

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

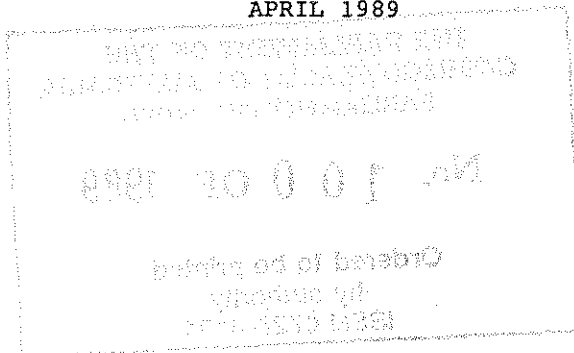
HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON PROCEDURE

35TH PARLIAMENT

FOURTH REPORT

COMMITTEE PROCEDURES FOR
DEALING WITH WITNESSES

APRIL 1989



THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES
DEPARTMENT OF PARLIAMENTARY AFFAIRS

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Terms of reference of the committee

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.

Members of the committee

Chairman:	Mr J G Mountford, MP
Deputy Chairman:	Mr D M Cameron, MP
Members:	Mr E C Cameron, MP
	Mr R F Edwards, MP
	Mr A H Lamb, MP
	Mr E J Lindsay, RFD, MP
	Mr P C Millar, MP
	The Hon. G G D Scholes, MP
Secretary:	Mr M J McRae

COMMITTEE PROCEDURES FOR DEALING WITH WITNESSES

INTRODUCTION

1. In its final report of October 1984 the Joint Select Committee on Parliamentary Privilege, having referred to the growth of the Parliament's committee activity and its concern with the protection of the rights of witnesses, recommended that Parliament enact a Witnesses Protection Act and proposed the adoption of a set of procedures for investigatory committees to observe in their dealings with witnesses.

2. In May 1987, during debate on the Parliamentary Privileges Bill, the Attorney-General tabled in the House of Representatives a series of proposed resolutions in response to the 1984 recommendations of the joint select committee. The proposed resolutions, which dealt with a number of matters ranging from procedures for the protection of witnesses before the Privileges Committee to matters constituting contempts, were tabled to allow comment and discussion on their terms before they were formally brought forward for debate¹. The first of the proposed resolutions, that setting out procedures to be observed by committees for the protection of witnesses, is the subject of this report.

3. The subject of the rights of witnesses and committee procedures for dealing with witnesses has arisen since the joint select committee's original recommendations. In its May 1985 report on the Aboriginal Development Commission the House of Representatives Standing Committee on Expenditure noted that aspects of its inquiry illustrated a weakness in the mechanisms available to investigate serious matters which may be drawn to a committee's attention and noted that, in certain instances, witnesses may be denied natural justice by the Parliament.

1. H.R. Deb. (6.5.87) 2671-79. See also H.R. Deb. (5.5.87) 2629-35.

4. Currently, House committees alone are conducting 24 separate inquiries on a diverse range of subjects, sometimes in controversial areas and there is a need therefore for the House to have a set of clear and common procedures for committees to follow in dealing with witnesses. In February 1988 the Senate adopted procedures to be observed by Senate committees for the protection of witnesses.

CURRENT PROVISIONS

5. The sessional and standing orders of the House contain a number of provisions relating to the appearance of witnesses before general purpose standing and select committees including providing committees with the power to send for persons, papers and records, and setting procedures for the examination of witnesses, payment of certain witnesses and disclosure of evidence. In addition, committees have established procedures which enable due regard to be paid to the rights of witnesses though these arrangements have not been given any official status by the House. This report is concerned particularly with such procedures and the desirability of achieving a high level of commonality and endowing them with the House's approval.

6. There are currently five joint statutory committees, which, to varying degrees, have their own statutory provisions covering the rights of and protection of witnesses. These provisions have effect notwithstanding any resolutions of the Houses or standing orders and are often quite specific and differ from those contained in the proposals circulated. For example, the Australian Security Intelligence Organization Act sets out provisions for the conduct of inquiries and publication of evidence which are very different from normal committee practices.

7. House standing orders and joint standing orders make no specific provision for the treatment of witnesses before joint standing and select committees. It has become the custom for joint standing and select committees to follow Senate select committee procedures. As there are differences between the procedures proposed and those adopted by the Senate, it would be preferable that either a joint resolution was agreed to covering joint committees or joint standing orders were adopted. An alternative approach would be to include in the resolutions appointing joint committees a direction to follow the procedures agreed to by one or other of the Houses. In regard to joint statutory committees it would be preferable if the Houses were to agree to joint standing orders which would have effect insofar as they do not conflict with the particular statutory provisions.

THE INQUIRY

8. The committee had before it three sets of possible procedures:

those recommended by the Joint Select Committee on Parliamentary Privilege in October 1984;

a draft (based largely on the joint select committee's proposals) circulated for comment to House committee chairmen in December 1986 by the Clerk of the House; and

the proposed procedures tabled in the House by the Attorney-General in May 1987.

9. The procedures tabled by the Attorney-General are substantially the same as those adopted by the Senate on 25 February 1988, with certain amendments.

10. At the commencement of the inquiry the Chairman of this committee wrote to the chairmen of all House investigatory committees inviting them to examine the procedures circulated and submit any comments they wished to make on the question of procedures generally and the options proposed. Copies of that letter were forwarded to chairmen of joint investigatory committees (non-statutory) and an invitation extended to submit their views on the matter. The submissions received are listed at the Appendix to this report.

THE PROCEDURES

11. During the course of its deliberations this committee considered the three sets of procedures proposed and those adopted by the Senate. These were compared with the current practices of House committees. Often the differences between the procedures are minor and do not warrant comment, but certain of the topics covered such as the provisions relating to the disclosure of in camera evidence and the expunging of material from committee transcripts are quite sensitive and significant.

12. After deliberating and considering the submissions on the proposals, this committee has proposed procedures which it believes strike a balance between the need to give committees appropriate powers and discretions to conduct their inquiries whilst ensuring the rights of witnesses are protected.

13. The procedures proposed by the committee are set out in paragraph 23. There are certain comments the committee wishes to make relating to the disclosure of in camera evidence and the expunging of material from the transcript of committee evidence and the forbidding of publication of that evidence. These are set out below.

14. The paragraphs relating to the reimbursement of legal costs and reimbursement of expenses in the resolution tabled by the Attorney-General have been omitted from the resolution recommended for adoption by this committee. Provision already exists for application to be made for the reimbursement of certain witness expenses though reimbursement is generally restricted to certain travel and accommodation expenses. In the submissions to the committee doubts were expressed concerning the wisdom of including these provisions. The provisions were omitted from the Senate resolution.

15. The resolution recommended for adoption by this committee contains certain provisions which conflict with standing orders of the House. Paragraph (16) has been added to the resolution recommended to ensure that the provisions of the resolution have effect notwithstanding anything contained in the standing orders.

Disclosure of in camera evidence

16. This matter is dealt with in paragraph (7) of the proposed resolution. Whilst in the vast majority of occasions evidence taken by committees is public evidence there are instances where, for a variety of reasons, evidence is taken in camera, thus prohibiting its disclosure unless or until authorisation has been given.

17. The paragraph stipulates that a committee must inform a witness whether or not it proposes to publish or present to the House all or part of evidence given in camera. The committee notes a recent precedent where evidence taken at a private meeting of a Senate standing committee was disclosed in a dissent to that committee's report.² This committee believes that a committee member should not have the power to disclose in camera

2. Sen. Deb. (10.11.88) 2421, 2423-4, 2431-4.

evidence in a dissent to a report without the authorisation of the full committee and has added a provision to the paragraph to that effect. This is a matter that will be further considered by the committee in its forthcoming review of the standing orders.

18. A provision has also been inserted in the paragraph to ensure that a witness who gave in camera evidence is given notice prior to any release of that evidence should a committee decide to publish or disclose that evidence to the House.

Expunging of evidence from the transcript and forbidding publication of evidence.

19. Both the Joint Select Committee on Parliamentary Privilege and the Attorney-General have proposed that a provision be included to give a committee the option to expunge evidence from the transcript and forbid its publication. In the Clerk's proposal this paragraph was excluded.

20. The Clerk of the House commented on this provision in his December 1986 letter to House committee chairmen, stating:

This is a very important but very difficult area in terms of the definition of 'proceedings in Parliament'. If a journalist attending a public hearing notes that certain words have been used by a witness in giving evidence, and reports them, despite an order of the committee that they be expunged or their publication forbidden, some very delicate and important questions of law could arise. If, for example, the Hansard record shows an order to expunge certain words, there is a record that they have been said and were part of proceedings and presumably absolutely privileged when uttered, and it might be said that the reporting or repetition of them would be covered by qualified privilege. Whilst the practice of ordering deletion and forbidding publication has been used in the past, the issues are such as to cause us to question the desirability of including it in the guidelines.

21. This committee has deliberated on the matter and considered the views advanced in submissions but has concluded that it is preferable not to include the paragraph.

22. In reality, neither a committee nor the House has much control over the situation, especially if the act of publication occurs prior to, or in ignorance of, an order of a committee that the material be expunged. It would be far better in practice for a committee to consider the evidence being given and where it is felt that the evidence is of such a nature that immediate publication would not be appropriate, give consideration to taking further evidence in camera.

23. Recommendation

It is therefore recommended that the following resolution be adopted by the House:

That, in their dealings with witnesses, committees of the House shall observe the following procedures:

(1) 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.

(2) 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.

(3) 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.

- (4) A witness may be given the opportunity to make a submission in writing before appearing to give oral evidence.
- (5) A witness shall be given reasonable access to any documents or records that the witness has produced to a committee.
- (6) 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.
- (7) 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.
- (8) The Chairman 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.
- (9) 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.

- (10) 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.
- (11) 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.
- (12) 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.
- (13) 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.
- (14) 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.
- (15) 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.

(16) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

JOHN MOUNTFORD
Chairman

Parliament House
4 April 1989

APPENDIX

SUBMISSIONS

Submissions were received from the following:

Mr A. Blanchard, MP, Chairman, House of Representatives
Standing Committee on Aboriginal Affairs

Mr John Brumby, MP, Chairman, House of Representatives
Standing Committee on Employment, Education and
Training

Mr S Martin, MP, Chairman, House of Representatives
Standing Committee on Finance and Public
Administration

Mr P Milton, MP, Chairman, House of Representatives
Standing Committee on Environment, Recreation and the
Arts

Mr N O'Keefe, MP, Chairman, House of Representatives
Standing Committee on Community Affairs

In addition, the committee considered the views of the Clerk of the House in his letter to committee chairmen of 23 December 1986 and the views of Mr L B McLeay, MP expressed in a letter circulated to committee members whilst he was a member of the Procedure Committee of the 34th Parliament.

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MEMORANDUM

TO: THE SECRETARY OF THE ARMY

FROM: THE CHIEF OF STAFF

SUBJECT: [Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]