



Discussion paper: Procedural fairness for inquiry participants

Committees of the Legislative Council have significant powers to conduct inquiries and compel persons to give evidence. When exercising these powers committees seek to ensure that witnesses and submission authors are treated fairly but there are no formal requirements which committees are bound to follow or consider to ensure procedural fairness is observed. Some Houses of Parliament, by contrast, have adopted resolutions, standing orders or guidelines codifying the procedures to be observed by their committees for the protection of witnesses. Such provisions foster a uniform approach which provides a safeguard against the misuse of committee powers and facilitates the process of informing participants of their rights.

In December 2016 the Select Committee on the Legislative Council Committee System recommended that the Privileges Committee examine the issue of procedural protections for committee witnesses. In response to that recommendation the President of the Legislative Council has referred an inquiry to the Privileges Committee on procedures to be observed by Legislative Council committees to provide procedural fairness for inquiry participants. The inquiry provides an opportunity to examine the effectiveness of the practices currently followed by Council committees, assess the need for those practices to be codified in a resolution or order of the House, and learn from the experience of other Parliaments.

The Privileges Committee is currently seeking written submissions to the inquiry. This discussion paper provides guidance on issues relevant to the inquiry to assist persons making a submission.

What is procedural fairness?

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.¹ At the root of procedural fairness 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.²

¹ *Butterworths Encyclopaedic Australian Legal Dictionary*, LexisNexis (AU), accessed 29 August 2017, ‘Procedural fairness, ‘Natural justice’.

² *Judicial Review; The laws of Australia*, Mark Robinson SC, ed, Thomson Reuters, 2014, p 301.

There is no legal requirement for Parliament or a parliamentary committee to observe procedural fairness in its proceedings.³ 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 proceedings on the internet and broadcasting hearings live.

Procedural fairness can be distinguished from other measures which protect inquiry participants. Witnesses and submission authors are immune from legal liability with respect to the evidence they give.⁴ Further, the House may treat as a contempt any attempt to influence or penalise such a person as a result of their evidence.⁵ These protections concern the treatment of inquiry participants outside the inquiry process while procedural fairness concerns the treatment of participants by the committee itself.

A distinction can also 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 powers of Legislative Council committees

In conducting their inquiries Council committees have power to send for and examine persons, records and things.⁶ While most witnesses attend voluntarily a committee may summon a witness if necessary.⁷ Committees may hold hearings in public or in private, publish the submissions and evidence they receive and make findings and recommendations in their reports to the House. The powers to publish evidence and hear evidence in public are supported by statutory immunities which protect committee proceedings from legal liability.⁸

Special powers are available to deal with witnesses who refuse to cooperate with committees. Under sections 7-9 of 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. Under section 11, a person who fails to answer a 'lawful question' during examination by a committee may be committed to gaol for up to one month.

Procedures to protect procedural fairness in the Legislative Council

The procedures currently observed by Council committees for the protection of inquiry participants draw on standing orders, conventions, particular resolutions of the House, and longstanding practices. The key procedures can be summarised as follows:

- Parties are normally invited to make a written submission to an inquiry before being invited to give oral evidence.

³ See, for example, 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.

⁴ 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; *Parliamentary Evidence Act 1901*, section 12.

⁵ The Legislative Council has no power to punish for contempt in the absence of statutory authority but may take such other action as may be necessary to protect the exercise of its functions.

⁶ Standing Order 208(c).

⁷ *Parliamentary Evidence Act 1901*, section 4.

⁸ 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.

- Submission authors who are unable to write a submission may request that the committee secretariat transcribe their submission for them.
- 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.⁹
- 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 camera*. 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 remains confidential and not be published. Any application to do so is considered by a committee, which generally accepts these requests.
- Submission authors may request that their submission be made public, but not published online. Any such application 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.¹⁰
- 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.

⁹ 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.

¹⁰ 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'. Committees generally allow witnesses to be accompanied by and consult a lawyer but it has not been the practice to allow counsel to make oral submissions or question witnesses.

- 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 must be given a reasonable opportunity before appearing to object to the broadcasting or televising of their evidence. The committee must consider an objection, but does not have to agree to such a request.¹¹
- A transcript of a witness's evidence is forwarded to the witness as soon as possible after each hearing for the correction of errors in transcription.

Additional considerations apply in the case of the Privileges Committee which examines matters of parliamentary privilege referred to it by the House or the President including possible contempts. If a finding of contempt by the Privileges Committee is adopted by the House, the range of sanctions which may be imposed is limited¹² as the Houses of Parliament in New South Wales have no power to punish in the absence of statutory authority. 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 to be in contempt is a member of the House more significant sanctions are available potentially including suspension or expulsion from the House.

In view of the gravity of a finding of contempt the Privileges Committee has adopted additional measures to strengthen procedural fairness in some of its inquiries. The nature of those measures has varied depending on the circumstances of the inquiries concerned, but include:

- 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 held¹³
- inviting a member whose conduct is being investigated to respond to draft material before its inclusion in the committee's report¹⁴
- allowing legal advisers for a witness to be present while the witness gives evidence *in camera*¹⁵
- engaging legal advisers to advise the committee on the application of the principles of procedural fairness/natural justice¹⁶
- conducting all hearings *in camera* and only authorising the subsequent publication of those sections of the evidence which would not cause unnecessary damage to the reputations of

¹¹ Resolution of the Legislative Council concerning the sound and audio-visual broadcast of proceedings of the House: *Minutes*, 18 October 2007, p 281.

¹² Such sanctions may include a reprimand or an order that the person apologise.

¹³ Standing Committee on Parliamentary Privilege and Ethics, *Report on statements made by Mr Gallacher and Mr Hannaford*, November 1999, Appendix 2, p 4.

¹⁴ Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the pecuniary interests register*, October 2002, p 107.

¹⁵ 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.

¹⁶ 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.

individuals, compromise ongoing police investigations or prejudice matters currently before the courts¹⁷

- seeking approval for financial assistance from Treasury to allow a member whose conduct is being investigated to access legal advice.¹⁸

The issue of procedural fairness arose most recently in the Privileges Committee's inquiry into the Mt Penny return to order in 2013. In that inquiry the House authorised the Committee to adopt any additional procedures to protect procedural fairness as the Committee saw fit. In the event, the Committee examined additional procedures to ensure appropriate action could be taken if the need arose but did not adopt any special measures.¹⁹

Procedures to protect procedural fairness in other Parliaments

To illustrate the approaches which have been adopted to the issue of procedural fairness in other jurisdictions, the protections for witnesses published on the websites of the Houses of the Australian Parliament and the Parliaments of Victoria and New Zealand are summarised below.

Senate

In 1988, following the enactment of the *Parliamentary Privileges Act 1987* (Cth), the Senate adopted a series of Privilege Resolutions which include a code of procedures for the protection of witnesses before Senate committees (Privilege Resolution 1). These procedures cover many of the matters addressed in the Council's informal procedures, albeit with a greater level of precision.²⁰ They also address a number of additional matters on which the Council has not developed standard practices such as procedures for inviting a witness to produce documents, allowing witnesses access to documents they have provided to a committee, and notifying witnesses of the reasons for certain decisions.

The Senate Privilege Resolutions also prescribe procedures to be followed by the Senate Privileges Committee when considering any matter which may involve or give rise to an allegation of contempt (Privilege Resolution 2). The need for such measures is described in *Odgers' Australian Senate Practice* as follows:

Special procedural protections are provided for witnesses involved in investigations by the Privileges Committee into allegations of contempt of the Senate. The reason for this is that the Privileges Committee investigates in particular cases whether contempts have been committed. If a finding of contempt is adopted by the Senate, the consequences for the person or persons concerned are very serious. A finding of contempt may in itself damage a person's reputation or professional standing, and it is open to the Senate to impose a penalty of up to 6 months' imprisonment or a fine of up to \$5 000 for a natural person and \$25 000 for a corporation.²¹

The additional procedures to be applied by the Privileges Committee include requirements to inform a person of the nature of allegations against the person, allow a person to be present during the hearing

¹⁷ 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.

¹⁸ 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.

¹⁹ Privileges Committee, *The 2009 Mt Penny return to order*, October 2013, p 7.

²⁰ For example, the Senate procedure concerning the right of witnesses to object to a question (Privilege Resolution 1(10)) spells out various steps to be followed and matters to be taken into account by the committee.

²¹ *Odgers' Australian Senate Practice*, 14th ed, 2016, p 552.

of evidence containing allegations against the person, allow such a person to examine witnesses in relation to that evidence by counsel or personally, and allow a person affected by findings in a report to make submissions to the committee on those findings prior to presentation of the report. The Privileges Committee is required to observe these procedures in addition to the procedures prescribed for all committees, and to the extent of any inconsistency, the procedures specific to the Privileges Committee prevail.

House of Representatives

A resolution adopted by the House of Representatives on 13 November 2013 prescribes procedures to be followed by House of Representatives committees for dealing with witnesses. The resolution is in similar terms to the Senate resolution for the protection of witnesses before its committees, but omits certain provisions of the Senate resolution²² and includes various new procedures. The new procedures include requirements for a committee to advise a witness in advance if the committee decides to publish evidence taken in camera (paragraph 7), treat witnesses with respect and dignity at all times (paragraph 14), and allow witnesses to request the opportunity to give further oral evidence (paragraph 15).

A resolution of the House of Representatives dated 25 November 2009 prescribes separate procedures to be followed by the Committee of Privileges and Members' Interests, modelled on the Senate's resolution concerning the protection of witness before its Privileges Committee. The House of Representatives resolution also includes additional procedures allowing a person to make submissions specifically on a proposed penalty (paragraph 11) and precluding a member who has instigated a contempt allegation or who is directly implicated in an allegation from serving on the inquiry (paragraph 13).

Victoria

The Parliament of Victoria's website contains a document entitled *Appearing before a parliamentary committee; guidelines for the rights and responsibilities of witnesses*.²³ Many of procedures set out in the Guidelines reflect those which apply in the Senate although there are differences in wording and the level of detail. As well as protections for witnesses, the Guidelines include provisions describing the responsibilities of witnesses, specifying matters such as the consequences if a witness does not attend in response to a summons. The Guidelines do not include any special procedures to be followed in inquiries concerning possible contempts.

New Zealand

The Standing Orders of the Parliament of New Zealand include extensive provisions concerning the application of procedural fairness in committee inquiries. These include provisions allowing counsel for a witness to object to their client answering a question (SO 228), disqualifying a committee member who has made an allegation of crime or expressed a concluded view on such a matter in certain circumstances (SO 232), specifying a procedure for dealing with complaints of apparent bias on the part of a committee member (SO 233), and giving a person against whom a seriously damaging allegation has been made a reasonable opportunity to respond (SO 238). The nature of these procedures may reflect section 27(1) of the New Zealand *Bill of Rights Act 1990* which is in the following terms:

²² For example, there is no equivalent to Senate Privilege Resolution 1(5) (opportunity to raise concerns before the hearing) and (12) (expunging evidence).

²³ Available at: <https://www.parliament.vic.gov.au/committees/get-involved/rights-&-responsibilities>

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

Questions for consideration

The Privileges Committee seeks written submissions addressing any aspect of its terms of reference. Issues addressed may include:

- How effective are the procedures currently followed by Council committees for the protection of witnesses?
- What procedural protections are observed in other Parliaments that would be appropriate for the New South Wales context? What are the sources of these procedures?
- What practices or procedures to protect procedural fairness are observed by courts, tribunals and investigating agencies? Are any of these appropriate for Council committees?
- Have any cases arisen in other Parliaments which demonstrate the need for particular procedural protections in committee proceedings?
- What are the advantages and disadvantages of codifying procedural protections and what would be the best mechanism for codifying such procedures?
- What if any special protections may be needed in inquiries by the Privileges Committee concerning possible contempts?