

5. PRACTICE AND PROCEDURE

The means of appointment of members to committees

5.1. There are varying means through which Members of the House are appointed to serve on committees. For those internal committees for which there is no nomination process stipulated in the standing orders (Privileges, Library, House, Publications and Selection) the practice has been that the House appoints Members by resolution. For some other committees, including the general purpose standing committees, the Committee of Members' Interests and the Standing Committee on Procedure, the standing orders include a nomination process (by Whips etc) and Members are deemed to be officially appointed on receipt by the Speaker of appropriate letters of nomination, with the House being advised by the Speaker subsequently of the nominations. Statutory committee membership is effected by resolution of the House.¹

5.2. As a consequence of these differing means of appointment to committees, there is generally a degree of uncertainty at the start of each Parliament as to when committees are properly constituted and can meet to transact business. Whips' offices of all parties share this uncertainty, which in turn is reflected by Members. Standardisation of the means of appointment would rectify this. The process of appointment on motion capable of amendment would enable independent Members, for example, to appeal to the House for decision.

5.3. There is also some inconsistency in termination of membership provisions, which would be rectified by making all committee membership issues the decision of the House. The submission from the Department of the House of Representatives argues that as committees are creatures of, and subordinate to, the House(s) it is appropriate that their membership be determined by resolution of the House, following nomination to the Speaker.

5.4. The Chair of the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform believes that an alternative practice should be adopted to enable Independents or Members of a minor party to be appointed to a particular committee. For example, Independents or Members of a minor party, on application to, and at the discretion of, the Speaker, could be nominated to a committee with not more than one appointed to each committee and in proportion to their representation in the House of Representatives. This would be an additional member (by number) to the committee and the person would be a full member (for example, be counted for quorum and voting purposes). Nomination by the Speaker would not require the Chief Whips to give up one of their nominations to a committee.²

¹ Department of the House of Representatives, *Submission*.

² Neville, P, Chair, House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform, *Submission*.

5.5. The committee **recommends** that:

- **The standing orders governing the appointment of members to serve on committees be amended to provide for appointment by resolution of the House in all cases. (recommendation 19) (see appendix 4)**

Attendance at meetings

5.6. Some submissions and committee chairs were critical of Members who do not regularly attend meetings. The committee was advised that Members who have not participated in an inquiry to any great extent may influence the contents and recommendations in a report. Recommendations based on complex arguments are sometimes amended in ways that may not be based on sound policy analysis (because members have simply not had time to understand the issues). There is a tendency in such circumstances to be attracted to compromise or weaker proposals.³ In particular shadow ministers were identified as being poor attenders, although it was recognised that their portfolio responsibilities placed considerable demands on their time.

5.7. The LACA Committee considers that the following changes to membership eligibility should be made:

shadow ministers should be discouraged (but not necessarily prohibited) from joining committees,

members should be required to attend private meetings on a regular basis—members who are absent from three private meetings in a row without the leave of the committee, should resign from the committee, and

members should be, ideally, on only one committee.⁴

5.8. The committee agrees in general with the views put to it relating to Members' attendance. It does not, however, support amendments to the standing orders to discourage committee membership of shadow ministers, restrict Members to a specific number of committees or to require the resignation of Members who do not regularly attend meetings. The committee believes that more informal processes would achieve the desired results, for instance, the chair or deputy chair seeking the support of the whips in terms of attendance. The proposed reduction in the number of members on each committee (and the reduction in the number of committees) should help relieve the pressure on the time of members. It believes that Members would have extreme difficulty in effectively serving on more than three committees. The committee considers that this however is a matter for each party to decide.

Joint committees—Procedure and quorums

5.9. Joint standing and select committees are established by resolution agreed to by both Houses. The standing orders are largely silent on the procedures to be followed by joint committees. It has become the established practice for such committees to follow Senate select committee procedures when such procedures differ from those of the House.

³ Round table discussions with committee chairs, 6 April 1998 and House of Representatives Standing Committee on Legal and Constitutional Affairs, *Submission*.

⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Submission*.

5.10. Until 1987 the Senate imposed a general prohibition on committees meeting during its sittings. Senate standing orders now allow joint committees to meet when the Senate is sitting provided certain conditions are met.

5.11. Senate standing order 33 requires both a government and opposition Senator to be present at a time when the Senate is sitting for the meeting to be valid. There are some committees with only one non-government Senator in their membership. When the Senate is not sitting the resolutions of appointment for the joint standing committees require only that one non-government member and one government member be present from either House. The committee was advised that the Senate restrictions make it extremely difficult for joint committees to meet when the Senate is sitting.

5.12. As joint committees are creatures of both Houses it is important that the two Houses agree to arrangements for the operation of joint committees which meet the needs of both Houses and the committees themselves.

5.13. The committee **recommends** that:

- **The Speaker and the President of the Senate confer on the development of suitable joint standing orders concerning the operation of joint committees which should then be agreed to by both Houses. (recommendation 20)**

Inquiry processes

5.14. The standing orders outline the formal processes to be followed by House committees when conducting formal public and private meetings. Increasingly, committees have adopted less formal and more flexible approaches to the gathering of information and providing public input to committee activities. These approaches were developing well before the establishment of the current committee system. These processes can take the form of informal discussions, public meetings, seminars or workshops. 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.⁵

5.15. As these discussions are not conducted under the formal requirements for gathering evidence and hearing witnesses they are much more informal and allow for a much freer interchange of views than is often possible in a public hearing context.

5.16. The Chair of the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform considers that there is need for clarification of privilege in a changing environment with new technological transfer of documents/evidence and for some of the recent less traditional committee activities. He suggests that the Procedure Committee recommend procedures or draft

⁵ Barlin, L M, (Ed) *House of Representatives Practice*, 3rd edn, AGPS 1997.

guidelines of best practices to be adopted for conducting seminars, video conferences, and public round table discussions.⁶

5.17. *House of Representatives Practice* states that these informal processes are not regarded as a substitute for the normal hearing process. Depending on the circumstances, such informal proceedings may not be found to enjoy parliamentary privilege. *House of Representatives Practice* argues that the information obtained in this manner does not have either the forensic value or 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.

5.18. The committee believes that the practical use of such information is somewhat wider and more significant than indicated in *House of Representatives Practice*. Committees such as the Aboriginal and Torres Strait Islander Affairs Committee and the Employment, Education and Training Committee, to name just two committees, extensively use informal processes to obtain information which often provides the most important information upon which these committees base their conclusions and recommendations. In these instances they do represent a substitute for the normal hearing processes. One committee chair advised the committee for example, that a one day seminar in which he was involved:

...has been probably one of the most productive things that any committee I have been on has done.⁷

5.19. The committee acknowledges that there has been some doubt in the past as to whether these informal proceedings attract parliamentary privilege. The experience of a decade of operations of the House general purpose standing committees indicates that to a large extent the question of privilege does not arise. However, the Parliamentary Privileges Act provides that:

...“proceedings in Parliament” means all words spoken and acts done in the course of, or for the purposes of **or incidental to**, the transacting of the business of the House or of a committee ...(emphasis added).⁸

5.20. The committee believes that, with the recognition of informal committee proceedings in the standing orders of the House, it would be difficult to argue that parliamentary privilege did not apply to any proceedings properly conducted by a parliamentary committee.

5.21. It could also be said that information received in less formal ways may not be as rigorously tested as in the formal hearing process. It may be more open to criticism or challenge especially if it concerns the conduct of persons or other sensitive matters. For this reason some care should be taken by committees in using information given in an informal process.

5.22. The committee considers that committees should freely be able to use in reports material gathered by informal processes, provided that the type of process used is acknowledged and the person providing the information is aware that it may be used in this way. The committee also believes that the standing orders should be

⁶ Neville, P, Chair, House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform, *Submission*.

⁷ Round table discussions with committee chairs, 6 April 1998.

⁸ *Parliamentary Privileges Act 1987*, s.16.

amended to recognise the less formal procedures, which have become an accepted part of modern committees' operations.

5.23. The committee **recommends** that:

- **The standing orders be amended to recognise as appropriate inquiry procedure, the less formal processes used by committees in the gathering of information. (recommendation 21) (see appendix 4)**

Use of technology

5.24. 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.⁹

5.25. On 27 August 1997 the House, by resolution, authorised the use of electronic communication devices by committees. The resolution requires a quorum to be present in one location, and requires regard to be 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.

5.26. The committee received one private submission on this matter. It urges the committee to recommend as standard practice the use of videoconferencing to permit Australians living in regional areas to give evidence.¹⁰

5.27. Documentary evidence can be received by electronic means, ie electronic mail, facsimile, telex, computer disc, and video. Advice received by a previous Procedure Committee indicates that evidence received this way can be authorised for publication.¹¹ In its proposed standing orders (see appendix 4), the committee has used the term 'document' in several instances. It proposes that, in the context of the standing orders, this term have the same meaning it is given in s.25 of the Acts Interpretation Act viz.:

Document includes:

- (a) any paper or other material on which there is writing;
- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device.¹²

5.28. Participants in the round table discussions strongly supported the formal recognition of the use of modern technology as part of the inquiry process. The committee agrees.

⁹ House of Representatives Standing Committee on Procedure, *Application of Modern Technology to Committee Proceedings*, November 1994.

¹⁰ Quiggan, J, *Submission*.

¹¹ House of Representatives Standing Committee on Procedure, *Application of Modern Technology to Committee Proceedings*, November 1994.

¹² *Acts Interpretation Act 1901*, s.25

5.29. The committee **recommends** that:

- **The existing procedures relating to the use of electronic communication devices by committees be reviewed by the Standing Committee on Procedure prior to the end of the 39th Parliament with a view to their incorporation in the standing orders. (recommendation 22)**
- **The standing orders be amended to recognise, as evidence, documents received by committees by electronic means. (recommendation 23) (see appendix 4)**

Dealing with witnesses

5.30. From the evidence received by the committee it is clear that guidelines for dealing with witnesses need to be adopted as a matter of some priority, not only to ensure that witnesses are treated in a suitably respectful manner when they appear before a committee, but also to ensure that they are in a position to provide the committee with the required information. Currently (25 May 1998), House committees are undertaking 18 inquiries, most of which will call individuals and organisations as witnesses. Yet the House has no set of clear and common procedures to follow in dealing with witnesses. In the Department of House of Representatives' view, there is a clear need for the House to formally accept, as a set of established guidelines, detailed procedures to be adopted by committees in dealing with witnesses.¹³

5.31. One organisation believes that their appearance before a committee would have been more effective if they had been given prior indication of the areas of Members' interest.¹⁴ One State government complains about the time given to prepare submissions and the short notice given of hearings.¹⁵ The Attorney-General's Department advises that there are situations where there seemed to be an expectation that departmental witnesses would address a policy issue contrary to official guidelines. It is not the department's role to suggest how government policy should be advanced before a committee. The department also considers that some questions directed to witnesses at hearings could be better answered in writing or by other officers if prior notice had been given.¹⁶

5.32. The committee received a number of submissions from Members and the public concerning the manner that witnesses have been or should be dealt with by committees. A number of submissions received from private citizens strongly complain about the treatment of witnesses during a particular inquiry. They were particularly concerned about aggression shown to witnesses expressing views which differed from those of some Members. They also complained about the lack of attention shown by Members at various stages during hearings.

5.33. One submission stated that standing orders should be amended to protect witnesses from "politically motivated aggression".¹⁷ Another considered that

¹³ Department of the House of Representatives, *Submission*.

¹⁴ Australian Road Federation, *Submission*.

¹⁵ Department of the Premier and Cabinet (SA), *Submission*.

¹⁶ Attorney-General's Department, *Submission*.

¹⁷ McClelland, R, *Submission*.

witnesses should be clearly advised of the question and answer process which would be followed, which may be searching, but “there needs to be limits”.¹⁸

5.34. During the round table discussions the committee was told of one committee that:

... has disrupted into absolute chaos from time to time. It does not put a good light on the parliament... we have got down to shouting matches with members of parliament on three occasions in front of 50 or 60 people. It is a disgrace. I think there should be some standing orders...¹⁹

5.35. The Department advises that it recognises the care which committees take to respect the rights and interests of witnesses. It does not argue for any extension of these rights, but it recognises the value, in practical and stylistic terms, of having a concise but comprehensive statement of the procedures to be followed in so far as witnesses are concerned. The procedures laid down in the Procedure Committee’s 1989 report on procedures for dealing with witnesses are used as current reference points and non-binding guidelines by committees of the House.²⁰ However, these procedures have no formal status until adopted by the House in a resolution of continuing effect.

5.36. The committee supports the recommendations of its predecessor. It believes that the recommended procedures cover most of the issues discussed in the previous paragraphs. An additional clause has been added to the committee’s 1989 recommended resolution to require that witnesses be treated with respect and dignity. The terms of the proposed resolution are set out at appendix 2.

5.37. The committee **recommends** that:

- **The House agree to a resolution providing procedures for dealing with witnesses in the terms set out in appendix 2 to this report. (recommendation 24)**

Disclosure of Evidence

5.38. The confidentiality of evidence taken by committees is provided for in standing orders, resolutions of appointment and, for committees established by statute, enabling legislation. Section 13 of the *Parliamentary Privileges Act 1987* makes it an offence for a person to disclose or publish a document or evidence taken *in camera* without the authority of the House or a committee. Thus it is both a contempt of Parliament and a criminal offence to disclose evidence which has not been authorised for publication. However, these provisions have no application to the disclosure of evidence in the course of proceedings of Parliament.²¹

5.39. The Chair of the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform is concerned that it is generally not understood by witnesses that a committee may confer confidentiality on a document or verbal evidence given in an *in camera* hearing and later withdraw that

¹⁸ Smith, A, *Submission*.

¹⁹ Round table discussions with committee chairs, 6 April 1998.

²⁰ House of Representatives Standing Committee on Procedure, *Committee Procedures for Dealing with Witnesses*, April 1989.

²¹ House of Representatives Standing Committee on Procedure, *Disclosure of In camera Evidence*, November 1991.

undertaking without any formal obligation to advise the party who provided the documentation/information of the committee's intention to change the status of the document/evidence. Further, there is no formal mechanism for that party to have a chance to argue a case against a committee's intended action to withdraw confidentiality at a later time.²²

5.40. The Department of the House of Representatives advises that two relevant propositions were advanced by a committee to the House in 1989, namely that:

- there is a strong presumption that evidence taken *in camera*, or documents treated as confidential by parliamentary committees, should not be released; and
- this presumption is directly related to the continued effectiveness of the committee system.²³

5.41. The Procedure Committee reviewed the question of disclosure of *in camera* evidence in 1991 and concluded that a rigorous mechanism should be put in place to ensure that *in camera* evidence could only be disclosed in the most outstanding circumstances. The committee recommended severe penalties for Members who disclosed *in camera* evidence, including exclusion from committees and suspension from the House.²⁴

5.42. In its report on the review of previous reports in 1996, the present committee generally endorsed the findings of the previous committee but indicated that it did not wish to express a view on the issue of penalties for the unauthorised disclosure by a Member of evidence taken *in camera*.²⁵

5.43. The Department of the House of Representatives believes that, with the exception of the penalties, the 1991 Procedure Committee's suggested resolution on the disclosure of *in camera* evidence should be put before the House with a recommendation for adoption.

5.44. The Department however does not support a fixed penalty system for unauthorised disclosure. The Department believes that each case will vary in its background and circumstances and should be considered individually. To that end, the Department sees a valid role for the Privileges Committee to investigate, report and make recommendations to the House, if requested to do so by the House, following a report by a committee of alleged unauthorised disclosure.

5.45. The committee agrees with the recommendations of its 1991 predecessor, with the exception of penalties. The committee considers that the House should decide penalties for unauthorised disclosure on a case by case basis following investigation and recommendation by the Privileges Committee.

²² Neville, P, Chair, House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform, *Submission*.

²³ Department of the House of Representatives, *Submission*.

²⁴ House of Representatives Standing Committee on Procedure, *Disclosure of In camera Evidence*, November 1991.

²⁵ House of Representatives Standing Committee on Procedure, *Review of Reports of previous Procedure Committees which have not Received a Government Response*, November 1996.

5.46. The committee **recommends** that:

- **The House adopt the 1991 recommendations of the Standing Committee on Procedure relating to the disclosure of *in camera* evidence, except for that recommendation relating to penalties. (recommendation 25)**
- **Penalties for unauthorised disclosure be decided by the House on a case by case basis following investigation and report by the Privileges Committee. The terms of the proposed resolution are set out in appendix 3 to this report. (recommendation 26)**

5.47. During the round table discussions a committee chair raised the related matter of the claim of commercial-in-confidence and the provision of such information *in camera*. He asked:

How is a committee, on behalf of the Parliament, in order to get evidence, to require those before it to answer honestly and openly and without resorting constantly to the defence that it is commercial-in-confidence?²⁶

5.48. The use of the claim of commercial-in-confidence is a matter which should concern all Members, particularly as more government services are outsourced. The committee has been advised that the Senate Standing Committee on Finance and Public Administration has just completed an extensive inquiry into the matter and will report in the near future. The committee has decided to defer any decisions relating to commercial-in-confidence until such time as it has had the opportunity to examine the Senate committee's findings.

Structure of the standing orders

5.49. The standing orders, as presently constructed, have application to committees in several distinct and seemingly unrelated chapters. The Department of the House of Representatives submission suggests that greater clarity would prevail if the standing orders relating to committees were consolidated into perhaps two chapters. The first could include structural and organisational aspects such as titles, composition and particular powers or restrictions. The second chapter could cover the powers and procedures of committees of the House generally, whether standing (general purpose or domestic) or select.

5.50. The standing orders also contain provisions that no longer apply and some of the language is dated and unclear.

5.51. The committee notes that a previous Procedure Committee in 1989 recommended substantial changes to the standing orders as they related to committees.²⁷ These recommendations were intended to form part of a review of all the standing orders which was not completed. As a result the recommendations have been largely ignored.

5.52. In previous sections of this report, the committee has made recommendations which, if adopted, will require extensive amendments to the standing orders. In

²⁶ Round table discussions with committee chairs, 6 April 1998.

²⁷ House of Representatives Standing Committee on Procedure, *The Standing Orders Governing the Conduct of Committees of the House*, November 1989.

addition to these changes, the committee considers that there is a clear need for an overall revision and restructure of the standing orders, as they relate to committees, so that they reflect current practice and procedure.

5.53. Appendix 4 contains a table listing proposed new standing orders. The proposed changes—

Implement the recommendations contained in this report;

Restructure the standing orders relating to committees into a more logical format;

Make powers and procedures more consistent across all committees of the House—with a few minor exceptions, all committees, including the domestic committees are given the same powers; and

Update archaic language and remove references to obsolete practices.

The comments column of appendix 4 indicates which recommendations are implemented by the proposed standing orders. It also highlights some proposed amendments additional to those already discussed in the body of the report and which implement the points listed above and some other minor changes. Additional explanation for some of the proposed standing orders is also provided in the appendix.

5.54. The committee **recommends** that:

- **The standing orders be amended as set out in appendix 4 of this report to implement the recommendations and make other related changes. (recommendation 27)**

PETER NUGENT MP

Chair

25 May 1998