

Privileges Committee

Procedural fairness for inquiry participants

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Terms of reference

That, in response to Recommendation 4 of the Select Committee on the Legislative Council Committee System, the Privileges Committee inquire into and report on procedures to be observed by Council committees to provide procedural fairness for inquiry participants.

The terms of reference were referred to the committee by the President of the Legislative Council, the Honourable John Ajaka MLC, on 8 August 2017.

Committee details

Committee members

The Hon Natasha Maclaren-Jones MLC ¹	Liberal Party	<i>Chair</i>
The Hon Peter Primrose MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
Dr Mehreen Faruqi MLC	The Greens	
The Hon Trevor Khan MLC	National Party	
The Hon Shayne Mallard MLC ²	Liberal Party	
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¹ Nominated as Chair on 16 April 2018 (Minutes, *NSW Legislative Council*, 1 May 2018, p 2457).

² Appointed on 16 April 2018 in place of Mr Mason-Cox (Minutes, *NSW Legislative Council*, 1 May 2018, p 2457).

Chair's foreword

The genesis for this inquiry was a recommendation of the Select Committee on the Legislative Council Committee System in 2016. The select committee noted that while the Legislative Council committees act judiciously to protect their inquiry participants, there are no formal, publicly available procedures to ensure witnesses are accorded proper process and fair treatment. The select committee therefore recommended that an inquiry be referred to this committee in relation to protections for witnesses.

In conducting the inquiry the committee noted that Council committees already have a suite of procedural protections in place for inquiry participants based on standing orders, ad hoc resolutions and longstanding practice, but that these protections have never been codified by the House. The committee also noted that many Houses of Parliament have directed their committees to follow particular procedures for the protection of witnesses by either resolution or standing order. The committee considered these differing approaches and concluded that the adoption of a uniform set of protections for participants in Council committee inquiries would foster greater clarity and consistency, ensure inquiries are conducted in a manner which is seen to be fair, and enhance public confidence in the committee system.

Accordingly, the committee's report recommends that the Council adopt a resolution specifying the procedures to be followed by committees to provide procedural fairness to inquiry participants. The form and wording of the draft resolution draw on similar resolutions in comparable Houses of Parliaments and in particular the Senate's 1988 resolution, *Procedures to be observed by Senate committees for the protection of witnesses*. However, the procedures prescribed in the draft resolution reflect current Council procedure and practice.

The committee is confident that the proposed resolution will strengthen the Legislative Council committee system by informing witnesses of their procedural rights when participating in a parliamentary inquiry, via a complete but concise set of procedures to be followed by a committee before, during and after their hearing.

I thank the members of the committee for their work in this inquiry and the committee secretariat for their efforts. I also thank the Clerk of the Parliaments and the other officers of the Legislative Council who were consulted in relation to the procedures set out in the draft resolution.

I commend the report to the House.



The Hon Natasha Maclaren-Jones MLC

Committee Chair

Recommendation 1

That the House adopt the following resolution of continuing effect for the procedures to be followed by Legislative Council committees to provide procedural fairness to inquiry participants:

Procedures to be followed by Legislative Council committees to provide procedural fairness to inquiry participants

1. Inviting and summoning witnesses

A witness will be invited to give evidence at a hearing unless the committee decides that a summons is warranted.

2. Information for witnesses

A witness will normally be given reasonable notice of their hearing and will be provided with the inquiry terms of reference, a list of committee members and a copy of these procedures.

3. Opportunity to make a submission before a hearing

A witness will normally be given the opportunity to make a submission before their hearing.

4. Opportunity to request a private (*in camera*) hearing

A witness may request, before or during their hearing, that some or all of their evidence be heard in private (*in camera*). The committee will consider this request and if it declines, will advise the witness of the reasons why.

5. Publication of evidence taken in private (*in camera*)

Prior to their private (*in camera*) hearing, a witness will be informed that the committee and the Legislative Council have the power to publish some or all of the evidence given. If the committee intends to publish, it will normally consult the witness, advise them of the outcome, and give reasonable notice of when the evidence will be published.

6. Attendance with a legal adviser

With the prior agreement of the committee, a witness may be accompanied by and have reasonable opportunity to consult a legal adviser during their hearing. The legal adviser cannot participate in the hearing and will not be sworn in or give evidence, unless the committee decides otherwise.

7. Attendance with a support person

With the prior agreement of the committee, a witness may be accompanied at their hearing by a support person. The support person will not be sworn in or give evidence, unless the committee decides otherwise.

8. Witnesses to be sworn

At the start of their hearing a witness will, unless the committee decides otherwise, take an oath or affirmation to tell the truth, and the provisions of the *Parliamentary Evidence Act 1901* will then apply.

9. Chair to ensure relevance of questions

A committee chair will ensure that all questions put to witnesses are relevant to the inquiry.

10. Questions to public officials

Public officials will not be asked to give opinions on matters of policy, and will be given reasonable opportunity to refer questions to more senior officials or to a minister.

11. Questions on notice

A witness may request to take a question on notice and provide the answer in writing at a later date to be determined by the committee.

12. Objections to answering questions

Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (*in camera*).

(a) **Witness appearing by invitation**

If a witness who appears by invitation continues to refuse to answer the question, the committee may consider summoning the witness to reappear later, and will advise the witness that as they will be under oath and so subject to section 11 of the *Parliamentary Evidence Act 1901*, they may be compelled to answer the question.

(b) **Witness appearing under summons**

The continued refusal by a witness, having been summoned, to answer the question while under oath, may constitute a contempt of parliament under the *Parliamentary Evidence Act 1901*, and the committee may report the matter to the Legislative Council.

13. Evidence that may seriously damage the reputation of a third party

(a) **Evidence about to be given**

Where a committee anticipates that evidence about to be given may seriously damage the reputation of a person or body, the committee may consider hearing the evidence in private (*in camera*).

(b) **Evidence that has been given**

Where a witness gives evidence in public that may seriously damage the reputation of a person or body, the committee may consider keeping some or all of the evidence confidential.

(c) **Opportunity to respond**

Where a witness gives evidence that may seriously damage the reputation of a person or body, the committee may give the person or body reasonable access to the evidence, and the opportunity to respond in writing or at a hearing.

14. Evidence that places a person at risk of serious harm

Where a witness gives evidence that places a person at risk of serious harm, the committee will immediately consider expunging the information from the transcript of evidence.

15. Tendering documents

A witness may tender documents during their hearing. The committee will decide whether to accept and to publish such documents.

16. Inviting and ordering the production of documents

A witness will be invited to produce documents unless the committee decides that an order to produce the documents is warranted.

17. Requests for confidentiality

A person or body may request that documents provided to a committee be kept confidential in part or in full. The committee will consider the request and if it declines, will advise the person or body of the reasons why, and give reasonable notice of when the documents will be published.

18. Transcripts

A witness will be given the opportunity to correct transcription errors in their transcript of evidence. Amendments to or clarifications of evidence may be requested in writing.

19. Treatment of witnesses

Witnesses will be treated with courtesy at all times.

20. Improper treatment of inquiry participants

Where a committee has reason to believe that a person has been improperly influenced in respect of the evidence they may give to a committee, or has been penalised, injured or threatened in respect of evidence given, the committee will take all reasonable steps to ascertain the facts of the matter. If the committee is satisfied that such action may have occurred, the committee may report the matter to the Legislative Council.

21. Inquiry participants before the Privileges Committee

Where the Privileges Committee inquires into a matter which may involve an allegation of contempt, the committee may adopt additional procedures as it sees fit in order to ensure procedural fairness and the protection of inquiry participants.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the President of the Legislative Council, the Hon John Ajaka MLC, on 8 August 2017.

On 27 September 2017 the committee released a discussion paper which highlighted key issues in relation to the inquiry and invited stakeholder views on questions developed in response to those issues.

The committee received 10 submissions (see Appendix 1 for a list of submission authors).

On 3 May 2018 the committee considered a set of draft procedural fairness resolutions based on the current practices of committees in the Council, before the chair proceeded to prepare the chair's draft report.

Inquiry related documents are available on the committee's website including the discussion paper and submissions.

Chapter 1 Legislative Council committee inquiries: powers and protections

In 2016 the Select Committee on the Legislative Council Committee System noted that while Legislative Council committees act judiciously to protect their participants, there are no formal, publicly available procedures to ensure witnesses are accorded proper process and fair treatment. The Select Committee therefore recommended that the Privileges Committee inquire into procedures for the protection of witnesses in committee inquiries. That recommendation led to the referral by the President of the Legislative Council, the Hon John Ajaka MLC, of the current inquiry which requires the Privileges Committee to inquire into and report on procedures to be observed by Council committees to provide procedural fairness.

The identification of the procedures which should be observed by Council committees to protect procedural fairness requires an understanding of the meaning of procedural fairness, the nature of the inquiry powers of Council committees, the legal protections which apply to participants in Council committee inquiries and the procedures which are currently applied by Council committees to promote procedural fairness.

What is procedural fairness?

- 1.1** The term procedural fairness is often used to refer to common law principles concerning statutory and prerogative powers designed to ensure the fairness of the decision-making procedure of courts and administrators. The term is used interchangeably with ‘natural justice’. It encompasses the ‘hearing rule’, which requires that a person be given an opportunity to present their case with knowledge of any prejudicial material that might be taken into account by the decision maker, and the ‘rule against bias’ which protects the right to have a decision made by a decision maker who is neither biased nor might reasonably be apprehended to be so.³ At the root of the concept is the provision of a fair hearing and, in non-litigious contexts, the notion that an individual be given an adequate opportunity to be heard.⁴
- 1.2** As noted in submissions to this inquiry, Australian courts and tribunals are under a duty to afford procedural fairness.⁵ The requirement to provide procedural fairness also arises in respect of investigating agencies.⁶ For example, the Independent Commission Against Corruption must afford procedural fairness to those who may be adversely affected by its findings.⁷ The Commission is also required to issue guidelines in relation to aspects of procedural fairness in the conduct of its public inquiries.⁸

³ *Butterworths Encyclopaedic Australian Legal Dictionary*, LexisNexis (AU), accessed 29 August 2017, ‘Procedural fairness, ‘Natural justice’.

⁴ *Judicial Review; The laws of Australia*, Mark Robinson SC, ed, Thomson Reuters, 2014, p 301.

⁵ *International Finance Trust Company Ltd v New South Wales Crimes Commission* [2009] HCA 49, [54]. Cited in Submission 5, Law Society, page 3.

⁶ See Submission 5, Law Society, page 3.

⁷ *Edward Moses Obeid Sr v David Andrew Ipp* [2016] NSWSC 1376, [85]-[86], cited in Submission 5, Law Society, p 4.

⁸ *Independent Commission Against Corruption Act 1988*, section 31B; Submission 5, Law Society, p 4.

- 1.3 There is no legal requirement for Parliament or a parliamentary committee to observe procedural fairness.⁹ However, the public is entitled to expect that committees will have regard to principles of fairness when conducting their inquiries. The application of such principles is particularly important in light of the impact of publishing committee evidence and reports on the internet, and broadcasting committee hearings live.
- 1.4 The Clerk of the Australian Senate has observed that, in the context of parliamentary committee inquiries, procedural fairness does not require mimicry of the rules and procedures applied by the courts but rests on procedures which provide substantive natural justice.¹⁰
- 1.5 There is debate as to whether procedural fairness can be achieved in the context of a committee inquiry given that a House of Parliament is a political assembly rather than an impartial and independent tribunal.¹¹ However, the Law Society has argued that current standards of public administration and fairness require parliamentary committees to be guided by principles of procedural fairness to the extent possible.¹²
- 1.6 A distinction can be drawn between procedural fairness and the obligation on committees to consider and protect the interests of inquiry participants who may be vulnerable, such as persons with a mental illness, young people and indigenous people. Committees have adopted special measures to protect the interests of such persons where the circumstances have required it.

The inquiry powers of Council committees

- 1.7 In conducting their inquiries Council committees have power to send for and examine persons, records and things.¹³ Most witnesses attend voluntarily but if necessary a committee may issue a summons requiring a witness to attend.¹⁴ Committees may hold hearings in public or in private (*in camera*),¹⁵ publish the submissions and evidence they receive¹⁶ and authorise the filming, photography and broadcasting of their proceedings.¹⁷ The powers to publish

⁹ Senate Standing Committee on Privileges, *Report on question of appropriate penalties arising from the Report of Committee of Privileges of 17 October 1984*, 8th Report, 1985, PP No. 239/1985, p 29.

¹⁰ Submission 9, Australian Senate, p 8.

¹¹ See Submission 3, House of Representatives, Attachment, 'Review of procedures of the House of Representatives relating to the consideration of privilege matters and procedural fairness', Professors Geoffrey Lindell and Gerard Carney, p 5; Wayne Martin AC, Chief Justice of Western Australia, 'Natural justice in the parliamentary sphere: should parliaments retain the power to punish?', paper given at the Australian and New Zealand Association of Clerks at the Table Conference held on 24 January 2018.

¹² Submission 5, Law Society, p 2.

¹³ Standing Order 208(c).

¹⁴ *Parliamentary Evidence Act 1901*, section 4. Members of the Council and Assembly may not be summoned but may be invited to appear before a committee.

¹⁵ Standing Order 222(1).

¹⁶ *Parliamentary Papers (Supplementary Provisions) Act 1975*, section 4.

¹⁷ Resolution of the Legislative Council, 'Broadcast of proceedings', *Minutes*, 18 October 2007, pp 279-281.

evidence and hear evidence in public are supported by statutory immunities which exempt committee proceedings from legal liability.¹⁸

- 1.8** Special powers are available to deal with witnesses who refuse to cooperate with committees. For example, under the *Parliamentary Evidence Act 1901*, a person who fails to comply with a summons to attend and give evidence before a committee may be apprehended, retained in custody and brought before the committee from time to time for the purpose of giving evidence.¹⁹ Further, a person who fails to answer a 'lawful question' during examination by a committee may be committed to the custody of the Usher of the Black Rod and if the House so orders to gaol for up to one month.²⁰
- 1.9** Given the extensive nature of the powers available to committees and the impact which their exercise can have on inquiry participants and third parties there is an onus on committees to use their powers responsibly and in a manner which is seen to be fair.

Legal protections for participants in Council inquiries

- 1.10** Witnesses and submission authors enjoy a range of statutory protections with respect to the evidence they give to committees. For example, under the *Parliamentary Evidence Act 1901*, no action can be maintained against a witness for defamatory words spoken while giving evidence before a committee.²¹ Under the *Defamation Act 2005* the giving of evidence or the presentation of a document to a committee is protected by absolute privilege for the purpose of any action for defamation.²²
- 1.11** While legal protections shield participants from adverse consequences outside the committee process such as action in courts or tribunals, procedural fairness is concerned with protecting participants and third parties from unjust treatment by the committee itself.

Current procedures to protect procedural fairness in Council inquiries

Standard committee inquiries

- 1.12** The Legislative Council has not adopted any order or resolution setting out the procedures to be followed by its committees for the protection of procedural fairness. However, Council committees commonly follow a number of informal procedures to ensure that participants are treated fairly and committees are not oppressive in the use of their powers. These procedures draw on standing orders, conventions, resolutions of the House and longstanding practice.

¹⁸ Article 9 of the Bill of Rights 1689 (which applies in New South Wales by section 6 and schedule 2 of the *Imperial Acts Application Act 1969*); *Defamation Act 2005*, section 27.

¹⁹ *Parliamentary Evidence Act 1901*, section 7-9.

²⁰ *Parliamentary Evidence Act 1901*, section 11.

²¹ *Parliamentary Evidence Act 1901*, section 12.

²² *Defamation Act 2005*, sections 27 and 4.

1.13 The key procedures which are usually followed by committees to provide procedural fairness can be summarised as follows:

- Parties are normally invited to make a written submission to an inquiry before being invited to give oral evidence.
- Witnesses are normally invited to appear at a public hearing and summonses are only issued where a witness has declined such an invitation or if a witness objects to answering a 'lawful question' and the committee wishes to press the witness for an answer at a further hearing. Witnesses may also be summoned if a committee intends to ask questions that may reveal information covered by statutory secrecy provisions or a deed of release.²³
- Witnesses are normally given reasonable notice of a hearing to which they are invited or summoned to appear, and are supplied with a copy of the committee's terms of reference, membership and other information prior to appearing before the committee.
- Witnesses may request to give their evidence in private (*in camera*).²⁴ Any application to do so is considered by a committee, which generally accepts these requests.
- Inquiry participants may request that some or all of their evidence remain confidential and not be published. Any application to do so is considered by a committee, which generally accepts these requests.
- Members are generally expected to ask questions of a witness within the terms of reference of an inquiry.
- Witnesses may request to be accompanied by, and may consult, an adviser if the committee agrees.²⁵
- Witnesses may request to be accompanied by a support person if the committee agrees.
- Witnesses may object to answering a question, and committees should consider and determine any objection by a witness.
- At the discretion of the committee, inquiry participants may be given an opportunity to respond to any adverse reflections made about them.
- If a committee believes that evidence adversely reflecting on a person is to be given, the committee may consider hearing the evidence *in camera* or redacting the information from the transcript. Where highly sensitive evidence has been given the committee may in exceptional circumstances consider whether the record should be expunged.

²³ This practice is based on legal advice received by the Clerk of the Parliaments in 2015 which supported the practice of serving a summons if a committee is questioning a witness on matters the witness might otherwise not be permitted to answer to make it abundantly clear that the committee can compel answers to these questions.

²⁴ Under SO 222(1) A committee is to take all evidence in public unless the committee decides otherwise.

²⁵ This includes a legal adviser. Standing Order 225 provides: 'A person or body is not entitled or permitted to be represented by counsel or a solicitor at a hearing of a committee unless the committee otherwise decides'.

- Public servants should not be asked to express an opinion on the merits of a government policy but may be asked to explain government policy, describe how it has been formulated and how it differs from past policies.
- A witness will be advised that their evidence may be broadcast or televised.²⁶
- A transcript of a witness' evidence is forwarded to the witness as soon as possible after each hearing for the correction of errors in transcription.²⁷

Contempt inquiries by the Privileges Committee

- 1.14** The Privileges Committee examines matters of parliamentary privilege referred to it by the House or the President including matters involving a possible contempt. Where a finding of contempt by the committee is adopted by the House the range of sanctions which may be imposed is limited as the Legislative Council has no power to punish the offender in the absence of statutory authority.²⁸ However, a finding of contempt in itself can have damaging consequences for the reputation and professional standing of the person concerned. Further, if the person found in contempt is a member of the House more significant sanctions are available potentially including suspension or expulsion from the House.
- 1.15** The Privileges Committee usually follows the procedural fairness procedures which apply in standard committee inquiries outlined in paragraph 1.13 above. However, in view of the gravity of a finding of contempt, the committee has adopted additional measures to strengthen procedural fairness in some of its inquiries. These measures have varied depending on the circumstances of the inquiries concerned, but have included:
- agreeing to allow a member whose conduct is being investigated to submit to the Chair written questions to be asked of witnesses in the event that hearings are held²⁹
 - inviting a member whose conduct is being investigated to respond to draft material before its inclusion in the committee's report³⁰
 - allowing legal advisers for a witness to be present while the witness gives evidence in private (*in camera*)³¹

²⁶ Resolution of the Legislative Council concerning the sound and audio-visual broadcast of proceedings of the House: *Minutes*, 18 October 2007, p 281.

²⁷ SO 222(2) 'A witness before a committee is to be given the opportunity of correcting their transcript of evidence, but corrections must be confined to verbal inaccuracies or explanations of answers. Corrections in substance can only be made by further giving of evidence'.

²⁸ For a description of the powers of the Legislative Council to deal with contempt, see Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, The Federation Press, 2008, pp 94-99.

²⁹ Standing Committee on Parliamentary Privilege and Ethics, *Report on statements made by Mr Gallacher and Mr Hannaford*, November 1999, Appendix 2, p 4.

³⁰ Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the pecuniary interests register*, October 2002, p 107.

³¹ Standing Committee on Parliamentary Privilege, *Report concerning the publication of an article in the Sun Herald newspaper containing details of in camera evidence*, October 1993, p 46.

- engaging legal advisers to advise the committee on the application of the principles of procedural fairness/natural justice³²
- conducting all hearings in private (*in camera*) and only authorising the subsequent publication of those sections of the evidence which would not cause unnecessary damage to the reputations of individuals, compromise ongoing police investigations or prejudice matters currently before the courts³³
- seeking approval for financial assistance from Treasury to allow a member whose conduct is being investigated to access legal advice.³⁴

1.16 In some inquiries conducted by the Privileges Committee the terms of reference from the House itself have included direction to the committee in relation to procedural fairness.³⁵ There have also been cases in which a member of the Privileges Committee who has had an interest in a particular inquiry which may have given rise to a perception of bias has been replaced for that inquiry.³⁶

Committee comment

1.17 Council committees have developed a comprehensive range of procedures to provide procedural fairness to inquiry participants and third parties. These procedures are important given that Council inquiries may have significant impacts on witnesses, submission authors and third parties. However, as noted by the Select Committee on the Legislative Council Committee System, there are currently no formal measures which oblige committees to accord proper process and fair treatment. The next chapter explores the approaches to procedural fairness which have been adopted in other jurisdictions with a view to assessing appropriate avenues to provide procedural fairness to inquiry participants.

³² Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the conduct of the Honourable Franca Arena MLC*, June 1998, Report 6, Vol 1, p 9.

³³ Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the conduct of the Honourable Franca Arena MLC*, June 1998, Report 6, Vol 1, p 11.

³⁴ Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the conduct of the Honourable Franca Arena MLC*, June 1998, Report 6, Vol 1, p 9.

³⁵ For example, the terms of reference establishing the Mt Penny inquiry in 2013 authorised the committee to adopt and report on such additional procedures concerning procedural fairness, natural justice and the protection of witnesses as the committee saw fit. In the result, however, the committee reported that no additional procedural protections had been necessary: Privileges Committee, *The 2009 Mt Penny return to order*, Report 69, October 2013, p 7.

³⁶ Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into statements made by Mr Gallacher and Mr Hannaford*, Report 11, November 1999, paragraph 1.1.7; *Possible intimidation of witnesses before GPSC No. 3 and unauthorised disclosure of committee evidence*, Report 13, November 2001, paragraph 1.11.

Chapter 2 Procedural fairness measures in other Parliaments

In conducting this inquiry the committee received submissions from a number of Houses of Parliament outlining the measures which are followed by their committees to protect procedural fairness. The submissions revealed that some Houses have adopted resolutions directing their committees to apply particular measures for the protection of procedural fairness, other Houses have adopted standing orders prescribing such measures, while in others the issue of procedural fairness is addressed in guidelines and uncodified practices. This chapter summarises the approaches adopted by Houses within each of these three categories.

Resolutions concerning procedural fairness

- 2.1 The Senate and the House of Representatives have passed resolutions prescribing the procedures to be followed by their committees to provide procedural fairness.

The Senate

- 2.2 In 1988, following the passage of the *Parliamentary Privileges Act 1987* (Cth), the Senate agreed to a series of ‘Privilege Resolutions’, largely codifying existing practice, which declare the manner in which the Senate will observe its privileges and exercise its contempt powers and provide mandatory procedural direction to its committees.³⁷
- 2.3 Privilege Resolution 1 sets out the general protections available to witnesses and other participants in Senate inquiries.³⁸ These are broadly similar to the informal procedures followed by Legislative Council committees discussed in chapter 1 of this report.
- 2.4 Privilege Resolution 2 concerns special procedures for the protection of witnesses before the Senate Committee of Privileges in inquiries concerning a possible contempt.³⁹ The rationale for the adoption of these procedures included the Senate’s powers under section 7 of the *Parliamentary Privileges Act 1987* to punish contempts by fines or imprisonment, and the potential for damage to the reputation of persons subject to contempt findings.⁴⁰
- 2.5 In practice Senate committees observe various other procedures relating to procedural fairness in addition to those prescribed in Privilege Resolution 1. For example, under the Senate’s broadcasting resolution a witness must be given a reasonable opportunity to object to the

³⁷ Submission 9, Australian Senate, p 1.

³⁸ The Senate Privilege Resolutions, including Resolution 1, are published on the Senate’s website at www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Appendices/Appendix_2.

³⁹ Submission 9, Australian Senate, p 1. The Senate Privilege Resolutions, including Resolution 2, are published on the Senate’s website at www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Appendices/Appendix_2.

⁴⁰ Submission 9, Australian Senate, pp 1-2.

broadcasting of proceedings; under the Senate's *Guide to committee procedure and practice* witnesses are to be treated fairly and with courtesy.⁴¹

- 2.6 Further, when conducting inquiries involving a possible contempt the Senate Privileges Committee has at times adopted specific measures beyond those mandated by Privilege Resolution 2 such as declining to publish certain types of material to protect witnesses and third parties.⁴²

The House of Representatives

- 2.7 In 2013 the House of Representatives adopted a resolution setting out procedures to be followed by committees when interacting with witnesses⁴³ which are similar to those in Senate Privilege Resolution 1.
- 2.8 The Clerk of the House of Representatives has stated that these procedures 'work well', provide 'a clear set of principles for House committees to follow when dealing with witnesses', and 'provide witnesses appearing before House committees with an understanding of what they expect in their dealings with House committees'.⁴⁴
- 2.9 In 2009 the House of Representatives adopted a resolution prescribing procedures for the protection of witnesses before the House's Committee of Privileges and Members' Interests in inquiries involving a possible contempt.⁴⁵ These procedures are broadly similar to those specified in Senate Privilege Resolution 2.⁴⁶
- 2.10 The Clerk of the House has advised that the resolution for the protection of witnesses in contempt inquiries 'seems to have worked successfully', while noting that 'inquiry processes are more drawn out as the procedures build in time for a person who is the subject of allegations to be able to respond'.⁴⁷

Standing orders concerning procedural fairness

- 2.11 The committee received four submissions from Houses of Parliament which have adopted standing orders prescribing procedures to promote procedural fairness in committee inquiries.

⁴¹ Submission 9, Australian Senate, p 7.

⁴² Submission 9, Australian Senate, p 4.

⁴³ Submission 3, House of Representatives, attachment, 'Procedures for dealing with witnesses', Resolution adopted 13 November 2013.

⁴⁴ Submission 3, House of Representatives, p 3.

⁴⁵ Submission 3, House of Representatives, attachment, 'Procedures for the protection of witness before the Committee of Privileges and members' Interests', Resolution adopted 25 November 2009.

⁴⁶ The House of Representatives has also adopted a resolution specifying procedures to be followed by the House when dealing with matters of contempt: Submission 3, House of Representatives, attachment, 'Procedures of the House of Representatives for dealing with matters of contempt', Resolution adopted 25 November 2009.

⁴⁷ Submission 3, House of Representatives, p 2.

- 2.12** The Legislative Assembly of the Northern Territory has adopted standing orders similar to Senate Privilege Resolutions 1 and 2. In his submission to this inquiry the Clerk of the Assembly advised that these provisions have provided ‘a useful guide to committees’ and ‘appear to have been effective in both facilitating committee inquiries and protecting the rights of witnesses’.⁴⁸
- 2.13** The Legislative Assembly of the Australian Capital Territory has adopted a standing order concerning the protection of witnesses and adverse mention,⁴⁹ which is similar to Senate Privilege Resolution 1.
- 2.14** The Legislative Council of Western Australia has adopted a standing order which sets out a series of witness ‘entitlements’, including a right to the benefit of counsel, a right to request that evidence be considered *in camera* and a right to a reasonable opportunity to rebut certain types of allegations.⁵⁰
- 2.15** The Standing Orders of the New Zealand House of Representatives include extensive natural justice provisions including provisions which allow counsel for a witness to object to the witness answering a question⁵¹ and disqualify a committee member for apparent bias.⁵² These procedures were adopted following the receipt of advice that the *Bill of Rights Act 1990* (NZ) obliges the House to observe principles of natural justice but that the content and application of any such rules in respect of parliamentary proceedings were for the House to determine.⁵³ The Clerk of the House has advised that the adoption of these procedures has strengthened the committee system:
- Reflecting procedural protections in this way has strengthened the select committee system, and given a level of legitimacy to their work that otherwise would be lacking. Members treat the procedures seriously and tend to err on the side of caution. On the whole, the formal natural justice procedures are not resorted to frequently. Thousands of written submissions are received, and hundreds of hours of hearings occur without incident. There is a general expectation that chairpersons will ensure participants in parliamentary processes are treated fairly and respectfully. It is only when serious allegations are made, or proceedings arise that may seriously damage a person’s reputation, that the chairperson needs to reach for the natural justice procedures.⁵⁴
- 2.16** The Clerk of the House also advised that the Privileges Committee offers further natural justice protections some of which are detailed in the standing orders.⁵⁵

⁴⁸ Submission 1, Legislative Assembly of the Northern Territory, p 1.

⁴⁹ Submission 8, Legislative Assembly of the Australian Capital Territory, p 1, and attachment, Standing Order 264A.

⁵⁰ Submission 4, Legislative Council of Western Australia, p 1.

⁵¹ New Zealand House of Representatives, Standing Order 228.

⁵² New Zealand House of Representatives, Standing Order 232.

⁵³ Submission 6, New Zealand House of Representatives, p 2.

⁵⁴ Submission 6, New Zealand House of Representatives, pp 2-3.

⁵⁵ Submission 6, New Zealand House of Representatives, p 3.

Guidelines and practice

- 2.17** The committee received two submissions from Parliaments in which procedural fairness is addressed in guidelines and informal practices and rather than being prescribed by the House.
- 2.18** In the Victorian Parliament committees endeavour to conduct their inquiries in a manner consistent with principles of procedural fairness and it is recognised that a link can be drawn between procedural fairness and the legitimacy of committee reports:
- A committee's findings and recommendations are open to question in the public arena if the committee has not accorded a fair hearing to participants or sought to avoid bias.⁵⁶
- 2.19** The Victorian Parliament's website includes a document entitled *Appearing before a parliamentary committee; guidelines for the rights and responsibilities of witnesses* which contains procedures similar to those in Senate Privilege Resolution 1. The guidelines do not include special procedures to be followed in contempt inquiries, however the Legislative Assembly's Privileges Committee has adopted additional procedures to protect procedural fairness in certain contempt inquiries depending on the circumstances.⁵⁷
- 2.20** In the Scottish Parliament procedural fairness is 'generally encouraged ... through the ways in which committees operate in practice rather than formal rules'.⁵⁸ However some issues relating to procedural fairness are touched on in the 'Guidance for committees' concerning oral evidence.⁵⁹

Committee comment

- 2.21** Most of the Houses of Parliament considered in this chapter have prescribed procedures to be followed by their committees for the protection of procedural fairness either by a resolution of the House or by standing order. The Senate's resolution setting out mandatory protections for inquiry participants has been in place for 30 years.
- 2.22** The adoption of a Senate-style resolution by the Legislative Council would ensure that a consistent level of procedural fairness was applied in all Council committee inquiries and strengthen the committee system. While Council committees endeavour to apply procedural fairness as noted in chapter 1, the codification of a uniform set of procedures by a resolution of the House would foster greater clarity and transparency and facilitate the process of informing inquiry participants of their rights. It would also be likely to enhance the standing and legitimacy of committee work in the eyes of stakeholders and the public by formalising committees' commitment to the responsible use of their powers.

⁵⁶ Submission 7, Victorian Parliament, p 1.

⁵⁷ Submission 7, Victorian Parliament, p 3.

⁵⁸ Submission 2, Scottish Parliament, p 3.

⁵⁹ Submission 2, Scottish Parliament, pp 1, 3.

Chapter 3 The proposed resolution

This chapter focuses on the proposed resolution to be followed by Legislative Council committees to provide procedural fairness to inquiry participants, developed by the Privileges Committee for consideration by the Council.

It first sets out the purpose of the proposed resolution and the key principles underpinning it. It then documents the process of drafting the proposed resolution. Next, the chapter notes several key procedural issues in respect of the document: the ability of the Privileges Committee to adopt additional procedures for contempt inquiries; the process for dealing with possible complaints arising from the resolution; reports to the Legislative Council in the event that a committee considers a contempt has occurred; and requests for confidentiality in respect of documents provided to a committee. Particular attention is given to the complex procedural issue of witness objections to questions. The chapter concludes with a recommendation that the House adopt the proposed resolution of the committee.

Purpose

- 3.1 The proposed resolution will inform witnesses of their procedural rights when participating in a parliamentary inquiry, via a complete but concise set of procedures to be followed by a committee before, during and after a hearing.
- 3.2 The document contains no new protections; it simply articulates to inquiry participants existing protections in an accessible form.
- 3.3 The document will be given to every witness before their hearing.
- 3.4 As a secondary purpose, the document will serve as a succinct source of procedural guidance to committee members and clerks on the operations of committee hearings.

Key principles

- 3.5 The proposed resolution is drafted to encapsulate witness' procedural rights as clearly, completely and concisely as possible.
- 3.6 It reflects existing Council procedure and practice, and preserves all the rights and powers of committees. It is consistent with the Standing Orders and the resolutions establishing the committees. Where more detail or information on committee practice is required, this is available in the forthcoming *Legislative Council in Practice* (2nd edition) or the *Annotated Standing Orders of the New South Wales Legislative Council*.
- 3.7 As a matter of practice, although the paragraphs generally refer to witnesses, they may be used as a point of reference for submission authors and other inquiry participants, such as those who take part in public forums and roundtable discussions.⁶⁰

⁶⁰ An example of where a paragraph would be used as a point of reference in respect of submission authors would be paragraph 13(c)'s provision for the opportunity to respond to evidence that may seriously damage the reputation of a person or body. While the paragraph is written in respect of

- 3.8** The proposed resolution is to apply to all committees including the Privileges Committee. Provision has been made for the Privileges Committee to adopt additional procedures when inquiring into matters that may involve an allegation of contempt. This is discussed further in the section below addressing key issues.

Process of developing the proposed resolution

- 3.9** The starting point for the drafting process was to examine the wording of each separate paragraph comprising the Senate resolution, *Procedures to be observed by Senate committees for the protection of witnesses*.
- 3.10** Each paragraph was carefully drafted to reflect current Legislative Council procedure and practice. Consideration was given to committees in general and the Privileges Committee in particular, with the wording duly tested by a broad range of scenarios.
- 3.11** The wording of comparable resolutions adopted by other legislatures, particularly the House of Representatives, Victorian Legislative Council, Western Australian Legislative Council, Queensland Parliament and New Zealand Parliament, was consulted.
- 3.12** The use of different qualifiers in the paragraphs was minimised, but each was carefully chosen to reflect the appropriate level of flexibility applied in current Council procedure and practice:
- ‘unless the committee decides...’ provides the highest threshold, indicating that taking such an action is contrary to standard practice but permissible, and requires a resolution of the committee⁶¹
 - ‘normally’ is the next level, indicating that a provision is the usual practice, but a committee can do otherwise if it so wishes
 - ‘may’ is the lowest threshold, indicating that doing otherwise is more routinely discretionary or simply that the option is available.
- 3.13** Two paragraphs in the Senate resolution were not included in the draft resolution. These are explained in paragraph 3.19 below.
- 3.14** Seven paragraphs in addition to those provisions covered by the Senate resolution were added to reflect practice in the Council and to provide for completeness of advice to inquiry participants. Each is explained in turn in paragraph 3.20 below.
- 3.15** In the interests of clarity to the key audience of witnesses, language was modified to reflect contemporary legal and lay terminology; each paragraph was simplified as far as possible and plain English applied. For example, parliamentary terminology such as ‘evidence that reflects adversely on’ was replaced with ‘evidence that may seriously damage the reputation of’, as utilised in the New Zealand Parliament, and consistent with Council and Senate practice.

oral evidence, the same protection would be available in respect of a person or body who is the subject of potentially damaging evidence in a submission or tendered document.

⁶¹ As an example, paragraph 1 states, ‘A witness will be invited to give evidence at a hearing unless the committee decides that a summons is warranted.’ While the default position is to invite first, it is necessary to allow for a committee to decide otherwise. The coercive effect of a summons requires this highest threshold to be met, in fairness to the witness.

Similarly, the draft paragraphs now refer to evidence taken in private, with *in camera* bracketed afterwards. As far as possible the language used was made internally consistent, to ensure the coherence of the document.

- 3.16** To facilitate ease of use, each paragraph was ascribed a short heading.
- 3.17** Once complete, the list was reordered logically to reflect the procedures applying before a hearing, during a hearing and after a hearing.
- 3.18** Drafted under the direction of the Clerk Assistant Committees, in close consultation with the Procedure Office, the proposed resolution was carefully scrutinised by the Clerk and Deputy Clerk, then considered in detail by this committee.

Paragraphs not included

- 3.19** The Senate paragraphs not included in the draft resolution are as follows:
- **Senate paragraph 5, regarding a witness having the opportunity to raise concerns prior to a hearing** – It was considered that the paragraph is superfluous. It is longstanding practice that witnesses are provided with a verbal briefing by secretariat staff prior to their hearing. In the event that a witness raises a concern, the matter is passed on to the committee for consideration. Neither the House of Representatives, Victorian Legislative Council nor Western Australian Legislative Council included this paragraph in their respective resolutions.
 - **Senate paragraph 6, regarding a witness being given access to a document they have produced to a committee** – From a procedural fairness perspective, the rationale for this paragraph is to ensure a witness’ access to a document (that they supplied) on which they are to be questioned during a hearing for that inquiry. Committee staff are not aware of any instance where this issue has arisen; nor does *Odgers Australia Senate Practice* document any. At the same time, its inclusion risks raising submission author expectations that may not be able to be met, to access documents from inquiries conducted by committees that have ceased to exist. Council practice is that such matters are dealt with on a case by case basis according to a protocol for managing access to documents, and it is not considered desirable to formalise this further. Neither the Victorian nor Western Australian Legislative Councils included this paragraph.

Paragraphs additional to Senate resolution

- 3.20** Further explanation for each of the seven paragraphs added to those provisions covered by the Senate resolution to reflect Council practice and provide for completeness of advice to witnesses, is as follows:
- **Draft paragraph 7 – Attendance with a support person** – It is standard committee practice to offer vulnerable witnesses the ability to attend with a support person, subject to the agreement of the committee, as a means of supporting witnesses and facilitating quality evidence. It is not envisaged that the provision will be misused by witnesses; as is currently the case, the secretariat can guide its appropriate use, and any such request is to be agreed by the committee.

- **Draft paragraph 8 – Witnesses to be sworn** – Inclusion of this paragraph will make clear that the *Parliamentary Evidence Act 1901* applies to all witnesses in the event that they refuse to answer a question, not just a witness who has been summoned. See discussion in respect of draft paragraph 12 in the key issues section below.
- **Draft paragraph 11 – Questions on notice** – It is standard practice that a witness may request to take a question on notice and provide the answer in writing at a later date to be determined by the committee.
- **Draft paragraph 14 – Evidence that places a person at risk of serious harm** – Standard practice is to expunge evidence from a transcript only in extremely serious and rare circumstances such as the naming of a police informant. This is not strictly a matter of procedural fairness, but of protecting individuals from serious harm.
- **Draft paragraph 15 – Tendering documents** – It is standard practice that a witness may tender documents during their hearing, and that the committee decides whether to accept and to publish such documents.
- **Draft paragraph 17 – Requests for confidentiality** – This is discussed at length in paragraphs 3.47 to 3.56 in key issues, below.
- **Draft paragraph 19 – Treatment of witnesses** – The House of Representatives resolution, otherwise almost replicating that of the Senate, includes an additional paragraph concerning the treatment of witnesses by committees. By including a similar paragraph stating that witnesses will be treated with courtesy at all times, the intention is primarily preventative, by affirming a high but reasonable standard of conduct for committees when interacting with witnesses. Showing courtesy does not in any way preclude robust questioning of witnesses. Any complaint in respect of this paragraph would be dealt with on a case by case basis by the relevant committee (see paragraphs 3.25-3.28 below). The House of Representatives has advised that it is not aware of any witness complaints with regard to its paragraph.

3.21 One final matter to be noted here pertains to the wording of draft paragraph 18, regarding transcripts. Despite the phrasing of standing order 222(2), longstanding Council practice is that witnesses may only correct transcription or minor errors, while corrections in substance and explanations of answers must be taken to the committee for its consideration. The difference between practice and the literal reading of the standing order is noted in the *Annotated Standing Orders*, and the paragraph was drafted to reflect practice.⁶²

Key issues

3.22 A number of specific issues are documented in this section: the ability of the Privileges Committee to adopt additional procedures for contempt inquiries; the process for dealing with possible complaints arising from the resolution; reports to the Legislative Council in the event that a committee considers a contempt has occurred; procedures in respect of objections to questions; and requests for confidentiality in respect of documents provided to a committee. Each is discussed in turn below. Notably, particular attention is given to elucidating the

⁶² See Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council* (Federation Press, 2018), pp 726-727.

complex procedural issue of objections to questions, and to explaining how the draft paragraph captures the standard process used by Council committees.

Additional procedures for Privileges Committee inquiries

- 3.23** While as noted above, each of the paragraphs was drafted with consideration given to the workings of all committees, it is acknowledged that the special role of the Privileges Committee in adjudicating matters of potential contempt of Parliament means that in certain circumstances, it will be desirable for that committee to adopt additional procedures in the interests of procedural fairness, as has happened in previous inquiries.⁶³
- 3.24** This ability is provided for under paragraph 21 of the draft resolution:

21. Inquiry participants before the Privileges Committee

Where the Privileges Committee inquires into a matter which may involve an allegation of contempt, the committee may adopt additional procedures as it sees fit in order to ensure procedural fairness and the protection of inquiry participants.

Process for dealing with possible complaints

- 3.25** The codification of procedural fairness provisions gives rise to the question of how any complaint from a witness about their treatment by a committee in possible contravention of the resolution would be dealt with.
- 3.26** Complaints from witnesses or third parties about how they were treated by a committee arise only rarely. Longstanding practice in the Council is that the committee concerned considers the matter and makes a determination on it.
- 3.27** Advice was sought from both the Senate and the House of Representatives as to their processes in the event of a complaint from a witness that a committee did not act in accordance with a provision in their respective resolutions.
- 3.28** Both advised that any such complaints would be dealt with on a case by case basis by the relevant committee. Both also advised that they were not aware of any instances in their respective legislature where such a complaint has been escalated further, for example to the Privileges Committee.

Reports to the Council

- 3.29** Two paragraphs include reference to a committee having the ability to report a matter to the House: paragraph 12 (b) concerning the refusal by a witness who has been summoned to answer a question; and paragraph 20, regarding an inquiry participant having been improperly influenced, penalised, injured or threatened in respect of their evidence to a committee. As

⁶³ See for example Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Council, *Inquiry into the conduct of the Honourable Franca Arena*, Report No. 6, Volume 1 of 3, June 1998, pp 9-10.

such, both paragraphs pertain to situations in which a committee considers that a contempt has occurred, and they make explicit the committee's ability (if it so chooses) to inform the House of what has occurred.

- 3.30** Use of the qualifier 'may' in both instances, in respect of reporting the matter to House (unlike the Senate, which uses 'shall' in both cases), leaves the use of this option to the discretion of the committee, consistent with Council practice that such a report would only occur in rare instances where the committee considered it appropriate. Thus, rather than being essential for a committee to report the matter to the House, it would be incumbent on a committee to advise the House if the committee has a will to pursue a matter further.
- 3.31** It should be noted that there is no set procedure for how such a report would be made, nor for how the House would deal with the matter.

Paragraph 12 – Objections to questions

- 3.32** We take the opportunity here to document in detail the background and reasoning behind draft paragraph 12, concerning the complex procedural issue of objections to questions.
- 3.33** For a witness who objects to answering a question, procedural fairness requires that they be given sufficient and clear warning of the powers of a committee under the *Parliamentary Evidence Act 1901*, the circumstances in which some of those powers may be used, and the process a committee would normally follow in doing so. A difficult issue for this committee is how far to go in describing the extent of the powers relating to failure to answer a lawful question, when the normal practice of committees is a more staged approach than the punitive process contemplated by the Act.

Section 11, Parliamentary Evidence Act 1901

- 3.34** The *Parliamentary Evidence Act* was introduced following a period where NSW Parliamentary committees were experiencing difficulties in gaining witnesses' co-operation with inquiries.⁶⁴ Section 4 of the Act provides a basis for compelling witnesses, other than members of parliament, both to attend and, once attending, to provide answers. The provision has helped to underpin the strong Legislative Council committee system, with committees using their power to summon witnesses reluctant to appear in highly controversial inquiries such as a ministerial staffer in the Orange Grove development inquiry in 2004,⁶⁵ Cabcharge owner Mr Reg Kermode in the Taxi Industry inquiry in 2010,⁶⁶ and the NSW Ombudsman and senior NSW Police during the Operation Prospect inquiry in 2014.⁶⁷ While the power to summon under section 4 has been used to significant effect, the power to compel answers to questions

⁶⁴ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 495.

⁶⁵ General Purpose Standing Committee No. 4, NSW Legislative Council, *The Designer Outlets Centre, Liverpool* (2004).

⁶⁶ Select Committee on the NSW Taxi Industry, NSW Legislative Council, *Inquiry into the Taxi Industry* (2010).

⁶⁷ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015).

under section 11 has not been except to remind witnesses of the powers available to the committee. The reasons for this lie in the way the provision is worded:

11 Penalty for refusal to answer

(1) Except as provided by section 127 (Religious confessions) of the Evidence Act 1995, if any witness refuses to answer any lawful question during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or serjeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be.

(2) Such warrant shall be a sufficient authority for all gaolers and other officers to hold the body of the person therein named for the term therein stated.

- 3.35** The provision in effect gives the committee the power to immediately 'deem' refusal to answer a lawful question a contempt and authorise the witness' arrest by the Usher of the Black Rod. Given the lack of co-operation from witnesses experienced by Legislative Council committees in the late 19th century, the punitive form of this provision is perhaps understandable, however to make use of these powers of arrest in 2018 could risk the type of ridicule experienced in Federal Parliament in the 1950s during the Fitzpatrick case or more recently in Western Australia with the gaoling of Mr Brian Easton by the Legislative Council.⁶⁸ The usual practice is for a committee to note the objection or refusal to answer a question, and to invite the witness to state the ground on which the objection is taken. The committee then would be expected to deliberate in private whether to insist on an answer, having regard to the basis of the objection, the relevance of the question to the terms of reference of the inquiry (it being required to be a 'lawful question') and the importance to the inquiry of the information sought.⁶⁹
- 3.36** If the committee decides that it does require an answer, the witness should be informed of that determination and the reasons for it. The next step would be to summon the witness to appear at a later hearing. As most witnesses appear voluntarily it has not been the practice of the Council since 2000 to compel attendance in the first instance.⁷⁰
- 3.37** It should be clear, however, that the basis upon which the witness is compellable under section 11 is that they are providing sworn evidence and so are brought under the provisions of the Act, it is not the summons which enables them to be compelled. This was outlined in legal advice obtained from Mr Bret Walker SC in November 2000:

In my opinion, the provisions of sec 10 of the Parliamentary Evidence Act impose a prerequisite of an oath or affirmation (relevantly). It follows that the 'examination' referred to in sec 11 is one which involves questions put following that compulsory oath or affirmation. If that prerequisite has not been observed, what ensues is not an

⁶⁸ Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales Parliamentary Evidence Act 1901' (2016) 27 *Public Law Review* 37.

⁶⁹ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 509.

⁷⁰ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 496.

‘examination’ within the meaning of sec 11, and thus there would be no statutorily deemed contempt of Parliament for refusal to answer.

... On the other hand, although a witness ‘attending to give evidence’ must be sworn or examined under sec 10, in my opinion the need for a summons by order is not mandatory. The language of sec 4 empowers rather than obliges the issue of a summons. Furthermore, it would be curious if a citizen could not demonstrate respect for and co-operation with the Houses by attending voluntarily to give evidence. Thus, the lack of a summons will not prevent the sanctions under sec 11 being imposed. There is a broad analogy in a court of law, where a witness is not entitled to refuse to answer questions simply because he or she did not require a subpoena in order to step into the witness box.⁷¹

- 3.38** Once a witness is appearing to give sworn evidence they are compelled to answer lawful questions. The committee should in the first instance offer the witness the opportunity to appear in private (*in camera*) to answer the question which they have previously objected to answering.
- 3.39** When considering whether it will insist upon an answer, a committee will have regard to the grounds given by the witness. Claims of privilege such as legal professional privilege, the privilege against self-incrimination and other immunities have no application to parliamentary inquiries. However, any such claim is usually given serious consideration on its merits by a committee.⁷²
- 3.40** In a staged approach, the next step would be that if the witness refuses at this point, the committee may consider summoning them to appear later, whether the same day or another day. A witness appearing voluntarily can choose to leave the hearing if they do not want to answer the question, although this will not always be practical.⁷³ For the witness, the issuing of a summons will indicate they are compelled to stay at the later hearing to answer the question they have objected to earlier.
- 3.41** Ultimately, if a witness, under oath, continued to refuse to answer a lawful question when pressed by the committee, the most likely step would be for the committee to prepare a special report to the House to consider whether a contempt had been committed (see paragraphs 3.29-3.31 above). This would be preferable to using the power under the Act to deem an immediate contempt and requesting the Usher to arrest the witness.

⁷¹ Walker B ‘Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No. 4’, dated 2 November 2000 (authorised to be published by resolution of the committee on 6 November 2000), p 15.

⁷² For example, see advice from Mr Bret Walker SC that committees consider objections on the basis of self-incrimination with the utmost care despite that this immunity does not apply in the parliamentary context. Walker B, ‘Parliament of New South Wales Legislative Council: Orders for papers from bodies not subject to direction or control by the Government,’ tabled in the Legislative Council, *Minutes*, NSW Legislative Council, 18 November 2015, p 608.

⁷³ Members of either House such as ministers, who are exempt from summons under s4 of the Act, are in this position each time they give evidence.

Senate paragraph

- 3.42** Other jurisdictions have comprehensive privileges legislation which includes the power to compel attendance and the power to compel answers when certain conditions are met, with penalties applying. However, most follow a staged process in which refusal to answer a relevant question escalates to the pressing of the question, until ultimately reporting to the House. The Senate resolution is a good example of this, which in paragraph 10 sets out:

Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.

Draft paragraph

- 3.43** As with each of our proposed paragraphs, the relevant Senate paragraph was the starting point for our drafting process. The paragraph as drafted states:

12. Objections to answering questions

Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (*in camera*).

(a) Witness appearing by invitation

If a witness who appears by invitation continues to refuse to answer the question, the committee may consider summoning the witness to reappear later, and will advise the witness that as they will be under oath and so subject to section 11 of the *Parliamentary Evidence Act 1901*, they may be compelled to answer the question.

(b) Witness appearing under summons

The continued refusal by a witness, having been summoned, to answer the question while under oath, may constitute a contempt of parliament under the *Parliamentary Evidence Act 1901*, and the committee may report the matter to the Legislative Council.

- 3.44** This paragraph indicates a staged process once the committee decides it requires an answer, beginning with, in (a), witnesses appearing voluntarily (usual) and then moving to (b), witnesses appearing under summons (exceptional).
- 3.45** The refusal to answer a lawful question can lead to a finding of contempt. As per proposed paragraph 8, it is not the summons which has this effect, but rather that the witness has been sworn, and so is required to provide truthful evidence. The sanctions under section 11 and section 13 do not apply to an unsworn witness, as this evidence does not constitute an ‘examination’.
- 3.46** Sub paragraph (b), which deals with witnesses appearing under summons, makes explicit that refusal may be a contempt, again for procedural fairness. The Senate’s ‘shall report the facts’ has been changed to ‘may’ so that it is not essential to report, but rather, incumbent upon a committee to advise the House if the committee has a will to pursue a matter (as discussed in paragraphs 3.29-3.31).

Paragraph 17 – Requests for confidentiality

- 3.47** The final key issue discussed here concerns requests for confidentiality. The paragraph as drafted states:
- A person or body may request that documents provided to a committee be kept confidential in part or in full. The committee will consider the request and if it declines, will advise the person or body of the reasons why, and give reasonable notice of when the documents will be published.
- 3.48** This paragraph could apply to submissions, correspondence, tendered documents, answers to questions on notice, or to attachments to any of these. As drafted, ‘a person or body’ may request confidentiality. This enables the procedure to apply not only to witnesses but also to third parties, such as a person named in the document.
- 3.49** As a matter of procedural fairness, and consistent with both the opportunity given to witnesses to request a private (*in camera*) hearing (paragraph 4) and the procedure for publication of evidence taken in private (paragraph 5), it is reasonable that a committee consider a request to keep documents confidential, and in the event that it declines, that it provide the reasons why, then give the person requesting confidentiality notice of when publication will occur. The amount of notice considered reasonable would be determined by the committee. Each of these steps is normal committee practice.
- 3.50** Where a committee is contemplating publication of a document (in full or in part) against the wishes of an individual or organisation, there is a balance to be struck between the interests of that person or body and the public interest. It is possible, for instance, that publication will do significant harm to the reputation of a person, that it may affect their career, and/or that it will place information in the public domain that an organisation believes will affect its ability to fulfil its role. The effect of the paragraph is to ensure the committee at least consider the request, and in so doing, pay due regard to the interests of the person or body, then advise them of the outcome in a timely way so that they may ready themselves for publication.

- 3.51** It may be argued that too great a use of confidentiality by committees undermines the accountability of inquiry participants for the things they tell a committee. On this view, it may be better to publish more and make greater use of the provision for opportunity to respond (captured in draft paragraph 13(c)), and to investigate any negative reprisals for participants (draft paragraph 20).
- 3.52** On the other hand, committees do have significant responsibilities towards inquiry participants and third parties, such as to protect their privacy, their reputation, or their vulnerability to recriminations, and in such instances the use of confidentiality can be a powerful preventative tool.
- 3.53** As drafted, the paragraph simply requires a committee to *consider* the request. The committee retains the right to decide. While the public interest in bringing matters to light lies at the heart of the inquiry power, and there is no doubt that a committee has the power to publish any document provided to it during an inquiry, it is fair that a committee take due care to consider the potential ramifications for inquiry participants.
- 3.54** In addition, it is recognised that if inquiry participants' requests for confidentiality are routinely ignored, they may be less inclined to furnish information to committees, whether via hearings, submissions or other documents, and this would impede the inquiry function.
- 3.55** Where a committee is satisfied that the public interest is served by publication, and is determined to publish against the wishes of a person or body, and the person or body is identified in a way that may seriously damage their reputation, as noted above, the committee may provide the opportunity for them to respond, usually prior to publication.
- 3.56** In practice, the process very often involves a dialogue between the committee and the person or body that mirrors the consultation process articulated in draft paragraph 5 regarding publication of evidence taken in private. In most cases this enables a middle ground to be found, for example to publish some parts of a document and suppress others, to the acceptance of both the person or body and the committee. There are many examples of this occurring in Council committees.

Committee comment

- 3.57** In the committee's view, the public is entitled to expect that committees observe procedural fairness when conducting their inquiries. It is important that inquiry participants are treated fairly by a committee, and that committees are seen to be fair.
- 3.58** The application of procedural fairness ensures that witnesses are given an adequate opportunity to be heard, and that in their decisions, committees are cognisant of how the interests of inquiry participants might be affected by committee decisions. As noted in chapter 1, these considerations are especially important in light of the impact of publishing written and oral evidence on the internet and broadcasting hearings live.
- 3.59** The committee recognises that procedural fairness for inquiry participants also serves to uphold the reputation of Parliament by protecting against perceptions of arbitrary use of power.

- 3.60** As a matter of principle, just as it is important that all witnesses be treated fairly, it is procedurally fair that they be informed of their options with regard to the giving of their evidence.
- 3.61** Legislative Council committees have a rich suite of procedural protections already in place for inquiry participants, captured in the standing orders, resolutions establishing the committees, and in longstanding practice. By communicating these protections to inquiry participants, thereby informing them of their rights, we further enable fair treatment to occur. We thus consider it highly desirable to communicate these existing procedural protections as simply and completely as possible to inquiry participants.
- 3.62** For any witness, attending a parliamentary committee hearing may be unusual and stressful, and informing them of procedure assists them to participate effectively. Arguably, the imperative to inform a witness is greater in the context of a controversial inquiry, where committee members will justifiably wish to exercise the inquiry power by asking challenging questions and interrogating the evidence at hand. When exercising the substantial powers of committees to compel the attendance of a witness, to order the production of documents and to require answers to questions, it is all the more important that a witness be aware of their rights – and the committee cognisant of them.
- 3.63** As drafted, the proposed resolution protects all the rights and powers of committees, whilst informing witnesses of their rights in an accessible form.
- 3.64** The committee is confident of the draft resolution’s utility to the primary audience of witnesses and other inquiry participants, and also of its usefulness in serving as a succinct source of procedural guidance to committee members and clerks.
- 3.65** The committee considers that the draft resolution will strengthen the Legislative Council committee system and is pleased to commend it to the House for adoption.
-

Recommendation 1

That the House adopt the following resolution of continuing effect for the procedures to be followed by Legislative Council committees to provide procedural fairness to inquiry participants:

Procedures to be followed by Legislative Council committees to provide procedural fairness to inquiry participants

1. Inviting and summoning witnesses

A witness will be invited to give evidence at a hearing unless the committee decides that a summons is warranted.

2. Information for witnesses

A witness will normally be given reasonable notice of their hearing and will be provided with the inquiry terms of reference, a list of committee members and a copy of these procedures.

3. Opportunity to make a submission before a hearing

A witness will normally be given the opportunity to make a submission before their hearing.

4. Opportunity to request a private (*in camera*) hearing

A witness may request, before or during their hearing, that some or all of their evidence be heard in private (*in camera*). The committee will consider this request and if it declines, will advise the witness of the reasons why.

5. Publication of evidence taken in private (*in camera*)

Prior to their private (*in camera*) hearing, a witness will be informed that the committee and the Legislative Council have the power to publish some or all of the evidence given. If the committee intends to publish, it will normally consult the witness, advise them of the outcome, and give reasonable notice of when the evidence will be published.

6. Attendance with a legal adviser

With the prior agreement of the committee, a witness may be accompanied by and have reasonable opportunity to consult a legal adviser during their hearing. The legal adviser cannot participate in the hearing and will not be sworn in or give evidence, unless the committee decides otherwise.

7. Attendance with a support person

With the prior agreement of the committee, a witness may be accompanied at their hearing by a support person. The support person will not be sworn in or give evidence, unless the committee decides otherwise.

8. Witnesses to be sworn

At the start of their hearing a witness will, unless the committee decides otherwise, take an oath or affirmation to tell the truth, and the provisions of the *Parliamentary Evidence Act 1901* will then apply.

9. Chair to ensure relevance of questions

A committee chair will ensure that all questions put to witnesses are relevant to the inquiry.

10. Questions to public officials

Public officials will not be asked to give opinions on matters of policy, and will be given reasonable opportunity to refer questions to more senior officials or to a minister.

11. Questions on notice

A witness may request to take a question on notice and provide the answer in writing at a later date to be determined by the committee.

12. Objections to answering questions

Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (*in camera*).

(a) Witness appearing by invitation

If a witness who appears by invitation continues to refuse to answer the question, the committee may consider summoning the witness to reappear later, and will advise the witness that as they will be under oath and so subject to section 11 of the *Parliamentary Evidence Act 1901*, they may be compelled to answer the question.

(b) Witness appearing under summons

The continued refusal by a witness, having been summoned, to answer the question while under oath, may constitute a contempt of parliament under the *Parliamentary Evidence Act 1901*, and the committee may report the matter to the Legislative Council.

13. Evidence that may seriously damage the reputation of a third party**(a) Evidence about to be given**

Where a committee anticipates that evidence about to be given may seriously damage the reputation of a person or body, the committee may consider hearing the evidence in private (*in camera*).

(b) Evidence that has been given

Where a witness gives evidence in public that may seriously damage the reputation of a person or body, the committee may consider keeping some or all of the evidence confidential.

(c) Opportunity to respond

Where a witness gives evidence that may seriously damage the reputation of a person or body, the committee may give the person or body reasonable access to the evidence, and the opportunity to respond in writing or at a hearing.

14. Evidence that places a person at risk of serious harm

Where a witness gives evidence that places a person at risk of serious harm, the committee will immediately consider expunging the information from the transcript of evidence.

15. Tendering documents

A witness may tender documents during their hearing. The committee will decide whether to accept and to publish such documents.

16. Inviting and ordering the production of documents

A witness will be invited to produce documents unless the committee decides that an order to produce the documents is warranted.

17. Requests for confidentiality

A person or body may request that documents provided to a committee be kept confidential in part or in full. The committee will consider the request and if it declines, will advise the person or body of the reasons why, and give reasonable notice of when the documents will be published.

18. Transcripts

A witness will be given the opportunity to correct transcription errors in their transcript of evidence. Amendments to or clarifications of evidence may be requested in writing.

19. Treatment of witnesses

Witnesses will be treated with courtesy at all times.

20. Improper treatment of inquiry participants

Where a committee has reason to believe that a person has been improperly influenced in respect of the evidence they may give to a committee, or has been penalised, injured or threatened in respect of evidence given, the committee will take all reasonable steps to ascertain the facts of the matter. If the committee is satisfied that such action may have occurred, the committee may report the matter to the Legislative Council.

21. Inquiry participants before the Privileges Committee

Where the Privileges Committee inquires into a matter which may involve an allegation of contempt, the committee may adopt additional procedures as it sees fit in order to ensure procedural fairness and the protection of inquiry participants.

Appendix 1 List of submissions

No	Author
1	Legislative Assembly of the Northern Territory
2	The Scottish Parliament
3	House of Representatives
4	Legislative Council Western Australia
5	The Law Society
6	House of Representatives, New Zealand
7	Parliament of Victoria
8	Legislative Assembly ACT
9	Australian Senate
10	House of Commons Canada

Appendix 2 Minutes

Minutes No. 4

Wednesday 20 September 2017

Members' Lounge, Parliament House, Sydney, at 1.05 pm

1. Members present

Mr Mason-Cox, *Chair*

Mr Primrose, *Deputy Chair*

Dr Faruqi

Mr Khan

Mrs Maclaren-Jones

Revd Mr Nile

2. Apologies

Mr Donnelly

3. Previous minutes

Resolved, on the motion of Revd Mr Nile: That draft minutes no. 3 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Sent:

- ***

Received:

- ***
- Letter from the President to the Chair dated 8 August 2017 enclosing a terms of reference for an inquiry into procedural fairness for inquiry participants.
- ***

5. ***

6. Inquiry reference

The chair tabled the following terms of reference received from the President on 8 August 2017:

Inquiry into procedural fairness for inquiry participants

That, in response to Recommendation 4 of the Select Committee on the Legislative Council Committee System, the Privileges Committee inquire into and report on procedures to be observed by Council committees to provide procedural fairness for inquiry participants.

7. Conduct of Inquiry into procedural fairness for inquiry participants

The chair tabled a draft discussion paper on procedural fairness for inquiry participants.

Resolved, on the motion of Mr Donnelly: That the:

- secretariat circulate a list of suggestions of relevant stakeholders who should be written to and invited to make submissions to the inquiry
- committee make additional suggestions of stakeholders within two days of the list being circulated
- committee authorise the publication of the discussion paper, as amended, under standing order 226(4)
- discussion paper be distributed to stakeholders invited to make submissions
- closing date for submissions be Monday 6 November 2017.

8. ***

9. Adjournment

The committee adjourned at 1.15 pm *sine die*.

Madeleine Foley
Clerk to the Committee

Minutes No. 5

Thursday 15 March 2018

President's Dining Room, Parliament House, Sydney, at 1.03 pm

1. Members present

Mr Mason-Cox, *Chair*

Mr Primrose, *Deputy Chair*

Mr Donnelly

Dr Faruqi

Mr Khan

Mrs Maclaren-Jones

Revd Mr Nile

Dr Phelps

2. Previous minutes

Resolved, on the motion of Mrs Maclaren-Jones: That draft minutes no. 4 be confirmed.

3. Correspondence

The committee noted the following item of correspondence:

Sent:

- ***

4. Inquiry into procedural fairness for inquiry participants

Resolved, on the motion of Dr Phelps:

- That the secretariat prepare draft procedural fairness resolutions for the committee's consideration.
- That the committee authorise the chair to write to submission authors to request further information if required during the development of the draft resolutions.

5. ***

6. ***

7. ***

8. Adjournment

The committee adjourned at 1.25 pm *sine die*.

Madeleine Foley

Clerk to the Committee

Minutes No. 6

Thursday 3 May 2018

Members' Lounge, Parliament House, Sydney, at 2.01 pm

1. Members present

Mrs Maclaren-Jones, *Chair*

Mr Primrose, *Deputy Chair*

Mr Donnelly

Dr Faruqi

Mr Khan

Mr Mallard

Revd Mr Nile

Dr Phelps

2. Previous minutes

Resolved, on the motion of Dr Phelps: That draft minutes no. 5 be confirmed.

3. Inquiry into procedural fairness for inquiry participants

The committee deliberated on the draft procedural fairness resolutions for inquiry participants.

The secretariat will incorporate members' comments into a revised set of procedural fairness resolutions, and prepare a chair's draft report based on the committee's deliberations.

4. Adjournment

The committee adjourned at 2.28 pm until Thursday 24 May 2018.

Madeleine Foley

Clerk to the Committee

Minutes No. 7

Thursday 24 May 2018

President's Dining Room, Parliament House, Sydney, at 1.03 pm

1. Members present

Mrs Maclaren-Jones, *Chair*

Mr Primrose, *Deputy Chair*

Dr Faruqi

Mr Mallard

Dr Phelps

2. Apologies

Mr Donnelly, Mr Khan and Revd Mr Nile.

3. Previous minutes

Resolved, on the motion of Dr Phelps: That draft minutes no. 6 be confirmed.

4. ***

5. ***

6. Adjournment

The committee adjourned at 1.25 pm.

Madeleine Foley

Clerk to the Committee

Draft Minutes No. 8

Thursday 21 June 2018

Room 1136, Parliament House, Sydney, at 1.20 pm

1. Members present

Mrs Maclaren-Jones, *Chair*

Mr Primrose, *Deputy Chair*

Mr Donnelly

Dr Faruqi

Mr Khan

Mr Mallard

Revd Mr Nile

Dr Phelps

2. Previous minutes

Resolved, on the motion of Dr Phelps: That draft minutes no. 7 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Sent:

- ***

Received:

- ***

4. Inquiry into procedural fairness for inquiry participants – consideration of Chair’s draft report

The Chair submitted her draft report entitled *Procedural fairness for inquiry participants*, which, having been previously circulated was taken as being read.

Resolved, on the motion of Dr Phelps: That on page 25, paragraph 8 of the procedural fairness resolution be amended to omit ‘normally’ and insert instead ‘, unless the committee decides otherwise.’

Resolved, on the motion of Dr Phelps: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The submissions and correspondence relating to the inquiry be tabled in the House with the report;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- That the report be tabled with the Clerk as soon as practicable.

Resolved, on the motion of Dr Phelps: That the committee acknowledge the excellent work of the secretariat in preparing the draft resolution.

5. Adjournment

The committee adjourned at 1.33 pm.

Madeleine Foley
Clerk to the Committee