

CHAPTER 19

COMMITTEES

A parliamentary committee is a group of members of Parliament primarily appointed to investigate policy issues, proposed legislation or executive activity on behalf of the House. Committees are an extension of the House, operate under the authority of the House and share the privileges of the House.

The key activity of committees is the conduct of inquiries. The typical inquiry process has several stages, including a call for submissions, public hearings and other types of consultation. A final report is then tabled, made publicly available and debated in the House. Where a report recommends that the government take action, a government response to the recommendations must be tabled within six months. Committee inquiries:

- allow members to examine an issue in more detail than if the matter were considered by the House as a whole;
- provide accountability of the Government and the public service to the Parliament through scrutiny of their activities;
- provide an opportunity for individuals and groups to put their views directly to members through written submissions and oral evidence;
- enable members to obtain expert opinions and advice on complex policy matters.

DEVELOPMENT OF THE COUNCIL COMMITTEE SYSTEM

The history of committees in the British Parliament dates back as far as 1586, and the beginning of the custom to appoint standing committees at the opening of each Parliament to decide disputed elections.¹

The first committee of the Council was appointed on 31 May 1825, shortly after the appointment of the first Council in August 1824. The Minutes of Proceedings record the appointment of a 'sub-committee', comprising three of the five

1 House of Commons Information Office, *A Brief Chronology of the House of Commons*, November 2006.

members of the Council, to investigate 'the subject of the Female Factory at Parramatta'.²

In the following years, committees were also appointed to consider domestic matters, such as the rules and orders of the Council,³ the parliamentary library⁴ and matters of privilege.⁵

However, the majority of early committees appointed by the Council were formed to consider bills. Private members' bills originating in the Council were routinely referred to a select committee for inquiry and report. The reports of these committees, being somewhat more succinct than committee reports of the present day, were recorded in the Minutes of Proceedings.⁶

With the advent of responsible government in 1856, there followed within five years at least 11 select committees of inquiry on issues of general public concern. They included inquiries into the separation of the northern districts,⁷ shipwrecks and shipping disasters,⁸ Australian federation,⁹ the railways¹⁰ and the business of the Supreme Court.¹¹

The establishment of a bicameral legislature in 1856 also introduced the possibility of committees of the Council conferring with committees of the Assembly, and for the appointment of joint committees. The standing orders adopted by the Council in 1856 provided for such collaboration. The library committees of the two Houses first conferred in December 1856 and continued to do so periodically before a joint library committee was later appointed.¹²

However, the vast majority of select committees appointed following the advent of responsible government were constituted to inquire into specific private and public bills. The appointment of such committees was a regular and ongoing feature of the operation of the Council throughout the latter half of the 1800s. Committees were also appointed to draw up the Address-in-Reply to the Governor's Opening Speech to Parliament.¹³

The use of select committees of inquiry continued to be a feature of the operation of the Council during the 20th century, although the formation became more

2 *LC Minutes* (21/6/1825) 16.

3 *LC Minutes* (24/12/1827) 39.

4 *LC Minutes* (18/8/1843) 31.

5 *LC Minutes* (3/7/1844) 61.

6 See, for example, *LC Minutes* (15/3/1830) 75.

7 Select Committee on the Separation of the Northern Districts, *LC Minutes* (19/11/1856) 23.

8 Select Committee on Shipwrecks and Disasters to Shipping, *LC Minutes* (7/1/1857) 42.

9 Select Committee on Australian Federation, *LC Minutes* (20/10/1857) 13.

10 Select Committee on Great Trunk Lines of Railway in New South Wales, *LC Minutes* (20/11/1857) 25.

11 Select Committee on the Business of the Supreme Court, *LC Minutes* (2/12/1857) 31.

12 *LC Minutes* (18/12/1856) 36. The library committee has not been reappointed since 2004.

13 For details of committees established by the Council since 1856 see the Legislative Council *Consolidated Index to the Minutes of Proceedings*.

COMMITTEES

selective over time. Only sessional 'domestic committees' concerned with the standing orders, the parliamentary library, printing and refreshments were routinely in place.

It was not until the 1980s that committees began to develop into one of the Council's key mechanisms for review of executive activity.

In 1985 the House appointed the 'Select Committee on Standing Committees' to investigate and report on a structured system of standing committees for the Council. The committee's report recommended the establishment of four standing committees covering subordinate legislation and deregulation, State development, social issues and country affairs.¹⁴

Following the election of the Greiner Government in 1998, the Council appointed the Standing Committee on State Development and the Standing Committee on Social Issues in June 1988,¹⁵ in accordance with the recommendation of the Select Committee on Standing Committees. The Standing Committee on Law and Justice was not appointed until May 1995, following the election of the Carr Labor Government.¹⁶ The recommendation for the appointment of a standing committee into country affairs has not been adopted to date, and the State Development Committee has responsibility for rural issues.¹⁷

Since their establishment, these policy-oriented standing committees have developed a reputation for conducting detailed inquiries into complex matters of public policy. Many of the standing committee inquiries have relatively long timeframes allowing the committee to conduct an in-depth analysis. Generally the standing committees produce consensus reports and develop bipartisan recommendations for addressing public policy issues. The committees also have a good record of having their recommendations implemented and have developed a reputation amongst stakeholders for the high quality of their reports and the outcomes achieved as a result of their inquiries.

The Council's fourth standing committee, the Privileges Committee, was first appointed as the Standing Committee upon Parliamentary Privilege by resolution of the House in October 1988.¹⁸

In May 1997, the Council also appointed five General Purpose Standing Committees (GPSCs), with each committee allocated responsibility for overseeing specific government portfolios. The GPSCs, modelled on the Senate legislation committees, were appointed on a motion of the Liberal/National opposition with the support

14 Select Committee on Standing Committees of the Legislative Council, *Standing Committees*, November 1986, p ix.

15 *LC Minutes* (9/6/1988) 182-186.

16 *LC Minutes* (24/5/1995) 36-43.

17 The recommendation for a standing committee on subordinate legislation and deregulation was adopted in 1987 with the formation of the Joint Legislation Review Committee under the *Legislation Review Act 1987*.

18 *LC Minutes* (20/10/1988) 190.

of cross-bench members.¹⁹ The Labor Government opposed the appointment of the GPSCs at the commencement of the Parliaments in 1997 and 1999.²⁰ However in 2003, and again in 2007, the Government itself moved the motion to appoint the committees, which the opposition and cross-bench members supported.²¹

The creation of the GPSCs effectively established a second, parallel, standing committee system alongside the Social Issues, State Development and Law and Justice Standing Committees.

A distinguishing feature of the GPSCs is that, in addition to receiving references from the House, they have the power to self-refer matters for inquiry. The GPSCs are also distinctive in not having a government majority of members, thereby reflecting the constitution of the House. As a result, they usually have had a non-government chair.

The GPSCs have traditionally been less likely to reach consensus on both the conduct of an inquiry and in their reports than the policy-oriented standing committees. A number of GPSC reports have included dissenting statements. However, notwithstanding some conflict during certain inquiries, several highly controversial inquiries have been conducted in a cooperative manner.

The scrutiny of the budget estimates in New South Wales by the GPSCs is discussed in Chapter 13 (Financial Legislation).

THE COUNCIL COMMITTEE SYSTEM

Chapter 35 of the standing orders deals with the appointment and operation of the Council Committees. Standing orders 204 to 207 provide for the House to establish sessional committees, a procedure committee, standing committees and select committees.

Sessional committees, sometimes referred to as ‘domestic committees’, are appointed at the commencement of each session of Parliament to consider matters relating to the provision of services to members. In the past, Council sessional committees have included the House Committee, the Library Committee, the Printing Committee and the Standing Orders Committee.

The Procedure Committee, formerly known as the Standing Orders Committee, may consider of its own initiative any amendments to the standing orders, proposals to change the practices and procedures of the House, or any other matter referred to it by the House or the President. The President, Deputy President, Leader of the Government and Leader of the Opposition must be amongst the members of the committee.²²

¹⁹ *LC Debates* (7/5/1997) 674-680.

²⁰ *LC Minutes* (7/5/1997) 674-680, (13/5/1999) 62-65.

²¹ *LC Minutes* (3/7/2003) 222-235, (10/5/2007) 55-57.

²² Before the adoption of current standing orders in 2004 the committee was known as the Standing Orders Committee.

COMMITTEES

Standing committees have power to sit during the life of the Parliament in which they are appointed, except during prorogation. Their functions, sources of references and composition are determined by the House in the resolution appointing the committee.

Select committees are only appointed to consider specific matters referred by the House. They have the power to sit during the life of the Parliament in which they are appointed, but once a select committee has presented its final report to the House it ceases to exist.

Joint committees may also be appointed by resolutions agreed to by both Houses. A proposal for a joint committee may contain the names of the members of the Council appointed to serve on the committee, although recent practice is for the House to allow the Leaders of the Government and the Opposition and the members of the cross-bench to nominate members of the committee. Any proposal to establish a joint committee agreed to by the Council must be forwarded to the Assembly by message. Although standing order 220 provides that at least three members of the Council must be present at any meeting of a joint committee, many resolutions appointing joint committees specify that a quorum is formed by the presence of any three members from either House, provided that at least one member from each House is present.

A member from either House may chair a joint committee, and the standing orders of the House in which the motion for the appointment of the joint committee originated apply to the functioning of the committee, unless otherwise agreed. By convention, joint committees are staffed by officers from the House in which the motion to establish the committee originated.

In addition to committees appointed under the standing orders, committees may also be established by statute. A resolution of the House is required to appoint a statutory committee and its membership, and to provide for any administrative or procedural details not specified in the relevant legislation.

CURRENT COMMITTEES IN THE COUNCIL

The Privileges Committee

The Council first appointed a Privileges Committee, known as the Standing Committee upon Parliamentary Privilege, by resolution of the House on 20 October 1988.²³ At its establishment the role of the Committee was to consider and report on matters relating to parliamentary privilege referred to it by the House or the President.

On 24 May 1995, the Standing Committee upon Parliamentary Privilege was renamed the Standing Committee on Parliamentary Privilege and Ethics and

²³ *LC Minutes* (20/10/1988) 190.

given additional functions in relation to ethical standards for members.²⁴ This followed the insertion of the new Part 7A into the *Independent Commission Against Corruption Act 1988* dealing with corrupt conduct, requiring the ‘designation’ of a committee by the Council to undertake specific functions in relation to the proposed new Code of Conduct. Since acquiring these additional functions, the Committee has published two reports relating to the development of the Code of Conduct,²⁵ and two subsequent reports reviewing the operation of the code.²⁶

On 13 November 1997, following a report by the Standing Orders Committee,²⁷ the Council established by resolution of the House a procedure to permit citizens referred to by members in the House to seek a right of reply.²⁸ The procedure was subsequently incorporated in the standing orders in May 2004 (SOs 202 and 203). This procedure has involved the Privileges Committee in the preparation of a large number of reports since 1997 where citizens have sought a right of reply.

With the adoption of the new standing orders in 2004, the Committee has been renamed the Privileges Committee,²⁹ although it remains the designated ethics committee under the *Independent Commission Against Corruption Act 1988* and retains responsibility both for specific functions in relation to the Code of Conduct for members and a citizen’s right of reply, alongside its responsibility for matters of privilege.

Significant issues of privilege examined by the Privileges Committee since 1988 have included:

- reflections by a member of the House on a committee of the House or the Chair (1989);³⁰
- broadcasting of Council proceedings (1993);³¹
- unauthorised disclosure of *in camera* evidence given before a parliamentary committee (1993);³²

24 *LC Minutes* (24/5/1995) 42-43.

25 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the establishment of a draft code of conduct for members*, Report No 3, October 1996; Standing Committee on Parliamentary Privilege and Ethics, *Second report on Code of Conduct*, Report No 5, June 1998.

26 Standing Committee on Parliamentary Privilege and Ethics, *Report on review of the Members’ Code of Conduct*, Report No 22, December 2002; Privileges Committee, *Review of Members’ Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, Report No 35, October 2006.

27 Standing Orders Committee, *Report on a Citizen’s Right of Reply*, Report No 26, November 1997.

28 *LC Minutes* (13/11/1997) 176-178.

29 *LC Minutes* (1/6/2004) 809-810, (10/5/2007) 53-54.

30 Standing Committee upon Parliamentary Privilege, *Documents issued by the Reverend the Honourable FJ Nile MLC*, December 1989.

31 Standing Committee upon Parliamentary Privilege, *The broadcasting of sound recordings of excerpts of proceedings of the Legislative Council*, September 1993.

32 Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993.

COMMITTEES

- sanctions where a minister fails to table documents (1996);³³
- attendance of witnesses before parliamentary committees (1996);³⁴
- failure of a witness to provide direct answers to questions by a Council estimates committee (1997);³⁵
- conduct of a member in making certain allegations in a speech to the House (1998);³⁶
- alleged attempts to interfere with a witness before a committee of the House (1998);³⁷
- allegations made by two members during debate in the House concerning a non-member (1999);³⁸
- unauthorised disclosure of committee proceedings and possible intimidation of witnesses (2001 and 2002);³⁹
- the operation of the Pecuniary Interests Register (2002);⁴⁰
- the execution of a search warrant and the seizure of documents by the Independent Commission Against Corruption (2003, 2004 and 2006).⁴¹

Standing committees

The Council appointed the Standing Committee on State Development and the Standing Committee on Social Issues in 1988, and the Standing Committee on Law and Justice in 1995. Each committee:

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- 33 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into sanctions where a Minister fails to table documents*, Report No 1, May 1996.
- 34 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the attendance of witnesses before parliamentary committees*, Report No 2, May 1996.
- 35 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry arising from Special Report of Estimates Committee No 1*, Report No 4, May 1997.
- 36 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the conduct of the Honourable Franca Arena*, Report No 6, June 1998.
- 37 Standing Committee on Parliamentary Privilege and Ethics, *Report on special report from General Purpose Standing Committee No 2 concerning a possible contempt*, Report No 9, November 1998.
- 38 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into statements by Mr Gallacher and Mr Hannaford*, Report No 11, November 1999.
- 39 Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before GPSC 3 and unauthorised disclosure of committee evidence*, Report No 13, November 2001; Standing Committee on Parliamentary Privilege and Ethics, *Report on guidelines concerning unauthorised disclosure of committee proceedings*, Report No 23, December 2002.
- 40 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the Pecuniary Interests Register*, Report No 20, October 2002; Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the Pecuniary Interests Register, supplementary returns*, Report No 21, December 2002.
- 41 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, December 2003; Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004; *Protocol for execution of search warrants on members' offices*, Report No 33, February 2006.

- is to inquire into and report on any proposal, matter or thing relevant to the functions of the committee which is referred to the committee by resolution of the House;
- may inquire into and report on any proposal, matter or thing relevant to the functions of the committee which is referred by a Minister of the Crown;
- may inquire into and report on any annual report or petition relevant to the functions of the committee which has been laid upon the table of the Council.⁴²

These committees were most recently reappointed by resolution of the House on 10 May 2007.⁴³

The five General Purpose Standing Committees were first appointed in May 1997 according to government ministers' portfolio responsibilities, to inquire into and report on:

- any matters referred to them by the House;
- the expenditure, performance or effectiveness of any department of government, statutory body or corporation;
- any matter in any annual report of a department of government, statutory body or corporation.⁴⁴

Since 1997, the budget and related papers have been referred to the GPSCs for inquiry and report under paragraph 2(1) of the resolution appointing the committees. This usually occurs each year shortly after the Treasurer's budget speech and the tabling of the budget papers in the House.⁴⁵

These committees were reappointed by resolution of the House on 10 May 2007.⁴⁶

Select committees

Recent select committees appointed by the Council have included the Select Committee on Juvenile Offenders in December 2004,⁴⁷ the Select Committee on the Proposed Sale of Snowy Hydro in May 2006,⁴⁸ the Select Committee on the Continued Public Ownership of Snowy Hydro Limited in June 2006,⁴⁹ and the Select Committee on Electoral and Political Party Funding in June 2007.⁵⁰

⁴² *LC Minutes* (10/5/2007) 57-59.

⁴³ *LC Minutes* (10/5/2007) 57-59, (28/6/2007) 210-215.

⁴⁴ *LC Minutes* (10/5/2007) 55-57.

⁴⁵ See, for example, *LC Minutes* (28/6/2007) 210-215.

⁴⁶ *LC Minutes* (10/5/2007) 55-57.

⁴⁷ *LC Minutes* (9/12/2004) 1204-1209. The Select Committee on Juvenile Offenders was appointed to inquire into and report on the provisions of the Juvenile Offenders Legislation Amendment Bill 2004.

⁴⁸ *LC Minutes* (3/5/2006) 1987-1990.

⁴⁹ *LC Minutes* (7/6/2006) 99-100, 103.

⁵⁰ *LC Minutes* (27/6/2007) 180-181.

Statutory committees

Various Acts provide for the appointment of joint statutory committees. These include: the Committee on Children and Young People, the Committee on the Health Care Complaints Commission, the Committee on the Independent Commission Against Corruption, the Legislation Review Committee, the Committee on the Office of the Ombudsman and Police Integrity Commission, and the Committee on the Office of the Valuer General.⁵¹ Members of the Council are appointed to these committees by resolution of the House.⁵²

Although not a statutory committee, the Privileges Committee has a statutory role to carry out certain functions relating to ethical standards for members of the Council under section 72C of the *Independent Commission Against Corruption Act 1988*. Similarly, the Law and Justice Committee is the designated committee under the *Motor Accidents Compensation Act 1999* to monitor and report to the House on the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council under the Act. It is also the designated committee to supervise the exercise of the functions of the Lifetime Care and Support Authority of New South Wales and the Lifetime Care and Support Advisory Council of New South Wales under the *Motor Accidents (Lifetime Care and Support) Act 2006*.

Joint committees

In addition to joint statutory committees, the Houses may appoint by resolution non-statutory joint committees. Recently, these have included: the Joint Standing Committee on Road Safety (Staysafe), first appointed in March 1982 and appointed each Parliament since;⁵³ the Joint Standing Committee on Electoral Matters appointed in June 2004 and re-appointed in June 2007;⁵⁴ the Joint Select Committee on the Cross City Tunnel, appointed in November 2005;⁵⁵ the Joint Select Committee on Tobacco Smoking, appointed in February 2006;⁵⁶ and the Joint Select Committee on the Royal North Shore Hospital, appointed in October 2007.⁵⁷

51 See the *Commission for Children and Young People Act 1998*, Part 6; the *Health Care Complaints Act 1993*, Part 4; the *Independent Commission Against Corruption Act 1988*, Part 7; the *Legislation Review Act 1987*; the *Ombudsman Act 1974*, Part 4A; the *Police Integrity Commission Act 1996*, Part 7; and the *Valuation of Land Act 1916*, Part 8. Part 2 of the *Public Works Act 1912* also provides for a joint statutory committee to be called the Parliamentary Standing Committee on Public Works. This Committee has not been active since the first session of the 29th Parliament commencing on 25 November 1930. The joint Committee is not to be confused with the modern Assembly Standing Committee on Public Works established under a resolution of the Assembly.

52 See, for example, *LC Minutes* (20/5/2003) 89-91, (26/6/2007) 172-174, (27/6/2007) 184.

53 See, for example, *LC Minutes* (30/3/1982) 307-308, (21/6/2007) 157-158.

54 *LC Minutes* (29/6/2004) 930-932, (27/6/2007) 173-174.

55 *LC Minutes* (15/11/2005) 1722-1729.

56 *LC Minutes* (28/2/2006) 1847-1850. The Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2005 introduced in the Council by the Revd the Hon Fred Nile was referred to the committee.

57 *LC Minutes* (16/10/2007) 263-267.

Either House can initiate the motion appointing a joint committee. The Joint Select Committees on the Cross City Tunnel, on Tobacco Smoking and on the Royal North Shore Hospital were all initiated on motions originating in the Council. These committees ceased to exist once they reported. By contrast, the Joint Standing Committees on Road Safety and on Electoral Matters continue to exist during the life of the Parliament.

On occasions, joint committees have been appointed to inquire into and report on bills.⁵⁸

POWERS OF COMMITTEES

The investigative power of Parliament is an essential and intrinsic aspect of its operation, although for the most part the Council itself does not conduct its own inquiries, but delegates this function, along with the necessary powers, to committees appointed by the House.

Committees are a creature of the House and act on behalf of the House with the powers conferred by the standing orders, the resolution of appointment or relevant statutes, such as the *Parliamentary Evidence Act 1901*.

The primary source of a committee's powers is the standing orders. Standing orders 208 to 234 regulate the operations of committees generally. In particular, standing order 208 provides that a committee has power:

- to adjourn from time to time;
- to adjourn from place to place;
- to send for and examine persons, papers, records and things;
- to make visits of inspection within New South Wales and, if authorised by the House, with the approval of the President, elsewhere in Australia and outside Australia; and
- to request the attendance of and examine members of the House.⁵⁹

Other standing orders that apply to committees include the rules of debate (SO 91), rules regarding questions from the chair (SOs 102 to 108), rules relating to amendments (SOs 109 to 111) and voting and divisions (SOs 112 to 119).

The resolutions of the House appointing each committee or type of committee (such as the three policy-oriented standing committees and the GPSCs) stipulate their powers and functions as well as their membership. These resolutions are

58 See the Joint Committee upon the Meat Industry Encouragement Bill, *LC Minutes* (18/12/1923) 130; and the Joint Standing Committee known as 'The Parliamentary Management Board' which was required to consider, amongst other things, the Parliamentary Appropriation Bills, *LC Minutes*, (2/12/1994) 467-470.

59 Before the adoption of the current standing orders in 2004, some of these matters were contained in the resolutions establishing the committees.

COMMITTEES

generally passed at the beginning of each Parliament and may override the standing orders.⁶⁰

Other sources of committee powers include sessional orders and precedents and practices of the Council. The provisions of certain statutes are also relevant to committee powers and procedures including:

- the *Parliamentary Evidence Act 1901*;
- the *Constitution Act 1902*;
- the *Defamation Act 2005*;
- the *Parliamentary Papers (Supplementary Provisions) Act 1975*;
- legislation establishing the statutory committees;⁶¹
- enabling acts empowering committees to continue to sit during prorogation.

The key powers of committees are the power to send for and examine witnesses, the power to compel witnesses to answer any 'lawful question' and the power to order the production of documents.

Power to send for and examine witnesses

Committees have extensive powers to compel the attendance of witnesses, as discussed in the previous chapter. The *Parliamentary Evidence Act 1901* provides that any person not being a member of the Council or Assembly may be summoned to attend and give evidence before the Council, Assembly or a committee. The Act further provides for the apprehension and custody of a witness who fails to appear or who refuses to answer a 'lawful question'.

Witnesses are normally invited to appear before committees. It is only on rare occasions, where a witness has declined an invitation to attend, that they are summoned.

The giving of evidence by a witness to a committee is protected by absolute privilege. As such, a witness's evidence cannot be impeached or questioned in any legal proceedings outside of Parliament.

Power to compel witnesses to answer any 'lawful question'

Committees have extensive powers to compel an answer to a 'lawful question'. Generally, a question of fact, as opposed to an opinion, relevant to the committee's

60 The resolutions appointing the various standing committees, the GPSCs, the Privileges Committee and select committees differ in their terms.

61 See the *Commission for Children and Young People Act 1998*, the *Health Care Complaints Act 1993*, the *Independent Commission Against Corruption Act 1988*, the *Ombudsman Act 1974*, the *Police Integrity Commission Act 1996*, the *Regulation Review Act 1987*, the *Legislation Review Amendment Act 2002* and the *Valuation of Land Act 1916*.

terms of reference would be considered a ‘lawful question’. The issue of ‘lawful questions’ is discussed in detail in the previous chapter.

Refusal to answer a ‘lawful question’ is deemed a contempt of Parliament, with the penalty of gaol for one month if the Council so decides. This sanction only applies where the witness had taken an oath or affirmation. It does not attach to the issuing of a summons.

Power to order the production of documents

It is now well established that the House possesses an implied or inherent common law power to order the production of State papers from the executive government, based on the common law principle of reasonable necessity. The existence of this power was affirmed by the High Court in *Egan v Willis*.⁶²

The position of the Council is that committees also have the power to order the production of State papers, if such a procedure is necessary or desirable in the context of a particular inquiry.

In support of this position, between 1999 and 2001 following the decision in *Egan v Willis*, there was a growing body of precedents of documents being provided to committees following a formal order by a committee.⁶³

It is also relevant to note the recent decision of the Canadian Supreme Court in *Attorney-General (Canada) v MacPhee*, cited in the previous chapter in relation to the power of committees to summon public servants of other jurisdictions. However, the case also examined the power of committees of the Legislative Assembly of the province of Prince Edward Island in Canada to order the production of documents. In the summary of the decision, Cheverie J observed:

It is my conclusion the Legislative Assembly of Prince Edward Island has the power to summon witnesses and order them to produce documents. This power is constitutional by virtue of the fact it is an exercise of inherent parliamentary privilege. The Committee of the House is an extension of the House and possesses the same constitutional power to summon witnesses and order them to produce documents.⁶⁴

However, in 2003, the New South Wales Government contested the power of committees to order the production of State papers. The Government’s 2003 ‘Guidelines for Public Servants appearing before Parliamentary Committees’ states:

62 (1998) 195 CLR 424.

63 See, for example, the Standing Committee on Social Issues, *Inquiry into Residential and Support Services for People with Disability*, Minutes No 11, 14 October 1999, entry No 2; GPSC No 5, *Report on inquiry into Northside Storage Tunnel – Scotts Creek Vent*, Report No 9, November 2000, pp 142-143; GPSC No 3, *Cabramatta Policing*, Report No 8, July 2001, p 264; GPSC No 1, *Inquiry into Multiculturalism – Interim report*, Report No 9, May 2000, pp 142-143.

64 (2003) 661 APR 164 at 182.

COMMITTEES

If a Committee requires an officer to hand over documents in the officer's possession at the hearing, the officer should request that the Committee refer the matter to the relevant House for a formal order to be made pursuant to the Standing Orders.⁶⁵

This position appears to be based on advice provided by the Crown Solicitor in September 2001.⁶⁶

Since the publication of the Government's 2003 'Guidelines for Public Servants appearing before Parliamentary Committees', the Council has adopted new standing orders. Standing order 208(c) now provides that committees have the power to send for and examine documents and papers, where necessary.

The issue of committees of the Council ordering documents came to a head but was not resolved during a budget estimates hearing of GPSC 4 in 2004. In a supplementary hearing regarding the Sydney Water Corporation, a member of the Committee requested that the Chair of Sydney Water provide to the Committee, on a confidential basis, a copy of an Internal Audit Bureau report referred to in evidence. The Chair of Sydney Water declined the request, on the basis that the document had been referred to the Independent Commission Against Corruption (ICAC) for investigation, although she did agree to contact the ICAC to determine whether the document could be made available to the Committee. In subsequent correspondence, the Chair of Sydney Water advised that the ICAC was of the view that it had no claim over the Audit Bureau report and held no view about preventing production of the report to the Committee. Notwithstanding this advice, the Chair of Sydney Water continued to decline to disclose the report to the Committee voluntarily. In a strategic move by the Government, prior to the Committee being able to convene to consider any action it might take in respect of this matter, the Hon Michael Egan, then Leader of the Government in the Council, gave notice of motion in the House of an order for papers that included the Audit Bureau report. This motion was passed in the House on 25 February 2004 and the documents were tabled in the House the following day.⁶⁷ In accordance with the terms of the order, the documents were made available only to members of the Council.⁶⁸

The issue also arose during the 2004 GPSC 4 'Orange Grove inquiry'.⁶⁹ Twice during the inquiry the committee resolved to order the production of documents under standing order 208(c) from relevant government departments.

First, on 28 July 2004 the Committee ordered the production of documents from the Department of Infrastructure, Planning and Natural Resources, relating to the preparation and consideration of the Draft Liverpool Local Environmental Plan

65 Premier's Circular No 2003-47, 'Guidelines for appearing before Parliamentary Committees', 17 November 2003, para 9.

66 Crown Solicitor, 'Re: Production of Documents to Legislative Council Standing Committee No 1', 28 September 2001.

67 *LC Minutes* (25/2/2004) 548-549, (26/2/2004) 561.

68 GPSC 4, *Budget Estimates 2003-2004*, Report No 9, March 2004, p 19.

69 GPSC 4, *The Designer Outlets Centre, Liverpool*, Report No 11, December 2004.

1997.⁷⁰ Subsequently, on 11 August 2004, the Department provided to the Acting Clerk of the Parliaments copies of two advices from the Crown Solicitor asserting that the Council did not have the power to order the production of the documents.⁷¹

After seeking advice from the Clerk of the Parliaments, on 12 August 2004 the Committee Director wrote to the Director General of the Department of Infrastructure, Planning and Natural Resources asserting that the House had delegated to the committee the power to call for documents.⁷² On 13 August 2004, the Department 'voluntarily' provided the documents requested together with a claim of legal professional privilege and statutory secrecy. The accompanying letter stated that 'the Government remains of the view that the Committee does not have the power to call for the Department's documents'.⁷³

The second incident occurred on 25 August 2004 when the committee ordered the production of documents held by the Premier's Office or the Premier's Department relating to briefing notes and records of any meetings concerning the approval of the Designer Outlets Centre and the proposed amendment to the Liverpool Local Environmental Plan.⁷⁴

In a letter dated 7 September 2004 the Director General of the Premier's Department declined to provide the documents to the Committee on the basis of the opinion of the Crown Solicitor that committees do not have the power to require documents to be produced; that there is no statute that confers powers on committees to require the production of documents; and that, while the House does have power to call for documents, there is no clear evidence to suggest that the House can delegate that power to its committees.⁷⁵

By letter dated 11 October 2004 the Chair of the committee wrote to the Director General of the Premier's Department adhering to the view that the House had delegated to the committee the power to order the production of documents, and noting that there are numerous precedents of the House conferring on committees the power to call for documents, and of governments complying with such orders. The Chair noted that the committee viewed non-compliance with the order seriously and that failure to comply may interfere with the work of the committee,

70 *Ibid*, p 136, and correspondence from Director to Ms Jennifer Westacott, Director General, Department of Infrastructure, Planning and Natural Resources, 28 July 2004.

71 Correspondence from Mr Marcus Ray, Acting Director Legal Services, Department of Infrastructure, Planning and Natural Resources, to Deputy Clerk, Legislative Council, 11 August 2004.

72 Correspondence from Director to Ms Jennifer Westacott, Department of Infrastructure, Planning and Natural Resources, 12 August 2004.

73 Correspondence from Mr Michael Astill, Corporate Counsel, Department of Infrastructure, Planning and Natural Resources, to Chair of GPSC 4, Miss Jennifer Gardiner, 13 August 2004.

74 *Designer Outlets Centre Report*, above n 69, pp 156-159.

75 Correspondence from Dr Col Gellatly, Director General, Premier's Department, to Director of GPSC 4, 7 September 2004.

COMMITTEES

and it would be likely to report any such failure to the House for consideration as a possible contempt.⁷⁶

In a letter dated 21 October 2004 the Director General of the Premier's Department indicated that he had sought further advice from the Crown Solicitor on the scope of the committee's alleged power to order the production of documents. The advice referred to uncertainty as to whether the power of the Council to order the production of documents is delegable, and that relying on standing order 208 as a delegation by the Council to order the production of documents gives rise to issues as to the validity of the standing order.⁷⁷

On 21 October 2004, on the motion of the Hon John Ryan, a member of the Committee, the Council passed an order, notwithstanding the committee's view that it had power to order the production of documents, for various papers regarding the Orange Grove Designer Outlets Centre. The House also ordered that documents provided to the committee during its inquiry, and subject to a claim of privilege by the Department of Infrastructure, Planning and Natural Resources, be made available to all members of the Council.⁷⁸

On 11 November 2004 the papers ordered by the House were duly delivered by the Director General of the Premier's Department and tabled in the Council. A claim of privilege was made over several documents.⁷⁹ A supplementary return of papers was made on 16 November 2004, providing further documents from the Attorney General's Department and Integral Energy, with a claim of privilege again made over several documents.⁸⁰

The key difference between the power of the House to order the production of documents and the power of a committee to do so is that, if an order by a committee is resisted, the committee itself does not have the power to deal with the consequences of that failure. If the committee considers that such action interferes with or obstructs its effective operation, the appropriate course of action is for the committee to report the occurrence to the House by way of a special report. The committee's role ends with the reporting of the matter to the House. It is then open to the House to determine whether to order the production of the document itself or if action should be taken for contempt against the person who has failed to comply with the committee's order. In some jurisdictions individuals have been held to be in contempt for disobeying or frustrating committee orders for the production of papers.⁸¹

76 Correspondence from the Chair of GPSC 4, Miss Jennifer Gardiner to Dr Col Gellatly, Director General, Premier's Department, 11 October 2004.

77 Correspondence from Dr Col Gellatly, Director General, Premier's Department, to the Chair of GPSC 4, Miss Jennifer Gardiner, 21 October 2004.

78 *LC Debates* (21/10/2004) 7.

79 *LC Debates* (11/11/2004) 12702.

80 *LC Debates* (16/11/2007) 12798.

81 See McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, p 131; see also Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, pp 377-378.

However, it is incumbent on a committee to use the power delegated to it to order the production of documents in a measured and considered manner. It is possible that the House would not support an unreasonable or punitive demand by a committee. For example, it would not be fair for a witness who appears voluntarily by invitation to be required to produce a document other than by invitation. An order for the production of documents should only be made where the committee has decided that the circumstances necessitate such an order.

The issue of a committee's power to order the production of documents is likely to continue to be contentious and may eventually be tested in the courts if the government continues to resist such orders.

It should also be noted that several joint statutory committees have been provided with an express power to 'send for persons, papers and records'. These include the Committee on the Independent Commission Against Corruption,⁸² the Committee on the Office of the Ombudsman and Police Integrity Commission,⁸³ the Committee on Children and Young People,⁸⁴ the Committee on the Health Care Complaints Commission,⁸⁵ the Legislation Review Committee⁸⁶ and the Committee on the Office of the Valuer-General.⁸⁷

Documents subject to a claim of public interest immunity or legal professional privilege

Where a committee orders the production of documents but is denied their production on the basis that the documents are subject to a claim of public interest immunity or legal professional privilege, then a committee should follow the procedure described above and report the matter to the House as an offence against the committee's authority.

A committee may order the production of documents subject to a claim of privilege. This reasoning is supported by *Egan v Chadwick*,⁸⁸ in that the power of the House to call for documents is not limited by such claims, except in relation to documents which disclose the actual deliberations of Cabinet. On this basis there is no reason why the power of a committee should be considered to be limited, subject to the limitation on enforcement noted above.

Where documents subject to a claim of privilege are provided to a committee, those documents, like any other documents provided to a committee, remain confidential to the members of the committee, unless and until the committee, or

82 *Independent Commission Against Corruption Act 1988*, s 69(1).

83 *Ombudsman Act 1974*, s 31G; *Police Integrity Commission Act 1996*, s 95.

84 *Commission for Children and Young People Act 1998*, Sch 1, Part 5(1).

85 *Health Care Complaints Act 1993*, s 71.

86 *Legislation Review Act 1987*, s 11.

87 *Valuation of Land Act 1916*, s 91.

88 (1999) 46 NSWLR 563.

the House, authorises their publication.⁸⁹ Where a claim of privilege made in relation to a document raises issues of such sensitivity that it is appropriate for the document to remain confidential, a committee could decide not to authorise the publication of the document or could authorise the partial publication of the document with the omission of sensitive wording.⁹⁰ These procedures are available in relation to sensitive documents generally, whether or not the sensitivity arises from a claim of privilege.

MEMBERSHIP OF COMMITTEES

Substantive members

All members of the Council other than the President are eligible to serve on a committee. Standing order 210(8) also provides that the President may not be elected to serve on a committee other than one of which the President is an *ex officio* member (that is, the Procedure Committee). In addition, if the Deputy President is elected to serve on a committee and declines to do so, another member is to be elected (SO 210(9)). In practice, ministers generally do not serve on a committee other than the Procedure Committee and Privileges Committee. Some statutes establishing statutory committees provide that ministers and parliamentary secretaries are not eligible to serve on those committees.⁹¹

Under standing order 210(1), the composition of each committee is to be determined by the House in the resolution appointing the committee. In recent times:

- the resolution appointing the three policy-oriented standing committees has provided that each committee consist of six members: three government members, two opposition members and one cross-bench member;
- the resolution appointing the five GPSCs has provided that each committee consist of seven members: three government members, two opposition members and two cross-bench members;
- the resolution appointing the Privileges Committee has provided that it consist of seven members: four government members, two opposition members and one cross-bench member.

As indicated previously, standing order 205 provides for the appointment of a Procedure Committee at the commencement of each Parliament. The President,

89 This is the effect of standing order 224, which provides that ‘documents presented to [a committee], which have not been reported to the House, may not, unless authorised by the House or committee, be disclosed to any person other than a member or officer of the committee’.

90 See, for example, the *Arena Report*, above n 36, p 12.

91 See the *Health Care Complaints Act 1993*, s 67(3); the *Independent Commission Against Corruption Act 1988*, s 65(3); the *Ombudsman Act 1974*, s 31C(3); the *Police Integrity Commission 1996*, s 94; the *Commission for Children and Young People Act 1998*, s 29(3); the *Public Finance and Audit Act 1983*, s 54(4); the *Legislation Review Act 1987*, s 5(3); and the *Valuation of Land Act 1916*, s 86(3).

Deputy President, Leader of the Government and Leader of the Opposition must be among the members of the committee.

It was once the practice of the House to name the members of a committee in the resolution appointing the Committee. On occasions the House appointed members to a committee by ballot under the former standing order 236.⁹² However, in 1990 the practice began to develop of members being nominated by party leaders.⁹³ This practice has now been included in the standing orders:

- government members are nominated by the Leader of the Government (SO 210(2));
- opposition members are nominated by the Leader of the Opposition (SO 210(3));
- cross-bench members are nominated by agreement between the cross-bench members (SO 210(4)).

Where the cross-bench cannot reach agreement, the House is required to choose the cross-bench member by ballot under standing order 135. Ballots have been held on several occasions.⁹⁴

Nominations for membership are made in writing to the Clerk within seven days of the passing of the resolution appointing the committee (SO 210(6)) and the House is advised accordingly. Any changes in membership are also made by nomination. In the absence of any agreement, the representation on a committee is to be determined by the House (SO 210(5)).

However, it is notable that several recent resolutions appointing select committees, including joint select committees, have nominated the members to serve on the committee, and in some instances the chair and deputy chair.⁹⁵

92 *LC Minutes* (12/6/1889) 97. The committee was the Joint Standing Committee on Public Works.

93 The practice of members being nominated to committees by the Leader of the Government and the Leader of the Opposition appears to have commenced with the appointment of the Joint Select Committee on Election Funding in 1990. On that occasion the Assembly proposed a committee of five Council members and eight Assembly members, *LC Minutes* (3/5/1990) 113-115. However, when the Hon Liz Kirkby proposed an amendment for equal representation of six members from each House, the government discharged the order of the day, *LC Minutes* (21/5/1990) 186. Subsequently, the government proposed a committee of seven members from each House, *LC Minutes* (23/5/1990) 223-226.

94 See, for example, the ballot to choose the cross-bench member of the Standing Committee on Social Issues conducted by the House on 24 June 2003, *LC Minutes* (24/6/2003) 158. See also *LC Minutes* (15/9/2004) 987, (23/5/2003) 116-117

95 The practice of the chair and deputy chair of a committee being nominated by party leaders commenced with the appointment of the standing committees in 1988, *LC Minutes* (9/6/1998) 182-186. As a recent example, the resolution appointing the Select Committee on the Continued Public Ownership of Snowy Hydro Limited nominated the seven members of the Committee and indicated that 'notwithstanding anything contained in the standing orders: the Chair of the Committee be Revd Dr Moyes, and the Deputy Chair be Mrs Pavey', *LC Minutes* (7/6/2006) 99-100, 103.

COMMITTEES

There are examples of where members have declined to serve on a proposed select committee and their names have been withdrawn from the membership and replaced.⁹⁶ In another instance, a member declined to act following the appointment of a select committee and was later discharged from the committee.⁹⁷

Substitute members for general purpose standing committees

A unique feature of the GPSCs is the ability of Council members to substitute for other members on any GPSC, whether for a particular meeting or for a whole inquiry. A substitute member has the same rights as a substantive member, and may question witnesses or vote or be counted for the purposes of any quorum. There is no provision for substitute members in the case of other standing or select committees.

A member wishing to have a substitute member take their place on a committee must provide written notice to the committee chair, including the date of the meeting and the name of the member substituting for the meeting. In the case of government and opposition members, substitutions are made by the respective leaders or whips. Nominations for substitute cross-bench members may be made by another cross-bench member.

A committee may also decide to exclude a member who is not a substantive member of the committee. For instance, in March 2006, during its inquiry into correctional services, GPSC 3 resolved that a member who had participated in the inquiry as a substitute cross-bench member should not participate in a site visit to a maximum security prison.⁹⁸

The substitution of members is common during the budget estimates hearings to allow members to attend hearings on matters in which they have a particular interest or experience.

Participating members

Under standing order 218(1), a member of the House who is not a member of a committee may take part in the public proceedings of the committee and question witnesses but cannot move a motion or be counted for the purposes of a division or quorum.

Each year since 1999, the resolution referring the budget estimates and related papers to the GPSCs for inquiry and report has expressly provided that any member of the House may attend a meeting of a committee in relation to the

96 *LC Minutes* (19/3/1931) 106. Two members requested the withdrawal of their names on the Select Committee on the Industrial Conciliation and Arbitration Bill.

97 *LC Minutes* (6/12/1923) 111. The committee was the Select Committee on advisability of amending the Constitution Act so far as it related to the Legislative Council.

98 GPSC 3, *Issues relating to the operations and management of the Department of Corrective Services*, Report No 17, June 2006, p 155.

budget estimates and question witnesses, participate in the deliberations of the committee and make a dissenting statement relating to the budget estimates. However, they may not vote or be counted for the purposes of any quorum.⁹⁹

These provisions in the standing orders for participating members, and substitute members for GPSCs, allow flexibility so that members with a particular interest in a portfolio area or issue may attend and take part in relevant hearings. The cross-bench has found the use of participating members particularly advantageous where more than one cross-bench member has an interest in a policy area, such as the environment.

Changing membership or discharging a member

The House may, by motion on notice, discharge a member from a committee and appoint another member in their place,¹⁰⁰ or appoint another member in place of a member resigned.¹⁰¹ On one occasion a member was re-appointed to a committee following his resignation from the House and subsequent re-election to the House after an unsuccessful attempt to be elected to the Senate.¹⁰²

Where the resolution appointing a committee has specified the names of members to serve on a committee, only the House may discharge or appoint members of that committee.

Where the resolution appointing a committee allows for the nomination of members by the Leader of the Government, Leader of the Opposition or cross-bench members, changes in membership are provided in writing to the Clerk of the House and reported to the House (SO 210).

On occasion the House has appointed additional members to a committee.¹⁰³ In November 1997, two additional members were appointed to the Standing Committee on Parliamentary Privilege and Ethics, which was conducting an inquiry into the conduct of the Hon Franca Arena. The House also determined that, for the purposes of the Arena inquiry, a quorum of the committee was to be four members, of whom three must be government members and one a non-government member.¹⁰⁴

99 See, for example, *LC Minutes* (8/6/2006) 120-124, (28/6/2007) 215.

100 *LC Minutes* (23/6/2005) 1506.

101 *LC Minutes* (22/9/2005) 1596.

102 *LC Minutes* (10/11/2004) 1107.

103 See, for example, three additional members appointed to the Select Committee on Registration of Deeds Affecting Real Property, *LC Minutes* (2/2/1860) 53; two additional members appointed to the Select Committee on the Legislative Council Bill, *LC Minutes* (9/10/1873) 23; and one member appointed in lieu of a member on leave and three additional members appointed to the Select Committee on New South Wales Electric Light and Power Bill, *LC Minutes* (10/5/1888) 187.

104 *LC Minutes* (25/11/1997) 224-225.

Member absences

Standing order 216(1) states that a member must seek leave of a committee to be absent from four or more consecutive committee meetings. If a member of a committee fails to attend four consecutive meetings without leave, the committee chair must report this to the House (SO 216(2)). If the member fails to attend the next meeting without leave, the Chair is to again inform the House and the procedure is to continue until the member attends a meeting. This requirement does not apply to those committees where the resolution of the House has made provision for substitute members.

Pecuniary interests and conflict of interest

Under section 14A of the *Constitution Act 1902* and the *Constitution (Disclosures by Members) Regulation 1983*, members of both Houses are required to make disclosures relating to certain specified matters, including interests in property, sources of income, gifts, contributions to travel, interests and positions in corporations and debts. Disclosures must also include things arising or received outside New South Wales.

In addition, under the Code of Conduct, as adopted by the House on 21 June 2007, members are required to disclose conflicts of interest when speaking on a matter in a committee. Standing order 210(10) further provides that no member may take part in a committee inquiry where the member has a pecuniary interest in the inquiry of the committee.

On 22 June 2007, the Minister for Primary Industries, the Hon Ian Macdonald, referred terms of reference to the Standing Committee on State Development for an inquiry into the agriculture industry in New South Wales. The Chair of the Committee had interests in the citrus industry, raising concerns that he could not participate in the inquiry under the provisions of standing order 210(10). In advice to the Clerk dated 26 June 2007 the Crown Solicitor stated:

I therefore incline to the view that the proposed Terms of Reference prevent a member who has a pecuniary interest connected with citrus growing from participating as a member of the Committee and, it follows, chairing that inquiry.¹⁰⁵

While the terms of reference could have been redrafted to allow the member to participate in the inquiry, the redrafting of the terms of reference to preclude any potential conflict of interest would have limited the ability of the committee to inquire into the agricultural industry.

Subsequently, on 28 June 2007, the House adopted a sessional order varying standing order 210(10) such that no member may take part in a committee inquiry where the member has a direct pecuniary interest in the inquiry of the committee,

¹⁰⁵ Crown Solicitor's Advice, 'Pecuniary interest of a member in a committee inquiry, 26 June 2007, p 8.

unless it is in common with the general public, or a class of persons within the general public, or it is on a matter of State policy.¹⁰⁶

This wording is consistent with standing order 113(2) which provides in relation to divisions in the House that a member may not vote in any division on a question in which the member has a direct pecuniary interest, unless it is in common with the general public or it is on a matter of State policy. If a member does vote, the vote of that member is to be disallowed.

This issue goes to the broader discussion of ‘conflict of interest’ on a committee inquiry, as opposed to simply disqualification from a committee inquiry for holding a ‘pecuniary interest’.

The position in the Council concerning conflict of interest in relation to a committee inquiry is that, if a member considers that they have a conflict, they should seek to be replaced on the committee during that inquiry, but that this is unnecessary if the member does not consider that they have a conflict of interest.¹⁰⁷

The issue of conflict of interest arose in 1989 during the Standing Committee upon Parliamentary Privilege inquiry into the Special Report from the select committee on the Police Regulation (Allegations of Misconduct) Amendment Bill. In this instance certain members of the Committee indicated that, in view of their membership of the select committee, they ought not to vote on recommendations which might emerge from the Standing Committee upon Parliamentary Privilege. The Clerk advised that it was a matter for each individual member as to whether they remained on both committees, and that there was no provision for noting abstentions in either the committee or the House. Notwithstanding this, the Standing Committee upon Parliamentary Privilege presented an interim report and sought direction from the House. On 6 April 1989 a motion was moved in the House to discharge the three members concerned and appoint other members in their place. After debate the motion was subsequently withdrawn by leave and the three members continued to serve on the Committee.¹⁰⁸

In 1993, there was a second instance where a member of the Standing Committee upon Parliamentary Privilege, the Hon John Jobling, remained a member of the Committee when it was referred terms of reference to look into the unauthorised publication of details of *in camera* evidence from the Joint Select Committee upon Police Administration,¹⁰⁹ of which he was also a member.¹¹⁰

106 *LC Minutes* (28/6/2007) 193.

107 Deputy Clerk, ‘Committee membership – Conflict of Interest’, Advisory Note No 4, September 1998.

108 *LC Minutes* (6/4/1989) 518-519. See also *Report of the Standing Committee upon Parliamentary Privilege together with the proceedings of the Committee*, 7 December 1989, p 50.

109 The select committee was established to investigate the relationships between the Minister for Police, the Police Board of New South Wales, the Inspector General of Police and the Commissioner of Police following the resignation of the Hon Ted Pickering as Minister for Police on 23 September 1992.

110 Standing Committee upon Parliamentary Privilege, above n 32.

COMMITTEES

This issue also arose during two inquiries in 1999 and 2001, but with a different result. During the 1999 inquiry by the Privileges and Ethics Committee into statements made by the Hon Michael Gallagher and the Hon John Hannaford concerning the Lord Mayor of Sydney, the Hon Helen Sham-Ho informed the House that, due to her personal involvement in the City of Sydney Council elections, she wished to step aside as Chair and requested the Leader of the House to replace her on the Committee for the inquiry.¹¹¹ On 15 September 1999, on the motion of the Hon Michael Egan, the House resolved that the Hon Peter Breen be appointed as a member of the Committee in place of Mrs Sham-Ho for the purpose of the inquiry.¹¹²

Similarly, in 2001 Mrs Sham-Ho was replaced by Mr Breen as a member of the Privileges Committee inquiry into the possible intimidation of witnesses before GPSC 3 and unauthorised disclosure of committee evidence. This step was taken because Mrs Sham-Ho had chaired the GPSC 3 inquiry and was therefore personally involved with the events that had led to the inquiry.¹¹³

In another example, in 2004 a stakeholder wrote to GPSC 5 at the start of an inquiry seeking the removal of the Chair of the Committee due to his stated opposition to a development which was the subject of the inquiry. The Committee, by resolution, expressed their confidence in the Chair, who remained in the position for the duration of the inquiry.¹¹⁴

The Senate deals with the issue of conflict of interest on committee inquiries in Senate standing order 27(5), which provides that a senator may not sit on a committee if the senator has a conflict of interest in relation to the inquiry of the committee. There is no precedent for the Senate enforcing this rule by removing a chair or member of a committee, or disagreeing with an appointment.¹¹⁵ However, there have been times when it has been suggested that a senator should not serve on a committee because of a perceived bias. This question has arisen in the Senate specifically in relation to the Committee of Privileges, where senators have been involved in other committee inquiries which have subsequently been referred to the Committee of Privileges. In its 18th Report, the Senate Committee of Privileges reaffirmed the principle that it was for individual senators to determine for themselves whether they should disqualify themselves in any particular circumstances.¹¹⁶

While the Clerk of the Senate advised that there are precedents where senators have both withdrawn and not withdrawn from inquiries on the grounds that they may have pre-judged the issues before those inquiries, he concluded:

111 Mrs Sham-Ho's husband was standing as a candidate in the forthcoming City of Sydney Council elections.

112 *LC Minutes* (15/9/1999) 56.

113 *LC Minutes* (28/6/2001) 1070.

114 GPSC 5, *Hunter Economic Zone and the Tomalpin Woodlands*, Report No 22, December 2004, p 146.

115 *Odgers*, 11th edn, p 375.

116 *Ibid*, pp 375-376.

[Q]uestions concerning the service of members on a committee where they may be regarded as not entirely impartial should be decided by the individual members concerned, and there is no general rule or convention which may be applied to all cases.¹¹⁷

Odgers specifically cites a case where one senator did not participate in a Senate Privileges Committee inquiry into the unauthorised publication of a proposed report by a select committee of which he was a member, while another senator of the same select committee continued to serve on the Privileges Committee, stating that he did not think it necessary for him to withdraw unless something arose to alter that decision.¹¹⁸

Similarly, *Erskine May* states that, when nominating members to serve on a committee, neither the House nor the Committee of Selection¹¹⁹ is bound to consider whether members are personally interested in the matter referred to the Committee. However, it is not the practice for a member of a select committee to take part in any inquiry while the affairs of any body in which he has a direct personal interest are under investigation.¹²⁰

OPERATION OF COMMITTEES

First meeting

Following the establishment of a committee, the Clerk is to fix the time and place for the first meeting of the committee (SO 213(1)). The Clerk then communicates to members the date, time and place for the first meeting.

Election of a chair and deputy chair

At the first meeting of a committee before proceeding to any other business, a chair and deputy chair must be elected, unless the resolution of the House appointing the committee provides otherwise (SO 213(2)). The Clerk conducts the election for the chair, and the chair conducts the election for the deputy chair.

In recent times, the chair and deputy chair have only had to be elected at the first meeting of the GPSCs and a limited number of the select committees, as many of the resolutions appointing select committees have appointed a member as chair, and the resolutions appointing the standing committees have provided that the chair and deputy chair be nominated by the Leader of the Government and the Leader of the Opposition respectively in writing to the Clerk.

117 *Ibid*, p 376.

118 *Ibid*.

119 The Committee of Selection is appointed to select and propose to the House the names of the members of Select Committees, the panel of Deputy Chairmen of Committees, and any other body referred to it by the Chairman of Committees.

120 *Erskine May*, 22nd edn, p 631.

COMMITTEES

The procedure for electing a chair at the first meeting of a committee conforms with procedures in the House. The committee clerk calls for nominations for chair. If more than one nomination is received, the chair is elected by ballot, following the process for electing the President in the House.¹²¹ Before the ballot, nominated members may wish to speak to their nomination, although this is not a requirement. Ballot papers are distributed to each member on which they write the name of the member they vote for to be chair. Ballot papers are then handed to the clerk for counting and determination of the result. If two members are nominated, the member with the greatest number of votes is elected chair.

If more than two members are proposed, the member who has the greatest number of votes is elected chair as long as that member also has an absolute majority of votes, that is, more than half of the votes. If no member has an absolute majority, then the name of the candidate with the fewest votes is withdrawn and a fresh ballot takes place. This is repeated until one candidate is elected by an absolute majority.¹²²

If there is an equality of votes, the ballot must be taken again. If there is an equality of votes again, the clerk must withdraw by lot the name of one candidate, and that candidate is withdrawn from the election. The candidate remaining is elected chair.

Once elected the chair assumes that role and conducts the election for a deputy chair, following the same process for the election of the chair, except that the chair has a casting vote in the event of an equality of votes.

The role of the chair and deputy chair

The role of the chair in conducting the proceedings of a committee is analogous to that of the President in the House. The chair is responsible for guiding the inquiry process. In addition, during public hearings, the chair is responsible for maintaining order, conducting divisions and ruling on the admissibility of questions and matters of privilege. Where the resolution appointing a committee and the standing orders are silent, the procedures of the House are followed. For example, the rules of debate under standing order 91 in relation to offensive words, reflecting on a resolution of the House and making personal reflections on members or officers apply in committee proceedings. Where remarks are considered to be offensive, the chair may request that the offensive remark be withdrawn. However, only the House can take action in relation to disorderly conduct. Where a member continues in a disorderly manner, the committee may refer the matter to the House, by way of a special report.

121 This is discussed in more detail in Chapter 10 (Resolutions, Motions and Amendments) under 'Ballot'.

122 See, for example, the election of the Chair of GPSC 1 following the resignation of Revd the Hon Fred Nile from the Council on Monday 30 August 2004 to contest a seat in the Senate; GPSC 1, *Budget Estimates 2004-2005*, Report No 26, November 2004, pp 9-10.

The chair is also responsible for administrative matters and may report to the President on any matters relating to the administration, functions and operations of a committee (SO 234(3)).

The deputy chair acts as chair when the chair is absent from a meeting and assumes all the authority of the chair (SO 211(2)). This provision in the standing orders is intended to cover situations where the chair is unexpectedly absent and not where the position has been vacated, such as on the resignation of the member from the House. In such cases the committee must elect a new chair at its next meeting, unless the chair is nominated by the Leader of the Government.¹²³

In the temporary absence of both the chair and deputy chair from a meeting a member of the committee is to be elected by the members present to act as chair for that meeting only (SO 211(3)).¹²⁴

The chair has a deliberative vote and, in the event of an equality of votes, a casting vote (SO 211(4)).

Initial resolutions of a committee

It is common practice for a committee, at its first meeting, to adopt a series of procedural resolutions which govern practical or 'housekeeping' aspects of its operations. These resolutions may include:

- authorising the sound and television broadcasting of the committee's public proceedings, as appropriate, unless the committee decides otherwise;¹²⁵
- that arrangements for the calling of witnesses and for visits of inspection be left in the hands of the chair and committee clerk after consultation with the committee;
- that media statements during the inquiry on behalf of the committee be made only by the chair, if possible after consultation with the committee;
- that the committee clerk be empowered to publish the transcript of evidence taken at public hearings, unless the committee decides otherwise;
- that if, by leave of the House, the committee meets while the House is sitting, the meeting be suspended during any division or call for a quorum in the House.¹²⁶

123 This situation arose following the resignation of Revd the Hon Dr Gordon Moyes as the Chair of GPSC 1 following the tabling of the report entitled *Personal Injury Compensation Legislation* in December 2005. In that instance, Revd the Hon Fred Nile was subsequently elected as Chair of the Committee at its next meeting on 2 March 2006.

124 See, for example, the election of a temporary chair of GPSC 2 on 23 September 2005 in the absence of both the Chair and Deputy Chair; GPSC 2, *Budget Estimates 2005-2006*, Report No 21, May 2006, pp 14-15.

125 See 'Progress Report from the Select Committee on Prevention of Fire in Sydney and Suburbs' where a request from the press to be present and take notes of evidence was denied, *LC Journals* (1908) Vol 72, pp 69, 72.

126 See standing order 209(2).

These resolutions have continuing effect for the life of the Parliament. Where a committee wishes to depart from any initial resolution, a further resolution is required to be adopted. Alternatively, an initial resolution may be amended or rescinded.

Committee meetings

In accordance with standing order 209(2), a committee is not permitted to meet when the House is sitting, *unless* the House expressly allows it by resolution. On rare occasions, however, the House has authorised a committee to meet when the House is sitting and some select committees have been authorised by the resolution appointing the committee to meet during a sitting of the House.¹²⁷

There are two types of committee meetings: deliberative meetings and public hearings.

A deliberative meeting is a private meeting of a committee during which members consider matters related to the conduct of an inquiry such as advertising the inquiry, the publication of submissions, the selection of witnesses to give evidence, any correspondence, matters of procedure and the draft report of the committee. Deliberative meetings are attended only by committee members and committee staff, and discussions remain confidential, although decisions of the committee are recorded in the published minutes of committee proceedings.

Committee hearings are meetings at which a committee takes evidence from one or more witnesses as part of an inquiry. Hearings are normally held in public, although a committee may decide to take evidence *in camera*.

Quorum

Standing order 214(1) states that, unless otherwise ordered by the House, the quorum of a committee is three members.¹²⁸ A committee cannot meet and conduct business unless it has a quorum.¹²⁹ Parliamentary privilege may not apply to

¹²⁷ See, for example, leave for the Standing Committee on Social Issues to sit while the House was sitting, *LC Minutes* (3/7/2001) 1097. See also the resolution appointing the Select Committee on the Financial Institutions (NSW) Bill and Cognate, *LC Minutes* (7/5/1992) 188-191.

¹²⁸ In recent times, the resolution establishing the 3 policy-oriented standing committees has always provided that the quorum must consist of 2 government members and 1 non-government member. There has been no membership requirement for the quorum of a GPSC.

¹²⁹ In November 1919, a meeting of the newly appointed Select Committee on Land Development under Western Lands Commission Administration lapsed for want of a quorum, *LC Minutes* (25/11/1919) 136. This issue arose again in March 2006 during a series of hearings in rural New South Wales held by the Standing Committee on Law and Justice, when a member of the Committee was unexpectedly and unavoidably prevented from undertaking the Committee's program, thereby preventing the Committee from forming a quorum. In the circumstances, the Committee held a teleconference, at which it was resolved to form a sub-committee for the purposes of the hearings. However, by agreement of the Leader of the Government and the Leader of the Opposition in the Council, this procedure is not to be taken as a precedent for the meeting of a committee of the Council by way of electronic means. See Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations*, Report No 30, March 2006, pp 294-297.

committee proceedings conducted in the absence of a quorum, as there may be some doubt as to whether such proceedings are properly constituted proceedings of the committee.¹³⁰

Standing order 214(2) states that, if after 15 minutes from the time appointed for commencement of a committee meeting a quorum is not present, the meeting is adjourned and the chair is to fix the next meeting of the committee. The clerk to the committee records the names of members present.

Under standing order 215, if a member brings the loss of a quorum to the attention of the chair, after 10 minutes has elapsed the chair must suspend the proceedings of the committee to a later time. If, at that later time, a quorum is still not present, the committee must be adjourned to another date, to be fixed by the chair.

As with the practice in the House, it is not the responsibility of the chair to call attention to the absence of a quorum. Maintaining a quorum is the responsibility of the committee collectively.

The clerk of the committee is responsible for recording the names of members present at any deliberative meeting or hearing (SO 214(3)). This record appears in the minutes of the committee proceedings, which are included in the committee's report to the House (SO 234(5)(a)).

Motions, resolutions and divisions

Following the practice of the House, any member of a committee, except the chair, may move a motion in a committee. After a motion is moved and discussion of the motion is complete, a vote is taken on the motion. A motion may be carried or negatived either on the voices or by division, following the procedure in the House.

A division is called if a member disagrees with the chair's determination of a vote on the voices. In accordance with standing order 234(5)(b) and (c), if a division occurs the names of members and the way they vote, as well as the details of the motion, are recorded in the minutes. This requirement ensures that members' opinions about a matter are formally recorded. A member may request that their vote be recorded in the minutes without the need to proceed to a division (SO 112(5)).

The chair, or deputy chair or other member acting as the chair, has a deliberative vote and, in the event of an equality of votes, a casting vote (SO 211(4)).

The recording of divisions has become increasingly important, since under the provisions of standing order 228(4), in order for a dissenting statement to be included in a report, members must have sought to have their opinions reflected in the committee's report.

Committee members who are present at a meeting cannot abstain from voting. This reflects the practice in the House.

130 *Odgers*, 11th edn, p 403.

The standing orders are silent on the rescission of resolutions by a committee. A rescission has the retrospective effect of annulling or quashing a decision from the time that decision was made as if it had never been made. In the absence of a specific provision, the practice of the House is followed. Consequently, a resolution, order or vote of the House may not be rescinded, during the same session, unless seven days' notice is given (SO 119). Alternatively, a rescission motion can be moved by leave without the requirement of seven days' notice.¹³¹

It is not necessary to rescind a resolution if the intention is simply to cease the operation of the resolution prospectively, as this can be done by a new resolution.

Chair's rulings and objections to rulings

The chair may make a ruling on any question of order, including a point of order, raised by a committee member.

In ruling on a point of order, the chair should apply the rules of debate and questioning to the extent that order is maintained and the functioning of the committee is facilitated.¹³² A ruling may also be based on a provision in the resolution appointing the committee or the standing orders. Where there is no provision guiding a chair's ruling, it is established Council practice that the chair should lean towards a ruling which preserves or strengthens the powers of the Council and the rights of members rather than one which may weaken or lessen those powers and rights.

Committee members may object to a chair's ruling. To do so, the member must formally move that the committee objects to the ruling, and must state their objection in writing in a deliberative meeting of the committee. If the committee resolves the question in the affirmative, the ruling of the chair does not stand. If resolved in the negative, the ruling stands.

Although objection to committee chairs' rulings is unusual, during the GPSC 4 Inquiry into the Designer Outlets Centre at Liverpool in 2004, members took objection to a number of rulings of the chair in regard to the relevancy of questions being put to a witness.¹³³

Removal of a chair

The method of removal of a chair depends on the process by which the chair was appointed. If the committee elected the chair, the committee may remove and replace the chair by vote of the committee. Where the Leader of the Government nominated a chair, the chair can only be removed or replaced by the Leader of the

131 There are several examples of committees rescinding previous resolutions. See, for example, *Budget Estimates 2003-2004*, above n 66, p 68.

132 *Odgers*, 11th edn, pp 389-90.

133 *Designer Outlets Centre Report*, above n 69, pp 173, 177, 190, 191.

Government or by resolution of the House. Where a chair was appointed by resolution of the House, only the House can remove or replace the chair.

Sub-committees

Standing order 217(1) provides that, where the resolution appointing a committee makes provision for a sub-committee, a committee has the power to appoint a sub-committee of two or more members to assist the committee in the exercise of any of its functions or to investigate and report on any matter referred to the committee.

The quorum of a sub-committee is two, of whom one must be a Government member and one a non-government member (SO 217(4)).

A sub-committee is useful where it is more practical or beneficial to conduct certain activities with a small number of members. The appointment of a sub-committee increases a committee's flexibility and enables it to pursue several tasks simultaneously. Examples of when a sub-committee can be formed include: to work on a specific item of business or discrete aspect of an inquiry, to conduct hearings at some distance where the cost associated with the whole committee travelling would not be justified, and to conduct a specific hearing or series of hearings in respect of an inquiry.¹³⁴ However, sub-committees should be used judiciously and should not routinely be used in place of the properly constituted committee.

Currently, the resolution appointing the three policy-oriented standing committees confers a power to appoint sub-committees, but the resolution appointing the GPSCs does not. However, GPSCs may appoint a sub-committee if the House gives that power. For example, in May 2005, the House resolved that GPSC 2 have the power to appoint a sub-committee for the purpose of its Inquiry into Post School Disability Programs. This step was taken in order to allow GPSC 2 to conduct site visits and consultations simultaneously.¹³⁵

In appointing a sub-committee, the committee should identify the members of the sub-committee and appoint a committee member to act as chair of the sub-committee. Where the committee chair is serving on the sub-committee, it is usual practice that they be appointed to chair the sub-committee. The sub-committee chair has a deliberative and casting vote (SO 217(3)).

A sub-committee is required to report to the committee on any matter referred to it by the committee. The committee may adopt the report, reject the report or adopt the report with variations (SO 217(5)).

134 See, for example, State Development Committee, *Inquiry into Port Infrastructure in New South Wales*, Report No 30, June 2005, pp 105-107.

135 *LC Minutes* (25/5/2005) 1396.

Conferring with other committees

A committee, or any sub-committee, of the Council has authority to confer with any other committee of the Council or a committee of the Assembly to take evidence, deliberate and make joint reports on matters of mutual concern (SO 219(a)). A committee may also meet with any other State or Commonwealth parliamentary committee to inquire into matters of mutual concern (SO 219(b)).

Before the adoption of standing order 219 in May 2004, the provision to confer with another committee was contained in the resolution appointing each committee.

The only recent example where committees have met was during the 1995-1996 inquiry by the Standing Committee on Parliamentary Privilege and Ethics into the establishment of the draft Code of Conduct for Members.¹³⁶ During that inquiry, the Committee met with the Assembly Ethics Committee on a number of occasions for the purposes of joint hearings, informal meetings and to confer on a draft Code of Conduct.

There are also precedents of a Council committee meeting with a committee of another jurisdiction. For example, during the 2006 review of the Members' Code of Conduct, the Privileges Committee met with representatives of the Western Australian Legislative Assembly Procedure and Privileges Committee to discuss aspects of a similar inquiry into pecuniary interests being conducted by that Committee.¹³⁷

THE INQUIRY PROCESS

Terms of reference

The terms of reference of a committee define the scope of a committee's inquiry. A committee is authorised to examine matters that are within the scope of the terms of reference. A committee is not permitted to go beyond the matters defined in the terms of reference, although it is common for terms of reference to include reference to 'any other matter' relevant to the terms of reference, thus providing broad scope for the conduct of an inquiry. However, if a committee clearly goes beyond its terms of reference, the chair may rule the matter out of order.

Standing committees

Under paragraph 5(1) of the resolution appointing the standing committees, the Law and Justice, Social Issues and State Development committees may be referred terms of reference by the House or by a minister. A committee may also undertake

136 See Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a draft code of conduct for Members*, Report No 3, October 1996.

137 Standing Committee upon Parliamentary Privilege, above n 26, pp 1-2.

an inquiry into any annual report or petition relevant to the functions of the committee.¹³⁸ Paragraph 5(2) of the resolution in turn requires that when a standing committee resolves to inquire into a matter referred by a minister or relating to an annual report or petition, the terms of reference or the resolution is to be reported to the House on the next sitting day.¹³⁹

While a minister may refer an inquiry to a standing committee, they cannot direct the conduct of the inquiry. The Committee itself can resolve to undertake the inquiry or to seek to have the reference amended by the minister.¹⁴⁰ Furthermore, the House can also amend the reference, instruct the committee on how it will proceed, or direct the committee not to proceed with the reference. It is even possible for the House to refer the reference to another committee.

By way of example, in 2005 the Minister for Police referred to the Standing Committee on Social Issues matters relating to public disturbances at Macquarie Fields for inquiry and report. Considerable debate ensued as to whether the terms of reference were in order, particularly in relation to the appropriateness of the Committee inquiring into statements made by a member of the Assembly. In advice in relation to this issue dated 22 March 2005, the Clerk indicated:

1. In my opinion paragraph (b) offends against the separation of powers and the authority of the House to manage its own affairs and investigate the conduct of members. There is no authority for a Minister to request a committee to investigate the actions of a member of Parliament.
2. The committee has no power to reject the Minister's terms of reference, although there is nothing to prevent the committee from seeking to have the reference amended by the Minister in the first instance. However, the House is not bound to accept the Minister's reference to the committee, and can take action to amend or reject the reference, or even refer the matter to another committee.¹⁴¹

Subsequently, the House resolved to amend the terms of reference to remove the requirement that the Committee inquire into and report on the extent to which the actions of any member of parliament compromised police operations in the Macquarie Fields area.¹⁴² This was the first time that the House had taken such action since the House appointed the standing committees in 1988.¹⁴³

The Privileges Committee and the Standing Committee on Law and Justice both have statutory functions, the former under the *Independent Commission Against*

138 *LC Minutes* (10/5/2007) 58.

139 *LC Minutes* (10/5/2007) 58.

140 Clerk of the Parliaments, 'Terms of reference by the Minister for Police to the Standing Committee on Social Issues relating to the public disturbances at Macquarie Fields', 22 March 2005.

141 *Ibid*, p 5.

142 Standing Committee on Social Issues, *Public Disturbances at Macquarie Fields*, Report No 38, June 2006, p 1.

143 *LC Minutes* (23/3/2005) 1293-1294.

COMMITTEES

Corruption Act 1988, and the latter under the *Motor Accidents Compensation Act 1999* and the *Motor Accidents (Lifetime Care and Support) Act 2006*, which require them to hold regular inquiries into certain matters.

General purpose standing committees

The GPSCs can receive terms of reference from the House. In addition, they have the ability to self-refer terms of reference on the expenditure, performance or effectiveness of a government department, statutory body or corporation or any matter in an annual report of a government department, statutory body or corporation.

In order to self-refer an inquiry, the resolution appointing the GPSCs requires that a meeting of a committee to consider the self-reference be convened at the request of any three members of the committee made in writing to the committee clerk. The request must include the proposed terms of reference. A meeting of the committee must be convened within seven days of the receipt of the request, provided that members have been given at least 24 hours' notice. The committee may adopt the terms of reference, adopt amended terms of reference or reject the terms of reference. Where a committee resolves to adopt self-referred terms of reference, the committee is required to report the terms of reference to the House on the next sitting day.

This self-referral power has greatly expanded the ability of the GPSCs to inquire into specific decisions or actions of the executive, subject to the requirement that the inquiry falls under one of the committee's portfolio responsibilities. These inquiries have tended toward short timeframes in order to respond to matters of immediate significance.

Reference of a bill

The House may refer a public or private bill to a standing or select committee for consideration and report, usually as an amendment to the motion for the second or third reading. Since the establishment of responsible government in 1856, there are numerous examples of bills being referred to a committee. Most recently in 2006, the *Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2005* and the *Correctional Services Legislation Amendment Bill 2006* were referred to a committee for inquiry and report. Unlike some other Parliaments, the Council has yet to adopt the practice of routinely referring bills to a committee for inquiry and report after the minister's second reading speech.

Once a committee has reported on a bill, the bill must be restored, by motion without notice, to the Notice Paper at the stage it was at when referred to the committee (SO 140(4)).

All private bills originating in the Council must be referred to a select committee (SO 168). The last occasion a private bill was referred to a select committee occurred in 1992 in relation to the *Tamworth Information Centre Bill*.

Select committees

The terms of reference for a select committee are contained in the resolution of the House appointing the committee.

Select committees to draw up reasons

The Council must appoint a select committee to draw up reasons when:

- the Council disagrees to an amendment made by the Assembly in a bill originated in the Council (SO 152);
- the Council disagrees to an amendment made by the Assembly on an amendment by the Council in a bill originated in the Assembly (SO 157).

In the past, the Council adopted the practice, quite contrary to the standing orders, of appointing a select committee to draw up reasons for insisting on its amendments made in a bill originated in the Assembly.¹⁴⁴

Priority of references

Under standing order 212, the priority to be accorded to a reference received by a committee is determined by the chair of the committee, unless the committee decides otherwise.¹⁴⁵

Instructions to committees

The House may give an instruction to a select or standing committee to extend or restrict its terms of reference (SO 182). Such an instruction must be given before the committee reports. Recent examples include an amendment to the reference to GPSC 3 relating to the inquiry into the Kariiong Juvenile Justice Centre, instructing the committee to take evidence from particular youth workers and other staff of the juvenile justice centre;¹⁴⁶ an instruction to the Standing Committee on Social Issues that it not commence its inquiry into public disturbances at Macquarie Fields, referred by the Minister for Police, until after the police and Ombudsman investigations into the matter had been completed;¹⁴⁷ and an instruction to GPSC 4 not to commence an inquiry into the Pacific Highway.¹⁴⁸

Where the terms of reference are unclear, a committee may also seek an instruction from the House as to how to proceed.

144 See, for example, the Police Regulation (Reinstatement) Bill, *LC Minutes* (11/10/1988) 130.

145 For example, in 2006, GPSC 2 had to prioritise and manage the conduct of two simultaneous inquiries: the review of health complaints handling within NSW Health and the inquiry into health impacts of air pollution in the Sydney basin.

146 *LC Minutes* (22/9/2004) 1018-1021.

147 *LC Minutes* (23/3/2005) 1294, 1297-1298. For older examples of instructions to committees, see the instruction to the Select Committee on the Public Hospital (Amendment) Bill, *LC Minutes* (1/3/1961) 148; and the instruction to the Standing Orders Committee, *LC Minutes* (22/4/1970) 76.

148 *LC Minutes* (15/11/2005) 1727.

Referral of evidence

In certain circumstances, the House may refer evidence collected by one committee to another committee for further inquiry and report. This occurred on 7 June 2006 following the tabling of the report by the Select Committee on the Proposed Sale of Snowy Hydro Limited, when the House referred the evidence collected by the Committee to the newly formed Select Committee on the Continued Public Ownership of Snowy Hydro Limited.¹⁴⁹ Similarly, on 25 September 2007, the House referred the evidence collected by GPSC 4 during its inquiry into the operations of the Home Building Service of the Office of Fair Trading to GPSC 2. This followed the adoption of the inquiry by GPSC 2 after a change in the portfolio responsibilities of the GPSCs.¹⁵⁰

Publicising terms of reference and calling for submissions

Generally, a committee begins an inquiry by publicising the terms of reference and calling for submissions. A committee usually sets a deadline for receipt of submissions, although on occasions this deadline has been extended. Media releases and newspaper advertisements are the most common method of publicising an inquiry, although methods such as placing posters in community venues are also used from time to time. A committee may also write directly to parties with specific interest in the subject matter of the inquiry, inviting them to make a submission or otherwise participate in the inquiry.

A committee may also publish a discussion paper for the purpose of an inquiry (SO 226(4)). A discussion paper may expand on and clarify matters raised in the terms of reference and raise issues for parties to the inquiry to address.¹⁵¹

Any person or body may make written or recorded submissions to a committee with respect to any inquiry being conducted by the committee so long as the submission is relevant to the terms of reference (SO 221). Submissions inform committee members about the subject matter of the inquiry and how individuals, groups or organisations view a particular issue. Submissions can also indicate which individuals or organisations should best be called as witnesses in order to gather relevant evidence.

Submissions can take almost any form such as a letter, a substantial research paper, a hand written note or a video or audiotape. In 2005, the issue arose during the GPSC 2 Inquiry into Mona Vale Hospital as to whether form letters should be accepted by the committee as submissions. In that case, those form letters which included additional comments by the signatories were taken to be submissions, while form letters without additional comment were not.¹⁵²

149 *LC Minutes* (7/6/2006) 103.

150 *LC Minutes* (25/9/2007) 234.

151 See, for example, GPSC 1, 'Inquiry into Personal Injury Compensation Legislation, Information Sheet', 28 February 2005.

152 GPSC 2, *Operation of Mona Vale Hospital*, Report No 19, May 2005, pp 1-2.

Another issue that has recently arisen is whether a member can make a formal submission to the committee of which they are a member. While there is no prohibition to prevent a member of a committee from making a submission, this is not a desirable practice, as the purpose of submissions is to give the community access to the parliamentary process.¹⁵³

On rare occasions, a committee may reject and return a submission if it is not relevant or contains defamatory material. Rejecting and returning the submission ensures that the author is aware that it has not been accepted by the committee and therefore does not attract parliamentary privilege.

Once a submission is received and accepted by a committee it becomes a committee document. Like other committee documents, submissions are confidential until the committee resolves to make them public. The power to make submissions public derives from standing order 223(1), which states that a committee has the power to authorise publication, before presentation to the House, of submissions received and evidence taken. In addition, section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, states that '[a] committee may authorise the publication of a document received by it or evidence given before it'.

Generally, all submissions are made public during the course of an inquiry, or when presented to the House with the committee's report. Making submissions public can generate further comment and discussion and encourage others to provide relevant information to the committee. A committee will generally place submissions that have been accepted and made public on its website to ensure that they are accessible to as wide a range of interested parties as possible.

However, a committee may determine that a submission should not be published, either in whole or in part, for example, where a submission makes adverse mention of a third party or is otherwise not in the public interest.¹⁵⁴ Authors may also request that all or part of their submission be kept confidential or that their name be withheld from the public. Committees frequently agree to such requests, although they are not obliged to. Regardless of the actions of the committee, the House may order that a submission be made public.

Submissions cannot be disclosed by the author or a committee member until they are made public by the committee. This prohibition does not apply to documents that have been published elsewhere before being submitted to a committee.

Hearings

Following the call for and receipt of submissions, committee inquiries normally proceed with witnesses being invited to appear and give evidence at a hearing. Hearings generally commence after a committee has received a sufficient number

153 Clerk of the Parliaments, 'Section 2: Submissions to Committee Inquiries by Members', February 2004.

154 See, for example, the *Arena Report*, above n 36, p 12.

COMMITTEES

of submissions to identify the direction of the inquiry. This may occur before the closing date for submissions if time constraints dictate.

Hearings allow the committee to speak directly with witnesses about matters relevant to an inquiry and to seek to clarify or test the issues raised in submissions through questioning of the witness.

The majority of hearings are held at Parliament House although committees also meet in other locations in Sydney and in rural and regional areas of New South Wales to allow participation by a wider range of people.

Selecting witnesses

Witnesses are selected with a view to obtaining a range of views relevant to an inquiry. Potential witnesses are often identified through submissions received by the committee. Witnesses can be examined separately or together as a panel. A panel of witnesses is effective if there are several witnesses from one organisation or where witnesses hold similar or related views.

While a committee generally resolves to leave the arrangements for the calling of witnesses in the hands of the chair and secretariat, it is common for members to request that certain witnesses appear before the committee to give evidence. For more controversial inquiries, a committee may request a formal process of determining witnesses. In such cases, a list of proposed witnesses may be presented to the committee by the chair or other members and a formal resolution adopted to accept or modify the list.

Although a committee has power under section 4 of the *Parliamentary Evidence Act 1901* to summon any person other than a member of the Council or Assembly to attend and give evidence, and to impose sanctions for non-compliance, witnesses are generally invited to appear at a public hearing and do so voluntarily. Under section 10 of the Act a witness is sworn or affirmed when appearing before a committee. Importantly, the power to compel answers under section 11 can only be enforced where a witness is sworn or affirmed.

Public and in camera hearings

Standing order 222(1) specifies that evidence taken by a committee must be taken in public unless the committee decides otherwise. Hearings are, in the most part, conducted in public so that the community can be properly informed on the issues under inquiry. Resolutions referring the budget estimates and related papers to the GPSCs for inquiry and report routinely order that all hearings be conducted in public.¹⁵⁵

On occasions, a committee may resolve that a hearing be conducted *in camera* with the public and the media excluded. This usually occurs when there is potential for

¹⁵⁵ For the financial year 2006-2007, see *LC Minutes* (8/6/2006) 120-124.

the evidence to be prejudicial to the public interest or injurious to character, or would disclose matters of commercial confidentiality, or would be undesirable on similar grounds.

The sub judice convention and committees

Sub judice is a Latin term meaning ‘under consideration’. It refers to matters that are currently being considered by a court. While there is no standing order or law relating to *sub judice*, Parliaments have adopted a convention to avoid discussions in Parliament that could prejudice court proceedings. The *sub judice* convention is discussed in more detail in relation to the House in Chapter 11 (Rules of Debate).

Sub judice does not apply to royal commissions and other commissions of inquiry such as the Independent Commission Against Corruption. However it is sometimes suggested that it applies, by implication from the House of Commons, to those inquiries that are a direct result of a resolution of the House.¹⁵⁶

In general terms, the *sub judice* convention in no way obligates a committee to forgo its right to inquire into a matter. However, committees are generally sensitive in dealing with matters that are *sub judice*. While a committee may discuss a matter that is being considered by another inquiry, the *sub judice* convention requires that committee members assess the risk that a particular inquiry or line of questioning will prejudice proceedings before a court. As prejudice does not arise from a simple reference to a particular matter, a committee should consider whether an inquiry or a line of questioning is likely to give rise to any real and substantial danger of prejudice to proceedings before a court. The probability of prejudice is greater in circumstances when a matter is before a magistrate or a jury. In its deliberations on the matter of *sub judice*, a committee should consider the risk of prejudice against the public interest in, and the right of, the committee inquiring into the matter. Only when a committee considers that the risk outweighs the benefit should a committee consider foregoing its right to inquire.

For example, during the GPSC 1 inquiry into serious injury and death in the workplace held in 2004, the Committee was presented with evidence of a number of recent workplace injuries and fatalities in New South Wales, including some cases which were still before the courts or still being considered by WorkCover for prosecution. In those instances, the Committee was careful not to trespass on issues that might possibly undermine or hinder a successful prosecution.¹⁵⁷

In another example, during the GPSC 2 inquiry into health care complaints handling in 2004, the committee chose not to pursue a line of questioning which traversed a then current ICAC investigation while acknowledging that the committee had the power to do so if it desired.¹⁵⁸

156 *Erskine May*, 23rd edn, p 438.

157 See GPSC 1, Inquiry into serious injury and death in the workplace, *Evidence*, 15 March 2004, p 21.

158 See GPSC 2, Inquiry into complaints handling with NSW Health, *Evidence*, 30 April 2004, p 1.

The option of hearing evidence *in camera* avoids any immediate impact on court proceedings and allows consideration to be given to what is actually said, rather than deciding in advance on the basis of what might be said. Subsequent action by the committee, such as whether to publish the transcript in whole or in part, can then be based on the actual evidence, rather than on supposition. In this way the committee avoids adversely affecting court proceedings without denigrating its fundamental right to inquire into a matter.

Broadcasting of proceedings

On 18 October 2007, the Council adopted a resolution of continuing effect regarding the broadcasting of proceedings.¹⁵⁹ Part of the resolution deals with the broadcasting of committee proceedings. According to the resolution of the House, a committee may authorise the broadcasting of its proceedings, and determine the terms and conditions for such broadcasting not inconsistent with the resolution.

Any witness who is to appear before a committee must be given a reasonable opportunity to object to the broadcasting of their appearance. Under the resolution of the House of 18 October 2007, a committee must give consideration to a witness's objection with particular regard to the protection of the witness and the public interest in the proceedings.

At the first meeting of a committee, the committee usually agrees to a series of resolutions, including authorising the broadcasting of its proceedings. This resolution stands for the duration of the Parliament unless the committee decides otherwise.

Authority to publish evidence and documents

Section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* authorises a committee to publish documents received by it or evidence given before it. In addition, under standing order 223(1), a committee has power to authorise the publication, before presentation to the House, of submissions received and evidence taken.

Evidence given by a witness is recorded and forms part of the official record of the committee.

Most committees adopt a resolution authorising the publication of all transcripts of evidence. Consequently, when evidence is to be kept confidential, a specific resolution must be adopted to that effect.

Evidence taken *in camera* can later be published by the committee if it considers it is in the public interest to do so. For example, the Standing Committee on Law and Justice, during its inquiry into back-end home detention, resolved to hear evidence *in camera* from a convicted offender who was, at the time, serving his

¹⁵⁹ LC Minutes (18/10/2007) 279-281.

sentence under a home detention order. However, the Committee later resolved to publish the transcript.¹⁶⁰

The House also has power to order that evidence taken by a committee *in camera* be laid before it, in accordance with House of Commons practice and the principle that a committee is a creature of the House. Although the Council rarely exercises this power, it was used in December 1994 when both Houses ordered the release of *in camera* evidence from the Joint Select Committee upon Police Administration to the Royal Commission into the New South Wales Police Service.¹⁶¹ Because of the sensitivity of the evidence, the evidence was only made available to the Royal Commission for investigative purposes and not to the general public.

Tabled papers

A committee must also decide whether to accept a document tendered by a witness during the course of a hearing. To ensure that committee members and others have an opportunity to review a document tendered by a witness before its publication as a privileged document, a committee should defer consideration of the matter until the conclusion of each hearing, or later if the document requires careful review. There have been circumstances where a committee has refused to accept a document tendered by a witness during a hearing. For example, during the GPSC 4 Inquiry into the Designer Outlets Centre at Liverpool in 2004, the Committee declined to accept a statutory declaration tendered by a witness on the basis that the person who made the statutory declaration was not present and could not attest to the veracity of the document.¹⁶²

Briefings and inspections

In addition to calling for submissions and taking evidence, a committee may canvass the opinions of interested parties and the public in other ways including visits of inspection, briefings, seminars, conferences, study tours, workshops and round-table discussions.

A committee has power to make visits of inspection within New South Wales and, if authorised by the House, with the approval of the President, elsewhere in Australia and outside Australia (SO 208). In addition, the House has authorised some of the standing committees to undertake visits of inspection within New South Wales on their own resolution and to undertake visits of inspection in other Australian States and Territories and overseas with the approval of the President.¹⁶³ However, the House has not authorised the GPSCs to undertake visits of

160 Standing Committee on Law and Justice *Back-end home detention*, Report No 28, June 2005, 2.

161 *LC Minutes* (2/12/1994) 464-465.

162 *Designer Outlets Centre Report*, above n 69, p 177.

163 See the resolution establishing the Privileges Committee, the Standing Committee on State Development, the Standing Committee on Social Issues and the Standing Committee on Law and Justice of 10 May 2007, *LC Minutes* (10/5/2007) 53-59.

inspection in other Australian jurisdictions or overseas. A GPSC that wishes to undertake travel interstate or overseas would require a resolution of the House, followed by the approval of funding by the President.

A committee may also wish to hold a meeting in which experts or other participants are invited to brief the committee on an issue. Such a briefing allows committee members to freely discuss the issues with experts and also overcomes the restriction in committee hearings that only members may question witnesses. Consequently, a briefing can facilitate participants discussing issues with each other. While it is not necessary to have Hansard transcribe a committee meeting in which a briefing is given, a transcript is useful if there is likely to be a need to refer to the discussions in the report.¹⁶⁴

In recent years, Council committees have also made increasing use of roundtable discussions and public forums for gathering evidence. Roundtable discussions and public seminars, conferences and forums provide an opportunity for a committee to learn about the issues being examined in an inquiry and the views of various participants. Such events also enable a committee to bring together principal stakeholders in order to develop a consensus position on inquiry issues and to contribute to the development of potential recommendations.¹⁶⁵

At the heart of these consultation methods is a desire to make committee processes more participatory. Less formal methods of evidence gathering can make people feel more comfortable than they might during formal hearings. As with all methods, however, a flexible and selective approach is required. Less formal methods of evidence gathering may not be appropriate for more controversial inquiries where matters of privilege may arise.

In general, participants in these other forms of evidence gathering continue to be protected by parliamentary privilege as long as it is a properly constituted meeting of the committee. This protection applies regardless of whether or not the participant is sworn, summoned, appearing by teleconference or appearing before a duly constituted sub-committee.

Unauthorised disclosure of committee documents

Evidence taken by a committee, and documents presented to a committee, which have not been reported to the House, may not, except with the permission of the committee, be disclosed or published by any member of the committee or by any other person (SO 224).

164 See, for example, the Select Committee on the Continued Public Ownership of Snowy Hydro Limited, *Continued public ownership of Snowy Hydro Limited*, Report, October 2006, p 82.

165 See, for example, the Standing Committee on Social Issues, *The Group Homes Proposal: Inquiry into Residential and Support Services for People with a Disability*, Report No 19, December 1999, p 4. See also the Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation*, Report No 18, November 1998, Appendices 4-6.

A member may not refer to evidence taken by a committee which has not been authorised for publication or reported to the House, as this would be a breach of standing order 224 and would constitute a contempt.

There have been several instances of unauthorised disclosure of committee submissions and evidence. For example, during the 2004 Standing Committee on Social Issues inquiry into issues relating to Redfern/Waterloo, a Committee document was disclosed without the authority of the Committee. In its report on the matter, the Committee emphasised that unauthorised disclosure of documents can impede the effectiveness of parliamentary committee inquiries and lower confidence in the Parliament, and that any person who discloses confidential committee documents may be deemed guilty of contempt of Parliament. However, no further action was taken in this instance.¹⁶⁶

Another case of unauthorised publication by the media of committee evidence arose during the 2001 GPSC 3 Inquiry into Cabramatta policing. The Committee initially attempted to establish the source of the leak to no avail. The Committee then presented a Special Report to the House stating that the unauthorised publication potentially interfered with the performance of the Committee's functions. As noted in the previous chapter, the Special Report recommended referral of allegations of intimidation to the Standing Committee on Parliamentary Privilege and Ethics, but did not recommend referral of the unauthorised publication, noting that further inquiry would not be able to identify the source of the disclosure.¹⁶⁷

The unauthorised disclosure of confidential committee documents may be a serious obstacle to committee operations. Successive House of Commons Privileges Committees have concluded that premature publication of committee proceedings or unreported evidence is a contempt of the House and damaging to the work of Parliament.¹⁶⁸

In accordance with the practice recommended by the Standing Committee on Parliamentary Privilege, when an unauthorised disclosure of committee information occurs, the following procedures should be observed:

- a deliberative meeting should be called as soon as possible to deal with the issue;
- the committee should seek to identify all possible sources of the disclosure;
- the committee should decide whether the disclosure is significant enough to justify further inquiry;
- if the committee considers that further inquiry is warranted, the chair should write to all persons who had access to the proceedings, requesting

166 Standing Committee on Social Issues, *Inquiry into Issues Relating to Redfern/Waterloo*, Report No 32, August 2004, p 1.

167 GPSC No 3, *Special Report on possible breaches of privilege (arising from the inquiry into Cabramatta policing)*, June 2001.

168 *Erskine May*, 23rd edn, p 140.

COMMITTEES

an indication as to whether the person was responsible for the disclosure or is able to provide any information that could be of assistance in determining the source of the disclosure;

- the committee should then come to a conclusion as to whether the leak is of sufficient seriousness as to constitute a substantial interference with the work of the committee, the Council committee system or the functions of the House. This occurs whether or not the source of the disclosure is discovered;
- if the committee concludes that the leak is of sufficient seriousness, it should make a special report to the House, describing the circumstances and the investigations it has made. The report should recommend that the matter be referred to the Privileges Committee for inquiry and report;
- following tabling of the special report, the House may refer the matter to the Privileges Committee;
- if the House refers the matter to the Privileges Committee, that committee may undertake such investigations of the matter as it considers appropriate, including taking evidence on oath or affirmation from the members of the committee from which the disclosure arose.¹⁶⁹

In 2005, a report by the Senate Committee of Privileges on unauthorised disclosure of committee proceedings altered the Senate approach to dealing with matters of unauthorised disclosure.¹⁷⁰ The Committee developed a three-tiered measure of the seriousness of an unauthorised disclosure, as follows:

- things that indisputably substantially undermine a committee inquiry (that is, have a fatal or significantly compromising effect on the eventual report) and have the ingredients to constitute a contempt;
- things which are detrimental and might deserve some censure (for example, by a statement by the President);
- things which are regrettable but which, when looked at objectively, do not themselves amount to substantial interference.¹⁷¹

The Senate Committee indicated that, generally, disclosure of committee proceedings would no longer be considered by the Committee as a contempt, unless such unauthorised disclosures 'are of such moment that they make impossible the continuation of an inquiry'.¹⁷²

However, as an exception to unauthorised disclosure, the Committee indicated that it would continue to treat unauthorised disclosure of *in camera* evidence differently from other evidence and committee documents. The rationale for this

169 *Report on Guidelines Concerning Unauthorised Disclosure*, above n 39, p 27.

170 Senate Committee of Privileges, *Parliamentary Privilege – Unauthorised Disclosure of Committee Proceedings*, Report No 122, June 2005, pp 37-51.

171 *Ibid*, pp 30-31.

172 *Ibid*, p 45.

approach was an assumption that any publication of, or reference to, *in camera* evidence will be ‘intrinsically harmful’.¹⁷³ The Committee concluded that:

Anyone who divulges or publishes such *in camera* evidence may expect a finding of contempt, regardless of the circumstances ... Inadvertent unauthorised disclosure or publication of readily-identified *in camera* evidence will be included as in effect a ‘strict liability’ offence, although the inadvertence will be taken into account in the determination of penalty. The Committee of Privileges intends this rule to apply at all stages of parliamentary committee proceedings, up to and including the premature publication of a completed report.¹⁷⁴

Since the publication of the Senate Committee of Privileges report, the only instance of a Council committee initiating an investigation into an unauthorised disclosure occurred during the 2005-2006 Joint Select Committee Inquiry on the Cross-City Tunnel, when details of the confidential draft First Report of the Committee were leaked to the media. However, the prorogation of the Parliament on 19 May 2006¹⁷⁵ meant that the Joint Select Committee ceased to exist before the matter could be considered further.

REPORTS

The culmination of a committee inquiry is a report to the House which addresses the inquiry’s terms of reference, outlines the information provided in evidence and presents the committee’s conclusions and recommendations (SO 226(1)). The exception to this is budget estimates reports, which only provide a summary of the conduct of the inquiry, matters raised during the hearings and any procedural issues of interest, but without presenting conclusions and recommendations.

Reports, including their conclusions and recommendations, should be based primarily on the submissions made to the inquiry, the evidence received and the documents tabled during the public hearings. However, they may also refer to additional secondary material, such as legislation, government reports, court decisions, media releases and so forth. By convention, *in camera* evidence or confidential submissions may be used in a general sense to inform a committee report, but should not be quoted or sourced directly.

It is the chair’s responsibility, on the request of the committee, to prepare the draft report and to present the draft to the committee for consideration and amendment (SO 227(11)). In most cases the committee secretariat prepares the draft report, with instruction from the Chair. However, there is nothing to prevent a committee member other than the chair from submitting an alternative report to the committee for its consideration, although this is extremely rare.

173 *Ibid*, p 48.

174 *Ibid*, p 43.

175 The prorogation was to mark the sesquicentenary of responsible government in New South Wales.

COMMITTEES

In 1865 a select committee was appointed to inquire into the question of a vacancy in the Council through the absence of three members for two successive sessions. The motion for the adoption of the draft report proposed by the Chair, which considered that the seats of the members had become vacant, was negatived on division. Another draft report from a member of the committee, which considered that the members had not failed to attend for two successive sessions within the intent and meaning of the then *Constitution Act 1855*, was adopted on division.¹⁷⁶

Standing order 227(2) states that the chair's draft report is to be considered at a meeting convened for that purpose and may be amended as the committee thinks fit.

At the outset, the committee should agree on a method of considering the report. The report can be considered sequentially, paragraph by paragraph, page by page, chapter by chapter, or even as a whole. Reports are usually considered page by page to allow a member objecting to any portion of the report to debate a paragraph or propose amendments in an orderly fashion.

Any committee member may propose amendments to the chair's draft report. However, the chair cannot move an amendment to their own report, and must seek the cooperation of another member to move an amendment at their suggestion. Any member of a committee may, following a vote on the voices, demand a division on any motion, such as a motion to amend the report, or on the question for adoption of part of a report.

An unusual procedure occurred in 1909 when the chair of the Select Committee on the Homebush Stock Saleyards and Abattoirs presented a draft progress report which was adopted by the committee. The following day the chair again submitted the draft progress report and the committee resolved to reopen the report for further consideration. Consequently, several amendments were agreed to, others negatived on the casting vote of the chair, and the progress report, as amended, was agreed to on the casting vote of the chair.¹⁷⁷

A committee may also include a draft bill in its report to give effect to the recommendations of the committee (SO 226(2)). For the purposes of preparing a draft bill the committee may, with the consent of the relevant minister, make use of the services of the Parliamentary Counsel's Office (SO 226(3)).

The report of a committee frequently includes a foreword by the Chair. There are no standing orders or other procedural rules that stipulate the scope and content of a foreword. However, the convention is for a chair to use the foreword to make general comments about a report, thank inquiry participants and to emphasise issues of particular significance to the chair or the inquiry. The foreword should

176 See 'Reports from the Select Committee on Question of Vacancy', 7 February 1865 and 8 April 1865, *LC Journals* (1865) Vol 12, pp 165, 169, 173-174.

177 See the 'Progress report from the Select Committee on the Homebush Stock Saleyards and Abattoirs', *LC Journals* (1909) Vol 74, pp 256-258.

not be used to criticise the report or the inquiry process, or to raise matters rejected by the committee during consideration of the draft report. In advice on this issue in May 2006, the Clerk observed: 'It is undesirable for a Chair's foreword in committee reports to be used to advance controversial opinions'.¹⁷⁸

Before the adoption of new standing orders in May 2004, it was not necessary for a committee to approve or adopt the chair's foreword. However, following an incident that arose in 2002, the standing orders now include a requirement for the foreword to be approved by the committee before tabling the report in the House, if the committee so resolves (SO 229).¹⁷⁹ This standing order was adopted to prevent a chair using the foreword as an opportunity to raise issues which had not been canvassed by the committee or to make political argument.¹⁸⁰

A number of procedural motions are agreed to at the conclusion of the consideration of a report. These formal motions are intended to ensure that the committee members are in agreement that the report be adopted as the report of the committee, whether or not individual members intend to submit a statement of dissent to the report in whole or in part. The committee also agrees that the transcripts of evidence, submissions, tabled documents and correspondence relating to the inquiry be tabled with the report. The report must be signed by the chair and tabled in the House within 10 calendar days of its adoption (SOs 227(3) and 230(5)).

Unanimity of opinion and dissenting statements

The report of a committee is, as far as practicable, to reflect a unanimity of opinion within a committee (SO 228(1)). As *Erskine May* notes, '[i]t is the opinion of the committee as a committee, not that of individual members, which is required by the House'.¹⁸¹

It is the responsibility of the chair and all members of a committee to seek unanimity of opinion (SO 228(2)). In order to seek unanimity, the chair may wish to canvass the views of committee members regarding the general nature of a report and the recommendations before a draft is prepared. The chair may also wish to submit a report outline to the committee for discussion before proceeding with a draft. This practice can smooth the process of adopting a report.

178 Advice of the Clerk in correspondence to the Hon Jan Burnswoods, 5 May 2006.

179 This amendment to the standing orders was made in response to a chair's foreword that contained argument and criticism of the report agreed to by the majority of the committee. See Clerk's advice, 'Report on Inquiry into the Pecuniary Interest Register; Advice in relation to the tabling of Report 20 of the Standing Committee on Parliamentary Privilege and Ethics on Thursday 31 October 2002', 1 November 2002.

180 For further information on the content of the chair's foreword, see Clerk's advice, above n 179, which addresses an example of a chair's foreword that contained argument and criticism of the report agreed to by the majority of the committee.

181 *Erskine May*, 23rd edn, p 772.

COMMITTEES

Where unanimity is not practicable, a committee's report should be prepared so as to reflect the views of all members of a committee (SO 228(3)). This can be achieved by stating the views of a majority of members and the views of a minority of members on a particular issue. The views of an individual member can also be noted in the relevant part of the report.¹⁸² In some instances conclusions and recommendations can be attributed to the majority or minority, as appropriate.

Alternatively, where unanimity is not practicable, a member may append a brief statement of dissent to a report, provided the member sought to have their opinions included in the report (SO 228(4)).¹⁸³ A statement of dissent must:

- be relevant to the committee's report and the terms of reference of the inquiry;
- not contain any matter which would unreasonably adversely affect or injure a person, or unreasonably invade a person's privacy;
- be signed by the member or members making it;
- be no more than 1000 words in length.¹⁸⁴

Statements of dissent are appended to the committee's report in the order in which they are received by the committee clerk. They may be signed by one member or many members.

Committee staff do not provide assistance in the drafting of a dissenting statement, since their role is to prepare the chair's draft report for consideration by the committee. However, the committee clerk is on occasions required to provide procedural advice on the content of the dissenting statement. In cases where the statement does not conform with the standing orders, the committee clerk will advise the member that the dissent must be redrafted.

Other members of a committee, including the chair, do not have a right to view a dissenting statement by a member before the tabling of the report, although sometimes a member may request that their statement be circulated to other members.

Standing order 228(4) requires that a statement of dissent be signed by the member or members making it. A signed copy is essential as it is included with the tabled report. It also ensures the provenance of the statement.

Tabling of committee reports

A report of a committee, along with accompanying documents, must be tabled in the House within 10 calendar days of the report being adopted by the committee (SO 230).

182 See GPSC 5, *A sustainable water supply for Sydney*, Report No 25, June 2006.

183 The practice of dissenting statements commenced with the second report of the Standing Committee on Social Issues entitled *Medically Acquired HIV*, dated October 1991. Provisions covering dissenting statements were incorporated in the new standing orders in 2004.

184 This standing order was adopted in 2004. Before then, there was no provision in the standing orders for statements of dissent.

When the House is not sitting, the report of a committee is tabled with the Clerk under standing order 231. A report tabled with the Clerk is for all purposes deemed to have been laid before the House and to be a document published by order or under the authority of the House. A report tabled with the Clerk is reported to the House on the next sitting day and recorded in the Minutes of Proceedings of the House.

In some instances, on the tabling of a report in the House, the House has recommitted the report or a recommendation in the report for further consideration. In November 1998, the House recommitted the report of the Standing Committee on Parliamentary Privilege and Ethics entitled *Report on Person Referred to in the Legislative Council (Professor Robert Walker)*¹⁸⁵ for further consideration. The Committee was asked to reconsider in particular whether the response by Professor Walker met with the guidelines agreed to by the House in relation to a citizen's right of reply, and the appropriateness of the existing guidelines in relation to procedures agreed to by the House involving a citizen's right of reply.¹⁸⁶

In September 2006, the House recommitted recommendation 33 of the Joint Standing Committee on Electoral Matters report entitled *Inquiry into the administration of the 2003 election and related matters*. The recommendation as it stood proposed to remove the entrenchment provision in the *Constitution Act 1902* which currently prevents the government of the day altering by way of statute the system of counting votes in the Council without approval by the people at a referendum.¹⁸⁷

Another example occurred in 1891 when the report of a Select Committee on the Land Company of Australasia Railway Bill, a private bill, was referred back to the Select Committee.¹⁸⁸

Debate on committee reports upon tabling is discussed further in Chapter 8 (Conduct of Proceedings).

Government response to committee reports

The practice of a government response being required to a committee report commenced with the appointment of the first two standing committees in 1988.¹⁸⁹ The resolution of appointment required the Clerk, on the tabling of a report from a standing committee which recommended that action be taken by the government, to refer the report to the Leader of the Government for a response within six months as to what action, if any, the government proposes to take in relation to the recommendations in the report. Subsequent to that there are also examples of

185 Standing Committee on Parliamentary Privilege and Ethics, *Report on Person Referred to in the Legislative Council (Professor Robert Walker)*, Report No 8, October 1998.

186 *LC Minutes* (12/11/1998) 861-862.

187 *LC Minutes* (27/9/2006) 231-232.

188 *LC Minutes* (3/9/1891) 65.

189 *LC Minutes* (9/6/1988) 182-186.

where the House has referred the report of a select committee¹⁹⁰ and the report of a GPSC¹⁹¹ to the Leader of the Government for a response in a similar manner.

Standing order 233 now requires the Clerk to refer all committee reports which recommend that action be taken by the government to the Leader of the Government for a government response. The government must, within six months of a report being tabled, report to the House what action, if any, it proposes to take in relation to each recommendation of the committee. If the House is not sitting when a minister seeks to report to the House, a response may be presented to the Clerk.

The President is required to report to the House if a government response has not been received by the six months' deadline (SO 233(4)). The record of governments to date in providing responses within the required time frame is generally very good. However, on several occasions, ministers have written to the Clerk advising that a response will be provided, but outside the deadline.¹⁹²

THE EFFECT OF PROROGATION ON COMMITTEES

The effect of prorogation is to terminate all business pending before the House until Parliament is summoned again for the next session. However, the consequences for committees are not straightforward.

Sessional committees cease to exist on prorogation and must be re-appointed at the commencement of the new session.

Statutory committees have power under the relevant Act constituting each committee to 'sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament'.¹⁹³

Committees appointed for the life of the Parliament, including the Procedure Committee (SO 205), standing committees (SO 206) or select committees (SO 207), have power to sit during the life of the Parliament. As such these committees have authority under the standing orders to continue to meet and dispatch business after any prorogation of the Council and up until the dissolution of the Assembly. Section 22F of the *Constitution Act 1902* provides that the Council is not competent to dispatch any business during the period commencing on the day of the termination, either by dissolution or expiry, of the Assembly and ending on the day fixed for the return of the writ for the periodic Council election held after that termination. Consequently, no committees may meet and dispatch business once the Assembly has been dissolved.

190 LC Minutes (6/9/2000) 634 (*Report of Select Committee on Increase in Prisoner Population*).

191 LC Minutes (4/6/2002) 174 (*Report of GPSC 5 on Sydney Water's Biosolids Strategy*).

192 See, for example, LC Minutes (17/3/2004) 619, (7/6/2005) 1420, (7/3/2006) 1875.

193 See the *Health Care Complaints Act 1993*, s 70(8); the *Independent Commission Against Corruption Act 1988*, s 68(8); the *Ombudsman Act 1974*, s 31F(8); and the *Legislation Review Act 1987*, s 8(8). Similar provisions apply to the Public Accounts Committee and Standing Ethics Committee of the Legislative Assembly.

The Crown Solicitor takes a different view of the authority of the House to meet and transact business following prorogation. Following the prorogation of the Parliament in December 1994, the Crown Solicitor provided written advice to the Clerk of the Legislative Assembly stating that the former Assembly standing order 374A (and the equivalent Council standing order 257C), to the extent to which it purported to authorise the transaction of business by standing committees following prorogation, was invalid.¹⁹⁴ The Premier's Department immediately issued a memorandum indicating that any transfer of documents or submissions to standing committees should cease immediately.¹⁹⁵ The President wrote to the chairs of the Council's standing committees advising that in view of the Crown Solicitor's advice it was not competent for the committees to hold deliberative meetings, conduct hearings or table reports, nor was it competent for the chairs to carry out any functions as committee chair.

The Crown Solicitor's advice was based on an extremely restrictive view of the powers of the Council (and Assembly). It is possible that another counsel may provide different advice on this matter and that, should the matter ever come before the courts, there may be a different outcome to that suggested by the Crown Solicitor. There appears to be no restriction on the Council passing a resolution to authorise a committee to sit during prorogation other than in circumstances governed by section 22F, discussed above.

In the absence of contrary advice at this time, on recent prorogations, the Clerk has issued written advice to members of the Council drawing attention to the content and effect of the Crown Solicitor's advice of December 1994. The advice of the Clerk has stated that, assuming the Crown Solicitor's advice is correct, the effect of prorogation on standing committees includes the following:

- the standing committees continue in existence after prorogation;
- current references remain on hold and are held over until the commencement of the next session of Parliament;
- the standing committees cannot meet or transact any business until the commencement of the next session;
- submissions, evidence and other material before a committee continue to be valid and open to be used by a committee after the commencement of the next session;
- questions on notice submitted to a committee, or forwarded to a witness (or minister in anticipation of a budget estimates hearing) remain valid. However, further questions on notice cannot be accepted or transmitted during prorogation, and it is not possible for the committee to enforce any

194 The advice distinguished those committees established under statute which were specifically provided with statutory authority to meet and transact business after prorogation.

195 Premier's Department, 'Status of Standing Committees after prorogation of the Parliament', Circular 94-29, 15 December 1994.

COMMITTEES

timeframe for the answering of such questions on notice until the commencement of the next session.¹⁹⁶

There have been instances in the past where legislation has been passed specifically to enable committees of both Houses, other than statutory committees, to continue to meet and transact business after prorogation. The most recent legislation was the *Parliamentary Committees Enabling Act 1996* and the *Parliamentary Committees Enabling Amendment Act 1997*.

Perhaps one reason why the question of the powers of the Council and its committees to meet between prorogation and the commencement of the next session has not been tested is the fact that recent prorogations have been timed so as to provide only a brief interval between the termination of one session and the commencement of a new session. For example, both Houses were prorogued on 3 February 1999, before the expiry of the Assembly (the 51st Parliament) on 5 March 1999. This contrasted with the prorogation of both Houses on 7 December 1994, before the expiry of the Assembly (the 50th Parliament) on 3 March 1995. Recent prorogations before the official opening of a new session of Parliament have also been timed so as to provide a brief period before the commencement of the new session.¹⁹⁷ While prorogations take place either close to the termination of the Assembly (and general election) or the commencement of the next session of Parliament, the question of the powers of the Council or its committees to meet and transact business during these periods is likely to remain dormant.

In the Senate, the question of whether or not it is competent for the Senate and its committees to meet after prorogation has been a matter of some controversy since the 1980s.¹⁹⁸ The matter has been the subject of conflicting legal advice, and the House of Representatives and Senate have continued to take different views on the matter. To some extent, the view taken by the Senate is based on the fact that the Senate, unlike the House of Representatives, continues in existence after the end of each Parliament, except in the case of a double dissolution. In recent years Senate committees have continued to meet and take evidence after the prorogation of the Parliament and the dissolution of the House of Representatives.

STAFF AND RESOURCES

Standing order 234(1) requires that a committee be provided with the resources necessary to carry out their functions. In particular, standing order 234(4) requires

196 Memorandum to members 11 August 1999, Correspondence to Mr Dyer, 9 August 1999.

197 For example, both Houses were prorogued on 11 August 1999, and the official opening of the second session of the 52nd Parliament took place on 7 September 1999. Both Houses were prorogued on 20 February 2002 and the official opening of the third session of the 52nd Parliament took place on 26 February 2002. Both Houses were prorogued on 19 May 2006 for the sesquicentenary celebration of responsible government in New South Wales and the official opening of the second session of the 53rd Parliament took place on 22 May 2006, which was 150 years to the day that the first bicameral Parliament met on 22 May 1856.

198 *Odgers*, 11th edn, pp 498-505.

the Clerk to appoint an officer of the Council to act as clerk of a committee. Other staff may also be appointed to a committee as required.

The role of committee staff is to facilitate the effective operation of a committee. Generally, this involves the following functions:

- providing procedural advice to the chair and other committee members;
- managing inquiries to be undertaken by the committee;
- preparing draft reports;
- organising meetings of the committee and preparing business papers;
- researching projects and providing material required by the committee;
- maintaining committee records and ensuring their security;
- attending to committee correspondence and public inquiries.

In addition to providing procedural advice to the chair during hearings and in deliberative meetings, committee staff may also respond to requests for procedural advice from other committee members. For example, a member may seek procedural advice on certain courses of action in a committee meeting.

Administrative tasks often performed include contacting potential witnesses, advertising inquiries, distributing reports, answering queries about aspects of a report or an inquiry and distributing the Government's response to a report.

Standing order 234(2) states that a committee may, with the consent of the appropriate minister, make use of the services of any staff or facilities of a government department, administrative office or public body.

With the approval of the President, a committee may also engage consultants to provide high-level professional expertise. In the past consultants have been engaged to provide actuarial advice, to write a background chapter on complex legal matters and to conduct consultation on behalf of the committee with groups with specific needs.¹⁹⁹

199 See, for example, the Social Issues Committee, *Group Homes Proposal*, above n 165, p 4; and Appendix 4. See also the Social Issues Committee, *Enhancing Aboriginal Political Representation*, above n 165, Appendices 6 and 7.