

## *Parliamentary committees*

The principle purpose of parliamentary committees is to perform functions for which the Houses themselves are not well fitted to perform, that is, finding out the facts of a case, examining witnesses, sifting evidence, and drawing up reasoned conclusions. Because of their composition and method of procedure, which is structured but generally informal compared with the Houses, committees are well suited to the gathering of evidence from expert groups or individuals. In a sense they 'take Parliament to the people' and allow direct contact with certain members of the public by a cross section of the House when engaged on programs of visits or inspections. The all-party composition of most committees and their propensity to operate across party lines are important features. This bi-partisan approach generally manifests itself throughout the conduct of inquiries and the drawing up of conclusions. In respect of their formal proceedings committees are microcosms and extensions of the Houses themselves, limited in their power of inquiry by the extent of the authority delegated to them but governed for the most part in their proceedings by the same procedures and practice as those which prevail in the House by which they were appointed. However, joint committees operate under the standing orders of the Senate following the United Kingdom practice and any instruction to a joint committee can only be effected by resolution agreed to by both Houses.<sup>1</sup>

### **AUTHORITY FOR THE APPOINTMENT OF COMMITTEES**

The power of the House to appoint committees is not in doubt but the source of this power, particularly in regard to investigatory committees, cannot be stated precisely. The following 3 sources have been suggested:

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

Section 49 of the Constitution appears to be a clear source of power, with extensive ambit, for the Australian Parliament to appoint committees of inquiry. The other sources 'could be called in aid to extend its breadth or to sustain what otherwise might be uncertain about it'.<sup>2</sup>

<sup>1</sup> This requirement should be remembered when reference is made in this chapter to resolutions affecting committees and to the responsibility of committees to report. Constant parenthetical references such as 'or by both Houses' would be tedious. Unless otherwise indicated it can be assumed that in any instance in which the House would be involved in the case of House committees, both Houses would be involved in

the case of joint committees. Further, where the Speaker is required to be involved, as in the appointment of members, the President would also be involved where joint committees are concerned. For a list of committees since 1901 see Appendix 3.

<sup>2</sup> 'Parliamentary committees: powers over and protection afforded to witnesses', Paper prepared by I. J. Greenwood and R.J. Ellicott, PP 168 (1972) 3.

There is no doubt about the power of the House of Commons to appoint committees. Committees were appointed by the Commons at least as early as 1571 and, in fact, they preceded the introduction of the procedure relating to the committee of the whole House.<sup>3</sup>

## **TYPES OF PARLIAMENTARY COMMITTEES**

Committees appointed by the House, or by both Houses, fall into 4 broad categories.

### **Appointed to consider bills**

A bill can be considered in detail in a committee of the whole House which is appointed by resolution that the House resolve itself into a committee of the whole<sup>4</sup> or recently in a legislation committee appointed by sessional order. The proposed expenditures in the main Appropriation Bill can be considered in a committee of the whole or in estimates committees which are also appointed by sessional order. These committees are discussed in detail in the chapter on 'Legislation'.

### **Appointed by standing order**

Five 'standing' committees are appointed, pursuant to standing orders, at the commencement of each Parliament, namely, the Standing Orders Committee, the Committee of Privileges, the Library Committee, the House Committee, and the Publications Committee.<sup>5</sup> The role of these committees largely relates to the operations of the House and the Parliament but in the cases of the Committee of Privileges and the Publications Committee a broader, investigatory, role is also involved.

### **Appointed under statute**

These committees are established under their respective Acts of Parliament which require that they be appointed at the commencement of each Parliament and specify their terms of reference, powers and procedures. The statutory committees are the Joint Committee on the Broadcasting of Parliamentary Proceedings, the Parliamentary Standing Committee on Public Works, and the Joint Committee of Public Accounts.

### **Appointed by resolution**

These committees are appointed by resolution of the House or, in the case of joint committees, by resolution of both Houses. They usually have an investigatory role and may be described either as 'select' or 'standing' committees. Standing committees differ from the former only in that they continue to exist, or stand, from the time of their appointment until the end of the Parliament. Select committees have a more limited life which should be defined in the resolution of appointment. In short, the creation of a select committee is seen as an ad hoc measure while standing committees are created with a long-term role in mind.

The standing orders provide that, on the appointment of every select committee, a day is to be fixed by which it is to bring up its final report unless an extension of time is moved and granted in the House.<sup>6</sup> However, practice does not always accord with this

<sup>3</sup> Campion, p. 26.

<sup>4</sup> S.O. 271.

<sup>5</sup> S.O.s 25-28. These committees are occasionally referred to as 'domestic' committees.

<sup>6</sup> S.O. 327.

provision as select committees have been appointed with the provision to report 'as soon as possible'.<sup>7</sup> This occurs when a committee undertakes an inquiry which can be seen to be long-term, perhaps extending over the life of more than one Parliament. The terms of appointment may then also contain the following provision:

That the members of the committee hold office as a committee until the House of Representatives expires by dissolution or effluxion of time.<sup>8</sup>

When a select committee is directed to report by a specific date or as soon as possible its corporate existence comes to an end as soon as it does so.<sup>9</sup>

A committee may also be given leave of the House to report 'from time to time'.<sup>10</sup> This authorisation means that the committee is at liberty to make progress reports during the course of the consideration of the matter referred to it.<sup>11</sup> The following provision has been included in the resolution of appointment of some select committees:

That the committee have leave to report from time to time but so that its final recommendations be presented on or before [date].<sup>12</sup>

On presenting its final recommendations the committee ceases to exist.

If a select committee finds it difficult or impossible to table a satisfactory final report by the specified date, it may be given an extension of time by the House, prior to the specified reporting date, by amendment of its resolution of appointment.<sup>13</sup>

Prior to prorogation of the Parliament in 1977, the Select Committee on Tourism, which was required to report as soon as possible, recommended to the House, *inter alia*, that in the next session it be reappointed with power to report from time to time.<sup>14</sup> It sought this power with a view to the tabling of an interim report in the next session. The recommendation was adopted by the House on the reappointment of the committee in the next session.<sup>15</sup>

The terms of reference of standing committees are usually so general as to presuppose a series of inquiries, rather than one inquiry, within a broadly defined jurisdiction. Individual inquiries by standing committees are usually initiated in any one of 3 ways:

- by resolution of the House (usually moved by a Minister);
- by the committee itself, or
- by a Minister specified in the resolution of appointment (by letter sent direct to the committee chairman).

Of the standing committees appointed at the beginning of the 32nd Parliament only the Standing Committee on Aboriginal Affairs and the Joint Committee on the Australian Capital Territory lacked the power to initiate their own inquiries within the area defined by their terms of reference.<sup>16</sup> Most standing committee inquiries are initiated by the committees themselves. In some instances Ministers are not given the power to refer particular matters to a committee for inquiry, other than by moving a specific motion in the House.<sup>17</sup>

7 Select Committee on Road Safety, VP 1970-72/1030.

8 Select Committee on Specific Learning Difficulties, VP 1974-75/287; Joint Select Committee on the New and Permanent Parliament House, VP 1967-68/210.

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

10 S.O. 341.

11 The Joint Select Committee on Defence Forces Re-

tirement Benefits Legislation had power to report from time to time, VP 1970-72/250.

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

13 Select Committee on Specific Learning Difficulties, VP 1976-77/273.

14 Report from the Select Committee on Tourism, PP 4(1977)5.

15 VP 1977/11.

16 VP 1980-81/48-9,54-5.

17 Standing Committees on Road Safety (VP 1978-80/42-3) and Expenditure (VP 1978-80/44-5).

Resolutions of appointment usually direct standing committees, in selecting particular matters for investigation, to take account of the investigations of other parliamentary committees in order to avoid duplication. Commenting on this requirement the Standing Committee on Expenditure reported to the House in 1977:

It must be remembered that the Houses are different—constitutionally, historically, and in practice. The Parliament is an entity; the two Houses complementary parts. Thus, while the avoidance of duplication through liaison is a worthwhile objective which the Committee will attempt to achieve it points out that this may not stop a Senate or House committee from covering the same ground, if each committee felt compelled to on the grounds of public interest.<sup>18</sup>

The terms of reference of select committees tend to be much narrower and more specific and presuppose a single inquiry and report. In fact, as already indicated, most select committees are required to produce only one report. Nevertheless, the resolutions of appointment of some select committees have given the relevant Minister power to refer additional matters to them, that is, before they report and cease to exist.<sup>19</sup> A select committee with an unqualified power to report from time to time can elect to present a series of reports on particular aspects of its terms of reference.

Current inquiries of all House and joint committees are listed on the Notice Paper.

In the early years of the Parliament several select committees were converted into royal commissions, their membership and terms of reference remaining unchanged. In at least one instance, that of the 1905 Select Committee on the Shipping Service between the Commonwealth and the United Kingdom<sup>20</sup>, this was done at the committee's request. It was a means by which the committee's inquiry could be continued and completed after prorogation of the Parliament.

## Unofficial committees

In addition to the categories of parliamentary committees described above there are a further 3 categories of committees consisting of Members and Senators which operate within the Parliament. They differ from those already described in that they are not appointed by either House and therefore do not enjoy the special powers and privileges of such committees and do not necessarily operate in accordance with parliamentary procedures and practice. They are thus parliamentary committees only to the extent that their members are Members of Parliament; they are not committees of the Parliament.

Committees consisting of Members and Senators have been appointed by the Government of the day, especially during World War II.<sup>21</sup> Membership included members of the Opposition. The committees' reports were submitted to the Government and subsequently tabled in one or both Houses. The practice of appointing such committees has not been continued.

In 1980, the Speaker announced his intention to appoint a 'Speaker's Committee' to report on whether the Westminster conventions concerning the continuity of the Speakership could be adopted by the House, the method of doing so, and when the system should commence. The announcement followed an informal ballot conducted by the Clerk, on the Speaker's behalf, to determine whether Members supported the establishment of such a committee. The majority of those who participated in the ballot

18 'A Year's Experience', *Report from the Standing Committee on Expenditure*, PP 244(1977)22.

20 VP 1940-43/43,109,213,279,300,372,459.

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

21 VP 1905/73; PP 36(1906).

favoured the establishment of a committee but the Opposition, as a party, did not support the ballot as it saw a need for a more comprehensive review of the parliamentary institution. The Speaker indicated that the terms of reference of the committee would be those contained in the ballot and that the committee was to report to the Speaker and, through him, to the House. The Speaker wrote to each of the 3 party whips asking for the nomination of a specified number of members from each party, the numbers being proportionate to each party's representation in the House.<sup>22</sup> The committee had not been established when the 31st Parliament was dissolved.

Again in 1980, the Speaker and the President of the Senate announced in the respective Houses that they had agreed to establish Presiding Officers' committees, comprised of 6 Members of each House with representatives from both sides in each House. The 2 committees were to meet jointly to consider and to advise the Presiding Officers on the accommodation problems confronting the Parliament. The Speaker announced his intention to write to the leaders of all parties in the House immediately after the general election, which was to be held in October 1980, to supply names of Members willing to serve on his committee. The President made a similar announcement.<sup>23</sup> The committees were established in the 32nd Parliament.

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

## COMMITTEES ESTABLISHED BY RESOLUTION OF THE HOUSE

The procedures and practice followed by select committees, unless the House otherwise orders, are also applied to standing committees both of the investigatory type and those appointed by standing order which relate to the operations of the House.

Joint select and standing committees, other than statutory committees, follow the Senate standing orders which differ little from those of the House. The differences are outlined under 'Joint Committees' (see p. 589). Where significant precedents affecting joint committees are equally relevant to House committees, as they are in most cases, they are used in this section as precedents for House practice.

Joint statutory committees operate under the provisions of their individual statutes. Their procedures and practice are dealt with under 'Joint Statutory Committees' (see p. 594).

### Appointment

The standing orders do not prevent any Member moving a motion for the appointment of a committee of the House,<sup>24</sup> but most motions brought to a successful vote are moved by a Minister.<sup>25</sup>

The resolution of appointment defines the nature and limits of the authority delegated to each committee by the House. It contains the committee's terms of reference and powers and may contain directions which the House wishes to give, for example, in relation to procedures. The resolution may modify or extend the provisions

22 H.R. Deb. (22.5.80)3059-61; VP 1978-80/1527.

23 H.R. Deb. (18.9.80)1501; S. Deb. (18.9.80)1324.

24 S.O. 323.

25 The Select Committee on Specific Learning Difficulties was appointed on motion moved by the Leader of the Opposition, VP 1974-75/286; see also VP 1970-72/147-8; VP 1962-63/549.

of the standing orders and it has become standard practice to include the following paragraph:

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

The powers and procedures of select and standing committees appointed by resolution have been varied from time to time as experience with committee operations has increased and shown the need for change, and to meet particular circumstances. Because of these variations and because of the range of discretions available to committees in their day-to-day operations, few, if any, generalisations about the powers and procedures of committees appointed by resolution hold true for every such committee. To determine the extent of the authority delegated to any committee recourse must be had to the standing orders, the committee's resolution of appointment and any later amendments, and any other orders agreed to by the House subsequent to the committee's appointment.

The standing orders provide that the original resolution of appointment may subsequently be amended by the House by way of instruction.<sup>26</sup> However this method of instruction has never been used and amendments are usually initiated directly or indirectly by the committee itself. Normally the committee seeks the amendment through the Leader of the House or the Minister associated with the committee's field of inquiry. If the proposed amendment has the Government's support, the Leader of the House or the responsible Minister then moves for its adoption by the House.<sup>27</sup> It is rare for the chairman of the committee to move such an amendment.<sup>28</sup> Motions for controversial or unusual amendments have occasionally been preceded by the tabling of a special report by the committee in which the need for the amendment has been explained.<sup>29</sup> Amendments have included extension of time for reporting<sup>30</sup>, alteration of quorum size<sup>31</sup>, extension of powers<sup>32</sup>, change in number of Members<sup>33</sup>, and extension of terms of reference.<sup>34</sup>

## Eligibility to serve on committees

### *Personal interest*

No Member may serve on a committee if he is personally interested in its inquiry.<sup>35</sup> 'Personal interest' is defined in the very narrow sense of an interest peculiar to a particular person. If, for example, a Member were a producer of beef he would not, for that reason alone, be under any obligation to disqualify himself from serving on a committee inquiring into beef prices, as his interest would be one held in common with many other people in the community.

The provision of the standing orders was given proper effect in 1955 when a member of the Committee of Privileges took no active part during an inquiry in which he was personally interested in that he was the accusing party. In 1978, the House resolved that a member of the Committee of Privileges be discharged from attendance on

26 S.O. 302.

27 VP 1974-75/380 (change in number of Members appointed to Select Committee on Specific Learning Difficulties).

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

29 VP 1954-55/225 (special report from the Committee of Privileges seeking power for committee to investigate matters not referred to it by the House); *see also* 'Resolution of appointment of the Committee', *Special report by the Joint Committee on the Parlia-*

*mentary Committee System*, PP 78(1976)5, which sought power to retain as chairman the chairman of the committee in the previous Parliament (the report was not adopted by the House).

30 VP 1974-75/617-18.

31 VP 1974-75/316.

32 VP 1974-75/358.

33 VP 1974-75/380.

34 VP 1926-28/159.

35 S.O. 326.

the committee during its consideration of a matter he had raised in the House. Another Member was appointed in his place for the duration of the inquiry.<sup>36</sup>

On the appointment of members to the Select Committee on Grievances of Yirrkala Aborigines, a Minister on a point of order asked whether a Member, who was a litigant in related court proceedings and who had been nominated to serve on the committee, was personally interested in the matters to be inquired into by the committee. The Speaker stated that, in his opinion:

... the Chair is not able to determine whether or not a member is personally interested in a committee's inquiry and cannot properly be called upon to so decide. A member must be guided by his own feelings in the matter and by the dictates of respect due to the House and to himself. Having regard to the existence of the standing order and its terms, it is likely that if a matter of this kind is brought to issue it will be one for the House to decide.<sup>37</sup>

The Member served on the committee.

In 1975, a Senator on the Joint Committee on the Pecuniary Interests of Members of Parliament resigned from the committee. He considered that allegations made against him by a witness had compromised him to such an extent that his integrity and objectivity would be questioned if he did not support particular points of view on the issues before the committee.<sup>38</sup>

In 1977, a member of the Joint Committee on the Australian Capital Territory chose not to take part in proceedings of the committee whilst items in which he had an investment interest were under discussion.

The report of the Committee of Inquiry into Public Duty and Private Interest, tabled in 1979, contained recommendations on the resolution of conflict between the public duty and private interests of Members.<sup>39</sup> The report's recommendations concerning Members and House practices and procedures have not yet been debated in the House nor acted upon. The report recommended, *inter alia*, that the House be invited to consider:

- adopting by resolution or standing order a requirement that a Member make a declaration of interest at the earliest opportunity when taking part in committee proceedings and that such declarations be recorded as part of the official record, and
- reviewing the present standing order concerning personal interest and service on committees (S.O. 326) to determine whether any amendments are required to avoid conflicts of interest.

#### *Suspension from the House*

A Member suspended from the service of the House may take part in committee proceedings (not committee of the whole) during the period of suspension.<sup>40</sup>

### **Membership**

The standing orders require that all select committees shall consist of the mover of the motion appointing the committee and other Members to be nominated.<sup>41</sup> In practice, it is rare for the mover, usually a Minister, to become a member of the committee.

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

*see* Ch. on 'Members' where the report is discussed in detail.

37 VP 1962-63/559; H.R. Deb. (19.9.63)1176-9.

40 *See* Ch. on 'Control and conduct of debate'.

38 S. Deb. (15.4.75)982.

41 S.O. 323.

39 'Public Duty and Private Interest', *Report of the Committee of Inquiry*, PP 353(1979)60-1,64; and

Committee service is considered to be one of the parliamentary duties of private Members. However, office holders and Ministers do not normally serve on committees other than the Standing Orders Committee, the Committee of Privileges, and select or standing committees appointed to consider matters affecting the Parliament.<sup>42</sup> Except with his consent, the Speaker or the Chairman of Committees shall not be chosen to serve on any committee appointed by resolution.<sup>43</sup>

The resolution of appointment specifies the number of Members to serve on the committee and how they are to be nominated. For some time resolutions of appointment provided that the leaders of the respective parties to be represented on the committee were to nominate specified numbers of Members. In 1979, all resolutions of appointment were amended to provide for a specified number of Members to be nominated by either the Prime Minister, the Leader of the House, or the Government Whip and a further specified number to be nominated by either the Leader or Deputy Leader of the Opposition or the Opposition Whip.<sup>44</sup> The purpose of the change was to facilitate the nomination of Members to committees.<sup>45</sup>

Each party's representation on a committee is equated as nearly as possible to its numerical strength in the House. The Members to be nominated are normally elected within the party. As required in the resolution of appointment, those responsible for nominations convey them to the Speaker in writing and he announces the names of nominated Members in the House. The nominees thereby become members of the relevant committee and no motion is required in the House.

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

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

The House agreed to the modification.<sup>46</sup>

Provision is rarely made for ex officio membership of committees other than committees appointed under standing orders. However, the chairman of the Standing Committee on Expenditure is an ex officio member of the Joint Committee of Public Accounts and vice versa.<sup>47</sup> This arrangement is intended to ensure adequate liaison between the 2 committees.<sup>48</sup> Ex officio members, including a Minister, also serve on the Joint Standing Committee on the New Parliament House.<sup>49</sup>

During the 27th Parliament the Joint Select Committee on the New and Permanent Parliament House consisted of 21 members, including several ex officio members, among whom were the Presiding Officers, the Prime Minister and the Leader of the Opposition. Some ex officio members were empowered to appoint a Member of the House or a Senator to attend the committee when they were unable to be present at a meeting. This delegate, when attending committee meetings, was deemed to be a member of the

42 The Chairman of Committees was chairman of the Joint Committee on the Parliamentary Committee System. The Presiding Officers and the Minister for the Capital Territory are ex officio members of the Joint Standing Committee on the New Parliament House.

43 S.O. 325.

44 VP 1978-80/637-9; and see VP 1980-81/48.

45 H.R. Deb. (22.2.79)289.

46 J 1951-53/145-6; VP 1951-53/273,278.

47 VP 1980-81/51. *Public Accounts Committee Act* 1951, s.5. The Chairman of the Joint Committee of Public Accounts may nominate in his place a member of that committee who is a Member of the House of Representatives.

48 H.R. Deb. (27.6.76)2613.

49 VP 1980-81/56.

committee.<sup>50</sup> Appointment of such delegates had to be notified in writing to the Speaker and the President. The Prime Minister appointed a delegate.<sup>51</sup>

On several occasions a resolution of appointment of a committee has specified that the membership be identical to that of its predecessor in the previous Parliament.<sup>52</sup>

## Vacancies

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

- resignation for personal reasons;
- resignation on appointment as a member of the Ministry or to any other office as may preclude membership of a committee, for example, to the office of Speaker or Chairman of Committees;
- resignation due to personal interest in an inquiry;
- resignation from the House, and
- death.

A Member seeking to be discharged from attendance on a committee submits a written resignation to the person in his party responsible for nominating members to the committee concerned and the chairman of the committee. If the resignation is accepted, the selection of a replacement is decided within the party. The person to whom the resignation was submitted then informs the Speaker, in writing, of the change and the Speaker announces it in the House. No motion is necessary. The occurrence and the filling of a vacancy are normally announced in the House at the same time.<sup>53</sup>

The standing orders provide that Members may be discharged from serving on a committee, and other Members appointed, after notice has been given in the House.<sup>54</sup> However, in practice, this procedure applies only to joint statutory committees, committees appointed pursuant to standing orders and any other committees whose members are appointed by the House itself on motion. Only the House can discharge and replace them.<sup>55</sup>

## First meeting

The standing orders provide that the mover of the motion for establishment of a committee shall fix the time for its first meeting.<sup>56</sup> As the mover is usually a Minister who is unlikely to become a member of the committee, this standing order is rarely applied.

If it is left to a committee to elect its own chairman, the committee secretary<sup>57</sup> must call the first meeting on his own initiative. It is his responsibility to inform the members in writing of the time and place of the first meeting. If the chairman is appointed, for example, by the Prime Minister, it is the chairman's responsibility to call the first meeting.

The first meeting cannot be held until the nominations of members have been formally notified to the Speaker (and to the President of the Senate in the case of joint committees) by the party leaders or their delegates in accordance with the resolution of appointment. Nevertheless, it is the practice that a committee may conduct its first meeting prior to membership being announced in the House once the Speaker has been formally notified of nominations.

50 VP 1964-66/495-6,512; VP 1967-68/210,216; VP 1969-70/14,29.

51 VP 1964-66/569; VP 1967-68/229.

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

53 VP 1978-80/441.

54 S.O. 324.

55 VP 1978-80/56,159.

56 S.O. 330.

57 Until June 1981 a committee secretary was described as the 'clerk to the committee'. The term 'clerk to the committee' continues to apply to estimates committees and legislation committees.

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

### Chairman

Standing order 331 provides that:

Every committee, before the commencement of business, shall elect one of its Members to be chairman, who shall have only a casting vote.

In practice the resolution of appointment now normally provides that the committee shall elect as chairman one of the members nominated by the Prime Minister, the Leader of the House or the Government Whip.<sup>58</sup> Some resolutions of appointment have provided that the Prime Minister 'nominate' or 'appoint' one of the government members of the committee as chairman.<sup>59</sup> The resolution of appointment of the Joint Standing Committee on the New Parliament House provides for the Speaker and the President of the Senate to be joint chairmen of the committee.<sup>60</sup>

In conducting the election of the chairman, the committee secretary calls for nominations, each of which must be seconded. If only one member is nominated, as is usually the case, the secretary declares the member elected as chairman and invites him to take the chair. If more than one member is nominated, the election is conducted by secret ballot in accordance with the procedures set down for the election of the Speaker in similar circumstances.<sup>61</sup>

In 1974, the Select Committee on Specific Learning Difficulties was appointed without any provision in the resolution of appointment for the election or nomination of the chairman.<sup>62</sup> Under the standing orders any member of the committee, including an opposition member, could have been elected chairman. The committee had 6 members, 3 each from the government and opposition parties, which raised the possibility of a deadlock in the event of both a government and an opposition member being nominated and being supported on party lines. Before the committee held its first meeting, the House amended its resolution of appointment to increase its membership to 7 by providing for an additional member to be nominated by the Prime Minister, thus giving the government party a majority. If the committee had met before this amendment was agreed to and had elected a government member as chairman, the opposition members would have had a majority of 3 : 2 in any division taken on party lines because the chairman was only empowered to exercise a casting vote.

In 1976, the Joint Committee on the Parliamentary Committee System, in a special report to the House, sought an amendment of that part of the resolution of appointment which provided that the chairman be elected by the committee from the members nominated by the Prime Minister or the Leader of the Government in the Senate. The committee wished to re-elect as chairman the member who had been chairman of the

58 See Standing Committee on Aboriginal Affairs, and others, VP 1980-81/48-53.

59 VP 1973-74/123-4; see also VP 1970-72/33; VP 1961/48.

60 VP 1980-81/56-7.

61 S.O. 12. See Ch. on 'The Speaker and Officers of the House'. A ballot was conducted for the election of the chairman of the Standing Committee on Expenditure following its reappointment in the 32nd Parliament.

62 VP 1974-75/286-7. For an explanation see H.R. Deb. (28.11.74)4233.

committee in the previous Parliament but who was now an opposition member. The committee argued that continuity in the chairmanship would facilitate finalisation of the committee's report.<sup>63</sup> The House took no action on the proposal.

## The relative roles of Speaker and Chairman of a committee

### *Procedural authority*

The powers of a chairman of a select committee are described by *May* as being substantially the same as those of the chairman of a committee of the whole House.<sup>64</sup> As no appeal can be made to the Speaker regarding the decisions and rulings of the Chairman of Committees in a committee of the whole, it follows that no appeal can be made regarding the decisions and rulings of a chairman of a select or standing committee. Formal authority over select and standing committee procedures therefore lies with the chairman and the committee itself, and the Speaker may not take formal notice of committee proceedings insofar as purely procedural matters are concerned. A chairman's procedural authority in a committee is as exclusive as that of the Speaker in the House.

While the Speaker's advice is occasionally sought on complex procedural matters, there is rarely any scope for him to intervene on committee procedures. The Speaker could normally interfere in such matters only if they affected the allocation of resources to a committee, which is largely his responsibility. Nevertheless, Speakers' rulings on procedural matters are significant as precedents whether they are made in the House or by letter to committee chairmen. Further, committee chairmen must have regard to the practice of the House where this is applicable to committee proceedings, for example, in respect of the sub judice convention (see p. 624).

Any concern about committee procedure or authority can be brought to the attention of the House in a special report, a dissenting report or in a debate on a motion that the House take note of a report. While these courses have been adopted, no action has been taken by the House.<sup>65</sup> It is, in any case, doubtful as to whether the Speaker, rather than the House, could exercise any authority in such a situation. In 1955, the Speaker was questioned on the extent of the powers and functions of the Committee of Privileges. He replied:

Such questions should not be directed to the Speaker; they are matters for the House, not for me. I am not a member of the Committee of Privileges. As the House appointed the committee, the House must answer questions in relation to it.<sup>66</sup>

Unlike the Speaker, the chairman of a committee plays both an active and a procedural role at hearings and deliberative meetings. His rights to take part in proceedings are no less than those of other members except that in divisions he may only exercise a casting vote.<sup>67</sup>

### *Administrative authority*

Resolutions of appointment of most committees include a paragraph 'That the committee be provided with all necessary staff, facilities and resources'. The Speaker's statutory powers make him the final arbiter, subject to the will of the House itself, of what constitutes a 'necessary' provision. The older form of the above paragraph 'That

63 VP 1976-77/119; PP 78(1976).

64 *May*, pp. 638-9.

65 See the dissent of A.J. Forbes in 'A proposed system of committees for the Australian Parliament', *Interim Report of the Joint Committee on the Parliamentary Committee System*, PP 275(1975)95-7; see

also the dissent of G.M. Bryant and L.R. Johnson in *Report of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory*, PP 351(1977)72; H.R. Deb. (18.8.77)419,423.

66 H.R. Deb. (7.6.55)1438.

67 S.O. 331.

Mr Speaker provide the committee with all necessary staff, facilities and resources', has fallen into disuse, but, as the Speaker's statutory powers are clearly exclusive in these areas, the current lack of a direct reference to him does not diminish either his authority or his obligations. In exercising these responsibilities the Speaker would be obliged to interfere in committee operations if he considers a committee is using or seeking resources for activities which exceed its delegated authority.

Appointments and promotions within the Department of the House of Representatives, which services House committees and some joint committees, are made by the Governor-General on the recommendation of the Speaker.<sup>68</sup> The Speaker, or an officer appointed by him, has exclusive authority to approve expenditure for supplies, works, stores and services, incidental to the running of the House.<sup>69</sup> The only statutory limitation on this power is the amount of the relevant vote in the Appropriation Acts. In 1944, 3 members of the Joint Committee on Social Security resigned from the committee in protest at the Speaker's insistence that a parliamentary officer replace an officer of the Public Service who had earlier been seconded to serve as clerk to the committee with the consent of the Speaker and on the recommendation of the committee. No action was taken by the House to question the Speaker's exercise of his authority to appoint committee staff but some Members expressed disapproval.<sup>70</sup>

The Speaker leaves most administrative decisions to the committees themselves although a continual oversight of operations, administration and expenditure is maintained. In instances involving unusual or large expenditures the Speaker's approval is always sought, such as the appointment of specialist advisers and the payment of expert witnesses. In the case of a proposed overseas visit by a committee, the Speaker's support is first sought. If he endorses the proposal, he will then approach the Prime Minister. Depending on the circumstances and merit of a case the Speaker may approve travel to Australia's external Territories and has approved visits to Pacific countries near Australia, such as New Zealand and Papua New Guinea, subject to funds being made available by the Government.

The chairman of the committee has the major responsibility for administration arising from committee operations but requires the authority of the committee for any significant decisions or actions involving matters of principle. The chairman is assisted in fulfilling both his administrative and procedural responsibilities by the secretary to the committee.

Some joint committees are serviced by the Department of the Senate. In those instances the role and powers of the President of the Senate are similar to those of the Speaker.

### Deputy Chairman

Most resolutions of appointment now provide for a deputy chairman to be elected by the committee.<sup>71</sup> However, it has been provided on other occasions that the chairman appoint a member of the committee as deputy chairman 'from time to time', that is, as circumstances demand. The same member is not necessarily appointed each time.<sup>72</sup>

The deputy chairman, whether appointed or elected, is normally an opposition member. The resolution of appointment of the Joint Committee on the Parliamentary Committee System in fact directed that the committee elect as deputy chairman one of

68 *Public Service Act* 1922, s. 9; see also Ch. on 'The Speaker and Officers of the House'.

71 Standing Committee on Expenditure, VP 1980-81/51.

69 Finance Regulation 48.

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

70 H.R. Deb. (29.3.44)2203-24; S. Deb. (30.3.44)2281-91.

the members nominated by the Leader of the Opposition. He was also to be a member from a different House than the chairman.<sup>73</sup>

Immediately upon his election at the committee's first meeting, the chairman conducts the election of a deputy chairman, if it is required by the resolution of appointment. The procedure is the same as for the election of the Chairman of Committees.<sup>74</sup>

The resolution of appointment normally provides that the deputy chairman shall perform the duties of the chairman at any time when the chairman is not present at a meeting of the committee. It is also provided that at any time when the chairman and deputy chairman are not present the committee shall elect another member to perform the duties of the chairman at that meeting.<sup>75</sup>

## Meeting procedures

### *Sittings*

A committee may adjourn from time to time and may sit during any sittings or adjournment of the House.<sup>76</sup> Committees of the House make much use of meetings during sittings of the House (although interrupted from time to time by calls for divisions or quorums in the House). Most Senate committees need the authorisation of the Senate to meet during sittings of the Senate and with most joint committees this Senate rule applies so as to prevent meetings during Senate sittings.

Committees normally adjourn to an agreed date or to a date to be fixed by the chairman. If a meeting is known to be the committee's last, it adjourns sine die. If the committee adjourns to a specific date, and a change in the date is subsequently found to be necessary, it is incumbent upon the chairman to ensure that members are notified and given reasonable notice of the new date which is fixed by the chairman. (For the practice in joint committees, particularly in regard to the initiation of meetings by committee members, see p. 591.)

If there is disagreement within the committee concerning the appropriateness of adjourning at a particular time, the matter should be determined by resolution of the committee. However, in circumstances of grave disorder, the chairman may suspend or adjourn the meeting without putting a question. These practices reflect those of the House itself.<sup>77</sup>

### *Committee meetings outside Parliament House*

Resolutions of appointment usually authorise committees to move from place to place. Without this authorisation a committee can only meet outside Parliament House, Canberra, by special order of the House.<sup>78</sup> In 1968, 2 such orders had to be made by both Houses in relation to the Joint Committee on the Australian Capital Territory whose resolution of appointment did not contain this authorisation. Each motion passed by the Houses limited the authorisation to the committee's current inquiry.<sup>79</sup> The committee's resolution of appointment was amended soon afterwards to avoid the need for these cumbersome procedures.<sup>80</sup>

73 VP 1976-77/59-60.

77 S.O.s 49, 308.

74 S.O. 13. See Ch. on 'The Speaker and Officers of the House'.

78 S.O. 333.

75 VP 1980-81/51.

79 VP 1968-69/44,53,329,339.

76 S.O. 333.

80 VP 1968-69/344,356.

On relatively rare occasions, committees, or their sub-committees, are permitted to travel overseas. The main principle to be considered, in relation to a committee travelling overseas, is that the House, and therefore its committees, have no jurisdiction outside Australia. It has been considered proper for members of a committee, as a group, to make inquiries abroad and to have regard to the results of those inquiries, provided they do not purport to sit as a committee and exercise the powers delegated by the House. Sub-committees of the Joint Committee on the Parliamentary Committee System and the Standing Committee on Environment and Conservation travelled overseas in 1975. Neither held formal proceedings, but informal discussions were held and inspections undertaken. In 1968, government approval was given for overseas travel by a 'study group' of members of the Joint Select Committee on the New and Permanent Parliament House. The committee's report referred to the group's overseas visit as 'the Committee's overseas inquiry'.<sup>81</sup> Leave of the House was not sought in any of the above cases.

These practices have probably been overly cautious.<sup>82</sup> It would appear that provided a committee did not attempt to exercise its powers to administer oaths, compel the giving of evidence, and so on, it could sit as a committee overseas and, with the consent of witnesses, have proceedings transcribed and published.<sup>83</sup> As proceedings would almost certainly not be privileged, witnesses would need to be informed accordingly. It would seem improper for a committee to sit, as a committee, in a foreign country without first seeking the consent of that country's government.

House committees have taken evidence on oath in Australian external Territories. For example, a sub-committee of the Standing Committee on Environment and Conservation took evidence on Christmas Island, and the Select Committee on Aircraft Noise did so in the Territory of Papua and New Guinea in 1969.

#### *Inspections*

In addition to gathering formal evidence, committees frequently undertake visits, or inspections, at which informal discussions take place. Such inspections permit members to familiarise themselves with places, processes, and so on, which are important to their inquiries but which cannot be adequately described in formal evidence.

#### *Quorum*

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

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

If, after the lapse of 15 minutes from the time appointed for the meeting of a committee, there is not a quorum, the Members present may retire, and their names shall be entered on the minutes; and the clerk attending the committee shall issue notices for the next meeting.<sup>84</sup>

If, after a committee has proceeded to business, the number of members present falls below a quorum, the chairman must immediately suspend the proceedings until a quorum is present or, after a reasonable period, adjourn the meeting.<sup>85</sup> This requirement is applied with common sense; and a meeting is not suspended if the quorum

<sup>81</sup> PP 32(1970)13.

*The Parliamentarian* L11, 1, 1971, p. 10.

<sup>82</sup> For House of Commons practice, see *May*, pp. 643-4.

<sup>84</sup> S.O. 329.

For Senate practice, see *Odgers*, p. 497.

<sup>85</sup> S.O. 328.

<sup>83</sup> See Sir Barnett Cocks, 'Parliament Goes Abroad'.

lapses when members leave the room for short periods. However, no vote can be taken during these periods.

The standing orders specify that the quorum of a select committee shall be 3<sup>86</sup> but this requirement may be varied by the resolution of appointment. The Standing Committees on Aboriginal Affairs, Environment and Conservation, and Road Safety, each of which has a membership of 8, all have a quorum of 3 as there is no specific provision in their resolutions of appointment. The Standing Committee on Expenditure, consisting of 12 members, has a quorum of 5. The Joint Committee on Foreign Affairs and Defence (21 members) has a quorum of 7 as has the Joint Standing Committee on the New Parliament House (15 members). No quorum requirement is set down in the resolution appointing the Joint Committee on the Australian Capital Territory (10 members), and it has therefore fixed its quorum at 3, pursuant to Senate standing order 353.

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

A Member of the House who is not a member of a particular committee may be present when it is examining witnesses but must withdraw if requested to do so by the chairman or any member of the committee and must always withdraw when the committee is deliberating.<sup>87</sup> When present at a hearing the Member cannot put questions to witnesses or take any other part in the formal proceedings.<sup>88</sup> These restrictions can only be removed by a provision in the committee's resolution of appointment or by special order of the House. By comparison the relevant Senate standing order relating to its legislative and general purpose standing committees states:

A Senator, though not a member of a Standing Committee, may participate in its public sessions and question witnesses, unless the Committee orders otherwise, but shall not vote.<sup>89</sup>

#### *Strangers*

Standing order 337 provides:

When a committee is examining witnesses, strangers may be admitted, but shall be excluded at the request of any Member, or at the discretion of the chairman of the committee, and shall always be excluded when the committee is deliberating.

In 1976, the Speaker wrote to all chairman of committees discouraging the attendance of Members' staff at other than public meetings of a committee or at committee inspections. The Speaker indicated that the provisions of the standing orders concerning the confidentiality of committee proceedings<sup>90</sup> militate against any person, other than a member of a committee or an officer of the House, being involved in committee proceedings which are not open to the public.

#### *Secret committees*

No strangers, or Members who are not members of the committee, may be admitted at any time to a secret committee.<sup>91</sup> No such committee has ever been established by either House and the last one established in the House of Commons was in 1857. A secret committee was established by the Commons when, in the opinion of the House, the nature of the inquiry appeared to require such a course.<sup>92</sup> (See p. 638, for the unusual secrecy provisions applied initially to the Joint Committee on Foreign Affairs.)

<sup>86</sup> S.O. 328.

<sup>90</sup> S.O.s 337, 338, 340.

<sup>87</sup> S.O. 338.

<sup>91</sup> S.O. 339.

<sup>88</sup> May, p. 648.

<sup>92</sup> May, pp. 648-9.

<sup>89</sup> Senate S.O. 36AA(9).

*Procedures at hearings*

Hearings are normally held in public but at the committee's discretion they may be held in camera. Authority to conduct public hearings is contained in the standing order which provides that when a committee is examining witnesses, strangers may be admitted.<sup>93</sup> Hearings are frequently attended by the general public and by representatives of the media. It is standard practice for the committee secretariat to notify the media in advance of proposed hearings and to advise individuals or organisations who have asked to be informed.

The chairman may open a hearing with a brief statement of its purpose and the background to it. He may also outline the procedures to be followed by the committee. He then calls to the table the first witness or witnesses who may be required by the secretary to make an oath or affirmation (*see* p. 626). The witness then sits at the table and is usually asked to state his full name and the capacity in which he is appearing before the committee, the part he played in preparation of the submission on which he is being examined, and whether he wishes to propose any amendment to the submission (*see* p. 623). If the committee so agrees, the submission is taken as read and ordered to be incorporated in the transcript of evidence. However, if the committee has not had an opportunity to read a submission in advance and it is relatively brief, the witness may be required to read the submission to the committee. Those submissions, or parts of submissions, which are not to be published, are not incorporated in the transcript of evidence (*see* p. 636). Before questions are put by committee members, the witness may be permitted to make a short statement.

In examining a witness, the chairman first puts, in an uninterrupted series, all questions he deems essential, according to the mode of procedure agreed on by the committee. The chairman then calls on each other member, in turn, to put any other questions. The name of the member asking the question of a witness is noted and prefixed to the question in the transcript of evidence.<sup>94</sup> While procedures vary to some extent between committees, all operate on the principle that questions are asked and answered through the chair and in an orderly manner. All members are given an equal opportunity to put questions to the witness.

A member of the committee or the witness may object to a question in which case the chairman decides whether the witness should answer. If there is any dissent from the chairman's decision, the chairman will suspend the public hearing and the witness (and other strangers) withdraws while the committee determines the matter, by vote if necessary, in private.<sup>95</sup> The committee may insist on the question being answered (*see* p. 615).

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

No person other than a member of the committee may question a witness during examination. No witness may question a member or any other person present but he may ask for clarification of a question.

Documents tendered as evidence, including maps, diagrams, or other illustrated and written material, may be incorporated in the transcript of evidence or included in the committee's records as exhibits (*see* p. 624). Where there is no objection to the incorporation of material in the transcript, the chairman usually so orders. Hansard prepares a written transcript of evidence taken at hearings. The transcript includes submissions and exhibits ordered to be incorporated. Witnesses are given an opportunity to correct errors of fact in the transcript.

<sup>93</sup> S.O. 337.

<sup>94</sup> S.O. 336.

<sup>95</sup> S.O. 366.

It is customary to publish evidence taken at public hearings (see p. 636) but witnesses may request that their evidence be taken in camera and that documents submitted be treated as confidential. Such requests are usually but not necessarily granted (see p. 637).

#### *Seminars*

In certain circumstances a committee may consider that procedures available for taking evidence at hearings are too formal to bring forth the required information. The standing orders only permit witnesses to provide information in response to questions from members. Witnesses may not cross-examine each other. Occasionally such cross-examination may assist the committee in making a balanced assessment. The committee may then resort to the use of private round table discussions, or seminars. The use of seminars also allows expert witnesses to comment on the ideas of others and to discuss evidence already taken by the committee, thus providing information not brought out by formal questioning. A seminar can also be a useful way of obtaining the comments of experts on possible recommendations. It also allows committee staff to participate directly in the discussion and, where necessary, can be used to assess potential specialist advisers.

Seminars are not regarded as official proceedings, because they are not conducted in accordance with the standing orders. Therefore, the proceedings do not attract parliamentary privilege. Further, the information obtained in seminars does not have the status of evidence and may not be used directly in preparing the committee's report. If the committee wishes to use factual data given at seminars, the witness must be called formally and the information given at either an in camera or public hearing, depending on the circumstances. Seminars cannot be used as an alternative to public hearings but only to complement them and are only resorted to if there is no standard procedure for obtaining the information required by the committee. A Hansard record of the proceedings may be taken but only for committee records, not for publication. Such a transcript is included in the committee's records as a confidential exhibit, by resolution of the committee.

In 1975, the Standing Committee on Road Safety and, in 1977, the Standing Committee on Environment and Conservation used private round table discussions between committee members, specialist advisers, expert witnesses and the secretariat as an adjunct to taking evidence at public hearings.

#### *Disorder*

Disorderly or disrespectful conduct by strangers, including witnesses, during a public or private meeting of a committee constitutes a contempt. In this regard a Member, who is not a member of the committee, is on the same footing as a stranger. Examples of disorderly or disrespectful conduct include:

- interrupting or disturbing committee proceedings;
- remaining after strangers have been ordered to withdraw;
- appearing before a committee in a state of intoxication, and
- using insulting or unseemly language before a committee.<sup>96</sup>

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

96 *May*, pp. 136-8.

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

In 1969, a public hearing by a sub-committee of the House of Commons Select Committee on Education and Science was held at Essex University. During the hearing the proceedings were constantly interrupted by shouting and barracking from the large audience. The sub-committee persisted in taking evidence for some time but finally had to adjourn because of the uproar and disorder. Members of the audience then tried to prevent sub-committee members from leaving the room. The incidents were referred to the Committee of Privileges which held that the incidents disclosed a contempt of the House. Responsibility for dealing with those who created the disorder was left to the university authorities. The Committee of Privileges noted that neither the House nor a select committee has any power to protect select committees outside the Palace of Westminster. The Serjeant-at-Arms and his officers are bound to maintain order within the precincts at Westminster under the authority of the Speaker, but their duties do not extend beyond the precincts. Outside the precincts the Serjeant-at-Arms would have none of the authority he exercises at Westminster. The select committee was advised that assistance which might be given by the police at meetings outside the Palace of Westminster was limited to occasions when offences against persons or property are committed, or are likely to be committed. Even if they were present, the police would not intervene to prevent heckling. The Committee of Privileges therefore advised, *inter alia*, that where it is anticipated that disorderly conduct may impede the work of a select committee meeting outside the parliamentary precincts, its proceedings should not be in public. It was considered that Members, when acting as representatives of the House, should not expose themselves to situations they could not control and which could reflect on the authority of Parliament.<sup>97</sup> This advice has equal application to House of Representatives committees.

#### *Motions and divisions*

The standing orders are silent on the moving of motions and voting in committees except to state that the chairman has a casting vote only<sup>98</sup> and that motions and the details of divisions are to be recorded<sup>99</sup> (*see also* procedures for consideration of draft reports, p. 579).

Following the procedure of the committee of the whole, motions and amendments do not require a seconder.<sup>100</sup> The one exception is the nomination of a member for election as chairman because in that case the procedures for the election of the Speaker are followed.

Questions are determined on division by a majority of votes. While the chairman of a House of Representatives committee exercises a casting vote only<sup>101</sup>, the voting rights of chairmen of joint committees vary:

- Joint Committee on the Australian Capital Territory—deliberative vote only (Senate S.O. 298);
- Joint Committee on Foreign Affairs and Defence—deliberative vote (Senate S.O. 298) and a casting vote (in accordance with resolution of appointment), and

<sup>97</sup> *House of Commons Committee of Privileges*, 2nd Report, Session 1968-69, H.C. 308(1968-69).

<sup>98</sup> S.O. 331.

<sup>99</sup> S.O. 332.

<sup>100</sup> S.O. 279.

<sup>101</sup> For an exception see Select Committee on Aircraft Noise where the chairman had a deliberative vote and, in the event of an equality of votes, also had a casting vote, VP 1969-70/15-17.

• Joint Standing Committee on the New Parliament House:

- in matters of procedure, each of the joint chairmen, whether or not occupying the chair, has a deliberative vote and, in the event of an equality of voting, the chairman occupying the chair has a casting vote, and
- in matters other than procedure, each of the chairmen, whether or not occupying the chair, has a deliberative vote only (in accordance with resolution of appointment).

As in the committee of the whole, a division is not proceeded with unless more than one member has called for a division. In such instances the member may inform the chairman that he wishes his dissent to be recorded in the minutes. This request is automatically granted.<sup>102</sup>

It is customary for committees to be constituted so as to ensure that the voting strength of government members exceeds that of opposition members. In 1974, the resolution of appointment of the Select Committee on Specific Learning Difficulties provided for the Government and Opposition to be equally represented on the committee. The result of this would have been that, if a government member had been elected chairman, his lack of a deliberative vote would have resulted in the voting strength of the Opposition exceeding that of the Government. The Government found this unacceptable and later amended the resolution to provide for an additional government member.<sup>103</sup>

*Minutes of proceedings*

The minutes of a committee record the names of members attending each meeting, every motion or amendment moved in the committee and the name of the mover. The chairman must record the names of members voting in a division, indicating on which side of the question they respectively vote.<sup>104</sup> In practice this is recorded in the minutes by the secretary. The minutes also record the time, date and place of each meeting, the attendance of specialist advisers, the names of any witnesses examined, the documents formally received and any action taken in relation to them, and the time, date and place of the next proposed meeting.

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

The chairman confirms the minutes of a preceding meeting by signing them. The committee secretary may certify as correct the unconfirmed minutes of a final meeting of a committee.

Minutes are required to be tabled in the House with the relevant report.<sup>105</sup> If a committee is conducting more than one inquiry, extracts from its minutes relating only to the inquiry on which it is reporting should be tabled. A corrected transcript of the published evidence taken by the committee should also be tabled. This procedure applies to interim and unfinished inquiry reports as well as final reports. If the minutes show disagreement or divisions on the content of a report, there are advantages in having them printed as an appendix to the committee's report. Publication of minutes is one method of drawing attention to dissent, and may overcome the need for a separate dissenting report. Reports by the Committee of Privileges and the report by the Select Committee on Pharmaceutical Benefits exemplify this approach.<sup>106</sup>

Minutes, like all papers and documents presented to the House, are considered public once they are tabled. If not ordered to be printed, they may be inspected at the

102 S.O.s 193, 277.

103 VP 1974-75/286-7,380; H.R. Deb. (28.11.74) 4233.

104 S.O. 332.

105 S.O. 347.

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

offices of the House at any time by Members and, with the permission of the Speaker, by other persons, and copies or extracts may be made.<sup>107</sup> Transcripts of evidence tabled with the minutes are subject to the same provisions. Therefore, a committee should not table evidence which it does not want to be made public.

### Confidentiality of proceedings and records

The confidentiality made possible by a committee's power to meet in private is bolstered by the provision in the standing orders that no member of the committee nor any other person, unless authorised by the House, may disclose or publish proceedings of the committee.<sup>108</sup> This provision covers private committee deliberations, the minutes which record them and committee files. Any unauthorised breach of this confidentiality may be dealt with by the House as a breach of privilege or a contempt.<sup>109</sup>

The files and other records of a committee are confidential to it and may be made available to others only by order of the committee, or of the House itself or, in the limited circumstances defined below, by authority of the Speaker. It is now standard practice to include in a resolution of appointment the power to consider and make use of the records and evidence of the committee's predecessors in earlier Parliaments or sessions.<sup>110</sup> Without such authority the Standing Committee on Environment and Conservation in the 32nd Parliament, for example, would not have had access to the inquiry records of the committee of the same name in the 31st Parliament.

In 1980, the House passed a resolution delegating to the Speaker some of its authority in relation to the release of committee records. The Speaker may permit any person to examine and take extracts from evidence submitted to, or records of, committees provided that:

- the evidence or records have been in the custody of the House for at least 10 years;
- the evidence was not taken in camera or submitted on a confidential or restricted basis, and
- the Speaker reports to the House the nature of the documents made available and the persons to whom they are made available.

Subject to the same conditions, the Speaker and the President of the Senate have been authorised to release records of joint committees, and any such release must be reported to both Houses.<sup>111</sup>

### Sub-committees

A committee cannot delegate any of its powers or functions to sub-committees unless so authorised by the House. Without this authority committees may only appoint sub-committees for purposes which do not constitute a delegation of authority, such as the drafting of reports.<sup>112</sup>

It is now standard practice for a resolution of appointment to authorise a committee to appoint sub-committees. Even with this authorisation a committee cannot confer any powers which it has not been expressly empowered to confer. A committee may make orders regulating the transaction of business by its sub-committees.<sup>113</sup>

<sup>107</sup> S.O. 320. See Ch. on 'Papers and documents'.

<sup>108</sup> S.O. 340. Resolutions of appointment authorise committees to publish any evidence given before them and any document presented to them, VP 1980-81/48.

<sup>109</sup> *May*, p. 651.

<sup>110</sup> Standing Committee on Environment and Conservation, VP 1980-81/51.

<sup>111</sup> VP 1978-80/1539-40; J 1978-80/1381.

<sup>112</sup> *May*, p. 652.

<sup>113</sup> *May*, p. 653.

A resolution of appointment now usually provides for:

- the minimum number of members to constitute a sub-committee;
- the chairman of a sub-committee to be appointed by the committee and to have a casting vote only;
- the reference by the committee to sub-committees of matters which the committee is empowered to examine;
- a majority of sub-committee members to constitute a quorum of that sub-committee;
- sub-committees to have power to send for persons, papers and records;
- sub-committees to have power to move from place to place and to sit during any sittings or adjournment of the House;
- sub-committees to have power to authorise publication of evidence given before them or any documents presented to them;
- sub-committees to have power to consider and make use of evidence and records of predecessors of the committee in earlier sessions or Parliaments, and
- committee members, not being members of the sub-committee, to take part in the public proceedings of that sub-committee but not to vote or move any motion or constitute a quorum.<sup>114</sup>

In resolving to establish each sub-committee, the committee states the purpose for which it is being established, the members who are to constitute it and, if the resolution of appointment so requires, the committee also appoints a member to be chairman of the sub-committee. The sub-committee cannot exceed this authority without proper authorisation from the committee.

A sub-committee may be appointed, for example, to:

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

Standing committees use sub-committees extensively to conduct full-scale inquiries. A sub-committee is required to keep minutes of each meeting and submit them with its report which is submitted to the committee by which it was appointed.<sup>115</sup> A sub-committee may not report directly to the House.

In 1975, the Joint Committee on the Parliamentary Committee System appointed a sub-committee to travel overseas in connection with its inquiry. The sub-committee submitted to the committee a report which drew together the evidence which was taken by the full committee in Australia and information obtained by the sub-committee in its discussions and observations overseas. On the sub-committee's recommendation the committee tabled this lengthy report, in effect as an appendix to the committee's 2-page report. The committee did not express any view on the sub-committee's conclusions and recommendations. The purpose of the arrangement was to seek comment on the report for the consideration of the full committee.<sup>116</sup> A member of the committee presented a dissenting report in which he stated:

It is my opinion, and I suspect that it is the opinion shared by many members of the Committee, that when a sub-committee is sent to perform a task it should not be obliged to report as an isolated unit; rather it should present its findings to its parent body, have them ratified and then present them to the Parliament.<sup>117</sup>

<sup>114</sup> Standing Committee on Expenditure, VP 1980-81/51-2.

<sup>116</sup> PP 275(1975)xi.

<sup>117</sup> PP 275(1975)95.

<sup>115</sup> *May*, p. 654.

He also strongly opposed the tabling by committees of reports which amount only to discussion papers. He concluded that the committee had 'abrogated its responsibilities'.<sup>118</sup>

At the dissolution of both Houses on 11 November 1975 the Standing Committee on Road Safety was about to consider its report on passenger motor vehicle safety following an inquiry conducted over the previous 18 months. On the reappointment of the committee in the new Parliament the committee took the view that it had a duty to report to the House without further delay in order that recommendations and conclusions may be known and put into effect. The committee therefore appointed a sub-committee, consisting of 3 committee members who were members of the previous committee, to consider the draft report. The sub-committee's report was adopted by the new committee but in doing so pointed out that the report did not necessarily convey specific views of committee members not being members of the sub-committee.<sup>119</sup>

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

A dissent cannot be added to a sub-committee report. A member wishing to dissent may acquaint the committee with his views and attempt to persuade it to amend the report accordingly when it is under consideration. If he fails to convince the committee, the member may add a protest or dissent to the committee's report.

## Conferences with committees of the Senate

The Committee of Privileges and committees appointed by resolution of the House have no power to confer with committees of the Senate without leave of the House.<sup>120</sup> Senate standing orders contain similar provisions.<sup>121</sup> There is no instance of leave of the House being given for this purpose. The resolutions of appointment of some committees have empowered them 'to confer with a similar committee of the Senate'.<sup>122</sup>

If leave of the House was granted for a House committee to confer with a Senate committee, there is provision in the standing orders for:

- a message to be sent to the Senate requesting it to concur in the proposal;
- the committee to confer freely by word of mouth with the Senate committee, and
- the committee to report in writing to the House the proceedings of the conference.<sup>123</sup>

## Reports

### *Frequency of reporting*

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

<sup>118</sup> PP 275(1975)96-7.

<sup>119</sup> PP 156(1976)xii.

<sup>120</sup> S.O.s 350, 26.

<sup>121</sup> Senate S.O.s 319-22.

<sup>122</sup> Standing Committee on Aboriginal Affairs, VP 1974-75/53-4; Standing Committee on Environment and Conservation, VP 1974-75/54-5.

<sup>123</sup> S.O.s 351, 352, 353.

A committee without the power to report from time to time may, however, seek leave of the House to submit an 'interim' or 'special' report.<sup>124</sup> A special report is one in which a committee draws attention to matters incidental to its inquiry and which relates to its powers, functions or proceedings.<sup>125</sup> For example, in 1955, the Committee of Privileges submitted a special report seeking an extension of its reference<sup>126</sup> and, in 1976, the Joint Committee on the Parliamentary Committee System presented a special report seeking an amendment to its powers to elect a chairman and deputy chairman.<sup>127</sup>

Instead of presenting a single report on a wide-ranging inquiry, a committee, properly authorised, may submit one or more interim reports. Such reports may deal with progress on the inquiry as a whole or contain the committee's recommendations on facets of the inquiry or both.<sup>128</sup>

If possible, committees should report to the House their inability to complete an inquiry before prorogation or dissolution of the House (see p. 584).

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

#### *Drafting and consideration of reports*

It is the duty of the chairman of a committee to prepare a draft report.<sup>129</sup> In this task it is usual practice to call on the assistance of the committee secretariat.

If, at the meeting at which the chairman formally brings up his draft report for the committee's consideration, any other member submits a draft report, the committee must first decide upon which report it will proceed.<sup>130</sup>

The procedures for the consideration of a draft report are set down in standing order 343:

The chairman shall read to the committee, at a meeting convened for the purpose, the whole of his draft report, which may at once be considered, but, if desired by any Member it shall be printed and circulated amongst the committee and a subsequent day fixed for its consideration. In considering the report, the chairman shall read it paragraph by paragraph, proposing the question to the committee at the end of each paragraph — "That it do stand part of the report". A Member objecting to any portion of the report shall move his amendment at the time the paragraph he wishes to amend is under consideration. A protest or dissent may be added to the report.

In practice the report is not read to the committee but circulated in advance. The committee may consider groups of paragraphs together, by leave.

Amendments may be proposed by any member and are determined in the same way as amendments to a bill in committee of the whole. The committee may divide on any question. After the draft report has been considered, all or part of it may be reconsidered and amended.<sup>131</sup>

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

124 S.O. 341. The standing order also provides that, by leave, the committee may table the report with or without the evidence, or the evidence only.

125 *May*, p. 661.

126 VP 1954-55/225-6,239.

127 VP 1976-77/119.

128 *Interim Report of the Select Committee on Tourism*, PP 349(1977); 'Conservation and commercial

exploitation of kangaroos', *Interim Report from the Select Committee on Wildlife Conservation*, PP 219(1971).

129 S.O. 342.

130 S.O. 344.

131 S.O. 345.

### *Protest or dissent*

Since 1978, the standing orders have permitted committee members to add a protest or dissent to the committee's report.<sup>132</sup> By then it had become common practice to include this provision in resolutions of appointment.<sup>133</sup> The difference, if any, between a 'protest' and a 'dissent' is not strictly defined.

A member who proposes to present a protest or dissent is not required to seek authorisation from the committee, as this power resides with individual members, not with the committee. Accordingly, the protest or dissent need not be shown to the chairman or other members of the committee, but not to do so would seem to be a courtesy.

A protest or dissent must be relevant to the committee's terms of reference, as the authority delegated to the committee and its members is limited to those areas defined by the terms of reference. The words 'protest' and 'dissent' imply some relationship with the committee's report. A protest (which is a rarely used form) or dissent is usually appended to the committee's report, and it may be signed by more than one member.<sup>134</sup>

Alternative methods of recording dissent are:

- submitting an alternative draft report to the committee<sup>135</sup>;
- moving amendments to the draft report, the voting on which is recorded in the minutes which are subsequently tabled and thereby become public<sup>136</sup>;
- making a statement in the House, by leave, when the report is tabled, or
- stating the dissent or protest in debate on any motion moved in relation to the report.

In 1975, a member of the Joint Committee on Foreign Affairs and Defence was given leave to make a statement following the tabling of a report by the committee. He stated that he had been overseas when the final draft and the dissenting report were prepared and completed. He had not been able to read the report or the dissenting report before their publication. He concluded:

I find that I dissent from both the report and the dissenting report but my dissent is moderate.

He did not elaborate on his dissent.<sup>137</sup> In 1980, a Member who similarly was unable to participate in the consideration of a report by the Standing Committee on Road Safety indicated, when the report was tabled, that he disagreed with 2 of its recommendations and gave his reasons.<sup>138</sup>

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

If a committee is unable to agree upon a report, it may present a special report to that effect, with its minutes and the transcript of evidence. *May* states that the committee may simply table the minutes and evidence without any observations<sup>139</sup>, but this action would seem undesirable even if the circumstances of the committee's inability to agree were widely known. The committee should still report the circumstances to the House if only as a matter of form and to place them on record.

<sup>132</sup> S.O. 343. Standing order amended on 22 February 1978, VP 1978-80/19-20.

<sup>133</sup> Select Committee on Tourism, VP 1977/10-11; Standing Committee on Aboriginal Affairs, VP 1976-77/65-6; Joint Committee on the Australian Capital Territory, VP 1956-57/368-9,371.

<sup>134</sup> PP 264(1977)71-2. In this instance one member added, separately, a protest and a dissent.

<sup>135</sup> S.O. 344.

<sup>136</sup> S.O.s 347, 320. Members of the Select Committee on Pharmaceutical Benefits had no power to add a protest or dissent to the committee's report. Their dissent was shown in the minutes which were printed as part of the report, PP 73(1972)95-147.

<sup>137</sup> H.R. Deb. (27.5.75)2841.

<sup>138</sup> H.R. Deb. (11.9.80)1188-9.

<sup>139</sup> *May*, p. 659.

### *Tabling of reports*

Committee reports may be presented at any time when other business is not before the House.<sup>140</sup> A copy of the report, signed by the chairman, and the committee's minutes of proceedings are tabled in the House by the chairman.<sup>141</sup> A corrected copy of the transcript of evidence, other than confidential evidence, should also be tabled. In the absence of the chairman, another committee member may table the report. In the case of a joint committee, if the chairman is a Senator, the report and associated papers are tabled in the House by the deputy chairman, if a Member of the House, or another Member as determined by the committee. Joint committee reports are tabled in both Houses, usually on the same day. Occasionally reports are tabled in one House before being tabled in the other. For example, the report of the Joint Committee on Prices on household soaps and detergents was tabled in the Senate on 15 August 1974 and in the House on 19 September, as the House was not sitting when the report was tabled in the Senate.<sup>142</sup>

It is normal practice for the Member who presents a report to move that the report, with or without the accompanying documents, be printed.<sup>143</sup> He may also be granted leave to make a brief statement on the report and this may be followed by statements, by leave, from other Members. If a Minister wishes to move a motion that the House take note of the report, or if a Minister or Member wishes to move that the report be adopted or agreed to, leave is required. The reason for leave being required for the above actions is because the standing orders state that, upon the presentation of a report, no discussion of the subject matter may take place. It is also provided that the consideration of the report may be set down for a subsequent sitting when a specific motion without notice in connection with it may be moved.<sup>144</sup>

Upon the presentation of a report, it may be read to the House by the Member presenting it.<sup>145</sup> In 1955, the House ordered that the Clerk read the special report of the Committee of Privileges relating to the *Bankstown Observer* case.<sup>146</sup>

### *Amendment of tabled reports*

Minor amendments to tabled copies of committee reports may be made with the approval of the Clerk of the House. Amendments are initialled by the committee secretary. In cases of more substantial but still relatively minor amendments, the committee chairman, or even the whole committee, would have to approve them. In the case of amendments of substance a further report would have to be presented or, in the case of a select committee, recommittal of the report, by the House to the committee, would have to be sought. Alternatively, the chairman could make a statement in the House.

### *Premature disclosure or publication*

Standing order 340 provides, *inter alia* (see p. 636), that committee reports may not be disclosed or published by any member of the committee or by any other person, prior to presentation to the House without the authority of the House.<sup>147</sup> Contravention of this rule is a breach of privilege.<sup>148</sup> This is a blanket prohibition which precludes disclosure of all or part of a report, or of its contents.

<sup>140</sup> S.O. 102.

<sup>145</sup> S.O. 347.

<sup>141</sup> S.O.s 346, 347.

<sup>146</sup> VP 1954-55/225.

<sup>142</sup> J 1974-75/155; VP 1974-75/177.

<sup>147</sup> S.O. 340.

<sup>143</sup> S.O. 348.

<sup>148</sup> *May*, p. 663.

<sup>144</sup> S.O. 348.

In 1979, the House resolved that, if the House was not sitting when the Standing Committee on Expenditure had completed its current inquiry, the committee was authorised to send the report to the Speaker, or, in his absence, to the Chairman of Committees, who in turn was authorised to give directions for its printing and circulation.<sup>149</sup> The report was in fact processed in this way and was subsequently tabled in the House.<sup>150</sup>

In 1973, the House agreed to a motion moved by the chairman of the Joint Committee on Prices to refer to the Committee of Privileges a newspaper article relating to recommendations in a report by the committee which at that time had not been presented to the House, and the publication of which had not been authorised by the committee or either House. The matter was raised on the day the report was tabled, immediately after the adjournment of the debate on a motion to take note of the report.<sup>151</sup> The House concurred in the finding of the Committee of Privileges that a breach of privilege and a contempt of the House had occurred and that the editor and journalist concerned were both guilty of contempt of the House. In view of the editor's subsequent death, the House resolved to take no further action on the committee's recommendation seeking publication of an apology. The House resolved, however, that the Speaker communicate with the President of the Parliamentary Press Gallery requesting him to bring to the notice of all journalists in the gallery the long-standing parliamentary rule applying to the premature publication or disclosure of committee proceedings, evidence and reports.<sup>152</sup>

Committees have chosen, from time to time, to take no action on press articles partially disclosing the contents of their reports or commenting on committee deliberations during the drafting of reports. It has been thought counter-productive to give further publicity and credence to such articles.

In 1977, the Clerk of the House advised the Standing Committee on Expenditure that he did not consider it a breach of the spirit or intention of the standing orders for the committee to supply to government departments, on a confidential basis, a document setting out its preliminary conclusions. He noted that the committee's intention was to obtain a considered response from the departments in camera and stated that he considered this was part of the committee's investigative or questioning process.

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

The Committee have power, in cases where considerations of National Security preclude the publication of any recommendations and of the arguments on which they are based, or both, to address a memorandum to the Prime Minister for the consideration of the War Cabinet, but, on every occasion when the Committee exercises this power, the Committee shall report to the Parliament accordingly.<sup>153</sup>

In 1952, the Joint Committee on Foreign Affairs was directed, by its resolution of appointment, to forward its reports to the Minister for External Affairs. On every occasion when it did so, the committee was required to inform the Parliament that it

<sup>149</sup> VP 1978-80/1205.

<sup>150</sup> VP 1978-80/1254.

<sup>151</sup> VP 1973-74/368; H.R. Deb. (20.9.73)1347. The chairman, in moving the motion, was giving effect to a committee resolution of the previous day.

<sup>152</sup> VP 1973-74/502,518. 'Article published in *The Sun* 18 September 1973', *Report from the Committee of Privileges*, PP 217(1973)5. The incident was also raised in the Senate but no motion was moved for referral of the article to the Senate Committee of Privileges, S. Deb. (19.9.73)665-6.

<sup>153</sup> VP 1940-43/157-8,161. In 1955, attempts were made to have one of the committee's reports and related documents published. The report concerned allegations of fraudulent practices during the years of World War II. The Prime Minister having first agreed to table the report later declined to do so on the grounds of justice to the individuals concerned, VP 1954-55/293-4,301; H.R. Deb. (6.9.55)360-75; H.R. Deb. (13.9.55)572-6.

had reported.<sup>154</sup> In later Parliaments the committee's resolution of appointment added that, in the case of inquiries not initiated by the Minister, the committee was not authorised to report either to the Minister or to the Parliament, without the Minister's consent. It was further provided that, if opposition Members were represented on the committee, copies of its reports to the Minister were to be forwarded to the Leader of the Opposition for his confidential information.<sup>155</sup> It was left to the Minister to decide whether or not the committee's reports would be published.<sup>156</sup> These arrangements were justified on the ground of national security.

#### *Recommittal*

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

A recommittal generally takes place for some cause which sufficiently indicates to the committee what it is expected to do, and, hence, it is not usual for instructions to be given on recommittal; but the committee is to gather from the sense of the House in such proceedings what method it is to pursue. When a report is thus recommitted, the committee, with all its powers, is thereby revived.<sup>157</sup>

#### *Government responses to reports*

In 1978, the Prime Minister announced that the Government would henceforth respond formally in the Parliament to recommendations contained in parliamentary committee reports. He stated that, within 6 months of the tabling of a report, the responsible Minister would make a statement in the Parliament outlining the action the Government proposes to take in relation to the report. If the 6-month period expires during an adjournment or recess, the ministerial statement would be made at the earliest opportunity in the next sittings.<sup>158</sup> A similar procedure had been initiated earlier in relation to reports by the Standing Committee on Expenditure.<sup>159</sup>

These procedures do not apply to reports by the Joint Committee of Public Accounts, the Parliamentary Standing Committee on Public Works or the Joint Committee on the New Parliament House. Responses are given to reports by the Joint Committee on Publications resulting from its broad inquiries but not to reports by the other standing committees appointed pursuant to standing orders. The Presiding Officers have also provided responses to reports by the Joint Committee on Publications.<sup>160</sup>

In reply to a question on notice on 8 April 1981, the Speaker indicated that a number of committee reports presented to the House during the 31st Parliament had not been responded to by Ministers within 6 months of their date of tabling, and some had not been responded to at all.<sup>161</sup>

### **Effects of prorogation and dissolution**

#### *Prorogation*

For constitutional reasons committees of the House and joint committees appointed either by standing order or by resolution for the life of the Parliament, continue in existence but may not meet and transact business following prorogation.<sup>162</sup> Committees whose tenure is on a sessional basis cease to exist.

<sup>154</sup> VP 1951-53/129.

<sup>159</sup> H.R. Deb. (8.4.76)1499.

<sup>155</sup> VP 1954-55/94-5.

<sup>160</sup> VP 1978-80/1237.

<sup>156</sup> The Minister tabled the committee's first report on 11 September 1952; VP 1951-53/417.

<sup>161</sup> H.R. Deb. (8.4.81)1501.

<sup>157</sup> *May*, p. 666.

<sup>162</sup> See Ch. on 'The parliamentary calendar' for more detail; but see *Odgers*, pp. 620-5.

<sup>158</sup> H.R. Deb. (25.5.78)2465-6.

Committees, appointed by standing order or by resolution of the House, or both Houses, for the life of the Parliament, may not meet after prorogation but may meet again in the new session of the same Parliament. Inquiries commenced in the previous session are resumed without action by the House unless the subject of inquiry was referred to the committee by the House in the previous session. In such cases the effect of the reference by the House ceases and the subject must be again referred by resolution of the House.<sup>163</sup>

Select committees which are appointed on a sessional basis, that is, not for the life of a Parliament, cease to exist upon prorogation. If such a committee is to continue its activities in the new session, the committee and its membership must be re-appointed by resolution and its terms of reference renewed. If the committee wishes to use the minutes of evidence and records of the previous committee, it requires to be given that power by the House.<sup>164</sup>

The provisions of the Acts establishing each of the joint statutory committees determine that the committees are to be appointed at the commencement of each Parliament, and that their members may hold office until the House of Representatives expires by dissolution or effluxion of time. Provision is also made for these committees to meet and transact business notwithstanding any prorogation of the Parliament. The granting of these powers by means of legislation is an example of the Parliament (the Crown and the 2 Houses) exercising its authority to declare powers under section 49 of the Constitution.

#### *Dissolution*

Upon dissolution of the House all committees, including joint committees, cease to exist. Even if a committee is appointed in the next Parliament with the same terms of reference, powers and title, it is in fact a different committee.

Consequently, the House must expressly authorise such a committee to have access to the records of, and evidence taken by, the previous committee. Without that authority no such access is permissible (see p. 576).

#### *Unfinished inquiry reports*

Unfinished inquiry reports are tabled under the following circumstances:

- by select committees—prior to prorogation or dissolution if they are unable to complete their inquiries, and
- by standing committees appointed for the life of the Parliament:
  - on any reference from the House which has not been completed before prorogation, or
  - on any reference under investigation prior to a dissolution.

Relevant minutes of proceedings and corrected transcripts of evidence are tabled with the report.

The principle underlying these practices is that a committee should inform the House, before an order ceases to have effect, that it has not been or will not be able to give effect to the order.<sup>165</sup> The practice followed by the House is in accordance with the practice of the House of Commons.<sup>166</sup>

<sup>163</sup> Standing Committee on Aboriginal Affairs: Initial reference, VP 1976-77/512; re-referred, VP 1977/13; Committee of Privileges: Initial reference, VP 1973-74/619; re-referred, VP 1974/34.

<sup>164</sup> See VP 1977/10-11,16, for the reappointment of the Select Committee on Tourism and VP 1977/12,16,

for the reappointment of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory.

<sup>165</sup> Unexpected situations, such as the sudden dissolution of the House in 1974 and 1975, can make the tabling of unfinished inquiry reports impossible.

<sup>166</sup> *May*, p. 662.

Reports normally state that the committee has been unable to finish one or more particular inquiries, briefly describe the committee's activities and progress, and recommend that the House re-establish the committee or re-refer the subject of inquiry, as the case may be, in the next session.<sup>167</sup> On occasions joint committees have been able to table their reports in only one House before the Houses have risen prior to prorogation or dissolution.<sup>168</sup> When circumstances permit, committees sometimes choose to present more substantial reports, more appropriately described as 'interim' or 'progress' reports (see p. 579), before prorogation or dissolution.<sup>169</sup>

### Televising, filming and tape-recording of proceedings

There is no provision under statute or the standing orders for the televising or filming of committee proceedings. Nor is televising or filming expressly forbidden. However, a committee should not permit the televising or filming, with sound, of its hearings without the authority of the House or both Houses, as the case may be.<sup>170</sup> Because these matters are not covered by the Parliamentary Proceedings Broadcasting Act, the protection attaching to a television or film company would be similar to that enjoyed by any person who, with the approval of the committee, published a report of its proceedings, that is, qualified privilege would apply. Members of a committee and witnesses appearing before it would have the usual protection from action in respect of things said by them during the proceedings. The fact that the proceedings were telecast, or filmed, would not alter their legal position.<sup>171</sup>

In 1970, the Joint Committee on the Australian Capital Territory authorised the Australian Broadcasting Commission to film and sound record the introductory remarks of the chairman at a hearing. Filming and sound recording of the taking of evidence were expressly not permitted. The same committee, in 1976 suspended a deliberative meeting, and in 1980 suspended a public hearing, to permit a commercial television station to film without sound. On these 3 occasions the film was subsequently used in telecasts. In April and June 1968, the Joint Committee of Public Accounts authorised the Australian Broadcasting Commission to film the taking of evidence. The committee was inquiring into the administration of the Commission, and the film was subsequently used in the Commission's television news coverage. In 1974, the Standing Committee on Aboriginal Affairs permitted Film Australia to film formal proceedings, without sound, and informal proceedings (the conduct of inspections), with sound. It was agreed that the committee should have an opportunity to see the film before its release.

Important questions of principle arise in respect of televising and filming. These relate not only to the legal position of the parties involved but also, for example, to the rights and legitimate interests of witnesses and of third parties who may be the subject of comment in proceedings conducted under privilege. The atmosphere in which the televised proceedings are held might also affect a witness significantly in some cases, as experience of the televising of committee proceedings in the United States of America

167 See 'Unfinished inquiry', *Report of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory*, PP 5(1977), VP 1976-77/617, J 1976-77/588 and 'Unfinished inquiry', *Report of the Standing Committee on Aboriginal Affairs*, PP 3(1977), VP 1976-77/617.

168 The joint committees on the Northern Territory and on Prices tabled unfinished inquiry reports in the Senate prior to the double dissolution of 1974, J 1974/118.

169 'Progress in its program of inquiries', *Report of the Standing Committee on Road Safety*, PP

232(1980); VP 1978-80/1671.

170 Senate S.O. 36AA(21), adopted on 16 March 1977, provides that standing committees may authorise the televising of public hearings, at the discretion of each committee, and under such rules as the Senate may adopt. The Senate has not adopted any such rules; see also PP 168(1972)57.

171 Advice of the Attorney-General to the President of the Senate, dated 23 May 1963. See Ch. on 'Parliamentary privilege' regarding qualified privilege.

suggests. The House needs to consider carefully its position on these matters and then, if appropriate, authorise its committees to permit televising, filming and sound recording of their proceedings subject to such conditions as it may think fit to apply.

Mainly because of the potential distraction to members and witnesses, photographs of committee proceedings are not permitted without the committee's authority. Committees occasionally agree to pose for photographs before or after a hearing, during a normal suspension of their proceedings or, in special circumstances, they may briefly suspend their proceedings in order to permit photographs to be taken.

People taking film, or still photographs, should have regard to the powers of each House to deal with any act which may be held to be a breach of its privileges.

Any person permitted by a committee to attend a hearing may tape record the proceedings. It is the responsibility of the person concerned to ensure that the recording is not used improperly or in contravention of the Parliamentary Proceedings Broadcasting Act or any other statute. The laws of defamation, publication, and so on, apply to any report published from such a recording. Further, the tape recording of proceedings confers no exemption from the laws of parliamentary privilege.

### **Staff and advisers**

The Department of the House of Representatives provides a full-time secretariat for committees of the House, and most joint committees, that have an investigatory role. Because they are generally less active, the 5 standing committees appointed pursuant to standing orders are staffed on a part-time basis. Two of the joint statutory committees, Public Accounts and Public Works, are staffed by the Joint House Department and one joint committee by the Department of the Senate.

The standard full-time secretariat provided to each investigatory committee serviced by the Department of the House of Representatives comprises a committee clerk, a research officer and a steno-secretary. Allocation of additional staff depends on each committee's terms of reference, the number of inquiries the committee is conducting, the nature of its operations, its reporting targets and the incidence of sub-committee operations.

Committees may be assisted by specialist witnesses or advisers who are remunerated at agreed rates of daily fee and receive reimbursement for travelling and incidental expenses. While witnesses are rarely paid a fee, this may be approved if a committee seeks from an expert witness important evidence which, because of the time and effort required for its preparation, the committee could not reasonably expect the witness to produce without remuneration. However, it is more likely that a committee will employ specialist advisers, and their function equates more closely to that of the committee secretariat than to that of witnesses. Most are engaged only for the duration of a particular inquiry or even to perform a specific task of limited scope. They normally work on a part-time basis, as required. While the standing orders provide, in effect, that the decision to employ and pay expert witnesses or advisers lies with the committee<sup>172</sup>, this is not so in practice. Proposals must be submitted to the Speaker who may approve them subject to the availability of funds. Most committees now employ expert advisers from time to time. Officers of the public service may be seconded to the Department of the House of Representatives on a full-time or part-time basis to provide specialist advice to committees.

In 1971, the Speaker made a private ruling that specialist advisers (like committee staff) must not be permitted to question witnesses, comment on their evidence or otherwise intervene directly in formal proceedings at a public hearing. Attention was drawn to standing order 336 which, in setting down procedures for the questioning of witnesses, mentions only committee members.

<sup>172</sup> S.O. 349.

## COMMITTEES ESTABLISHED BY STANDING ORDER

### The committees

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

- Standing Orders Committee;
- Committee of Privileges;
- Library Committee;
- House Committee, and
- Publications Committee.<sup>173</sup>

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

### Appointment

It has not been the practice of the House to require a resolution for the appointment of these 5 standing committees. They commence to operate when members are appointed to them and cease to exist only upon dissolution of the House. The number of members of each committee is determined by the standing orders. The members are nominated by the parties and are appointed on a motion moved by a Minister, usually by leave.<sup>174</sup>

If a Member no longer wishes to serve on a committee, he informs the whip of his party and the chairman of the committee in writing. A motion is then moved in the House by a Minister to discharge the Member from attendance on the committee. His replacement is also appointed by motion. Normally, both the discharge and the appointment are moved simultaneously on the one motion.<sup>175</sup> It is stressed that a Member may not simply resign; he must be discharged by a motion moved in the House.<sup>176</sup>

From time to time the number of members to serve on a committee is increased. It is necessary to suspend standing orders to enable this to be done.<sup>177</sup>

### Powers and procedures

As the standing orders are largely silent on the powers and procedures of committees established pursuant to standing orders, it is established practice for them to operate in accordance with select committee procedures. Therefore, this section deals only with procedures and practices which differ from those of select committees.

### Quorum

The quorum of a standing committee is 3, unless otherwise ordered.<sup>178</sup> The standing orders are silent on the quorum for meetings at which a committee of the House confers (sits jointly) with a similar committee of the Senate. In the absence of any provision, the Library, House and Publications Committees, when conferring, have fixed their quorums at 5, provided that each House is represented in the quorum.

<sup>173</sup> S.O.s 25-28.

<sup>177</sup> VP 1962-63/39, VP 1954-55/202.

<sup>174</sup> VP 1980-81/23.

<sup>178</sup> A quorum of 5 was fixed for the Committee of Privileges and the Standing Orders Committee in 1954,

<sup>175</sup> VP 1978-80/56.

VP 1954-55/19,21.

<sup>176</sup> H.R. Deb. (5.9.05) 1919.

## Standing Orders Committee

The committee examines and reports on the operation of the standing orders and occasionally the practice of the House and recommends changes where necessary. The membership consists of the Speaker, the Chairman of Committees, the Leader of the House, the Deputy Leader of the Opposition, who are all ex officio members, and 7 other Members.<sup>179</sup> The proportion of office holders in its membership has been a significant feature of the committee. Apart from the 4 ex officio members, other office holders have traditionally been appointed.<sup>180</sup>

The committee has power to confer with the Senate Standing Orders Committee<sup>181</sup> but it has rarely done so. Any such conferences have taken place when the matters under consideration have concerned the standing orders of both Houses. On 1 August 1901, the House resolved to grant the committee power to confer with the Senate Standing Orders Committee on the then proposed standing orders.<sup>182</sup> The Senate had already granted its committee a similar power.<sup>183</sup> The committees tabled separate reports. In 1905, the Houses again resolved to authorise their Standing Orders Committees to confer and on this occasion a joint report signed by both chairmen was tabled in each House.<sup>184</sup> The committee has no power under the standing orders to send for persons, papers and records.

## Library and House Committees

The Library Committee is concerned with the operation of the Parliamentary Library service while the House Committee is concerned with the provision of services and amenities to Members in Parliament House. Both committees consist of the Speaker and 6 other members.<sup>185</sup>

Both committees have an advisory role only. Executive responsibility lies with the Speaker and the President, who are not bound by the decisions of the committees. The limited powers of members of the House Committee, particularly concerning the appointment of officers of the Joint House Department, was raised as a matter of privilege in the House in 1927.<sup>186</sup> The Speaker made a statement in which he drew attention to the statutory responsibilities of the Speaker and the President under the Public Service Act.<sup>187</sup> A brief debate followed but no further action was taken.

Both the House and Library Committees regularly exercise their power to confer with similar committees of the Senate.<sup>188</sup> For many years the Speaker has been chairman of the Joint House Committee and the President has been chairman of the Joint Library Committee.

When the 2 House committees are sitting together as the Joint House Committee, they should, generally speaking, only consider those matters which affect joint services, as each House is master of its own affairs. Recommendations affecting only one House should properly be made by the appropriate House Committee independently. In 1956 and in 1959, the House of Representatives House Committee considered and reported informally on Members' accommodation. Reports are seldom made to the House.<sup>189</sup>

<sup>179</sup> S.O. 25.

<sup>180</sup> Prime Minister Whitlam, VP 1973-74/31; Deputy Prime Minister Anthony, VP 1980-81/23.

<sup>181</sup> S.O. 25.

<sup>182</sup> VP 1901-02/116.

<sup>183</sup> J 1901-02/87.

<sup>184</sup> VP 1905/23,49; J 1905/28,39; 'Proceedings on lapsed bills', *Report of the Standing Orders Committees of the Senate and the House of Representatives*, S 2(1905) and H of R 2(1905).

<sup>185</sup> S.O. 27.

<sup>186</sup> VP 1926-28/385.

<sup>187</sup> H.R. Deb. (21.10.27) 700.

<sup>188</sup> S.O. 27.

<sup>189</sup> *But see* report by Joint House Committee on accommodation for Members of Parliament at Canberra, VP 1926-28/181; *see also* reports by the Senate House Committee concerning Senators' dress in the Senate Chamber, PP 235(1971), and provision of staff and other facilities for Members of Parliament, PP 34(1972). The Joint Library Committee reported regularly until 1926.

Neither the House Committee nor the Library Committee has the power to send for persons, papers and records.

### Publications Committee

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

- of recommending to the Houses from time to time as to what petitions and papers, which have not been ordered to be printed by either House, ought to be printed, and
- to inquire into and report on the printing, publication and distribution of parliamentary and government publications, and on such matters as are referred to it by the relevant Minister.<sup>190</sup>

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

### Committee of Privileges

The Committee of Privileges consisting of 9 members (increased to 11 by sessional order on 4 December 1980) is established to inquire into and report upon complaints of breach of privilege which may be referred to it by the House.<sup>191</sup> The committee has no power to initiate inquiries but the House may refer to the committee matters of a general nature, for example, a reference in 1979 on the use of House records in the courts.<sup>192</sup>

In practice, once the Speaker has satisfied himself that a *prima facie* case of breach of privilege or contempt has been made out, and that the matter has been raised at the earliest opportunity, precedence will be given to the Member who drew attention to the alleged breach of privilege or contempt to move a motion, usually that the matter of the complaint be referred to the Committee of Privileges. The procedure for raising and dealing with questions of privilege and details of the functions and procedures of the committee are discussed in detail in the chapter on 'Parliamentary privilege'.

## JOINT COMMITTEES ESTABLISHED BY RESOLUTION OF BOTH HOUSES

### A creature of both Houses

Joint standing and select committees are established by resolutions agreed to by both Houses and the membership consists of both Members and Senators.

The standing orders of both Houses are largely silent on the procedures to be followed by joint committees. Therefore, it has become the established practice for such committees to follow Senate select committee procedures, subject to the provisions of the resolutions appointing them and any further instructions agreed upon by both Houses. This practice is based on that at Westminster.<sup>193</sup> However, chairmen of joint committees, when seeking procedural advice, customarily approach the Presiding Officers or Clerks of both Houses.

It is essential to an understanding of joint committees to recognise that they are the creatures of both Houses. Neither House may give instructions to a joint committee independently of the other unless both Houses expressly agree to the contrary.<sup>194</sup>

<sup>190</sup> S.O. 28.

<sup>191</sup> S.O. 26.

<sup>192</sup> VP 1978-80/975.

<sup>193</sup> *May*, p. 682.

<sup>194</sup> Resolutions of appointment often provide that matters may be referred to a given joint committee by resolution of either House of Parliament, VP 1978-80/47-8,60.

A resolution by the House proposing the establishment of a joint committee defines the nature and limits of the authority delegated to the committee in the same way as a resolution appointing a committee of the House (see p. 561). However, it also includes a paragraph stating:

That a message be sent to the Senate acquainting it of this resolution and requesting that it concur and take action accordingly.<sup>195</sup>

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

- accept them<sup>196</sup>;
- reject them;
- reject them and request the Senate to reconsider them<sup>197</sup>, or
- reject them and suggest an alternative.<sup>198</sup>

In the case of a total rejection, or a failure to respond to a message, the House may choose to appoint a committee of the House with the same purposes instead.<sup>199</sup>

While most proposals for joint committees have been initiated in the House, some have originated in the Senate.<sup>200</sup>

### Types of joint committees

Joint committees are described as 'joint standing committees' or 'joint select committees'. Like committees of the House the latter are seen to have an ad hoc role and generally cease to exist upon reporting, while the former have a long-term role and members hold office for the life of a Parliament. Some committees have simply been called 'joint committees', for example, the Joint Committee on the Australian Capital Territory which could equally be called a joint standing committee. While members of the Joint Committee on Pecuniary Interests of Members of Parliament were appointed for the life of the Parliament, the committee was strictly a joint select committee in that it had a definite and limited purpose and was required to report 'within the shortest reasonable period, not later than 90 days after the members of the committee are appointed'.<sup>201</sup>

Joint statutory committees differ from those appointed by resolution, and are discussed later in this chapter (see p. 594). Most existing committees appointed by standing order are given power to confer with similar committees of the Senate, but exist independently of the Senate committees. A similar procedure was followed in the early years of the Parliament in respect of some committees which were established by resolution by each House independently but in the conduct of inquiries became in effect joint committees. For example, the House, having appointed a Select Committee in relation to Procedure in Cases of Privilege, sent a message to the Senate 'requesting it to appoint a similar Committee empowered to act conjointly with the Committee of this House' to which the Senate agreed but the joint select committee reported as a single entity.<sup>202</sup>

195 VP 1980-81/57.

196 VP 1973-74/125.

197 VP 1974-75/828-9,870.

198 VP 1973-74/139,149.

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

200 Joint Select Committee on the Family Law Act, VP 1978-80/354-5.

201 VP 1974-75/173-4,208-09.

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

## Powers and privileges

Doubts have been expressed as to whether joint committees are invested with the same powers, privileges and immunities as the committees of the 2 Houses.<sup>203</sup> This doubt exists because section 49 of the Constitution invests the 2 Houses and the **committees of each House** with the powers, privileges and immunities of the House of Commons at Federation. No express mention is made of joint committees. If joint committees are not covered by section 49, the implications could have far-reaching and important effects. While committees may not have used their powers to compel, for example, the giving of evidence and production of documents, the power has at times encouraged reluctant witnesses to give important evidence.

In response to a request by the Joint Committee on War Expenditure in 1941 the Solicitor-General advised that in his opinion absolute privilege attaches to evidence given before a joint committee just as it does to evidence given before a select committee of one House. He also gave the opinion that a joint committee authorised to send for persons, papers and records has power to summon witnesses. He suggested that it was doubtful, however, whether a joint committee had the power to administer oaths to witnesses.<sup>204</sup>

## Quorum

The Houses may fix the quorum of their respective members required to constitute a sitting of a joint committee. Subject to this a joint committee fixes its own quorum.<sup>205</sup> Normally the quorum is stated in the resolution of appointment and no specific provision is made as to the number of Senators or Members, respectively, required to form a quorum. The effect has been that a quorum may be maintained by Members of one House only.<sup>206</sup>

The resolution of appointment of the Joint Standing Committee on the New Parliament House provides that either the Speaker or the President, and at least 6 other members of the committee, must be present to constitute a quorum.<sup>207</sup>

The quorum of the Joint Committee on the Australian Capital Territory, which has 10 members, has occasionally but not always been fixed by the Houses.<sup>208</sup>

## Meetings

Standing order 386 provides:

Whenever either House agrees to a proposal from the other House for the appointment of a joint committee, the first meeting of such committee shall be held at such time and place as is named by the House in which the proposal did not originate.

Senate standing order 354 contains a similar provision. In practice these provisions are no longer applied.<sup>209</sup> The first meeting is normally convened by the chairman of the committee, if appointed, or by the committee secretary, if the chairman is to be elected.

203 *See Odgers*, p. 519.

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

205 S.O. 387; Senate S.O. 353. The last occasion the Houses fixed the quorum of their respective Members was for the Joint Select Committee of Public Accounts for which the quorum included at least one Member of each House, VP 1932-34/118-19; J 1932-34/45,46; *see also* Joint Select Committee on the Moving-picture Industry, VP 1926-28/294,303.

206 Joint Committee on Foreign Affairs and Defence has 14 Members of the House and 7 committee members

are required to constitute a quorum, VP 1980-81/55-6.

207 VP 1980-81/56-7.

208 Quorum fixed at 5 by resolution of appointment, VP 1974-75/52-3; quorum fixed at 3 by the committee, VP 1980-81/54-5.

209 For a precedent *see* the Joint Select Committee of Public Accounts, VP 1932-34/109,118-19, J 1932-34/45,46.

The following specific provisions of Senate standing order 297A for the convening of meetings apply to joint committees:

Notice of meetings subsequent to the first meeting shall be given by the Clerk attending the Committee (a) pursuant to resolution of the Committee, (b) on instructions from the Chairman or (c) upon a request by a Quorum of Members of the Committee:

Provided that, in Committees consisting of less than seven Senators, the request is made by not less than three Members of the Committee.

A joint committee may not sit during sittings of the Senate, unless authorised by the Senate<sup>210</sup> (*but see* p. 600). Under Senate standing orders all committees sitting at the time the President is about to take the Chair must be informed by the Usher of the Black Rod. All proceedings after such notice are null and void.<sup>211</sup> Leave to sit during sittings of the Senate may be granted on motion<sup>212</sup> but such leave is not granted lightly or often. Occasionally resolutions of appointment have authorised joint committees to sit during the sittings of either House of the Parliament.<sup>213</sup> While the attitude has been taken that leave is required only of the Senate because House of Representatives committees are permitted to meet during sittings of the House<sup>214</sup>, the contemporary view is that leave of both Houses is required for a joint committee to meet during the sittings of either House of the Parliament. This view is supported by a recent request of the House made by the Joint Committee on Foreign Affairs and Defence.<sup>215</sup>

### **Election or appointment of chairman**

In the 32nd Parliament, it was provided in the resolutions of appointment that the chairmen of the Joint Committees on the Australian Capital Territory, and Foreign Affairs and Defence, be elected by the committee from the members nominated by the Prime Minister, the Leader of the House or the Government Whip, or the Leader of the Government in the Senate. In respect of the Joint Standing Committee on the New Parliament House, the resolution provided for the Speaker and President to be joint chairmen.<sup>216</sup>

However, the provisions for election or appointment of chairmen have not always been consistent. The variety of possibilities is well illustrated by the provisions made for the joint committees appointed in the 28th Parliament. In each case, except that of the Joint Committee on Prices, the procedure arrived at was after initial rejection by the Senate of the relevant provisions of the resolution of appointment conveyed to it by the House, namely, nomination by the Prime Minister or from the government Members. The final provisions were as follows:

- Joint Committees on the Australian Capital Territory and Foreign Affairs and Defence: chairman to be elected from one of the members nominated by the Prime Minister or by the Leader of the Government in the Senate<sup>217</sup>;
- Joint Committee on the Northern Territory: chairman to be elected from one of the members nominated by the Prime Minister<sup>218</sup>, and
- Joint Committee on Prices: chairman nominated by the Prime Minister from the government members of the committee<sup>219</sup>.

<sup>210</sup> Senate S.O. 300; J 1974-75/655; *see also* *Odgers*, p. 498.

<sup>211</sup> Senate S.O. 301.

<sup>212</sup> J 1974-75/655.

<sup>213</sup> Joint Committee on Profits, VP 1940-43/158-9,162; Joint Committee on Constitution Review, VP 1956-57/168-9,171 (the name of the committee was altered from 'Joint Committee on Constitutional change' *see* PP 50(1957-58)4).

<sup>214</sup> S.O. 333.

<sup>215</sup> VP 1977/166.

<sup>216</sup> VP 1980-81/54-7.

<sup>217</sup> VP 1973-74/58-9,139,149; VP 1973-74/52-3, 138-9,148.

<sup>218</sup> VP 1973-74/59,100,312.

<sup>219</sup> VP 1973-74/53-4,64-5,125.

In 1941, the chairmen of several joint committees were appointed by name in the resolution establishing the committees.<sup>220</sup> In some instances the House requested the Senate to appoint a Senator as chairman, which it did.<sup>221</sup> Such a request was again made and agreed to in 1957 in relation to the Joint Committee on Constitution Review.<sup>222</sup>

Resolutions of appointment have at times specified that the deputy chairman be a member from a different House than the chairman.<sup>223</sup>

## Voting

Senate standing orders provide that the chairman of a Senate select committee shall have a deliberative vote only, and that when the votes are equal the question shall pass in the negative.<sup>224</sup> This rule is applied to the relatively few joint committees whose resolution of appointment does not determine the chairman's voting powers.<sup>225</sup>

It is common to include in the resolution of appointment the following paragraph, or words to the same effect:

In matters of procedure the Chairman or Deputy-Chairman when acting as Chairman shall have a deliberative vote and, in the event of an equality of voting, shall have a casting vote, and, in other matters, the Chairman or Deputy-Chairman shall have a deliberative vote only.<sup>226</sup>

If there is an equality of votes on any question other than a procedural question, the question is negatived. The resolution of appointment of the Joint Committee on Foreign Affairs and Defence provides that, in the event of an equality of voting, the chairman, or the deputy chairman when acting as chairman, has a casting vote.<sup>227</sup> This is a second vote which is in addition to the chairman's deliberative vote.

The Joint Standing Committee on the New Parliament House has joint chairmen. Its resolution of appointment provides that in matters of procedure, each of the chairmen, whether or not occupying the chair, has a deliberative vote and, in the event of an equality of voting, the chairman occupying the chair has a casting vote. In matters other than those of procedure each of the chairmen, whether or not occupying the chair, has a deliberative vote only.<sup>228</sup>

## Admission of strangers and others

The standing orders of the House and the Senate contain similar provisions for the admission of strangers and of Senators and Members who are not members of the committee.<sup>229</sup> However, there is a different interpretation of the standing orders by the Senate, and it is this interpretation which is followed with joint committees.

Strangers may be excluded at the request of any committee member, but only following a majority decision of the committee. The chairman has discretion to exclude strangers but should exercise it only in cases of misconduct.<sup>230</sup> The same practice applies to any request by a committee member or the chairman for the exclusion of a Member or Senator who is not a committee member. Members, Senators and strangers must always withdraw when the committee is deliberating, in accordance with the standing orders.

220 Joint Committee on Social Security, VP 1940-43/158,161-2.

221 Joint Committee on Profits, VP 1940-43/158-9,162.

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

223 Joint Committee on the Parliamentary Committee System, VP 1976-77/59,74,82.

224 Senate S.O. 298.

225 Joint Committee on the Australian Capital Territory, VP 1980-81/54-5,69.

226 Joint Select Committee on the Family Law Act, VP 1978-80/355.

227 VP 1980-81/55-6.

228 VP 1980-81/56-7,69.

229 S.O.s 337, 338; Senate S.O.s 305, 306.

230 *Odgers*, p. 503.

### Tabling of reports and minutes

The standing orders provide that the proceedings of every joint committee shall be reported to the House by the members appointed by it to serve on the committee (*but see* p. 581).<sup>231</sup> The provision of the Senate standing orders is similar except that one of the Senators appointed to the committee is required to report.<sup>232</sup> Reports by joint committees are dealt with in the same manner as the reports of House or Senate select committees except that joint committee reports are directed to, and tabled in, both Houses. Senate standing orders do not require the tabling of minutes of proceedings with a committee's report.

Usually reports are tabled in both Houses on the same day but occasionally this is not possible when only one House is sitting and there is an urgent need for the report to be tabled and published.<sup>233</sup> A motion for the printing of a report need only be moved in one House.

### Publication of evidence

As the Senate standing orders empower committees to authorise publication or disclosure of their evidence, this power does not need to be incorporated in the resolution of appointment of joint committees.<sup>234</sup>

### Endorsement of papers

Under Senate standing orders the chairman, rather than the committee secretary, is required to endorse any papers and documents sent for by the committee or produced by witnesses.<sup>235</sup>

### Payment to witnesses

Payments to witnesses, which are occasionally made at the committee's discretion, have regard to the scale of witnesses' expenses prescribed by High Court Rules.<sup>236</sup>

### Witness in prison

When a witness is in the custody of the keeper of any prison, the keeper may be ordered to bring the witness in safe custody for examination from time to time.<sup>237</sup> If a joint committee required a witness to be brought from prison, it would appear to be desirable that the warrant be issued jointly by the Speaker and the President.

## JOINT STATUTORY COMMITTEES

### Parliamentary Standing Committee on Public Works

#### *Appointment*

The Parliamentary Standing Committee on Public Works is established by the *Public Works Committee Act* 1969, and is appointed as soon as practicable after the commencement of the first session of each Parliament. The Act prescribes the committee's

231 S.O. 389.

232 Senate S.O. 355.

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

234 Senate S.O. 308. *But for* precedents for the provision

being included in the resolution of appointment *see* Joint Committee on the Australian Capital Territory and Joint Committee on the New Parliament House, respectively, VP 1980-81/54-5,56-7.

235 Senate S.O. 314.

236 Senate S.O. 318.

237 S.O. 361, Senate S.O. 389.

powers, functions and procedures. In some respects procedural requirements vary from those parliamentary committees which operate according to the standing orders.

The committee is a joint committee consisting of 6 Members of the House of Representatives and 3 Senators who are appointed by motion by their respective Houses<sup>238</sup> and hold office during the pleasure of the House by which they were appointed. A Minister, the Speaker, the President of the Senate or the Chairman of Committees of either House is not eligible for appointment to the committee.

A member may resign his office by writing under his hand addressed to the Speaker or the President, as the case may be. When a Member of the House resigns, a motion is moved in the House by a Minister discharging the Member from attendance on the committee and appointing another Member in his place.<sup>239</sup> Appointments to the committee, and any changes in membership, are notified to the other House by message.

#### *Procedures*

The chairman and vice-chairman of the committee are elected by the members. The Member or Senator presiding over any meeting has both a deliberative and a casting vote.

The committee has the power to move from place to place and to meet during any recess but may not meet whilst either House is sitting except by leave of the House concerned.<sup>240</sup>

The quorum of the committee is 5 members. As there is no requirement in the Act for the presence of members of both Houses in the make-up of a quorum, the quorum can consist of Members of one House only.

The Act requires that minutes be kept of its proceedings and that the committee lay before each House, within 15 sitting days of that House after 31 December each year, a report, known as the General Report, of its proceedings during the previous year.

The committee has the power to appoint sectional committees (sub-committees) of 3 or more members, the chairman and vice-chairman of which are elected by the members of the sectional committee. There can be no more than 2 sectional committees at the same time. A majority of members of a sectional committee is required to form a quorum. The committee may refer to a sectional committee, for inquiry and report to the committee, a matter connected with a public work that has been referred to the committee under the Act.

#### *Functions and inquiries*

The Act provides that the committee shall consider each public work referred to it, and report to both Houses concerning the expediency of carrying out the work. It may also report on any other matters related to the work which the committee thinks it desirable that its views should be reported to the Houses. In its report the committee may recommend any alterations to the work which it thinks necessary or desirable to ensure that the most effective use is made of public moneys. In considering and reporting on a public work, the committee has regard to:

- the stated purposes of the work and its suitability for that purpose;
- the necessity for, or the advisability of, carrying out the work;
- the most effective use that can be made, in the carrying out of the work, of the moneys to be expended on the work;
- where the work purports to be of a revenue-producing character, the amount of revenue that it may reasonably be expected to produce, and
- the present and prospective public value of the work.

<sup>238</sup> VP 1980-81/23; J 1980-81/28.

<sup>240</sup> Leave is given from time to time, VP 1978-80/202.

<sup>239</sup> VP 1968-69/509.

A motion may be moved in either House that a public work be referred to the committee for consideration and report.<sup>241</sup> If the Parliament is not in session or the House is adjourned for more than a month or for an indefinite period, the Governor-General (in council) may refer a work to the committee for consideration and report.

A public work referred to the committee cannot be commenced unless, after the report of the committee has been presented to both Houses, the House of Representatives has resolved that it is expedient to carry out the work.<sup>242</sup> A proposal in 1968 to amend the Act to give the Senate a greater role in this regard was rejected.

If the estimated cost of a public work exceeds \$2 million, that work cannot be commenced unless it has been properly referred to the committee, or the House of Representatives has resolved that, because of the urgency of the work, it is expedient that the work be carried out without having been referred to the committee, or the Governor-General has declared that the work is for defence purposes and reference of it to the committee would be contrary to the public interest, or it has, with the agreement of the committee, been declared to be work of a repetitive nature. Estimated cost is defined as the estimate of cost made at the stage of design development at which all particulars of the work substantially affecting its cost have been determined.

Before commencement of a public work, the subject of an earlier report of the committee, both Houses may resolve that, for reasons or purposes stated in the resolution, the public work concerned be re-examined by the committee and a further report produced. The committee itself may also resolve to review a public work on which it or one of its predecessors has reported, if the work has not commenced. The work shall not then be commenced, other than under certain circumstances specified in the Act, until the committee has reported to both Houses. The Chair has ruled that the only amendment permissible, under the provisions of the Act, to a motion for approval of work is one which refers the work back to the committee for consideration and report.<sup>243</sup>

From time to time attention has been drawn to the fact that works undertaken by statutory authorities do not come under the scrutiny of the committee, unless the work is carried out by the Commonwealth or its agent, the Department of Housing and Construction, and where the money to be paid for the work is appropriated by Parliament and placed under the control of that department.<sup>244</sup> In addition, in relation to works outside Australia, the committee's jurisdiction was confined to public works to be undertaken in an external Territory.

The *Public Works Committee Amendment Act* 1981<sup>245</sup> brought the works of statutory authorities, Commonwealth instrumentalities and other bodies, as well as overseas works, under the purview of the committee. Some authorities and types of works will continue to be exempt from the Act because of their special nature. The works of the Northern Territory Government and the Administration of Norfolk Island are exempted because of the relationships between the administrations and the Commonwealth, while Commonwealth works in these Territories will continue to be subject to review by the committee. Similarly, the works of bodies established jointly by the Commonwealth with the States or other countries are exempted, as are overseas aid works because of their bilateral nature. The works of the tertiary education institutions in the Australian Capital Territory, which are already subject to examination by the Tertiary

241 VP 1980-81/46.

242 VP 1978-80/1693.

243 VP 1970-72/264; H.R. Deb. (26.8.70) 510.

244 See H.R. Deb. (27.11.68) 3323; see also *Report of the Interdepartmental Committee on the Review of*

*the Public Works Committee Act*, PP 105 (1974) 11; 'Forty-Third General Report', *Parliamentary Standing Committee on Public Works*, PP 46 (1980) 6.

245 Act No. 20 of 1981.

Education Commission, are exempted to avoid duplication. The National Capital Development Commission and the Parliament House Construction Authority are also exempted because of their specific legislation and functions. Regulations may be made to exempt certain authorities which trade, or which provide services and compete with the private sector.

The 1981 amendment also makes provision for specific works of authorities which are not subject to the Act to be declared examinable by the committee. This includes the National Capital Development Commission. In respect of urban land development works, the committee may report without inquiry. With regard to overseas works, the committee is not permitted to conduct inquiries nor take evidence in overseas countries; the committee is limited to the consideration of plans, models and statements placed before it, and to the taking of evidence from people already in Australia. The works of authorities do not become subject to the Act until 10 April 1982.

#### *Reports*

The committee normally presents its reports to both Houses in the same manner as select and standing committees. However, in 1920, the committee was given leave to continue its investigation during a recess and to present an interim report to the Governor-General<sup>246</sup>, as finalisation of the report was a matter of grave urgency.<sup>247</sup>

The Public Works Committee Act does not provide for committee members to add a protest or dissent to the committee's reports. In 1923, a member of the committee tabled a minority report and moved that it be printed.<sup>248</sup> Presentation of the minority report was opposed by the committee's chairman who indicated that the committee had decided that dissenting reports should not be tabled and that because the Act required that 'resolutions moved in the committee shall be included in its reports' any member's dissent was thus on record.<sup>249</sup> The debate was adjourned and the Solicitor-General's advice was sought. On resumption of the debate the Prime Minister stated:

The opinion of the Solicitor-General is that there can be one report only from the Public Works Committee, namely, the majority report, but there is nothing to prevent what is, to all intents and purposes, a minority report being submitted to Parliament by way of an addendum, provided that the majority of the Committee authorise it.<sup>250</sup>

The House did not authorise the printing of the minority report, as the committee had not authorised its presentation.<sup>251</sup> In 1955, attention was again drawn to the difficulties of committee members who differ from the views expressed in the committee's reports. A Senator, who was a member of the committee, moved for the adoption of a report of the committee in order to create for himself an opportunity to express his dissent from it.<sup>252</sup>

In determining whether it will authorise a committee member to add a dissent to a committee report, it would seem appropriate that the committee have regard to the provisions of the standing orders of both Houses which indicate the contemporary attitude of the Houses on the subject. Both Houses now permit a Member or a Senator to add a protest or a dissent to a report by a select or standing committee<sup>253</sup> (see p. 580 for alternative means of recording dissent).

246 VP 1920-21/473. Interim report tabled, VP 1920-21/480.

247 H.R. Deb. (26.11.20)7165-6.

248 VP 1923-24/73.

249 H.R. Deb. (12.7.23)1033.

250 H.R. Deb. (19.7.23)1325.

251 VP 1923-24/83.

252 S. Deb. (26.5.55) 495.

253 S.O. 343; Senate S.O. 311 (which applies to standing committees pursuant to S.O. 37A).

*Evidence*

The chairman, or a member authorised by resolution of the committee, may summon a person to appear before the committee to give evidence and to produce such documents as are referred to in the summons. There is no instance of a summons being issued. If a witness, who has been summonsed, fails to appear or fails to continue in attendance in obedience to the summons, the chairman or a member authorised by the committee may issue a warrant for his apprehension. The person executing the warrant may bring the witness before the committee and detain him in custody until released by order of the chairman or the authorised member.

Evidence may be taken on oath or affirmation administered by the chairman.

In 1953, the Secretary of the Attorney-General's Department gave the following advice on the committee's power to summon before it a State public servant:

With regard to the States, I entertain a good deal of doubt, firstly, whether as a mere matter of construction the Crown in right of the States would be bound by the Act without express mention and secondly, whether, if the Act is to be read as intending to bind the Crown in right of the States, the High Court would regard such a law as within the competence of the Commonwealth Parliament. In short, I would think the matter so doubtful that I would advise against making a test case by summoning a State officer.<sup>254</sup>

The Act in its present form still does not bind the Crown in right of the States by express mention.

The committee, and its sectional committees, may consider evidence taken by a former Public Works Committee, or sectional committee, if it ceased to exist before reporting on the matters to which that evidence related.

Evidence is normally taken in public but may be heard in camera. If so requested by a witness, and based on the giving of evidence or the producing of a document relating to a secret or confidential matter, the committee is required to take evidence in camera or direct that a document, or part of it, be treated as confidential. Such evidence may not be disclosed or published by a member of the committee or any person without the written consent of the witness or written authority of the committee. The Act prescribes a penalty of \$400 or imprisonment for one year for breach of these disclosure provisions.

Witnesses before the committee have the same protection and privileges as a witness in proceedings in the High Court.<sup>255</sup> This provision gives to witnesses the right to refuse to answer certain types of questions which they could be forced to answer before a select or standing committee<sup>256</sup> (see p. 616). Further, a witness is protected against proceedings for defamation in respect of anything he may say during an inquiry with reference to the matter under investigation.

Several penalties are specified in the Act. Wilfully giving false evidence on oath or affirmation is punishable by 5 years' imprisonment. A witness who has been summonsed to appear before the committee but, without reasonable excuse (proof of which lies upon the witness), fails to appear or fails to continue in attendance whilst his attendance is required, is subject to a fine of \$400 or one year's imprisonment. A similar penalty applies where:

- a person knowingly dissuades or prevents a person from obeying a committee summons;
- a witness refuses to make an oath or affirmation, answer a question by a committee member, or produce a document he is required by summons to produce, or

254 Advice of Attorney-General's Department, dated 16 September 1953.

255 See *Joint Committee of Public Accounts, 17th Report*, PP 30 (1954-55) 14.

256 *Public Works Committee Act* 1969, s. 25

- a person is responsible for any violence to, or punishment of, a witness or potential witness because of evidence given lawfully by him before the committee.

Again in these instances proof of reasonable excuse lies upon the witness or person, as the case may be. These provisions have the effect of leaving it to the courts to make determinations on matters which, in the case of other parliamentary committees, would be determined by the Houses themselves. Proceedings in respect of an offence against the Act shall not be instituted except by the Attorney-General or with his consent in writing.<sup>257</sup>

The committee may authorise a member, or other person acting on behalf of the committee, to enter and inspect any land, building or place, and to inspect any material on the land or on or in the building or place. Notice must be given by the committee to the occupier, in accordance with regulations, before this is done. Currently, no such regulations exist.

#### *Staff and expert assistance*

The committee has a small full-time secretariat employed by the Joint House Department. It also has authority under the Act to appoint assessors (specialist advisers).

### **Joint Committee of Public Accounts**

#### *Appointment*

The Joint Committee of Public Accounts is established by the *Public Accounts Committee Act* 1951, and is appointed as soon as practicable after the commencement of each Parliament. As with the Public Works Committee, the Act defines the committee's functions, constitution and powers.

The committee consists of 7 Members of the House and 3 Senators who are appointed by motion by their respective Houses and hold office during the pleasure of the House by which they were appointed, or until the House of Representatives expires by dissolution of effluxion of time. A Member not wishing to serve further on the committee should notify the whip of his party in writing. A motion is then moved by a Minister in the House, by leave, discharging the Member from attendance on the committee and appointing another Member in his place.<sup>258</sup> Appointments to the committee, and any changes in membership, are notified to the other House by message.

In addition to the 10 members appointed by the respective Houses, the chairman of the House of Representatives Standing Committee on Expenditure becomes an ex officio member of the committee but is not eligible to be elected as its chairman. The resolution of appointment of the Expenditure Committee provides that the chairman of the Public Accounts Committee or his nominee who is a Member of the House of Representatives shall be a member of the Expenditure Committee.<sup>259</sup> The provision for a nominee obviates the potential difficulty arising from the election of a Senator as chairman of the Public Accounts Committee who would be unable to sit on a House of Representatives committee. Nevertheless, only one Senator has been elected chairman of the Public Accounts Committee since it was first established in 1913.<sup>260</sup>

#### *Procedures*

The chairman of the committee and a vice-chairman are elected by the members. If both the chairman and vice-chairman are absent from a meeting the members present

<sup>257</sup> *Public Works Committee Act* 1969.

<sup>260</sup> Senator R.E. McAuliffe was chairman from 1973 to 1975.

<sup>258</sup> VP 1978-80/476.

<sup>259</sup> VP 1980-81/51-2.

may appoint one of their number to preside at the meeting. The member so elected has all the powers and functions of the chairman in relation to the meeting concerned.

The quorum of the committee is 4 members. As there is no requirement in the Act for the presence of members of both Houses in the make-up of a quorum, the quorum can consist of Members of one House only.

All questions are decided by a majority of the votes of members present and the chairman, or the member presiding, has both a deliberative and a casting vote. Unless members vote unanimously, the manner in which each member votes shall, if a member demands it, be recorded in the minutes and in the committee report.

The committee is empowered to appoint sectional committees (sub-committees) consisting of 3 or more members to inquire into and report to the committee upon such matters, within the committee's terms of reference, as the committee directs. There is no limitation on the number of sectional committees. With minor exceptions provisions in the Act applying to the committee also apply to its sectional committees. Similarly, provisions applying to the committee's chairman and vice-chairman apply to their counterparts in sectional committees. A sectional committee may sit at any time notwithstanding that the committee is sitting at the same time.

The 1979 amendment to the Act empowers the committee to meet and transact business notwithstanding any prorogation of the Parliament. It also empowers the committee to meet at such times within Australia as the committee by resolution determines. This can be interpreted to mean that the committee may meet while the Senate is sitting which is not consistent with the general theory 'that the duty of a Senator is first to the Senate, and that he should not subordinate that duty to any lesser duty'.<sup>261</sup> The committee policy however is generally to avoid meeting while either House is sitting. Prior to the 1979 amendment, standing orders had been suspended in the Senate from time to time to permit the Senate members of the committee to attend meetings during sittings of the Senate.<sup>262</sup>

The committee may meet at any place within Australia but the Act expressly precludes it from meeting outside Australia.

#### *Functions and inquiries*

The functions of the committee are:

- to examine the accounts of the receipts and expenditure of the Commonwealth including the financial statements transmitted to the Auditor-General under subsection (4) of section 50 of the *Audit Act* 1901;
- to examine the financial affairs of authorities of the Commonwealth, and of inter-governmental bodies, to which the Public Accounts Committee Act applies;
- to examine all reports of the Auditor-General (including reports of the results of efficiency audits) copies of which have been laid before the Houses of the Parliament;
- to report to both Houses of the Parliament, with such comment as it thinks fit, any items or matters in those accounts, statements and reports, or any circumstances connected with them to which the committee is of the opinion that the attention of the Parliament should be directed;
- to report to both Houses of the Parliament any alteration which the committee thinks desirable in the form of the public accounts or in the method of keeping them, or in the mode of receipt, control, issue or payment of public moneys, and
- to inquire into any question in connection with the public accounts which is referred to it by either House of the Parliament, and to report to that House upon that question.

261 *Odgers*, p. 498.

262 J 1978-80/741.

The functions also include such other duties as are assigned to the committee by joint standing orders approved by both Houses of the Parliament. No such duties have been assigned.

In 1979, the Public Accounts Committee Act was amended<sup>263</sup> to give the committee express powers to examine the financial affairs of certain Commonwealth authorities and inter-governmental bodies. Authorities subject to such examination are defined as:

- a body corporate or an unincorporated body established for a public purpose by, or in accordance with the provisions of, an enactment, not being an inter-governmental body;
- a body established by the Governor-General or by a Minister otherwise than in accordance with an enactment, and
- an incorporated company over which the Commonwealth is in a position to exercise control.

The committee may only examine the financial affairs of an inter-governmental body if, and for as long as, the parties to the agreement establishing the body consent to the committee having the power to do so. The consent or withdrawal of consent (which may result from withdrawal of consent by any party to the agreement) is notified to the relevant Minister who then gives it formal effect by notice in the Gazette. An inter-governmental body is defined as a body corporate, or an unincorporated body, established by, or in accordance with the provisions of, an agreement between the Commonwealth and a State or between the Commonwealth and the government of another country.

The committee does not have the power to examine the financial affairs of the Northern Territory or of the administration of an external Territory or to examine reports by the Auditor-General which relate to, or in so far as they relate to, such affairs. The committee also is not empowered to examine the results of an efficiency audit of operations of the administration of an external Territory.

#### Reports

After a committee report is tabled the chairman forwards a copy to Ministers affected. He also forwards a copy to the Minister for Finance with a request that the Minister give the report his consideration and inform the chairman of the action taken to deal with the committee's conclusions. The reply is received in the form of a Department of Finance Minute which is examined by the committee. The Minute and the conclusions of the report to which it relates are submitted as a report to the Parliament. If necessary, further discussions are held with Department of Finance officers before the committee reports. In reporting a Minute to the Parliament the committee does not usually comment other than to note recommendations not fully dealt with or subject to a further Minute.<sup>264</sup> The Public Accounts Committee Act, like the Public Works Committee Act, makes no provision for minority reports. However, the committee has permitted minority reports<sup>265</sup> and this is in accord with the contemporary attitude of both Houses (see p. 597).

#### Evidence

The committee may summon a person to appear before it to give evidence and produce documents. The summons must be signed by the chairman or the vice-chairman. If a witness who has been summonsed fails to appear or fails to continue in attendance in

<sup>263</sup> Act No. 187 of 1979.

<sup>265</sup> *Joint Committee of Public Accounts, 18th Report*,

<sup>264</sup> *Joint Committee of Public Accounts, 164th Report*,  
PP 89 (1977) 1.

PP 37 (1954-55) 25; and see *Odgers*, p. 510.

obedience to the summons without showing proof of reasonable excuse, the chairman or the vice-chairman may issue a warrant for his apprehension. The person executing the warrant may bring the witness before the committee and detain him in custody until he is released by order of the chairman or the vice-chairman. A person must not knowingly dissuade or prevent a person from obeying a summons.

Evidence may be taken on oath or affirmation and the chairman or vice-chairman may administer oaths or affirmations to witnesses. A person who wilfully gives false evidence on oath or affirmation is subject to a penalty of 5 years' imprisonment.

A person summonsed to appear before the committee may not, without just cause (proof whereof lies upon the witness), refuse to be sworn or make an affirmation, answer any question put to him by the committee or any member, or produce a document required by the committee or a member. For the committee's attitude towards questioning public servants on government policy *see* p. 613.

A witness has the same protection and privileges as a witness in proceedings in the High Court (*see* p. 598). The Act also provides a witness with legal protection against any physical or other harm which may be inflicted on him for or on account of his having appeared before the committee as a witness, or lawfully giving evidence before the committee.

A witness is entitled to fees and travelling expenses allowed by the chairman or vice-chairman in accordance with a prescribed scale.

The Act requires the committee, normally, to take evidence in public. However, the committee may take oral or documentary evidence in camera if, in the committee's opinion, the evidence relates to a secret or confidential matter. If the witness requests that such evidence be taken in camera, the committee is required to do so only if the committee forms the opinion that the evidence to be given is of a secret or confidential nature. If the committee accedes to a request of this kind, neither the committee nor a member of the committee may disclose or publish all or part of the evidence concerned without the consent of the witness in writing. Similarly, a person other than a member of the committee may not publish or disclose such evidence without both the consent of the witness in writing and the authority of the committee. In other instances where evidence is taken in camera no person, including a member of the committee, may publish or disclose the evidence concerned without the authority of the committee in writing and signed by the chairman. With these qualifications the committee has the discretion to disclose or publish, or authorise such disclosure or publication, of evidence taken in camera.

The committee, and its sectional committees, may consider evidence taken by a former Public Accounts Committee, if that committee, or a sectional committee, ceased to exist before reporting on the matters to which that evidence related.

It is an offence to contravene or fail to comply with provisions of the Act. Such contravention may be punished by fine or imprisonment. An offence against the Act cannot be prosecuted summarily without the written consent of the Attorney-General or of a person authorised by him, and an offence can only be prosecuted on indictment in the name of the Attorney-General.

#### *Staff and expert assistance*

The committee has a full-time secretariat employed by the Joint House Department. It also employs specialist advisers on a part-time basis.

The committee is also assisted by official observers: the Secretary to the Department of Finance, the Chairman of the Public Service Board and the Auditor-General. Their representatives sit at the table with committee members at all public hearings and are invited to comment on evidence presented.

### Joint Committee on the Broadcasting of Parliamentary Proceedings

The Joint Committee on the Broadcasting of Parliamentary Proceedings is established as soon as practicable after the commencement of each Parliament pursuant to the *Parliamentary Proceedings Broadcasting Act* 1946.

The committee consists of the Speaker and the President of the Senate, who are ex officio members, and 5 Members of the House of Representatives and 2 Senators appointed by their respective Houses by motion.<sup>266</sup> Members of the committee hold office as a joint committee until the House of Representatives expires by dissolution or effluxion of time. The quorum of the committee is 5 members. Any member, other than the Speaker and President, may resign his seat on the committee by writing addressed to the Speaker, or the President, as the case may be. When a Member of the House resigns, a motion is moved in the House by a Minister discharging the Member from attendance on the committee and appointing another Member in his place. There is no precedent for this in the House of Representatives.<sup>267</sup> Vacancies in the committee must be filled by the House concerned within 15 sitting days of the vacancy occurring if that House is then sitting, or, if not, then within 15 sitting days after the next meeting of that House. Appointments to the committee, and any changes in membership, are notified to the other House by message.

The Act provides for the committee to:

- consider and specify in a report to each House the general principles upon which there should be determined the days upon which, and the periods during which, the proceedings of the Senate and the House should be broadcast;
- determine the days upon which, and the periods during which, the proceedings of either House should be broadcast, in accordance with the general principles specified by the committee and adopted by each House, and
- determine the days upon which, and the periods during which, the proceedings of a joint sitting should be broadcast.

The committee has the power to make such arrangements as it thinks fit for the permanent safe keeping of recordings of proceedings in either House which are considered to be of sufficient historic interest. The committee also determines the conditions in accordance with which a re-broadcast may be made of any portion of the proceedings in either House.

In 1974, the Act was amended to provide for the televising of the Joint Sitting of both Houses in that year. The amendments gave the committee special powers in relation to both the broadcasting and televising of those proceedings.<sup>268</sup>

The committee may delegate to a sub-committee the power to determine the days on which, and the periods during which, the proceedings of either House shall be broadcast, and any determination of the sub-committee is deemed to be, for the purposes of the Act, a determination of the committee. The flexibility provided by this authority has facilitated urgent broadcasting changes. A sub-committee must consist of 2 Members of the House of Representatives and 2 Senators. Because of the possibility that only one House may be sitting, it is provided that 2 members of the sub-committee shall be sufficient to form a quorum.

In 1973, the Houses referred to the committee for investigation and report 'whether the televising of portion of the Parliamentary debates and proceedings is desirable, and if so, to what extent and in what manner the telecasts should be undertaken'. The committee was given the power, for the purposes of the inquiry, to send for persons, papers

266 VP 1980-81/23; J 1980-81/28.

268 See Ch. on 'Parliament and the citizen'.

267 But see J 1973-74/246 for case of Senator; see also VP 1948-49/13 (temporary vacancy); VP 1951-53/673 (death of Member).

and records.<sup>269</sup> The committee's report, which concluded that televising of proceedings was desirable in principle, was tabled in 1974.<sup>270</sup> Neither House has debated the report nor adopted any position on its recommendations.<sup>271</sup>

The chairman and vice-chairman are elected by members of the committee at their first meeting or as soon as practicable thereafter. With the exception of one Parliament, the Speaker has always been elected chairman and the President vice-chairman. When both the chairman and vice-chairman are absent a member elected by the members present presides.

All questions arising in the committee are decided by a majority of the votes of the members present with the chairman, or other member presiding, having a deliberative vote and, in the event of an equality of votes, a casting vote also.

The committee has power to sit during any adjournment or recess as well as during the session, and may sit at such times (including times while either House is sitting) and in such places, and conduct its proceedings in such manner as it deems proper.

Following publication in 1948 of a newspaper article purporting to give details of the committee's proceedings, the matter was raised in the House.<sup>272</sup> The Deputy Speaker subsequently informed the House that the information had not been released officially and that this would normally constitute a breach of privilege. He noted, however, that the committee differed from other statutory and select committees in that it had executive authority and there was no provision for it to report to the House other than in relation to specified general principles. He therefore proposed to consult the committee on the matter.<sup>273</sup> Having done so, the Deputy Speaker made a further statement in the House where he indicated that the joint committee considered the unauthorised publication of its proceedings undesirable and contrary to parliamentary practice. Accordingly, the committee, in pursuance of its statutory powers, declared that, unless otherwise determined, its proceedings would not be open to the public and were not to be published without the chairman's authority. The chairman was empowered to authorise publication of committee decisions, unless the committee specifically determined otherwise. Therefore, any unauthorised publication of the committee's proceedings would be a matter which could be considered by the House to constitute a breach of privilege.<sup>274</sup>

## EVIDENCE

### Extent of Parliament's investigatory powers

The power of a committee of inquiry to obtain evidence determines, in large measure, the potential scope and thoroughness of its inquiry. A committee possesses no authority except that which it derives by delegation from the House by which it is appointed. Thus, a committee cannot require the attendance of witnesses and the production of papers without express authority from the House. A committee is, therefore, normally granted the power to call for persons, papers and records in order that it can properly fulfil its functions.<sup>275</sup>

<sup>269</sup> VP 1973-74/69-70,137.

<sup>270</sup> 'Televising of Parliamentary Proceedings', *Report of Joint Committee on the Broadcasting of Parliamentary Proceedings*, PP 61 (1974)4.

<sup>271</sup> See also Ch. on 'Parliament and the citizen'.

<sup>272</sup> H.R. Deb. (14.10.48) 1659-60.

<sup>273</sup> H.R. Deb. (19.10.48) 1749.

<sup>274</sup> H.R. Deb. (27.10.48) 2184; VP 1948-49/103. For debate on a similar occurrence in 1947 see H.R. Deb. (23.10.47) 1228-9, 1234-5; H.R. Deb. (24.10.47) 1348-50.

<sup>275</sup> The nature of these powers is discussed at length in Greenwood and Ellicott, PP 168 (1972).

By virtue of section 49 of the Constitution the powers of the House, and of committees to which it delegates these powers, are those of the House of Commons at 1901. The extent of the investigatory powers of the House of Commons was described by Lord Coleridge in 1845 as follows:

That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: it is unnecessary to attempt to do so now: I would be content to state that they may inquire into everything which it concerns the public weal for them to know; and they themselves, I think, are entrusted with the determination of what falls within that category. Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary, and, where attendance is required, or refused, in either stage, of summons or arrest, there need be no specific disclosure of the subject matter of inquiry, because that might often defeat the purpose of the examination.<sup>276</sup>

The Commons exercised these powers in aid of both its legislative responsibilities and of its responsibility as the Grand Inquest of the Nation. There was no limit to the subject matters on which the Commons could legislate and as the Grand Inquest of the Nation it considered itself entitled to advise or remonstrate with the Crown on all affairs of State and in regard to any grievance of the monarch's subjects. Thus, there was no practical limit to the subject matters into which the House of Commons could inquire at 1901.

Doubts have been expressed as to whether the subject matters into which the House of Representatives and its committees may inquire is also virtually unlimited. Greenwood and Ellicott argue that:

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

It is our view, therefore, that neither of the Houses of the Commonwealth Parliament has been vested with the function which the Commons exercised as the Grand Inquest of the Nation. This view was also expressed by Forster J. in *Attorney-General v. Macfarlane & Ors.*<sup>277</sup>

276 *Howard v. Gosset* (1845) 10 QB 359, at pp. 379-80, 277 PP 168 (1972) 6-7, quoted in PP 168 (1972) 3.

Noting that the Australian Constitution adopted the principle of responsible government, Greenwood and Ellicott stated:

... even though neither of the Commonwealth Houses can claim to be the 'Grand Inquest of the Nation' in the full sense that the Commons claimed it, each is entitled to investigate executive action for the purpose of determining whether to advise, censure or withdraw confidence. It would indeed be odd if a House could not inquire into the administration of a department of State by a Minister in order to judge his competence before determining whether to advise him, censure him or withdraw its confidence in him. Each House of the Commonwealth Parliament can, therefore, in our view, as a necessary consequence of the existence of responsible government, exercise investigatory powers through committees in order to exercise what might broadly be called an advisory function.<sup>278</sup>

Nevertheless according to the Law Officers it remains doubtful whether the area of parliamentary inquiry is not unlimited in a legal sense:

It could be said that a House, like the executive, can inquire into any matter it chooses. A question as to legal limitations on the power of inquiry would only arise when it was sought to enforce the power e.g. by compelling persons to give evidence before a parliamentary committee. A similar thought is contained in the following remarks of Fullagar J. in *Lockwood v. The Commonwealth* 90 C.L.R. 177 at p. 182:

Apart from a possible objection, based on s. 81 of the Constitution, to the application of public moneys of the Commonwealth to matters outside the powers of the Commonwealth, I can think of no sound reason why the Commonwealth should not make an inquiry into any subject matter which it may choose. Where, however, the subject matter of the inquiry lies outside the field of Commonwealth power, the Commonwealth cannot constitutionally confer compulsive powers on any body set up to make the inquiry.<sup>279</sup>

The view that the compulsive investigatory powers which the House may delegate to its committees is limited to matters on which the Parliament may legislate has been argued on the basis of a judgment by the Judicial Committee of the Privy Council in 1914. It was held that the Commonwealth Parliament could not legislate to grant royal commissions appointed by the Commonwealth Government power to compel witnesses to attend and give evidence before them unless the royal commissions' terms of reference were limited to matters on which the Parliament could legislate.<sup>280</sup> It has been suggested that neither House could achieve by resolution that which it could not achieve by statute and that consequently the limitations on the granting of compulsive powers to royal commissions must apply equally to delegation of such powers to parliamentary committees.<sup>281</sup> However, there must be some doubt as to whether a court would find the so-called *Royal Commissions* case relevant to the question of the powers of parliamentary committees as that case was concerned with a different form of inquiring body and the exercise of a different head of constitutional power.<sup>282</sup>

In *R. v. Richards; ex parte Fitzpatrick and Browne* the High Court held in unequivocal terms that section 49 is incapable of a restricted meaning and that the House of Representatives, until such time as it declares otherwise, enjoys the full powers, privileges and immunities of the United Kingdom House of Commons.<sup>283</sup> If such is the case, either House of the Commonwealth Parliament, or its committees, has the power to conduct any inquiry into any matter in the public interest and to exercise, if necessary, compulsive powers to obtain evidence in any such inquiry.

278 PP 168 (1972)7.

279 PP 168(1972)8.

280 *A.G. (Commonwealth) v. Colonial Sugar Refining Company Ltd* (1914) A.C. 237.

281 Campbell, *Parliamentary Privilege in Australia*, 1966, pp. 163-4; see also Geoffrey Sawer, 'Like a

Host of Archangels', in *The Canberra Times*, 7 April 1971.

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

283 (1955) 92 CLR 157, pp. 164-70.

The precise limits, if any, to the investigatory powers which the Houses may exercise or delegate to committees is, therefore, presently in doubt. Nevertheless, there is no argument that they are very broad indeed.

Greenwood and Ellicott concluded:

... there are, in our view, legal limits to the facts and matters into which the Houses can, by compulsion, conduct an inquiry. But, even so, for practical purposes these limits are extremely wide, as a consideration of the various heads of Commonwealth legislative power will quickly reveal.

It does not follow, however, from the existence of such limits, that a Committee of the House could by legal process be restrained from inquiring into any matter.<sup>284</sup>

It may be a very long time before the courts make any authoritative judgment on these limits, if they exist. Firstly, committees rarely use their compulsive powers but rather rely on voluntary assistance and co-operation. Secondly, political realities, conventions and courtesies arising from the federal framework of the Constitution will continue to inhibit the House and its committees from pressing hard for information on matters wholly, or even largely, within the constitutional jurisdiction of the States.<sup>285</sup> Thirdly, the courts have been reluctant to intervene in the affairs of the Parliament, particularly with respect to parliamentary privilege and the Houses' powers to investigate and deal with alleged contempt which are the means by which the Houses compel the giving of evidence.

### Power to send for persons, papers and records

The House empowers most investigatory committees to send for persons, papers and records. This authority is delegated to the committee pursuant to standing orders<sup>286</sup>, by the resolution of appointment. Without such authority a committee has no power to compel witnesses to give oral or documentary evidence. It cannot even invite a person to appear as a witness or examine a person who offers to appear in that capacity.<sup>287</sup>

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

... the Committee shall have no power to send for persons, papers or records without the concurrence of the Minister for External Affairs and all evidence submitted to the Committee shall be regarded as confidential to the Committee . . .<sup>288</sup>

A committee has no authority to consider or use the evidence and records of a similar committee appointed in previous Parliaments or sessions unless specific authority is granted by the House. This is usually included in the resolution of appointment.<sup>289</sup>

### Voluntary evidence

#### *Invitation of submissions*

It needs to be stressed that most witnesses, far from needing to be compelled to give evidence, welcome the opportunity to do so. Soon after their appointment committees

284 PP 168(1972)9.

285 Where a committee is required to inquire into matters in which the Commonwealth and States share responsibilities, such as Aboriginal affairs, the committee's resolution of appointment now requires it to 'recognise the responsibility of the States and the Northern Territory in these matters and seek their co-operation in all relevant aspects', VP 1980-81/48-9.

286 S.O. 334.

287 *May*, p. 645.

288 VP 1951-53/129. In later Parliaments the restrictions on the committee's power to call for evidence were gradually eased, VP 1957-58/13-14, VP 1959-60/25-6, VP 1973-74/52-3.

289 See Redlich, vol. II, p. 196; and see Standing Committee on Aboriginal Affairs, VP 1980-81/48-9; Select Committee on Tourism, VP 1977/11; Joint Committee on the Australian Capital Territory, VP 1980-81/54-5.

usually advertise in the Press their terms of reference and their desire to receive written submissions from interested individuals or organisations. In addition, letters inviting written submissions are sent directly to those who are thought to have a special interest or expertise in the field under investigation. It is within the committee's discretion to decide whether or not a person who has lodged a submission should be invited to appear as a witness. Sometimes oral evidence is considered unnecessary and no invitation is issued.

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

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

Occasionally committees send questionnaires to appropriate organisations and the responses to these questionnaires form the basis for questioning at hearings. In 1971, the Select Committee on Pharmaceutical Benefits issued a questionnaire to manufacturers who co-operated with the committee after satisfactory arrangements had been negotiated to ensure security of the responses. The Standing Committee on Expenditure frequently obtains information from departments and authorities by questionnaire.<sup>290</sup>

#### *Evidence from Members, Senators and parliamentary officers*

Members or Senators may appear as witnesses before committees of the House.

If a Member, including a Minister, volunteers to appear before a House committee he may do so and does not need to seek leave of the House. For example, the Prime Minister appeared before the Standing Committee on Environment and Conservation in 1976 and, in 1977, the Minister for Aboriginal Affairs appeared before the Joint Select Committee on Aboriginal Land Rights in the Northern Territory. (See p. 622, for procedures to be followed when committees want to request the appearance before them of Members and Senators who have not volunteered to give evidence.)

*May* states:

When a Member submits himself to examination without any order of the House, he is to be treated precisely like any other witness, and is not at liberty to qualify his submission by stipulating that he is to answer only such questions as he pleases.<sup>291</sup>

In 1920, a Senator of his own volition sought consent of the Senate to appear before a House of Representatives committee. The Senate, by motion, granted the Senator leave to attend and give evidence to the committee if he thought fit.<sup>292</sup> However, in 1973 and 1976, Senators appeared before the House of Representatives Standing Committee on Environment and Conservation without seeking leave of the Senate. Their appearance was at their own request.

In 1973, a Member of the House, who was then a Minister, voluntarily gave evidence to the Senate Standing Committee on Social Environment. The Senate did not send a message to the House requesting his attendance as it was clear that he was prepared to give evidence.<sup>293</sup> The Minister did not personally seek leave of the House to appear. In 1981, the Speaker voluntarily appeared before the Senate Select Committee on Parliament's Appropriations and Staffing.

290 PP 244(1977)16-17.

291 *May*, p. 687.

292 J 1920-21/153; S. Deb. (15.9.20)4531.

293 *Odgers*, p. 564.

In 1901, the House granted a Member leave, if he thought fit, to attend and be examined by a select committee of the Victorian Legislative Assembly.<sup>294</sup>

In 1975, the Joint Committee on the Parliamentary Committee System formally sought the agreement of the Clerk of the House to the appearance before it of 2 officers of his department. It was noted that the standing orders concerning the appearance of parliamentary officers before committees were always interpreted liberally. Formal approval was sought in this case because the officers concerned sought to present personal views rather than to speak on behalf of the department. The Clerk gave his approval.

In 1971, at the request of the Committee of Privileges, the Clerk Assistant and the Serjeant-at-Arms appeared before the committee to give their account of the proceedings referred to in the article in the *Daily Telegraph* which had been referred to the committee for examination.<sup>295</sup> In 1978, the Clerk of the House and the Serjeant-at-Arms appeared before the Senate Committee of Privileges to give evidence in relation to the security of Parliament House.<sup>296</sup>

#### *Evidence from Commonwealth public servants*

In 1978, a government paper entitled *Proposed Guidelines for Official Witnesses Appearing before Parliamentary Committees* was tabled in the House. At the time of presentation the Minister said that the guidelines had been developed with 4 major considerations in mind:

- the importance of promoting the freest flow of information through the parliamentary committees to the public consistent with the protection, in the national interest, of the necessary confidences of government and the privacy of individual citizens;
- the achievement of a proper balance between the need of governments to preserve some confidences and the need of parliamentary committees to be able to conduct thorough inquiries;
- confirmation of the line of responsibility between the Executive and Parliament, where Ministers have the central role in dealings between the Executive and parliamentary committees and should respond to Parliament, and where officials are responsible to Ministers, and
- the maintaining of the traditional political impartiality of officials.

The Minister went on:

The government sees it as fundamental to the operation of our system of government that government and the committees approach hearings in a spirit of co-operation and with a full recognition of the functions each has in that system. Claims of privilege would not, of course, be made by Ministers without substantial cause. These considerations are in harmony with the principles of ministerial responsibility which underlies the relationships of Ministers and officials in their departments, as is the current general practice of committees addressing to Ministers their requests for nomination of official witnesses to appear and for provision of documents. The guidelines are tabled so that they may be considered by all concerned. The government will review the guidelines in the light of comments on them and experience in their operation.

The Minister indicated that the guidelines do not attempt to resolve 'the complex question of "deadlocks" between the Parliament and the Executive' on claims of Crown privilege.<sup>297</sup>

294 VP 1901-02/149.

295 PP 242(1971)39-45.

296 'Appropriate means of ensuring the security of Parliament House', *Report of Senate Standing Com-*

*mittee of Privileges*, PP 22(1978).

297 VP 1978-80/434; H.R. Deb. (28.9.78)1504-09.

As the term guidelines suggests, they are intended to provide general guidance rather than to set down inflexible prescriptions to cover every possible contingency. The guidelines suggest not only how public servants should act in relation to committees but also how committees should act in relation to public servants. However, it is stressed that the guidelines, not having the force of law, are not binding on committees and in no way limit the powers which parliamentary committees derive, through the Parliament, from the Constitution.

The draft guidelines largely restate and clarify existing practice. They are quoted here in full:

*Proposed guidelines for official witnesses appearing before parliamentary committees*

This statement contains general guidelines it is proposed to apply to the provision of evidence to Parliamentary Committees by officials of departments --paragraph 35 refers specifically to officials in statutory authorities and members of various Government-appointed advisory councils or committees.

Where special provision is made by statute in relation to the giving of evidence before Parliamentary Committees, the provisions of the relevant Act prevail—see paragraphs 32-33.

Paragraph 34 relates to committees that are concerned with administrative aspects of government.

*Preliminaries to an Inquiry*

1. As a matter of practice, arrangements for an official to attend a Committee inquiry in an official capacity, or to provide material to it, are made through the relevant Minister.

2. A Minister may delegate to the Permanent Head the responsibility of nominating to a Committee the official(s) most appropriate to provide the evidence sought by the Committee from the Department.

3. The original official statement, and the provision or production of other documentary evidence, will be cleared with the Minister, or upon his direction, by the Permanent Head, before it is submitted.

4. A request for more time to prepare evidence may be made to the Committee by the Minister (or the department acting on his behalf) if the notice is considered insufficient.

*Preparation for Hearings*

5. Witnesses are to prepare themselves thoroughly before hearings including, as appropriate, by consultation with the Minister (and, if required, the Minister representing him in the other House), e.g. on possible claims of privilege or requests for the hearing of evidence in camera.

6. When the interests of several departments are involved, adequate consultation is to take place in preparing material and making arrangements for witnesses to attend.

7. In the normal course, Committees should be provided with a written statement on which subsequent oral evidence will be based. In addition, where written questions have been forwarded by the Committee, written replies should also be provided.

8. In some cases it may be desirable for there to be informal consultation between the Minister and the Chairman of the Committee to consider ways of making available to the Committee information of a confidential nature which it considers essential to its purposes, without endangering the preservation of essential confidentiality.

*Conduct during Hearings*

9. The Government sees the role of an official witness as being to speak to any statement provided to the Committee (see paragraphs 3 and 7) and to provide factual and background material to assist understanding of the issues involved.

10. The Government does not see it being the role of the official to take policy positions or to answer questions:

(a) seeking his personal views on Government policy

- (b) seeking evidence or identification of considerations leading to a Ministerial or Government decision or possible decision, unless those considerations have already been made public or the giving of evidence on them has been approved
- (c) which would require the witnesses to advocate or defend Government policy, or canvass the merits of Government (including State or foreign Government) policy or policy options—past, present or future
- (d) on matters which could give rise to a claim of privilege (see below).

11. The Chairman can be asked to rule out of order questions falling within paragraph 10. If an official witness is directed to answer such a question, he should ask to be allowed to defer his answer until he has discussed the matter with the Minister or Permanent Head.

12. As an alternative to the approach suggested in paragraph 11, it may be appropriate for the official witness to refer to the written material provided to the Committee and offer, if the Committee wishes, to seek elaboration from the Minister (this would apply to sub-paragraphs (a), (b) and (c) of paragraph 10), or to request that his answer to a particular question be reserved for submission in writing.

13. Questions may arise which an official witness may need to answer because they are within the role of providing factual and background material but which would also have wider implications because they are within an area of public controversy. This points to the need for the witness in his preparation to give thorough consideration to any wider ramifications of the matter under inquiry.

14. It is important that as questions are answered during hearings, witnesses should take care not to intrude into responsibilities of other departments and agencies (see also paragraph 6 above, which relates to preparation for hearings). Where a question falls within the administration of another department or agency an official witness may request that it be directed to that department or agency or be deferred until that department or agency is consulted.

#### *Claims of Privilege by Ministers*

15. Claims of privilege should only be made by a Minister (normally the responsible Minister), consulting the Prime Minister where necessary.

16. As far as practicable, the question whether a claim of privilege should be made should be decided before a hearing, so that a certificate by the Minister can be produced.

17. If an official witness, when giving evidence to a Committee, believes that circumstances have arisen to justify a claim of privilege he should request a postponement of his evidence, or of the relevant part of his evidence, until the Minister can be consulted. (See also paragraph 8 above.)

18. It should be noted that privilege can be claimed in respect of oral evidence as well as documents.

19. Documents—or oral evidence—in respect of which Ministers may wish to consider claiming privilege may include matters which fall within the following categories:

- (a) Cabinet (and Cabinet Committee), Executive Council and Loan Council documents and proceedings.
- (b) communications between officers and Ministers and between Ministers
- (c) material the publication of which would be injurious to the national interest, e.g. matters relating to defence, internal security, confidential communications with other countries and with the States
- (d) opinions of the Law Officers of the Crown and legal advice to Ministers, departments and Commonwealth Government authorities
- (e) communications between officers and between officers and third parties relating to the formulation of policy
- (f) material which, by statute, is required to be kept secret, e.g. section 16 of the Income Tax Assessment Act.

20. There are documents within the foregoing categories which within themselves may not appear to warrant a claim of privilege but the production of which may affect subsequent claims of privilege. There should in such cases be consultation with the Minister, and where necessary the Prime Minister, as provided in paragraphs 15-17.

21. In addition to the documents mentioned in paragraph 19 there are other documents and there is other oral evidence in respect of which privilege might be claimed, depending on the circumstances. It is not possible to give an exhaustive list, the question in each case being whether the balance of public interest is against disclosure of the material.

22. The following list will give some indication of the possible nature of the material referred to in paragraph 21, but it is important that each matter be considered in the light of the particular circumstances:

- (a) communications between Ministers and third parties
- (b) medical, financial and other personal information relating to private citizens and officers, e.g. medical reports, financial returns
- (c) material obtained from individuals or corporations in confidence or in circumstances where there is a duty not to disclose it
- (d) material which, if disclosed, might injure or substantially embarrass private citizens
- (e) information obtained by officers relevant to possible breaches of the law.

23. Documents that are given one of the usual security ratings as 'Confidential', 'Secret', or 'Top Secret' would normally be included under one of the categories in paragraph 19 above. Before producing a document bearing such a classification, an official witness should seek instructions from the Minister. (Note: it does not follow that documents without a formal security classification may not be the subject of a claim of privilege. Nor does it follow that classified documents may not in any circumstances be produced. Each document should be considered on its own merits and, where classified, in consultation with the originator.)

24. In relation to oral evidence, the same considerations apply as to the contents of a classified document and as to information which, while not contained in a document, is of a Confidential, Secret or Top Secret nature.

#### *Evidence in Camera*

25. There may be occasions when a Minister would wish on a balancing of the public interests involved, to raise with the Chairman the possibility of an official producing documents or giving oral evidence in camera and on the basis that the information be not disclosed or published except with the Minister's consent.

26. There will be circumstances where an official witness may have to request that his evidence, or part of his evidence, be heard in camera. These circumstances might include:

- (a) cases where, although a claim of privilege could be justified, the Minister considers that the balance of public interest lies in making information available to the Committee on the basis that it be heard in camera and not disclosed or published except with his consent
- (b) cases where, while a claim of privilege may not be justified, there are other special considerations justifying the Committee being asked to take the evidence privately, e.g. where a private individual might unfairly be prejudiced by public disclosure, say of a conversation between him and the witness
- (c) cases where similar or identical evidence has been previously given in camera to other hearings of the Committee or other Committees of the Parliament and has not been made public.

27. If an official witness when giving evidence to a Committee believes that circumstances have arisen to justify a request that evidence be heard in camera, he should request the postponement of his evidence, or of the relevant part of his evidence, until his Minister can be consulted and approval obtained.

28. In the event of an officer being asked by a Committee to give evidence 'off the record', he should request a postponement until his Minister can be consulted.

#### *Publication of Evidence*

29. After perusing the record of their evidence official witnesses should suggest any necessary corrections, for incorporation or noting in the published record. Where these affect the substance of the evidence previously given, it may be necessary to seek the agreement of the Committee on the way in which the correction should be made, e.g. by tendering a subsequent statement.

30. If an official witness believes, after perusing the record, that he has omitted to give some relevant evidence, he should, after consultation with the Minister (or Permanent Head) seek leave of the Committee to lodge a further statement supplementing his earlier evidence or to give further oral evidence.

31. An official witness has no authority to consent to the disclosure or publication of evidence given in camera. This is a matter for the Minister, or the Permanent Head acting on his behalf.

#### *Statutory Committees*

32. The Public Works Committee Act and the Public Accounts Committee Act provide for the summoning of witnesses and raise some special considerations: e.g. in section 23 of the Public Works Committee Act special provision is made in relation to the hearing of evidence in confidential matters.

33. In these and similar cases the special provisions of the relevant Act take precedence.

#### *Committees Concerned with Administrative Aspects of Government*

34. Where a Parliamentary Committee is one which, by its nature, concentrates on the administrative aspects of government and the subject of the Committee's inquiry is directed towards the examination of departmental administration and practice it is for the Permanent Head, with the general consent of the relevant Minister, to use his discretion as to the extent to which aspects of these guidelines such as the clearing of written evidence and the selection of witnesses, are to be followed.

#### *Non-departmental Official Witnesses*

35. It is difficult to generalise on the wide range of relationships between Ministers and instrumentalities, advisory councils and committees, etc. As appropriate, suitable arrangements should be made with the Minister concerned.

No comment is made here on those aspects of the guidelines relating to the principles, practice and procedure associated with Crown privilege (see p. 616).<sup>298</sup> In reading the draft guidelines, notably 25 to 28 and 31, it should be noted that it is within the discretion of the House or, as empowered, a committee to authorise disclosure or publication of oral or documentary evidence presented to a committee at public or in camera hearings.<sup>299</sup> A Minister's consent is not required, nor may he issue an effective formal direction to the committee unless expressly authorised by the House to do so.<sup>300</sup>

Draft guideline 10 relating to government policy, in principle, reflects established practice. Governments and public servants have not sought to interpret the guideline too narrowly in the past. In 1969, the Joint Committee of Public Accounts set down its practice on questions to public servants about government policy. This practice, while to some extent reflecting the particular concerns of a Public Accounts Committee, nevertheless represents a sensible balance between meeting the needs of most investigatory committees and recognising the role and responsibility of public servants. The joint committee said:

This Committee does not examine public servants on matters of Government policy. The understanding of Government policy, however, is itself essential to the effective operation of the Committee during specific inquiries as the Committee is concerned with the administrative out-workings of such policy. In these circumstances, the Committee has normally proceeded on the basis of asking public servants to outline for it the particular policy of the Government which is being administered by them. It does not ask public servants, however,

298 See also Ch. on 'Papers and documents'.

299 S.O. 340.

300 The committee's resolution of appointment or some other order of the House could impose such a requirement. This restriction was imposed on the Joint Committee on Foreign Affairs for some time.

to comment on the adequacy of such policies. It is not unusual to find that in the implementation of Government policy, departments and authorities develop administrative policies. In the past, the Committee has regarded this type of policy as within its purview and has examined public servants in the administrative policy field.<sup>301</sup>

#### *Evidence from State public servants*

State public servants have always appeared before House and joint committees in response to an invitation to do so. No summons has ever been issued.

The need for co-operation with the States is explicitly acknowledged in several resolutions of appointment which direct that the committees recognise the responsibility of the States in the matters into which they inquire and that they seek the States' co-operation in all relevant aspects.<sup>302</sup>

By convention, a committee chairman informs each State Premier and the Chief Minister of the Northern Territory of the terms of reference of each inquiry at its outset and requests their co-operation. This co-operation is usually forthcoming. The extent to which the Premiers insist on being personally involved in negotiations between their States and the committees varies.

As with Commonwealth officials it is accepted practice that State officials will not be asked to comment on government policy. In fact, State Premiers insist on agreement to this condition before permitting their officials to give evidence.

### **Evidence by compulsion**

#### *Compulsory attendance*

If a person declines an invitation to give evidence, a committee invested with power to send for persons, papers and records may issue a summons, signed by the committee secretary, ordering the person to attend before it and to bring such documents as the committee specifies.<sup>303</sup> The form of the summons is not prescribed by standing orders or by statute.

It appears to have been the practice of committees established in the early years of the Parliament to issue what were called 'summonses' to prospective witnesses whether or not they had shown any reluctance to appear.

In 1963, the Joint Select Committee on Parliamentary and Government Publications summonsed 2 witnesses to appear before it. The witnesses were required to give evidence in relation to alleged threats to a witness because of evidence he had given to the committee (*see* p. 634 for further details). Each summons, which was signed by the clerk to the committee, showed the full name, designation and address of the person being summonsed and took the following form:

I am directed by the Joint Select Committee on Parliamentary and Government Publications to summon you to attend before it on the second day of July, 1963, at 10.30 o'clock in the forenoon, at the Cabinet Room, 7th Floor, Commonwealth Bank Building, Martin Place, Sydney, then and there to give evidence; and you are required to continue in attendance as directed by the said Committee or the Chairman thereof, until your attendance is no longer required.

Dated the first day of July, 1963.

One summons was served in Canberra by the Australian Capital Territory Police and the other in Sydney by the Commonwealth Police.

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

1980-81/38-9) and Environment and Conservation (VP 1980-81/50-5).

302 The Standing Committees on Road Safety (VP 1980-81/52-3), Aboriginal Affairs (VP

303 S.O. 354; *May*, p. 644.

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

It is unlikely that the House would take any action against, or in relation to, a recusant witness until he had refused or neglected to obey a formal summons (*see also* p. 626). Failure to accept an invitation or request to appear before a committee could not be interpreted as a failure to obey an order of the committee. This view was supported by the Attorney-General in 1951 when the Senate Select Committee on National Service in the Defence Force reported to the Senate the failure of the Chiefs of Staff of the armed services and other specified officers of the Commonwealth service to appear before it.<sup>304</sup> However, because the debate on the motion to adopt the committee's report had not been concluded when the Senate was dissolved on 19 March 1951, the matter was not satisfactorily resolved. Furthermore, it could be argued, as the committee did, that the failure to issue a summons was not the central issue, as this was not given as a ground for the Government's refusal to permit the officers to attend (*see* p. 618 for further details).

When a witness is in the custody of any prison, the keeper may be ordered to bring the witness in safe custody for examination as often as his attendance is considered necessary. The Speaker may issue a warrant accordingly.<sup>305</sup>

#### *Compulsory answers to questions*

A committee, by virtue of its powers to send for persons, papers and records, may compel witnesses to answer questions. *May* summarises the position:

A witness is, however, bound to answer all questions which the committee see fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client; or on the ground that he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit, or that it would prejudice him as defendant in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law. Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not to disclose them without his express authority. He may, however, request that the whole or part of his evidence should not be published.<sup>306</sup>

A witness may, nevertheless, object to a question and the committee may, and frequently does, exercise its discretion in his favour. If the committee needs to deliberate on the objection, the witness and any other strangers present are required to withdraw while it does so.<sup>307</sup> If the objection is overruled, the witness is required to present the oral or documentary evidence required. Failure to provide such evidence may be reported to the House and the witness punished for contempt. It has been suggested that the witness may not have any right of redress before a court even if he objects to a question on the grounds that the information sought is outside the committee's terms of reference or the terms of reference are outside the House's constitutional powers.

<sup>304</sup> S. Deb. (8.3.51) 155-7.

<sup>305</sup> S.O. 361. *See* Ch. on 'Parliamentary privilege', the 'Bankstown Observer' Case (1955).

<sup>306</sup> *May*, p. 692.

<sup>307</sup> S.O. 366.

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

In 1975, a witness representing his employer before the Standing Committee on Road Safety indicated that a document sought by the committee would be provided only on the condition that it be kept confidential. The committee was not prepared to give that undertaking as it believed it to be in the public interest that the document be published. The witness persisted in his refusal. The committee resolved to call for the document pursuant to its power to call for persons, papers and records. The committee secretary, on the committee's authority, wrote to the managing director of the company acquainting him of the circumstances and drawing his attention to the committee's resolution. The managing director was informed that, if the document requested was not provided within 7 days of the date of the secretary's letter, the secretary would have no alternative but to implement the committee's resolution and summons him to appear before the committee with the document. The document was subsequently provided and was published in the committee's report.<sup>308</sup>

Doubt has been expressed as to whether a witness who appears voluntarily before a committee can be compelled to answer a question. In 1971, a witness appearing voluntarily before a Senate select committee declined to answer a question. The committee, having asked the witness to withdraw, decided to insist upon an answer. In order to protect its position the committee issued a summons, which was served on the witness immediately, ordering him to appear at a time which, in effect, was forthwith. The witness was called and the question put to him. He was advised that, if he refused to answer, the matter would be dealt with as a question of privilege and a report made to the Senate. After consulting counsel the witness answered the question and continued his evidence.<sup>309</sup> The procedure adopted by the Senate committee would seem to be unnecessary as an oral order, in the presence of the witness at a hearing, would seem to have legal force equal to that of a written order in the form of a summons.<sup>310</sup>

### *Crown privilege*

#### THE GOVERNMENT'S STRONG POSITION

Commonwealth public servants appearing before committees as private individuals to give evidence unrelated to their past or present duties as public servants, are bound by orders of a committee. They are open to the same penalties as any other citizen if they do not obey. While in principle they are equally bound when summoned to give evidence relating to their official duties, in practice their position is quite different. This is particularly so with respect to failure or refusal to answer a committee's questions. They may, under certain circumstances and on behalf of their Minister, claim Crown privilege, that is, they may decline to provide certain oral or documentary evidence on the grounds that its disclosure to the committee would not be in the public interest (see p. 610 for guidelines to public servants). It is doubtful, however, whether a public servant, even on instructions from his Minister or the Government, could refuse or fail to obey a summons to attend before a committee.<sup>311</sup>

<sup>308</sup> PP 156(1976).

<sup>309</sup> *Odgers*, pp. 542-3.

<sup>310</sup> See *May*, p. 687, concerning Members who give evidence voluntarily.

<sup>311</sup> See Campbell, 'Parliament and the Executive', in Leslie Zines (ed.), *Commentaries on the Australian Constitution*, Butterworths, 1977, p. 100.

The Joint Committee on the Parliamentary Committee System reported that the application of the rules of Crown privilege is 'one of the most vexed questions of committee procedure'. It concluded:

Notwithstanding the authoritative literature and knowledge of the application of the rule in other Commonwealth Parliaments the Committee finds itself unable to offer any clarification of the rules.<sup>312</sup>

Crown privilege in parliamentary proceedings involves the following considerations:

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

Clearly in dealing with a request from the House for information, Government is in a strong position, stronger than when dealing with similar requests by the courts or by the Senate when it is controlled by the Opposition. Only a measure of public (or private) support from government Members, or perhaps public pressure, could force the Government to provide to the House or its committees information or documents which the Government does not want disclosed. Any order or address, for the production of such documents or information, could not be successful without a majority vote of Members.

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

It is clear that crown privilege is relied on by governments to protect themselves. The protection of the confidentiality of advice to Ministers or security matters is a shield behind which witnesses sometimes retreat.<sup>313</sup>

#### COURT PRINCIPLES AND PRACTICE AND THEIR RELEVANCE

Despite the obvious differences between parliamentary and judicial proceedings it is useful to consider the attitudes adopted by the courts towards Crown privilege.

On 9 November 1978 the High Court of Australia, in its decision in the case of *Sankey v. Whitlam and others*, made important statements about the principles involved in Crown privilege and set precedents for court practice in relation to it.<sup>314</sup> The decision reflected a continuing trend away from accepting the Minister's certification that information cannot, in the public interest, be disclosed to the courts. The High Court's decision superseded a long-held view (House of Lords in *Conway v. Rimmer* (1968)) that certain classes of important government documents can be excluded automatically from production in court proceedings simply on a plea for secrecy by a Minister or senior public servant, a view often put in relation to parliamentary committee proceedings.<sup>315</sup> The court held that the claim of privilege must be considered in the light of the nature of the documents, and not just their belonging to a class of documents, and where there is a real doubt as to whether a document should be withheld, the High Court said that a court can look at the document and decide whether it should be produced.

312 'A New Parliamentary Committee System', Report from the Joint Committee on the Parliamentary Committee System, PP 128(1976)87; see also Ch. on 'Papers and documents'.

313 PP 128(1976)87.

314 *Sankey v. Whitlam and others* (1978) 142 CLR 1.

315 PP 168(1972)33-40; see also Solicitor-General's letter to the Senate Regulations and Ordinances Committee, quoted in *Odgers*, pp. 548-54.

## COMMITTEE PRACTICE

The procedures adopted by the courts for testing the Minister's claim that disclosure would not be in the public interest, that is, by inspection of documents or consideration of the nature of the evidence while relevant to parliamentary proceedings, could not be given effect to in the House. For example, if the Speaker were given responsibility for viewing documents to test a Minister's claim of Crown privilege, his decision could be overruled by a vote of the House.

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

The Senate, nevertheless, came close to this position in 1951, when, on 6 February, the Senate Select Committee on National Service in the Defence Force, consisting only of opposition Senators, resolved:

- (1) That the Committee takes a very grave view of the action of the Cabinet in flouting Parliamentary authority by directing that the Chiefs of Staff and other officers should not attend before the Select Committee.
- (2) That such action by the Cabinet is an interference with the freedom of prospective witnesses, and can only be construed as calculated to defeat, hamper and obstruct the purpose which the Senate had in appointing the Select Committee.
- (3) That a statement of the facts be laid before the Senate in a Special Report as soon as possible.<sup>316</sup>

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

It is quite impossible to draw the line between what your Committee may call "factual" and what is "policy", and it should not be for any official or for the Committee, in the view of the Government on matters which may touch security, to decide whether it is either one or the other.<sup>317</sup>

The failure of the committee to summons the officials was not mentioned but the Attorney-General subsequently referred to it in debate.<sup>318</sup>

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

316 *Special report from the Senate Select Committee on National Service in the Defence Force, S 2(1950-51)5.*

317 S 2(1950-51)8.

318 S. Deb. (8.3.51)154-7.

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

... if the Senate decides that a breach of privilege has been committed, the action to be taken by the Senate should be aimed at asserting and upholding the cherished principle of the right of the Senate to the free exercise of its authority without interference from the Cabinet.<sup>319</sup>

The special report was presented to the Senate and a motion for its adoption was moved.<sup>320</sup> The debate on the motion was not concluded when the Senate was dissolved on 19 March 1951. As the matter was not revived the issues were left unresolved.

A significant factor in the case was that not only did the committee consist entirely of opposition Senators, but the opposition party held a majority in the Senate at the time. If this had not been so, it can be surmised that events would have been very different. Indeed the committee may not have been appointed. The case perhaps best illustrates the importance of party political realities in any consideration of parliamentary access to information held by Government. This was similarly shown in the report of the Senate Committee of Privileges on the refusal of officials, at the direction of the Government, to give oral or documentary evidence in 1975 at the Bar of the Senate on the Whitlam Government's overseas loans negotiations. The committee divided on party lines.<sup>321</sup>

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

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

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

However, documents that do not come within this category and are relevant to the matters mentioned in your letters of 28th and 30th November, are produced for the Committee's examination. These papers provide the factual information requested by the Committee.<sup>322</sup>

The committee did not press for the information requested.

While requests for oral or documentary evidence from government sources have not been pressed to the point of bringing the powers of contempt into force, committees have not lightly accepted objections by officials to presenting certain evidence. While objections have often been readily and immediately accepted, the evidence has at times been so important that the committee has persisted. This persistence has taken the form of requiring the witness or prospective witness to consult with his Permanent Head or Minister, or of the committee or its chairman negotiating with the Permanent Head or the Minister.

In 1977, a sub-committee of the Standing Committee on Expenditure was able to obtain important information, initially refused, after the chairman talked to a witness'

319 S 2(1950-51)16.

320 J 1950-51/215,220.

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

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

superior officer who in turn sought the Minister's approval. No objection was raised to the committee's subsequent publication of the evidence. The same committee was unsuccessful in certain other attempts to obtain information from the Government and brought this to the attention of the House in a report describing its first year of operation. The committee indicated that the Prime Minister had refused to provide it with 2 sets of documents, even on a confidential basis, on the ground that they were internal working documents. Attention was drawn to the fact that the documents would have helped the committee to determine which matters under investigation it should concentrate upon and in turn would have enabled it to use its limited resources to greater advantage. The committee urged Governments, if necessary, to find ways of minimising restrictions on information to be made available to committees, for example, by providing documents with offending material removed.<sup>323</sup> This latter course has in fact been followed on occasions.

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

The principles upon which the House and Governments have proceeded to deal with Crown privilege were summarised by Greenwood and Ellicott. They drew on 2 documents, namely, a letter of November 1953 to the Joint Committee of Public Accounts from the Prime Minister and a letter of September 1956 from the Solicitor-General to the Senate Regulations and Ordinances Committee.<sup>324</sup> These principles have been substantially incorporated in the Government's *Proposed Guidelines for Official Witnesses Appearing before Parliamentary Committees* (see p. 610). The principles are:

- The privilege involved is not that of the witness but that of the Crown.
- If a witness attends to give evidence on any matter in which it appears that State secrets may be concerned, he should endeavour to obtain instructions from his Minister beforehand as to the questions, if any, which he should not answer.
- If questions arise unexpectedly in the course of an inquiry, the witness should request postponement of the taking of his evidence to enable him to obtain the instructions of his Minister through his Permanent Head.
- If the Minister decides to claim privilege, he should furnish the committee with a certificate to that effect.
- Where the witness does not raise any question of privilege, although the matter is obviously one which could be the subject of privilege, the chairman of the committee should stop the evidence being given until the appropriate Minister has an opportunity to consider whether privilege should be claimed or whether a request should be made that the evidence be heard in private.<sup>325</sup>
- If a witness were to supply to the committee a certificate from the appropriate Minister to the effect that he regarded it as being injurious to the public interest to divulge information concerning particular matters, the committee should accept the certificate and not continue further to question a witness on these matters.

<sup>323</sup> PP 244(1977)20.

<sup>324</sup> Both are quoted in full in *Odgers*, pp. 545-54.

<sup>325</sup> The Select Committee on Tourism, on its own initiative, decided not to publish a Cabinet decision and related papers which were attached to a submission.

The documents were treated as confidential exhibits. The committee dealt similarly with that part of a submission presented to it which cited a minute from a senior public servant to his Minister.

- Should the committee regard the question of the line of inquiry being pursued as important for its purposes, the chairman should arrange to discuss the matter with the appropriate Minister. The object of the discussion would be to arrange a method of making available to the committee such information as is requisite for its purposes without endangering the security of classified information.
- Before deciding whether to grant a certificate, the Minister should carefully consider the matter in the light of the relevant principles.<sup>326</sup>

It needs to be emphasised that the 6th point, regarding the actual supply of a certificate to a committee, simply recognises that it is the Minister not his officer who may claim Crown privilege. It therefore represents sound practice. However, as already indicated, a committee may negotiate further with the Minister himself or the Prime Minister. Ultimately, it is, in principle, open to the committee to challenge the Minister's certificate in the House by raising his, or the Government's, behaviour as a contempt of the House.<sup>327</sup>

#### THE ROYAL PREROGATIVE

A committee may not send for papers which, if required by the House itself, would have to be sought by address to the Governor-General.<sup>328</sup> Such is the case when the Royal prerogative is concerned in any paper.<sup>329</sup>

#### *Evidence from State public servants*

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

It is unclear in law as to whether the Commonwealth Houses and their committees have the full investigatory powers of the House of Commons or whether they are limited to those matters on which the Commonwealth Parliament may legislate (see p. 605). If the latter were the case, committees of the House could not compel witnesses to attend before them and give evidence on matters outside these constitutional limits. Beyond those limits evidence could be sought only on a voluntary basis from any person, including State Government Ministers and officials.

No committee of the Commonwealth Parliament has been prepared to summons a State public servant or Minister to give documentary or oral evidence which they have been unwilling to provide. If such a summons were issued, a State Government could challenge it in the High Court or simply claim Crown privilege. In the highly unlikely event of either House of the Commonwealth Parliament attempting to deal with a State Minister or Government for contempt, the matter would appear to be one to be decided by the High Court.

In 1953, the Parliamentary Standing Committee on Public Works sought the Solicitor-General's advice as to its power to summons a State official to give evidence before it. He considered the matter so doubtful that he advised against making a test case by summoning a State officer<sup>330</sup> (see p. 598).

The relevance of this opinion to other committee's powers is doubtful, as the Public Works Committee derives its power from statute whereas committees appointed by resolution or pursuant to standing orders, given the appropriate authority, enjoy the

326 PP 168(1972)37-8.

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

328 May, p. 647.

329 S.O. 317. For details see Ch. on 'Papers and documents'.

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

powers of committees of the House of Commons as at 1901 by virtue of section 49 of the Constitution.

In light of the unclear constitutional situation, a committee would be prudent to seek advice from the Law Officers before summonsing State officials or State Ministers to provide oral or documentary evidence.

#### *Evidence from Members, Senators and parliamentary officers*

If a committee desires a Member to appear as a witness, the chairman shall request him in writing to attend. If the Member refuses to attend or to give evidence or information as a witness, the committee is required to acquaint the House of the circumstances and may not summon the Member again to attend the committee.<sup>331</sup> It is then for the House to determine the matter. These procedures have never had to be implemented in the House of Representatives.

Standing orders of both Houses set down procedures to be followed if a Member of the other House is to be called to give evidence before a committee. These procedures are not followed when the Member or Senator concerned has informed the committee that he wants to give evidence<sup>332</sup> (see p. 608).

If a committee of the House wishes to call before it a Senator who has not volunteered to appear before it as a witness, a message is sent to the Senate by the House requesting the Senate to give leave to the Senator to attend for examination.<sup>333</sup> Upon receiving such a request the Senate may forthwith authorise the Senator to attend if he thinks fit.<sup>334</sup> Only once have these procedures been implemented in full. The Senate ordered that the Senator concerned have leave to give evidence before the Select Committee on Coinage if he thought fit.<sup>335</sup>

The same procedures are followed if an officer of the Senate is to be requested to give evidence.<sup>336</sup> Upon receiving such a request the Senate may instruct the officer to attend the committee.<sup>337</sup> The officer is then compelled to attend and give evidence. However, if the officer, having been instructed by the Senate to attend and give evidence before a House of Representatives committee, neglects or refuses to do so, the principle of the complete independence of each House prevents the House of Representatives from dealing with the matter. In such a case the House would acquaint the Senate of the circumstances and it would then be for the Senate to inquire into and, if it thought fit, to punish the offence.<sup>338</sup> If a Senate committee formally sought the attendance before it of an officer of the House the same procedures would apply.<sup>339</sup>

Using the same procedures as those followed by the House<sup>340</sup>, the Senate has requested that Members of the House be given leave to attend and be examined by Senate committees. The House has several times resolved to grant such leave to Members, adding the qualification that the Member may attend and give evidence if he thinks fit.<sup>341</sup> In 1913, the House considered a request from the Senate that 6 named Members, including the Prime Minister, be granted leave to be examined as witnesses before the Senate Select Committee on General Elections, 1913. On motion moved by the Prime Minister, the House resolved to grant such leave only to 3 Members, all of them opposition Members. The Prime Minister explained that the 3 government Members whose attendance was requested were not included in the motion because

<sup>331</sup> S.O. 357.

<sup>337</sup> Senate S.O. 388.

<sup>332</sup> *See also May*, p. 688.

<sup>338</sup> *May*, p. 173.

<sup>333</sup> S.O. 359.

<sup>339</sup> S.O. 360; Senate S.O. 387.

<sup>334</sup> Senate S.O. 388.

<sup>340</sup> Senate S.O. 387.

<sup>335</sup> VP 1901-02/109,113; J 1901-02/88.

<sup>341</sup> S.O. 360; VP 1904/100,114; VP 1909/189.

<sup>336</sup> S.O. 359.

they did not desire to attend.<sup>342</sup> After the receipt of the message from the House was announced in the Senate, the President stated in answer to a question:

The Senate sent a request to the House of Representatives; but it is no part of our duty, nor have we any right to dictate to the House of Representatives as to what it should or should not do. We have no right to ask it to give reasons as to why it has complied with a part and not the whole of our request.<sup>343</sup>

A similar request for the attendance of Members before another Senate committee was received later on the same day and was dealt with in like manner.<sup>344</sup>

### Documentary evidence—additional considerations

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

#### *Search for documents*

Greenwood and Ellicott suggested that it would be within the competence of the House 'to authorise an officer to search for specified documents or classes of documents in a particular place and order that they be inspected or copied or brought before the House'.<sup>345</sup> They considered the power to give such an order is conferred on a committee by reason of a power to send for documents. They conceded that this view is arguable and felt that it is a power which should only be used in exceptional circumstances. Even if this power is conferred in the way stated, the most appropriate course of action for a committee faced with a refusal by a witness to produce specified documents would be to acquaint the House of the refusal so that it may make a determination (as with oral evidence<sup>346</sup>). It would be inappropriate for a committee to take direct action to search for a copy or take possession of documents without first informing the House and seeking a determination from it. *May* cites refusal to permit books or papers to be inspected when required by orders of committees as an instance of contempt.<sup>347</sup>

#### *Withdrawal, alteration, destruction or return of documents*

No document received by the secretary of a committee may be withdrawn or altered without the knowledge and approval of the committee.<sup>348</sup> A document becomes the property of a committee as soon as it is received by the secretary or by a member of the committee itself.

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

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

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

342 VP 1913/130; H.R. Deb. (31.10.13)2830-1.

346 S.O. 355.

343 S. Deb. (31.10.13)2824.

347 *May*, p. 140.

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

348 *May*, p. 652.

345 PP 168(1972)31-2.

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

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

A committee could resolve to return a submission or other document lodged with it if, for example, the submission was considered irrelevant to the committee's inquiry or if it contained offensive or possibly defamatory material. A rejected submission would cease to be the property of the committee and would not attract privilege. In most circumstances it would be more appropriate for the committee to retain the document, ignore it in its deliberations and not publish it. By virtue of standing order 340, the fact that the document is not published by the committee or, subsequently, by the House would preclude anyone from publishing the document without the risk of being in contempt of the House. Anyone who published a submission which had not been authorised for publication, pursuant to the Parliamentary Papers Act, would not have the protection of that Act and would therefore not be immune from any legal proceedings for such publication. Whether or not qualified privilege would apply is uncertain.<sup>349</sup> It is highly unlikely that the House would give its protection in legal proceedings to a person who had ignored the desire of its committee that a defamatory document remain unpublished. The committee should advise the originator of the submission of his legal position.

#### *Submissions and exhibits*

The record of proceedings of a committee is comprised of the verbatim transcript of evidence taken at hearings by Hansard together with any material ordered by the committee to be incorporated in the transcript. Submissions are usually included in the transcript when a witness appears to give oral evidence at a hearing. If a witness is not invited to give oral evidence, his submission may still be incorporated in a transcript so that it is readily available to the public. Some items cannot (for example, objects), or need not, be incorporated in the transcript and if they are considered relevant to the inquiry, the committee may order that they be included in the committee's records as exhibits. Any documents may be published later at the committee's discretion. Those submissions which a committee agrees not to publish are usually designated confidential exhibits. Committee reports include a list of submissions and exhibits, both published and confidential.

#### *Sub judice convention*

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

Committees are bound by the convention. The chairman of a committee, like the Speaker, may exercise discretion as to whether the convention should apply in a given

<sup>349</sup> For a discussion of qualified privilege see Ch. on 'Parliamentary privilege'.

situation but he must have regard to the principles followed by the Speaker in the House<sup>350</sup> and the option open to a committee to take evidence in camera, an option which is not open readily to the House.

If the chairman decides the sub judice convention should apply to evidence being given, he may direct that the line of questioning and evidence be discontinued or that the evidence be taken in camera. It would also be open to any other member to require the withdrawal of strangers and Members who are not members of the committee.<sup>351</sup>

If the evidence were taken in camera and it subsequently became clear that it did not warrant the application of the sub judice convention, the committee can authorise publication. Equally a committee might publish such in camera evidence once the possibility had passed of its publication interfering with the course of justice.

In 1975, a witness before a sub-committee of the Standing Committee on Environment and Conservation sought to give evidence relating to the circumstances of a legal action against him in the High Court. The evidence was taken in camera.<sup>352</sup>

### Charges against Members

The standing orders provide that if any information comes before a committee in the nature of a charge against any Member of the House, the committee may only direct that the House be acquainted with the matter. It may not proceed further on the matter. The Senate standing orders contain a similar provision.<sup>353</sup>

In 1975, a witness before the Joint Committee on Pecuniary Interests of Members of Parliament alleged that a Senator, who was a member of the committee, was ineligible under section 44(v) of the Constitution to serve as a Senator. It was claimed that the Senator was a director, manager, secretary and substantial shareholder in a company which had a number of contracts with Commonwealth government departments. The committee resolved that, in accordance with standing orders, the Senate should be acquainted with the relevant evidence. The chairman wrote to the President describing the information brought before the committee and enclosing a copy of the relevant transcript of evidence. The President reported to the Senate, read the committee chairman's letter and tabled the letter and transcript of evidence.<sup>354</sup> The Senator was given leave to make a statement in which he denied the allegations and indicated that he had resigned from the committee as the nature of the allegations against him was such as to place in question his objectivity in dealing with the issues before the committee.<sup>355</sup> On 22 April 1975, the Senate resolved to refer the matter to the High Court of Australia, in its jurisdiction as the Court of Disputed Returns, and to grant the Senator 2 months' leave of absence.<sup>356</sup> The Court upheld the Senator's eligibility to serve as a Senator.<sup>357</sup>

### Swearing of witnesses and false evidence

There are no provisions in the standing orders for the swearing of witnesses. Committees of the House which have the power to call for persons, papers and records have the power to administer an oath to witnesses. This power is derived from the House of Commons by virtue of section 49 of the Constitution and on the basis that the United Kingdom *Parliamentary Witnesses Act* 1871 empowers the House of Commons and its committees to administer oaths to witnesses and attaches to false evidence the penalties

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

355 S. Deb. (15.4.75)981-4.

351 S.O.s 337,338.

356 J 1974-75/628-9.

352 A Senate Committee in 1973 decided not to take evidence from a witness in similar circumstances, see *Odgers*, pp. 252-3.

357 For a detailed discussion of pecuniary and personal interest see Ch. on 'Members', and for a more detailed description of the case see *Odgers*, pp. 115-18.

353 S.O. 358; Senate S.O. 386.

354 J 1974-75/597.

of perjury.<sup>358</sup> There has been some doubt cast on whether joint committees have this power<sup>359</sup> but some, such as the Joint Committee on the Australian Capital Territory, continue to swear witnesses. A witness who refuses to submit to an oath may be dealt with by the House for contempt.<sup>360</sup> Similarly, a witness who gives false evidence before a committee, whether he is under oath or not, may be found in contempt of the House.<sup>361</sup> No instance of either contempt has arisen in the House.

The practice of swearing witnesses has become less common in recent years. Committees may exercise their discretion as to whether they require a witness to take an oath. Under most circumstances it would seem unnecessary in view of the House's power to punish a witness who gives false evidence even when not under oath. If a witness is not sworn, the committee should formally warn him that the deliberate misleading of the committee may be regarded as a contempt of the House and broadly indicate the possible consequences.

A reluctant witness, especially one who has been summonsed, should probably be sworn to impress upon him the importance and solemnity of the occasion and to ensure that he understands his obligation to tell the whole truth.

A witness who conscientiously objects to taking an oath is given the opportunity to make a solemn affirmation. The oath or affirmation is administered to the witness by the committee secretary. The oath and affirmation used by committees of the House take the following form:

#### **Oath**

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

#### **Affirmation**

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

An oath need not necessarily be made on the authorised version of the Holy Bible. Every witness taking an oath should take it in a manner which affects his conscience regardless of whether a holy book is used or not.<sup>362</sup>

### **Enforcement of committee orders—contempt**

Disobedience to orders of a committee given in the proper exercise of its authority is a contempt of the House.<sup>363</sup> It is equally a contempt to 'prevent delay obstruct or interfere with the execution of the orders of committees'<sup>364</sup>, or to behave in such a manner as to obstruct a committee in its efforts to learn the truth of a matter.

The standing orders provide explicitly that, if a witness who is summonsed fails or refuses to attend before a committee, or to give evidence before it, the committee may

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

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

360 *May*, p. 137.

361 *May*, p. 141.

362 See Ch. on 'Members' as to how the oath may be taken by Members.

363 *May*, p. 139.

364 *May*, p. 140.

draw the circumstances to the attention of the House, which shall deal with the matter.<sup>365</sup> *May* specifies those acts or omissions which constitute contempt and which should therefore be brought before the House for its consideration. Among the specific examples of contempt cited by *May* are:

- refusing to answer questions;
- destroying material evidence;
- disobedience to orders for attendance made by committees with the requisite authority;
- disobedience to orders for the production before a committee of papers or other documents;
- refusing to permit books or papers to be inspected when required by order of a committee;
- presenting documents with a view to deceiving a committee;
- wilfully suppressing the truth;
- persistently misleading a committee;
- trifling with a committee;
- avoiding or assisting someone else to avoid being served with a summons;
- removing any record or document from the Clerk's custody or falsifying or improperly altering such records or documents;
- arresting or procuring the arrest on civil process of witnesses or other persons summoned to attend a committee while going to, attending or returning from, such committee, and
- refusing to be sworn or to take some corresponding obligation to speak the truth.<sup>366</sup>

*May* also refers to acts or omissions which the House of Commons has treated as contempt with a view to protecting witnesses and thereby indirectly strengthening its capacity to obtain evidence (see p. 633).

A committee's report to the House on an alleged contempt must be made at the earliest opportunity if the matter is to be given precedence.<sup>367</sup> The report, therefore, might be in the form of a statement to the House by the chairman (see p. 582).

In only one instance has the House referred to its Committee of Privileges an alleged breach of privilege of the kind described above. In 1973, the House referred a complaint raised by the Leader of the Opposition concerning a letter allegedly written by the Permanent Head of the Department of Aboriginal Affairs which had been quoted in part in a newspaper article.<sup>368</sup> The committee saw its task as determining whether statements in the letter constituted:

- (a) imputations against or reflections on members of the Standing Committee on the Environment and Conservation in their capacity as members of that committee, and/or
- (b) an intention to withhold information from the committee or an attempt to influence a witness with respect to the evidence he was to give to that committee.<sup>369</sup>

The committee found that portions of the letter had been quoted out of context and its sense distorted, and that there had been no breach of privilege.<sup>370</sup>

Where it is apparent that an offence has been committed and the offence is of such a nature that no explanation of the offender could extenuate it, for example, where a

<sup>365</sup> S.O. 355.

<sup>366</sup> *May*, pp. 137-42, 156-7.

<sup>367</sup> S.O. 96; see also Ch. on 'Parliamentary privilege'.

<sup>368</sup> VP 1973-74/428-9, 431, 562.

<sup>369</sup> 'Letter allegedly written by Secretary, Department of Aboriginal Affairs', *Report of Committee of Privileges*, PP 236(1973)3-4.

<sup>370</sup> PP 236(1973)4.

committee has reported that a witness had refused to answer questions, the House may proceed at once, without investigation by the Committee of Privileges or perhaps the committee which reported the offence and without hearing the offender, to punish him for his contempt.<sup>371</sup>

In 1908, a person who had been twice summonsed refused each time to give evidence to the Select Committee on Stripper Harvesters and Drills. Advice was sought from the Attorney-General but the matter was not raised in the House as a matter of privilege. Rather, the Prime Minister was asked whether he would have the committee converted into a royal commission so that it ' . . . may be armed with the power to compel witnesses to give the information for which it seeks'. Having considered this option and having considered an extension of the committee's powers, the Government decided on the former.<sup>372</sup> However, even the royal commission, the membership of which was identical to that of the committee, failed to obtain some commercial information it sought from several witnesses, having refused to accept the information on a confidential basis. The royal commission reported the recusant witnesses with a view to proceedings being taken against them under the Royal Commissions Act which provided a penalty for refusal by witnesses to answer any question relevant to the inquiry put to them by commissioners. A prosecution was initiated but was dismissed on the grounds that the questions asked went beyond the scope of the commission.<sup>373</sup>

The view that a select committee could not compel witnesses to answer its questions appears to have been current at the time. The chairman of the Joint Select Committee on Privilege stated in 1908 on the committee's behalf:

. . . we decline to go through the farce of summoning witnesses who might refuse to answer questions. We were not successful in obtaining the information that we sought, and under the circumstances we thought it desirable to present our report to the Senate and to this House. Until we have been equipped with the necessary authority to prosecute our inquiry to a successful issue we resign our trust to this House.<sup>374</sup>

The above committees may not have been questioning their legal power to compel witnesses to answer questions but rather the effectiveness of the available means of giving effect to that power, that is, enforcing it. The Joint Select Committee on Privilege found, in the report it tabled in 1908, that the ancient procedures for punishment of contempt of Parliament were 'cumbersome, ineffective, and not consonant with modern ideas and requirements in the administration of justice'.<sup>375</sup>

In 1909, the Senate Select Committee on the Press Cable Service called before it to give evidence Lauchlan Charles Mackinnon of The Argus Proprietary and a representative of the Press Association. When Mackinnon, on oath, refused to answer certain questions, the committee resolved to seek the advice of the Attorney-General as to what steps he would recommend the committee to follow, with a view to obtaining from the witness the information sought by the committee. Noting that the committee had been given power to send for persons, papers and records, the Attorney-General gave the following advice on the committee's power to insist that the witness answer the committee's questions and on action to be taken by the committee should the witness refuse to do so:

For the purposes of the opinion, I assume that the order of reference is within the powers of the Senate (which seems to be beyond doubt), and clearly expresses the particular matters referred. No objections on these points (or on the ground of relevancy, as to which, I think,

371 *May*, pp. 174-5.

372 H.R. Deb. (3.12.08)2627; H.R. Deb. (4.12.08)2725.

373 *Report from the Royal Commission on Stripper Harvesters and Drills*, PP 24(1909) xix, xxxvii, xxxviii, xliv, xlvi; see also H.R. Deb. (25.8.09)2562-3.

374 H.R. Deb. (4.6.08)12 048.

375 'Procedure in cases of Privilege', *Progress Report from the Joint Select Committee on Privilege*, H of R 4(1907-08)4.

the decision of the Senate would be final) were taken by the witness; nor can the coercive or punitive action of the Senate (which is limited to committal for the remainder of the session) be questioned if the subject-matter falls within its jurisdiction. (*Stockdale v. Hansard*, R.R. vol. 48, pp. 412,427,441.)

In my opinion, the steps to be taken, should the Committee insist on the evidence being given, are:

- (i) Summon the witness in accordance with the Standing Orders.
- (ii) The Chairman should put such specific questions as he deems essential, and make it clear that the witness is required to answer them.
- (iii) If the witness declines to answer, the refusal should be reported by the Committee to the Senate, which may then deal with the matter as one of privilege under sections 49 and 50 of the Constitution.

The Attorney-General subsequently provided the following advice on the procedure to be followed on the Senate being acquainted with the refusal of the witness to answer the committee's questions:

The Senate shall deal with the matter [S.O. 383]. A motion should be moved by a Member, preferably by the Chairman of the Select Committee, to the following effect: That Mr L.C. Mackinnon, of . . . , Manager of the *Argus* newspaper, do attend at the Bar of this House tomorrow (or as fixed) at . . . p.m.

Serve a summons to attend, and a copy of the resolution. If he does not attend, the Senate should resolve that he be taken into the custody of (the Black Rod) in order that he be brought to the Bar of the House, and that the President should issue his warrant accordingly. The President (in accordance with what appears to be the practice) should inform him of the cause of his being summoned to attend, and ask him if he has any explanation to make.

After explanation (if any), etc. — the witness should be ordered to withdraw. The House then deals further with the matter, by motion, and, if it thinks fit, may resolve — That the refusal of the Witness to answer, etc., is a contempt and breach of privilege of the Senate, and that the said L.C. Mackinnon being guilty of contempt and breach of the privileges of the Senate be for the said offence committed to (His Majesty's Gaol, Melbourne, or such other custody as the Senate may determine) and that the President do issue his warrant accordingly. The term should be during the pleasure of the House, but imprisonment must not extend beyond the session.

Following the receipt by the committee of the Attorney-General's opinion, Mackinnon was again summonsed to appear before the committee, and to produce books, and so on, at which time he answered questions to the satisfaction of members of the committee.<sup>376</sup>

The procedures outlined by the Attorney-General in 1909 could be applied equally in the case of a witness failing or refusing to attend or give evidence before a committee of the House.

There is only one recorded case in Australia in which a recusant witness has been punished by a House of Parliament.<sup>377</sup> In 1904, the Western Australian Legislative Assembly committed Mr John Drayton to prison for failure to pay a fine imposed upon him for refusal to testify before a select committee. Almost a month after he had been so committed, the House resolved that the authority of the Parliament had been fully vindicated and that the party leaders should consult with the Speaker with a view to Drayton's release. Subsequently, it was resolved that Drayton be released from custody and be granted a free pardon.<sup>378</sup>

A committee may only exercise compulsive powers in relation to the matters which the House has delegated to the committee to investigate by way of its terms of reference. A witness may therefore object to a question which goes beyond the committee's

<sup>376</sup> *Odgers*, pp. 540-1.

<sup>378</sup> Legislative Assembly of Western Australia, VP

<sup>377</sup> Campbell, *Parliamentary Privilege in Australia*, p. 167.

1904/161-2,182,193,216,307-08.

terms of reference. If the committee overruled the objection and reported the matter to the House, the House would have to satisfy itself that the question was admissible on these grounds before finding the witness in contempt.

If a witness objected to a question on these grounds or because the committee's terms of reference were outside the Parliament's constitutional powers, it is doubtful whether he would have any right of redress before a court should the House find him guilty of contempt and issue a general warrant.<sup>379</sup>

## Protection of witnesses

### *Confidentiality*

A straight-forward protection which can be afforded a witness who wishes to give evidence in confidence is that of taking evidence in camera and treating documents as confidential. Any person who publishes evidence without the committee's authorisation may be found guilty of contempt and punished accordingly (see p. 638).

A request by a witness that his evidence remain confidential is often granted but on occasions a committee may consider that the public interest outweighs the private interest of the witness and choose not to accede to the request (see p. 637).

Evidence which committees would normally take in camera and not publish because of possibly adverse effects on the witness himself includes: evidence which might incriminate the witness, industrial secrets, classified material, and evidence which may bring advantage to a witness' prospective adversary in litigation. In the last case the witness could be disadvantaged by having the details of his case made known to his adversary or by informing his adversary of the existence of certain evidence beneficial to his case and even how the evidence might be obtained.

Witnesses granted permission to give their evidence in camera should be warned that it is within the committee's discretion to publish the evidence subsequently, if it thinks fit. This discretion would normally be exercised only in cases where the confidentiality of evidence ceased to be important after a certain time or when the evidence given did not warrant the confidential treatment which it was originally thought might be necessary. For example, having heard the evidence the committee might form the opinion that the public interest is greater than the grounds of confidentiality claimed, or, a claim that the evidence is sub judice could not be sustained (see p. 624).

### *Counsel*

There is no provision in the standing orders nor any statutory provision for a witness before a committee of the House to be represented by counsel. Furthermore, there is no precedent for such representation before the House of Representatives or its committees. Several applications by witnesses to be represented by counsel have been rejected, for example, by the Committee of Privileges<sup>380</sup> and the Standing Committee on Environment and Conservation.

There are precedents, however, for House of Representatives committees to permit witnesses to have counsel present in an advisory capacity during hearings. The witness is required in each instance to seek the permission of the chairman of the committee to consult counsel. The proceedings are temporarily suspended during such consultations. The role of counsel is emphatically that of adviser rather than representative. Counsel is not permitted, for example, to:

- present evidence in support of a witness or his submission;

379 PP 168(1972)15: see also Lumb & Ryan, p. 64. In relation to the form of warrants see Ch. on 'Parliamentary privilege'.

380 See Ch. on 'Parliamentary privilege'.

- object to procedures or lines of questioning pursued by the committee;
- ask questions of witnesses, or
- attempt to avoid these restrictions by passing notes to the witness or providing the witness with written responses to questions.

These limitations attempt to ensure that the witness himself answers the questions and presents his own evidence while at the same time ensuring that the witness can readily obtain, for example, advice as to legal issues arising in the giving of evidence. Counsel could be permitted, at the committee's discretion, to attend an *in camera* hearing of his client's evidence.

In 1973, a representative of the Yirrkala people indicated to the Standing Committee on Aboriginal Affairs, that they wished to be assisted in the preparation of their submission by a barrister and solicitor, whom they nominated. This person had special ties with, and knowledge of, the Yirrkala people. The committee considered it essential to the success of its inquiry that the assistance be granted. The solicitor sought reimbursement for the cost of necessary air travel and accommodation and a daily fee. The Speaker agreed to these costs being met. As well as providing the assistance for which he was paid, the solicitor was permitted to address the committee in his own right.

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

*May* describes the House of Commons practice:

By leave of the House parties whose conduct forms the subject, or one of the subjects, of an investigation by a select committee, or whose rights and interests, as distinct from those of the general public, are directly affected by a public bill or other matter which has been referred to the consideration of such a committee, are sometimes allowed to be heard in person or by counsel before the committee.<sup>381</sup>

The requirement that leave of the House be sought is an important qualification in permitting counsel to be heard. The House could give leave to a committee, from the outset, in the resolution of appointment. Alternatively, the House could grant leave after considering a special report by the committee or simply on motion of its chairman in the House. Orders for the hearing of parties have been made by the House of Commons on the petition of the interested party 'praying to be heard'.<sup>382</sup>

The most modern type of order by the House of Commons, specifying the forms of representation open to parties before select committees, is that which gives the committee leave to 'hear counsel to such extent as they shall see fit; or to hear parties by themselves, their counsel, or agents'.<sup>383</sup> *May* also states:

Where a party is given the right to be heard, it seems he is entitled to adduce evidence; but it is otherwise where the hearing is at the discretion of the committee.<sup>384</sup>

The House of Commons has rarely given witnesses leave to be represented by counsel and to cross-examine a witness. The House of Commons Committee of Public Accounts was given leave in 1968 to hear counsel to such extent as the committee thought fit. Leave was limited to the committee's inquiry into a particular matter on which the committee had made a special report to the House.<sup>385</sup>

381 *May*, p. 646.

384 *May*, p. 647.

382 *May*, p. 646.

385 H.C. Deb. (14.3.68) 1643-6.

383 *May*, p. 646.

*Protection in legal proceedings*

All witnesses examined before the House, or any of its committees, are entitled to the protection of the House in respect of anything that may be said by them in their evidence.<sup>386</sup> This reflects a resolution of the House of Commons on 26 May 1818 following a court decision that evidence which a person had given before a committee of the House was subsequently admissible against him on a criminal charge.<sup>387</sup> The ultimate authority for this protection is Article 9 of the Bill of Rights which states:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Committee proceedings are regarded as proceedings in Parliament for the purposes of Article 9.<sup>388</sup>

It is sufficient here to quote a statement by Greenwood and Ellicott which summarises the position:

... evidence given by a witness before a committee cannot be used against him in subsequent proceedings. Clearly his evidence could not, without the consent of the House before whose committee it was given, be used against him in subsequent civil or criminal proceedings to prove the commission of a crime or a civil wrong. There seems no reason to doubt that on the same basis it could not be used to prove an admission by him to challenge his credit or to rebut denials in cross-examination.<sup>389</sup>

A committee which is not properly constituted at the time of a hearing, for instance, when a quorum is not present, does not attract the protection of parliamentary privilege.

The House could grant permission for evidence given by a witness to be used against him in criminal or civil proceedings. In *Chubb v. Salomons* evidence of proceedings was admitted where the House of Commons consented to it being given. Although the evidence concerned proceedings in the House involving Members, not witnesses before a committee, the principle would seem to apply equally to proceedings in a committee.<sup>390</sup> However, the damage which would be done to the stature and authority of the House if it were to withdraw protection promised to a witness, even if only indirectly by virtue of the standing orders, would be so great as to deter the House from doing so in all but the most exceptional circumstances. Such circumstances might include, for example, breach of the non-disclosure provisions of standing order 340 in relation to a submission containing defamatory material which a committee chose not to publish. If a witness were giving evidence under summons, that is under compulsion, the likelihood of the House electing not to give its protection to his evidence would be even more remote. In such circumstances it must be doubted whether a court would rule the evidence as admissible.

The protection afforded a witness in relation to oral evidence given before a committee also applies to documentary evidence he may give.<sup>391</sup> Practice is based on the assumption that a document becomes the property of the committee as soon as it is received by the committee secretary, or the committee itself, but it may not be adduced as formal evidence until authorised by the committee and it only attracts the protection of parliamentary privilege from that time.

<sup>386</sup> S.O. 362.

<sup>387</sup> *R. v. Merceron* (1818), 2 Stark 367. Doubts have been expressed about the correctness of the decision in the case, see PP 168(1972)24.

<sup>388</sup> May, p. 83; see also Campbell, *Parliamentary Privilege in Australia*, p. 34 and Ch. on 'Parliamentary privilege'.

<sup>389</sup> PP 168(1972)29; see also, *Reg. v. Wainscot* (1899) 1 West Australian L.R. 77 and *Goffin v. Donnelly* (1881) 6 Q.B.D. 307.

<sup>390</sup> *Chubb v. Salomons* (1852) 3 Car. & K 75; see also PP 168(1972)25,29.

<sup>391</sup> PP 168(1972)31.

Greenwood and Ellicott canvassed the question as to whether documents containing defamatory matter given to a parliamentary officer have the same protection of parliamentary privilege as similar documents presented to the committee in session. They concluded:

The available precedents on this subject leave it in doubt whether such an act would be protected. We are inclined to the view that it would, but the uncertainty surrounding the matter might be thought to emphasise the need for legislation clarifying the position.<sup>392</sup>

The protection of parliamentary privilege applies as equally to the evidence of a voluntary witness as it does to the evidence of a witness summonsed by the committee. It is immaterial whether the evidence is given on oath or not.<sup>393</sup>

No officer of the House, or shorthand writer (parliamentary reporter) employed to take minutes of evidence of a committee, may give evidence elsewhere in respect of any proceedings or examination of any witness, without the leave of the House.<sup>394</sup> In 1974, an inquiry was conducted by the Australian Broadcasting Control Board into allegations that certain television stations suppressed television news coverage of a report tabled by the Joint Committee on Prices.<sup>395</sup> The Clerk of the House received a request for the clerk to the committee to make a statement and, if necessary, to give evidence before the board of inquiry. In giving permission for the officer to make a statement it was made clear he could not give evidence in respect of any proceedings before the committee without the leave of the House, and that this restriction was imposed by the standing orders of both Houses.<sup>396</sup> Further, in answer to a request that the committee's minutes be made available, it was explained that anyone seeking them would have to obtain the Speaker's approval.<sup>397</sup> This procedure was necessary because, while the minutes had been tabled in the House, they had not been ordered to be printed. The clerk to the committee appeared before the inquiry and read a statement in which no reference was made to any proceedings of the committee and which contained only factual information as to when and to whom copies of the committee's report had been distributed after it had been tabled in the Senate and ordered to be printed.

The absolute privilege derived from the Bill of Rights applies only to oral or written statements which form part of parliamentary proceedings. The Parliamentary Papers Act provides absolute protection to the publisher of documents, including submissions and transcripts, whose publication is authorised by the House or its committees. Therefore, a statement made by a witness during committee proceedings is absolutely privileged but the same statement repeated by him elsewhere is not. Similarly, the publication of a document presented to a committee is not absolutely privileged unless publication has been authorised by the House or its committee under the Parliamentary Papers Act.

However, the publication, whether by order of the House or its committees, of a fair and accurate account of committee proceedings is protected by the same qualified privilege as applies to such reports of court proceedings, that is, unless malice is proved, the publisher is protected on the ground that the public interest outweighs any disadvantage to individuals.

#### *Protection from arrest, molestation, etc.*

Witnesses are protected by the House from arrest (other than on criminal charges), molestation, tampering or other acts aimed at deterring a witness from giving evidence before a committee or at doing him harm for having given such evidence. These acts

392 PP 168(1972)31.

395 PP 326(1974); VP 1974-75/177.

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

396 S.O. 368; Senate S.O. 396.

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

397 S.O. 320.

may be punished as contempt of the House. House of Commons committees have occasionally taken evidence from witnesses whose names are not divulged where it is thought that 'private injury or vengeance might result from publication'.<sup>398</sup>

In relation to arrest, the broad position was stated succinctly in a resolution of the House of Commons on 8 March 1688:

It is the undoubted right of this House that all witnesses summoned to attend this House or any committees appointed by it have the privilege of this House in coming, staying and returning.

In 1980, the Committee of Privileges examined and reported on the alleged discrimination and intimidation of Mr David E. Berthelsen in his public service employment because of evidence given by him to a sub-committee of the Joint Committee on Foreign Affairs and Defence. The committee saw 2 possible issues of privilege:<sup>399</sup>

- the right of the Parliament to seek and obtain information required in the proper execution of its investigatory role, and
- the necessity to protect witnesses and prospective witnesses before committees of the Parliament from molestation, intimidation and discrimination or threats of such action.

While the committee was not prepared to dismiss out of hand the allegation that there was a conspiracy against Mr Berthelsen, there was insufficient evidence for the committee to conclude that a breach of privilege had been committed by any person. The committee nevertheless concluded that Mr Berthelsen had been disadvantaged in his career prospects in the Public Service and recommended that the attention of the Public Service Board be drawn to the circumstances of his case. It was also recommended that the Board do all within its power to restore Mr Berthelsen's career prospects in the Public Service and to ensure that he suffered no further disadvantage as a result of the case. The committee declared that it would deal most seriously with any matters referred to it involving tampering, intimidation, discrimination or threats thereof, involving witnesses or prospective witnesses before committees of the Parliament. The report suggested the enactment of a Parliamentary Witnesses Protection Act to provide for the prosecution of persons who tamper with, intimidate or discriminate against witnesses who give, or have given, evidence before a committee of the House, and to provide a statutory cause of action in which witnesses who have suffered intimidation or discrimination would have the right to sue for damages those responsible for such acts.<sup>400</sup> The House endorsed the committee's recommendation that the Public Service Board be requested to act to restore Mr Berthelsen's career prospects in the Public Service and to ensure that he suffered no further disadvantage as a result of the case. The House also resolved that the report should be further considered early in the 32nd Parliament.<sup>401</sup>

In 1963, a witness informed the Joint Select Committee on Parliamentary and Government Publications, in a sworn statement, that he had been insulted and threatened because of evidence he had given before the committee. Both persons were formally summonsed to appear before the committee and were heard under oath. The

398 *May*, p. 694.

399 'Alleged discrimination and intimidation of Mr David E. Berthelsen in his public service employment because of evidence given by him to a sub-committee of the Joint Committee on Foreign Affairs and Defence', *Report of Committee of Privileges*, PP 158(1980)3.

400 PP 158(1980)11-12.

401 VP 1978-80/1672-3.

Presiding Officers were then acquainted with the facts of the case and the action taken by the committee. The committee stated in its report:

The Presiding Officers felt that the Committee had clearly and properly shown that a Committee of the Parliament does not tolerate interference or intimidation in respect of its witnesses and that the Parliament protects witnesses appearing before its Committees to the fullest extent.<sup>402</sup>

In 1975, the Standing Committee on Environment and Conservation took action to ensure the safety of witnesses who feared for their well-being after having given evidence to the committee (see p. 638).

A person who appeared as a witness before the Standing Committee on Aboriginal Affairs in 1975 subsequently informed the committee that he had been subjected to threats and abusive telephone calls following his appearance. The case was brought to the attention of the Speaker who sought police assistance. The harassment of the witness ceased and no further action was necessary.

#### *Indemnification of witnesses*

On extraordinary occasions the House of Commons has passed Acts to indemnify witnesses from all penal consequences of their testimony. On those occasions it was thought that such protection, in addition to that normally provided by the House, was necessary to bring about full disclosures.<sup>403</sup>

The United Kingdom *Witnesses (Public Inquiries) Protection Act* 1892 provides for the protection of witnesses and their indemnification for damage suffered. Section 2 of the Act provides:

Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damages, or injures, or attempts to punish, damage, or injure, any person for having given evidence upon any inquiry, or on account of the evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.

A court has power to award costs and compensation to the complainant. The Act does not affect the powers or privileges of the House. Greenwood and Ellicott considered the protection given to witnesses by the Act could not be brought within the terms of section 49 of the Constitution<sup>404</sup>, that is, the provisions of the Act would not apply to witnesses before committees of the Australian Parliament. The fact that the legislation applies to all forms of public inquiry would seem to add weight to that view.

#### *Media coverage*

Committees have a responsibility to ensure that inaccurate media reports of their proceedings which may adversely affect witnesses, or the committee or its members, are corrected. A notable instance occurred in 1972, when the Joint Committee on the Australian Capital Territory insisted that a newspaper correct an article in which it was alleged, *inter alia*, that an officer of the Department of the Interior had written the committee's report. The newspaper published on its front page a correction, withdrawal and apology. It apologised unreservedly 'for any reflection that may have been cast upon members and officers of the committee, the Department of the Interior, and officers of the department'.<sup>405</sup> No further action was taken by the committee.

402 *Report of Joint Select Committee on Parliamentary and Government Publications*, PP 32(1964-66)40.

403 *May*, p. 694.

404 PP 168(1972)30.

405 *The Canberra Times*, 16 September 1972.

*Payment to witnesses*

At the discretion of the committee payments may be made to witnesses.<sup>406</sup> Payments would normally cover only the travel and accommodation costs of the witness. Committees of the House adopt the fees and allowances listed in the second schedule of the regulations under the *Public Works Committee Act* 1969. Joint committees, in accordance with Senate standing orders, have regard to the scale of witnesses' expenses prescribed by High Court Rules.<sup>407</sup> Because of the extent to which committees travel and take evidence throughout Australia, payments to witnesses for travel expenses are rarely necessary.

**Publication of evidence***Authorisation for publication of evidence*

Standing order 340 provides for the House, but not for committees, to authorise publication of evidence:

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

In practice the House now delegates to committees, in the resolution of appointment, the power to authorise publication of any evidence given before them and any document presented to them. (See p. 576 for Speaker's delegated authority in relation to the release of unpublished committee evidence and other records.)

A committee may limit the release of confidential evidence to particular individuals. This approach may be adopted, for example, to enable individuals to respond to allegations made against them at an in camera hearing by another witness.

In 1970, the Joint Committee on the Australian Capital Territory received a request for a copy of evidence taken by its predecessor in the previous Parliament in its inquiry into breath analysing equipment for drivers of motor vehicles. The evidence had not been published and the committee was advised that it had no power to publish it as the evidence had been given before the previous committee. The committee resolved that the Speaker should be requested to take appropriate steps to enable the evidence to be published. As the House was not sitting the President tabled the evidence in the Senate and it was ordered to be printed.<sup>408</sup> Similar steps were taken in 1972, with respect to the same committee, when the transcript of evidence taken during its inquiry into Australian Capital Territory Freehold Lands, which was reported on in 1968, was tabled by the Deputy Speaker and the House authorised its publication.<sup>409</sup> In the case of a joint committee, it is only necessary for one House to order that evidence, and so on, relating to the committee, be printed.

The *Parliamentary Papers Act* 1908, *inter alia*, makes it lawful for a committee of either or both Houses to authorise the publication of any document laid before it or of any evidence given before it. It also grants protection from civil or criminal proceedings to any person publishing any document or evidence published under an authority given pursuant to the provisions of the Act.

The resolution of appointment of a committee normally states that the committee or any sub-committee shall have the power to authorise publication of evidence given before it and any document presented to it. However, as the *Parliamentary Papers Act* does not expressly mention evidence given before a sub-committee, it is doubtful

406 S.O. 349.

408 J 1970-72/431.

407 Senate S.O. 318.

409 VP 1970-72/943.

whether protection would be afforded by a sub-committee resolution moved pursuant to the Act. It is therefore customary for a sub-committee to conclude its public hearings with the motion:

That pursuant to the power conferred by paragraph . . . of the committee's resolution of appointment, this sub-committee authorises the publication of evidence given before it at the public hearing this day.

In order to protect any publisher of such evidence the full committee, as soon as possible thereafter, authorises publication of the evidence pursuant to the Parliamentary Papers Act.

#### *In camera hearings*

The standing orders provide indirectly for in camera hearings of evidence. Standing order 337 provides that:

When a committee is examining witnesses, strangers may be admitted, but shall be excluded at the request of any Member, or at the discretion of the chairman of the committee, and shall always be excluded when the committee is deliberating.

Standing order 338 provides that:

Members of the House may be present when a committee is examining witnesses; but shall withdraw if requested by the chairman or any Member of the committee; and shall always withdraw when the committee is deliberating.

Thus, while any one member of the committee may require that evidence be heard in camera, the decision to publish the evidence is made by resolution which requires the support of a majority of the committee members.

Witnesses may request an in camera hearing but a committee will agree only for compelling reasons, for example, industrial secrets, classified material, self-incriminating evidence, evidence likely to involve serious allegations against third parties (see p. 630), a matter which is sub judice (see p. 624) or a matter on which a Minister may otherwise claim Crown privilege (see p. 616). When a witness makes an application for an in camera hearing, the committee decides the issue on the balance of the public interest and any disadvantage the witness, or a third party, may suffer through publication of the evidence.

A committee retains the right, by virtue of the power delegated to it by the House, to authorise disclosure or publication of evidence even if it has initially been taken in camera. Witnesses giving evidence in camera should be warned of this, preferably in writing. If a committee does want to publish in camera evidence, it should inform the witness and consider any objections raised. For obvious reasons a committee should authorise publication of in camera evidence only when there is a real and justifiable need or when subsequent events have removed the need for confidentiality, for example, in cases involving the sub judice convention.

The Standing Committee on Expenditure holds in camera hearings towards the end of its inquiries to hear evidence from relevant government departments in order to test its preliminary conclusions.<sup>410</sup> The hearings are held in camera to avoid speculation about the committee's recommendations. Departments are informed that the evidence will be published when the committee's report has been tabled.

The final authority, in the publication of in camera evidence, rests with the House itself. *May* states:

When evidence has not been reported, or if the evidence as reported should not be deemed sufficiently full or complete, the House may order the minutes of evidence to be laid before it. When the evidence is presented in pursuance of such an order, it is usually ordered to be printed.<sup>411</sup>

<sup>410</sup> PP 244(1977)18-19.

<sup>411</sup> *May*, p. 651.

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

#### *Confidential documents*

The principles applying to requests for hearing evidence in camera apply equally to requests for non-publication of documents. In 1975, the Select Committee on Road Safety refused to accept documentary evidence from a witness on a confidential basis, insisting that it was in the public interest that the evidence be published. After protracted negotiations the evidence was provided and was published in the committee's report (see p. 616 for details).

Steps are taken to retrieve confidential documents from members of committees of previous Parliaments and from members of any committees which cease to exist or requests are made that the documents be destroyed. Similar action is taken when a Member ceases to be a member of a committee or a Member of the House.

#### *Unusual secrecy provisions*

For considerations of national security unusual secrecy provisions were applied to the Joint Committee on Foreign Affairs when it was appointed in 1952. The committee's resolution of appointment required that it sit in camera, that its proceedings be secret, and that it report only to the Minister for External Affairs.<sup>412</sup> Whenever it reported to the Minister, the committee was to inform the Parliament that it had reported. The Minister decided whether or not the reports should be tabled in the Parliament and printed. These restrictions were modified and ultimately removed from the resolutions of appointment of the committee's successors in subsequent Parliaments. Because of these restrictions and other limitations imposed on the committee, the Opposition refused until 1967 to nominate members to the committee.<sup>413</sup>

#### *Unauthorised publication of evidence*

It is a contempt of the House for any person, including the originator, to publish oral or documentary evidence received by a committee until the evidence has been reported to the House or its publication has been authorised by the committee or the House.<sup>414</sup> The restriction on publication of a document, including a submission, applies once the document comes into the committee's possession, that is, when it is received by the committee, or by the secretary of the committee (and see p. 632).

Committees exercise discretion in dealing with breaches of these provisions. Indeed, none of the occasional cases of unauthorised publication of evidence has been reported to the House. However, committees have at times deemed it necessary to stress to those concerned the seriousness of their action.

A notable instance of the discretion used by committees arose in 1975. A sub-committee of the Standing Committee on Environment and Conservation acceded to a request by 2 witnesses that their evidence be taken in camera because of their fears of physical harm from people whom they wished to name in their evidence. One of the witnesses subsequently disclosed the transcript of evidence to a journalist who published parts of it. The other witness, who had not been consulted on disclosure of the evidence, informed the committee that he feared publication of the evidence may have placed him in jeopardy. The Speaker was informed of the circumstances and his

412 VP 1951-53/129.

414 *May*, p. 651.

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

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

It is standard practice for an acknowledgment of receipt of a submission by the committee secretary to contain the following warning:

It is a serious matter to publish or disclose any document or portion of any evidence, given to a parliamentary committee, before such document or evidence has been reported to the House or until the committee authorises its publication.

From time to time publication has preceded receipt of this warning. In 1979, after considering an apology by prospective witnesses who had published their submission before receiving the warning, the Joint Select Committee on the Family Law Act resolved that a statement on the status of submissions be included in any future advertisements on the committee's inquiry.

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

#### *Expunging of material from evidence*

Part or all of the evidence given by a witness, or questions or statements by committee members, may be expunged from the transcript of evidence and an order made that any such material expunged be disregarded by the Press. In tendering this advice to the Joint Committee on Pecuniary Interests of Members of Parliament the Clerks of the 2 Houses relied on the provisions of the standing orders of each House, sub-section 2(2) of the Parliamentary Papers Act, *May and Odgers*.<sup>415</sup> Instances cited of evidence which might be expunged included unfair allegations, use of improper language and hearsay. The Clerks noted that in all cases the references used referred to the authority of the committee and not of the chairman. They therefore recommended that any direction that material be struck out and be disregarded by the Press be by order of the committee.

<sup>415</sup> S.O. 340; Senate S.O. 308; *May*, p. 650; *Odgers*, p. 503.