No. 52

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE COUNCIL

STANDING COMMITTEE ON
PARLIAMENTARY PRIVILEGE AND ETHICS

REPORT

ON

INQUIRY INTO THE ATTENDANCE OF WITNESSES BEFORE PARLIAMENTARY COMMITTEES

Ordered to be printed 30 May 1996

REPORT NO. 2

MAY 1996

Foreword by the Chair

This inquiry arose from confusion concerning the procedures to be followed when calling public servants and statutory officers as witnesses before Committees. This confusion became manifest in November 1995 when a motion was moved adjudging the Attorney General guilty of contempt for his actions concerning the Director of Public Prosecutions' attendance before a Standing Committee of the Legislative Council. In view of the apparently conflicting procedures between Premier's Department guidelines and Parliamentary Committee guidelines issued to witnesses, the House referred the matter to this Committee for clarification rather than continuing with the motion of contempt.

The Committee considered various published guidelines in this matter. These include the Premiers' Memoranda No. 84/2026 of 19 November 1984 and No. 91/36 of 9 December 1991, Premier's Department Guidelines for Officers Who are Witnesses Before Parliamentary Committees which are reproduced in the Legislative Council Manual on Practices and Procedures for Committee Members, and Commonwealth Guidelines to Officers and Senate practice. In addition, the Committee considered the events leading up to this Inquiry, as well as the position and responsibilities of persons such as the Director of Public Prosecutions and other officers of departments and government instrumentalities.

During the course of the Inquiry, three issues emerged as central to the matter referred to the Committee: the procedure for calling public servants as witnesses either directly, or through the relevant Minister; the nature of evidence provided by public servants; and whether there is a difference between public servants as defined by the Public Sector Management Act and statutory office holders such as the Director of Public Prosecutions.

The Committee concluded that, although a Government may not wish public servants to answer questions that require the public servant to express an opinion on Government policy, there is no legal basis for restricting any answer the public servant might give. In fact, the public servant could be found guilty of contempt for failing to answer a lawful question posed by the Committee. This does not however, prevent Ministers from expecting their departmental officials to discuss their submission and answers to potential questions, prior to Committee hearings. Such discussions though should not involve intimidation or any coercive measures, since this would constitute a contempt of the Parliament.

The Report makes five recommendations. Firstly, it recommends that Committees directly summon public servants to appear as witnesses, but suggests that, as a matter of courtesy, the relevant Minister should be notified. Secondly, it recommends that public servants should not be required to answer questions

which seek their opinion on the merits of Government policy. Thirdly, the Committee recommends that Ministers and senior departmental officers be advised that any attempt to intimidate or coerce public sector officers who are called to give evidence before Parliamentary Committees in relation to their evidence would constitute a contempt of Parliament. Fourthly, in relation to statutory office holders, the Committee concluded that it was not a requirement that the relevant Minister be notified of any request for the officer to attend before a Committee, but that such notification should be left to the discretion of the Committee. Finally, the Report recommends that Statutory Officers, like their public service counterparts, should not be required to answer questions seeking their opinions on the merits of Government policy.

As Committee Chair, I wish to acknowledge the co-operation and contributions of the Members of the Legislative Council who served on the Committee.

The Committee also wishes to thank the Clerk to the Committee and Deputy Clerk of the Legislative Council, Ms Lynn Lovelock, the Senior Project Officer, Ms Velia Mignacca, the Project Officer, Ms Michelle Pilfrey, and the Secretary to the Office of the Clerk, Ms Phillipa Gately.

The Hon Dr Meredith Burgmann MLC
Chair
Standing Committee on Parliamentary Privilege and Ethics

Background to the Committee

The Committee was first established as the Standing Committee Upon Parliamentary Privilege by resolution of the Legislative Council on 9 November 1988. It was re-established under the 50th Parliament on 16 October 1991. On 24 May 1995 at the commencement of the 51st Parliament the Committee was reconstituted as the Standing Committee on Parliamentary Privilege and Ethics.

The Committee has two main roles:

(1) to consider and report on any matters relating to parliamentary privilege which may be referred to it by the House or the President; and

(2) to carry out certain functions relating to ethical standards for Members of the Legislative Council under Part 7A of the *Independent Commission Against Corruption Act 1988 (NSW)*.

Terms of Reference

The Terms of Reference for the Inquiry are contained in the following Resolution of the Legislative Council, passed on Tuesday 14 November 1995:

1. That this House refers:

   (a) the position and responsibilities of persons such as the Director of Public Prosecutions and other officers of departments or government instrumentalities who have been called as witnesses before Parliamentary Select and Standing Committees.

   (b) the Premier's Memorandum No. 84/2026 of 19 November 1984 and Memorandum No. 91/36 of 9 December 1991; and

   (c) the guidelines for officers who are witnesses before Parliamentary Committees reproduced in the Legislative Council Manual on Practices and Procedures for Committee Members

to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report to this house by 1 April 1996.

2. If the House is not sitting when the Committee wishes to report to the House, the Committee is to present copies of its report to the Clerk of the House.

A report presented to the Clerk is:

   (a) on presentation, and for all purposes, deemed to have been laid before the House;

   (b) to be printed on authority of the Clerk;

   (c) for all purposes, deemed to be a document published by order or under the authority of the House; and

   (d) to be recorded in the Minutes of the Proceedings of the House–put and passed.

(Minutes No. 23, Tuesday 14 November 1995, Entry no. 11)

Committee Membership

The Hon Dr Meredith Burgmann, MLC **Chair**	Australian Labor Party
The Hon Jenny Gardiner, MLC	National Party
The Hon Charlie Lynn, MLC	Liberal Party
The Hon John Johnson, MLC	Australian Labor Party
The Hon Richard Jones, MLC	
The Hon Andrew Manson, MLC	Australian Labor Party
The Hon Bryan Vaughan, MLC	Australian Labor Party

SECRETARIAT

Ms Lynn Lovelock	Clerk to the Committee
Ms Velia Mignacca	Senior Project Officer
Ms Michelle Pilfrey	Project Officer (until February 1996)
Ms Phillipa Gately	Committee Officer

Table of Contents

Appendices:

Chapter One

1 OUTLINE OF THE INQUIRY

1.1 BACKGROUND TO THE INQUIRY

1.1.1 On 14 November 1995, the Leader of the Opposition in the Legislative Council moved a motion to adjudge the Attorney-General guilty of contempt for his reported public statements which attempted to deter the Director of Public Prosecutions (DPP) from appearing before the Standing Committee on Law and Justice to give evidence in relation to its inquiry into the Crimes Amendment (Mandatory Life Sentences) Bill.

1.1.2 The Bill had been referred by the House to the Standing Committee on Law and Justice on 11 October 1995. The Committee identified the DPP, Mr Nicholas Cowdery QC, as a witness. He was invited directly, in a letter dated 26 October 1995, to give evidence. He was summoned and appeared as a witness on 6 November 1995. In his prepared statement to the Committee (Appendix 5), Mr Cowdery outlined the sequence of events between the invitation and his appearance.

1.1.3 In summary of his statement:

- On 27 September 1995 Mr Cowdery was asked, by the Attorney General, for his comments on the Bill. He responded on 5 October stating his opposition to the Bill.

- On 6 October, Mr Cowdery was asked for his views on the Bill by a journalist from the Sydney Morning Herald and he responded along the lines of his comments to the Attorney General. These comments appeared in the Herald on 9 October.

- Mr Cowdery was criticised, by the Premier and others, for commenting on government policy and compromising the independence of his office. The Premier did not contact Mr Cowdery directly.

- After receiving the invitation from the Committee, Mr Cowdery requested the advice of the Attorney General on the procedure of having been invited directly and the nature of any relevant evidence he could give.

- The Attorney General, in his response, agreed with the Premier's stated view that it would be inappropriate for the DPP to give evidence.

- The DPP declined the Committee's invitation by letter, expressing his view that he was constrained to do so by the views of the Attorney General.

- The DPP was issued with a summons on 3 November to appear before the Committee.

1.1.4 In moving his motion for contempt, the Leader of the Opposition stated that:

> An attempt to discourage a witness from appearing before a parliamentary inquiry constitutes intimidation of a witness and that constitutes contempt of the House. [1]

1.1.5 After much debate, the Hon. the Reverend FJ Nile moved to amend the motion. In speaking to his motion, the Hon. Member stated:

> Documents before the House lay down procedures to be followed by public servants. They need to be more clearly understood by the chairmen and members of committees. [2]

1.1.6 After stating his amendments, he continued:

> The effect of the amendment is that the Standing Committee on Parliamentary Privilege and Ethics of this House will take into account the various guidelines and memoranda and lay down a policy on calling witnesses who are in the category of officers of government departments or instrumentalities. The situation will then be clear for the future operations of the Parliament's important standing committees. [3]

The motion, as amended, was passed by the House.

1.2 CONDUCT OF INQUIRY

1.2.1 During the course of the Inquiry the Committee considered the following:

- the background to the reference;

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[1] Parliamentary Debates, 14 November 1995, p. 3

[2] *Ibid.*, p. 30

[3] *Ibid.*, p. 31

- the power of Parliamentary Committees to call witnesses;
- the Premiers' Memoranda No.84/2026 of 19 November 1984 (Appendix 1) and No.91/36 of 9 December 1991 (Appendix 2);
- Premier's Department Guidelines for Officers Who are Witnesses Before Parliamentary Committees which are reproduced in the Legislative Council Manual on Practices and Procedures for Committee Members (Appendix 3);
- Commonwealth Guidelines to Officers and Senate practice (Appendix 4); and
- the position and responsibilities of the persons such as the Director of Public Prosecutions and other officers of departments and government instrumentalities.

1.2.2 Essentially three issues were examined:

(a) the procedure for calling public servants as witnesses either directly, or through the relevant Minister;

(b) the nature of evidence provided by public servants; and

(c) whether there is a difference between public servants as defined by the Public Sector Management Act and statutory office holders such as the Director of Public Prosecutions.

1.2.3 Under the Resolution which established this Inquiry, the Committee was to report to the House by 1 April 1996. However, at 1 April 1996 the Legislative Council stood prorogued until 16 April 1996. A new reporting date of 31 May 1996 was set by Resolution of the House on 17 April 1996.

The Minutes of the Proceedings are reproduced at Appendix 10.

Chapter Two

2 PARLIAMENTARY POWERS TO CALL WITNESSES

Before considering the documents referred to in the reference, it was necessary to examine the basis of Parliamentary Committees' power to call witnesses.

2.1 *PARLIAMENTARY EVIDENCE ACT 1901*

Section 4(2) of the *Parliamentary Evidence Act 1901* provides that any person, other than a Member of Parliament, may be summoned to attend and give evidence before a Committee. Although it is not mandatory for witnesses to be summoned under the Act, it is necessary if a witness is to receive protection for defamation under section 12 of the Parliamentary Evidence Act. Most Committees provide the witness with his or her summons at the start of the hearing.

2.2 STANDING COMMITTEES

Under section 17 of the resolution of the Legislative Council establishing the Standing Committees[4], a Standing Committee or any sub-committee has the power to send for and examine persons, papers, records and things.

Both the Social Issues Committee and the State Development Committee have produced a leaflet "Giving Evidence" which is sent to all witnesses. The leaflet assumes that the witness has been invited directly by the Committee to appear. The leaflet states that:

> Departmental officers are not required to answer questions which seek their opinion on the merits of government policy. However, they may be asked to describe past and present policy, the effects of changes in policy and to discuss matters which public service advisers take into account when advising on policy.

[4] 24 May 1995, 1st Session, Minutes No. 2, pp. 36-41

2.3 SELECT COMMITTEES

Select Committees will only have the power to call witnesses if the resolution establishing the Select Committee contains such a power.

2.4 VIEW OF ATTORNEY GENERAL

The power of the Committee to call the Director of Public Prosecutions, or any other witness, was never challenged by the Attorney General. The Attorney General, in his reply to the DPP's request for advice, was concerned about the expression of the DPP's opinion about the Bill. He stated:

> As you know, the Premier has indicated that it would be inappropriate for you to give such evidence. I agree. [5]

[5] Statement by NR Cowdery QC to Standing Committee on Law and Justice, 6 November 1995, p. 2

Chapter Three

3 POSITION AND RESPONSIBILITIES OF WITNESSES

Paragraph 1(a) of the reference required the Committee to examine:

> the position and responsibilities of persons such as the Director of Public Prosecutions and other officers of departments or government instrumentalities who have been called as witnesses before Parliamentary Select and Standing Committees.

3.1 THE DIRECTOR OF PUBLIC PROSECUTIONS

3.1.1 The Office of Director of Public Prosecutions was created by the *Director of Public Prosecutions Act 1986 No.207.* Part 2, Section 4 of the Act provides:

> 4(1) The Governor may appoint a Director of Public Prosecutions.
>
> (2) The Director shall have and may exercise the functions conferred or imposed on the Director by or under this or any other Act.
>
> (3) The Director is responsible to the Attorney General for the due exercise of the Director's functions, but nothing in this subsection affects or derogates from the authority of the Director in respect of the preparation, institution and conduct of any proceedings.

3.1.2 The DPP also has the power, under Part 3 20 (1)(b) to do anything incidental or conducive to the exercise of any functions of the Director. Such a catch-all power may be seen to give the DPP powers to speak publicly on matters that affect the functioning of his office, such as proposals to change legislation.

3.2 PROCEDURE

3.2.1 The DPP made several references to the fact that he was invited directly to appear as a witness, rather than being invited through his Minister as is contemplated by the Premiers' Memoranda which he had consulted. He noted that he sought advice from the Attorney General, "to whom I am responsible for the due exercise of my functions", on the procedural

issue and the nature of any evidence to be given. He did concede that one "might view the Office of the DPP as a 'State instrumentality'; although its independence is constantly affirmed." He then indicated that it appeared that the Premier may well regard it as a "State instrumentality" as the Cabinet Office faxed him, on the morning of his hearing, copies of the memoranda.[6]

3.3 THE NATURE OF THE EVIDENCE

3.3.1 In his newspaper article of 10 November, the DPP commented that:

> The Director of Public Prosecutions is not a public servant, but an independent officer appointed by statute...The Office of the DPP is not a government department, even though it is funded by the Government.
>
> Independence for the DPP is the most important quality given by the act...
>
> Being independent of political interference does not mean that I cannot take an interest and manifest a concern in the law-making process, especially where it touches upon my functions, duties and responsibilities....I must always act in what is perceived to be the general public interest when making prosecuting decisions. I may also serve the public interest in a broader way by providing information and advice, based on practical experience, when government is contemplating making laws in the area of criminal justice. It matters not whether that information and advice advances or militates against the course set by government acting in accordance with an assumed mandate or otherwise."[7] (Appendix 6)

3.3.2 This mirrors the comments he made in his prepared statement to the Law and Justice Committee that:

> I think it appropriate - indeed desirable - that the Director of Public Prosecutions contribute publicly (or confidentially if

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[6] Statement by NR Cowdery QC to Standing Committee on Law and Justice, 6 November 1995, p. 2

[7] "DPP must be independent of politics" Sydney Morning Herald, 10 November 1995

> desired) to the development of the criminal law and comment where necessary on matters affecting the legal practice in the criminal justice system, even if such matters might be said by some to contain elements of "policy. [8]

3.3.3 He reiterated his view that the Office of the Director of Public Prosecutions is independent of the executive government in a way that departments and most instrumentalities are not. As he is not a public servant under the Public Sector Management Act he is not strictly a "departmental officer". He noted:

> That independence has been constantly reinforced by the Premier in recent times. [9]

3.3.4 Mr Cowdery also stated that he had read the Premiers' Memoranda and the leaflet "Giving Evidence" provided by the Committee which stated that:

> Departmental officers are not required to answer questions which seek their opinion on the merits of government policy. However, they may be asked to describe past and present policy, the effects of changes in policy and to discuss matters which public service advisers take into account when advising on policy.

3.3.5 He was of the view that the statement in the leaflet:

> appears to be in broader terms than the memoranda. With those considerations in mind and from the position of independence I enjoy, I have prepared this statement to comply with my obligations to the Committee. In doing so I accept the notion that the advocacy of Government policy is a Ministerial responsibility and I have sought to avoid doing that. My evidence is confined to the Bill and practical considerations arising from it. [10]

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[8] Statement by NR Cowdery QC to Standing Committee on Law and Justice, 6 November 1995, p. 3

[9] *Ibid.*, p.4

[10] *Ibid.*

3.4 OTHER OFFICERS OF DEPARTMENTS AND GOVERNMENT INSTRUMENTALITIES

3.4.1 Unlike the Director of Public Prosecutions, most heads of departments and government instrumentalities are employed under the *Public Sector Management Act 1988.* They are therefore, public servants. Division 2 of the Act outlines the appointment of Departmental Heads and Division 3 outlines the appointment of senior executive officers. Both department heads and senior executives are appointed by the Governor.

3.4.2 Department Heads are, according to section 11 of the Act:

(1) responsible to the appropriate Minister for the general conduct and the effective, efficient and economical management of the functions and activities of the Department.

(2) For the purpose of exercising the responsibility imposed by subsection (1), a Department Head may take such action as the Department Head considers appropriate in the circumstances, but may not take action that is inconsistent with the functions of the Minister or the Industrial Authority specified in this Act.

Chapter Four

4 CURRENT PRACTICE AND GUIDELINES

Paragraph 1(b) of the terms of reference required the Committee to consider the Premier's Memoranda 84/2026 of 19 November 1984 and 91/36 of 9 December 1991, and the Guidelines for witnesses reproduced in the Legislative Council Manual on Practices and Procedures for Committee Members. The Committee considered these as well as Commonwealth Guidelines and Senate Practice.

4.1 MEMORANDUM 84/2026, 19 NOVEMBER 1984

This memorandum was issued by Premier Neville Wran to all Ministers, along with a set of "Guidelines for Officers Who are Witnesses Before Parliamentary Committees."

The memo stated that:

> From time to time state government departments and instrumentalities are asked to provide evidence or information to committees of either the State or Commonwealth Parliament.
>
> A committee of State Parliament would normally approach the Minister concerned or, if the matter was related to a broader issue of government, would approach the Premier in the first instance...
>
> ...Subject to the views of Ministers in particular cases, the Government would expect to provide information sought by a committee and to agree to officers attending before the committee for the purpose of giving information or assisting the committee in regard to administrative arrangements relating to existing policies.
>
> It is preferred that the committee be provided with a written statement on which any oral evidence should be based.
>
> It must be made clear to the committee that because the advocacy of Government policy is a Ministerial responsibility, officers should not be asked to canvass, interpret or express opinions on policy issues. The evidence of officers should be

limited to factual information related to their duties or responsibilities.

4.2 MEMORANDUM 91/36, 9 DECEMBER 1991

This memo was issued by Premier Nick Greiner, again to all Ministers, and reiterated that the rules and procedures to be followed are those issued by Premier Wran in the abovementioned memo.

The question arose as to whether it is more appropriate for the invitation to a departmental officer to appear as a witness to be sent through a Minister's Office, rather than directly to the witness(es) in question. While this is the situation envisaged by the Premiers' Memoranda, there is no requirement under the Parliamentary Evidence Act, or under the Resolutions establishing the Committees, to do so. It may be considered a courtesy to advise the Minister, particularly where the witness is a public servant. It was not as clear whether this should occur in situations, such as the DPP, where the witness is an independent office holder.

4.3 PREMIER'S DEPARTMENT GUIDELINES FOR OFFICERS WHO ARE WITNESSES BEFORE PARLIAMENTARY COMMITTEES

4.3.1 Paragraph 1(c) of the reference required the Committee to consider the Premier's Department guidelines reproduced in the *Legislative Council Manual on Practices and Procedures for Committee Members* issued in August 1994. These guidelines were developed by the Premier's Office and accompanied both of the Premiers' Memoranda. The guidelines are directed to officers of departments and Government instrumentalities. There are 14 in all, 9 dealing with State Parliamentary Committees and 5 with Commonwealth Parliamentary Committees.

Procedure

4.3.2 Guideline 1 states that requests for an officer to attend before a committee or to provide material to it are to be made through the relevant Minister.

4.3.3 Guideline 2 states that the Committee should, normally, be supplied with a written submission on which any oral evidence is based. All submissions should be cleared within the department and with the Minister, if appropriate.

Nature of Evidence

4.3.4 Guideline 3 states that a submission should not take policy positions. It should not identify considerations which have led to a Government decision unless those considerations have already been made public or the release of the information is authorised by the Minister.

4.3.5 A submission may describe Government policies and the administrative arrangements and procedures involved in implementing them. It may, with the concurrence of the Minister, set out policy options and list their advantages and disadvantages. Other matters of fact or background information may be included.

4.3.6 Guideline 4 states that the role of an officer appearing as a witness before a Committee is to speak to any submission provided and to assist the understanding of the issues involved.

4.3.7 Guideline 5 identifies that officers called before committees should have an appropriate level of responsibility in the work area. It is noted that, if necessary, the Minister should be consulted as to the attitude to be adopted in specific matters.

4.3.8 Guideline 6 advises that if an officer giving evidence believes that circumstances have arisen to justify a claim of public interest immunity, the officer should suggest a postponement to consult with the Minister.

4.3.9 Guideline 7 advises officers to take care when giving evidence not to intrude into the responsibilities of other departments or instrumentalities.

4.3.10 Guideline 8 advises that the issue of documents or evidence to be given in camera should be raised within the department or with the Minister in order to determine an official attitude prior to the hearing.

4.3.11 Guideline 9 advises officers to make themselves aware of the law and practice of parliamentary privilege.

4.3.12 The power of Parliamentary Committees to summon witnesses was canvassed in correspondence between the Chairman of the STAYSAFE Committee and the Speaker of the Legislative Assembly in 1992. (Appendices 8 and 9) In his letter to the Speaker, the Chairman noted

the view expressed by some Ministers that Parliamentary Committees *were required* to summon departmental officers through the Minister's Office. The Chairman indicated that he:

> ...did not believe that such a requirement is the intent of the Premier's Memorandum 91/36...In fact, I believe that such a requirement challenges the rights and role of ...Committees...The Premier's Memorandum is addressed to Ministers... and sets out the guidelines for Departmental officers when approached by Parliamentary Committees. These guidelines, in essence, require Departmental officers to inform their Minister that they have received an inquiry from a Parliamentary Committee...I am particularly concerned that point A.1 of the guidelines (that requests for departmental officers to appear as witnesses be made through the Minister) to Departmental officers is wrong. [11]

4.3.13 He noted that the Parliamentary Evidence Act does not prescribe the method by which any witness should be contacted, other than through the issuing of a summons. The Chairman also expressed concern about the Memorandum suggesting that Departmental Officers should not be asked to canvass or interpret or express opinions on policy issues. He stated:

> The Parliamentary Evidence Act, 1901 s11 permits a Parliamentary Committee to compel a witness to answer questions which require the witness to express an opinion. Thus it is my belief that Departmental officers appearing before the Committee can be asked questions about policy matters. [12]

4.3.14 In his reply, the Speaker referred to a 1990 advice from the Crown Solicitor that the power to summon witnesses was unquestionable. However:

> ...the inquiry process is extremely formal and often an inefficient means of obtaining or confirming non-controversial or semi-public factual information. Thus modern committee practice has been to foster, so far as may be possible, cooperation and courteous relations between Parliament and

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[11] Letter of 9 April 1992 from Chris Downy MP, Chairman of the Standing Committee on Road Safety to the Hon, KR Rozzoli MP, Speaker of the Legislative Assembly

[12] *Ibid.*

> the Executive. In this way the work of committees, which can assist Departments in formation and review of policy implementation, can be enhanced.
>
> In practical terms Chairmen may consider, as a matter of course, routinely advising Ministers of the announcement of new topics of inquiry which touch on their portfolios, and foreshadowing that the Committee will be seeking submissions or input from officers...It is of course up to the committee to determine how it wishes to approach a particular inquiry. [13]

4.3.15 With regard to the question of whether departmental officers can be asked questions requiring an expression of an opinion, the Speaker stated that the Crown Solicitor had advised that:

> Pursuant to s11 (1) of the Parliamentary Evidence Act a witness appearing before the committee can be compelled to answer a lawful question which requires that witness to express an opinion. In my view the question, to be lawful, must be one which is relevant to the inquiry being conducted.[14]

4.3.16 The Committee concluded that, although a Government may not wish public servants to answer questions that require the public servant to express an opinion on Government policy, there is no legal basis for restricting any answer the public servant might give. In fact, the public servant could be found guilty of contempt for failing to answer a lawful question posed by the Committee. This does not however, prevent Ministers from expecting their departmental officials to discuss their submission and answers to potential questions, prior to Committee hearings. Such discussions though should not involve intimidation or any coercive measures, since this would constitute a contempt of the Parliament.

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[13] Letter of 27 May 1992 from the Hon, KR Rozzoli MP, Speaker of the Legislative Assembly to Chris Downy MP, Chairman of the Standing Committee on Road Safety

[14] *Ibid.*

4.4 THE COMMONWEALTH GUIDELINES AND SENATE PRACTICE

4.4.1 The Commonwealth Guidelines for Official Witnesses were developed by the Government in 1984 and revised in 1989.[15] For the most part, the NSW State Guidelines appear to have been modelled on these guidelines, although with much less detail. The principal Commonwealth Guidelines are summarised below:

Procedure

4.4.2 2.7 *Generally* requests for an official to attend a committee hearing in an official capacity, or to provide material to it, are made through the relevant Minister.

4.4.3 2.10 As appropriate, witnesses should consult the Minister before a hearing and, if required, the Minister representing in the other House.

4.4.4 2.12 In the normal course, departments should provide a written statement on which subsequent oral evidence will be based.

4.4.5 2.14 Submissions should be cleared to appropriate levels within the department, and normally with the Minister, in accordance with arrangements approved by the Minister(s) concerned.

Nature of Evidence

4.4.6 2.15 Such submissions (a) should not advocate, defend or canvass the merits of government policies.

4.4.7 2.16 In relation to the matters in 2.15(a), the proper course is for Ministers to make written submissions, to appear personally, to arrange for Ministers representing them to appear personally, or to invite committees to submit questions on policy issues in writing.

4.4.8 2.25 The role of an official witness is not to comment on policy but to speak to any statement provided to the committee and to provide factual and background material to assist understanding of the issues involved. The detailed rules applying to written submissions also apply to oral evidence. Note, however, that such restrictions do not necessarily apply to statutory office holders (see para 2.49).

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[15] Senate Debates, 30 November 1989, pp. 3693-3702

4.4.9 2.26 The Senate resolutions provide that "An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister." (r1.1.6) The resolutions also prescribe the procedure by which a witness may object to answering "any question put to the witness" on any ground (r1.1.0). This would include the ground that the question requires the witness to give an opinion on a matter of policy contrary to r1.1.6.

4.4.10 2.49 Members of authorities which have statutory public information and education roles clearly are able to express views on the policy responsibilities of their authorities. However, care should be taken to avoid taking partisan positions on matters of political controversy. In other respects these guidelines should be followed as far as is relevant.."

4.4.11 For the purposes of this inquiry the key paragraphs of the Commonwealth guidelines appeared to be 2.25, 2.26 and 2.49. All of the earlier paragraphs relating to the procedure for contacting witnesses are similar to those found in the Premiers' Guidelines to Officers. Paragraph 2.25, as highlighted, contemplates a different position for statutory office holders than the situation applying to regular public servants which is reflected in paragraph 2.49. If the claim by the DPP is accepted that he has a broader public interest role by providing information and advice based on his experience, then the principle enunciated in para.2.49 applies. As well, the Act confers on the DPP the power to do anything incidental or conducive to the exercise of any functions.

4.4.12 One of the most important cases of alleged interference with a witness occurred in the Senate in 1975 over the "Overseas Loans Negotiations Inquiry". Summonses had been issued to a number of senior public servants to attend before the Bar of the Senate to account for the Government's dealings in the overseas loan negotiations. Their Ministers wrote to them, and to the President of the Senate, stating:

> I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any

> documents, files or papers relevant to those matters. This direction does not, of course, prevent you from giving answers to formal questions that may be addressed to you by the Senate. [16]

4.4.13 The Senate referred to the Committee of Privileges, for inquiry and report, the directions of the Ministers and the public servants' claims of privilege in refusing to answer Senate questions. All of the heads of departments had refused to answer any of the questions when they appeared at the Bar. The claims of privilege were accepted and they were excused from attendance by the President. Of particular relevance to this inquiry is the position of the Solicitor-General who, unlike other heads of departments, is a statutory office holder.

4.4.14 In the Senate inquiry's report, a number of observations were made. It found that:

> ...the directions given by the Ministers were valid and lawful directions. A Minister, as an Executive Officer of the Commonwealth is entitled as a general principle to direct a public servant on any matter falling within the scope of his employment...Only if the direction were, in itself a direction to perform an unlawful act might it be construed as an unlawful direction. The direction to claim privilege before the Bar of the Senate was clearly not such a direction. [17]

4.4.15 The inquiry determined though, that the Solicitor-General had not claimed Crown privilege. He answered some of the questions, but considered that as Solicitor General (the Crown's second law officer) he could not "do anything inconsistent with the privilege which the Crown asserts"[18] and refused to answer others.

4.4.16 Although the current inquiry was not considered a privileges matter, the issue of the relationship of a statutory officer holder to the Executive remains. The Director of Public Prosecutions was in a similar position to that of the Solicitor General. While he is independent and is not controlled by the Minister in exercising the functions conferred by the

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[16] A copy of this letter was sent from the Minister for Minerals and Energy, the Attorney General and the Treasurer to their Secretaries on 16 July 1975.

[17] Parliamentary Paper No.215, Report on Matters referred by Senate Resolution of 17 July 1973, 7 October 1975, p. 11

[18] *Ibid.*, p. 13

Act, he nonetheless, is responsible to the Attorney General for the due exercise of his functions. The Executive remains the authority to which the Director of Public Prosecutions is accountable. As the Solicitor General did not wish to do anything inconsistent with the Crown (by not claiming privilege as the Crown did), so too, the Director of Public Prosecutions did not wish to do anything inconsistent with the expectations of the Crown. Hence, he declined the invitation to appear as a witness on the advice of his Minister. However, when lawfully summoned, he did appear as a witness and reply to the Committee's questions.

Chapter Five

5 RECOMMENDATIONS

5.1 SUMMONING PUBLIC SERVANTS AS WITNESSES

5.1.1 The Parliamentary Evidence Act confers the Committees with the power to summon persons, other than Members of Parliament, as witnesses. There is no special requirement for public servants being called through their Minister's office.

5.1.2 Similarly, the resolutions establishing Committees in the Legislative Council are phrased widely and simply provide for the power to send for and examine persons, papers, records and things. The information provided to witnesses in the leaflet "Giving Evidence" starts from the premise that the witness has been invited directly.

5.1.3 However, it has been the accepted practice in New South Wales and the Senate to call public servants as witnesses by going through the Minister's office. This course of action is reflected in the Guidelines issued by the NSW Premier's Department and the Senate.

5.1.4 As highlighted in the letter from the Speaker to the Chairman of STAYSAFE "...modern committee practice has been to foster, so far as may be possible, cooperation and courteous relations between Parliament and the Executive."

5.1.5 The Minister's office can be of assistance in ensuring that public servants make themselves available and that the Committee's enquiries are addressed. It is therefore, helpful to advise the Minister of all public servants that may be called as witnesses.

Therefore the Committee recommends:

RECOMMENDATION No. 1

When summoning public servants as witnesses, Committees write directly to the Officer to request their attendance at hearings. As a matter of courtesy the relevant Minister should be advised that the Officer has been summoned.

5.2 QUESTIONING OF PUBLIC SERVANTS AS WITNESSES

5.2.1 The Parliamentary Evidence Act does not define the nature of the questions that may be asked of witnesses. Witnesses are simply called "to give evidence".

5.2.2 The resolutions establishing the Committees are also framed in broad terms and allow for "the examination of persons", with no restriction on the nature of questions which may be asked.

5.2.3 Further, the Crown Solicitor advised that a witness can be compelled to answer "a lawful question...one which is relevant to the inquiry...". A question which requires the expression of an opinion is not necessarily an unlawful question.

5.2.4 However, it is established practice in both the State and Commonwealth Governments that public servants should not be expected to canvass the merits of Government policy. This is in keeping with the concept of a neutral public service, able to serve Governments formed by any political party, without fear or favour. This idea is reflected in the Premiers' Memoranda and Guidelines, and the Commonwealth Guidelines to officers.

5.2.5 It has also been accepted by the Legislative Council Standing Committees that "Departmental officers are not required to answer questions which seek their opinion on the merits of Government policy."[19]

5.2.6 In recognising this, there is no intention to restrict the powers of a Committee in requiring witnesses to answer any and all lawful questions put to them. Further, the Committee is firmly of the view that Ministers and senior public servants must take great care to ensure that in briefing departmental officers appearing before Parliamentary Committees their actions in no way constitute intimidation or coercion.

Therefore the Committee recommends:

RECOMMENDATION No. 2

That departmental officers not be required to answer questions which seek their opinion on the merits of Government policy.

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[19] "Giving Evidence" as set out in the Standing Committees on Social Issues and State Development Guidelines Brochure to witnesses.

RECOMMENDATION No. 3

That Ministers and senior departmental officers be advised that any attempt to intimidate or coerce public sector officers who are called to give evidence before Parliamentary Committees in relation to their evidence would constitute a contempt of Parliament.

5.3 STATUTORY OFFICE HOLDERS

5.3.1 Statutory office holders not appointed under the Public Service Management Act are not under the direct and daily control of a Minister although their office, for the purpose of executive budgetary responsibility, must fall within the portfolio responsibility of a particular Minister.

5.3.2 Statutory office holders generally obtain their power to exercise their functions through the relevant statute creating the office. This has the effect of maintaining a level of independence from the ordinary public service. This independence is usually crucial to the office, as is asserted by the DPP. It is also publicly supported, as was seen with several editorials in the Sydney Morning Herald.(Appendix 9)

5.3.3 Some statutory office holders may have specific educative/public information roles as envisaged by the Commonwealth Guideline 2.25 and 2.49 which would allow them greater scope to comment on policy matters. This is a role that the DPP, in his statement, claimed to have.

5.3.4 However, although not under the daily control of the Minister, statutory officer holders are ultimately responsible to the Executive for the due exercise of their functions. This is a point conceded by the DPP. To treat them differently to their counterparts employed under the Public Service Management Act could result in the officer finding themselves in a position of conflicting interests.

5.3.5 Even within Commonwealth Guideline 2.49, it is noted that witnesses should take care "to avoid taking partisan positions on matters of political controversy".

5.3.6 In the Overseas Loans Senate Inquiry, the Federal Solicitor General did not want to do anything inconsistent with the Crown. Neither did the DPP, so after consulting with his Minister, he declined the invitation to appear as a witness. The Senate report found that the Minister was entitled, as a general principle, to direct a public servant on any matter falling within the scope of his employment.

Therefore the Committee recommends:

RECOMMENDATION No. 4

When summoning as witnesses Statutory Office holders, and any other public office holder not subject to the direct and daily control of a Minister under an Act of Parliament, Committees write directly to the Officer to request their attendance at hearings. Notification of the relevant Minister should be at the discretion of the Committee.

RECOMMENDATION No. 5

That Statutory Office holders, and any other public officer not subject to the direct and daily control of a Minister under an Act of Parliament, not be required to answer questions which seek their opinion on the merits of Government policy.

APPENDIX 1

Premier's Memorandum
No. 84/2026

19 November 1984

Premier of New South Wales
Australia

C/ 41
84/ 2026
19th November, 1984

Dear

Provision of Evidence and Information
to Committees of Parliament

(Memo to all Ministers)

From time to time State Government departments and instrumentalities are asked to provide evidence or information to committees of either the State or the Commonwealth Parliament.

A committee of the State Parliament would normally approach the Minister concerned or, if the matter was related to a broader issue of government, would approach the Premier in the first instance.

When a State parliamentary committee approaches the Premier, the request for assistance will be referred to the Ministers concerned for advice. All such advice should be provided promptly so that full account can be taken of the views of those Ministers when a response to the committee is being considered.

Subject to the views of Ministers in particular cases, the Government would expect to provide information sought by a committee and to agree to officers attending before the committee for the purpose of giving information or assisting the committee in regard to administrative arrangements relating to existing policies.

It is preferred that the committee be provided with a written statement on which any oral evidence should be based.

It must be made clear to the committee that because the advocacy of Government policy is a Ministerial responsibility, officers should not be asked to canvass, interpret or express opinions on policy issues. The evidence of officers should be limited to factual information related to their duties or responsibilities.

When a committee of the Commonwealth Parliament wishes to seek assistance from the State Government, an approach is usually made to the Premier.

.../2

Floor, State Office Block, Macquarie Street, Sydney 2000. Telephone: (02) 20575. Telex AA21288, Telegraphic Address: MANIPRETE

If a State Government submission to the committee is requested and/or considered appropriate, it is the practice to seek from Ministers concerned advice which may be incorporated in the submission. This advice should be provided in time to enable all the views expressed to be considered in the preparation of the submission.

If Ministers should be approached to provide information which relates entirely to their own portfolios, there is no objection to a written response being sent direct to a committee or to the attendance of officers before the committee. However, if a Minister proposes to canvass policy matters in a submission, the Minister should, if necessary, seek the concurrence of the Premier or of Cabinet, if appropriate, to the submission.

The position in regard to the provision of information sought by a committee of the Commonwealth Parliament and the role of officers who attend as witnesses is similar to that applicable to State parliamentary committees.

I am enclosing guidelines which have been prepared to assist officers who may be called upon to give evidence to parliamentary committees and I should be pleased if you would bring them to the notice of all departments and instrumentalities associated with your area of administration.

Yours sincerely,

Premier.

APPENDIX 2

Premier's Memorandum No. 91/36

9 December 1991

Attachment D.

Premier of New South Wales
Australia

PROVISION OF EVIDENCE AND INFORMATION TO PARLIAMENTARY COMMITTEES

(Memorandum to Ministers)

MEMORANDUM NO. 91-36

I am advised that officers of State Government Departments and instrumentalities are uncertain of the rules and procedures which govern their appearances before committees of either the State or the Commonwealth Parliament.

The rules and procedures which should be followed in the event that officers are called upon to provide evidence or information to Parliamentary Committees are contained in a Memorandum which the Honourable N K Wran issued to Ministers on 19th November, 1984.

That Memorandum (number 84/2026) has been adopted by each administration, including this administration, since the Memorandum's issue in 1984. A copy of Memorandum numbered 84/2026 is attached for your reference.

Accordingly, I would ask that you bring this Memorandum, together with Memorandum 84/2026, to the notice of all Departments and Authorities within your administration.

Yours sincerely

N F Greiner, MP

BRANCH: LEGAL
ISSUED: 9TH DEC 1991

[illegible]TH FLOOR, STATE OFFICE BLOCK, MACQUARIE STREET, SYDNEY, N.S.W. 2000, AUSTRALIA. TEL. 228 5239 FAX: 252 2791

APPENDIX 3

Premier's Department Guidelines for Officers who are Witnesses before Parliamentary Committees

(reproduced in the Legislative Council Manual on Practices and Procedures for Committee Members)

GUIDELINES FOR OFFICERS WHO ARE WITNESSES BEFORE PARLIAMENTARY COMMITTEES

State Parliamentary Committees

Guidelines for officers of departments or Government instrumentalities who are required to attend as witnesses before State parliamentary committees, have been prepared on the basis that the advocacy of Government policies is a Ministerial responsibility. Officers may provide information to assist parliamentary committees.

1. Requests for an officer to attend before a committee or to provide material to it are to be made through the relevant Minister.

2. In the normal course, the committee should be supplied with a written submission on which any subsequent oral evidence should be based. All such submissions should be cleared within the department and with the Minister, if appropriate.

3. A submission should not take policy positions; that is, it:

   (a) should not advocate or canvass the merits of Government policies;

   (b) may describe Government policies and the administrative arrangements and procedures involved in implementing them;

   (c) should not identify considerations which have led to a Government decision unless those considerations have already been made public or the release of the information is authorised by the Minister;

   (d) may, with the concurrence of the Minister, set out policy options and list their advantages and disadvantages. Other matters of fact or background information may be included.

4. The role of an officer appearing as a witness before a committee is to speak to any submission provided and to assist the understanding of the issues involved.

5. Officers selected to provide information sought by a committee should have sufficient responsibility in the particular work area to be able to meet the committee's requirements. If necessary, the Minister should be consulted as to the attitude to be adopted in specific matters.

6. An officer, who, when giving evidence, believes that circumstances have arisen to justify a claim of public interest immunity, should suggest a postponement of the evidence until the Minister can be consulted.

7. Officers should take care in giving evidence that they do not intrude into the responsibilities of other departments or instrumentalities. Where a question falls within the administration of another department or instrumentality, the officer concerned should request that it be directed to that department or instrumentality or deferred until the relevant department or instrumentality has been consulted.

8. It is anticipated that it will be necessary to tender documents or give evidence which it may be desirable to tender or give in camera, the matter should be raised beforehand at departmental or Ministerial level to enable an official attitude to be determined.

9. Officers who are required to give evidence to parliamentary committees should make themselves aware of the relevant law and practice of parliamentary privilege. It should be noted that the powers of Select and Standing Committees derive from the resolutions establishing them, Standing Rules and Orders and legislation, including the Parliamentary Evidence Act, 1901. In the case of the Public Accounts Committee, reference should also be made to the provisions of the Public Finance and Audit Act, 1983.

APPENDIX 4

Commonwealth Guidelines to Officers and Senate Practice

GOVERNMENT GUIDELINES FOR OFFICIAL WITNESSES BEFORE PARLIAMENTARY COMMITTEES AND RELATED MATTERS - NOVEMBER 1989

CONTENTS — PARAGRAPH

GOVERNMENT GUIDELINES FOR OFFICIAL WITNESSES BEFORE PARLIAMENTARY COMMITTEES AND RELATED MATTERS

INTRODUCTION

Accountability

1.1 In the Australian system of parliamentary government, and consistent with the traditional understanding of ministerial responsibility, the public and parliamentary advocacy and defence of government policies and administration has traditionally been, and should remain, the preserve of Ministers, not officials. The duty of the public servant is to assist ministers to fulfil their accountability obligations by providing full and accurate information to the Parliament about the factual and technical background to policies and their administration. The guidelines are therefore aimed at encouraging the freest possible flow of such information between the public service, the Parliament and the public.

Scope of guidelines

1.2 The guidelines apply primarily to the preparation of submissions and the giving of evidence to parliamentary committees by officials, although sections 3-6 also discuss their relevance to contexts outside parliamentary committees, including party committees, Royal Commissions, individual Members of Parliament, speeches, public inquiries and court appearances.

1.3 The previous version of the guidelines was tabled in the Parliament in August 1984. Changes have been made to take account of the Senate Parliamentary Privilege Resolutions of 25 February 1988 (see Appendix) and recent experience with the appearance of witnesses before parliamentary committees.

PARLIAMENTARY COMMITTEES

Application of Guidelines

2.1 This section is designed to assist departmental officials, statutory office holders and the staff of statutory authorities appearing before parliamentary committees, by informing them of the principles they are required by the Government to follow. It is recognised, however, that the role and nature of some statutory authorities will require the selective application of these guidelines (see paragraph 2.49).

Parliamentary rules of procedure

2.2 This section also takes into account the Senate Parliamentary Privilege Resolutions of 25 February 1988 which include procedures to be observed by Senate committees in their dealings with witnesses. (References to the Senate resolutions in these guidelines appear as r.1.1; r.1.6 etc.) At the time of tabling these guidelines, the House of Representatives had not dealt with the committee procedures which have been proposed by the Standing Committee on Procedure. These are broadly similar, with some additions, to the procedures adopted by the Senate.

2.3 These guidelines should, nonetheless, be read in conjunction with the Senate Parliamentary Privilege Resolutions, the House of Representatives Standing Committee on Procedure's Report on Committee Procedures for Dealing with Witnesses dated 4 April 1989 and the Parliamentary Privileges Act 1987, particularly sections 13 and 16.

Inquiries into administrative matters

2.4 Where a committee's inquiry is directed towards the examination of departmental administration and practice, it is for the departmental Secretary, with the general consent of the relevant Minister, to use his or her discretion as to the extent to which aspects of these guidelines, such as the clearing of written evidence and the selection of witnesses, are to be followed. In this context a witness should also be aware of the provisions of s.12 of the Parliamentary Privileges Act (see para 2.40).

Committees dealing with individual conduct

2.5 Where a committee is inquiring into the personal actions of a Minister (or official) and seeks information from officials, there may be circumstances where it is not appropriate for the requirements set out in para 2.14 for clearance of evidence to be followed. (Note also that the Senate resolutions provide that a witness may apply to have assistance from counsel during the course of a hearing (r.1.14 and r.1.15). See para 2.42.

Joint Statutory Committees

2.6 The Public Works Committee Act 1969, the Public Accounts Committee Act 1951 and the Australian Security Intelligence Organisation Act 1979 provide for the summoning of witnesses and raise some special considerations. For example, s.23 of the Public Works Committee Act makes special provision for hearing of evidence on confidential matters and the Public Accounts Committee Act and the Public Works Committee Act have special provisions relating, among other things, to self-incriminating evidence (see ss.19 and 25, respectively). In these and similar cases, the special provisions of the relevant Acts take precedence.

Preliminaries to an inquiry

Requests for attendance

2.7 Generally requests for an official to attend a committee hearing in an official capacity, or to provide material to it, are made through the relevant Minister. There are, however, exceptions - for example the Estimates Committees and the Public Accounts Committee (see para 2.4). (Note also that the Senate resolutions provide that a witness will be invited to give evidence or produce documents, but may be summoned to do so if circumstances warrant such an order (r.1.1 and r.1.2).)

Choice of witnesses

2.8 A Minister may delegate to the departmental Secretary the responsibility of deciding the official(s) most appropriate to provide the information sought by the committee. It is essential that the official(s) selected should have sufficient responsibility or be sufficiently close to the particular work area to be able to satisfy the committee's requirements.

Preparation of witnesses

2.9 It is also essential that all witnesses are thoroughly prepared for hearings. Such preparation should include ensuring familiarity with probable lines of questioning, either by discussion with the committee secretariat or, in the case of Estimates and similar inquiries, by ascertaining from the committee secretary or from Hansard and other sources the issues that are likely to be of interest to committee members. Officers who have not previously attended committee hearings should receive briefing on the requirements, and senior officers should satisfy themselves, so far as possible, that all witnesses are capable of giving evidence creditably.

Consultation with Ministers

2.10 As appropriate, witnesses should consult the Minister before a hearing and, if required, the Minister representing in the other House. Examples of the need for such consultation would be in relation to possible claims that it would be in the public interest to withhold certain documents or oral evidence, or requests for the hearing of evidence in camera (see paras 2.22 to 2.38).

Senate resolutions

2.11 Officers appearing before Senate Committees should also make themselves aware of the Senate resolutions relating to the rights of witnesses (r.1.1-r.1.18) and matters which may be treated as a contempt of the Parliament (r.3 and r.6.1-r.6.16)

Preparation of written material

2.12 In the normal course, departments should provide a written statement on which subsequent oral evidence will be based (see r.1.4). In addition, where a committee asks written questions, written replies should be provided. All written material (authorised in accordance with these guidelines) should be sent to the committee secretary.

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

Clearance with Minister

2.14 Submissions should be cleared to appropriate levels within the department, and normally with the Minister, in accordance with arrangements approved by the Minister(s) concerned.

Matters of policy

2.15 Such submissions:

(a) should not advocate, defend or canvass the merits of government policies (including policies of previous Commonwealth governments, or State or foreign governments);

(b) may describe those policies and the administrative arrangements and procedures involved in implementing them;

(c) should not identify considerations leading to government decisions or possible decisions, in areas of any sensitivity, unless those considerations have already been made public or the

Minister authorises the department to identify them; and

(d) may, after consultation with the Minister, and especially when the Government is encouraging public discussion of issues, set out policy options and list the main advantages and disadvantages, but should not reflect on the merits of any judgement the Government may have made on those options or otherwise promote a particular policy viewpoint.

2.16 In relation to the matters in para 2.15(a) above, the proper course is for Ministers to make written submissions, to appear personally, to arrange for Ministers representing them to appear personally, or to invite committees to submit questions on policy issues in writing.

2.17 In relation to para 2.15(c), the normal course is for Ministers to canvass the material in these categories, but if departments are to canvass such material, they should clearly bring it to the Minister's attention when seeking clearance for the submission.

Requests for more time to prepare evidence

2.18 The Minister (or the department on his or her behalf) may ask the committee for more time to prepare evidence, if the notice is considered insufficient. The Senate resolutions provide for a witness to be given reasonable notice and an indication of the matters expected to be dealt with (r.1.3).

Conduct during hearings

General Principles

2.19 As described above (para 1.1), it is intended, subject to the application of certain necessary principles, that there be the freest possible flow of information between the public service, the Parliament and the public. To this end, officials should be open with committees and if unable or unwilling to answer questions or provide information should say so, and give reasons. It is also, of course, incumbent on officials to maintain the highest standards of courtesy in their dealings with parliamentary committees.

2.20 These guidelines, and particularly paras 2.15 and 2.32-2.36, should be read in the context of the Freedom of Information Act 1982 (the FOI Act). The Act establishes minimum standards of disclosure of documents held by the Commonwealth. It is not, however, a code governing release of documents or information generally as there are many other means of obtaining information from Government (e.g. press releases, annual reports, etc.). Any material which would not be exempt under this legislation should (with the knowledge of the Minister in sensitive cases or where the Minister has a particular interest or has been involved) be produced or

given, on request, to a parliamentary committee. Moreover, it may be in the public interest to provide to the committee a document or information for which exemption would normally be claimed under the Act. The exemptions in the Act should therefore be viewed from the perspective of the proper role and functions of the Parliament.

2.21 So far as relevant, the guidelines in paras 2.12-2.18 above relating to written material apply also to oral evidence.

Limitations upon officials' evidence

2.22 There are three main areas in which officials need to be alert to the possibility that they may not be able to provide committees with all the information they seek, or may need to request restrictions on the provision of such information. These are:

(a) matters of policy;

(b) public interest immunity; and

(c) confidential material where in camera evidence is desirable.

The conduct of official witnesses in relation to these areas is described in detail below (paras 2.25-2.38).

Clarification or amplification of evidence

2.23 In addition, committees may occasionally seek information which may properly be given, but where officials are unsure of the facts, or do not have the information to hand. In such cases witnesses should qualify their answers as necessary so as to avoid misleading the committee, and, if appropriate, should give undertakings to provide further clarifying information. It is particularly important to submit such further material without delay.

Questions about other departments' responsibilities

2.24 It is also important that witnesses should take care not to intrude into responsibilities of other departments and agencies (see also para 2.13). Where a question falls within the administration of another department or agency, an official witness may request that it be directed to that department or agency or be deferred until that department or agency is consulted.

Matters of policy

2.25 The role of an official witness is not to comment on policy but to speak to any statement provided to the committee and to provide factual and background material to assist understanding of the issues involved. The detailed rules applying to written submissions (para 2.15) also apply to oral evidence. Note, however, that such restrictions do not necessarily apply to statutory officers (see para 2.49).

2.26 The Senate resolutions provide that "An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister" (r.1.16). The resolutions also prescribe the procedure by which a witness may object to answering "any question put to the witness" on "any ground" (r.1.10). This would include the ground that the question requires the witness to give an opinion on a matter of policy contrary to r.1.16. In such a situation an officer may ask the person chairing the committee to consider whether questions which fall within the parameters of policy positions (outlined in para 2.15) are in order. Moreover, the resolutions provide scope for a witness to make a statement about matters of concern to the witness in pre-hearing discussions before appearing at the committee hearing (r.1.5).

2.27 If an official witness is directed to answer a "policy" question, and has not (in line with para 2.17) previously cleared the matter with the Minister, the officer should ask to be allowed to defer the answer until such clearance is obtained. Alternatively, it may be appropriate for the witness to refer to the written material provided to the committee and offer, if the committee wishes, to seek elaboration from the Minister; or to request that the answer to a particular question be reserved for submission in writing.

Public interest immunity

Claims to be made by Ministers

2.28 Claims that information should be withheld from disclosure on grounds of public interest (public interest immunity) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney-General and the Prime Minister).

2.29 As far as practicable, decisions to claim public interest immunity should take place before hearings, so that the necessary documentation can be produced at the time. The normal means of claiming public interest immunity is by way of a letter from the Minister to the committee chairman. The Attorney-General's Department should be consulted on appropriateness of the claim in the particular circumstances and the method of making the claim.

2.30 As a matter of practice, before making a claim of public interest immunity, a Minister might explore with a committee the possibility of providing the information in a form or under conditions which would not give rise to a need for the claim (including on a confidential basis or in camera, see paras 2.35-2.36).

Matters arising during hearing

2.31 If an official witness, when giving evidence to a committee, believes that circumstances have arisen to justify a claim of public interest immunity, the official should request a postponement of the evidence, or of the relevant part of the evidence, until the Minister can be consulted.

Scope of public interest immunity

2.32 Documents - or oral evidence - which could form the basis of a claim of public interest immunity may include matters falling into the following categories that coincide with some exemption provisions of the FOI Act:

(a) material the disclosure of which could reasonably be expected to cause damage to:

(i) national security, defence, or international relations; or

(ii) relations with the States;

including disclosure of documents or information obtained in confidence from other governments;

(b) material disclosing any deliberation or decision of the Cabinet, other than a decision that has been officially published, or purely factual material the disclosure of which would not reveal a decision or deliberation not officially published;

(c) material disclosing any deliberation of or advice to the Executive Council, other than a document by which an act of the Governor-General in Council was officially published;

(d) material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government where disclosure would be contrary to the public interest;

(e) material relating to law enforcement or protection of public safety which would, or could reasonably be expected to:

(i) prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance;

(ii) disclose, or enable a person to ascertain the existence or identity of a confidential source or information, in relation to the enforcement or administration of the law;

(iii) endanger the life or physical safety of any person;

(iv) prejudice the fair trial of a person or the impartial adjudication of a particular case;

(v) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(vi) prejudice the maintenance or enforcement of lawful methods for the protection of public safety; and

(f) material subject to legal professional privilege.

It must be emphasised that the provisions of the FOI Act have no actual application as such to parliamentary inquiries, but are merely a general guide to the grounds on which a parliamentary inquiry may be asked not to press for particular information, and that the public interest in providing information to a parliamentary inquiry may override any particular ground for not disclosing information. For a more detailed understanding of the above exemption provisions, reference should be made to the FOI Act and to separate guidelines on its operation issued by the

Attorney-General's Department.

2.33 In addition the following considerations may affect a decision whether to make documents or information available:

(a) secrecy provisions of Acts: Attorney-General's Department should be consulted when occasions involving such provisions arise; and

(b) court orders or subjudice issues : where the provision of information would appear to be restricted by a court order, or where the question of possible prejudice to court proceedings could arise, the Attorney-General's Department should be consulted although decisions on the application of the subjudice rule are for the committee to determine, not witnesses.

Classified documents

2.34 Documents, and oral information relating to documents, having a national security classification of 'confidential', 'secret' or 'top secret' would normally be within one of the categories in para 2.32, particularly para 2.32(a). Before producing a document bearing such a classification, an official witness should seek declassification of the document. (Note that it does not follow that documents without a formal security classification may not be the subject of a claim of immunity. Nor does it follow that classified documents may not in any circumstances be produced. Each document should be considered on its merits and, where classified, in consultation with the originator.)

In camera evidence

2.35 There may be occasions when a Minister (or, on his or her behalf, the departmental Secretary) would wish, on balancing the public interests involved, to raise with the committee the possibility of an official producing documents or giving oral evidence in camera, and on the basis that the information be not disclosed or published except with the Minister's consent (see r.1.7, r.1.8 and r.2.7). It should be noted that Estimates Committees have no power to take evidence in camera or to treat documents submitted to them as in camera evidence.

Matters arising during hearing

2.36 If, when giving evidence to a committee, an official witness believes that circumstances have arisen to justify requesting that evidence be heard in camera, the official should make such a request if the possibility has been foreshadowed with the Minister or should ask for the postponement of the evidence or the relevant part of the evidence until the Minister can be

consulted. (The Senate resolutions provide that "A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for the decision." (See r.1.7 and also r.1.8 relating to the publication of evidence given in camera.)

2.37 These circumstances might include cases where:

(a) although a claim of public interest immunity could be justified, the Minister considers that the balance of public interest lies in making information available to the committee;

(b) while a claim of immunity may not be appropriate, other social considerations justify the committee being asked to take evidence privately. Examples, which parallel other exemption provisions in Part IV of the FOI Act, are evidence the public disclosure of which would:

(i) affect law enforcement or protection of public safety;

(ii) have a substantial adverse effect on financial or property interests of the Commonwealth;

(iii) prejudice the attainment of the objects or effectiveness of procedures or methods for the conduct of tests, examinations or audits of a Commonwealth agency;

(iv) have a substantial adverse effect on the management or assessment of personnel, or on the proper and efficient conduct of the operations of a Commonwealth agency including the conduct by the Commonwealth of industrial relations;

(v) unreasonably disclose information relating to the personal affairs of any person. Note also that the Senate resolutions provide that a committee may consider taking in camera evidence reflecting adversely on a person (see r.1.11-r.1.13, r.2.1-r.2.3). The Privacy Act 1988, in particular Part III which explains Information Privacy Principles, is also relevant;

(vi) reveal business affairs, including trade secrets or other commercially sensitive information;

(vii) reasonably be expected to have a substantial adverse effect on the management of the economy or on the conduct of business generally; or

(viii) disclose material obtained in confidence;

(c) similar or identical evidence has been previously given in camera to other hearings of the committee or other committees of the Parliament and has not been made public.

Committee requests for evidence off the record

2.38 An official who is asked by a committee to give evidence 'off the record', unless this refers to evidence given in camera or evidence of which there is to be no transcript taken, should appreciate that technically there is no such category as 'off the record' evidence which has any special protection or status. In the event an official is asked to give evidence 'off the record', however, he/she should request a postponement until the Minister can be consulted, unless the possibility has been clearly foreshadowed with the Minister.

Protection of submissions and witnesses

Parliamentary privilege

2.39 The act of submitting a document to a parliamentary committee is protected by parliamentary privilege: Parliamentary Privileges Act 1987, paragraph 16(2)(b). Any publication of the submission other than to the committee, however, is protected by parliamentary privilege only if that publication takes place by or pursuant to the order of the committee, in which case the content of the document is also protected: paragraph 16(2)(d) of the Act. The protection of parliamentary privilege means that a person cannot be sued or prosecuted in respect of the act or the material protected, nor can that act or material be used against a person in legal proceedings. The unauthorised disclosure of a document or evidence submitted to a parliamentary committee, that is, a disclosure not authorised by the committee or the House concerned, may be treated as a criminal offence under section 13 of the Act or as a contempt (r.6.16.).

Contempt of the Parliament

2.40 It is an offence against s.12(1) of the Parliamentary Privileges Act for a person, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, to influence another person in respect of any evidence given or to be given before a House of the Parliament or a committee, or to induce another person to refrain from giving any such evidence. It is also an offence, under s.12(2) of that Act, for a person to inflict any penalty or injury upon, or deprive another person of any benefit, any person on account of the giving or proposed giving of any evidence, or of any evidence given or to be given, before a House or a Committee. It should be noted that the existence of s.12 of the Parliamentary Privileges Act does not prevent imposition by a House of a penalty (see s.12(3)). In particular, those kinds of conduct are also punishable as a contempt by the Senate (r.6.10 and r.6.11 respectively) or the House of Representatives.

Self incrimination

2.41 In general a witness cannot refuse to answer a question or produce documents on the ground that the answer to the question or the production of documents might incriminate the witness. The exceptions to this are witnesses appearing before the Public Accounts Committee or the Public Works Committee (see s.19 of the Public Accounts Committee Act, s.25 of the Public Works Committee Act and para 2.6). In such cases parliamentary privilege protects a witness against only that evidence itself being used against the witness outside the Parliament; (for example, as evidence in proceedings before the courts). A witness may request the committee to take the evidence in camera in those circumstances (see r.1.7 and r.1.8). The Senate resolutions also outline a procedure for considering claims by a witness that he or she not answer a question on grounds of self-incrimination (r.1.10 and r.2.5).

Access to counsel

2.42 A witness may apply to have assistance from counsel in the course of a hearing. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision (see r.1.14). If an application is granted, the witness shall be given reasonable opportunity to consult general counsel during a committee hearing (see r.1.15).

2.43 In normal circumstances officials should not need counsel when appearing before parliamentary committees. Should the need arise, however, the Attorney-General's Department should be consulted.

Correction of Evidence

2.44 After perusing the record of their evidence, official witnesses should propose for the committee's consideration any necessary corrections for incorporation or noting in the published record. Where these affect the substance of evidence previously given, it may be necessary to seek the agreement of the committee on the way in which the correction should be made, e.g. by tendering a subsequent statement. The Senate resolutions provide that "Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence" (r.1.17).

2.45 Also, if a witness believes, after perusing the record, that he or she has omitted some relevant evidence, the witness should, having consulted with the Minister (or departmental Secretary), seek leave of the committee to lodge a supplementary statement or to give further oral evidence. All supplementary written material (authorised in accordance with these guidelines) should be forwarded to the committee secretary.

Publication of evidence

2.46 Evidence provided to committees in a public hearing is normally published in the form of a Hansard record.

2.47 Authority for the publication of evidence, whether taken in public or in camera, is vested in Parliamentary committees by virtue of s.2(2) of the Parliamentary Papers Act 1908. Evidence taken in camera is confidential and its publication without a committee's consent constitutes a contempt (see s.13 of the Parliamentary Privileges Act 1987 and r.6.16.). Note, too, that s.46 of the FOI Act provides for documents to be exempt if disclosure would infringe parliamentary privilege.

Proposals to publish in camera evidence

2.48 If a committee seeks an official witness's concurrence to publish the witness's in camera evidence, he or she should ask the committee to delay the decision to enable the witness to consult the Minister or the departmental Secretary. A committee will not normally

authorise the publication of in camera evidence without the concurrence of the witness, although such concurrence is not a binding requirement (see r.1.8).

Official witnesses from statutory authorities

2.49 Members of authorities which have statutory public information and education roles clearly are able to express views on the policy responsibilities of their authorities. However, care should be taken to avoid taking partisan positions on matters of political controversy. In other respects these guidelines should be followed as far as is relevant including in relation to claims of public interest immunity (see para 2.28).

Appearance in a 'personal' capacity

2.50 There is no intention for there to be any restriction on officers appearing before parliamentary committees in their 'personal' capacity. An officer so called, however, should pay heed to the guidelines relating to public comment contained in the Guidelines on Official Conduct of Commonwealth Public Servants (July 1987). As the guidelines emphasise, it is particularly important for senior officials to give careful consideration to the impact, by virtue of their positions, of any comment they might make. Indeed heads of agencies and other very senior officers need to consider carefully whether, in particular cases, it is possible for them realistically to claim to appear in a 'personal' rather than an 'official' capacity, particularly if they are likely to be asked to comment on matters which fall within or impinge on their area of responsibility. An officer who is appearing before a committee in a personal capacity should make it clear to the committee that the officer's appearance is not in an official capacity.

PARTY COMMITTEES

3.1 It is quite appropriate for officials, subject to ministerial authorisation, to make themselves available to brief party committees to assist them in understanding the technical and factual background to government policies and proposals, including details and/or explanations of proposed legislation. Departmental officials will not be expected, or authorised, to express opinions on matters of a policy or party political nature (see paras 2.15 and 2.25). The guidelines for submissions to and appearances before parliamentary committees apply to briefing of party committees, subject to paras 3.2-3.7 below.

3.2 Committee requests for such briefing should be directed to the Minister concerned. It will also be open to Ministers to initiate proposals for briefing of

committees, where they consider this to be desirable.

3.3 Where considered appropriate or desirable, Ministers may elect to be present at discussions with Government party committees, to deal with questions of a policy or party political nature.

3.4 Where the Minister does not attend the committee proceedings, officials should keep the Minister informed of the nature of the discussions and of any matters the officials could not resolve to the committee's satisfaction.

3.5 Party committees do not have the powers or privileges of parliamentary committees. Consequently officials appearing before them do not have the protection afforded to witnesses appearing before parliamentary committees (see paras 2.39 and 2.41). Party committee hearings, however, are not generally held in public.

INDIVIDUAL MEMBERS OF PARLIAMENT

4.1 Members of Parliament usually request information through the responsible Minister, but direct approaches to officials for routine factual information, particularly on constituency matters, are also traditional and appropriate. When a request amounts to no more than a request for readily available factual information, the information should obviously be provided, although depending on the nature or significance of a request, an official may judge it appropriate to inform the departmental Secretary of the request and response. Ministers should be informed of any matter which is likely to involve them.

4.2 There may be other occasions where a Member of Parliament's request raises sensitive issues. For example, where expressions of opinion are sought on government policies or alternative policies, as distinct from explanation of existing policies. Officials will not be expected or authorised to express opinions on government policies, policy options or matters of a party political nature. Information provided may, however, include details of administrative arrangements and procedures involved in the implementation of approved policies or legislation.

4.3 If a Member of Parliament seeks expressions of opinion on government policies or policy options, it would be appropriate to suggest that the Member pursue the matter with the Minister. Similar action would be appropriate if a request raised other issues of a sensitive nature, or where the answering of a request would necessitate the use of substantial resources of the department or authority.

4.4 Care should be taken to avoid unauthorised disclosure of classified or otherwise confidential information - for example, where a breach of personal or commercial privacy could be involved.

4.5 Where an official considers that the terms of a request would require going beyond the authorised scope of the above arrangements, the official should so indicate to the Member, and would be at liberty to raise the matter with the departmental Secretary and the Minister and, if desired, with the Public Service Commission.

Special arrangements for pre-election consultation with officials by the Opposition

4.6 On 5 June 1987 the Government tabled in the Parliament specific guidelines relating to consultation by the Opposition with officials during the pre-election period. These guidelines, which are almost identical with guidelines first tabled on 9 December 1976, are as follows:

(i) The pre-election period is to date from three months prior to the expiry of the House of Representatives or the date of announcement of the House of Representatives election, whichever date comes first. It does not apply in respect of Senate elections only.

(ii) Under the special arrangement, shadow Ministers may be given approval to have discussions with appropriate officials of government departments. Party leaders may have other Members of Parliament or their staff members present. A departmental Secretary may have other officials present.

(iii) The procedure will be initiated by the relevant Opposition spokesperson making a request of the Minister concerned who is to notify the Prime Minister of the request and whether it has been agreed.

(iv) The discussions will be at the initiative of the non-government parties, not officials. Officials will inform their Ministers when the discussions are taking place.

(v) Officials will not be authorised to discuss government policies or to give opinions on matters of a party political nature. The subject matter of the discussions would relate to the machinery of government and administration. The discussions may inclu

the administrative and technical practicalities and procedures involved in implementation of policies proposed by the non-government parties. If the Opposition representatives raised matters which, in the judgement of the officials, sought information on government policies or sought expressions of opinion on alternative policies, the officials would suggest that the matter be raised with the Minister.

(vi) The detailed substance of the discussions will be confidential but Ministers will be entitled to seek from officials general information on whether the discussions kept within the agreed purposes.

APPEARANCES BEFORE THE BAR OF A HOUSE OF THE PARLIAMENT

5.1 It would be only in exceptional circumstances that an official would be summoned to the bar of a House of the Parliament and each case would need individual consideration.

5.2 As a general rule, it would be appropriate for these guidelines to be followed insofar as they apply to the particular circumstances.

NON-PARLIAMENTARY PUBLIC INQUIRIES (INCLUDING ROYAL COMMISSIONS) AND SPEECHES

6.1 The guidelines for submissions to and appearances before parliamentary committees generally apply to submissions to and appearances before other public inquiries, and to the preparation and presentation of speeches by officials in their official capacity.

Speeches

6.2 Subject to these guidelines, officers, other than those employed in areas where national security or other reasons demand confidentiality, should be prepared to make themselves available to attend and address conferences in their areas of professional expertise. Speeches in such circumstances should aim to provide the necessary factual information and analytical material to promote informed public discussion. Such activities should be regarded as part of the normal interchange of information between government and community groups.

6.3 The Minister may decide to authorise the departmental Secretary to clear material for speeches. Subject to ministerial guidance, the Secretary is responsible for instituting appropriate departmental rules. Officials will often also find it necessary to

speak in their official capacity without having the opportunity to clear the substance of their comments (for example, in open discussions at public seminars). In such cases officials should heed the rules laid down by the departmental Secretary and the Guidelines on Official Conduct of Commonwealth Public Servants concerning public comment by public servants. In particular, they should avoid taking partisan positions on policy issues or matters of public controversy.

Foreign Service

6.4 Heads of Australian diplomatic or consular posts and senior officials serving abroad have the responsibility in countries to which they are accredited to explain, advocate or defend the Government's international and domestic policies through public speeches, conferences, media enquiries, appearances before host government parliamentary committees, etc. It may not always be possible for officers to obtain ministerial or departmental clearance. It is expected, however, that public comment will be consistent with authorised policies in all respects.

Royal Commissions and bodies with Royal Commission powers

6.5 Officials appearing before Royal Commissions established by the Commonwealth should take note of the provisions of the Royal Commissions Act 1902. The categories of evidence enumerated in para 2.32 above are also appropriate to claims of public interest immunity before a Commonwealth Royal Commission. The circumstances in which the Commission might be asked to hear evidence in camera are also likely to be the same as those listed at para 2.37 above.

6.6 An official appearing before a Commonwealth Royal Commission or similar body may not refuse to answer a question (or to produce a document or other item) on the ground that the giving of the answer or the production of the document or item might tend to be self-incriminatory. This rule does not apply where an official has been charged with an offence and the charge has not been finally dealt with by a court or otherwise disposed of.

6.7 Where guidance is required regarding counsel for officials - including about legal aid - advice should be sought from the Attorney-General's Department.

State inquiries (parliamentary and other)

6.8 Where additional guidance is required regarding appearances before State inquiries, advice should be sought from the Attorney-General's Department. Such advice should also be sought where a claim of public

interest immunity may be under consideration.

Courts and tribunals

6.9 Where officials require further guidance or counsel in respect of their appearance before and giving evidence to courts of law and tribunals - particularly concerning possible claims of public interest immunity - advice should be sought from the Attorney-General's Department.

APPENDIX 5

Statement by Nicholas Cowdery, QC, Director of Public Prosecutions to the Standing Committee on Law and Justice

Standing Committee on Law & Justice
Legislative Council
Parliament of New South Wales

Inquiry into the Crimes Amendment
(Mandatory Life Sentences) Bill 1995

Statement by

Nicholas Richard Cowdery QC

Director of Public Prosecutions

Preliminary

Relevant Personal History

1968–1970	:	Commonwealth Deputy Crown Solicitor's Office, Sydney – including involvement in the prosecution of Commonwealth offences.
12 February 1971	:	Admitted as a Barrister in New South Wales.
1971–1975	:	Public Defender in Papua New Guinea.
1975–1994	:	Barrister at the private bar with chambers in Sydney. Practised largely in the criminal jurisdiction, including much prosecuting.
1987	:	Appointed one of Her Majesty's counsel (subsequently so appointed in the High Court, the ACT, Victoria, Queensland and the Northern Territory).
17 October 1994	:	Appointed Director of Public Prosecutions for the State of New South Wales.

Member from time to time of various associations connected with the criminal law.

Presently	:	Vice–Chairman of the International Bar Association's Criminal Law Committee and Co–Chairman of the Prosecutors' Sub–Committee.

Circumstances of Appearance

On 26 October 1995 the Committee invited me directly to appear before it to give evidence in relation to the inquiry (Annexure A).

I consulted memoranda nos. 84/2026 of 19 November 1984 (Mr N K Wran) and 91/36 of 9 December 1991 (Mr N F Greiner). These had been included in material concerning Estimates Committees sent to me by the Director-General, The Cabinet Office with his memorandum dated 24 October 1995 (Annexure B).

Memorandum no. 84/2026 contemplates a committee of State Parliament approaching the Minister concerned (or the Premier) in the first instance when a State instrumentality is asked to provide evidence. That step appeared not to have occurred. The memorandum also stated that "officers should not be asked to canvass, interpret or express opinions on policy issues. The evidence of officers should be limited to factual information related to their duties or responsibilities".

Memorandum no. 91/36 adopted that memorandum.

The memorandum from the Director-General, The Cabinet Office, reminded me of these memoranda and stated: "You should ensure that any answers to questions provided ... are limited to factual information and do not canvass policy views".

On one view the Office of the Director of Public Prosecutions might be described as a "State instrumentality"; although its independence is constantly affirmed. It would appear that the Premier may well regard it as such – notwithstanding his support of its independence – because at 10.15 this morning I received from the Director-General, The Cabinet Office, further copies of the memoranda referred to above.

By letter dated 26 October 1995 (Annexure C) I sought advice from the Attorney General, the Minister to whom I am responsible for the due exercise of my functions, on:

- the procedural issue (the invitation having been made directly to me); and

- the nature of any relevant evidence I would be able to give.

By letter dated 27 October 1995 (Annexure D) the Attorney General stated: "As you know, the Premier has indicated that it would be inappropriate for you to give such evidence. I agree". (Any knowledge I had of the Premier's indications could have come only from the news media.)

By letter dated 27 October 1995 (Annexure E) I declined the Committee's invitation, expressing myself to be constrained to do so by the views expressed by the Attorney General. I stated, nevertheless, that I was willing to assist the Committee in its inquiry.

On 3 November 1995 I was informed by the Committee that a summons for my appearance had been prepared.

I now appear before the Committee in my capacity as the Director of Public Prosecutions in obedience to the summons.

Background

On 27 September 1995 the Attorney General sent me a copy of the Crimes Amendment (Mandatory Life Sentences) Bill 1995 and asked for my comments on it. The Bill was then before Parliament (and therefore in the public arena) having had its second reading on 21 September 1995.

I commented in writing on 5 October 1995 to the effect that:

- I was opposed in principle to mandatory sentences of this type;
- the provisions in relation to murder merely codified the existing law and practice; and
- the provisions relating to drug offences would virtually never be invoked because all the conditions would not be fulfilled.

On 6 October 1995 a journalist from the Sydney Morning Herald contacted me and asked if I had seen the Bill and if so what views I had of it. I gave the journalist a short response similar in substance to the comments I had made to the Attorney General.

Those comments were reproduced, especially the second and third, in the Sydney Morning Herald of 9 October 1995. I have made no further public comment on the Bill.

There followed immediate and vigorous criticism of me by the Premier and others, conveyed wholly by the public media and in Parliament. There has been no communication by the Premier with me.

As far as I can tell from the media reports that have come to my attention (and only a small fraction have, I believe) I have been criticised for commenting on government policy matters and thereby compromising the independence of my office.

I reject such assertions if they have been made.

I think it appropriate – indeed desirable – that the Director of Public Prosecutions contribute publicly (or confidentially if desired) to the development of the criminal law and comment where necessary on matters affecting legal practice in the criminal justice system, even if such matters might be said by some to contain elements of "policy" (as indeed any proposal for change will probably do, even incidentally).

I am concerned at the attack on the independence of my office in fact constituted by such allegations. It is imperative that I be free to exercise my decision–making functions under the Director of Public Prosecutions Act independently of any improper or untoward influence by government (or from any other source). My decisions are made according to legal principle and in the public interest. The former is to be found in the statutes as interpreted by the courts and in pronouncements by the courts themselves. The latter is not to be determined by reference to ad hoc pronouncements by politicians or media commentators.

If there is even a reasonable perception that I am subject to the dictates of politicians, the independence and effectiveness of my office are at risk.

Scope of Evidence

The Office of the Director of Public Prosecutions is independent of the executive government in a way that departments and most instrumentalities are not. That independence has been constantly reinforced by the Premier in recent times. I am not subject to the Public Sector Management Act – I am not a public servant. I am not, therefore, strictly a "departmental officer".

The memoranda referred to above (Annexure B) prescribe administrative rules and procedures and provide guidelines for officers of State Government departments and instrumentalities. They do not have the force of law. Nevertheless for more abundant caution I sought the Attorney General's advice in relation to their application when the Committee's invitation was received.

The document entitled "Giving Evidence" provided by the Committee states that:

> "Departmental officers are not required to answer questions which seek their opinions on the merits of government policy. However, they may be asked to describe past and present policy, the effects of changes in policy and to discuss matters which public service advisers take into account when advising on policy."

That statement appears to be in broader terms than the memoranda.

With those considerations in mind and from the position of independence I enjoy, I have prepared this statement to comply with my obligations to the Committee. In doing so I accept the notion that the advocacy of Government policy is a Ministerial responsibility and I have sought to avoid doing that. My evidence is confined to the Bill and practical considerations arising from it.

APPENDIX 6

Article written by
Nicholas Cowdery, QC,
Director of Public Prosecutions

10 November 1995

The Sydney Morning Herald 10 NOV 1995

DPP must be independent of politics

NICHOLAS COWDERY

IN THE present unhelpful and largely unenlightening media controversy about my office of Director of Public Prosecutions, some commentators seem to have lost sight of its true nature and its proper relationship with the Government.

The Director of Public Prosecutions (DPP) is not a public servant, but an independent officer appointed by statute to prosecute crime in the name of the Crown (that is, on behalf of the community). The Office of the DPP is not a government department, even though it is funded by the Government.

Independence for the DPP is the most important quality given by the act passed in 1986 by the then Labor Government. That was recognised and stated in the second reading speech on December 1, 1986, by Terry Sheahan, Attorney-General, and by John Dowd, then in Opposition.

It is well-established and constantly reaffirmed on all sides; but what does it mean in practice, and why the recent fuss?

It means that decision-making in the prosecution process (including whether or not to prosecute, what charges to prosecute, whether or not to appeal and so on) takes place without political interference and without improper or untoward influence by the government of the day.

It is vital that the public have confidence in the independence of those decisions and, accordingly, it is important that they accept and believe that such influences are not operating. In fact they are not, but some media reports may generate a perception that there is conflict between me and the Government and that the Government is telling me what to do and what not to do. That creates the possibility that people may believe that there is improper influence being exercised when there is not. That is harmful to us all.

In one of those prosecution functions – deciding whether or not to appeal against sentences – I apply the legal tests that I am bound to apply. Has the judge made a material error of fact or law? Is the sentence outside the range of sentences properly imposed by the courts for offences of that type? If the answer to those questions is no, there will be no appeal.

Political influences do not bear on those questions. There is an argument, however, vigorously urged by some, that general public concern about low sentences should in some cases prompt an appeal where it is not otherwise indicated. Assuming such concern is genuine and widespread (and not merely the product of the unrepresentative noise-makers in the community), how can I nevertheless justify spending diminishing public funds on appeals unlikely to succeed simply in order to make a point to the courts? That is a conundrum involving a different kind of admittedly "political" influence.

Despite reports to the contrary, I have not "defied" the Premier. The Premier has not spoken or written to me at all in relation to the Crimes Amendment (Mandatory Life Sentences) Bill 1995, nor I to him. I understand from reports, however, that he has expressed some trenchant views. His are not the only opinions worthy of consideration.

Being independent of political interference does not mean that I cannot take an interest and manifest a concern in the law-making process, especially where it touches upon my functions, duties and responsibilities.

The Premier heads the elected government of the State. As the law-maker, the Government should not be afraid to receive opinions from interested members and organisations in the community about its proposals. It should not be afraid to hear those opinions expressed publicly. That is all that has happened in recent weeks in relation to this bill and my only public utterance was to comment, when asked by a journalist, along the lines of comment I had already made to the Attorney-General at his request.

I am not elected, much less elected to act in any particular way. Governments are elected and often say they have been elected to do certain things. I must always act in what is perceived to be the general public interest when making prosecuting decisions. I may also serve the public interest in a broader way by providing information and advice, based on practical experience, when government is contemplating making laws in the area of criminal justice. It matters not whether that information and advice advances or militates against the course set by government, acting in accordance with an assumed mandate or otherwise.

That is all that has occurred. There are no divisions, there is no "defiance", there is no crisis. The Attorney-General and I have continued in our proper working relationship, even though we disagree on some matters. I have provided information and views (reported elsewhere) to government and the parliamentary committee about the proposed legislation, as have many others, and the law-makers will act as they see fit according to proper parliamentary process.

Members of the public can, should, and no doubt do, make their own views known to the politicians engaged in that process. They and the criminal justice system must then live with the result, whatever it may be and whatever may be the consequences, foreseeable or not.

Nicholas Cowdery, QC, is Director of Public Prosecutions.

APPENDIX 7

Correspondence relating to the power of Parliamentary Committees to summon witnesses from the Chairman of the STAYSAFE Committee to the Speaker of the Legislative Assembly

9 April 1992

Staysafe
Joint Standing Committee on Road Safety

Parliament House, Macquarie St, Sydney 2000
Telephone: (02) 230 2161
Fax: (02) 230 2928

The Honourable K R Rozzoli MP
Speaker
Legislative Assembly

Dear Speaker,

The Deputy Premier and Minister for Roads, Mr Wal Murray MP, has recently written to me raising his serious concerns with the relationship between the Staysafe Committee and the Roads and Traffic Authority. I have attached Mr Murray's letter for your information.

Mr Murray has drawn attention to the Premier's Memorandum 91/36, which he indicates requires Parliamentary Committees to work through Ministers in accessing information or personnel from Departments under their administration.

I do not believe that such a requirement is the intent of the Premier's Memorandum 91/36.

In fact, I believe that such a requirement challenges the rights and role of Parliamentary Select and Standing Committees as laid out under the resolutions establishing them, Standing Rules and Orders, and legislation, particularly the Parliamentary Evidence Act, 1901, as amended.

The Premier's Memorandum is addressed to Ministers. It provides advice to Ministers concerning inquiries from Parliamentary Committees, and sets out the guidelines for Departmental officers when approached by Parliamentary Committees. These guidelines, in essence, require Departmental officers to inform their Minister that they have received an inquiry from a Parliamentary Committee, and provide advice as to the nature of the responses that Departmental officers can give with or without consultation with their Minister. I am particularly concerned that point A.1 of the guidelines to Departmental Officers is wrong. This point states:

> "Request for an officer to attend before a Committee or to provide material to it are to be made through the relevant Minister."

The Parliamentary Evidence Act, 1901 S.4 (1) and S.4 (2) indicates that a Parliamentary Committee such as STAYSAFE can compel witnesses to appear before it, without requiring prior Ministerial approval.

The Premier's Memorandum 91/36 also suggests that Departmental officers should not be asked to canvass, or interpret or express opinions on policy issues. The Parliamentary Evidence

Report by 30/4/92.

Act, 1901 S.11, permits a Parliamentary Committee to compel a witness to answer questions which require the witness to express an opinion. Thus it is my belief that Departmental officers appearing before the Committee can be asked questions about policy matters.

It seems that there are different interpretations of Premier's Memorandum 91/36. I understand that other Parliamentary Committees have similar concerns with Premier's Memorandum 91/36. I would appreciate your advice on this matter.

Yours sincerely,

Chris Downy 9/4/92.

Chris Downy, M.P.,
Chairman.
STAYSAFE, Standing Committee
on Road Safety.
Member for Sutherland.

SEEN BY ME
Speaker
9/4/1992

Seek Crown Solicitor's advice.

APPENDIX 8

Correspondence relating to the power of Parliamentary Committees to summon witnesses from the Speaker of the Legislative Assembly to the Chairman of the STAYSAFE Committee

27 May 1992

FILE COPY

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

OFFICE OF THE CLERK OF THE HOUSE

PARLIAMENT HOUSE
SYDNEY N.S.W. 2000
TELEPHONE: 230 2111

27 May 1992

Dear Mr Downy,

I refer to your recent letter concerning the Memorandum to Ministers issued by the Premier on Provision of Evidence and Information to Parliamentary Committees (Memorandum No. 91-36) and the correspondence you received from the Deputy Premier and Minister for Roads, the Hon W.T.J. Murray, M.P.

I have reviewed the Memorandum and agree that a misunderstanding appears to have arisen regarding the interpretation of several of the guidelines. The guidelines, which were prepared by the Premier's Department, as it was then called, are intended as directions to public servants on how they should conduct themselves should they be called on to attend before a committee or to provide it with material. They cannot amend the fundamental law which provides Parliamentary Committees with their power and authority.

As you have noted, the law relating to the summoning, attendance and examination of witnesses before the Legislative Council or Legislative Assembly or Committees thereof is governed in New South Wales by the Parliamentary Evidence Act 1901 ("the Act").

By provision of section 4 of the Act "any person not being a member of the Council or Assembly may be summoned to attend and give evidence before the Council or Assembly by notice of the order of the Council or Assembly signed by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be and personally served upon such person. Any such person may be summoned to attend and give evidence before a committee by an order of such committee signed by the chairman thereof and served as aforesaid."

The Crown Solicitor in advice to the Clerk of the Parliaments in 1990 concluded "there can be little doubt that [a] committee may compel a witness, other than a member of Parliament, to attend before it."

While the power to summon witnesses is therefore unquestionable, the inquiry process is extremely formal and often an inefficient means of obtaining or confirming non-contraversial or semi-public factual information. Thus modern committee practice has been to foster, so far as may be possible, co-operation and courteous relations between Parliament and the Executive. In this way the work of committees, which can assist Departments in formation and review of policy implementation, can be enhanced.

In practical terms Chairmen may consider, as a matter of course, routinely advising Ministers of the announcement of new topics of inquiry which touch on their portfolios, and foreshadowing that the Committee will be seeking submissions or input from officers. Some committees have requested that an appropriate senior officer be nominated as a contact or liaison officer, to open an informal channel of information for handling of minor information requests. It is of course up to the committee to determine how it wishes to approach a particular inquiry.

A further matter requiring clarification is the direction that "the evidence of officers should be limited to factual information related to their duties or responsibilities".

Advice has recently been sought from the Crown Solicitor as to whether a Parliamentary Committee has the power to compel witnesses to answer questions that require expression of opinions or the drawing of inferences. He has advised that his opinion is that "pursuant to s11 (1) of the Parliamentary Evidence Act a witness appearing before the committee can be compelled to answer a lawful question which requires that witness to express an opinion. In my view the question to be lawful must be one which is relevant to the inquiry being conducted".

The Crown Solicitor has suggested that because of the uncertainties surrounding the application of public interest immunity (as a result of the decision in Sankey v Whitlam (1979 - 1980) 142 CLR 1) the Parliamentary Evidence Act should be clarified by legislative amendment.

I draw these matters to your attention to be considered in conjunction with the other reform proposals aimed at strengthening Parliament and ensuring the continuing accountability of Executive Government to the Parliament.

Yours faithfully

The Hon. K.R. Rozzoli, M.P.
Speaker

The Hon. N.F. Greiner, M.P.
Premier, Treasurer and Minister
for Ethnic Affairs
State Office Block
Macquarie Street
SYDNEY NSW 2000

B:RONDA 1992\PREMIER.MEM

APPENDIX 9

Editorials in the Sydney Morning Herald relating to the Director of Public Prosecutions

The Sydney Morning Herald

23 OCT 1995

Independence of the DPP

THE State Government does not like what the Director of Public Prosecutions, Mr Nicholas Cowdery, QC, has said about its mandatory life sentence legislation. If it can, it should say why, instead of maintaining a doubtful attack on Mr Cowdery for speaking out of turn. Two weeks ago, Mr Carr went as far as to say Mr Cowdery had no right to criticise government legislation in the way he had. Even more ludicrously in Parliament last Thursday, the Police Minister, Mr Whelan, said: "If Mr Cowdery wants to get into the political area then he should resign his position and run for Parliament."

The Government should pause before it does itself more harm pursuing this line. Its attempts to suggest Mr Cowdery is out of order merely for speaking seem to rest on two main propositions. One is that policy is for elected governments, not officials such as the DPP, whose particular role as a prosecutor is well defined. The other is that the independence of the DPP is compromised by interventions such as Mr Cowdery's on the mandatory life sentence legislation. While it is true that policy is for governments and the independence of the DPP is crucial, the way these principles have been applied to this case has been very shaky indeed.

The DPP exists to provide an independent authority for the decision to prosecute. This role enhances public confidence in the criminal justice system. It makes the exercise of the discretion to prosecute separate from the government of the day and ensures a high degree of consistency and expertise is applied in the most serious or complicated criminal cases. The Government rightly emphasises the crucial importance of the DPP's independence in maintaining public confidence in the office. But that does not mean Mr Cowdery's criticism of the mandatory life sentence legislation has compromised the independence of his office. He has simply pointed out – from the vantage-point of experience – how unworkable the legislation is likely to be. He has done that in the context of a political frenzy which dates back to the State election campaign, when both sides engaged in a foolish and irresponsible policy auction, each promising to be tougher on crime than the other. Far from taking one side or the other politically, Mr Cowdery, from the time of his first criticism of the approach now embodied in the Crimes Amendment (Mandatory Life Sentence) Bill, has been quite apolitical.

The Opposition has now begun to attack the Government for its criticism of Mr Cowdery. That is sheer political opportunism, and to be expected. It does not turn Mr Cowdery's criticisms of the bill in terms of legal practice into engagement in partisan politics. Another way to consider whether he has compromised the independence of his office is to ask whether anything he has said could compromise any decision he might have to make about whether or not to prosecute in a particular case. Obviously not.

The more the Government attacks Mr Cowdery with the suggestion that he should say nothing about this or other legislation, the more it appears to be avoiding the substance of his criticisms of the bill. Those criticisms have always been cogent. The bill is based on ideas foolish when made in the heat of the election campaign and impractical as presented in the bill. The Government should be looking for ways to let the bill quietly die. For the Government to continue to attack Mr Cowdery will simply make matters worse for it.

The Sydney Morning Herald 8 NOV

(6)

Wrong verdict on the DPP

Comment

Parliamentary Committee, NSW Col-Law NSW

THE NSW Director of Public Prosecutions, Mr Nicholas Cowdery, QC, is right to warn that attacks on his independence by the NSW Government are putting his office at risk. The DPP must be independent and must be seen to be independent. The Carr Government has been under some pressure from the Opposition because of its response to Mr Cowdery's criticism of its Crimes Amendment (Mandatory Life Sentence) Bill. It is in danger of falling into the clumsy political response of shooting the messenger, Mr Cowdery, rather than listening to his message.

At the heart of the argument is Mr Carr's determination to introduce mandatory life sentences for commercial drug traffickers and the worst murderers. Mr Cowdery has, rightly, criticised this legislation in strong terms. Rather than answering the criticism with cogent argument, the Government has tried to stop Mr Cowdery appearing before a parliamentary committee hearing evidence on the legislation. In the words of the Police Minister, Mr Whelan: "If Mr Cowdery wants to get into the political area then he should resign his position and run for Parliament."

There are two separate matters at issue in the row between Mr Cowdery and the Government. On both matters Mr Cowdery's position is preferable to that of the Government. He is correct, for example, to insist that he must be free to act independently "of any improper or untoward influence by government". The DPP provides an independent authority for the decision to prosecute. Public confidence in the decisions the DPP makes is helped by the exposure of his views on the criminal justice system. By trying to prevent Mr Cowdery from appearing before the parliamentary committee, the Government is trying to prevent him from exposing his views. The Opposition, in fact, claims that this pressure on Mr Cowdery to remain silent amounts to contempt of Parliament by the Government.

The second issue relates to the legislation itself. In his evidence to the parliamentary committee, Mr Cowdery was unequivocal about "the vices inherent in this bill". He cited five consequences of the legislation — including the way it will inhibit genuine rehabilitation — that ensures a "wholly undesirable and regressive" outcome if it is forced through the Parliament.

This criticism of the legislation has been supported by other experts. Dr Dave Dixon, from the Law School of the University of NSW, insists that the legislation treats the public as "fools" by setting out quick solutions to complex problems. Mr George Zdenkowski, an Associate Professor in Law at the University of NSW, makes the point that "mandatory sentencing is too serious an issue of public policy to be a political football". Russell Hogg, a senior lecturer at Macquarie University's Law School, says the legislation appeals to "the lowest common denominator". Mr Hogg is a member of Mr Carr's Crime Prevention Council.

It is clear that the Government, which is offside with informed opinion, is too committed to its election promise of a mandatory sentencing regime. During the campaign, Mr Carr was obsessed with being seen as tough on law and order. When the Coalition proposed its "three strikes and you're in" (for life) legislation, he felt obliged to trump this with the mandatory sentencing card. His attack on Mr Cowdery is clearly a diversionary tactic. The proposed legislation is the real problem, not the DPP.

APPENDIX 10

Minutes of the Proceedings

Proceedings of the Committee

Note:

At the time the Committee was conducting this inquiry, it was also inquiring into other unrelated matters. Those parts of the Minutes of the Meetings of the Committee which concern the other two matters have been deleted from the Minutes appearing below.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No. 21

Wednesday 15 May 1996

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Miss Gardiner	Mr Lynn
Mr Johnson	Mr Manson
Mr Jones	Mr Vaughan

Minutes of meeting No. 20 were confirmed, on motion of Mr Johnson.

The Committee deliberated.

* * *

The Committee discussed the reference regarding the Attendance of Witnesses before Parliamentary Select and Standing Committees.

The Committee adjourned at 10.45 am until Friday 17 May 1996 at 2.00 pm.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No. 22

Friday 17 May 1996

at Parliament House, Sydney at 2.00 pm

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Miss Gardiner	Mr Jones
Mr Johnson	Mr Vaughan

Apologies were received from Mr Lynn and Mr Manson.

Minutes of meeting No. 21 were confirmed, on motion of Mr Johnson.

* * *

The Committee deliberated.

* * *

The Committee adjourned at 3.35 pm until Wednesday 22 May 1996 at 12 noon.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No. 23

Wednesday 22 May 1996

at Parliament House, Sydney at 12.00 noon

MEMBERS PRESENT

Miss Gardiner	Mr Lynn
Mr Johnson	Mr Manson
Mr Jones	Mr Vaughan

Minutes of meeting No. 22 were confirmed, on motion of Mr Vaughan.

* * *

The Committee deliberated.

* * *

Resolved, on motion of Mr Johnson: That the Chair prepare and submit a Draft Report on the Inquiry into the Attendance of Witnesses before Parliamentary Committees, for consideration by the Committee.

Resolved, on motion of Ms Gardiner: That the Chair is authorised to give a copy of the Draft Report on the Inquiry into the Attendance of Witnesses before Parliamentary Committees to Party Leaders in the Legislative Council.

The Committee determined that a meeting of the Committee would be held on Tuesday 28 May 1996 at 1.45 pm in the Clerk's Conference Room to consider the Draft Report on the Inquiry into the Attendance of Witnesses before Parliamentary Committees.

The Committee adjourned at 12.28 pm until Thursday 23 May 1996 at 1.00 pm.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No. 25

Tuesday 28 May 1996

at Parliament House, Sydney at 1.45 pm

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Miss Gardiner	Mr Lynn
Mr Johnson	Mr Manson
Mr Jones	Mr Vaughan

Minutes of meeting No. 24 were confirmed, on motion of Mr Johnson.

CORRESPONDENCE RECEIVED:

Letter to the Clerk from the Hon B S J O'Keefe, AM, QC, Commissioner, Independent Commission Against Corruption in response to the letter from the Clerk forwarding the Committee's Draft Code of Conduct. (23 May 1996)

The Committee deliberated.

The Committee considered the Draft Report on the Inquiry into the Attendance of Witnesses before Parliamentary Committees.

Resolved, on motion of Mr Johnson: That consideration of the Draft Report on the Inquiry into the Attendance of Witnesses before Parliamentary Committees be deferred until 5.00 pm today to allow for consultation with the Leader of the Opposition.

In accordance with the Committee's resolution, the Committee adjourned at 2.00 pm until 5.00 pm today.

At 5.00 pm, the Committee reconvened.

The Committee further considered the Draft Report on the Inquiry into the Attendance of Witnesses before Parliamentary Committees.

Chapter 1, sections 1 and 2, read and agreed to.

Chapter 2, sections 1 to 4, read and agreed to.

Chapter 3, sections 1 to 4, read and agreed to.

Chapter 4, sections 1 and 2, read and agreed to.

Chapter 4, section 3, read.

Resolved, on motion of Mr Lynn: That the following sentence be inserted at the end of paragraph 4.3.16: "Such discussions though should not involve intimidation or any coercive methods, since this would constitute a contempt of the Parliament".

Chapter 4, section 3, as amended, agreed to.

Chapter 4, section 4, read and agreed to.

Chapter 5, section 1, read and agreed to.

Recommendation No. 1, read and agreed to.

Chapter 5, section 2, read.

Resolved, on motion of Mr Lynn: That the following paragraph be inserted after paragraph 5.2.5:

> 5.2.6 In recognising this, there is no intention to restrict the powers of a Committee in requiring witnesses to answer any and all lawful questions put to them. Further, the Committee is firmly of the view that Ministers and senior public servants must take great care to ensure that in briefing departmental officers appearing before Parliamentary Committees their actions in no way constitute intimidation or coercion.

Chapter 5, section 2, as amended, agreed to.

Recommendation No. 2, read and agreed to.

Resolved, on motion of Mr Lynn: That the following recommendation be inserted:

> RECOMMENDATION No. 3
>
> That Ministers and senior departmental officers be advised that any attempt to intimidate or coerce public sector officers who are called to give evidence before Parliamentary Committees in relation to their evidence would constitute a contempt of Parliament.

Recommendations Nos. 4 and 5, read and agreed to.

Resolved, on motion of Mr Vaughan: That the Report on the Inquiry into the Attendance of Witnesses before Parliamentary Committees, as amended, be adopted.

Resolved, on motion of Mr Lynn: That the Report be signed by the Chair and be presented to the Clerk in accordance with the Resolution establishing the Committee.

Resolved, on motion of Mr Jones: That 300 copies of the Report be printed, on recycled paper if possible, after tabling.

The Committee adjourned at 5.20 pm until Monday 17 June 1996 at 2.00 pm.

Contact Details

Correspondence and telephone enquiries concerning the Committee or its work should be directed to:

Ms Lynn Lovelock
Clerk to the Committee
Standing Committee on Parliamentary Privilege and Ethics
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Telephone: (02) 230 2024
Facsimile: (02) 230 2761
e-mail: council@ph.nsw.gov.au

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Standing Committee on Parliamentary Privilege and Ethics, Report No.2