



SENATE
REPORT

Committee of Privileges

Joint meetings of the Senate and the House of
Representatives on 23 and 24 October 2003

118th Report

April 2004

The Senate

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APPENDIX A - SUBMISSIONS

CHAPTER ONE

Introduction

Terms of reference

1.1 On 29 October 2003, on the motion of Senator Brown, the Senate referred the following two matters to the Committee of Privileges for inquiry and report:

In relation to the joint meeting of the Senate and the House of Representatives to receive an address by the President of the United States of America on 23 October 2003:

- (a) whether there was any inappropriate presence or activity by agents of the Government of the United States;
- (b) whether foreign media or other personnel were permitted to record the proceedings, in circumstances in which Australian media were forbidden to do so, and whether this was appropriate;
- (c) whether there was any improper interference with Senator Nettle by any officer of the Parliamentary Service;
- (d) whether there was any other improper interference with Senator Brown or Senator Nettle; and
- (e) whether there are any implications for the powers, privileges and immunities of the Senate arising from these matters, and whether the Senate should take or recommend any action in consequence.

In relation to the joint meeting of the Senate and the House of Representatives to receive an address by the President of the People's Republic of China on 24 October 2003:

- (a) whether there was any inappropriate presence or activity by agents of the Chinese Government;
- (b) whether agents of the Chinese Government exercised or attempted to exercise any inappropriate influence over any part of the proceedings, including:
 - (i) any suggested cancellation of, or any delay in, the proceedings,
 - (ii) the removal or redirection of senators' or members' guests from the public gallery,
 - (iii) the exclusion of Senator Brown and Senator Nettle from the proceedings and the method by which that exclusion was achieved, and

- (iv) any message or instruction to persons attending the proceedings in relation to any dress, display of insignia or symbolism;
- (c) whether senators were appropriately informed of any of these matters or of any other matters relating to the proceedings; and
- (d) whether there are any implications for the powers, privileges and immunities of the Senate arising from these matters, and whether the Senate should take or recommend any action in consequence.¹

1.2 Given the similarities between the two inquiries, the committee has chosen to report on them together in a single report.

Nature of the inquiry

1.3 Most inquiries that come before the committee, apart from right of reply submissions, are initiated in accordance with standing order 81. A senator notifies the President in writing of a matter of privilege and the President makes a determination whether to give precedence to a notice of motion referring the matter to the Committee of Privileges, taking into account the criteria set out in Privilege Resolution No. 4. Such inquiries usually involve the exercise of the committee's contempt jurisdiction in which the committee makes findings as to whether a particular contempt has been committed.

1.4 These inquiries into the joint meetings do not follow this pattern. The terms of reference do not identify specific possible contempts to be investigated by the committee, but require the committee to consider whether there was any improper conduct or any improper interference with senators. Although the committee can make findings of fact in relation to these matters, it does not consider that the terms of reference require it to determine whether any contempts have been committed. However, the terms of reference do require the committee to consider whether there are any implications for the powers, privileges and immunities of the Senate arising from these matters, and whether the Senate should take or recommend any action in consequence.

Conduct of the inquiry

1.5 After receiving the references, and given the public and media interest in the joint meetings and the events surrounding them, the committee took the unusual step, for it, of advertising the inquiry in the press. An invitation to make submissions appeared in *The Australian* of 2 December 2003, as part of a regular advertisement about Senate committee inquiries. The committee also wrote to all senators and major participants in the events, seeking written submissions addressing the terms of reference. Only one submission appears to have been generated by the press

1 *Journals of the Senate*, 29 October 2003, pp. 2645-7.

advertisement. All other submissions received were in response to the committee's written invitations. In all, nine submissions were received. These are reproduced at Appendix A.

1.6 The events of the joint meetings had also been canvassed before the Finance and Public Administration Legislation Committee at its supplementary budget estimates hearings on 3 and 4 November 2003. The transcripts of these hearings, at which officers from the Department of the Senate, the Joint House Department (as it then was) and the Department of the Prime Minister and Cabinet gave evidence, were available to the committee, as was the transcript of that committee's additional estimates hearing on 16 February 2004 at which further questions were asked of officials of the Department of the Prime Minister and Cabinet in relation to media arrangements for the joint meetings. Statements made to the House of Representatives were provided to this committee by the Speaker in his submission.

1.7 In addition, the Procedure Committee, in its *Third report of 2003*, presented in December 2003, had examined the issue of joint meetings to receive addresses by foreign heads of state. That committee noted the significant potential problems inherent in the tension between the notion that the joint meetings were simultaneous meetings of the Houses and the conferral of authority on the Speaker, as chair, to apply the standing orders of the House of Representatives "so far as they [were] applicable". These problems had been raised by the Clerk of the Senate in 1991 in advance of an address by President George Bush (senior) with suggestions that alternatives to the proposed format should be adopted. The Procedure Committee recommended that any future parliamentary addresses by visiting heads of state should be received by a meeting of the House of Representatives in the House chamber, to which senators would be invited as guests.² Consideration of this report is listed on the *Notice Paper* for 11 May 2004.

1.8 The evidence available to this committee in the form of submissions and the transcripts from the Finance and Public Administration Legislation Committee's estimates hearings was limited in scope and value. Although this committee conducts most of its inquiries, where possible, on the papers, in this case it had serious doubts about the adequacy of the evidence assembled and value of pursuing further evidence. These doubts reflected a deeper concern about the ability of this committee to make definite findings or for the inquiry to reach a satisfactory outcome.

1.9 The bases for these doubts are discussed in the next chapter. The committee's conclusions and recommendation are contained in Chapter 3.

2 *Third report of 2003*, pp. 2 and 3; Estimates, 3 November 2003, F&PA pp. 8-9, 12-13, 24-25 and 30.

Background

1.10 On 9 October 2003, the Senate agreed to two resolutions providing for joint meetings of the Senate and the House of Representatives on 23 and 24 October 2003 for the purpose of receiving addresses from President George W. Bush of the United States of America and President Hu Jintao of the People's Republic of China.³ These resolutions were similar in form to those which had been agreed in respect of previous visits by United States Presidents George Bush (senior) in 1992 and Bill Clinton in 1996.

1.11 Procedurally, the resolutions invited the relevant President to address a meeting of the Senate, accepted the invitation of the House of Representatives to meet with it and concurred with the resolution of the House in relation to the conduct of the meeting. In other words, the Senate agreed that the Speaker would preside over the meetings of the two Houses, the only business would be introductory remarks by the Prime Minister and Leader of the Opposition, an address by the relevant President, followed by the adjournment of the meeting, and that the procedures of the House would apply "so far as they are applicable". Under the terms of the resolutions, these were separate but simultaneous and co-located meetings of the Senate and the House of Representatives, presided over by the Speaker and following House procedures to the extent that they were applicable.

1.12 The meetings duly occurred on the proposed dates. Security arrangements for the visit of President George W. Bush were more stringent than for any previous visit to Parliament House by a head of state. Parliament House was closed to the public, including most visiting school groups, until 1 pm on 23 October 2003.⁴ Access to the House of Representatives chamber and galleries was limited to senators, members, invited guests and accredited media representatives. Senators and members were permitted one guest each. Invitations were otherwise administered by the Department of the Prime Minister and Cabinet. Allocation of the limited number of places available for the Australian media had been arranged by the Federal Parliamentary Press Gallery liaising with the Parliamentary Security Service and the Department of the Prime Minister and Cabinet.⁵

1.13 During the address by President George W. Bush, both Senator Brown and Senator Nettle, representatives of the Australian Greens, interjected and were ordered to leave the chamber by the Speaker. They did not do so. After the address, the Speaker stated that they had committed an offence and called the Leader of the House

3 *Journals of the Senate*, 9 October 2003, pp. 2506-9.

4 Statement by the President, 16 October 2003, *Senate Debates*, p. 16593; Estimates, 3 November 2003, F&PA, pp. 3-4.

5 Press Gallery submission, Attachment 1, paragraphs 3.2 to 3.5; Estimates, 3 November 2003, F&PA, pp. 64, 81.

to move that they be suspended “from the service of the House”.⁶ The Speaker declared the motion carried, although it was claimed that the Speaker had ignored calls for a division made by the required number of members under the procedures of the House.⁷ The effect of the resolution was subsequently held by the Presiding Officers to be that Senators Brown and Nettle were excluded from the House for twenty-four hours and therefore from the address by President Hu Jintao the following day.⁸

1.14 At the conclusion of his address on 23 October 2003, President George W. Bush, accompanied by the Prime Minister, made his way from the chamber, greeting members and senators in the process. At this time Senator Nettle, who wished to present the President with a letter from the wife of one of the Australian detainees in Guantanamo Bay in Cuba, attempted to approach him and was unable to do so. Visual images of the events show Senator Nettle amidst a crush of senators and members and, at one point, a House of Representatives chamber attendant was seen to put his hand on her arm, apparently restraining her.⁹ Senator Nettle was unable to present the letter to President George W. Bush who shortly afterwards left the chamber.

1.15 After the meeting, the Speaker wrote to the President of the Senate who wrote to Senators Brown and Nettle explaining that, as a consequence of the decision purportedly made earlier by the joint meeting, Senators Brown and Nettle would not be permitted to attend the address by President Hu Jintao the following day.¹⁰ The President and the Speaker also issued a directive to parliamentary security personnel, employed by the former Joint House Department, that Senators Brown and Nettle were not to be permitted to enter the House of Representatives chamber and that, if necessary, “preventative force” should be used.¹¹ The Clerk of the Senate issued an instruction to Senate staff on duty in the House of Representatives chamber itself that they should not physically restrain any senator.¹²

1.16 Later that day, footage of the scuffle involving Senator Nettle was shown on television stations throughout the world. The footage was in breach of the rules for filming parliamentary proceedings which require any footage to be taken from the

6 *Votes and Proceedings*, 23 October 2003, p. 1275.

7 Procedure Committee, *Third report of 2003*, p. 2; Estimates, 3 November 2003, F&PA, pp. 27, 28-29.

8 Senator Brown’s submission, Attachment 1; Estimates, 3 November 2003, F&PA, p. 15.

9 Senator Lightfoot’s submission, Attachments; Estimates, 3 November 2003, F&PA, p. 39.

10 Estimates, 3 November 2003, F&PA, p. 17; Senator Brown’s submission, Attachment 1.

11 Senator Brown’s submission, Attachment 1A; Estimates, 3 November 2003, F&PA, pp. 5-7, 30-36, 82-83.

12 Estimates, 3 November 2003, F&PA, pp. 5-7, 14, 33-35.

house monitoring system.¹³ Instructions from the Presiding Officers require the camera to focus on the speaker, not on peripheral events. This footage had apparently been taken by an American media crew which had taken a camera into one of the galleries. This action had not been authorised. The Speaker subsequently caused an inquiry to be conducted into how an unauthorised camera was taken into the gallery.¹⁴ The results of that inquiry have not been made public but a partial account of events was given to the Finance and Public Administration Legislation Committee on 3 November 2003.¹⁵

1.17 With respect to the Australian media, complaints swiftly emerged of differential treatment of American and Australian media representatives to the detriment of the latter. Despite pre-existing arrangements, some journalists and media crew found themselves excluded from the gallery or ousted from pre-arranged vantage points, apparently on the orders of American officials accompanying the President of the United States of America.¹⁶ The Department of Prime Minister and Cabinet had engaged a contractor, Mr Daniel Bolger, to liaise with the media about arrangements for the visit. Mr Bolger's report on the events was received by the Department, and a request to provide a copy to the Finance and Public Administration Legislation Committee was taken on notice by the relevant officials at its estimates hearings on 16 February 2004.¹⁷

1.18 The following day, 24 October 2003, the commencement of the meeting to receive an address from President Hu Jintao was slightly delayed. Both the *Journals of the Senate* and the *House of Representatives Votes and Proceedings* show a starting time of 10.04 am, compared with the scheduled starting time of 10 am.¹⁸ According to the President of the Senate, the delay was due to a late visit by Chinese officials, concerned to ensure that President Hu Jintao's speech would not be disrupted, as President Bush's had been the day before, and to a photographic session while President Hu Jintao signed the Presiding Officers' guest books.¹⁹

1.19 Before the meeting began, Senators Brown and Nettle approached the House of Representatives chamber through the glass link-way and were spoken to by security

13 See Broadcasting of Senate and committee proceedings, *Standing and other orders of the Senate*, February 2004, pp. 151-153; the House of Representatives has similar orders.

14 Speaker's submission, attachment, *House of Representatives Debates*, pp. 21732-5, 23374.

15 Estimates, 3 November 2003, F&PA, pp. 62-65, 68-71, 74.

16 Press Gallery submission; Estimates, 3 November 2003, F&PA, pp. 21-24, 65-68.

17 Estimates, 16 February 2004, F&PA, pp. 30-31.

18 *Journals of the Senate*, p. 2599; *Votes and Proceedings*, p. 1279; Statement by the President, 16 October 2003, *Senate Debates*, p. 1662-3.

19 Estimates, 3 November 2003, F&PA, pp. 42-43.

personnel. They then departed and did not attempt to enter the chamber. For the visits, each senator and member had been assigned a seat in the galleries for one guest. Guests were required to identify themselves outside the chamber and were then directed to their seats. On 24 October, the guests of Senators Brown and Nettle and their House of Representatives colleague, Mr Michael Organ MP, were directed not to the public galleries but to the glazed galleries on the second floor, usually occupied by school students. They were unable to hear the translation of President Hu Jintao's speech. It has been claimed that this action was taken at the behest of Chinese security agents who did not want any potentially embarrassing incidents to occur during President Hu Jintao's address.²⁰

1.20 The terms of reference given to this committee on 29 October 2003 require it to examine, inter alia:

Inappropriate presence or activity by United States Government agents

Whether foreign media were permitted to record the proceedings in circumstances where Australian media were excluded

Possible improper interference with Senator Nettle by an officer of the parliamentary service

Any other possible improper interference with Senator Brown or Senator Nettle

Inappropriate presence or activity by Chinese Government agents or influence over any part of the proceedings including the exclusion of Senators Brown and Nettle and the treatment of their guests.

Before attempting to address these particular issues, the committee will examine the barriers it faced in attempting to come to satisfactory conclusions on these matters.

20 Estimates, 3 November 2003, F&PA, pp. 17-20, 42-48.

CHAPTER TWO

Constitutional, jurisdictional and evidentiary issues

2.1 The committee has referred to doubts and concerns as to the value of pursuing further evidence and the improbability of the inquiry reaching a satisfactory outcome. These issues and concerns may be summarised under the following headings:

Joint meetings and parliamentary privilege – constitutional issues

Jurisdictional issues

The availability of evidence

Joint meetings and parliamentary privilege – constitutional issues

2.2 A discussion of the constitutionality of the joint meetings occurred at the estimates hearing of the Finance and Public Administration Legislation Committee on 3 November 2003. According to the Clerk of the Senate:

On one view it had no constitutional character because it is not provided for in the Constitution but, theoretically, it was a meeting of the Senate which happened to be taking place in the House of Representatives chamber at the same time as a meeting of the House of Representatives was occurring there.

...Section 57 of the Constitution refers to a joint sitting where members of the two houses will meet and vote together, so it is a different body constituted under that provision of the Constitution. It is not a meeting of the Senate; it is not a meeting of the House of Representatives; it is an entirely different body consisting of the members of the two houses meeting and voting together. As a purist I take the view that it is not open to the two houses to authorise that sort of different body to meet for any purpose other than under section 57 of the Constitution.¹

2.3 On another view, the fact that section 50 of the Constitution authorises the Houses to make rules and orders for their proceedings either separately or jointly with the other House may be taken as an authorisation to hold joint meetings for other purposes. Alternatively, it refers only to the joint sitting authorised by section 57. The question has never been adjudicated.

2.4 There has been only one joint sitting under section 57 of the Constitution since Federation. It occurred in August 1974 following the double dissolution that year. Before the joint sitting, each House agreed to a set of rules that would apply to the

1 Estimates, 3 November 2003, F&PA, p. 9.

joint sitting.² The rules included provision for dealing with questions of order by providing how objections to rulings by the chair would be dealt with. Questions of order may be quite separate from questions of privilege and so, by separate resolutions, each House resolved that the joint sitting constituted proceedings in Parliament and that the powers, privileges and immunities of the members of each House applied.³ The purpose of the resolutions was to declare that the joint sitting was covered by parliamentary privilege, given that the powers and privileges of the House of Commons in 1901, inherited by the houses of the Commonwealth Parliament under section 49 of the Constitution, provided for no such body.⁴ The effect of these resolutions is uncertain but was never tested. Relevant legislation applying to the Parliament, such as the *Parliamentary Papers Act 1908*, the *Evidence Act 1905* and the *Parliamentary Proceedings Broadcasting Act 1946*, was amended to extend its application to a joint sitting under section 57 of the Constitution.

2.5 The Constitution mentions joint sittings in another context: under section 15, senators chosen to fill casual vacancies shall be chosen by a joint sitting of the state Houses. The Commonwealth followed this model in the *Senate (Representation of Territories) Act 1974* in choosing a mechanism to fill casual vacancies in respect of the ACT which was then a non-self-governing territory. Casual vacancies for the ACT were to be filled by a senator chosen by the Senate and the House of Representatives sitting and voting together for that purpose. In this role, a joint meeting of the two Commonwealth Houses operated as an electoral college, as did the state Houses under section 15, rather than exercising the legislative power of the Commonwealth as provided under section 57. Although there was a constitutional challenge to the *Senate (Representation of Territories) Act 1974* (which had been passed at the 1974 joint sitting), the challenge did not relate to the mechanism for choosing ACT senators to fill casual vacancies.⁵ Arguably, it is not within the power of the legislature to authorise by statute a form of meeting reserved for the special circumstances arising out of section 57. But the legislation survived challenge, and the provisions were incorporated into the *Commonwealth Electoral Act 1918* in 1980 and were used to fill two casual vacancies occurring in the representation of the ACT before the territory gained self-government in 1989.

2.6 Before these two joint meetings, the two Houses again agreed on rules for the meetings, including rules for the maintenance of order, and the Senate again passed a resolution, declaring the meeting to be proceedings in Parliament and applying the powers, privileges and immunities of the Senate and senators to meetings under the

2 *Journals of the Senate*, 1 August 1974, pp. 117-120; *Votes and Proceedings*, 1 August 1974, pp. 118-121.

3 Estimates, 3 November 2003, F&PA, pp. 11-12; *Journals of the Senate*, 1 August 1974, p. 117; *Votes and Proceedings*, 31 July 1974, p. 106.

4 *House of Representatives Debates*, 31 July 1974, p. 908.

5 *Western Australia v Commonwealth* (1975) 134 CLR 201.

particular provisions of the *Commonwealth Electoral Act 1918*. A similar resolution was passed by the House.⁶ Again, relevant legislation was amended to extend its application to joint meetings of this kind.⁷

2.7 The mechanism of joint meetings of the Senate and the House of Representatives for decision-making purposes was employed in the Constitution Alteration (Establishment of a Republic) Bill 1999 for the purpose of choosing a president for the proposed republic. The proposal failed at the 1999 referendum but, in any case, as it involved a constitutional amendment, the question of validity would not have arisen.

2.8 Since 1992, there have been five occasions when the houses have met jointly by resolution, four of which were to receive addresses by foreign heads of state and which have been mentioned previously in this report. The fifth occasion was a joint meeting in the Royal Exhibition Buildings in Melbourne to commemorate the centenary of the first meeting of the Commonwealth Parliament on 9 May 1901. The order of proceedings was set out in the resolutions of the two Houses.⁸ There was, in effect, no chair of the meeting and at the conclusion of proceedings, the President of the Senate adjourned the Senate and the Speaker separately adjourned the House, thereby maintaining the concept that the meetings were separate though co-located and simultaneous meeting of the two Houses. This device was not used for any of the meetings receiving addresses from foreign heads of state.

2.9 A distinguishing feature of these ceremonial meetings was the absence of any detailed rules and of any resolution declaring them to be proceedings in Parliament and applying the powers, privileges and immunities of the Houses and their members to the meetings, however uncertain the effect of such resolutions. Also missing were any legislative amendments to the relevant legislation, including the *Parliamentary Proceedings Broadcasting Act 1946*. In the case of the meetings to receive addresses from foreign heads of state, it is apparent that the possible need to deal with questions of order was dismissed as unlikely and, in any event, was presumed to be covered by the agreement to follow House of Representatives procedures “so far as they [were] applicable”. According to evidence given by the Clerk of the Senate to the Finance and Public Administration Legislation Committee, the possible need to deal with disruption was discussed before the first such address early in 1992:

All that was just left up in the air, I think and not revisited in any systematic fashion on this occasion.⁹

6 *Journals of the Senate*, 29 April 1981, pp. 218-220; 16 February 1988, pp. 469-472; *Votes and Proceedings*, 29 April 1981, pp. 204-209; 16 February 1988, pp. 333-338.

7 *Parliamentary Joint Sittings Amendment Act 1981*.

8 *Journals of the Senate*, 27 February 2001; *Votes and Proceedings*, 27 February 2001, p. 2104.

9 Estimates, 3 November 2003, F&PA, p. 8.

2.10 For this committee, a key question that arises from the brief history of joint sittings and joint meetings in the foregoing paragraphs is the extent to which the joint meetings of 23 and 24 October 2003 were proceedings in Parliament, regardless of any resolution declaring them to be so, given the dubious validity of any such declaration and the absence of any constitutional authority for meetings of this character.

2.11 This is a question that the committee does not consider itself able to answer on the material before it. Nor does it believe that a definitive answer is likely given the absence of precedents in any comparable parliamentary system. The joint meetings to receive addresses from foreign heads of state were modelled on the US practice in response to a desire to reciprocate invitations to Prime Ministers Hawke and Howard to address the US Congress. Australia has different constitutional arrangements and the committee is of the view that there are no interests to be served in pursuing this question further. Serious doubts must remain about the status and validity of arrangements under which the Speaker of the House of Representatives purported to exercise the disciplinary powers of the House over senators who were participating in a meeting of the Senate. Whether the nature of the joint meetings and the events that occurred have any implications for the powers, privileges and immunities of the Senate is a question to be taken up in the next chapter.

Jurisdictional issues

2.12 The joint meetings involved distinct meetings of the Senate and the House of Representatives, and occurred in the House of Representatives chamber. Although it is a fundamental tenet of parliamentary privilege that each House is the guardian of its own powers, privileges and immunities, it is unclear how the powers, privileges and immunities of the Houses interrelate when they hold simultaneous meetings in one location. In the case of the House of Representatives chamber, galleries and precincts, on one view these are clearly within the exclusive jurisdiction of the House of Representatives. By accepting the House's invitation to meet in its chamber under House standing orders, the Senate in effect submitted itself to the jurisdiction of the House. On another view, the Senate could not constitutionally forego or waive any of its powers, privileges and immunities, let alone submit to the jurisdiction of the House.

2.13 What happened in the chamber, galleries and precincts on 23 and 24 October 2003 remains complicated by jurisdictional uncertainties.

2.14 Several aspects of these inquiries require the committee to examine the conduct of members and officers of the House of Representatives who were participating in or supporting meetings of the House of Representatives. As the committee noted in its 54th Report,¹⁰ its capacity to inquire into matters is constrained where the proceedings

10 *Possible unauthorised disclosure of a submission to the Joint Committee on the National Crime Authority, PP. 133/1995.*

of other Houses are concerned. The question is whether the immunity possessed by most Australian Houses under Article 9 of the Bill of Rights prevents inquiries by other Houses or their committees. It is recognised that there may be a limitation on the power of Senate committees to summon members of other Houses, reflecting the principle of comity between the Houses. This limitation may have the force of law.¹¹ Furthermore, this limitation is recognised in the Senate's standing orders. Standing order 178 requires the Senate to send a message to the House of Representatives requesting that leave be given to a member or officer of the House to attend before a Senate committee. The House determines whether its members or officers attend.

2.15 There is no such restriction on the voluntary provision of evidence to a committee of another House and on this basis, the committee invited the Speaker of the House of Representatives and the Serjeant-at-Arms to make submissions to its inquiries.

2.16 While the committee is grateful to the Speaker of the House of Representatives for making a submission to the committee, it notes that the submission comprised only public statements made by the Speaker to the House and included advice that the Serjeant-at-Arms, an officer of the House who was closely involved in the events of 23 October 2003, would not be responding to the committee's invitation to make a submission. In addition, it is apparent that key witnesses to events relevant to this committee's terms of reference are officers of the House. These include the parliamentary attendant who was seen to lay a hand on Senator Nettle's arm and the official from the Serjeant at Arms' office mentioned in Senator Brown's submission in connection with the redirection of guests to the glazed galleries.¹²

2.17 To take the matter further, the committee would be required to take action in the Senate to initiate a request to the House of Representatives to give leave to the Speaker and relevant officers to appear before it. The appearance of the officers, however, would not overcome the inherent limitation on an inquiry by one House into the activities of the other. In deference to the principle of comity between the Houses, the committee is unwilling to take this step unless otherwise directed by the Senate.

The availability of evidence

2.18 The committee recognises that it is problematic to seek further evidence from the Speaker or officers of the House of Representatives.

2.19 Other difficulties are also apparent, as illustrated by the following example. On the issue of whether there was any improper interference with Senator Brown or Senator Nettle, the committee has before it detailed submissions from Senator Lightfoot and Senator Brown (on behalf of the Australian Greens) about events

11 *Odgers' Australian Senate Practice*, 10th edition, Canberra 2001, pp. 56-7.

12 Senator Brown's submission, Attachment 4, statement by Ms Lauren Van Dyke.

following the conclusion of President Bush's address on 23 October 2003 when Senator Nettle attempted to give the President a letter from Mrs Mamdouh Habib. Senator Lightfoot's submission is accompanied by a series of still photographic frames obtained from *The Canberra Times* website illustrating his interpretation of the chain of events. Senator Brown's submission is accompanied by press articles and transcripts supporting his interpretation of the chain of events. There are contradictions between the two accounts. Normally, a committee faced with contradictions of this nature would hold a hearing and seek to resolve the contradictions by forensically probing the witnesses' accounts and seeking corroboration from other witnesses or sources.

2.20 Where witnesses hold different views of events, public hearings can often be useful in allowing those witnesses to put their point of view on the record. The opportunity to be heard can of itself be a remedy. In this case, both witnesses have available to them, and have used, the forum of the Senate and access to the media to put their point of view. The committee believes these two accounts are irreconcilable and is not persuaded that the expenditure of public resources required to hold a hearing to probe differences of interpretation between two participants in the events is warranted. Nor is it persuaded that after a hearing, public or otherwise, the committee would be in a position to favour one account or the other. Furthermore, the committee wishes to avoid providing a forum for further exploitation of the politics of the joint meetings, which it regards as a distraction from the task given to it by the Senate.

2.21 On other issues raised by the terms of reference there is no prospect of obtaining evidence from sufficient sources to enable the committee to reach a safe conclusion. With respect to whether there was inappropriate presence or activity by agents of the governments of the United States of America or the People's Republic of China, the committee has only glimpses of one side of the picture, provided in brief comments in the submissions of the President of the Senate, Senator Brown and the Secretary of the Department of Parliamentary Services, Ms Penfold QC, statements to the House of Representatives or answers to questions by the Speaker and a short passage in the transcript of the Finance and Public Administration Legislation Committee estimates hearing on 3 November 2003.¹³ The likelihood of obtaining evidence about government agents from the United States of America and the People's Republic of China is self-evidently slim. With no jurisdiction to follow up any refusal the committee sees little value in embarking on this exercise. In addition, the committee is conscious of the diplomatic ramifications of doing so.

2.22 It would also be difficult to obtain an account of the foreign media's experience of covering the events and its response, if any, to issues raised in the submission from the Press Gallery about differential treatment of Australian and foreign media. The difficulties relate to the problem of identifying foreign media witnesses and the

13 Submissions: President of the Senate, pp. 1-2, 3; Ms Penfold QC, Attachment, pp. 1, 2; Senator Brown, paragraphs 20, 25-26; *House of Representatives Debates*, 3 November 2003, pp. 21733, 21734. Estimates, 3 November 2003, F&PA, pp. 75-76.

committee's lack of jurisdiction in requiring them to provide evidence. The committee notes that a copy of the report of a person contracted by the Department of the Prime Minister and Cabinet for media liaison duties (Mr Daniel Bolger) has been requested through the additional estimates inquiries of the Finance and Public Administration Legislation Committee. Rather than duplicating efforts at this stage, this committee would prefer to await the Department's response to that question on notice.¹⁴

2.23 In summary, for almost every term of reference before the committee there is a deficiency in the evidence available to the committee and significant difficulties in pursuing further evidence. These are summarised in the following chart:

14 Estimates, 16 February 2004, F&PA, p. 31.

23 October 2003

Term of reference	Evidence available to the Committee	Deficiencies in the evidence	Barriers to obtaining further evidence
(a) whether there was any inappropriate presence or activity by agents of the Government of the United States	Estimates transcript , 3 November 2003, F&PA 74-77. Submissions: The Speaker, attachment, answers to questions from Mr Martin Ferguson, MP, <i>HoR Debates</i> , p. 21734; The President, pp. 1-2; Ms Penfold QC, attachment p. 1; Senator Brown, p. 3.	No evidence from US government	Diplomatic Jurisdictional
(b) whether foreign media or other personnel were permitted to record the proceedings, in circumstances in which Australian media were forbidden to do so, and whether this was appropriate	Estimates transcript , 3 November 2003, F&PA 20-24, 62-74; 4 November 2003, F&PA 32; 16 February 2004, F&PA 30-31. Submissions: Senator Murray, pp. 4-5; Press Gallery, entire submission and attachments; The Speaker, attachment, <i>HoR Debates</i> , pp. 21732, 21733-4, 21734-5, 23374; The President, p. 2; Ms Penfold QC, attachment, p. 1; Senator Brown, p. 3.	No evidence from foreign media No evidence from Mr Bolger	Identification of sources Jurisdictional Evidence currently sought by another committee – disinclination to duplicate
(c) whether there was any improper interference with Senator Nettle by any officer of the Parliamentary Service	Estimates transcript , 3 November 2003, F&PA 31, 39-40. Submissions: The Speaker, attachment, <i>HoR Debates</i> , pp. 21732, 21734, 21735; The President, p. 2; Ms Penfold QC, attachment, p. 1; Senator Brown, pp. 2-3.	No evidence from House of Representatives officers	Jurisdictional Comity between the Houses
(d) whether there was any other improper interference with Senator Brown or Senator Nettle	Estimates transcript , 3 November 2003, F&PA 15, 24-30, 31. Submissions: The Speaker, attachment, <i>HoR Debates</i> , p. 21732; The President, p. 3; Ms Penfold QC, attachment, p. 2; Senator Lightfoot, p. 2 and attachments.	No evidence from House of Representatives officers	Jurisdictional Comity between the Houses
(e) whether there are any implications for the powers, privileges and immunities of the Senate arising from these matters, and whether the Senate should take or recommend any action in consequence	Estimates transcript , 3 November 2003, F&PA 8-14, 24-30. Submissions: Senator Murray, pp. 2-3; The President, p. 3; Senator Santoro, pp. 1-2; Senator Brown, pp. 1-2.		

24 October 2003

Term of reference	Evidence available to the Committee	Deficiencies in the evidence	Barriers to obtaining further evidence
<p>(a) whether there was any inappropriate presence or activity by agents of the Chinese Government</p> <p>(b) whether agents of the Chinese Government exercised or attempted to exercise any inappropriate influence over any part of the proceedings, including:</p> <ul style="list-style-type: none"> (i) any suggested cancellation of, or any delay in, the proceedings, (ii) the removal or redirection of senators' or members' guests from the public gallery, (iii) the exclusion of Senator Brown and Senator Nettle from the proceedings and the method by which that exclusion was achieved, and (iv) any message or instruction to persons attending the proceedings in relation to any dress, display of insignia or symbolism 	<p>Estimates transcript, 3 November 2003, F&PA 19, 40-48, 72-73, 75-81. Submissions: The Speaker, attachment, <i>HoR Debates</i>, pp. 21733-21734; The President, p. 3; Ms Penfold QC, attachment p. 2; Senator Brown, pp. 3-4.</p> <p>Estimates transcript, 3 November 2003, F&PA 19, 40-48, 72-73, 75-81. Submissions: Mr Bourke, pp. 1-2; The Speaker, attachment, <i>HoR Debates</i>, pp. 21732-21733. The President, pp. 4-5; Ms Penfold QC, attachment, pp. 2-3; Senator Brown, pp. 3-4.</p>	<p>No evidence from Chinese government</p> <p>No evidence from Chinese government</p> <p>No evidence from House of Representatives officials</p>	<p>Diplomatic Jurisdictional</p> <p>Diplomatic Jurisdictional</p> <p>Jurisdictional Comity between the Houses</p>

Term of reference	Evidence available to the Committee	Deficiencies in the evidence	Barriers to obtaining further evidence
<p>(c) whether senators were appropriately informed of any of these matters or of any other matters relating to the proceedings of the Parliamentary Service</p>	<p>Estimates transcript, 3 November 2003, F&PA 18, 20. Submissions: The Speaker, attachment, <i>HoR Debates</i>, pp. 21732-21733; The President, p. 5; Senator Brown, pp. 1,4.</p>		
<p>(d) whether there are any implications for the powers, privileges and immunities of the Senate arising from these matters, and whether the Senate should take or recommend any action in consequence</p>	<p>Estimates transcript, 3 November 2003, F&PA 8-14, 25-30. Submissions: Senator Murray, pp. 2-3; The President, pp. 5-6; Senator Santoro, pp. 1-2; Senator Brown, pp. 1-2.</p>		

CHAPTER THREE

Conclusions and recommendation

3.1 In this chapter, the committee draws what conclusions it can in respect of terms of reference (a) to (d) of 23 October 2003 and (a) to (c) of 24 October 2003 before summarising its views on the final terms of reference for each inquiry and making a recommendation to the Senate.

The joint meeting of 23 October 2003

(a) whether there was any inappropriate presence or activity by agents of the Government of the United States

3.2 The President of the Senate and Ms Penfold QC in their submissions, state that agents of the Government of the United States were present, and acted in accordance with the agreed protocols for the visit.¹ In the absence of evidence from other sources, the committee is unable to conclude whether the presence or activity of US agents was inappropriate.

(b) whether foreign media or other personnel were permitted to record the proceedings, in circumstances in which Australian media were forbidden to do so, and whether this was appropriate

3.3 On the basis of a statement to the House of Representatives by the Speaker on 3 November 2003,² the committee finds that an unauthorised camera was taken into the public gallery by a foreign media crew and filmed the proceedings. No permission had been given to the media crew to do so. Given that an inquiry into this incident is still in train, the committee proposes no further action on this point.

3.4 The Press Gallery submission contains other possible examples of foreign media being permitted to record proceedings in circumstances in which Australia media were forbidden to do so.³ In the absence of further evidence on these incidents, the committee is unable to make findings in relation to them. The committee observes that a finding that foreign media had been permitted to record proceedings in circumstances in which Australian media were forbidden to do so would not necessarily raise matters of privilege. The committee agrees with observations made by Senator Murray in his submission that:

1 Submission of the President of the Senate, p. 1-2; Ms Penfold QC's submission, Attachment, p. 1.

2 *House of Representatives Debates*, 3 November 2003, p. 21732.

3 Press Gallery submission, Attachments, 1, 2 and 3.

Self-evidently, there must be a better process of consultation between both Houses for Joint Meetings, preferably frame worked in advance by appropriate protocols. These protocols need to include the manner in which the media and guests issues will be determined.⁴

3.5 Arrangements for the media for any future events of this nature in Parliament House should be the subject of early negotiations between the Press Gallery and the Presiding Officers to ensure that members of the Australian media do not again find themselves at a disadvantage in their own country.

(c) whether there was any improper interference with Senator Nettle by any officer of the Parliamentary Service

3.6 Senators Brown and Lightfoot in their submissions and the Speaker in a statement and answer to the House of Representatives on 3 November 2003 all allude to an incident in which a House of Representatives chamber attendant put his hand on Senator Nettle's arm.⁵ There is no dispute that this occurred. The issue for the committee is whether this constituted improper interference with Senator Nettle. Given the inability of the committee to obtain evidence from House of Representatives officers on the one hand, and the apparently irreconcilable differences in the submissions of Senators Brown and Lightfoot on the other, the committee is unable to make a finding on this issue.

(d) whether there was any other improper interference with Senator Brown or Senator Nettle

3.7 In addition to what may have occurred in the crush of senators and members at the conclusion of President Bush's address, Senators Brown and Nettle were suspended from "the service of the House" and prohibited from attending the joint meeting the following day. The committee finds that the validity of the suspension and, therefore, the question whether it constituted an improper interference with Senators Brown and Nettle is impossible to determine. The uncertain constitutional status of the joint meetings, the uncertainty of their status as "proceedings in Parliament", and the question mark over the suspension of senators from a meeting of the Senate without a vote of the Senate lead the committee into that unnavigable territory where a sound finding is impossible.

4 Senator Murray's submission, p. 4.

5 Senator Brown's submission, p. 2; Senator Lightfoot's submission, p. 2 and Attachment 4; *House of Representatives Debates*, 3 November 2003, pp. 21732, 21734, 21735.

The joint meeting of 24 October 2003

(a) whether there was any inappropriate presence or activity by agents of the Chinese Government

3.8 The President of the Senate and Ms Penfold QC in their submissions state that agents of the government of the People's Republic of China were present, and acted in accordance with the agreed protocols for the visit.⁶ In the absence of evidence from other sources, the committee is unable to conclude whether the presence or activity of Chinese agents was inappropriate.

(b) whether agents of the Chinese Government exercised or attempted to exercise any inappropriate influence over any part of the proceedings, including:

(i) any suggested cancellation of, or any delay in, the proceedings

3.9 According to both the President, in his submission and evidence to the Finance and Public Administration Legislation Committee, and the Speaker, in his statement to the House of Representatives, there had been contact between Chinese officials and the Presiding Officers in the days leading up to the joint meeting.⁷ On the morning of 24 October 2003, shortly before the scheduled commencement time of 10.00am, the Chinese foreign minister had an unscheduled meeting with the Presiding Officers to seek assurances that President Hu Jintao's address would not be disrupted. President Hu arrived shortly afterwards and the meeting commenced at 10.04am. There is no dispute that Chinese officials expressed concern about possible disruption to President Hu's address but in the absence of evidence from other sources, the committee is unable to conclude that agents of the Chinese government exercised or attempted to exercise any inappropriate influence over this part of the proceedings.

(ii) the removal or redirection of senators' or members' guests from the public gallery

3.10 In his statement to the House on 3 November 2003, the Speaker stated as follows:

The fact of the matter is that, having sole responsibility for the management of the House galleries, I made a deliberate decision on Thursday, 23 October 2003, following the unacceptable behaviour of the Greens senators in the chamber and one of their guests in the gallery that day, to ensure that guests of the Greens were unable to interrupt proceedings during the visit of President Hu. I directed that the Greens guests be seated with other overflow guests from the open galleries in the enclosed galleries.⁸

6 Submission of the President of the Senate, p. 3; Ms Penfold QC's submission, Attachment, p. 2.

7 Submission of the President of the Senate, p. 4-5; Estimates, 3 November 2003, F&PA, pp. 19, 40-43, 74-75; *House of Representatives Debates*, 3 November 2003, p. 21733.

8 *House of Representatives Debates*, 3 November 2003, p. 21732.

3.11 In the face of such an unequivocal statement, the committee finds that the Speaker made the decision to place guests of the Australian Greens in the glazed galleries and accepts that Chinese government agents did not directly inappropriately influence his decision. The committee is unable to pursue with the Speaker the extent to which he may have been influenced by a desire to avoid offending the Chinese and whether this amounted to inappropriate influence, albeit indirectly.

(iii) the exclusion of Senator Brown and Senator Nettle from the proceedings and the method by which that exclusion was achieved

3.12 The question of Chinese government influences on the exclusion of Senators Brown and Nettle from the proceedings and the method by which that exclusion was achieved is impossible to determine in the absence of further evidence from the Speaker and evidence from the Chinese government. The committee discusses elsewhere its reasons for not pursuing such evidence.

(iv) any message or instruction to persons attending the proceedings in relation to any dress, display of insignia or symbolism

3.13 The committee is puzzled by this term of reference. As all senators would know, it is not in order for senators to hold up newspapers or placards in the chamber or display items such as badges or T-shirts with slogans.⁹ Such items represent an intrusion in debate by senators who do not have the call, which is disorderly.

3.14 The only references to this issue are in Senator Brown's submission¹⁰ and in the transcript of the Finance and Public Administration Legislation Committee on 3 November 2003 when Senator Brown questioned the President about his knowledge of the Speaker's conversation with Mr Organ MP about the wearing of an armband bearing the Tibetan flag.¹¹ Senator Brown alleges Chinese influence on the Speaker's attempt to dissuade Mr Organ from wearing insignia.

3.15 In the absence of any further evidence, this appears to the committee to be a matter between the Speaker and Mr Organ and therefore outside this committee's jurisdiction.

(c) whether senators were appropriately informed of any of these matters or of any other matters relating to the proceedings

3.16 The question whether senators were appropriately informed of these matters raises difficult issues about the nature of the proceedings themselves. Messages relating to the proposed joint meetings were received by the Senate on 8 October 2003

9 *Odgers' Australian Senate Practice*, 10th edition, p. 235.

10 Senator Brown's submission, paragraphs 26-27.

11 Estimates, 3 November 2003, F&PA, p. 47.

and notices of motion were given for the following day.¹² On 9 October when the motions were debated it was apparent that the timing of the addresses was still to be determined.¹³ Amendments to the motion proposed that the Senate continue its meetings to deal with other business, that the joint meetings take place in the Great Hall and that other members and senators have the opportunity to contribute. All amendments were defeated. Surprisingly, no minister contributed to the debate to put the government's view or the rationale for the meetings and how they were expected to proceed.¹⁴

3.17 On 16 October 2003, the President made a statement to the Senate outlining security arrangements for the visits. This sparked debate and some criticism of the arrangements, particularly the lack of consultation with senators.¹⁵ On the same day, the President informed the Senate of the times for the meetings and also responded to issues raised in the earlier debate about security arrangements. Senator Brown, refused leave to make a statement in response, moved unsuccessfully to suspend standing orders to permit a response.¹⁶

3.18 None of the debates on these days anticipated the constitutional and procedural difficulties which subsequently emerged from the purported suspensions of Senators Brown and Nettle. Many views have been expressed about the conduct of these senators on what were expected to be purely ceremonial occasions. The committee expresses no view, but the issue of the appropriate level of information highlights the lack of thought on all sides about the constitutional and procedural implications of occasions of this nature.

3.19 The committee is unable to make a finding on the issue but refers senators to its observations below on the final terms of reference of each inquiry.

Implications for the powers, privileges and immunities of the Senate arising from these matters, and whether the Senate should take or recommend any action in consequence

3.20 The committee has been unable to reach a conclusion on many of the terms of reference because of the uncertain constitutional status of the joint meetings, the uncertainty regarding their status as proceedings in parliament, the limitations on the committee's jurisdiction to obtain sufficient evidence to make safe findings and the desire of the committee to avoid providing a forum for further exploitation of the

12 *Journals of the Senate*, 8 October 2003, pp. 2489-91.

13 *Senate Debates*, 9 October 2003, pp. 16014-15.

14 *Senate Debates*, 9 October 2003, pp. 16013-27, 16050-51.

15 *Senate Debates*, 16 October 2003, pp. 16593-99.

16 *Senate Debates*, 16 October 2003, pp. 16623-27.

politics of the joint meetings, which it regards as a distraction from the task given to it by the Senate.

3.21 The committee does not believe there is any solution to the serious problems raised by the joint meeting format under present constitutional arrangements. The concept that the two Houses could meet under the rules of one House as applied by its Presiding Officer seriously disadvantages the Senate, senators and the President of the Senate. While it may be sustainable for purely ceremonial occasions, the events of 23 and 24 October 2003 demonstrated that this framework is inadequate to deal with questions of order that arise, let alone questions of privilege.

3.22 The committee therefore endorses the recommendation made by the Procedure Committee in its *Third Report of 2003*, that the Senate pass a resolution expressing its opinion that future addresses by foreign heads of state should be received by a meeting of the House of Representatives in the House chamber, to which all senators are invited as guests.¹⁷

The committee **recommends** that the Senate agree to a resolution along the lines proposed by the Procedure Committee.

Robert Ray
Chair

17 Procedure Committee, *Third Report of 2003*, p. 3.

APPENDIX A

SUBMISSIONS RECEIVED

- 1 Australia Tibet Council
- 2 The Australian Democrats
- 3 Parliamentary Press Gallery Committee
- 4 The Hon. Neil Andrew MP, Speaker of the House of Representatives
- 5 Senator the Hon. Paul Calvert, President of the Senate
- 6 Senator Santo Santoro
- 7 Department of Parliamentary Services
- 8 Senator Ross Lightfoot*
- 9 The Australian Greens

*Photographic attachments to Submission No. 8 take the form of JPEG files which may be accessed on the committee's website at: http://www.aph.gov.au/Senate/committee/priv_ctte