and refusal of such authorisation would now be regarded as highly unusual. Committees may also be authorised to hold deliberative meetings other than in accordance with the standing order. The importance of committee meetings being duly

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233 SO 36.

234 J.1710.

authorised is underlined by paragraph (4) of standing order 33 which provides that proceedings of a committee at a meeting contrary to the standing order shall be void.

As an alternative to authorising committees to meet during sittings, the Senate has on many occasions adjourned early to enable committees to meet without restriction. This was formerly used for committees considering estimates, during the periods when the particulars of proposed expenditure stand referred to the committees.<sup>235</sup>

### ***Public and private meetings***

Any person may attend a public meeting of a committee. Persons other than committee members and officers of a committee may not attend a deliberative meeting of a committee, but may be expressly invited to attend other private meetings of committees.<sup>236</sup> A deliberative meeting is one at which a committee considers proposed actions or decisions, for example, a meeting at which a draft report is considered to determine whether it should be the report of the committee.<sup>237</sup>

### ***Meetings by electronic means***

Committees are authorised to hold “electronic meetings”, that is, meetings at which the members and other participants communicate by electronic means, subject to prescribed conditions, principally that the participants can all hear each other and communicate contemporaneously.<sup>238</sup> Until the adoption of this provision in 1997, the principle was followed that a duly constituted meeting of a committee required a quorum of members present in one place, but other members and witnesses could participate in such a meeting by telephone or videolink.

### ***Disclosure of evidence and documents***

Evidence taken by a committee and documents presented to it, and not published by the committee or presented to the Senate, may not be disclosed to any person other than a member or officer of the committee.<sup>239</sup> A committee may authorise the publication of such material. If a committee does not deliberately resolve to publish any such material, it is automatically published on presentation to the Senate. The Senate may separately authorise the disclosure of evidence or other material presented to a committee.

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235 For a precedent for the Senate suspending its sitting for several hours to enable legislative and general purpose standing committees to meet, see 9/3/1978, J.63.

236 SO 36.

237 For suspensions of the standing order to allow the legislative scrutiny committees to invite members of their state counterpart to their deliberations, see 2/6/2001, J.4368, 26/6/2001, J.4405.

238 SO 30(3).

239 SO 37.

Persons who make a submission to a committee are routinely advised that they may not disclose their submission to other persons until the committee has resolved to publish it. To do so may be a contempt of the Senate.

The principle contained in standing order 37, that only the Senate or a committee may authorise the disclosure of material belonging to it, is elaborated in Privilege Resolution 6, which defines matters constituting contempts to include unauthorised disclosure of evidence:

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

- (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;
- (b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or
- (c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings (paragraph 16).

It is also an offence under section 13 of the *Parliamentary Privileges Act 1987* to publish or disclose, without the authority of a House or committee, a confidential submission, oral evidence taken in camera or a report of such evidence. Such an offence may be prosecuted in the courts.

All oral evidence taken in public is automatically published, but any other evidence, written or oral, requires specific authorisation by the committee or the Senate for disclosure.

Given the public interest focus of most Senate committee inquiries, it is usual for most evidence taken by a committee to be published during the course of, or at the conclusion of, the inquiry. There may be reasons why some evidence should remain confidential, including personal privacy, active litigation or possibly adverse commercial consequences.

Where an inquiry has been concluded and unpublished evidence is in the custody of the Senate,<sup>240</sup> an order of the Senate is necessary to publish it. The Senate occasionally makes such an order on the recommendation of the committee concerned.<sup>241</sup> This procedure has been used for limited

240 SO 25 (15).

241 30/11/2000, J.3638.

publication of evidence, for example, to police to assist in fraud inquiries, subject to the limitation imposed by parliamentary privilege.<sup>242</sup>

On 30 August 2001 the Senate took the unusual step of ordering the publication of documents held, and not published, by a committee. The Rural and Regional Affairs and Transport Committee was given a reference on the role of the Australian Maritime Safety Authority (AMSA) in the search for the Tasmanian fishing vessel the *Margaret J*. A majority of the committee subsequently accepted representations by AMSA and counsel assisting the Tasmanian coroner that it should not proceed with its inquiry until the coroner had concluded his inquiry into the matter, a decision opposed by the non-government members of the committee. The representations were based on a claim that the committee's inquiry could prejudice the coroner's inquiry. Advice to the committee from the Clerk (which was tabled in the Senate), however, pointed out that this claim rested on misapprehensions that the coroner could not receive documents which were laid before the committee or evidence which contradicted evidence given in the committee or remarks made in the Senate, misapprehensions clearly arising from a misunderstanding of parliamentary privilege. While not seeking to compel the committee to proceed with its inquiry, the majority of the Senate directed the publication of relevant documents supplied by AMSA and held by the committee, so as to ensure that the documents provided to the committee could not be withheld from the coroner.<sup>243</sup>

Committees sometimes table in the Senate submissions or other material received after the committees have concluded their inquiries. Thus on 9 May 1996 Senator Campbell, the former chair of the Select Committee on Certain Land Fund Matters, tabled a document submitted by a person who had featured in the committee's inquiry and which referred to disputes between witnesses before that inquiry.<sup>244</sup> This procedure is used to allow witnesses to respond to evidence adverse to them.<sup>245</sup>

For the publication of in camera evidence in a report, see Chapter 17, *Witnesses*, under that heading.

Committees are occasionally asked to provide unpublished evidence or documents to particular persons for purposes which those persons wish to pursue, particularly for use in litigation. Committees have been advised that they should not publish the documents unless they would do so having regard to the purpose for which documents are normally published, that is, to assist a committee and its witnesses in its functions of inquiring into and reporting on matters referred to it by the Senate. Committees have been advised that, if they have not, and would not, publish

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242 31/8/2000, J.3181.

243 30/8/2001, J.4830-1.

244 J.138.

245 See Chapter 17, *Witnesses*, under *Protection of witnesses*.



documents for that purpose, they should not, particularly after the conclusion of an inquiry, publish such documents for the purposes of other persons, such as the pursuit of litigation. The basis of this advice is that committees should use their powers only to enable them to perform their functions on behalf of the Senate, and not for purposes unrelated to those functions. If this principle is not followed committees risk having their powers used to support one side or another in disputes which are unrelated to the Senate's purpose in conducting an inquiry. Committees have generally adhered to these principles.

A committee may consider, however, that there is an overriding public interest in providing unpublished material in particular circumstances. It is a matter for the committee's judgment whether there is such an overriding public interest which should overcome the general principle.

### *Investigation of unauthorised disclosures*

Orders of the Senate, adopted on the recommendations of the Procedure and Privileges Committees, require committees to investigate in a preliminary way any unauthorised disclosures of their unpublished materials, and form a conclusion about whether the disclosures tended to interfere with their work, before raising such disclosures as matters of privilege for investigation by the Privileges Committee.<sup>246</sup>

### *Access to historic committee material*

Standing order 37(3) provides procedures for regulating access to historic committee material which has not been published. It authorises the President to permit any person to examine and copy evidence submitted to, or documents of, committees which are in the custody of the Senate, have not previously been published and have been in the Senate's custody for at least ten years. Confidential and in camera material may not be disclosed until it has been in the custody of the Senate for at least thirty years and unless the President is of the opinion that it is appropriate that such evidence or documents be disclosed. The President is required to report to the Senate the nature of any evidence or documents made available and the persons to whom they have been made available. The House of Representatives agreed to similar conditions under which the President and Speaker may jointly authorise access to evidence and documents of joint committees.<sup>247</sup> In 1996 the President tabled an unpublished document of a former select committee on the basis that it would normally have been made public.<sup>248</sup>

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246 20/6/1996, J.361; 6/10/2005, J.1200-2; 17/9/2007, J.4388. For examples of action by committees under these provisions, see statement by the chair of the Senators' Interests Committee, SD, 13/9/2006, pp. 90-2; report by the Rural and Regional Affairs and Transport Committee, PP 205/2007.

247 Resolution of the Senate of 6 September 1984, J.1086, concurred with by the House of Representatives on 11 October 1984.

248 9/5/1996, J.282.

## **Staff of committees**

Standing orders require each legislative and general purpose standing committee to be provided with “all necessary staff, facilities and resources”.<sup>249</sup> As a matter of practice, each committee is supported by a full-time committee secretary and a number of research and clerical staff. The secretary is the committee’s principal adviser on committee procedures and manages all aspects of the committee’s research and operations. The secretary prepares an initial draft of the chair’s report.<sup>250</sup> At the first meeting of the committee the secretary takes the chair, calls for nominations for the chair, conducts any subsequent ballot and declares the outcome. The successful candidate for chair then assumes control of the proceedings.

The secretary is responsible for preparation of the committee’s minutes. The secretary records members’ attendances and absences, motions and amendments moved and the name of the senator proposing them, resolutions agreed to and the names and votes of senators in the event of any division to determine the matter.<sup>251</sup> The draft record of meetings, votes and resolutions is subject to the endorsement, amendment or rejection of the whole committee, not only the chair.

The secretary also assists the chair in maintaining a quorum by ensuring that the attendance and presence of members furnishes a quorum at all times. A committee cannot commence formal business in the absence of a quorum. It is a secretary’s role to monitor this requirement to ensure that no doubt can arise about the validity and hence the privileged status of the proceedings. The secretary records the names of senators present and constituting a quorum. Where no quorum is formed within 15 minutes of the appointed meeting time, the senators attending may depart after the secretary has recorded their names in the minutes. In these circumstances, the secretary fixes another time for the meeting.<sup>252</sup>

Where a committee or subcommittee has resolved to invite witnesses to assist it, or has ordered the attendance of a witness or the production of documents, the chair directs the secretary to carry out the committee’s wishes by signing the invitation or order to attend and produce documents.<sup>253</sup> As a courtesy to particular witnesses, such as ministers, members of the judiciary or ambassadors, the chair signs the invitation to attend before the committee.

Committees other than the legislative and general purpose standing committees have designated secretaries, who may be senior officers of the Senate Department performing other duties in the department.

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249 SO 25(17).

250 SO 38(1).

251 SO 32(2).

252 SO 29.

253 SO 176.

With the approval of the President, a committee may agree to engage the services of a consultant to advise on matters of technical complexity associated with or arising from an inquiry.<sup>254</sup> A contract of engagement is drawn up by the secretary who is responsible for managing the quality, timeliness and cost effectiveness of the consultant's contribution.

## Privilege of proceedings

Section 16 of the *Parliamentary Privileges Act 1987* declares that for the purposes of the immunity of proceedings of the Parliament from impeachment or question before the courts,

“proceedings in Parliament” means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

A committee is defined to include a subcommittee. Proceedings in committees therefore have the same legal status as proceedings in the Houses.

It is arguable that proceedings contrary to the standing orders are not properly constituted “proceedings in Parliament” and are not, therefore, covered by parliamentary privilege. Although only one standing order expressly provides that proceedings contrary to the standing order shall be void,<sup>255</sup> it is arguable that proceedings not presided over by the duly elected chair or deputy chair, or occurring without committee authority or proper notice to the members, or without a quorum available, are also void and may not be protected by the *Parliamentary Privileges Act 1987*. On the other hand, the procedures of each House are generally not justiciable but are matters for each House.<sup>256</sup> Clearly such a risk is greater where a committee is hearing sensitive evidence in public or members are making controversial statements at a public hearing. The outcome of, for example, a suit or prosecution arising from statements made during proceedings which were

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254 SO 25(17).

255 SO 33, Meetings during sitting.

256 See Chapter 2, Parliamentary Privilege, under Immunities of the Houses.

contrary to standing orders is not sufficiently certain for any senator or committee to treat the procedural rules for valid committee meetings other than with the strict compliance from which absolute parliamentary privilege will certainly flow.

In 2010, unusual proceedings occurred during consideration by the Foreign Affairs, Defence and Trade Legislation Committee of the Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2]. The committee did not hold public hearings, claiming that the topic had been under debate for several decades and submissions to the inquiry raised no new issues. The bill's proponent, a member of the committee, took the unusual step of convening a private forum on the bill and inviting experts (some of whom had made submissions to the inquiry) to present their views on the bill. Participants were warned that the forum was not part of official proceedings and may not attract parliamentary privilege at the time but a transcript was taken and included in the senator's dissenting report, meaning that subsequent publication of it in that form does attract privilege.<sup>257</sup>

As noted in Chapter 10, the sub judge convention applies to proceedings in committees, but not so as to prevent an inquiry which the Senate has directed.<sup>258</sup> Committees have the capacity to avoid prejudice to legal proceedings by hearing evidence in camera.

The question of whether a legislative committee may inquire into matters at issue in legal proceedings was the subject of leading cases on legislative powers in the United States, and the courts have consistently held that the legislature and its committees are not inhibited in inquiring into such matters, and may, indeed, examine the executive's conduct of prosecutions and suits.<sup>259</sup>

Committees may, however, indirectly cause difficulties in legal proceedings by generating evidence which, because of parliamentary privilege, cannot be used in any substantive way in the legal proceedings.<sup>260</sup> For example, if a party to legal proceedings makes statements before a committee relevant to those proceedings, the other party may claim that the inability to examine those statements leads to unfairness in the proceedings, perhaps even justifying their termination.<sup>261</sup> Particularly in criminal proceedings, there may be a danger of defendants deliberately placing material before a parliamentary committee in the hope of aborting or disrupting the court proceedings. Committees should therefore be wary of taking evidence relevant to legal proceedings.

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257 For other examples of "private inquiries", see Procedural Information Bulletin No. 216, 21/9/2007.

258 See Chapter 10, Debate, under Sub judge convention.

259 *McGrain v Daugherty* 273 US 135 (1927); *Sinclair v United States* 279 US 263 (1929); *Hutcheson v United States* 369 US 599 (1962).

260 See Chapter 2, Parliamentary Privilege, under Immunities of the Houses.

261 See Chapter 2 under Is the 1987 Act too restrictive?, for the point that proceedings may be stayed if the inability to examine privileged material leads to significant difficulty.

On this basis, committees on several occasions have refrained from taking particular evidence. In 2002 the Legal and Constitutional Affairs Committee sustained an objection by the Commissioner of the Australian Federal Police to answering questions put by a senator concerning police investigations of that senator.<sup>262</sup>

The potential difficulty clearly arises where parties to legal proceedings give evidence, but may also exist in relation to other persons involved in proceedings.

The taking of evidence from investigating police and potential defendants during the course of police investigations which have not yet led to prosecutions may also give rise to the potential difficulty.

For a committee refraining from an inquiry while a coroner concluded an examination of a matter, see the case of the Rural and Regional Affairs and Transport Legislation Committee's inquiry into the search for the Margaret J, above, under Disclosure of evidence and documents.

## Questions to chairs of committees

Questions to chairs of committees were abolished in 2009.<sup>263</sup>

## Presentation of reports

Committees may not present reports without authority from the Senate. Reports are presented pursuant to standing orders or other orders of the Senate. Such orders may be specific, requiring the presentation of a specific report on a particular day, or they may generally authorise the presentation of reports from time to time.<sup>264</sup>

Legislative and general purpose standing committees may report from time to time their proceedings, evidence taken, and any recommendations, and should make regular reports on their progress.<sup>265</sup> Matters referred to the committees are usually referred with a specific reporting date. The presentation of the report becomes a Business of the Senate order of the day and therefore has priority over

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262 Transcript of the estimates hearing of the committee, 28/5/2002, and advice from the Clerk of the Senate included in the transcript, pp. 297-8; see also the statement by the Commissioner of the Australian Federal Police at a hearing of the Select Committee on a Certain Maritime Incident, 11/7/2002, transcript pp. 1926-8; estimates hearing of the Employment, Workplace Relations and Education Legislation Committee, 3/6/2005, transcript p. 44; estimates hearing of the Finance and Public Administration Committee, 26/5/2008, pp. 52-3.

263 Adopted 10/3/2009, J.1657-8. For previous practice, see *OASP* 12th ed., p.406.

264 SO 38(6).

265 SO 25(18).

government and general business for the relevant day.<sup>266</sup> Similarly, bills referred to the committees carry a specific reporting date, as do the particulars of proposed expenditure or estimates. Such dates are determined on a case by case basis. For reports on annual reports the committees are subject to fixed reporting times. Reports on annual reports tabled by 31 October each year are due by the tenth sitting day of the following year. Reports on annual reports tabled by 30 April each year are due by the tenth sitting day after 30 June that year.<sup>267</sup>

Resolutions establishing select committees are required by standing order 28 to fix a time for presentation of the committee's final report. Such resolutions usually also include a provision authorising the committee to report from time to time. Long term select committees have also been required to present reports on a regular basis by the inclusion of a provision along the following lines:

That the committee report to the Senate by the end of each June and December until the end of the Parliament or until the committee presents its final report, whichever first occurs.

The Select Committee on Superannuation and the Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies were subject to such a requirement.<sup>268</sup>

Some standing committees are required to present annual reports of their operations. These include the Appropriations and Staffing Committee and the Committee of Senators' Interests.<sup>269</sup> Such reports are in addition to the committees' other reporting obligations.

The Scrutiny of Bills Committee and the Selection of Bills Committee are required to report on virtually all bills considered by the Senate. Although the standing orders do not specify the frequency of reports of these committees, in practice they usually report each sitting week. When presented on sitting days, reports of the Selection of Bills Committee are required to be presented after the giving of notices; leave is required to present them at other times.

A report of a committee is signed and presented to the Senate by the chair.<sup>270</sup> In the chair's absence, the deputy chair or another senator may present the report on behalf of the chair. Until a report is

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266 SO 58(d).

267 SO 25(20).

268 See 5/5/1993, J.67, as modified by 8/2/1994, J.1219; and 19/5/1993, J.200, as modified by 22/2/1994, J.1278. Also see the resolution of appointment of the Select Committee on the Scrutiny of New Taxes which provided for the presentation of an interim report, 30/9/2010, J.119-20, 156.

269 SOs 19(3)(c) and 22A(9).

270 SO 38(5).

tabled, it may not be disclosed to any person other than a member or officer of the committee.<sup>271</sup>

Where members of a committee indicate an intention to present a minority report, they may present, without leave, such a report subsequent to the presentation of the main committee report. In the absence of a notification of intention to the committee, however, such a minority report is simply another document for which a senator requires leave to table.<sup>272</sup>

Reports of committees may be presented at any time when no other business is before the Senate.<sup>273</sup> By convention, time is set aside after question time and discussion of any matter of public importance or urgency each day, for the presentation of documents by the President, by senators presenting reports from committees and by the Clerk. Reports presented pursuant to Business of the Senate orders of the day are presented when the business of the day is called on, while reports of the Selection of Bills Committee are presented after the giving of notices of motion on any sitting day. An hour is set aside on Wednesdays and Thursdays for committee reports to be presented and debated. During the hour, a motion relating to a report may be moved and senators may speak for up to 10 minutes each.<sup>274</sup>

### *Reports when Senate not sitting*

When a committee has completed its report it is desirable that it should be publicly available as soon as possible, particularly if the report deals with matters of significant public interest. Publication of the report should not be delayed by a long adjournment of the Senate. Provision is therefore made for the release of reports when the Senate is not sitting.

Standing order 38(7) provides for a report to be presented to the President or, in the President's absence, the Deputy President or, in the absence of the Deputy President, any one of the Temporary Chairs of Committees. The report is deemed then to have been presented to the Senate and its publication is authorised. Whoever receives the report may also give directions for its printing and circulation. The report is subsequently tabled by the President at the next sitting of the Senate.

The Senate agreed first in 1990 to an order providing for the presentation of committee reports to the President when the Senate is not sitting. The order was agreed to following a recommendation by the Procedure Committee.<sup>275</sup> The committee examined issues relating to the presentation of reports following an inquiry by the Committee of Privileges into a case of unauthorised disclosure

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271 SO 37.

272 10/5/2007, J.3805.

273 SO 63.

274 SO 62(4).

275 First Report of 1990, PP 436/1990.

of a committee report before presentation to the Senate. The Privileges Committee drew attention to the practice that had developed of committees seeking permission to present reports to the President when the Senate was not sitting, and noted that this practice had the advantage of minimising the danger of premature disclosure of reports finalised during long adjournments. First adopted as a sessional order, the procedure was subsequently adopted as an order of continuing effect.<sup>276</sup> The order formalised and extended a practice which had been operating frequently on an ad hoc basis since 1984.

### ***Consideration of committee reports***

Standing order 39 provides that no discussion shall take place on the presentation of a report but that the report and any documents accompanying it may be ordered to be printed. Any further proceedings on a report occur by motion after notice. Standing order 62, however, provides two special times for the presentation and debate of committee reports when they may be debated.<sup>277</sup> In conjunction with the acceptance of motions moved by leave on the presentation of reports at other times, this means that in practice most committee reports, except reports on bills, are debated on presentation.

The procedures for presentation and debate of committee reports have been considered several times by the Procedure Committee. In its First Report of 1990, the Procedure Committee examined a suggestion by the Committee of Privileges that there should be a limited debate on the presentation of reports and that, to discourage unauthorised disclosure, reports should be presented as early as possible on days when the Senate meets in the mornings.<sup>278</sup> The Procedure Committee reported that the idea had merit but its preferred approach was to allow limited debate as a matter of right regardless of when a committee report was presented. The matter was referred back to the committee for reconsideration and in its Second Report of 1991 the committee suggested that any such debate on a committee report should be interrupted after 30 minutes.<sup>279</sup> Again, the Senate referred the matter for reconsideration but the Procedure Committee, noting resistance to its earlier proposals, recommended no changes to the procedures current at the time.<sup>280</sup> Eventually, variations on these proposals were incorporated into changes to the hours of sitting and routine of business adopted by the Senate on 2 February 1994. These changes, recommended by the Procedure Committee in its Second Report of 1993,<sup>281</sup> included provision of an opportunity, on Wednesday and Thursday

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276 23/8/1990, J.237; 13/2/1991, J.738. For a full account of the evolution of the procedure, see *Annotated Standing Orders of the Australian Senate*, under SO 38.

277 See Chapter 8, Conduct of Proceedings, under Consideration of committee reports and Auditor-General's reports.

278 PP 436/1990, pp. 1-2, 7, 9.

279 PP 466/1991, pp. 1-2.

280 First Report of 1992, PP 527/1992, pp. 3-4.

281 PP 212/1993.



mornings, for committee reports to be presented and debated by right, without the need for the Senate to grant leave, and these provisions are now reflected in standing order 62.<sup>282</sup>

At other times when committee reports are presented, it is customary for the Senate to grant leave for a motion to take note of the report to be moved. When this occurs, senators may speak for up to 10 minutes to the motion and there is a 30 minute limit on the total time for debate. Debate on all such motions is limited to 60 minutes where two or more motions are moved in succession.<sup>283</sup>

Standing order 60 provides that a motion for the consideration or adoption of the report of a committee of the Senate and any government statement on such a report takes precedence of any other General Business on the day on which it is set down for consideration. Since most initial consideration of committee reports occurs by debate on a motion moved by leave when the report is presented, this procedure is rarely used.

When debate on a motion in relation to a committee report is adjourned or interrupted by other business, consideration of the report becomes an order of the day for the next day of sitting, in accordance with standing order 62. One hour is allocated for such debate on Thursday and senators may speak for not more than 10 minutes. A senator who has already spoken to the report on its presentation may speak to it again when debate is called on again under standing order 62. During consideration of orders of the day relating to committee reports and government responses, reports are called on in the following order:

- orders of the day relating to reports or government responses presented that week are called on in the order in which they were presented;
- orders of the day relating to reports or government responses presented prior to that week are called on in the reverse order of presentation; that is, from latest to earliest.

If an order of the day is called on and no senator speaks to it or wishes to adjourn the debate, the question on the motion is put and the item removed from the Notice Paper.

In most cases, the motion moved in relation to a report is that the Senate take note of the report. Where a report presents recommendations requiring some action by the Senate, the motion is that the report be adopted. Such motions are usually moved in relation to reports of the Committee of Privileges and the Selection of Bills Committee, whose recommendations require adoption by the Senate to bring them into effect.

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282 For a full account of the evolution of the procedure, see *Annotated Standing Orders of the Australian Senate*, under SO 62.

283 SO 169(2).

## ***Government responses***

Since the 1970s, successive governments have undertaken to respond to committee reports within specified periods. The Senate first declared its view that the government should respond to committee reports in 1973 when the following resolution was agreed to:

- (1) The Senate declares its opinion that, following the presentation of a Report from a Standing Committee or Select Committee of the Senate which recommends action by the Government, the Government should, within the ensuing three months, table a paper informing the Senate of its observations and intentions with respect to such recommendations.
- (2) The Senate resolves that the President communicate this Resolution to the Government with a request that the foregoing procedure apply, from the date of the passing of this Resolution, to Reports already presented during the present Session and, in respect of future Reports, from the date of presentation of a Report.<sup>284</sup>

Various governments have given undertakings in relation to the presentations of responses.<sup>285</sup>

In 1994 the resolution was amended following the adoption by the Senate of new standing orders authorising members or groups of members to add dissenting reports, and members or participating members of committees to attach relevant conclusions and recommendations to reports. The amended resolution requires the government to respond also to any minority or dissenting report and any matter added to the report by a member or participating member.<sup>286</sup>

The Senate has also developed a mechanism for monitoring government compliance with this resolution. On 23 August 1979, the Senate considered the Standing Orders Committee's 4th Report of the 59th Session and agreed to adopt a proposal that the President provide reports to the Senate identifying committee reports to which the government had not delivered a response within the prescribed time.<sup>287</sup> Such reports have been regularly presented since 1981.<sup>288</sup>

Government responses are regularly subject to motions moved by leave that the Senate take note of the document. When debate on such a motion is adjourned, the resulting order of the day comes up for reconsideration on Thursdays during the hour set aside for consideration of orders of the day relating to committee reports and government responses, pursuant to standing order 62.

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284 14/3/1973, J.51.

285 See SD, 26/5/1978, p. 1933; 24/8/1983, p. 141.

286 24/8/1994, J.2054.

287 J.883-4.

288 10/11/1981, J.627.

On occasions government responses have been presented in response to questions at question time. There is nothing in the rules of the Senate to prevent this, although question time does not facilitate the consideration of responses.<sup>289</sup>

### Action on committee reports

Where committees recommend action by the Senate, for example, in relation to legislation before the Senate, such recommendations may be, and usually are, swiftly adopted by the Senate. Most recommendations, however, involve new legislation or administrative action by the executive government, and therefore cannot be carried out by the Senate acting alone. Ensuring expeditious and considered government responses to such recommendations is therefore important. Most Senate committee recommendations, if not adopted in the short term, are frequently reflected in public policy in the long term, partly because they often embody the considered views of relevant institutions and persons or of the community as a whole.

Apart from the adoption of recommendations, Senate committee inquiries influence the conduct of public affairs by providing persons and organisations with an interest in issues an opportunity to be heard in the parliamentary forum, and for problems and proposed solutions to be aired and debated. Committee inquiries also increase the knowledge and expertise of senators as legislators and participants in the framing of public policy.

### Meeting with House committees

Meetings between Senate and House of Representatives committees are governed by standing order 40. A Senate committee may not confer or sit with a committee of the House of Representatives except by order of the Senate. Any such order is conveyed by message to the House of Representatives with a request that leave be given to the committee of that House to confer or sit with the Senate committee. Conferring may occur orally or in writing and includes exchange of information. The term “sit with” refers to two committees formally meeting together, transacting business and making decisions as if they were a joint committee. Committees meeting together under this standing order may exercise only such powers as are conferred in the order of the Senate authorising the meeting. Proceedings of any conference or joint sitting must be reported to the Senate by its committee.

Some of the domestic standing committees commonly meet as joint committees with their House of Representatives counterparts, pursuant to the standing orders governing their establishment and operations. These include the Library Committee, the House Committee and the Publications Committee.<sup>290</sup> Other cases of committees of the two Houses meeting together are extremely rare.

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289 SD, 29/11/2005, pp. 36-8.

290 SOs 20, 21 and 22.

In November 1987 the Senate Committee on Transport, Communications and Infrastructure was empowered to sit as a joint committee with its House of Representatives counterpart for consideration of a reference on any proposed variations to the Canberra City Plan. The resolution provided for the following conditions:

That the Joint committee appoint as its chairman the Chairman of the Senate Committee or the Chairman of the House of Representatives Committee.

- (2) That the quorum of the committee be 2 Senators and 2 Members of the House of Representatives.
- (3) That a subcommittee of the Senate Committee, when considering the matters referred to in paragraph (1), be empowered to sit with a subcommittee of the House of Representatives Committee, when that subcommittee is considering those matters, as a subcommittee of the joint committee.
- (4) That a Senator who is not a member of the Senate Committee may attend a meeting of the joint committee or a subcommittee, with the approval of the joint committee or subcommittee, and participate in its proceedings and deliberations, but may not vote.
- (5) That nothing in these resolutions be taken to affect the power of the Senate Committee to consider the matters referred to in paragraph (1) or its duty to report to the Senate on those matters.<sup>291</sup>

When the committee received a reference on the Canberra leasehold system on 14 April 1988, it was empowered to sit as a joint committee with its House of Representatives counterpart under the same provisions as in the resolution of November 1987, to which the House of Representatives had agreed on 5 November 1987.<sup>292</sup> This further resolution was also agreed to by the House of Representatives on 18 April 1988, and the inquiry was undertaken by a joint subcommittee, whose report was adopted as a report of the Senate Standing Committee on Transport, Communications and Infrastructure and presented to the Senate on 24 November 1988.<sup>293</sup>

A message was received from the House of Representatives on 3 May 1994<sup>294</sup> requesting that the Senate agree to an order that its Standing Committee on Legal and Constitutional Affairs confer with its counterpart committee in the House in relation to inquiries being undertaken by both committees into section 53 of the Constitution. In response, the Senate directed its committee to confer with its counterpart. A further message from the House of Representatives, dated 30 June

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291 3/11/1987, J.250-1.

292 J.628.

293 PP 411/1988.

294 J.1558.

1994, and reported in the Senate on 23 August 1994,<sup>295</sup> contained more specific provisions for a joint meeting of the two committees to take evidence on their references. No action was taken by the Senate in response to this message.

In 2011, the Committee of Senators' Interests received a reference on the development of a code of conduct for senators and was authorised to consult with the equivalent committee of the House with a view to developing a uniform code and uniform procedures for members and senators.<sup>296</sup> The two committees participated in a round-table hearing shortly afterwards.

The independence of each House from the other, and their differing composition and history, make joint meetings of committees a rarity not lightly authorised by the Senate, which values particularly the advice of its own committees. Practical difficulties in reaching agreement on rules for joint meetings and in securing agreed reports are also grounds for the traditionally strong resistance in the Senate to such joint meetings.

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295 J.2038.

296 2/3/2011; J.644. The committee was also authorised to confer with the Committee of Privileges on the same reference, 12/9/2011, J.1413.

## Stages of a Senate Committee Inquiry

