

Parliamentary committees

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

AUTHORITY FOR THE APPOINTMENT OF COMMITTEES

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

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

As there is no doubt about the power of the House of Commons to appoint committees², section 49 of the Constitution appears to be a clear source of power, with extensive

¹ However, joint committees operate under the standing orders of the Senate, *see* p. 623. Any instruction to a joint committee can only be effected by resolution agreed to by both Houses. This should be remembered when reference is made in this chapter to resolutions affecting committees and to the responsibility of committees to report. 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 24.

² Committees were appointed by the Commons at least as early as 1571. The term 'committee' originally signified an individual (i.e. to whom a bill had been committed). Campion, p. 26.

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'.³

Some doubts have been expressed as to the precise extent of the investigatory powers which the Houses may exercise or delegate to committees. By virtue of section 49 of the Constitution the powers of the House and of committees to which it delegates these powers are those of the House of Commons at 1901. Based on this there could be a claim of unlimited powers. In 1845 Lord Coleridge said that as the 'general inquisitors of the realm' the Commons could inquire into anything it wanted to. A corollary of this was the authority to compel the attendance of witnesses.⁴ The Commons exercised these powers in aid of both its legislative responsibilities and of its responsibility as the 'Grand Inquest of the Nation'. There was no limit to the subject matters on which the Commons could legislate and as the Grand Inquest of the Nation it considered itself entitled to advise or remonstrate with the Crown on all affairs of State and in regard to any grievance of the monarch's subjects. Thus, there was no practical limit to the subject matters into which the House of Commons could inquire at 1901. In *R. v. Richards: ex parte Fitzpatrick and Browne* the High Court held in unequivocal terms that section 49 is incapable of a restricted meaning and that the House of Representatives, until such time as it declares otherwise, enjoys the full powers, privileges and immunities of the United Kingdom House of Commons.⁵ If such is the case, either House of the Commonwealth Parliament, or its committees, could be said to have the power to conduct any inquiry into any matter in the public interest and to exercise, if necessary, compulsive powers to obtain evidence in any such inquiry.

On the other hand, there is the view that the compulsive investigatory powers which the House may delegate to its committees is limited to matters on which the Parliament may legislate. This view was argued on the basis of a judgment by the Judicial Committee of the Privy Council in 1914. It was held that the Commonwealth Parliament could not legislate to grant a royal commission, appointed by the Commonwealth Government, power to compel witnesses to attend and give evidence before it unless the royal commission's terms of reference were limited to matters on which the Parliament could legislate.⁶ It has been suggested that neither House could achieve by resolution that which it could not achieve by statute and that consequently the limitations on the granting of compulsive powers to royal commissions must apply equally to the delegation of such powers to parliamentary committees.⁷ 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.⁸

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

Although, for the time being, s. 49 of the Constitution has conferred on each House the powers of the Commons as at 1901, it does not, in our view, enlarge the functions which either House can exercise.

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

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

5 (1955) 92 CLR 157, at 164–70.

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

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

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

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.*⁹

Nevertheless, the law officers differentiated between the virtually unlimited power of inquiry and the legal limitations of the inquiry power, which would arise only when it was sought to enforce that power, for example, by compelling persons to attend a parliamentary committee. A similar view was taken by Fullagar J. in *Lockwood v. The Commonwealth*.¹⁰

Even though Greenwood and Ellicott stated that there are legal limits to the facts and matters into which the Houses can, by compulsion, conduct an inquiry, for practical purposes they also noted that these limits are extremely wide, as a consideration of the various heads of Commonwealth legislative power will quickly reveal.¹¹ They added that each House:

... is entitled to investigate executive action for the purpose of determining whether to advise, censure or withdraw confidence. It would indeed be odd if a House could not inquire into the administration of a department of State by a Minister in order to judge his competence before determining whether to advise him, censure him or withdraw its confidence in him. Each House of the Commonwealth Parliament can, therefore, in our view, as a necessary consequence of the existence of responsible government, exercise investigatory powers through committees in order to exercise what might broadly be called an advisory function.¹²

More recently a recognised authority on constitutional law, Geoffrey Lindell, has reviewed these issues. Lindell has observed that even if the power to establish parliamentary committees is federally limited, two factors would lessen the practical significance of such a limitation: the limitation may not come into play unless a committee was armed with compulsory powers to compel the attendance of witnesses and the production of documents, and the difficulty of establishing that a matter may never be relevant to the Commonwealth's legislative powers.¹³

It may be a very long time before the courts make any authoritative judgment on the limits on the Houses in these matters. First, committees rarely use their compulsive powers but rather rely on voluntary assistance and co-operation. Secondly, political realities, conventions and courtesies arising from the federal framework of the

9 PP 168 (1972) 6-7.

10 (1954) 90 CLR 177 at 182.

11 PP 168 (1972) 9.

12 PP 168 (1972) 7.

13 Geoffrey Lindell, 'Parliamentary Committees and Government Witnesses', *Melbourne University Law Review*, vol. 20, 1995, pp. 384-91.

Constitution are likely to continue to inhibit the House and its committees from pressing hard for information on matters wholly, or even largely, within the constitutional jurisdiction of the States. Thirdly, the courts have been reluctant to intervene in the affairs of the Parliament, particularly with respect to parliamentary privilege and the Houses' powers to investigate and deal with alleged contempt which underpin the Houses' powers to compel the giving of evidence. (*see* p. 660).

TYPES OF PARLIAMENTARY COMMITTEES

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

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

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

Joint committees draw their membership from, and report to, both Houses of Parliament, enabling Members and Senators to work together. (*See* p. 623.)

Statutory committees are those established by Act of Parliament, that is, by statute. All existing statutory committees are joint committees. (*See* p. 629.)

Domestic or internal committees are those whose functions are concerned with the powers and procedures of the House or the administration of Parliament. (*See* p. 618.)

Investigatory committees are those with investigatory powers. Generally speaking the term is used to describe all committees other than the Main Committee and domestic or internal committees (although some internal committees, such as the Privileges Committee, may also have an investigative function).

General purpose standing committees are investigatory or scrutiny committees, established by the House at the commencement of each Parliament to inquire into and report upon any matters referred to them, including legislation. These committees specialise by subject area, between them covering most government activity. Annual reports of government departments and authorities are automatically referred to the appropriate committee. (*See* p. 621.)

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

Unofficial committees

In addition to the categories of parliamentary committees described above there are a further three 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 could only be described as parliamentary

committees because their members are Members of Parliament; but they are not committees of the Parliament.

In earlier years unofficial committees consisting of Members and Senators were appointed by the Government of the day, especially during World War II.¹⁴ 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 recent years informal committees consisting of Members and Senators have been established to assist the Presiding Officers in respect of the information systems needs of Members and Senators, to advise them in respect of the Parliamentary Education Office, and to advise in respect of accommodation matters in the provisional Parliament House. In the 36th and 37th Parliaments a group of Members and Senators, including the Presiding Officers, formed a working group to consider issues relating to standards of conduct for Members of Parliament, including Ministers (*see* Chapter on 'Members').

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

COMMITTEES OF THE HOUSE—OPERATIONS AND PROCEDURES

The differences in respect of joint committees are outlined under 'Joint committees' (*see* p. 623). Where significant precedents affecting joint committees are also relevant to House committees, as they are in many cases, they are used in this section as precedents for House practice.

Joint statutory committees operate within the framework of their individual statutes, but statutory provisions may be supplemented by resolutions of the Houses. Their procedures and practice are dealt with under 'Joint statutory committees'.

Appointment

Standing committees continue for the life of a Parliament. Some are appointed pursuant to standing orders, and some pursuant to sessional orders or by resolution of the House.

Select committees, in Australian practice, 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 a measure to meet a particular and perhaps short-term need, while standing committees are created with a continuing role for the life of the Parliament. The House has not found it necessary, since the first establishment of the general purpose standing committees in 1987, to establish select committees on a regular basis.

The standing orders provide that, at the appointment of every select committee, a day is to be fixed by which it is to bring up its final report unless an extension of time is moved and granted in the House.¹⁵ However, practice does not always accord with this provision as select committees have been appointed with the provision to report 'as soon as possible'.¹⁶ This occurs when a committee undertakes an inquiry which can be seen to

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

15 S.O. 327.

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

be longer-term, perhaps even extending over the life of more than one Parliament. When a select committee is directed to report by a specific date or as soon as possible, its corporate existence comes to an end as soon as it does so.¹⁷

Committees may also be given leave of the House to report from time to time.¹⁸ This authorisation means that a committee is at liberty to make progress reports during the course of the consideration of the matter referred to it.¹⁹ 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].²⁰

On presenting its final report the committee ceases to exist.

If a select committee finds it difficult or impossible to table a satisfactory final report by the specified date, it may be given an extension of time by the House, prior to, or on, the specified reporting date, by amendment of its resolution of appointment.²¹

The terms of reference of select committees tend to be narrow and specific and have traditionally been based on the assumption of a single inquiry and report. Nevertheless, the resolutions of appointment of some select committees have given the relevant Minister power to refer additional matters to them, that is, before they report and cease to exist.²² 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.

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

The standing orders do not prevent any Member moving a motion for the appointment of a committee of the House²³, but most motions brought to a successful vote are moved by a Minister.²⁴

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

17 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.

18 S.O. 341.

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

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

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

22 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).

23 S.O. 323.

24 E.g. VP 1993–95/77–8; VP 1996/126–138. 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.

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 and sessional orders, a committee's resolution of appointment and any later amendments, and any other orders agreed to by the House subsequent to the committee's appointment.

The standing orders provide that the original resolution of appointment may subsequently be amended by the House by way of instruction.²⁵ However, this method has never been used and amendments have usually been initiated directly or indirectly by the committee itself. Normally a committee seeks an amendment through the Leader of the House or the Minister associated with the committee's field of inquiry. If the proposed amendment has the Government's support, the Leader of the House or the responsible Minister then moves for its adoption by the House.²⁶ It is rare for the chair of the committee to move such an amendment.²⁷ 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.²⁸ Amendments have included extension of time for reporting²⁹, alteration of quorum size³⁰, extension of powers³¹, change in the number of Members³², and extension of the terms of reference.³³

Eligibility to serve on committees

Personal interest

No Member may serve on a committee if that Member is personally interested in its inquiry.³⁴ 'Personal interest' has been interpreted in the very narrow sense of an interest peculiar to a particular person. If, for example, a Member were a producer of beef he or she would not, for that reason alone, be under any obligation to disqualify himself or herself from serving on a committee inquiring into beef prices, as the interest would be one held in common with many other people in the community.

The provision of the standing orders was given proper effect in 1955 when a member of the Committee of Privileges took no active part during an inquiry in which he was personally interested in that he was the Member who had raised the complaint. The House has resolved that a member of the Committee of Privileges be discharged from attendance on the committee during its consideration of particular matters. Another

²⁵ S.O. 302.

²⁶ VP 1974-75/380 (change in number of Members appointed to Select Committee on Specific Learning Difficulties);

VP 1993-95/131 (amendment of resolution of power of Joint Committee on Corporations and Securities).

²⁷ VP 1920-21/377 (time of reporting extended for Select Committee on Sea Carriage).

²⁸ VP 1954-55/225 (special report from the Committee of Privileges seeking power for committee to investigate matters not referred to it by the House) *see also* 'Resolution of appointment of the Committee', *Special report by the Joint Committee on the Parliamentary Committee System*, PP 78 (1976) 5, which sought power to retain as chair the chair of the committee in the previous Parliament (the report was not adopted by the House).

²⁹ VP 1983-84/156; 1985-87/764, 886; VP 1993-95/2058.

³⁰ VP 1987-89/123.

³¹ VP 1974-75/358.

³² VP 1987-89/123.

³³ VP 1983-84/124; 1985-87/87, 675.

³⁴ S.O. 326. Between 1984 and 1988 an obligation was imposed on Members to declare 'relevant interests' at the beginning of a speech in the House or in a committee, or after a division in which the Member proposed to vote was called.

Member has been appointed to the committee in such cases.³⁵ In the 37th Parliament a member of the Committee of Privileges did not participate in an inquiry concerning the unauthorised disclosure of information from another committee on which he served.³⁶ In another inquiry by the committee in the same Parliament a Member who had spoken in the House when the matter was raised withdrew from the committee for the duration of the inquiry³⁷ (*and see below*).

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

... the Chair is not able to determine whether or not a member is personally interested in a committee's inquiry and cannot properly be called upon to so decide. A member must be guided by his own feelings in the matter and by the dictates of respect due to the House and to himself. Having 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.³⁸

The Member served on the committee.

In other instances members of committees have decided not to participate in an inquiry or a facet of an inquiry because of conflict of interest considerations. In 1977 a member of the Joint Committee on the Australian Capital Territory chose not to take part in proceedings of the committee whilst items in which that member had an investment interest were under discussion. In 1981 a member of the Joint Committee of Public Accounts did not take part in that part of an inquiry dealing with the ACT Schools Authority because the member had chaired the Authority in the past.³⁹ For precedents and comments concerning Senate committees *see Odgers*, 7th edn, pp. 396–7.

Where there may be the possibility of a conflict of interest of some kind, or of the perception of such a conflict, Members have made an oral declaration in the form of a statement on the matter at a meeting of the committee at an early stage of the particular inquiry, even though, technically, there may be no question of an infringement of standing order 326.⁴⁰

Suspension from the House

A Member suspended from the service of the House may take part in committee proceedings other than the Main Committee during the period of suspension.⁴¹

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.⁴² In practice, it is rare for the mover, usually a Minister, to become a member of the committee.

Committee service is considered to be one of the parliamentary duties of private Members. Office holders and Ministers have not normally served on committees other than the (former) Standing Orders Committee, the Committee of Privileges, and select or

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

36 VP 1993–95/546.

37 VP 1993–95/605.

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

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

40 E.g. Committee of Privileges, minutes 5.5.94, PP 136 (1994); Standing Committee on Finance and Public Administration, minutes 18.2.91.

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

42 S.O. 323.

standing committees appointed to consider matters affecting the Parliament.⁴³ Given the role of investigatory committees in scrutinising the Executive it may be considered inappropriate for Ministers or Parliamentary Secretaries to serve on them. Standing order 325 provides that, except with their consent, the Speaker, the Deputy Speaker or the Second Deputy Speaker may not be chosen to serve on any committee appointed by resolution.⁴⁴ (In the case of some statutory committees certain office holders, such as the Speaker and the Deputy Speaker, are not able to be appointed to the committee.) The Deputy Speaker is a member of the Selection Committee *ex officio*, and both the Deputy Speaker and the Deputy President were *ex officio* members of the Joint Standing Committee on the National Capital and External Territories in the 37th and 38th Parliaments.

The standing or sessional orders or resolution of appointment specify the number of Members to serve on a committee and how they are to be nominated. In respect of the general purpose standing committees there is provision for a specified number of Members to be nominated by the appropriate whips only, although there is provision for consultation with minority groups and other non-government Members.⁴⁵

In the case of committees appointed by resolution, provisions have varied. In some cases, the whips in the House have been able to make nominations⁴⁶, but so too have independent Members (but with the nominee of an independent Member to come from the number of places allocated for the Opposition).⁴⁷ In the case of joint committees independent Members have sometimes been able to make nominations on the same basis⁴⁸, but this has not always been the case.⁴⁹ In the case of joint committees recent practice has been to have nominations of Senators made by the Leader of the Government and the Leader of the Opposition in the Senate, and with reference also to nominations by minority groups or independent Senators.⁵⁰ By sessional order, in the 38th Parliament standing order 28D was amended to provide that one independent Member be appointed to the Selection Committee.⁵¹

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 or selected within the party. As required in the standing or sessional orders or the resolution of appointment, those responsible for nominations convey them to the Speaker in writing and the Speaker announces the names of nominated Members in the House. It is considered that Members have been nominated when the Speaker has been advised, so that, even if the House has not been informed, such Members may attend a committee meeting. No motion is required in the House in such cases, although in other cases, such as the Committee of Privileges and some of the joint committees, Members are appointed by resolution of the House(s).

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

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

44 S.O. 325.

45 S.O. 28A

46 VP 1993-95/78-86.

47 VP 1993-95/77.

48 VP 1993-95/79-86.

49 VP 1993-95/78.

50 VP 1993-95/78-86; even though Senators are nominated, the nominees are appointed by resolution of the Senate.

51 VP 1996/65.

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.⁵²

Provision is rarely made for ex officio membership of committees other than committees appointed under standing orders. However, the chair of the Standing Committee on Expenditure was an ex officio member of the Joint Committee of Public Accounts and vice versa.⁵³ This arrangement was intended to ensure adequate liaison between the two committees.⁵⁴ Ex officio members, including a Minister, also served on the Joint Standing Committee on the New Parliament House.⁵⁵

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.⁵⁶

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

In the case of a committee to which Members are nominated, a Member seeking to resign from a committee submits a written resignation to the relevant person responsible for nominating members to the committee concerned and the chair of the committee. The selection of a replacement is normally 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.⁵⁷

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.⁵⁸ 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.⁵⁹ However, in such cases motions to discharge and appoint Members are moved after advice as to the changes, normally from the Whips.

⁵² J 1951–53/145–6; VP 1951–53/273, 278.

⁵³ *Public Accounts Committee Act 1951*, s. 5. The chair of the Joint Committee of Public Accounts could nominate in his place a member of that committee who was a Member of the House of Representatives.

⁵⁴ H.R. Deb. (27.6.76) 2613.

⁵⁵ VP 1987–89/39–40.

⁵⁶ Joint Select Committee on Parliamentary and Government Publications, VP 1964–66/25–6, 27.

⁵⁷ VP 1993–95/2328; VP 1996/345.

⁵⁸ S.O. 324.

⁵⁹ VP 1978–80/56, 159; VP 1996/314.

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.⁶⁰ As the mover is usually a Minister who is unlikely to become a member of the committee, this standing order is rarely applied.

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

The first meeting cannot be held until the nominations of Members have been formally notified to the Speaker (and Senators have been appointed by the Senate in the case of joint committees) by the whips in accordance with the standing or sessional orders or the resolution of appointment. It is the practice that a committee may conduct its first meeting prior to membership being announced in the House provided that the Speaker has been formally notified of nominations.

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

Chair

Standing order 331 provides that:

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

In practice the standing orders or the resolution of appointment now normally provide that the committee shall elect as chair a government member.⁶¹ Some resolutions of appointment have provided that the Prime Minister 'nominate' or 'appoint' one of the government members of the committee as chair.⁶² The resolution of appointment of the Joint Standing Committee on the New Parliament House provided for the Speaker and the President of the Senate to be joint chairs of the committee.⁶³

In conducting the election of the chair, the committee secretary, having drawn attention to any special provision in the standing orders or resolution of appointment (such as a requirement that the committee elect a government member as chair), should call for nominations, each of which must be seconded. If only one member is nominated, as is usually the case, the secretary declares the member elected as chair and invites that member to take the chair. If more than one member is nominated, the election is conducted by secret ballot in accordance with the procedures set down for the election of the Speaker in similar circumstances.⁶⁴

60 S.O. 330.

61 S.O.s 28A, 28B and 28C; e.g. VP 1993-95/77-8.

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

63 VP 1987-89/39-40.

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

In 1974 the Select Committee on Specific Learning Difficulties was appointed without any provision in the resolution of appointment for the election or nomination of the chair.⁶⁵ Under the standing orders any member of the committee, including an opposition member, could have been elected chair. The committee had six members, three each from the government and opposition parties, which raised the possibility of a deadlock in the event of both a government and an opposition member being nominated and being supported on party lines. Before the committee held its first meeting, the House amended its resolution of appointment to increase its membership to seven by providing for an additional member to be nominated by the Prime Minister, thus giving the government party a majority. If the committee had met before this amendment had been agreed to and had elected a government member as chair, the opposition members would have had a majority of three to two in any division taken on party lines because the chair was only empowered to exercise a casting vote.

In 1976 the Joint Committee on the Parliamentary Committee System, in a special report to the House, sought an amendment of that part of the resolution of appointment which provided that the chair be elected by the committee from the members nominated by the Prime Minister or the Leader of the Government in the Senate. The committee wished to re-elect as chair the member who had been chair in the previous Parliament but who was now an opposition member. The committee argued that continuity would facilitate finalisation of the committee's report.⁶⁶ The House took no action on the proposal.

The relative roles of Speaker and committee chair

Procedural authority

The powers of a chair of a select committee have been described as being substantially the same as those of the chair of a committee of the whole House.⁶⁷ As, under the former procedures, no appeal could be made to the Speaker regarding the decisions and rulings of the Chairman of Committees in a committee of the whole, it was considered that no appeal could be made regarding the decisions and rulings of a chair of a select or standing committee. Within the framework set by the House (in terms of the provisions of the standing orders and any resolution of appointment), formal authority over select and standing committee procedures therefore lies with the chair and the committee itself, and the Speaker may not take formal notice of committee proceedings in so far as purely procedural matters are concerned. A chair's procedural authority in a committee is as exclusive as that of the Speaker in the House.

While the Speaker's advice is occasionally sought on complex procedural matters, there is rarely any scope for the Speaker to intervene on committee procedures. The Speaker would normally interfere in such matters only if they were of general significance or affected the allocation of resources to a committee, which is largely the Speaker's responsibility. Nevertheless, Speakers' rulings on procedural matters are significant as precedents. Further, committee chairs must have regard to the practice of the House where this is applicable to committee proceedings, for example, in respect of the sub judice convention (*see* p. 658).

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

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

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

67 *May*, p. 622.

House take note of a report. While these courses have been adopted, no action has been taken by the House.⁶⁸ 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 replied to questioning on the extent of the powers and functions of the Committee of Privileges:

Such questions should not be directed to the Speaker; they are matters for the House, not for me. I am not a member of the Committee of Privileges. As the House appointed the committee, the House must answer questions in relation to it.⁶⁹

Unlike the Speaker, the chair of a committee takes part in the substance of discussions, as well as playing a procedural role at hearings and deliberative meetings. A chair's rights to take part in proceedings are no less than those of other members except that in divisions the chair may only exercise a casting vote.⁷⁰

Administrative authority

Prior to the 33rd Parliament resolutions of appointment of committees included a paragraph 'That the committee be provided with all necessary staff, facilities and resources'. The Speaker's statutory powers made the occupant of the office the final arbiter, subject to the will of the House itself, of what constituted a 'necessary' provision. The Speaker's statutory powers are clearly exclusive in these areas and a lack of a reference to the Speaker in resolutions of appointment or sessional orders does not diminish either the Speaker's authority or obligations. In exercising these responsibilities it is considered that the Speaker would be obliged to intervene in committee operations where it was believed that a committee was using or seeking resources for activities which exceeded its delegated authority.

The Speaker, or an officer appointed by the Speaker, has exclusive authority to approve expenditure for supplies, works, stores and services, incidental to the running of the House.⁷¹ In 1944 three members of the Joint Committee on Social Security resigned from the committee in protest at the Speaker's insistence that a parliamentary officer replace an officer of the Public Service who had earlier been seconded to serve as clerk to the committee 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.⁷²

The Speaker is not involved in normal day-to-day administrative decisions in respect of committees, although a continual oversight of operations, administration and expenditure is maintained, and in instances involving unusual or large expenditures the Speaker's approval may be sought. In the case of a proposed overseas visit by a committee, the Speaker's support is first sought. If the Speaker endorses the proposal, an approach is then made to the Prime Minister. Subject to the provision of additional funding by the Government, the Speaker has supported travel to regional countries, such as New Zealand, Papua New Guinea, Indonesia and Thailand. These visits (apart from the annual committee exchange with New Zealand) have been directly related to inquiries by the Joint Standing Committee on Foreign Affairs Defence and Trade. It has not been considered appropriate for other committees to travel to other countries.

68 See for example the dissent of A. J. Forbes in 'A proposed system of committees for the Australian Parliament', *Interim Report of the Joint Committee on the Parliamentary Committee System*, PP 275 (1975) 95-7; see also the dissent of G. M. Bryant and L. R. Johnson in *Report of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory*, PP 351 (1977) 72; H.R. Deb. (18.8.77) 419, 423.

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

70 S.O. 331.

71 *Audit Act 1901* and Finance Regulation 5.

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

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

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

Deputy chair

Standing orders 28B (general purpose standing committees) and 28C (Procedure Committee) and most resolutions of appointment provide for a deputy chair to be elected by a committee.⁷³ However, it has been provided on other occasions that the chair appoint a member of the committee as deputy chair 'from time to time', that is, as circumstances demand. In such cases the same member is not necessarily appointed each time.⁷⁴

The deputy chair, 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 chair one of the members nominated by the Leader of the Opposition. The deputy chair was also to be a member from a different House from the chair.⁷⁵

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

The deputy chair acts as chair at any time when the chair is not present at a meeting of the committee. At any time when the chair and deputy chair are not present the committee is required to elect another member to perform the duties of the chair at that meeting.⁷⁶

Meeting procedures

Sittings

A committee may adjourn from time to time and may sit during any sittings or adjournment of the House.⁷⁷ 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). Senate standing order 33 provides that Senate committees and joint committees may meet during sittings for the purpose of deliberating in private session, but that at such a meeting a decision cannot be made unless all members of the committee are present, or unless a member appointed on the nomination of the Leader of the Government in the Senate and one appointed on the nomination of the Leader of the

⁷³ An example of a committee with no provision for the appointment of a deputy chair is the Committee of Members' Interests.

⁷⁴ Standing Committee on Road Safety, VP 1974-75/51-2; Select Committee on Aircraft Noise, VP 1970-72/33-4.

⁷⁵ VP 1976-77/59-60.

⁷⁶ E.g. S.O. 28B(f).

⁷⁷ S.O. 333.

Opposition in the Senate are present and the decision is agreed to unanimously by those present. It further provides that committees may not otherwise meet during sittings except by order of the Senate and that proceedings at a meeting contrary to the standing order shall be void.

Committees normally adjourn to an agreed date or to a date to be fixed by the chair or presiding member. If a meeting is known to be the committee's last, it adjourns sine die. If the committee adjourns to a specific date, and a change in the date is subsequently found to be necessary, it is incumbent upon the chair to ensure that members are notified and given reasonable notice of the new date which is fixed by the chair. (For the practice in joint committees *see* p. 626.)

If there is disagreement within a committee concerning the appropriateness of adjourning at a particular time, the matter should be determined by resolution of the committee. However, in circumstances of grave disorder, the chair may suspend or adjourn the meeting without putting a question. These practices reflect those of the House itself.⁷⁸

Committee meetings outside Parliament House

Committees are usually authorised to move from place to place.⁷⁹ Without this authorisation a committee can only meet outside Parliament House, Canberra, by special order of the House.⁸⁰ In 1968 two such orders had to be made by both Houses in relation to the Joint Committee on the Australian Capital Territory whose resolution of appointment did not contain this authorisation. Each motion passed by the Houses limited the authorisation to the committee's current inquiry.⁸¹ The committee's resolution of appointment was amended soon afterwards to avoid the need for these cumbersome procedures.⁸²

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

It would appear that provided a committee did not attempt to exercise its powers to administer oaths, compel the giving of evidence, and so on, it could sit as a committee overseas and, with the consent of witnesses, have proceedings transcribed and published.⁸³ As proceedings would almost certainly not be privileged (in terms of the law of the country concerned), witnesses would need to be informed accordingly. In addition, committees would be unable to have orders enforced and to protect witnesses against intimidation, punishment and so on. It would seem improper for a committee to sit, as a committee, in a foreign country without first seeking the consent of that country's government. Committees which are allowed to travel overseas are therefore more likely to conduct inspections and hold meetings and discussions of an informal nature.

⁷⁸ S.O.s 49, 308.

⁷⁹ S.O.s 28B(m), 28C(j); VP 1993-95/78.

⁸⁰ S.O. 333.

⁸¹ VP 1968-69/44, 53, 329, 339.

⁸² VP 1968-69/344, 356.

⁸³ *See* Sir Barnett Cocks, 'Parliament Goes Abroad', *The Parliamentarian* LII, 1, 1971, p. 10. For House of Commons practice *see* May, pp. 626-7. And *see* Odgers, 6th edn, p. 756-7.

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

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 matters which are important to their inquiries but which cannot be adequately described in formal evidence. If a quorum is present, these are formal proceedings (private meetings), and the committee's minutes will reflect the nature of the inspections, as with private briefings.

Quorum

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

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

If, after the lapse of 15 minutes from the time appointed for the meeting of a committee, 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.⁸⁴

The reference to 'minutes' is in practice taken to mean the committee secretary's rough minutes. If, after a committee has proceeded to business, the number of members present falls below a quorum, the chair must suspend the proceedings until a quorum is present or, after a reasonable period, adjourn the meeting.⁸⁵ This requirement is applied with common sense, and a meeting is not suspended if the quorum lapses when members leave the room for short periods. However, no vote can be taken during these periods.

The standing orders specify that the quorum of a select committee shall be three⁸⁶ but this requirement may be varied. Standing order 28B provides that the quorum for a general purpose standing committee is three (membership 14). (*And see* p. 625 re joint committees.)

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

A Member of the House who is not a member of a particular committee may be present when it is examining witnesses but must withdraw if requested to do so by the chair or any member of the committee and must always withdraw when the committee is deliberating.⁸⁷ When present at a hearing the Member cannot put questions to witnesses or take any other part in the formal proceedings. These restrictions can only be removed by a provision in the committee's resolution of appointment or by special order of the House. By comparison the relevant Senate standing order relating to its legislative and general purpose standing committees allows Senators to be nominated as 'participating members' of committees, although while such members have all the rights of committee members and may participate in the hearing of evidence and deliberations, they may not vote on any question before the committee.⁸⁸

84 S.O. 329.

85 S.O. 328.

86 S.O. 328.

87 S.O. 338.

88 Senate S.O. 25(7) (a)–(c).

Standing order 28B allows a general purpose standing committee to be supplemented by up to three additional members for a particular inquiry. In addition, when a committee is considering a bill referred to it under the provisions of standing order 217A one or more members of it may be replaced by other Members. In these cases however the Members in question become full members of the committees, they are not to be regarded as 'observers' or 'participating Members'.

Strangers or visitors

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 chair of the committee, and shall always be excluded when the committee is deliberating.

The question of whether committee members' personal staff may attend private meetings of committees has arisen. In 1976 the Speaker wrote to all chairs of committees discouraging the attendance of members' staff at other than public meetings of a committee or at committee inspections. The Speaker indicated that the provisions of the standing orders concerning the confidentiality of committee proceedings⁸⁹ militated against any person, other than a member of a committee or an officer of the House, being involved in committee proceedings which are not open to the public. More recently, the practice of excluding such staff members from private meetings has been mentioned at the first meeting of a committee in each Parliament.

Secret committees

No strangers, or Members who are not members of the committee, may be admitted at any time to a secret committee.⁹⁰ 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 that House, the nature of the inquiry appeared to require such a course.⁹¹

Procedures at hearings

Hearings are normally held in public but at the committee's discretion they may be held in camera. The authority to conduct public hearings is reflected in the standing order which provides that when a committee is examining witnesses, strangers may be admitted.⁹² 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 chair or presiding member may open a hearing with a brief statement of its purpose and the background to it. The chair may also outline the procedures to be followed by the committee. The first witness or witnesses are called to the table and they then may be required to make an oath or affirmation (*see* p. 659). The witness then sits at the table and is usually asked to state his or her full name and the capacity in which he or she is appearing before the committee, the part the witness played in preparation of the submission on which the examination is occurring, and whether the witness wishes to propose any amendment to the submission (*see* p. 657). For the purposes of the *Parliamentary Privileges Act 1987* the submission of a written statement by a person is,

⁸⁹ S.O.s 337, 338, 340.

⁹⁰ S.O. 339.

⁹¹ *May*, p. 633.

⁹² S.O. 337.

if so ordered, deemed to be the giving of evidence in accordance with the statement by that person. Because of this, committees may choose, at the first available opportunity, to resolve to receive submissions they wish to receive. Before questions are put by committee members, it is usual for the chair to invite a witness to make a short statement to the committee.

In examining a witness, standing order 336 provides that the chair first puts, in an uninterrupted series, all questions the chair deems essential, according to the mode of procedure agreed on by the committee. The chair 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.⁹³ While procedures vary to some extent between committees, all operate on the principle that questions are asked and answered through the chair and in an orderly manner. All members should be given an equal opportunity to put questions to a witness. Questions put to witnesses are normally substantially focussed on the witnesses' written submissions, but it is considered that committees are not confined to questioning witnesses only about matters raised in their submissions.

A member of the committee or a witness may object to a question, in which case the chair decides whether the witness should answer. If there is any dissent from the chair's decision, the chair should suspend the public hearing and have the witness (and other strangers) withdraw while the committee determines the matter in private, by vote if necessary.⁹⁴ The committee may insist on the question being answered (*see p. 645*).

In its report *Committee Procedures for Dealing with Witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following provisions to be observed by committees of the House:

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

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

Other recommendations are quoted later in this chapter, although three other proposals should be noted here:

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

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

A witness shall be given reasonable access to any documents or records that the witness has produced to a committee.⁹⁵

93 S.O. 336.

94 S.O. 366; e.g. Committee of Privileges, minutes 28.11.89, PP 498 (1989).

95 PP 100 (1989). The recommendation had not been implemented formally at the time of publication.

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

No person other than a member of the committee may question a witness during examination. No witness may question a member or any other person present but a witness may ask for clarification of a question. In 1971 the Speaker made a private ruling that specialist advisers (such as committee staff) must not be permitted to question witnesses, comment on their evidence or otherwise intervene directly in formal proceedings at a public hearing. Attention was drawn to standing order 336 which, in setting down procedures for the questioning of witnesses, mentions only committee members.

Documents provided to a committee, including maps, diagrams, or other illustrated and written material, are normally included in the committee's records as exhibits (*see* p. 656). Where it is necessary to incorporate material in the transcript and there is no objection to this course, the chair usually so orders, although modern practice is that the transcript is regarded as a record of oral evidence only, and the incorporation of material is kept at a minimum. Hansard prepares a written transcript of evidence taken at hearings. Witnesses are given an opportunity to correct errors of fact in the transcript.

It is customary at the conclusion of public hearings for motions to be passed authorising the publication of the evidence taken, thus conferring privilege on the publication of the transcript (*see* p. 670). 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. 671). In some cases evidence taken in camera may be published to another person so that the person may be informed of statements made and given the opportunity to respond.⁹⁶

Seminars, informal discussions, public meetings and workshops

In certain circumstances a committee may consider that the procedures available for formal hearings are inappropriate for the committee's purposes. In these circumstances the committee may consider informal discussions, public meetings, seminars or workshops more appropriate. Such procedures have been used:

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

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

Seminars and workshops have also been used by committees. This approach can allow committee members to question experts and others, and such persons can also

⁹⁶ This course has been followed by the Committee of Privileges, e.g. minutes 14.12.93, PP 78 (1994).

question each other directly. This process provides immediate opportunities to both clarify the issues and explain particular opinions.

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

Although alternative processes of this nature can be helpful in particular inquiries, they are not regarded as a substitute for the normal hearing process under which witnesses may be questioned as fully as necessary to allow committee members to inform themselves on a matter. Depending on the circumstances, such informal proceedings may not be found to enjoy parliamentary privilege. The information obtained in this manner does not have either the forensic value nor the technical status of formal evidence, although it can be used in committee reports, provided that the report indicates the manner in which the information has been obtained. Minutes or a report, or both, on public meetings or seminars can be included in the committee's records as an exhibit. The Hansard record of such proceedings is often not authorised for publication although it may be incorporated into the committee's records as an exhibit.

Videoconferencing etc.—possible use

In 1994 the Standing Committee on Procedure reported on the application of modern technology to committee proceedings. It concluded that in certain circumstances benefits could be obtained from the use of video or teleconferencing to hear evidence, although it pointed out the value of face to face discussions, and saw video or teleconferencing facilities as the exception rather than the rule. It also recognised that there were benefits in allowing members who were not able to be present to contribute to the deliberations of a committee, although it endorsed the requirement in the standing orders that a quorum be present in one location. It recommended that the House authorise its committees to meet and take evidence by electronic means, subject to a number of conditions. The committee proposed conditions such as regard being had to the benefits, the nature of the evidence to be heard, whether it would be necessary to question a witness rigorously for truthfulness and the real cost comparison with traditional processes.⁹⁷

Disorder

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

- interrupting or disturbing committee proceedings;
- remaining after strangers have been ordered to withdraw;
- appearing before a committee in a state of intoxication; and

⁹⁷ PP 364 (1994). At the time of publication the committee's recommendations had not been implemented.

- using offensive language before a committee.⁹⁸

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 staff from the Serjeant-at-Arms' office may have to be sought. If the committee is meeting outside Parliament House, it may have to adjourn its proceedings.

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

A committee may not punish a person considered guilty of contempt; it may only draw the circumstances to the attention of the House by special report or a statement by the chair. The House may then deal with the matter as it thinks fit. (*And see* p. 604 of the second edition, for details of a case referred by the House of Commons to its Committee of Privileges.)

Motions and divisions

The standing orders are silent on the moving of motions and amendments and voting in committees, except to state that the chair has a casting vote only⁹⁹ and that motions and the details of divisions are to be recorded.¹⁰⁰ (*See also* procedures for consideration of draft reports, p. 609.)

Following the procedure of the former committee of the whole, motions and amendments do not require a seconder.¹⁰¹ The one exception is the nomination of a member for election as chair (*see* p. 593). An amendment may be moved to an amendment.¹⁰²

Questions are determined on division by a majority of votes. While the chair of a House of Representatives committee exercises a casting vote only¹⁰³, the voting rights of chairs of joint committees can vary. In the 38th Parliament the chairs of joint committees were given casting votes as well as deliberative votes. If special provisions are not made for a casting vote, the chair of a joint committee has a deliberative vote only.¹⁰⁴

As in the former committee of the whole, a division is not proceeded with unless more than one member has called for a division. In such instances the member may inform the chair that the member wishes his or her dissent to be recorded in the minutes. This request is automatically granted.¹⁰⁵

⁹⁸ *And see* May, pp. 115–6.

⁹⁹ S.O. 331.

¹⁰⁰ S.O. 332.

¹⁰¹ S.O. 279.

¹⁰² Committee of Privileges, minutes 21.12.93, PP 78 (1994).

¹⁰³ For an exception *see* Select Committee on Aircraft Noise where the chair had a deliberative vote and, in the event of an equality of votes, also had a casting vote, VP 1969–70/15–17.

¹⁰⁴ Senate S.O. 31, e.g. Joint Committee on Foreign Affairs, Defence and Trade in 37th Parliament.

¹⁰⁵ S.O.s 193, 277.

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 chair must record the names of members voting in a division, indicating on which side of the question they respectively vote.¹⁰⁶ 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 any 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 chair confirms the minutes of a preceding meeting by signing them after the committee has adopted them and agreed to any necessary amendments. The committee secretary may certify as correct the unconfirmed minutes of a final meeting of a committee.

Minutes are required to be tabled in the House with the relevant report.¹⁰⁷ 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.¹⁰⁸

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 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.¹⁰⁹ 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.¹¹⁰ This provision covers private committee deliberations, the minutes which record them and committee files. Any unauthorised breach of this confidentiality may be dealt with by the House as a contempt.¹¹¹

106 S.O. 332.

107 S.O. 347.

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

109 S.O. 320. See Ch. on 'Papers and documents'.

110 S.O. 340 and see also the *Parliamentary Privileges Act 1987*, s. 13. Standing order 28B and resolutions of appointment authorise committees to publish any evidence given before them and any document presented to them.

111 Subject to the provisions of the *Parliamentary Privileges Act 1987*. (And see Ch. on 'Parliamentary privilege', and *May*, pp. 122-3, 636, 648.)

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. Standing order 28B provides that each of the general purpose standing committees and any of their subcommittees shall have power to consider and make use of the evidence and records of the relevant standing committees appointed during previous Parliaments. An equivalent provision is often included in resolutions of appointment.¹¹²

By authority of the House, the Speaker may permit any person to examine and copy evidence submitted to, or documents of, committees, which are in the custody of the House, which have not already been published by the House or its committees and which have been in the custody of the House for at least 10 years. However, if such evidence or documents were taken in camera or submitted on a confidential or restricted basis, disclosure shall not take place unless the evidence or documents have been in the custody of the House for at least 30 years, and, in the opinion of the Speaker, it is appropriate that such evidence or documents be disclosed. The Speaker must report to the House the nature of any evidence or documents made available under the resolution and the persons to whom they have been made available. Subject to the same conditions, the Speaker and the President of the Senate have been authorised to release records of joint committees. Any such release must be reported to both Houses.¹¹³ This procedure applies to papers which have not been made public.

Subcommittees

A committee cannot delegate any of its powers or functions to a subcommittee unless so authorised by the House. Without this authority committees may only appoint subcommittees for purposes which do not constitute a delegation of authority, such as the drafting of reports.¹¹⁴

Standing or sessional orders and resolutions of appointment authorise committees to appoint subcommittees. Usually the committee is empowered to appoint subcommittees consisting of three or more of its members and to refer to any subcommittee any matter which the committee is empowered to examine. Even with this authorisation a committee cannot confer any powers which it has not been expressly empowered to confer. In appointing a subcommittee a committee should name the subcommittee members, appoint the chair and identify the purpose of appointing the subcommittee. A committee may make orders regulating the transaction of business by its subcommittees.¹¹⁵

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

In appointing committees it is now usual to provide that they have the power to establish subcommittees which shall have the powers of a committee (e.g. the power to send for persons, papers and records; the power to move from place to place; the power to authorise publication of any evidence given before it and any document presented to it; and the power to consider and make use of the evidence and records of relevant standing committees appointed during previous Parliaments). In addition the resolutions or sessional or standing orders would normally provide for the appointment of a

112 VP 1993–95/77–8.

113 E.g. VP 1978–80/1539–40; J 1978–80/1381; VP 1993–95/2027; J 1995/2942–3.

114 *May*, p. 637–8.

115 *May*, p. 638–9.

subcommittee chair; the quorum (usually a majority of the members of a subcommittee); the participation of members of the committee who are not members of a subcommittee; and provide that subcommittees have power to move from place to place and to sit during any sittings or adjournment of the House.¹¹⁶

Subcommittees are often appointed to:

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

A subcommittee is required to keep minutes of each meeting and submit them with its report to the committee by which it was appointed. A subcommittee may not report directly to the House but only to its parent committee¹¹⁷ which in turn reports to the House in terms of its reference.

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

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

In 1975 the Joint Committee on the Parliamentary Committee System appointed a subcommittee to travel overseas in connection with its inquiry. The subcommittee submitted to the committee a report which drew together the evidence which was taken by the full committee in Australia and information obtained by the subcommittee in its discussions and observations overseas. On the subcommittee's recommendation the committee tabled this lengthy report, in effect as an appendix to the committee's two-page report. The committee did not express any view on the subcommittee's conclusions and recommendations. The purpose of the arrangement was to seek comment on the report for the consideration of the full committee.¹¹⁸ A member of the committee presented a dissenting report in which he stated:

It is my opinion, and I suspect that it is the opinion shared by many members of the Committee, that when a subcommittee is sent to perform a task it should not be obliged to report as an isolated unit; rather it should present its findings to its parent body, have them ratified and then present them to the Parliament.¹¹⁹

The same Member strongly opposed the tabling by committees of reports which amounted only to discussion papers and concluded that the committee had 'abrogated its responsibilities'.¹²⁰

On other occasions when inquiries have been reported on at the dissolution of the House, in the new Parliament the opportunity has sometimes been taken for the new committee, or another appropriate committee, to have the inquiry completed by use of a

116 S.O. 28B; VP 1993-95/77-8.

117 *May*, p. 639.

118 PP 275 (1975) xi.

119 PP 275 (1975) 95.

120 PP 275 (1975) 96-7.

subcommittee. It has been pointed out that, while for the purpose of enabling a report to go forward, a committee may adopt a subcommittee's report in such circumstances, the report did not necessarily convey the views of committee members who did not serve on the subcommittee.¹²¹

Conferences etc. with committees of the Senate

General purpose standing committees are empowered 'to confer with a similar committee of the Senate'¹²² and the Library, House and Publications Committees each have power to confer with similar committees of the Senate—in practice these three committees and their Senate counterparts operate as joint committees (*see* p. 619).

The Committee of Privileges and committees appointed by resolution of the House have traditionally had no power to confer with committees of the Senate without leave of the House.¹²³ Senate standing orders contain similar provisions.¹²⁴

If leave of the House is 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.¹²⁵

Senate standing order 40 provides that a committee of the Senate may not confer or sit with a committee of the House except by order of the Senate; that committees permitted or directed to confer with House committees may confer by writing or orally and that proceedings of a conference or joint sitting with a House committee must be reported to the Senate by its committee.

In 1994 the House authorised the Standing Committee on Legal and Constitutional Affairs to meet concurrently with its Senate counterpart for the purposes of examining and taking evidence in connection with inquiries being held by each committee into aspects of section 53 of the Constitution. The resolution provided for meetings to be jointly chaired and for the procedures of the Senate as set out in its privilege resolution 1 of February 1988 to be followed to the extent that they were applicable.¹²⁶ The Senate, by resolution, noted that its standing committee had power to confer with its counterpart, and directed its committee to confer accordingly.¹²⁷ In the event no formal meetings were held between the two committees, although two informal meetings took place between their members.¹²⁸

When a Joint Committee on the Australian Capital Territory was not appointed in the 35th Parliament the House resolved to refer all proposed variations of the plan of lay-out of the city of Canberra and its environs to the Standing Committees on Infrastructure of each House (later renamed Transport, Communications and Infrastructure). The Senate concurred and also resolved that:

- the two committees meeting as a joint committee should either appoint the chair of the Senate committee or the chair of the House of Representatives committee as its chair;

121 'Passenger motor vehicle safety', *House of Representatives Standing Committee on Road Safety*, PP 156 (1976) xii.

122 S.O. 28B(r).

123 S.O.s 350, 26.

124 Senate S.O. 40.

125 S.O.s 351, 352, 353.

126 VP 1993-95/1165.

127 J 1993-95/1677. Note that the Senate standing orders on this matter changed during 1994.

128 PP 307 (1995).

- the quorum of the joint committee be two Senators and two Members of the House of Representatives;
- a subcommittee of the Senate committee be empowered to sit with a subcommittee of the House of Representatives committee, as a subcommittee of the joint committee, when considering the variations; and
- a Senator, who was not a member of the Senate committee be permitted to attend meetings of the joint committee or a subcommittee and participate in the proceedings and deliberations, but not vote.

The House of Representatives agreed to the Senate's resolution and also empowered the joint committee to consider and make use of the evidence and records of the Joint Committees on the Australian Capital Territory appointed during previous Parliaments.

Reports

Frequency of reporting

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

A committee without the power to report from time to time may, however, seek leave of the House to submit an 'interim' or 'special' report.¹²⁹ A special report is one in which a committee draws attention to matters incidental to its inquiry and which relates to its powers, functions or proceedings. For example, the Committee of Privileges has submitted special reports seeking an extension of its reference¹³⁰ and recommending that the House ask the Senate to grant leave to named Senators to appear before it.¹³¹ In 1976 the Joint Committee on the Parliamentary Committee System presented a special report seeking an amendment to its powers to elect a chair and deputy chair.¹³² In 1987 and again in 1988 the Joint Committee of Public Accounts felt compelled to report on the issue of whether it was able to sit while the Senate was sitting, the committee maintaining that it had a statutory right to meet contrary to the provisions of Senate standing orders and the wish of the Senate.¹³³ In 1988 the Joint Committee of Public Accounts also reported on revised procedures for its reports.¹³⁴

Instead of presenting a single report on a wide-ranging inquiry, a committee, properly authorised, may submit one or more interim reports. Such reports may deal with the committee's method of inquiry, or report progress on the inquiry as a whole and/or contain the committee's recommendations on facets of the inquiry.¹³⁵

From time to time committees have reported to the House without a formal inquiry reference or without following the normal procedures of advertising, inviting

129 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.

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

131 VP 1985-87/1361; H.R. Deb. (26.11.86) 3778.

132 VP 1976-77/119.

133 Reports 264 and 292 of the Joint Committee of Public Accounts, PP 75 (1987) and PP 317 (1988); Senate S.O. 300. See also reports of the Senate Standing Orders Committee, PP 117 (1983) and PP 169 (1987); and J 1987-89/1050.

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

135 'Effectiveness of support services for Aboriginal and Torres Strait Island communities', *House of Representatives Standing Committee on Aboriginal Affairs, Interim report*, PP 197 (1988).

submissions and public hearings. Circumstances in which committees have decided to report without following the normal inquiry processes have included situations:

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

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

Committees have also presented annual reports.¹³⁶ The annual report of the Department of the House of Representatives also contains some information on committees serviced by the department.

Drafting and consideration of reports

Technically, it is the duty of the chair of a committee to prepare a draft report.¹³⁷ In order to pave the way for the preparation of a report after evidence has been received and reviewed, it is normal for members to discuss possible conclusions and recommendations at deliberative meetings. This process is normally assisted by advice and documentation from committee staff. In light of such discussions secretariats are able to develop draft report material for consideration, in the first instance, by the chair.

If, at the meeting at which the chair formally brings up his or her draft report for the committee's consideration, any other member submits a draft report, the committee must first decide upon which report it will proceed.¹³⁸

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

The chair shall read to the committee, at a meeting convened for the purpose, the whole of his or her 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 chair 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 or her amendment at the time the paragraph he or she 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 during the consideration in detail stage. The committee may divide on any question. After the draft report has been considered, all or part of it may be reconsidered and amended.¹³⁹

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

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

137 S.O. 342.

138 S.O. 344.

139 S.O. 345.

the committee'. The date on which the report is adopted is the date which appears under the chair's signature in the report.

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

Protest or dissent

Since 1978 the standing orders have permitted committee members to add a protest or dissent to a committee's report.¹⁴⁰ The difference, if any, between a 'protest' and a 'dissent' is not strictly defined. A possible distinction between protest and dissent would be to associate a protest with procedural matters, and dissent with opposition to a committee's conclusions or recommendations. In dissenting from a report by the Standing Committee on Environment and Conservation in August 1984¹⁴¹, three members of the committee, while not disagreeing with some of the report recommendations, stated that they had serious reservations about reporting without conducting a thorough investigation. They also considered it premature to report at that particular time. This action appeared to be more of a protest at the way in which the committee had gone about reporting on the reference.

A member who proposes to present a protest or dissent is not required to seek authorisation from the committee, as this power resides with individual members, not with the committee. Accordingly, the protest or dissent need not be shown by its author to the chair or other members of the committee, although not to do so would be regarded as a discourtesy. On 22 November 1995 the Senate passed a motion to the effect that prior to the printing of a committee report a member or a group of members is not required to disclose to the committee any minority or dissenting report, or any relevant conclusions and recommendations, proposed to be added or attached to the report after it had been agreed.¹⁴² This has not been considered to preclude action by a committee to direct the circulation of dissenting reports to committee members on their receipt by the secretariat.

A protest or dissent must be relevant to the committee's reference, as the authority delegated to the committee and its members is limited to those areas defined by the terms of the inquiry. The words 'protest' and 'dissent' imply some relationship with the committee's report. A protest (which is a rarely used form) or dissent is usually appended to the committee's report, and it may be signed by more than one member.¹⁴³

In its 1989 report on procedures for dealing with witnesses, the Standing Committee on Procedure argued that in camera evidence should not be disclosed by members in dissenting reports, unless authorised by the committee. It proposed the inclusion of a provision to enforce this prohibition in resolutions to be adopted by the House to guide committees in dealings with witnesses.¹⁴⁴

Alternative methods of recording dissent are:

- moving amendments to the draft report, the voting on which is recorded in the minutes which are subsequently tabled and thereby become public¹⁴⁵;

140 S.O. 343. Standing order amended on 22 February 1978, VP 1978-80/19-20.

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

142 J 1993-95/4198.

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

144 PP 100 (1989). The recommendation had not been implemented formally at the time of publication.

145 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.

- submitting an alternative draft report to the committee¹⁴⁶;
- making a statement in the House, by leave, when the report is tabled; or
- stating the dissent or protest in debate on any motion moved in relation to the report.

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

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

If a committee is unable to agree upon a report, it may present a special report to that effect, with its minutes and the transcript of evidence.¹⁴⁷ Even if the circumstances of the committee's inability to agree are widely known the committee should still report the circumstances to the House, if only as a matter of form and to place them on record.

Presentation of reports

The standing orders permit committee reports to be presented at any time when other business is not before the House.¹⁴⁸ However, a period is allocated each sitting Monday for the presentation of parliamentary committee and delegation reports.¹⁴⁹ A copy of the report, signed by the chair, and the committee's minutes of proceedings are tabled in the House by the chair or a member of the committee.¹⁵⁰ A corrected copy of the transcript of evidence, other than confidential evidence, should also be tabled. Joint committee reports are tabled in both Houses, usually on the same day. Occasionally reports are tabled in one House well before being tabled in the other, especially when the Houses follow different sitting patterns.

It is normal practice for the Member who presents a report to move that the report, with or without the accompanying documents, be printed.¹⁵¹ If a Member presents a report from a committee during the period allocated on Monday, then, subject to any determination of the Selection Committee, he or she and other members of the committee can each be accorded priority in making a statement to the House for a period not exceeding 10 minutes. After the statements a specific motion in connection with the report can be moved without notice by the Member presenting it, and the debate on the question is then adjourned until a future day to be determined by the Selection Committee.¹⁵² Debate on a report can also be resumed in the Main Committee.

A Member presenting a committee report at times other than the period allocated on Monday may be granted leave to make a brief statement on the report and this may be followed by statements, by leave, from other Members. In these circumstances, if at this time a Minister wishes to move a motion that the House take note of the report, or if a Minister or Member wishes to move that the report be adopted or agreed to, leave is required. The standing order states that, upon the presentation of a report, the consideration of the report may be set down for a subsequent sitting when a specific motion without notice in connection with it may be moved.¹⁵³

146 S.O. 344.

147 *And see* *May*, p. 645.

148 S.O. 102.

149 S.O. 102A.

150 S.O.s 346, 347.

151 S.O. 348.

152 S.O. 102B.

153 S.O. 348.

Upon the presentation of a report it may be read to the House by the Member presenting it.¹⁵⁴ In 1955 the House ordered that the Clerk read the special report of the Committee of Privileges relating to the *Bankstown Observer Case*.¹⁵⁵

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, even if still relatively technical, amendments the committee chair, or even the whole committee, would have to approve them. In the case of amendments of substance a further report would have to be presented¹⁵⁶ or, in the case of a select committee, recommitment of the report, by the House to the committee, would have to be sought. Alternatively, the chair could make a statement in the House.

Premature disclosure or publication

Standing order 340 provides that 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 authorised by the House, be disclosed or published by any member of such committee or by any other person. Contravention of this rule has been held to be a contempt.¹⁵⁷ This is a blanket prohibition which precludes disclosure of all or part of a report, or of its contents. Such unauthorised disclosure may be found to be a contempt (*see* Chapter on 'Parliamentary privilege').

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.¹⁵⁸

In 1985, after a report from the Standing Committee on Expenditure on the Aboriginal Development Commission had been debated, a Member raised, as a matter of privilege, the reported provision of a final draft of the committee's report to legal counsel who had earlier been engaged to assist the committee.¹⁵⁹ The following day the Speaker stated that he was not aware of any precedent for the situation but said he was prepared to accord precedence to a motion on the matter. The Member who had raised the complaint said that, in the circumstances, he would not move a motion and the matter was not pursued any further.¹⁶⁰

In 1986 the House referred to the Committee of Privileges press reports relating to purported contents of the report of the Joint Select Committee on Telecommunications Interception which had not been presented to the House. The Committee of Privileges could make no recommendation on the matter of disclosure as it was unable to find the identity of the person or persons responsible—a common feature of such inquiries. On the matter of publication, although the Committee of Privileges took note of the view of the chair of the joint select committee to the effect that no impediment had been caused to that committee, it found that a contempt had been committed by those responsible for publishing the material.

154 S.O. 347.

155 VP 1954–55/225.

156 VP 1980–83/1220.

157 *Parliamentary Privileges Act 1987*, s. 13 deals with in camera evidence, *see* Ch. on 'Parliamentary privilege'.

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

159 H.R. Deb. (22–23.5.85) 2964.

160 H.R. Deb. (23.5.85) 3080–1.

With the enactment of the *Parliamentary Privileges Act 1987*, complaints in this area, as in other areas of parliamentary privilege, have to be tested against the provisions of section 4 of the Act which provides that conduct does not constitute an offence unless it amounts or is intended or likely to amount to an improper interference with the free exercise by a House or committee of its authority or functions or with the free performance by a Member of the Member's duties. In addition, since 1990, when complaints of such matters have been raised in the House Speakers have required the committees concerned to consider the matter themselves in the first instance. They have been required to consider and advise as to whether, in their view, substantial interference has occurred and to seek to ascertain the source or sources of the disclosure(s) (*see* Chapter on 'Parliamentary privilege').

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.

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

On rare occasions a committee has been authorised, even directed, to depart from standing order 340 and disclose its report before its presentation to the House. The resolution of appointment of the Joint Committee on War Expenditure provided that:

The Committee have power, in cases where considerations of National Security preclude the publication of any recommendations and of the arguments on which they are based, or both, to address a memorandum to the Prime Minister for the consideration of the War Cabinet, but, on every occasion when the Committee exercises this power, the Committee shall report to the Parliament accordingly.¹⁶¹

In 1952 the Joint Committee on Foreign Affairs was directed by its resolution of appointment to forward its reports to the Minister for External Affairs. On every occasion when it did so, the committee was required to inform the Parliament that it had reported.¹⁶² 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.¹⁶³ It was left to the Minister to decide whether or not the committee's reports would be published.¹⁶⁴ These arrangements were justified on the ground of national security.

161 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.

162 VP 1951-53/129.

163 VP 1954-55/94-5.

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

Authority for release when House not sitting

Sometimes, when the House is expected to adjourn for a lengthy break and a committee is nearing the completion of an inquiry, the committee may seek the authority of the House to have the report released over the adjournment. The House has permitted this on a number of occasions¹⁶⁵, although the use of the procedure has not been widespread. Motions must be moved in the House as necessary, on a case by case basis.¹⁶⁶ The motion normally moved would authorise the committee to forward its report to the Speaker (or, in the Speaker's absence, the Deputy Speaker), who is authorised to give directions for its printing and circulation. The report is usually tabled when the sittings are resumed or when a new Parliament first meets.¹⁶⁷

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.¹⁶⁸

Government responses to reports

Since 1978 Governments have followed a practice of responding formally to committee reports by way of a statement to the House(s).¹⁶⁹ The original commitment was to respond within six months of the tabling of the report, but in 1983 this period was reduced to three months.¹⁷⁰

These procedures do not apply to reports by the Joint Committee of Public Accounts and the Parliamentary Standing Committee on Public Works. Government responses are made to reports by the Joint Committee on Publications resulting from inquiries and reports by the Procedure Committee but not to reports by other committees concerned with 'internal' matters, such as the House Committee. The Presiding Officers have also provided responses to reports by the Joint Committee on Publications.¹⁷¹

Speakers have followed the practice of presenting to the House at approximately six-monthly intervals a schedule listing government responses to House of Representatives and joint committee reports as well as responses outstanding.¹⁷² Subsequently the Leader of the House tables a list of parliamentary committee reports showing the stage reached with the government response in each case.¹⁷³ This list does not constitute the formal response, nor does correspondence from a Minister directly to a committee chair. The Government's response to a committee report is considered to have been formally made only when presented directly to the House(s).

165 E.g. VP 1993-95/2260-1 (joint committee and House committees).

166 Unlike the situation in the Senate, J. 1990-93/237, 707, 738.

167 VP 1996/52-3.

168 *May*, p. 719.

169 H.R. Deb. (25.5.78) 2465-6.

170 S. Deb. (24.8.83) 141-2.

171 VP 1978-80/1237.

172 E.g. VP 1993-95/2687; VP 1996/95.

173 E.g. VP 1993-95/1683; VP 1996/340.

Effects of prorogation and dissolution

Prorogation

For constitutional reasons, committees of the House and joint committees appointed by standing order or by resolution for the life of the Parliament continue in existence but may not meet and transact business following prorogation.¹⁷⁴ Committees whose tenure is on a sessional basis cease to exist.

Committees appointed by standing or sessional order or by resolution of the House, or both Houses, for the life of the Parliament may meet again in the new session of the same Parliament. 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 ceases and the subject must be again referred by resolution of the House.¹⁷⁵

Select committees which are appointed on a sessional basis, that is, not for the life of a Parliament, cease to exist upon prorogation. If a select 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 must be given that power by the House.¹⁷⁶

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.

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. 604*).

The effect of prorogation and dissolution on committees is discussed at greater length in the Chapter on 'The parliamentary calendar'.

Televising, filming and tape recording of proceedings

It has become reasonably common for committees to allow some footage to be taken, without sound, at committee meetings. This footage may be used as background to news reports and has usually been taken while committee members are in fact preparing for a meeting or sitting at the table during a meeting but not actually taking evidence or deliberating (*see below*). Committees may permit cameras to film both committee members and witnesses, and the impression may be given that the witnesses are being

174 *See* Ch. on 'The parliamentary calendar' for more detail; *and see* *Odgers*, 6th edn, pp. 972–82 and 7th edn, pp. 400, 516–22 (argument to the effect that prorogation does not prevent committees of the Senate from continuing their activities); *but see also* Lindell, *op. cit.*, p. 399, expressing agreement with a conclusion by Commonwealth Law Officers to the effect that prorogation (and dissolution) means that committees should not continue to operate.

175 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.

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

examined, although typically they may just be giving their names and so on for the record, or they may be speaking informally with committee members while the taking of evidence has been suspended.

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

- only public hearings may be covered;
- in all cases it is for the committee to decide whether to allow access (and approval may be withdrawn at any time);
- fairness and accuracy and a general overall balance must be observed;
- excerpts may be taken but must be placed in context; and
- excerpts may not be used for political party advertising etc. or for the purposes of satire or ridicule.¹⁷⁷

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

Because these matters are not covered by the Parliamentary Proceedings Broadcasting Act, the protection attaching to a television or film company may be found to be similar to that enjoyed by any person who, with the approval of the committee, published a report of its proceedings, that is, qualified privilege may apply. Members of a committee and witnesses appearing before it would have the usual protection from action in respect of statements made by them during the proceedings. The fact that the proceedings were telecast, or filmed, would not alter their legal position.¹⁷⁸

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 contempt or a breach of the rules applying to the taking of photographs in Parliament House.

Any person permitted by a committee to attend a hearing may 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. Further, such tape recording of proceedings has no

¹⁷⁷ The authority for this action is a resolution of the House of 16 October 1991, VP 1990-93/1084-5. On 23 August 1990 the Senate agreed to a detailed resolution concerning the broadcasting, including the televising, of committee proceedings, J 1990-93/237.

¹⁷⁸ Advice of the Attorney-General to the President of the Senate, dated 23 May 1963.

standing in terms of the laws governing the broadcasting of proceedings or the laws of parliamentary privilege.

Staff and advisers

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

The arrangements for secretariat support provided to investigatory committees serviced by the Department of the House of Representatives vary. In some cases it may comprise a committee secretary, perhaps a project/research officer and one or more secretariat support staff. Committee secretaries, and other staff members, may be required to support more than one committee. Allocation of additional staff depends on the availability of funds and personnel, each committee's terms of reference, the number of inquiries a committee is conducting, the nature of its operations, its reporting targets and the incidence of subcommittee operations. Committee secretariats have three basic functions:

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

Committees may be assisted by specialist advisers who are remunerated at agreed rates and receive reimbursement for travelling and incidental expenses. While witnesses are rarely paid a fee, this may be approved if a committee seeks from an expert witness 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, whose 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 and 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 committee¹⁷⁹, this is not so in practice. Proposals must be submitted to an officer authorised to approve such expenditure who may approve them subject to the availability of funds. Many committees have employed expert advisers from time to time. Officers of the public service may be seconded to the Department of the House of Representatives on a full-time or part-time basis to provide specialist advice to committees and this form of support is frequently resorted to.

Special arrangements made in 1984 in connection with the Senate Select Committee on the Conduct of a Judge are worthy of note. A senior member of the Brisbane Bar and President of the Law Council of Australia, Mr C. W. Pincus, QC, was appointed as counsel to advise the committee. In September 1984 the Senate Select Committee on Allegations Concerning a Judge was appointed, and the resolution of appointment provided that two Commissioners Assisting the Committee be appointed by resolution

179 S.O. 349.

of the Senate. Each Commissioner was a recently retired Supreme Court judge, and they were permitted to be present at meetings of the committee and were able to participate in the committee's deliberations and examine witnesses before the committee. The committee also appointed counsel to assist it.¹⁸⁰

COMMITTEES CONCERNED WITH THE OPERATIONS OF THE HOUSE

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

- Committee of Privileges;
- Library Committee;
- House Committee;
- Procedure Committee;
- Selection Committee;
- Publications Committee; and
- Committee of Members' Interests.¹⁸¹

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

Appointment

It has not been the practice of the House to require a resolution for the appointment of the standing committees appointed under the standing orders. They commence to operate when Members are appointed to them and cease to exist only upon dissolution of the House. The number of members of each committee is determined by the standing orders. Except for the Procedure Committee, to which members are nominated¹⁸², the members of such committees are nominated by the parliamentary parties and are appointed on a motion moved by a Minister, usually by leave.¹⁸³

If a Member no longer wishes to serve on a committee, the Member informs the whip of that Member's party and the chair of the committee in writing. A motion is then moved in the House by a Minister to discharge the Member from attendance on the committee. A replacement is also appointed by motion. Normally, both the discharge and the appointment are moved simultaneously on the one motion.¹⁸⁴ A Member may not simply resign; the Member must be discharged by a motion moved in the House.¹⁸⁵

From time to time the number of Members to serve on a committee may be increased. It is necessary to suspend standing (and sessional) orders to enable this to be done.¹⁸⁶

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

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

181 S.O.s 25–28A.

182 VP 1996/208.

183 VP 1996/208, 251.

184 VP 1993–95/1769.

185 H.R. Deb. (5.9.05) 1919.

186 VP 1962–63/39, VP 1954–55/202.

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 three, unless otherwise ordered.¹⁸⁷ The standing orders are silent on the quorum for meetings at which a committee of the House confers (sits jointly) with a similar committee of the Senate. In the absence of any provision, the Library, House and Publications Committees, when conferring, have fixed their quorums at five, provided that each House is represented in the quorum.

Library and House Committees

The Library Committee is concerned with the operation of the Parliamentary Library services while the House Committee is concerned with the provision of services and amenities to Members in Parliament House. Both committees consist of the Speaker and six other members.¹⁸⁸

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 1927.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ For many years the Speaker has been chair of the Joint House Committee and the President has been chair of the Joint Library Committee.

When the two House committees are sitting together as the Joint House Committee, they should, generally speaking, only consider those matters which affect joint services, as each House is responsible for its own affairs. Recommendations affecting only one House should properly be made by the appropriate House Committee independently. In 1956 and in 1959 the House of Representatives House Committee considered and reported informally on Members' accommodation. Reports are seldom made to the House.¹⁹²

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 which has the dual role:

- of recommending to the Houses from time to time as to what petitions and papers, which have not been ordered to be printed by either House, ought to be printed; and

¹⁸⁷ S.O. 29. A quorum of five was fixed for the Committee of Privileges and the Standing Orders Committee in 1954, VP 1954-55/19, 21. The quorum of the Selection Committee is five.

¹⁸⁸ S.O. 27.

¹⁸⁹ VP 1926-28/385.

¹⁹⁰ H.R. Deb. (21.10.27) 700.

¹⁹¹ S.O. 27.

¹⁹² *But see* report by Joint House Committee on accommodation for Members of Parliament at Canberra, VP 1926-28/181; *see also* reports by the Senate House Committee concerning Senators' dress in the Senate Chamber, PP 235 (1971), and provision of staff and other facilities for Members of Parliament, PP 34 (1972), and the Joint House Department. The Joint Library Committee reported regularly until 1926.

- 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.¹⁹³

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

Committee of Privileges

The Committee of Privileges consisting of 11 members is established to inquire into and report upon complaints of breach of privilege which may be referred to it by the House.¹⁹⁴ The committee has no power to initiate inquiries but the House has referred to the committee matters of a general nature, for example, references on the use of House records in the courts and on the issue of public interest immunity.¹⁹⁵

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

Committee of Members’ Interests

The Committee of Members’ Interests consists of seven Members and is established:

- (i) to inquire into and report upon the arrangements made for the compilation, maintenance and accessibility of a Register of Members’ Interests;
- (ii) to consider any proposals made by Members and others as to the form and content of the register;
- (iii) to consider any specific complaints made in relation to the registering or declaring of interests;
- (iv) to consider what changes to any code of conduct adopted by the House are necessary or desirable;
- (v) to consider what classes of persons (if any) other than Members ought to be required to register and declare their interests; and
- (vi) to make recommendations upon these and any other matters which are relevant.¹⁹⁶

Requirements for the registration of Members’ interests are set by resolutions of the House. Upon election Members are required to complete a pro-forma statement of registrable interests in accordance with the requirements. The completed forms go to make up the Register which is presented to the House as soon as practicable. The committee also presents notifications of alterations of interests by Members. It presents a report on its operations each year. The committee has the power to send for persons, papers and records but is limited in using that power unless it is approved by not less than four members of the committee other than the chair, a requirement which also applies in respect of any investigation of the private interests of any person. The committee also has power to report from time to time and to confer with its Senate counterpart. (For registration requirements *see* Chapter on ‘Members’.)

Procedure Committee

The Standing Committee on Procedure is appointed ‘to inquire into and report on the practices and procedures of the House generally with a view to making recommendations for their improvement or change and for the development of new procedures’.¹⁹⁷ As a result of reports of the Procedure Committee a number of initiatives have been taken relating to the business of the House, including significant

193 S.O. 28.

194 S.O. 26.

195 VP 1978–80/975; VP 1993–95/1107.

196 S.O. 28A.

197 S.O. 28C(a).

developments relating to private Members' business and the associated establishment of the Selection Committee (*see below*). Major changes in the procedures for the consideration of legislation, including the establishment of the Main Committee, also followed recommendations of the Procedure Committee.

The committee has power to send for persons, papers and records, to report from time to time, and it or its subcommittees have the power to consider and make use of the evidence and records of the Standing Committee on Procedure appointed during previous Parliaments.

Selection Committee

The basic responsibility of the Selection Committee is 'to arrange the timetable and order of business for private Members' business and committee and delegation reports on each sitting Monday pursuant to standing order 101'.¹⁹⁸ The quorum of the committee is five.

As part of its charter the committee selects, establishes the order of, and allots the time to, the private Members' motions and bills to be considered during the private Members' business period. The committee meets each sitting week to determine the program of business for the following sitting Monday. Normally it reports these decisions to the House on Tuesday of each week. These are printed in Hansard and published in the Notice Paper as soon as possible. The committee has no power under the standing order to send for persons, papers and records nor has it the power to appoint subcommittees or conduct inquiries as such.

GENERAL PURPOSE STANDING COMMITTEES

On 24 September 1987 the House established a comprehensive committee system by setting up eight general purpose standing committees. At the same time, the functions of the Joint Committee on Foreign Affairs and Defence were extended, thus giving the House the capacity to monitor or to 'shadow' the work of all federal government departments and instrumentalities.

The general purpose standing committees appointed in the 38th Parliament were increased to nine, as follows:

- Standing Committee on Aboriginal and Torres Strait Islander Affairs;
- Standing Committee on Communications, Transport and Microeconomic Reform;
- Standing Committee on Employment, Education and Training;
- Standing Committee on Environment, Recreation and the Arts;
- Standing Committee on Family and Community Affairs;
- Standing Committee on Financial Institutions and Public Administration;
- Standing Committee on Industry, Science and Technology;
- Standing Committee on Legal and Constitutional Affairs; and
- Standing Committee on Primary Industries, Resources and Rural and Regional Affairs.

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

¹⁹⁸ S.O. 28D(a).

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

In addition, annual reports of government departments and authorities tabled in the House stand referred to the committees for any inquiry they may wish to make. Reports stand referred to particular committees in accordance with a schedule tabled by the Speaker recording the areas of responsibilities of each committee. The Speaker is empowered to determine any question should responsibility be unclear or disputed in respect of an annual report or a part of a report. The period during which an inquiry concerning an annual report can be commenced ends on the day on which the next annual report of the department or authority is presented to the House.¹⁹⁹

As part of the legislative process, under standing order 217A bills may be referred for advisory reports by a general purpose standing committee or to a committee formed of the House members of a joint committee.²⁰⁰ (*See Chapter on 'Legislation'.*)

Although technically these committees cannot initiate their own references, in practice committees may either take the initiative and seek a reference or at least be involved in considering and negotiating suitable terms of reference.²⁰¹ Committees would normally formally resolve to accept references.²⁰² In addition, the ability to consider annual reports enables committees on their own initiative to address matters dealt with in such reports, and this may lead to informal discussions with officials, or to formal hearings. Such consideration may cause a committee to recommend that a reference be given to it on a particular subject.²⁰³ It has been considered that, although a Minister may refer a matter to a committee, a Minister is not able to withdraw a reference from a committee.

Appointment of Members

Members are appointed in numbers which reflect the proportion of government to non-government Members in the House; in the 38th Parliament the general purpose standing committees of 14 had nine government and five non-government members. Each committee may be supplemented with up to three members for a particular inquiry.²⁰⁴ Government members are nominated by the Chief Government Whip and non-government members by the Chief Opposition Whip in consultation with any minority group or other non-government Member. In the event of disagreement in the nominations, the Speaker is notified and informs the House, which determines the matter. If the appropriate numbers of government and non-government members have been nominated and the committee has met and elected a chair no other nomination or notification of disagreement other than in respect of the filling of a casual or supplementary vacancy can be made.²⁰⁵ Members are considered to be appointed to a committee once the notification of a nomination has been received by the Speaker. The Speaker would normally announce to the House any nomination at the first appropriate opportunity after receipt of the whip's letter. For the purposes of the consideration of a bill referred to a committee for an advisory report under the provisions of standing order

199 S.O. 28B.

200 S.O. 28BA. Such committees operate under the provisions applying to general purpose standing committees.

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

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

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

204 S.O. 28B.

205 S.O. 28B.

217A, one or more members of the committee may be replaced by other Members; this does not affect the provision for the committee to be supplemented by up to three other members.²⁰⁶

Powers and procedures

Where the standing orders are silent on the method of operation of the general purpose standing committees, they follow the established practice of operating in accordance with select committee procedures.

The standing order establishing the committees specifies that the committees can only inquire into matters referred to them by either the House or a Minister (*but see* p. 622 re annual reports).

Each committee must elect a government member as its chair and a deputy chair is appointed for each committee; as a general rule the deputy chair is an opposition Member. The committees or their subcommittees have power to send for persons, papers and records and to move from place to place. The standing order permits each subcommittee to adjourn from time to time and to sit during any sittings or adjournment of the House (powers which the committees themselves have pursuant to the standing orders relating to select committees). Each committee or any subcommittee is empowered to authorise publication of any evidence given before it and any document presented to it, and each committee has leave to report from time to time.

Each committee or any subcommittee has been given the power to consider and make use of the evidence and records of the relevant standing committees appointed during previous Parliaments and each committee may confer with a similar committee of the Senate. Where these powers have been used they are referred to elsewhere in this chapter.

Quorum

In the 38th Parliament a standing committee consisted of 14 members and three members of the committee constituted a quorum. The quorum of a subcommittee was two.²⁰⁷

JOINT COMMITTEES ESTABLISHED BY RESOLUTION OF BOTH HOUSES

Joint standing and joint select committees operate in a similar manner to standing and select committees outlined in the previous section. In the 38th Parliament joint standing committees were appointed on Foreign Affairs, Defence and Trade; Electoral Matters; Migration; the National Capital and External Territories; and Treaties.

Creatures 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 when such procedures differ

206 S.O. 28B.

207 S.O. 28B(f).

from those of the House²⁰⁸, subject to any particular variations, necessitated for example by the provisions of the resolutions appointing them and any further instructions agreed to by both Houses. However, chairs of joint committees, when seeking procedural advice, may approach the Presiding Officers or the 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. However, it is often provided in resolutions appointing joint committees that either House may refer matters for investigation by those committees.²⁰⁹

A proposal for a joint committee may originate in either House. A resolution by the House proposing the establishment of a joint committee defines the nature and limits of the authority delegated to the committee in the same way as a resolution appointing a committee of the House (*see* p. 588). 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.²¹⁰

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 them²¹¹;
- accept them and add modifications of its own;
- reject them;
- reject them and request the Senate to reconsider them²¹²; or
- reject them and suggest an alternative.²¹³

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.²¹⁴

For references to the appointment of Members to joint committees *see* p. 590.

Types of joint committee

Joint statutory committees differ from those appointed by resolution, and are discussed later in this chapter (*see* p. 629).

Joint committees are described as ‘joint standing committees’ or ‘joint select committees’. Like select committees of the House the latter are seen to have an ad hoc role and generally cease to exist upon reporting, while the former have a longer-term role and members hold office for the life of a Parliament. Some committees have simply been called ‘joint committees’ (for example, the former Joint Committee on the Australian Capital Territory) which could equally have been called joint standing committees. While members of the Joint Committee on Pecuniary Interests of Members of Parliament were appointed for the life of the Parliament, the committee was strictly a *joint select committee in that it had a definite and limited purpose and was required to*

208 This practice is based on that of the United Kingdom whereby joint committees follow House of Lords select committee procedures when such procedures differ from those of Commons select committees, *May*, p. 667.

209 VP 1993–95/80, 82.

210 VP 1993–95/80.

211 VP 1987–89/150.

212 VP 1974–75/828–9, 870.

213 VP 1973–74/139, 149.

214 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.

report 'within the shortest reasonable period, not later than 90 days after the members of the committee are appointed'.²¹⁵

Most existing committees appointed by standing or sessional order are given power to confer with similar committees of the Senate, but they exist independently of the Senate committees, and the committees in question never operate as joint committees. However, a procedure was followed in the early years of the Parliament in respect of some committees which were established by resolution by each House independently but which in the conduct of inquiries became in effect joint committees. For example, the House, having appointed a Select Committee in relation to Procedure in Cases of Privilege, sent a message to the Senate 'requesting it to appoint a similar Committee empowered to act conjointly with the Committee of this House' to which the Senate agreed; the joint select committee reported as a single entity.²¹⁶

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 individual Houses.²¹⁷ These doubts have been expressed because section 49 of the Constitution invests the two Houses and the **committees of each House** with the powers, privileges and immunities of the House of Commons at the time of Federation. No express mention is made of joint committees. If joint committees were not covered by section 49, the implications could have far-reaching and significant effects for those without relevant statutory provisions. However, it is considered that since 1987 any risk has been removed by section 3 of the *Parliamentary Privileges Act 1987* which provides that, in the Act, 'committee' means a committee of a House or of both Houses (and subcommittees).

In response to a request by the Joint Committee on War Expenditure in 1941, the Solicitor-General advised that in his opinion absolute privilege attached to evidence given before a joint committee just as it did to evidence given before a select committee of one House. He also gave the opinion that a joint committee authorised to send for persons, papers and records had power to summon witnesses. He suggested that it was doubtful, however, whether a joint committee had the power to administer oaths to witnesses.²¹⁸

Quorum

The Houses may fix the quorum of their respective members required to constitute a meeting of a joint committee.²¹⁹ Normally the quorum is stated in the resolution of appointment and no specific provision is made as to the number of Senators or Members, respectively, required to form a quorum. The effect has been that a quorum may be maintained by Members of one House only. This has not prevented some joint committees, such as the Joint Committee on Publications, from maintaining an informal

215 VP 1974-75/173-4, 208-9.

216 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.

217 See *Odgers*, 7th edn, p. 390-1; but see also Lindell, op. cit. pp. 392-3, expressing the view that such doubts are not well founded.

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

219 S.O. 387. The Senate could also set such a requirement by resolution or by standing order. The last occasion the Houses fixed the quorum of their respective Members was for the Joint Select Committee of Public Accounts for which the quorum included at least one Member of each House, VP 1932-34/118-19; J 1932-34/45, 46; see also Joint Select Committee on the Moving-Picture Industry, VP 1926-28/294, 303.

quorum arrangement where the committee agrees that it is not properly constituted unless there is at least one representative from each House.

Quorum requirements vary between committees and for the same committee in different Parliaments. In the 37th Parliament the Joint Standing Committee on Foreign Affairs Defence and Trade, with 32 members had a quorum requirement of 10, while the joint standing committees on Electoral Matters and Migration, each with a membership of 10, had quorum requirements of four.²²⁰ In the 38th Parliament these committees, with the same number of members as before, had quorum requirements of six²²¹, three²²² and three²²³, respectively. In the 38th Parliament the quorum provisions also included a requirement for the presence of one government and one non-government member (from either House) at deliberative meetings.²²⁴ The resolution of appointment of the Joint Standing Committee on the New Parliament House provided that five members of the committee, one of whom was either the Speaker or the President, constituted a quorum of the committee.²²⁵ In the 37th and 38th Parliaments the Joint Standing Committee on the National Capital and External Territories had a quorum of three, one of whom had to be the Deputy Speaker or the Deputy President when matters affecting the parliamentary zone were under consideration.²²⁶

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.

The first meeting is normally convened by the chair of the committee, if appointed, or by the committee secretary, if the chair is to be elected.

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

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

*Meetings during sittings of the Senate*²²⁷

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

- (1) A committee of the Senate and a joint committee of both Houses of the Parliament may meet during sittings of the Senate for the purpose of deliberating in private session, but shall not make a decision at such a meeting unless:
 - (a) all members of the committee are present; or
 - (b) a member appointed to the committee on the nomination of the Leader of the Government in the Senate and a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate are present, and the decision is agreed to unanimously by the members present.
- (2) A committee shall not otherwise meet during sittings of the Senate except by order of the Senate.

220 VP 1993-95/81-3.

221 VP 1996/127.

222 VP 1996/121.

223 VP 1996/133.

224 VP 1996/227-235.

225 VP 1987-89/39-40.

226 VP 1993-95/85; VP 1996/131.

227 See also *Odgers*, 7th edn, pp. 418-9.

(3) Proceedings of a committee at a meeting contrary to this standing order shall be void.

Until 1987 the Senate imposed a general prohibition on committees meeting during its sittings (the view being held that the primary duty of Senators was to the plenary), although leave to sit during sittings of the Senate had been granted on motion.²²⁸ The attitude was taken that leave was required only of the Senate because House of Representatives committees are permitted to meet during sittings of the House.²²⁹ Occasionally resolutions of appointment have authorised joint committees to sit during the sittings of either House of the Parliament.²³⁰

Election or appointment of chair

Usually the resolutions of appointment of joint standing committees²³¹ or the resolutions supplementing statutory provisions²³² provide that committees elect either a government member or a member nominated by the Government Whip or Leader of the Government in the Senate as chair, but this practice has not always been followed.²³³ In respect of the Joint Standing Committee on the New Parliament House which operated in previous Parliaments, the resolution provided for the Speaker and President to be joint chairs.²³⁴

In 1941 the chairs of several joint committees were appointed by name in the resolution establishing the committees.²³⁵ In some instances the House requested the Senate to appoint a Senator as chair, which it did.²³⁶ Such a request was again made and agreed to in 1957 in relation to the Joint Committee on Constitutional Review.²³⁷

Resolutions of appointment have at times specified that the deputy chair be a member of a different House from the chair.²³⁸

Voting

Senate standing orders provide that the chair of a Senate select committee shall unless otherwise provided have a deliberative vote only.²³⁹ Thus, when the votes are equal the question will pass in the negative. This rule is applied to the relatively few joint committees whose resolutions of appointment do not determine the chair's voting powers.²⁴⁰ The resolution of appointment of the Joint Committee on Foreign Affairs, Defence and Trade in the 37th Parliament did not have a provision covering an equality of voting, hence the provision in the Senate standing order applied.²⁴¹

It is common to include in the resolution of appointment the following paragraph:

In the event of an equality in voting, the chair, or the deputy chair when acting as chair, shall have a casting vote.²⁴²

228 J 1974-75/655.

229 S.O. 333.

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

231 VP 1996/126-135.

232 VP 1996/102.

233 VP 1993-95/52.

234 VP 1987-89/39-40.

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

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

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

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

239 Senate S.O. 31.

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

241 VP 1993-95/82. In the 38th Parliament the resolution did so provide, VP 1996/127.

242 VP 1996/126-135.

This is in effect a second vote which is in addition to the chair's deliberative vote.

The Joint Standing Committee on the New Parliament House had joint chairs. Its resolution of appointment provided that in matters of procedure, each of the chairs, whether or not occupying the chair, had a deliberative vote and, in the event of an equality of voting, the chair occupying the chair had a casting vote. In matters other than those of procedure each of the chairs, whether or not occupying the chair, had a deliberative vote only.²⁴³

Protection of witnesses

On 25 February 1988 the Senate adopted a detailed resolution to govern the way in which Senate committees deal with witnesses. Provisions included a requirement witnesses be invited, in the first instance, to give evidence, that they be given an opportunity to make a submission in writing before appearing, that they be given a reasonable opportunity to raise matters of concern before appearing, that they be given the opportunity to apply to give evidence in camera, to object to questions and to apply to be accompanied by counsel.²⁴⁴ While these rules were set for Senate committees, regard should be had to them by joint committees.

Admission of strangers and others

The standing orders of the House and the Senate contain provisions for the admission of strangers and of Senators and Members who are not members of a committee.²⁴⁵ Because there is a difference, the provisions of Senate standing order 36 are applicable. It provides that persons other than members and officers of a committee may attend a public meeting of a committee, but that such persons shall not attend a private meeting except by express invitation of the committee and that they must be excluded when the committee is deliberating. Members, Senators and strangers must always withdraw when the committee is deliberating, in accordance with the standing orders.

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.²⁴⁶ The provision of the Senate standing orders is similar except that one of the Senators appointed to the committee is required to report.²⁴⁷ 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 presented in, both Houses. For presentation procedures in the House see p. 611. Senate standing orders do not require the tabling of minutes of proceedings with a committee's report.²⁴⁸

Usually reports are presented to both Houses on the same day but occasionally this is not possible, for example, when only one House is sitting and there is an urgent need for the report to be presented and published.²⁴⁹ A motion for the printing of a report need only be moved in one House.

243 VP 1987-89/39-40.

244 J 1987-89/517-9, 534-6.

245 S.O.s 337, 338; Senate S.O. 36; and see *Odgers*, 7th edn, p. 419.

246 S.O. 389.

247 Senate S.O. 40.

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

249 '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.

Publication of evidence

As the Senate standing orders empower committees to authorise publication of their evidence and documents it has been considered that this power does not need to be incorporated in the resolution of appointment of joint committees.²⁵⁰

Witness in prison

When a witness is in prison, the person in charge of the prison may be ordered to bring the witness in safe custody for examination.²⁵¹ If a joint committee were to require a witness to be brought from prison, it would appear to be desirable that the warrant be issued jointly by the Speaker and the President.

Consideration of bills by House members of joint committees

Standing order 28BA provides that the House of Representatives members of joint committees shall be considered a committee for the purpose of considering bills referred by the House under standing order 217A (advisory reports) and shall operate under the provisions applying to general purpose standing committees.

JOINT STATUTORY COMMITTEES

Those committees appointed under an Act of Parliament are required to be established at the commencement of each Parliament. In some cases the Act makes provisions for their terms of reference, powers and procedures. This is the case in respect of the Joint Committee on Public Works, the Joint Committee of Public Accounts and the Joint Committee on the Australian Security Intelligence Organization. In some other cases, such as the Joint Committees on Corporations and Securities, the National Crime Authority, and Native Title, it is provided that matters relating to the powers and proceedings of the committee shall be determined by resolution of both Houses of the Parliament. In these cases the relevant Act specifies the duties of the committee but each House has to resolve all other matters pertaining to the workings of the particular committee.²⁵²

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 powers, functions and procedures. In some respects procedural requirements vary from those for ordinary committees.

The committee is a joint committee consisting of six Members of the House of Representatives and three Senators who are appointed by motion by their respective Houses²⁵³ and hold office during the pleasure of the House by which they were

250 Senate S.O. 37. 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 1980-83/54-5, 56-7; and *see* the Parliamentary Papers Act and the Parliamentary Privileges Act (s. 16).

251 S.O. 361, Senate S.O. 180, and *see* *Parliamentary Privileges Act 1987*, s. 14

252 VP 1993-95/78-9, 131, 150, 901-2.

253 VP 1993-95/64, 76.

appointed. Ministers, the Speaker, the President of the Senate and the Deputy Presiding Officers of either House are not eligible for appointment to the committee.

A member may resign by writing 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 appointing another Member.*²⁵⁴ Appointments to the committee, and any changes in membership, are notified to the other House by message.

Procedures

The chair and vice-chair of the committee are elected by the members. The member presiding at a 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.²⁵⁵

The quorum of the committee is five 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 (subcommittees) of three or more members, the chair and vice-chair of which are elected by the members of the sectional committee. There can be no more than two sectional committees at the same time. A majority of members of 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 expedience of carrying out the work. It may also report on any other matters related to the work where the committee thinks it desirable that its views should be reported to the Houses. In its report the committee may recommend any alterations to the work which it thinks necessary or desirable to ensure that the most effective use is made of public moneys. 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.

A motion may be moved in either House that a public work be referred to the committee for consideration and report.²⁵⁶ 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.

²⁵⁴ VP 1987–89/742.

²⁵⁵ Leave is given from time to time, VP 1993–95/131; VP 1996/253–4.

²⁵⁶ VP 1987–89/830.

For the purposes of the committee's responsibilities 'work' means an architectural or engineering work and specifically excludes intangible things, movable works and engineering equipment not being integral components of a work. Works financed by deferred payment or similar arrangements must be referred to the committee. After consultation with the committee, types of works can be declared to be works or public works by regulation. Similarly, types of works can also be declared not to be works or public works by regulation. The approach is intended to facilitate consideration of new types of projects and delivery systems and to meet changing circumstances.²⁵⁷

If the estimated cost of a public work exceeds \$6 million, that work cannot be commenced unless it has been referred to the committee; or the House of Representatives has resolved that, because of the urgency of the work, it is expedient that the work be carried out without having been referred to the committee; or it is a work of an authority that has been exempted by regulation; or the Governor-General has declared that the work is for defence purposes and reference of it to the committee would be contrary to the public interest; or it has, with the agreement of the committee, been declared to be work of a repetitive nature.

A public work referred to the committee cannot be commenced unless, after the report of the committee has been presented to both Houses, the House of Representatives has resolved that it is expedient to carry out the work.²⁵⁸ A proposal in 1968 to amend the Act to give the Senate a greater role in this regard was not agreed to. However, a motion has been passed by the Senate rejecting the committee's recommendation that certain works proceed²⁵⁹—while such a motion was recognised as expressing a view of the Senate, technically it could not prevent the works from being proceeded with.

Before commencement of a public work which has been 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 may 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.²⁶⁰

The works of statutory authorities, Commonwealth instrumentalities and other bodies, as well as overseas works, fall under the purview of the committee.²⁶¹ 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 exempt because of the relationships between the administrations and the Commonwealth, while Commonwealth works in these Territories 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 exempt, as are overseas aid works because of their bilateral nature. The works of the tertiary education institutions in the Australian Capital Territory are exempt. Regulations may be made to exempt

257 Act No. 5 of 1989.

258 VP 1987-89/985.

259 J 1993-95/4317, 4318.

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

261 Act No. 20 of 1981.

certain authorities which trade, or which provide services and compete with the private sector.

Specific works of authorities which are not subject to the Act may be declared examinable by the committee. 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 to 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 persons already in Australia. The works of authorities became subject to the Act on 10 April 1982. Since 1989, works which were formerly carried out by the National Capital Development Commission have fallen within the purview of the committee, with the exception of works within the parliamentary zone and works of a territorial or municipal nature.

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*²⁶², as finalisation of the report was a matter of grave urgency.²⁶³

The Public Works Committee Act does not provide for committee members to add a protest or dissent to the committee's reports, although dissenting reports have been added to reports in recent years.²⁶⁴

In determining whether a committee member may 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 committee²⁶⁵ (see p. 610 for alternative means of recording dissent).

Evidence

The chair, 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 chair or a member authorised by the committee may issue a warrant for the witness's apprehension. The person executing the warrant may bring the witness before the committee and detain the witness in custody until released by order of the chair or the authorised member.

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

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.²⁶⁶

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

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

264 E.g. PP 310 (1995).

265 S.O. 343; Senate S.O. 38.

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

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 which had 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 in relation to the giving of evidence or the producing of a document concerning 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.²⁶⁷ This provision has been interpreted as giving to witnesses the right to refuse to answer certain types of questions which they could be forced to answer before a select or standing committee²⁶⁸ (see p. 645).

Several penalties are specified in the Act. Wilfully giving false evidence on oath or affirmation is punishable by five years' imprisonment. A witness who has been summonsed to appear before the committee but who, without reasonable excuse (proof of which lies upon the witness), fails to appear or fails to continue in attendance whilst 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 the witness is required by summons to produce; or
- a person is responsible for any violence to, or punishment of, a witness or potential witness because of evidence given lawfully by that witness 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 may not be instituted except by the Attorney-General or with the Attorney-General's consent in writing.²⁶⁹

The committee may authorise a member, or another 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 secretariat employed by the Department of the House of Representatives. It also has authority under the Act to appoint assessors (specialist advisers).

²⁶⁷ *Public Works Committee Act 1969*, s. 25.

²⁶⁸ See *Joint Committee of Public Accounts, 17th Report*, PP 30 (1954–55) 14.

²⁶⁹ *Public Works Committee Act 1969*, s. 34.

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 provides for the committee's functions, constitution and powers.

The committee consists of 10 Members of the House and five 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 or effluxion of time. A Member not wishing to serve further on the committee should notify the appropriate party whip 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.²⁷⁰ Appointments to the committee, and any changes in membership, are notified to the other House by message.

Two Senators have been elected chair of the Public Accounts Committee since it was first established in 1913.²⁷¹

Procedures

The chair of the committee and a vice-chair are elected by the members. If both the chair and vice-chair are absent from a meeting the members present may appoint one of their number to preside at the meeting. The member so elected has all the powers and functions of the chair in relation to the meeting concerned.

The quorum of the committee is six 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 chair, or the member presiding, has both a deliberative and a casting vote. Unless members vote unanimously, the manner in which each member votes must, if a member demands it, be recorded in the minutes and in the committee report.

The committee is empowered to appoint sectional committees (subcommittees) consisting of three 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 chair and vice-chair 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 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 has been interpreted to mean that the committee may meet while the Senate is sitting, a view which is not consistent with Senate standing orders (*see* p. 626). It is only in exceptional circumstances that the committee has sought the leave of the Senate to meet when the Senate is sitting.

²⁷⁰ VP 1993-95/476.

²⁷¹ Senator R. E. McAuliffe was chair from 1973 to 1975 and Senator G. Georges from 1985 to 1987.

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 50(4) 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, 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 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, and to report to that House upon that question.

The committee is also responsible, under the Public Service Act, for approving annual report requirements of Commonwealth departments. The functions also include such other duties as are assigned to the committee by joint standing orders approved by both Houses of the Parliament.

In the 37th Parliament three bills dealing with major changes in Commonwealth financial controls, management and audit were referred to the committee and reported on. Other bills dealing with taxation law were also referred to it, but the committee had not reported on these bills at the time of dissolution; new bills were introduced in the 38th Parliament, referred to the committee and reported on. In each case the bills were referred by the House, standing orders having been suspended to allow it.²⁷²

Reports

After a committee report is tabled the chair forwards a copy to Ministers affected. The chair also forwards a copy to the Minister for Finance with a request that the Minister consider the report and inform the chair 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 and presented to Parliament. If the committee is dissatisfied with the response it may seek further information as clarification or elaboration prior to presenting a report to Parliament.²⁷³ The Public Accounts Committee Act, like the Public Works Committee Act, makes no provision for minority reports. However, the committee has permitted minority reports²⁷⁴ and this is in accord with the contemporary attitude of both Houses (*see* p. 610).

²⁷² VP 1993–95/1145, 1327; 2678; VP 1996/266, 389.

²⁷³ *Joint Committee of Public Accounts, 255th Report, PP 70 (1987)*.

²⁷⁴ At the time of publication, all but three of the committee's reports had been unanimous; *and see Odgers, 7th edn, p. 414.*

Evidence

The committee may summon a person to appear before it to give evidence and produce documents. The summons must be signed by the chair or the vice-chair. If a witness who has been summonsed fails to appear or fails to continue in attendance in obedience to the summons without showing proof of reasonable excuse, the chair or the vice-chair may issue a warrant for the apprehension of the witness. The person executing the warrant may bring the witness before the committee and detain that witness in custody until release by order of the chair or the vice-chair. A person must not knowingly dissuade or prevent a person from obeying a summons.

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

A person summonsed to appear before the committee may not refuse, without just cause (proof whereof lies upon the witness), to be sworn or make an affirmation, answer any question put to that person 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. 643.)

A witness has the same protection and privileges as a witness in proceedings in the High Court (*see* p. 633 for comment on such provisions). The Act also provides a witness with legal protection against any physical or other harm which may be inflicted on the witness for or on account of having appeared before the committee as a witness, or lawfully giving evidence before the committee.

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 chair. 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 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 the Attorney-General, and an offence can only be prosecuted on indictment in the name of the Attorney-General.

Staff and expert assistance

The committee has a secretariat employed by the Department of the House of Representatives. It has also employed specialist advisers on a part-time basis. The committee is also assisted by official observers: the Secretary to the Department of

Finance and the Auditor-General. Their representatives sit at the table with committee members at all public hearings and later have the opportunity 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 five Members of the House of Representatives and two Senators appointed by their respective Houses by motion.²⁷⁵ 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 five members. Any member, other than the Speaker and President, may resign his or her 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.²⁷⁶ 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 (*see below*); 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 of 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.²⁷⁷

The committee may delegate to a subcommittee 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 subcommittee 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 subcommittee must consist of two Members of the House of Representatives and two Senators. Because of the possibility that only

275 VP 1993–95/111; J 1993–95/189.

276 VP 1993–95/951, and *see* J 1973–74/246 for case of Senator; *see also* VP 1948–49/13 (temporary vacancy); VP 1951–53/673 (death of Member).

277 *See* Ch. on 'Parliament and the citizen'.

one House may be sitting, it is provided that two members of the subcommittee shall be sufficient to form a quorum.

The chair and vice-chair 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 chair and the President vice-chair. When both the chair and vice-chair 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 chair, 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. The committee has been given power to send for persons, papers and records.²⁷⁸

The committee has operated on the basis that, unless otherwise determined, its proceedings are not open to the public and are not to be published without the chair's authority. The chair has been empowered to authorise publication of committee decisions, unless the committee has specifically determined otherwise.²⁷⁹

Parliamentary Joint Committee on the Australian Security Intelligence Organization

Appointment

The Parliamentary Joint Committee on the Australian Security Intelligence Organization is established by the *Australian Security Intelligence Organization Act 1979*, and is appointed as soon as practicable after the commencement of the first session of each Parliament. The committee's functions, procedures and powers are prescribed in the Act.

The committee consists of seven members—four Members of the House of Representatives nominated by the Prime Minister and three Senators nominated by the Leader of the Government in the Senate. Committee members are appointed by resolution of 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 effluxion of time or is dissolved. A Minister, the Speaker of the House of Representatives, the President of the Senate, the Deputy Speaker and the Deputy President are not eligible for appointment to the committee.

A member may resign membership of the committee by notifying the Speaker of the House of Representatives or the President of the Senate, as appropriate. The notice of resignation must be in writing, signed by the member, and delivered to the Speaker or the President, as the case requires. The relevant House is empowered to appoint one of its members to fill a vacancy amongst the members of the committee appointed by that House.

Procedures

Meetings of the committee are chaired by a Presiding Member who is elected by the members. If the Presiding Member is not present at a meeting of the committee, the members present elect one of their number to preside at the meeting. The member so

²⁷⁸ VP 1973–74/69–70, 137.

²⁷⁹ 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. *But see also* Ch. on 'Parliamentary privilege'.

elected may exercise all powers and functions of the Presiding Member in relation to that meeting, and any matter arising out of that meeting. The member presiding at a meeting of the committee has both a deliberative and a casting vote.

The quorum of the committee is four members. There is no requirement in the Act for the presence of members of both Houses in the make-up of a quorum and, consequently, the quorum can consist of Members of the House of Representatives only.

The Act requires the committee to keep minutes of its proceedings. Where members do not vote unanimously on a question, and if a member so requires, the names and manner in which each member voted and the names of members who abstained from voting are to be recorded in the minutes and in the committee report.

The committee may meet at places within Australia providing that, before a meeting-place is determined, advice is sought from the Director-General of Security regarding the suitability of that place. The committee may meet at such times as it determines and may also meet when the Parliament has been prorogued.

The committee is required by the Act to conduct its reviews, in general, in private. The committee may determine otherwise in relation to its reviews, but in this case, it must also seek the approval of the responsible Minister.

Functions

The functions of the committee are:

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

The functions of the committee, however, do not include:

- reviewing a matter that relates to the obtaining or communicating by ASIO of foreign intelligence;
- reviewing an aspect of the activities of ASIO that does not affect any person who is an Australian citizen or a permanent resident;
- reviewing a matter, including a matter that relates to intelligence collection methods or sources of information, that is operationally sensitive; or
- originating inquiries into individual complaints concerning the activities of ASIO.

Subject to these provisions, where the Minister refers a particular aspect of the activities of ASIO to the committee for review, or when one of the Houses passes a motion that the committee is to review a particular aspect of the activities of ASIO, the committee is empowered to review that aspect. In addition, if the committee, by resolution, requests the Minister to refer a particular aspect of the activities of ASIO, the Minister may refer that aspect to the committee for review.

Evidence

The committee may require persons to appear before it to give evidence or to produce documents, providing that a minimum of five days' notice, in writing, is given to that person. When these circumstances occur, a copy of the notice must also be given to the Minister. When required to appear before the committee, a person concerned is entitled to be paid, by the Commonwealth, allowances for travelling and other prescribed expenses. Evidence may be taken on oath or affirmation and the Presiding Member may administer an oath or affirmation to a witness.

A person required to give evidence before the committee may not refuse or fail, without reasonable excuse, to be sworn or make an affirmation, to answer the committee's questions, or to produce documents required by the committee. The penalty for refusal or failure to comply, under these provisions, is \$1000 or imprisonment for six months or both. Should a person knowingly give evidence that is false or misleading in a material particular, the penalty is \$5000 or imprisonment for two years or both. In such cases, prosecutions are instituted only by or with the consent of the Attorney-General.

The Minister may on occasion, for reasons relevant to security, determine that a person should not give evidence in whole or in part and/or produce documents to the committee. Under these circumstances, the Minister gives a certificate to this effect to the committee member presiding. A copy of the certificate is also provided to the Speaker of the House of Representatives, the President of the Senate and the person concerned.

Members of the committee, and members of staff of the committee, both current and former, are prohibited from either directly or indirectly recording, divulging or communicating information or documents received, except for the purposes prescribed in the Act. The penalty for such an infringement is \$5000 or imprisonment for two years or both.

Neither members of the committee nor members of staff of the committee, both current and former, can be required by a court to produce documents or information acquired by virtue of their office or employment.

Evidence taken by a committee which ceases to exist before reporting on a matter may be considered by a committee that is constituted at a subsequent time.

Disclosure to Parliament

Under the provisions of the Act, the committee is prohibited from disclosing in its reports the identity of a current or former officer, employee or agent of ASIO. It is also prohibited from publicly disclosing material or information which might prejudice ASIO's performance of its functions.

Before presenting its reports, the committee is required to obtain the advice of the Minister as to whether any part of the report should not be disclosed.

Staffing

The committee has a small secretariat employed by the Department of the House of Representatives.

Other statutory committees

In the 38th Parliament three other joint statutory committees operated:

- the Joint Committee on Corporations and Securities established by the *Australian Securities Commission Act 1989*;
- the Joint Committee on the National Crime Authority established by the *National Crime Authority Act 1984*; and
- the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, established by the *Native Title Act 1993*. (This committee is subject to a five year sunset provision.)

In each case the relevant Acts contained basic provisions dealing with the establishment, duties and membership of the committee, while providing that matters relating to committee powers and proceedings be determined by resolution of the

Houses.²⁸⁰ This approach may be seen as avoiding some of the practical and theoretical difficulties that could be associated with complex and detailed statutory provision for committees.

The secretariats of these committees were employed by the Department of the Senate.

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 (save for statutory committees). A committee cannot require the attendance of witnesses and the production of papers without express authority from the House or Houses (again, save for statutory committees). A committee is therefore normally granted the power to call for persons, papers and records in order that it can properly fulfil its functions.²⁸¹

Power to send for persons, papers and records

The House empowers most investigatory committees to send for persons, papers and records. Section 49 of the Constitution confers on both Houses the powers, privileges and immunities possessed by the United Kingdom House of Commons in 1901. Section 50 confers on each House the right to make rules or orders concerning its powers and conduct of business. This power extends to committees and is delegated to the committee pursuant to standing orders²⁸², by the resolution of appointment, or by the relevant statute. Without such authority a committee has no power to compel witnesses to give oral or documentary evidence.

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

...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...²⁸³

The Committee of Members' Interests has power to send for persons, papers and records but it may not exercise that power (nor undertake an investigation of the private interests of any person) unless approved by not less than four members of the committee other than the chair.²⁸⁴

The Parliamentary Joint Committee on the Australian Security Intelligence Organization has, by virtue of the Act establishing the committee, some limitations in respect of the gathering and use of evidence. These are discussed more fully in the section on that committee (*see* p. 638).

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

280 Resolutions of the 38th Parliament: Joint Committee on Corporations and Securities, VP 1996/101-3, 223-4, 227-8; Joint Committee on the National Crime Authority, VP 1996/129-30, 231-2; Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, VP 1996/ 127-9, 230-31.

281 The nature of these powers is discussed at length in Greenwood and Ellicott, PP 168 (1972).

282 S.O. 334.

283 VP 1951-53/129. In later Parliaments the restrictions on the committee's power to call for evidence were gradually eased, VP 1957-58/13-14, VP 1959-60/25-6, VP 1973-74/52-3. The powers of the modern Joint Standing Committee on Foreign Affairs, Defence and Trade are unqualified in this respect, VP 1996/127.

284 S.O. 28A.

included in a constituting Act or granted by the House. Authority granted by the House is included in the sessional or standing orders or resolution of appointment.²⁸⁵

Statutory secrecy provisions

A number of provisions in Commonwealth Acts prohibit the disclosure of certain information and create criminal offences for disclosure in contravention of the provisions. Examples are to be found in the Income Tax Assessment Act and the Family Law Act. The application of such provisions could become an issue in respect of either House directly, but is more likely to arise in respect of committee inquiries, and did so in 1990 and 1991. Different views were expressed as to whether such provisions prevented the provision of such information to a committee, but in August 1991 the Solicitor-General advised as follows:

Although express words are not required, a sufficiently clear intention that the provision is a declaration under section 49 must be discernible. Accordingly, a general and almost unqualified prohibition on disclosure is, in my view, insufficient to embrace disclosure to Committees. The nature of section 49 requires something more specific.²⁸⁶

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

It is also to be noted that should information prohibited from disclosure under a general secrecy provision be disclosed in a submission received by a committee or in oral evidence to a committee, the law of parliamentary privilege would prevent any action or prosecution because the disclosure would have occurred as part of 'proceedings in Parliament'.²⁸⁷

Obtaining evidence

Invitation of submissions

It needs to be stressed that most witnesses, far from needing to be compelled to give evidence, welcome the opportunity to do so. Soon after subjects are adopted for inquiry, committees usually advertise their terms of reference and their desire to receive submissions from interested individuals or organisations. In addition, letters inviting submissions may be sent directly to those who are thought to have a special interest or expertise in the field under investigation. It is completely within a committee's discretion to decide whether or not a person who has lodged a submission should be invited to appear as a witness. When persons give oral evidence their examination is usually substantially based on their written submissions, although it is not considered that committee members must confine their questions to matters dealt with in submissions. Sometimes oral evidence is considered unnecessary and no invitation is issued. (See p. 655 for further commentary on submissions and exhibits.)

Sometimes, depending on the particular circumstances, a person who has not lodged a written submission is granted the opportunity to give evidence at a hearing. Committees

285 See Redlich, vol. II, p. 196; and see Standing Committee on Aboriginal Affairs, VP 1980-83/48-9; Select Committee on Tourism, VP 1977/11; Joint Committee on the Australian Capital Territory, VP 1980-83/54-5.

286 Opinion of Solicitor-General Griffith 12 August 1991. This view was consistent with a joint opinion given in 1985 by the Attorney-General and the Solicitor-General, although in 1990 differing views were put forward by officers of the Attorney-General's Department. In a 1984 report the House of Lords Committee of Privileges published an opinion by three Law Lords to the effect that general legislative provisions override previously existing parliamentary privileges (HL 254 (1984)). And see *Odgers*, 7th edn, pp. 43-7 and Lindell, op. cit., pp. 408-9.

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

need to have some knowledge of the nature of evidence to be presented so that they can determine in advance, for example:

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

Occasionally committees have sent questionnaires to appropriate organisations and used the responses to these questionnaires to form the basis for questioning at hearings. In 1971 the Select Committee on Pharmaceutical Benefits issued a questionnaire to manufacturers who co-operated with the committee after satisfactory arrangements had been negotiated to ensure security of the responses. The Standing Committee on Expenditure frequently obtained information from departments and authorities by questionnaire.²⁸⁸

Evidence from Commonwealth public servants

In 1989 a government paper entitled *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters* was presented to the House.²⁸⁹

This paper set down similar guidelines to those originally presented in 1978 and updated in 1984.²⁹⁰ As the title suggests the guidelines are intended to provide general guidance, not inflexible rules to cover every possible contingency. Basically their purpose is to assist Commonwealth public servants appearing before parliamentary committees, by informing them of the principles they are required by the Government to follow. However, the guidelines state that they must be read in conjunction with relevant parliamentary and statutory provisions.²⁹¹

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

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

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

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

288 PP 244 (1977) 16-17.

289 The guidelines were also incorporated in Hansard, H.R. Deb. (28.11.89) 3011-22.

290 VP 1987-89/1662.

291 Guidelines, paras. 2-3.

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.²⁹²

This practice is acknowledged in the 1989 government guidelines.

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

A departmental officer shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of him or her to superior officers or to the appropriate Minister.²⁹³

(See also 'Public interest immunity' at p. 646.)

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.²⁹⁴ The form of the summons is not prescribed by standing orders or by statute.

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

A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.²⁹⁵

In 1963 the Joint Select Committee on Parliamentary and Government Publications summonsed two witnesses to appear before it. The witnesses were required to give evidence in relation to alleged threats to a witness because of evidence he had given to the committee. Each summons, which was signed by the clerk to the committee, showed the full name, designation and address of the person being summonsed. In a further case a witness, while willing to give evidence before a particular committee, was concerned that the type of evidence that he would give might affect his future employment prospects. On that basis the witness was concerned that it should not appear as if he was appearing of his own volition. Accordingly the committee resolved to assist the witness by summonsing that witness to appear before it.

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

It is unlikely that the House would take any action against, or in relation to, a recusant witness until that witness had refused or neglected to obey a formal summons. Failure to accept an invitation or request to appear before a committee could not be interpreted as a failure to obey an order of the committee. This view was supported by the Attorney-General in 1951 when the Senate Select Committee on National Service in the Defence

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

293 PP 100 (1989). The recommendation had not been adopted formally at the time of publication, but in practice committees operate on this basis.

294 S.O. 354; *May*, p. 628.

295 PP 100 (1989). The recommendation had not been adopted formally at the time of publication.

Force reported to the Senate the failure of the Chiefs of Staff of the armed services and other specified officers of the Commonwealth service to appear before it (*see* p. 649).²⁹⁶

According to *May* 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 the witness's attendance is considered necessary. The Speaker may issue a warrant accordingly.²⁹⁷

Answers to questions, provision of information

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

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

It is acknowledged that some of these grounds would be accepted in a court of law. It is also noted that a witness cannot refuse to produce documents in his or her possession on the ground that they are under the control of a client who has given instructions that they not be disclosed without the client's authority.²⁹⁸

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

If a witness objects to a question the committee may, and frequently does, exercise its discretion in the witness's favour. If the committee needs to deliberate on the objection, the witness and any other strangers present are required to withdraw while it does so.²⁹⁹ If the objection is overruled, the witness is required to present the oral or documentary evidence required. Failure to provide such evidence may be reported to the House and the witness may be punished for contempt (*see* p. 660).

The April 1989 Procedure Committee report *Committee Procedures for Dealing with Witnesses* proposed the adoption by the House of the following provisions:

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

Where a witness objects to answering any question put to him or her on any ground, including the grounds that it is not relevant, or that it may tend to incriminate him or her, he or she shall be invited to state the ground upon which he or she objects to answering the question. The committee may then consider, in camera, whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination, and of the reasons for it, and shall be required to answer the question in camera, unless the committee resolves that it is essential that it be answered in public. Where a witness declines to answer a question to which a committee has required an answer, the committee may report the facts to the House.³⁰⁰

(*See also* comments at p. 642 about statutory secrecy provisions.)

296 S. Deb. (8.3.51) 155–7.

297 S.O. 361. *See* Ch. on 'Parliamentary privilege', the 'Bankstown Observer' Case (1955).

298 *May*, p. 680.

299 S.O. 366.

300 PP 100 (1989). The recommendation had not been implemented formally at the time of publication.

In 1982 the Joint Committee of Public Accounts summonsed the Commonwealth Crown Solicitor to appear before it with a number of files the committee considered would be pertinent to an inquiry. The Commonwealth Crown Solicitor refused to produce the documents sought by the committee, and in answer to a question without notice on 19 October 1982, the Attorney-General stated that the reason the Crown Solicitor would not produce the documents was on the ground of legal professional privilege.³⁰¹

On the following day the chair of the committee, by leave, made a statement to the House to the effect that the Commonwealth Crown Solicitor's claim was inappropriate. In addition, the chair incorporated a legal opinion supporting the committee's argument and the chair also drew attention to the Greenwood and Ellicott paper which stated:

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

Although these privileged communications are usually respected by committees, committees are not restricted in the same way as the Courts.³⁰²

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 seven days of the date of the secretary's letter, the secretary would have no alternative but to implement the committee's resolution and summons him to appear before the committee with the document. The document was subsequently provided and was published in the committee's report.³⁰³

In April 1989 the Procedure Committee proposed the adoption of the following resolution to be observed by committees:

Where a committee desires that a witness produce documents or records relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents or records be produced shall be made (whether or not an invitation to produce documents or records has previously been made) only where the committee has made a decision that the circumstances warrant such an order.³⁰⁴

Public interest immunity

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

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

302 PP 168 (1972) 33.

303 PP 156 (1976).

304 PP 100 (1989). The recommendation had not been implemented formally at the time of publication.

relating to their official duties, in practice their position is somewhat different. This is particularly so with respect to failure or refusal to answer a committee's questions. They may, under certain circumstances and on behalf of their Minister, claim public interest immunity, that is, they may seek to decline to provide certain oral or documentary evidence on the grounds that its disclosure to the committee would not be in the public interest. It is doubtful, however, whether a public servant, even on instructions from a Minister or the Government, could refuse or fail to obey a summons to attend before a committee.³⁰⁵

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

Notwithstanding the authoritative literature and knowledge of the application of the rule in other Commonwealth Parliaments the Committee finds itself unable to offer any clarification of the rules.³⁰⁶

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

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

There is obvious potential for Governments, by 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.³⁰⁷

GOVERNMENT GUIDELINES

The principles upon which Governments have proceeded to deal with public interest immunity were summarised by Greenwood and Ellicott. They drew on two documents in particular, namely, a letter of November 1953 to the Joint Committee of Public Accounts from the Prime Minister and a letter of September 1956 from the Solicitor-General to the Senate Regulations and Ordinances Committee.³⁰⁸ These principles have been substantially incorporated in the Government's *Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*. Key points in the guidelines include the following:

- the privilege involved is not that of the witness but that of the Crown;
- if a witness attends to give evidence on any matter in which it appears that issues of public interest immunity may be concerned, the witness should endeavour to obtain instructions from a Minister beforehand as to the questions, if any, which the witness should not answer;

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

306 'A New Parliamentary Committee System', *Report from the Joint Committee on the Parliamentary Committee System*, PP 128 (1976) 87.

307 PP 128 (1976) 87.

308 Both are quoted in full in *Odgers*, 6th edn, pp. 830-44.

- if questions arise unexpectedly in the course of an inquiry, the witness should request postponement of the taking of evidence to enable the Minister to be consulted;
- if the Minister decides to claim immunity, normally the Minister should write to the committee chair to that effect;
- should the committee regard information about which a claim for public interest immunity may be made as necessary, consideration should be given to agreeing on a means of making it available in some other form, such as in camera evidence; and
- before deciding whether to grant a certificate, the Minister should carefully consider the matter in the light of the relevant principles.³⁰⁹

It needs to be emphasised that the fourth point, regarding a letter from a Minister to a committee, simply recognises that it is the Minister, not an officer, who may claim public interest immunity. In this respect it therefore represents sound practice. However, as already indicated, a committee may negotiate further with a Minister³¹⁰ or the Prime Minister. Ultimately it is, in principle, open to the committee to challenge the Minister's claim in the House by raising the Minister's, or the Government's, behaviour as a contempt of the House.³¹¹

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 public interest immunity.

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 and set precedents for court practice in relation to it.³¹² The decision reflected a continuing trend away from accepting a 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*³¹³) 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.³¹⁴ The High Court held that the claim of privilege must be considered in the light of the nature of the documents, and not just of their belonging to a class of documents, and that where there was a real doubt as to whether a document should be withheld, a court could look at the document and decide whether it should be produced.

COMMITTEE PRACTICE

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

309 PP 168 (1972) 37–8.

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

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

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

313 *Conway v. Rimmer* (1968) AC 910.

314 PP 168 (1972) 33–40; see also Solicitor-General's letter to the Senate Regulations and Ordinances Committee, quoted in *Oggers*, 6th edn, pp. 834–44.

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

It is quite impossible to draw the line between what your Committee may call "factual" and what is "policy", and it should not be for any official or for the Committee, in the view of the Government on matters which may touch security, to decide whether it is either one or the other.³¹⁵

The failure of the committee to summons the officials was not mentioned but the Attorney-General subsequently referred to it in debate.³¹⁶

In its report to the Senate the committee acknowledged that it was for the Senate itself to decide on any action to be taken. The committee, nevertheless, drew attention to established practice that neither House of the Parliament could punish any breach or contempt offered to it by any member of the other House. It recommended therefore that in so far as House of Representatives members of Cabinet were concerned, a statement 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.³¹⁷

The special report was presented to the Senate and a motion for its adoption was moved.³¹⁸ 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. 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.

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

In 1975 the Senate Committee of Privileges reported on the refusal of officials, at the direction of the Government, to give oral or documentary evidence at the Bar of the Senate on the Whitlam Government's overseas loans negotiations. The committee divided on party lines.³¹⁹

315 S 2 (1950-51) 8.

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

317 S 2 (1950-51) 16.

318 J 1950-51/215, 220.

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

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.³²⁰

The committee did not press for the other papers requested.

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

In 1977 a subcommittee of the Standing Committee on Expenditure was able to obtain important information, initially refused, after the chair talked to a witness's superior officer who in turn sought the Minister's approval. No objection was raised to the committee's subsequent publication of the evidence. The same committee was unsuccessful in certain other attempts to obtain information from the Government and brought this to the attention of the House in a report describing its first year of operation. The committee indicated that the Prime Minister had refused to provide it with two sets of documents, even on a confidential basis, on the ground that they were internal working documents. Attention was drawn to the fact that the documents would have helped the committee to determine which matters under investigation it should concentrate upon and in turn would have enabled it to use its limited resources to greater advantage. The committee urged Governments, if necessary, to find ways of minimising restrictions on information to be made available to committees, for example, by providing documents with offending material removed.³²¹ This latter course has in fact been followed on occasions.

The subject of relations between committees and the Executive arose in 1992–3 in respect of a Senate select committee inquiry into the Australian Loan Council. This case is referred to at pp. 654 and 652 in relation to evidence from Members of the House and State Members.

In 1994 in relation to a Senate select committee inquiry concerning the print media the Treasurer instructed officials not to give evidence or to provide certain documents to the committee. This case preceded the introduction of a private Senator's bill seeking to give the Federal Court responsibility to adjudicate in cases of disputed claims for public interest immunity (*see below*).³²²

³²⁰ Letter from the Secretary, Department of the Interior, dated 21 December 1967.

³²¹ PP 244 (1977) 20.

³²² *And see Odgers*, 7th edn, pp. 492–6.

The course mostly followed by committees in an attempt to circumvent the possibility of public interest immunity being claimed is to undertake to treat oral or documentary evidence as confidential. This confidentiality can create difficulties when the committee comes to drafting its report. 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.

PROPOSAL FOR COURT INVOLVEMENT

In December 1994 the Committee of Privileges reported on a proposal, contained in a bill presented by a private Senator, to give to the Federal Court responsibility to determine disputed claims for public interest immunity. The committee recognised the appeal of a mechanism to allow such disputes to be resolved, but was not convinced that the proposal should proceed. It supported the observations of the Joint Select Committee on Parliamentary Privilege in its 1984 report that neither House had ever conceded that any other institution should make such determinations and that such conflicts, which it described as quintessentially political, should be left to the Parliament and the Executive to resolve.³²³

See also Chapter on 'Papers and documents'.

Evidence from State public servants and State Members

State public servants have appeared before House and joint committees in response to an invitation. The need to have due regard to the position and responsibilities of State and Territory Governments is recognised. Most recent practice has been for committee chairs to write to the relevant State or Territory Ministers seeking co-operation with inquiries. Subsequently contact may occur at officer level. Co-operation is usually forthcoming but in some cases State Governments have been seen as unhelpful because of either refusal to co-operate or failure to contribute to an inquiry.³²⁴

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

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

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

No committee of the Commonwealth Parliament has been prepared to summons a State public servant or Minister to give documentary or oral evidence which they have

323 PP 408 (1995); and see Lindell, *op. cit.*, pp. 413–21 concerning possible judicial review.

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

been unwilling to provide. If such a summons were issued, a State Government could seek to challenge it in the High Court or simply claim public interest immunity. In the highly unlikely event of either House of the Commonwealth Parliament attempting to deal with a State Minister or Government for contempt, the matter would appear to be one to be decided by the High Court.

In 1953 the Parliamentary Standing Committee on Public Works sought the Solicitor-General's advice as to its power to summons a State official to give evidence before it. The Solicitor-General considered the matter so doubtful that the advice given was against making a test case by summoning a State officer³²⁵ (see p. 632). The relevance of this opinion to other committees' powers is unclear as the Public Works Committee derives its power from statute, whereas committees appointed by resolution or pursuant to standing or sessional orders, given the appropriate authority, enjoy the powers of committees of the House of Commons as at 1901 by virtue of section 49 of the Constitution.

In light of the unclear constitutional situation, a committee would be prudent to seek advice from the Law Officers before deciding to summons State officials or State Ministers to provide oral or documentary evidence. This was the case in 1982 when the Standing Committee on Aboriginal Affairs was concerned over what it regarded as a lack of co-operation by a State Government in two of its inquiries. The committee had sought the Attorney-General's advice, which confirmed that the committee did not have the power to require the attendance of State officers. If the resolution of appointment of the committee was to be amended to give the committee this power, then the Attorney-General's advice was that serious constitutional questions would arise. The committee felt that it was being hampered in making worthwhile recommendations and it reported its view that the State Government deserved strong condemnation for its lack of willingness to cooperate with the committee.³²⁶

During the course of an inquiry into the Australian Loan Council in 1993 a Senate select committee sought to receive evidence from five Members of State Parliaments. The committee recommended in a special report that the Senate ask the State Houses involved to require the attendance of the Members in question. The Senate passed such a motion.³²⁷ *Odgers* reports that the Houses of the Victorian Parliament did not agree to require their Members to attend, but gave leave for them to appear if they thought fit and the Legislative Assembly of New South Wales accepted a statement by its Speaker that it did not have the power to compel its Members to appear before the committee.³²⁸ In the event none of the Members listed in the motion gave evidence.³²⁹

Evidence from Members, Senators and parliamentary officers

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

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

May states:

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

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

327 J 1993-95/565-6. The resolution also requested the House of Representatives to require the Commonwealth Treasurer's attendance, see p. 654.

328 *Odgers*, 7th edn, pp. 444-5.

329 PP 449 (1993).

A Member who has submitted himself to examination without any order of the House is treated like any other witness.³³⁰

If a committee desires a Member to appear as a witness, the chair must request in writing the attendance of the Member. If the Member refuses to attend or to give evidence or information as a witness, the committee is required to acquaint the House of the circumstances and may not summon the Member again to attend the committee.³³¹ It is then for the House to determine the matter. These procedures have never had to be implemented in the House of Representatives. In appearing before the Committee of Privileges, Members (and Senators) have, like all other witnesses, been required to swear an oath or make an affirmation and have been dealt with in the same manner as other witnesses.³³²

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.³³³ However, in 1973 and 1976 Senators appeared before the House of Representatives Standing Committee on Environment and Conservation without seeking leave of the Senate. Their appearance was at their own request.

There have been several instances of Members of the House who have appeared, as Ministers, before Senate committees.³³⁴ In 1981 the Speaker voluntarily appeared before the Senate Select Committee on Parliament's Appropriations and Staffing.

In the same year the chair of the Senate Standing Committee on Finance and Government Operations wrote to a former Minister for Primary Industry regarding the apparent conflict in evidence given to the Senate committee during the course of its inquiry into the Australian Dairy Corporation and its Asian subsidiaries.³³⁵ The former Minister, who at the time had another portfolio, wrote to the committee. There was still a discrepancy between the sworn evidence of one witness and the recollections of the Minister as expressed in the letter. As a result of further correspondence the Minister made a personal explanation in the House of Representatives. During the course of this personal explanation the Minister stated:

I do not believe it appropriate that a Minister of this House should appear and give sworn evidence before a committee of the other House.³³⁶

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

Standing orders of both Houses set down procedures to be followed if a member of the other House is to be called to give evidence before a committee. If a committee of the House wishes to call before it a Senator who has not volunteered to appear before it as a witness, a message is sent to the Senate by the House requesting the Senate to give leave to the Senator to attend for examination.³³⁷ Upon receiving such a request the Senate may authorise the Senator to attend.³³⁸ In 1901 the Senate ordered that a Senator have leave to give evidence before the Select Committee on Coinage if that Senator

330 *May*, p. 676.

331 S.O. 357.

332 PP 77 (1994) 3.

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

334 *Odgers*, 6th edn, pp. 871–2, and 7th edn, pp. 443–4.

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

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

337 S.O. 359; e.g. VP 1993–95/596.

338 E.g. J 1993–95/1077–8.

thought fit³³⁹ and, in response to a request from the House of Representatives³⁴⁰, the Senate granted leave to authorised Senators to attend and give evidence before the House of Representatives Committee of Privileges.³⁴¹ The Senators appeared and gave evidence having sworn oaths/made affirmations.³⁴²

The same procedures are followed if an officer of the Senate is to be requested to give evidence.³⁴³ Upon receiving such a request the Senate may authorise the officer to attend the committee.³⁴⁴ If a Senate committee were to formally seek the attendance before it of an officer of the House³⁴⁵, standing order 360 provides that the House may instruct its officers to attend the Senate or any Senate committee.

Using similar procedures to those followed by the House³⁴⁶, the Senate has requested that Members of the House be given leave to attend and be examined by Senate committees. The House has several times resolved to grant such leave to Members, adding the qualification that the Member may attend and give evidence if the Member thinks fit.³⁴⁷ In 1913 the House considered a request from the Senate that six named Members, including the Prime Minister, be granted leave to be examined as witnesses before the Senate Select Committee on General Elections. On motion moved by the Prime Minister, the House resolved to grant such leave only to three of the Members, all of them opposition Members. The Prime Minister explained that the three government Members whose attendance had been requested were not included in the motion because they did not desire to attend.³⁴⁸ 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.³⁴⁹

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.³⁵⁰

In 1993 the Senate requested the House to require the attendance of the Treasurer before a Senate select committee.³⁵¹ The request was considered by the House, but rejected, in the following terms:

That the House of Representatives . . . :

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

339 VP 1901-02/109, 113; J 1901-02/88.

340 VP 1985-87/1365; VP 1993-95/596.

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

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

343 S.O. 359.

344 Senate S.O. 179.

345 Senate S.O. 178.

346 Senate S.O. 178.

347 S.O. 360; VP 1904/100, 114; VP 1909/189.

348 VP 1913/130; H.R. Deb. (31.10.13) 2830-1.

349 S. Deb. (31.10.13) 2824.

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

351 J 1993-95/565-6.

(e) declines to require the Honourable John Dawkins MP to attend before the Senate Select Committee on the Functions, Powers and Operation of the Australian Loan Council.³⁵²

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.³⁵³

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

In 1971, at the request of the Committee of Privileges, the Clerk Assistant and the Serjeant-at-Arms appeared before the committee to give their account of the proceedings referred to in the article in the *Daily Telegraph* which had been referred to the committee for examination.³⁵⁴ In 1973 the Secretary of the Joint Committee on Prices appeared before the Committee of Privileges and in 1987 members of a select committee secretariat gave evidence to the committee. In 1978 the Clerk of the House and the Serjeant-at-Arms appeared before the Senate Committee of Privileges to give evidence in relation to the security of Parliament House.³⁵⁵ The Clerk and other officers have appeared informally before the Procedure Committee to discuss matters being considered by the Committee.³⁵⁶ At the request of the Standing Committee on Community Affairs, the Assistant Secretary (Committees) appeared at a public hearing of the committee in 1995 in relation to its inquiry into migrant access and equity.³⁵⁷

Documentary evidence—additional considerations

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

Submissions and exhibits

The provision of written material to committees is a basic feature of modern practice. There is no fixed form or format for submissions, although it assists if they are in typewritten or printed form; a single page letter and a large elaborately presented document can each be accepted as a submission. Distinguishing features of a submission are that it is prepared for the purposes of presentation to a committee, sent ('submitted') to the committee and received by it. There is no obligation on the author of a submission to address the full terms of reference of an inquiry; comments or information may be provided on one or more aspects only.

The protection of parliamentary privilege (for example, in conferring immunity from action for defamation) applies to the preparation of a document for the purposes of or incidental to the transacting of the business of a committee and the presentation or submission of a document to a committee.³⁵⁸ In addition, committees may authorise the

352 VP 1993-95/342-3.

353 VP 1901-02/149.

354 'Article published in *Daily Telegraph*, 27 August 1971', *House of Representatives Committee of Privileges*, PP 242 (1971) 39-45.

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

356 E.g. PP 364 (1994) and PP 108 (1995).

357 PP 24 (1996) 130.

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

publication of submissions, thus conferring privilege on their wider publication. In the absence of such motions submissions remain confidential and any wider publication would not be protected and may give rise to a matter of contempt. In addition, if a committee directs that a submission be treated as evidence taken in camera (see p. 671) the provisions of section 13 of the Parliamentary Privileges Act in respect of unauthorised publication are available.

Committees may order that submissions or other documents be returned if they are not considered relevant.³⁵⁹

Exhibits are items (most commonly documents) presented to committees or obtained by them during an inquiry—either by being sent in or by presentation during a hearing. While a submission is a document prepared solely for the purposes of an inquiry, an exhibit is not. An exhibit is a document or item created or existing for another purpose but presented to a committee or obtained by it because of its perceived relevance to an inquiry or to a matter under consideration. Typically, an exhibit would be a copy of a document or record—perhaps held by a person, organisation or department for other purposes but seen as relevant to the inquiry. Sometimes persons may seek to tender as exhibits copies of material published elsewhere. When such material is readily available, there is less point in receiving and retaining it as an exhibit. The act of presenting an exhibit to a committee would normally be protected by parliamentary privilege, although it would not be expected that committees would authorise the publication of exhibits, so any wider publication would not be protected.³⁶⁰ Sometimes committees have, however, authorised the publication of exhibits.³⁶¹ Committees have sometimes received exhibits as confidential exhibits.³⁶² A submission to another committee has been received as an exhibit—a course which may be seen as minimising the burden on the authors of the document.³⁶³

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'.³⁶⁴ They considered the power to give such an order was conferred on a committee by reason of a power to send for documents. They conceded that this view was arguable and felt that it was a power which should only be used in exceptional circumstances. Even if this power is conferred in the way stated, the most appropriate course of action for a committee faced with a refusal by a witness to produce specified documents would be to acquaint the House of the refusal so that it may make a determination (as with oral evidence³⁶⁵). It would be inappropriate for a committee to take direct action to search for a copy or take possession of documents without first informing the House and seeking a determination from it. *May* cites disobedience to or frustration of committee orders for the production of papers as an instance of contempt.³⁶⁶

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

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

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

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

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

364 PP 168 (1972) 31–2.

365 S.O. 355.

366 *May*, pp. 117–8.

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.³⁶⁷ 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. Normally, unless a committee did not wish to receive a submission (for example, on the grounds that it was not relevant to the committee's inquiry—*see below*) the committee would resolve formally to receive written submissions as evidence at an early opportunity.

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

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

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

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

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 inquiry³⁶⁸ or if

367 *May*, p. 635.

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

it contained offensive or possibly scurrilous material. A rejected submission would cease to be the property of the committee and any further circulation of it would not attract privilege. In most circumstances it would be more appropriate for the committee to retain the document, ignore it in its deliberations and not authorise its publication. By virtue of standing order 340, the fact that the document has not been published by the committee or, subsequently, by the House would preclude anyone from publishing the document without the risk of being in contempt of the House. Anyone who published a submission which had not been authorised for publication would not have the protection this would confer, and would therefore not be immune from any legal proceedings for such publication. Whether or not qualified privilege would apply is uncertain. It is highly unlikely that the House would give its protection in legal proceedings to a person who had ignored the desire of its committee that a defamatory document remain unpublished.

Sub judice convention

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

Committees are bound by the convention. The chair of a committee, like the Speaker, may exercise discretion as to whether the convention should apply in a given situation but the chair must have regard to the principles followed by the Speaker in the House³⁶⁹ and the option open to a committee to take evidence in camera, an option which is not readily open to the House.

If a chair decides the sub judice convention should apply to evidence being given, he or she may direct that the line of questioning and evidence be discontinued or that the evidence be taken in camera. It would also be open to any other member to require the withdrawal of strangers and Members who are not members of the committee.³⁷⁰

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

In 1975 a witness before a subcommittee of the Standing Committee on Environment and Conservation sought to give evidence relating to the circumstances of a legal action against him in the High Court. The evidence was taken in camera.³⁷¹ In the 37th Parliament the Standing Committee on Transport, Communications and Infrastructure conducted an inquiry into aviation safety. At the time of the inquiry a coronial inquest was taking place into one aircraft accident and a judicial inquiry was being conducted into another. Having regard to the sub judice convention, the committee agreed to a resolution that it should take no evidence on either matter unless the resolution was rescinded, and it completed the inquiry without changing this decision.³⁷²

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

370 S.O.s 337, 338.

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

372 PP 480 (1995) 5.

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.³⁷³

In 1975 a witness before the Joint Committee on Pecuniary Interests of Members of Parliament alleged that a Senator, who was a member of the committee, was ineligible under paragraph 44(v) of the Constitution to serve as a Senator. It was claimed that the Senator was a director, manager, secretary and substantial shareholder in a company which had a number of contracts with Commonwealth government departments. The committee resolved that, in accordance with standing orders, the Senate should be acquainted with the relevant evidence. The chair wrote to the President describing the information brought before the committee and enclosing a copy of the relevant transcript of evidence. The President reported to the Senate, read the committee chair's letter and tabled the letter and transcript of evidence.³⁷⁴ The Senator was given leave to make a statement in which the allegations were denied and it was indicated that the Senator had resigned from the committee as the nature of the allegations was such as to place in question the Senator's objectivity in dealing with the issues before the committee.³⁷⁵ 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 two months' leave of absence.³⁷⁶ The Court upheld the Senator's eligibility to serve as a Senator.³⁷⁷

Swearing of witnesses

There are no provisions in the standing orders for the swearing of witnesses. Committees of the House which have the power to call for persons, papers and records have the power to administer an oath to witnesses. This power is derived from the House of Commons by virtue of section 49 of the Constitution and on the basis that the United Kingdom Parliamentary Witnesses Act 1871 empowers the House of Commons and its committees to administer oaths to witnesses and attaches to false evidence the penalties of perjury.³⁷⁸ There has been some doubt cast on whether joint committees have this power³⁷⁹ but some, such as the Joint Committee on Foreign Affairs, Defence and Trade, continue to swear witnesses. According to *May*, a witness who refuses to submit to an oath may be dealt with by the House for contempt.³⁸⁰

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

373 S.O. 358.

374 J 1974-75/597.

375 S. Deb. (15.4.75) 981-4.

376 J 1974-75/628-9.

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

378 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.

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

380 *May*, p. 116.

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

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

Oath

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

Witness: I do. So help me God.

Affirmation

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

Witness: I do.

An oath need not necessarily be made on the authorised version of the Holy Bible. Every witness taking an oath should take it in a manner which affects his or her conscience regardless of whether a holy book is used or not.³⁸¹

Offences by witnesses

A witness who gives false evidence before a committee, whether the witness is under oath or not, may be found to be in contempt of the House.³⁸² To date the House has not made a finding of contempt on this score. In 1991 the Committee of Privileges reported on an allegation that a witness before the Standing Committee on Finance and Public Administration had misled the committee in evidence he had given. While the Committee of Privileges considered that the witness had given a somewhat ambiguous answer, it concluded that he had not intended to mislead the standing committee, and found that no contempt had been committed.³⁸³

When a committee becomes aware that false or misleading evidence may have been given, or a similar offence committed, it should take steps to ascertain the facts of the matter so that it may decide whether it should be raised as a matter of contempt. Such steps would include informing the person alleged to have offended of the claims and seeking a response from that person.

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 draw the circumstances to the attention of the House, which shall deal with the matter.³⁸⁴ *May* specifies those acts or omissions which have been found by the House of Commons to constitute contempt. 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;

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

382 And see *May*, p. 116.

383 PP 456 (1991) 5.

384 S.O. 355.

- prevaricating;
- giving false evidence;
- interrupting or disrupting the proceedings of a committee;
- offering bribes or persuading or inducing another person to procure evidence;
- molestation of witnesses during their evidence in committee;
- refusing to permit books or papers to be inspected when required by order of a committee;
- presenting documents with a view to deceiving a committee;
- wilfully suppressing the truth;
- persistently misleading a committee;
- avoiding or assisting someone else to avoid being served with a summons;
- removing any record or document from the Clerk's custody or falsifying or improperly altering such records or documents;
- arresting or procuring the arrest on civil process of witnesses or other persons summoned to attend a committee while going to, attending or returning from, such committee; and
- refusing to be sworn or to take some corresponding obligation to speak the truth.³⁸⁵

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. 667). **It is important however to note that in the House of Representatives all such complaints need to be tested against the provisions of section 4 of the *Parliamentary Privileges Act 1987*.** (See also Chapter on 'Parliamentary privilege'.)

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.³⁸⁶ The report, therefore, might be in the form of a statement to the House by the chair (see below). Despite this requirement it is considered that a committee should seek to form some preliminary view on a matter, and that a matter should be identified in specific terms, before bringing it before the House, and unless the committee has done so the Speaker may direct it to consider the matter further. In order to inform itself on the matter a committee would take such steps as writing to the person or organisation suspected of offending or alleged to have offended, indicating the nature of the concern and seeking a response. By such means a committee can seek to have the essential allegations clarified so that it can make an informed decision as to whether to proceed with a complaint to the House.

In 1973 the Committee of Privileges reported on a complaint concerning a letter allegedly written by the departmental secretary of the Department of Aboriginal Affairs which had been quoted in part in a newspaper article.³⁸⁷ 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.³⁸⁸

385 *May*, pp. 115–8, 131–2.

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

387 VP 1973–74/428–9, 431, 562.

388 'Letter allegedly written by Secretary, Department of Aboriginal Affairs', *Report of Committee of Privileges*, PP 236 (1973)

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.³⁸⁹

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'. (A royal commission was created, but a prosecution which was initiated for the refusal by witnesses to answer questions failed on the grounds that the questions had gone beyond the scope of the commission.)³⁹⁰

The view that a select committee could not compel witnesses to answer its questions appears to have been current at the time. The chair 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.³⁹¹

The joint committee may not have been questioning the legal power of committees 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'.³⁹²

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 Mr Mackinnon, on oath, refused to answer certain questions, the committee resolved to seek the advice of the Attorney-General as to what steps the Attorney-General 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, 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 Chair should put such specific questions as he deems essential, and make it clear that the witness is required to answer them.

389 PP 236 (1973) 4.

390 *Report from the Royal Commission on Stripper Harvesters and Drills*, PP 24 (1909) xix, xxxvii, xxxviii, xliv, xlv; see also H.R. Deb. (25.8.09) 2562-3.

391 H.R. Deb. (4.6.08) 12 048.

392 'Procedure in cases of Privilege', *Progress Report from the Joint Select Committee on Privilege*, H of R 4 (1907-08) 4.

- (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 Chair 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, Mr 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.³⁹³

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. However in 1913 there was evidence that the doubts still remained. In endeavouring to establish a Joint Committee of Public Accounts, the Government chose to introduce a bill to facilitate two matters in relation to the operation of the committee. As the Attorney-General explained:

[The object of the bill was] that the committee when appointed could hold its sittings when Parliament would not be sitting, and that it should have the power to take evidence on oath.³⁹⁴

There is only one recorded case in Australia in which a recusant witness has been punished by a House of Parliament³⁹⁵ and that was in 1904 in the Western Australian Legislative Assembly.³⁹⁶

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 terms of reference. If the committee overruled the objection and reported the matter to the House, the House would presumably have to satisfy itself that the question was admissible on these grounds before considering whether the witness was in contempt. Presumably, action would only be taken in light of advice from the Committee of Privileges and the matter would need to be assessed in terms of section 4 of the *Parliamentary Privileges Act 1987*—that is, as to whether it amounted or was intended or likely to amount to improper interference with the free performance by a committee of its authority or functions.

393 *Odgers*, 6th edn, pp. 824–6.

394 H.R. Deb. (16.12.13) 4506.

395 Campbell, *Parliamentary Privilege in Australia*, p. 167.

396 Legislative Assembly of Western Australia, VP 1904/161–2, 182, 193, 216, 307–8.

It had been considered that, if a witness persisted in objecting to a question on the grounds that the question was outside the committee's terms of reference or that the committee's terms of reference were outside the Parliament's constitutional powers, it was doubtful whether he or she would have any right of redress before a court should the House find him or her guilty of contempt and issue a general warrant.³⁹⁷ However, the combined effect of sections 4 and 9 (the requirement that details be set out in resolutions and warrants concerning committal) of the *Parliamentary Privileges Act 1987* is to confer some such possible redress: a court could determine whether the ground stated for imprisonment was sufficient in law to constitute a contempt.³⁹⁸

Protection of witnesses

Confidentiality

A straightforward protection which can be afforded a witness who wishes to give evidence in confidence is that of taking evidence in camera and treating documents as confidential. These matters are covered at pages 671 to 674.

Counsell/advisers

There is no provision in the standing orders nor any statutory provision for a witness before a committee of the House to be represented by counsel. Furthermore, there is no precedent for such representation before the House of Representatives or its committees. Applications by witnesses to be represented by counsel have been rejected, for example, by the Committee of Privileges³⁹⁹ and the Standing Committee on Environment and Conservation.

There are precedents, however, for House of Representatives committees to permit witnesses to have counsel or advisers present in an advisory capacity during hearings. On several occasions the Committee of Privileges has permitted witnesses to be accompanied by, and to confer with, counsel or advisers but, save for seeking clarification on and making submissions concerning their own involvement, counsel have not been permitted to address the committee directly (*and see* Chapter on 'Parliamentary privilege').⁴⁰⁰

Persons permitted to accompany and assist witnesses need not be lawyers—for example, Members appearing before the Committee of Privileges have been accompanied by research assistants.⁴⁰¹ On another occasion a Member appearing before the Committee of Privileges was accompanied by another Member.⁴⁰² The role of such persons is emphatically that of adviser rather than representative. Witnesses have been permitted to converse freely with such advisers, but the advisers have not been permitted, for example, to:

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

397 PP 168 (1972) 15; *see also* Lumb and Ryan, p. 64. In relation to the form of warrants *see* Ch. on 'Parliamentary privilege'.

398 Parliamentary Privileges Bill 1986, explanatory memorandum, *and see* Geoffrey Lindell, 'Parliamentary Inquiries and Government Witnesses', *Melbourne University Law Review*, vol. 20, 1995, pp. 413–422.

399 *See* Ch. on 'Parliamentary privilege'.

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

401 PP 77 (1994)—minutes 17.12.93.

402 PP 498 (1989)—minutes 28.11.89.

On one occasion a committee intervened to prevent what it saw as an attempt to avoid these restrictions by the passing of notes to a witness or providing the witness with written responses to questions.⁴⁰³ These limitations attempt to ensure that the witness answers the questions and presents his or her own evidence while at the same time allowing the witness to readily obtain, for example, advice or help as to legal or other issues arising in the giving of evidence. Counsel or advisers could be permitted, at the committee's discretion, to attend an *in camera* hearing of a client's evidence.

In 1973 a representative of the Yirrkala people indicated to the Standing Committee on Aboriginal Affairs that they wished to be assisted in the preparation of their submission by a nominated barrister and solicitor, who had special ties with, and knowledge of, the Yirrkala people. The committee considered it essential to the success of its inquiry that the assistance be granted. The solicitor sought reimbursement for the cost of necessary air travel and accommodation and a daily fee, and the Speaker agreed to these costs being met. The solicitor was permitted to address the committee.

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

In 1985, during the conduct of the Transport Safety Committee's inquiry into passenger coach safety, a solicitor, whose firm had been given the responsibility for preparing and conducting a coach company's case before the Arbitration Commission in a particular award matter, helped prepare that company's submission to the committee. The solicitor was permitted to appear before the committee, together with representatives of the company, as a witness having specialist knowledge of the award provisions, their history and the implications for that company.⁴⁰⁴

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

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

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.⁴⁰⁵

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 chair 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'.⁴⁰⁶

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

404 *Standing Committee on Transport Safety*, transcript of evidence 5.6.85, 253-328

405 *May*, p. 631.

406 *May*, p. 631.

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'.⁴⁰⁷ *May* also states:

Where a party is given the right to be heard, he may adduce evidence; but he may not do so where the hearing is at the discretion of the committee.⁴⁰⁸

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.⁴⁰⁹ In 1976 the House of Commons gave leave in the same terms to the Select Committee on the Conduct of Members.⁴¹⁰

In 1989 the House of Representatives Procedure Committee proposed the adoption of the following rule:

A witness may make application to be accompanied by counsel or an adviser or advisers and to consult counsel or the adviser(s) in the course of the meeting at which he or she appears. If such an application is not granted, the witness shall be notified of reasons for that decision. A witness accompanied by counsel or an adviser or advisers shall be given reasonable opportunity to consult with counsel or the adviser(s) during a meeting at which he or she appears.⁴¹¹

Special arrangements were made during the inquiries of two Senate select committees appointed in 1984 to inquire into matters concerning a judge. During the inquiry by the Select Committee on the Conduct of a Judge witnesses were permitted to be accompanied by counsel and were given all reasonable opportunity to consult counsel during their appearance. Counsel were allowed to make statements to the committee in writing or orally, but were not able to cross-examine other witnesses. During the inquiry by the Select Committee on Allegations Concerning a Judge, more detailed rules were adopted. Amongst other things, counsel assisting and counsel for the judge were able to cross examine witnesses (with certain qualifications) and counsel for other witnesses had a similar right, although the committee's statement of rules and procedures included provision that it could stop any secondary cross-examination if it considered it repetitive or oppressive.⁴¹²

Protection in legal proceedings

Standing order 362 states 'All witnesses examined before the House, or any committee thereof, are entitled to the protection of the House in respect of anything that may be said by them in their evidence'. The protection available to witnesses however also has another source—it derives from Article 9 of the Bill of Rights (applying by virtue of section 49 of the Constitution and re-asserted by the *Parliamentary Privileges Act 1987*) which declares that . . . 'proceedings in Parliament ought not to be impeached or questioned in any court'. The term 'proceedings in Parliament' includes committee

407 *May*, p. 631.

408 *May*, p. 632.

409 H.C. Deb. (14.3.68) 1643–6.

410 HC 490 (1977).

411 PP 100 (1989) 9. The recommendation had not been implemented at the time of publication.

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

proceedings⁴¹³, and witnesses giving evidence to a committee are protected from legal proceedings on account of that evidence (for a more complete account see Chapter on 'Parliamentary privilege'). However, it is important that a committee is properly constituted at the time of a hearing, for instance, to remove any possible concerns as to the protection of parliamentary privilege.

In *Chubb v. Salomons* evidence of proceedings was admitted where the House of Commons consented to it being given. The evidence concerned proceedings in the House involving Members, not witnesses before a committee.⁴¹⁴ However, the damage which would be done to the stature and authority of the House if it were in some way to seek to withdraw protection promised to a witness, 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 had chosen 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 that evidence would be even more remote.

The protection afforded a witness in relation to oral evidence given before a committee also applies to documentary evidence that witness may give.⁴¹⁵ This protection is now conferred explicitly under the Parliamentary Privileges Act.

The protection of parliamentary privilege applies as equally to the evidence of a voluntary witness as it does to the evidence of a witness summonsed by the committee. It is immaterial whether the evidence is given on oath or not.⁴¹⁶

The absolute privilege derived from the Bill of Rights and enhanced by the *Parliamentary Privileges Act 1987* 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, while a statement made by a witness in the course of committee proceedings is absolutely privileged, the same statement repeated by that witness elsewhere is not. Similarly, the separate publication of a document presented to a committee is not absolutely privileged unless publication has been authorised by the House or the committee.

Protection from improper interference, arrest, molestation, etc.

Witnesses are protected from arrest (other than on criminal charges), molestation, tampering or other acts aimed at deterring them from giving evidence before a committee or punishing or penalising them for having given such evidence under the traditional power of the House to punish contempts. (These matters are described in detail in the Chapter on 'Parliamentary Privilege'.) Witnesses are also protected by sections 12 and 14 of the *Parliamentary Privileges Act 1987*.

Section 12 of the Act provides for substantial penalties to be imposed against persons or corporations who by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence a person in respect of evidence given or to be given before a committee or who induce another person to refrain from giving evidence. The section creates a further statutory offence in respect of

413 *May*, p. 92. *Parliamentary Privileges Act 1987*, s. 16(2). The enactment of the *Parliamentary Privileges Act* followed, and sought to reverse, judicial decisions which had allowed witnesses before Senate committees to be examined in court as to their committee evidence.

414 *Chubb v. Salomons* (1852) 3 Car. and K. 75; see also PP 168 (1972) 25, 29.

415 PP 168 (1972) 31.

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

persons who inflict any penalty or injury upon, or who deprive of any benefit, a person on account of the giving or proposed giving of any evidence, or any evidence given or to be given, before a committee. The submission of a written statement is, if so ordered by a committee, deemed to be the giving of evidence, and thus the protection of section 12 can be gained.

Penalties available are \$5 000 or imprisonment for 6 months in the case of a natural person and \$25 000 in the case of a corporation. The section does not prevent the imposition of a penalty in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee. Technically there is nothing to prevent action being taken against a person by the House on the grounds of contempt and a prosecution also being initiated under section 12, although this is unlikely in practice.

Under section 14 of the *Parliamentary Privileges Act 1987*, a person who is required to attend before a House or a committee on a particular day may not be required to attend before a court or a tribunal, or arrested or detained in a civil cause, on that day.

House of Commons committees have occasionally taken evidence from witnesses whose names are not divulged where it is thought that 'private injury or vengeance might result from publication'.⁴¹⁷

If a committee becomes aware of allegations that an offence or contempt may have been committed against a witness or a prospective witness, it should take all reasonable steps to ascertain the facts of the matter. This could include publishing details of the allegation to the person alleged to have offended, so that that person is able to respond.⁴¹⁸

In 1980 the Committee of Privileges examined and reported on the alleged discrimination and intimidation of D. E. Berthelsen in his public service employment because of evidence given by him to a subcommittee of the Joint Committee on Foreign Affairs and Defence. While not satisfied that a breach was proven against any person, the committee found that Mr Berthelsen had been disadvantaged in his public service career because of his involvement with the subcommittee inquiry.⁴¹⁹ The report also 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.⁴²⁰ The House endorsed the committee's specific recommendation regarding Berthelsen (*see* Chapter on 'Parliamentary privilege'). While a Witnesses Protection Act was not introduced at that time, the *Parliamentary Privileges Act 1987* contained some provisions relevant to these ends (*see above*).

Among earlier instances in this area was one in 1975, when 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. 675). Later that year a person who had appeared as a witness before the Standing Committee on Aboriginal Affairs subsequently informed the committee that he had been subjected to threats and abusive telephone calls following his appearance. The case was brought to

417 *May*, p. 683.

418 E.g. Standing Committee on Transport, Communications and Infrastructure, minutes 31.5.95.

419 'Alleged discrimination and intimidation of Mr David E. Berthelsen in his public service employment because of evidence given by him to a Subcommittee of the Joint Committee on Foreign Affairs and Defence', *Report of Committee of Privileges*, PP 158 (1980) 3 and *see* Ch. on 'Parliamentary privilege'.

420 PP 158 (1980) 11–12 and *see Parliamentary Privileges Act 1987* s. 12.

the attention of the Speaker who sought police assistance. The harassment of the witness ceased and no further action was necessary.

In 1991 the Committee of Privileges reported on a claim that a witness before the Standing Committee on Legal and Constitutional Affairs had been intimidated. In this case complaints about certain aspects of the affairs of a company were made on behalf of a shareholder to the standing committee and to other authorities. It was claimed that letters from company officers following these complaints amounted to intimidatory threats to the person who had made the submission. The Committee of Privileges reported that although the person had felt intimidated, and that although this feeling was genuinely held, this was not evidence that intimidation or improper interference was intended or attempted. It found that on the evidence available no contempt had been committed.⁴²¹ In 1994 another complaint, alleging discrimination by government officials against a witness before the Standing Committee on Industry Science and Technology, was referred to the Committee of Privileges; however the complaint was not sustained.⁴²²

In its 1989 report *Committee Procedures for Dealing with Witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following provision:

Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which has been or may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given or in respect of prospective evidence, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the House.⁴²³

Other proposals for protection of witnesses or other persons

In addition to the recommendations on particular issues quoted in this chapter, the Procedure Committee recommended in 1989 that the following provisions be adopted for the assistance or protection of witnesses or other persons:

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

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

Where evidence is given which reflects upon a person, the committee may provide a reasonable opportunity for the person reflected upon to have access to that evidence and to respond to that evidence by written submission or appearance before the committee.⁴²⁴

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

Payment to witnesses

At the discretion of the committee, payments may be made to witnesses.⁴²⁵ Payments would normally cover only witnesses' travel and accommodation costs regarded as reasonable. Because of the extent to which committees travel and take evidence throughout Australia, payments to witnesses for travel expenses are rarely necessary.

421 PP 455 (1991) paras 16–18.

422 PP 136 (1994) 10.

423 PP 100 (1989) 9. The recommendation had not been implemented formally at the time of publication.

424 PP 100 (1989) 9.

425 S.O. 349.

Evidence as to proceedings, etc,

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.⁴²⁶ In 1974 an inquiry was conducted by the Australian Broadcasting Control Board into allegations that certain television stations had suppressed television news coverage of a report tabled by the Joint Committee on Prices.⁴²⁷ 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 that the officer could not give evidence in respect of any proceedings before the committee without the leave of the House, and that this restriction was imposed by the standing orders of both Houses.⁴²⁸ 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.⁴²⁹ 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.

Subsection 16(6) of the *Parliamentary Privileges Act 1987* provides that neither the section nor the Bill of Rights prevents or restricts the admission in evidence and examination of proceedings in connection with the prosecution for an offence against an Act establishing a committee. Section 17 of the Act provides, inter alia, that a certificate signed by or on behalf of the Speaker or President, or a committee chair, in relation to committee records, evidence, etc. is evidence of the matters contained in the certificate. (*And see* Chapter on 'Parliamentary Privilege'.)

Publication of evidence*Authorisation for publication of evidence*

Standing order 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.

The *Parliamentary Papers Act 1908*, inter alia, makes it lawful for a committee of either or both Houses to authorise the publication of any document laid before it or of any evidence given before it. It also grants protection from civil or criminal proceedings to any person publishing any document or evidence published under an authority given pursuant to the provisions of the Act. Section 16 of the *Parliamentary Privileges Act 1987* provides that the term 'proceedings in Parliament' includes 'the formulation, making or publication of a document including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published'. This means that absolute privilege attaches to such actions and documents and, by virtue of section 3

426 S.O. 368. See Ch. on 'Papers and documents'.

427 PP 326 (1974); VP 1974-75/177.

428 S.O. 368; Senate S.O. 183.

429 S.O. 320.

of the Act, the reference to a committee includes a subcommittee. A practical difference between the two statutory provisions is that motions to authorise publication under the Parliamentary Papers Act can only be moved in respect to evidence which has been given or papers which have been laid before a committee (or a House). This limitation does not apply in respect of action under section 16 of the Parliamentary Privileges Act.

Standing orders 28B and 28C provide that the general purpose standing committees, and the Procedure Committee, and their subcommittees, have power to authorise publication of any evidence given before them and any document presented to them.

A committee may limit the publication of confidential documents or evidence to particular individuals. This approach may be adopted, for example, to enable individuals to respond to allegations made against them in a submission or at an *in camera* hearing by another witness.⁴³⁰ In other cases committees have authorised the publication of submissions or other documents with certain information deleted (for example to allow views or facts to be disclosed while still protecting the privacy of persons).⁴³¹

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'.⁴³² No further action was taken by the committee.

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

(*And see* Chapter on 'Parliament and the citizen'.)

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 chair 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 chair or any member of the committee; and shall always withdraw when the committee is deliberating.

Thus, any one member of the committee may require that evidence be heard *in camera*. (However, one member alone cannot prevent the publication of the evidence so heard; the decision to publish the evidence is made by resolution—that is, with the support of a majority of the committee members present.)

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

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

432 *Canberra Times*, 16 September 1972.

Witnesses may request an *in camera* hearing but a committee will agree only for compelling reasons. Evidence which committees would normally take *in camera* and not publish because of possibly adverse effects on a witness includes: evidence which might incriminate the witness, industrial secrets, classified material, medical records and evidence which may bring advantage to a witness's prospective adversary in litigation. In the last case the witness could be disadvantaged by having the details of a case made known to an adversary or by informing the adversary of the existence of certain evidence beneficial to the witness's case and even how the evidence might be obtained. Other reasons for *in camera* hearings could include evidence likely to involve serious allegations against third parties, a matter which is *sub judice* (*see* p. 658) or a matter on which a Minister may otherwise claim public interest immunity (*see* p. 646). 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 granted permission to give their evidence *in camera* should be warned that it is within the committee's (or the House's) discretion to publish the evidence subsequently, if it thinks fit. For obvious reasons a committee should authorise publication of *in camera* evidence only when there is a real and justifiable need or when subsequent events have removed the need for confidentiality, or when the evidence given does not warrant the confidential treatment which it was originally thought might be necessary. For example, having heard the evidence the committee might form the opinion that the arguments in favour of publication in the public interest carry more weight than the grounds of confidentiality claimed, or that a claim that the evidence is *sub judice* (*see* p. 658) cannot be sustained. Committees, while not authorising publication of evidence generally, may need to authorise publication of the evidence to a person named in it in order to enable such a person to be aware of statements made and thus enabled to put his or her view to the committee.

The Standing Committee on Expenditure used to hold *in camera* hearings towards the end of its inquiries to hear evidence from relevant government departments in order to test its preliminary conclusions.⁴³³ The hearings were held *in camera* to avoid speculation about the committee's recommendations. Departments were informed that the evidence would be published when the committee's report had been tabled.

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

433 PP 244 (1977) 18-19.

- there was a strong presumption that evidence taken in camera, or documents treated as confidential by parliamentary committees should not be released; and
- this presumption was related to the effectiveness in the working of parliamentary committees.⁴³⁴

If a committee does want to publish in camera evidence, it should inform the witness and consider any objections raised. Resolutions passed by the Senate and which were put before the House in 1987 would make this mandatory.

In its 1989 report *Committee Procedures for Dealing with Witnesses* the Standing Committee on Procedure proposed the adoption by the House of the following provisions to be observed by committees of the House:

A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in camera, and shall be invited to give reasons for any such application. The witness may give reasons in camera. If the application is not granted, the witness shall be notified of reasons for that decision.

Before giving any evidence in camera a witness shall be informed whether it is the intention of the committee to publish or present to the House all or part of that evidence, that it is within the power of the committee to do so, and that the House has the authority to order the production and publication of undisclosed evidence. Should the committee decide to publish or present to the House all or part of the evidence taken in camera, the witness shall be advised in advance. A member, in a protest or dissent added to a report, shall not disclose evidence taken in camera unless so authorised by the committee.⁴³⁵

The final authority in the publication of in camera evidence rests with the House itself. *May* states:

Occasionally the House orders unreported evidence to be laid before it. When the evidence is presented in pursuance of such an order, it is usually ordered to be printed.⁴³⁶

Although it is highly improbable that the House would insist on the publication of evidence received in camera, a committee cannot give a witness an absolute guarantee that the witness's evidence will not be published.

Confidential documents

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

A request by a witness that evidence given remain confidential is often granted but on occasions a committee may consider that the public interest outweighs the private interest of the witness and choose not to accede to the request. In 1975 the Select Committee on Road Safety refused to accept documentary evidence from a witness on a confidential basis, insisting that it was in the public interest that the evidence be published. After protracted negotiations the evidence was provided and was published in the committee's report (*see p. 646* for details).

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

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

435 PP 100 (1989) 8. The recommendation had not been implemented formally at the time of publication.

436 *May*, p. 636.

In 1987, in order to produce documents in court, the Aboriginal Legal Service petitioned the House to obtain access to the evidence presented in an earlier Aboriginal Affairs Committee inquiry. The House resolved that the evidence authorised for publication could be accessed by the Aboriginal Legal Service and used in court (subject to the usual conditions) and that the committee should advise the House on the release of confidential materials provided to the committee during the course of that inquiry. That aspect was referred to the committee and it recommended that the House grant leave to the petitioners or their legal representatives to issue and serve subpoenas for the production to a court of documents tendered by a witness and the Aboriginal Legal Service Ltd during the course of the inquiry. The House took the committee's advice and these documents were passed on to the Supreme Court of New South Wales for use during the hearing as detailed in the petition.⁴³⁷

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.⁴³⁸ 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.⁴³⁹

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

Unauthorised disclosure or publication of evidence

Subject to section 4 of the *Parliamentary Privileges Act 1987*, it may be regarded as a contempt for any person, including the originator, to publish or disclose oral or documentary evidence received by a committee before the evidence has been reported to the House or its publication has been authorised by the committee or the House.⁴⁴⁰ The restriction on publication of a document, including a submission, applies once the document comes into the committee's possession, that is, when it is received by the committee, or by the secretary of the committee. In addition, section 13 of the

437 'Certain Documents Tendered to the Committee During the Baryulgil Community Inquiry', *House of Representatives Standing Committee on Aboriginal Affairs*, PP 355 (1986) 13; and see Ch. on 'Parliamentary privilege'.

438 VP 1951-53/129.

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

440 And see *May*, p. 636.

Parliamentary Privileges Act 1987 enables substantial penalties to be imposed for the publication or disclosure of documents directed by a committee to be treated as evidence taken in camera or oral evidence taken in camera or a report of such oral evidence.

Committees exercise discretion in dealing with breaches of these provisions. Indeed, it has been rare for cases of unauthorised publication of evidence to be reported to the House.⁴⁴¹ However, committees have at times deemed it necessary to stress to those concerned the seriousness of their action. A complaint may be made if the disclosure is seen as particularly damaging or as indicating possible impropriety of some kind.

An instance of the discretion used by committees arose in 1975. A subcommittee of the Standing Committee on Environment and Conservation acceded to a request by two witnesses that their evidence be taken in camera because of their fears of physical harm from persons whom they wished to name in their evidence. One of the witnesses subsequently disclosed the transcript of evidence to a journalist who published parts of it. The other witness, who had not been consulted on disclosure of the evidence, informed the committee that publication of the evidence may have placed him in jeopardy. The Speaker was informed of the circumstances and advice was sought. The Australian Federal Police were asked to investigate the possible need for the witnesses to be given protection, but this was found to be unnecessary. The Speaker advised against the incident being raised as a matter of privilege because of concern that further publicity might lead to a greater risk of harm to the witnesses. The Speaker wrote to the witness who had disclosed the evidence and to the editor of the newspaper which had published it. The Speaker stressed the seriousness of the disclosure, indicated that under normal circumstances the incident may have been raised as a matter of privilege, and stated why no further action had been taken.

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

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

Expunging of material from evidence etc.

Part or all of the evidence given by a witness, or questions or statements by committee members, has been expunged from the transcript of evidence and an order

⁴⁴¹ The few cases that have been reported on by the Committee of Privileges are noted in the Chapter on 'Parliamentary privilege'.

made that any such material expunged be disregarded by the press. Advice on this matter to the Joint Committee on Pecuniary Interests of Members of Parliament relied on the provisions of the standing orders of each House, subsection 2(2) of the *Parliamentary Papers Act 1908*, *May* and *Odgers*. Instances cited of evidence which might be expunged included unfair allegations, use of improper language and hearsay. The advice noted that in all cases the references were to the authority of the committee and not of the chair and therefore recommended that any direction that material be struck out and be disregarded by the press be by order of the committee.⁴⁴²

In its report on procedures for dealing with witnesses in 1989⁴⁴³, the Procedure Committee recognised the difficulties that could be encountered in respect of orders for material to be expunged if, for example, the act of publication occurred prior to or in ignorance of an order that it be expunged. It considered that it would be better practice for committees to consider the evidence being given and that, where it was felt that the evidence was of such a nature that immediate publication would not be appropriate, a committee should give consideration to taking further evidence in camera.

442 S.O. 340; Senate S.O. 37; *May*, p. 634–5; *Odgers*, 7th edn, p. 439—see also Senate privilege resolution 1 (12).

443 PP 100 (1989).