

INQUIRY INTO PROCEDURAL FAIRNESS FOR INQUIRY PARTICIPANTS

Organisation: Legislative Council Western Australia

Name: Hon Kate Doust MLC

Date received: 3 November 2017



3 November 2017

Hon Matthew Mason-Cox MLC
Committee Chair
Privileges Committee
Legislative Council of New South Wales
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Mason-Cox

Inquiry into procedural fairness for inquiry participants

Thank you for your email, dated 12 October 2017, inviting a submission to your committee's inquiry into procedural fairness for inquiry participants.

The Legislative Council of Western Australia's Standing Orders set out 8 entitlements for witnesses participating in inquiries. The entitlements are contained in Standing Order (SO) 181, which states:

181. Witnesses' Entitlements

Any person examined before a Committee is entitled to –

- (a) access to relevant documents before and during examination;
- (b) benefit of counsel;
- (c) request that the evidence be deemed private or in camera;
- (d) be informed prior to the examination of the right of objection provided by section 7 of the Parliamentary Privileges Act 1891;
- (e) a reasonable opportunity to rebut allegations of criminal, improper or unethical conduct made against the witness if the allegations are relevant to the Committee's inquiry;
- (f) a reasonable opportunity to correct errors of transcription in a transcript of evidence;
- (g) an opportunity to provide supplementary or new evidence; and
- (h) any additional entitlements as determined by the Council.

Witnesses' Entitlements were first adopted as Standing Orders of the House on 21 December 1989. The current Standing Order 181 was adopted by the House on 30 November 2011 following a comprehensive review of the Standing Orders undertaken by the Procedure and Privileges Committee (PPC). On the whole, Standing Order 181 works well to ensure that witnesses are afforded the appropriate level of procedural fairness. However, a 2016 report of the PPC noted that:

- 4.4 The review of the Standing Orders [in 2011] recommended the adoption of a varied arrangement to modernise the Standing Order which included the omission of the words 'Subject to order'. This omission was intended to be captured by new SO 181(h), however, paragraph (h) considers "additional entitlements as determined by the Council" rather than the ability of a Committee to determine the application or otherwise of the entitlements.
- 4.5 The PPC is concerned that a face value reading of the Standing Order as currently written creates the impression that an absolute entitlement exists for witnesses. The potential for discord to arise between witnesses and a Committee is an undesirable outcome in instances where a Committee is simply exercising its right to determine how to conduct its inquiry.
- 4.6 The PPC is mindful of a potentially detrimental situation occurring whereby a witness seeks to assert an entitlement and thus bring the witness into conflict with the Committee.

The PPC reasoned that:

the "entitlements" contained in SO 181 are provided to witnesses in addition to the usual protections afforded to witnesses, and are a courtesy that accords witnesses with a measure of procedural fairness. There may be instances, however, where these entitlements should be subject to the discretion of the Committee and the necessary requirements of the Committee in relation to its inquiry. The entitlements are not entitlements as of a right, which a witness may then use to impede or delay the finalisation of a Committee's inquiry into a certain matter.

The PPC therefore recommended that SO 181 be amended to delete 'Any' and insert — 'Subject to order, any'. However, this recommendation was not considered by the Council in the 39th Parliament prior to the March 2017 general election. The PPC's recommendation has been restored to the Notice Paper in the 40th Parliament and awaits consideration by the House.

Standing Order 181 must also be read subject to the *Parliamentary Privileges Act 1891* and those privileges incorporated into Western Australian law by reason of section 1 of that Act.

For your Committee's further information, I have attached to this letter:

- further detail on how witness entitlements operate in practice, at Appendix 1;
- a copy of the Witness Information Sheet required to be signed by every non-member witness that appears before a Legislative Council Committee, at Appendix 2; and

a copy of the Procedure and Privileges Committee's report No. 39, *Reference from the House on 25 February 2015; Standing Order 97: Strangers in the Council; and Standing Order 181: Witnesses' Entitlements*.

I trust that the information provided is of use to your Committee and I wish you well in your deliberations.

Yours sincerely

Hon Kate Doust MLC

President of the Legislative Council

Appendix 1 — Witnesses Entitlements

Access to relevant documents

- 1.1 A witness has access to any relevant documents in a committee's possession which are directly relevant to the witness's evidence to the committee. This entitlement is subject to any order of the committee that a document be kept confidential (e.g. if the document is given a private status). A witness's general entitlement to access does not prevail over specific orders of the committee in relation to private evidence. The committee is not required to inform a witness of the existence of private evidence.
- 1.2 If the relevant documents in question are private and if a witness is aware of the document they may request the committee to review any refusal to provide a private document or to make an order to facilitate access. This provision presupposes that the documents in question are not readily available, and that they have not been previously published. In considering whether to grant access to a relevant document, a committee will need to consider a number of matters, which may include but are not limited to the following:
 - whether provision of a document would breach any undertaking given by the committee in relation to maintaining its confidentiality;
 - whether provision of a document would breach any applicable law.
 - the effects of providing a document on a person's privacy, security, commercial interests, or legal interests of any person;
 - whether the withholding of a document would unfairly prejudice a person's capacity to rebut allegations made against them;
 - whether there are other methods of providing access. These may include providing a document in a summarised or redacted form that provides the witnesses with the capacity to rebut allegations, while addressing committee concerns; or making the provision of a document subject to requirements that limit its further publication; and
 - whether provision of a document would prejudice the committee's inquiry.
- 1.3 Committees may receive evidence in camera . Evidence taken in camera can only be disclosed by order of the Council. Normal practice in matters of this nature is for the Committee to provide a report to the house to assist Members and inform debate. In this instance it is anticipated a report would encompass matters listed in 1.2 above.
- 1.4 The committee publishing submissions and material correspondence on its website is a common way to provide access to relevant documents to witnesses.

Benefit of counsel

- 1.5 The practice of the House is that this entitlement refers only to 'legal counsel'. A witness is not entitled to the benefit of a support person or counsel who is not 'legal counsel' under

the standing orders. However, a committee has a discretion to allow a witness the benefit of counsel that is not 'legal counsel'.

- 1.6 The role of counsel is one of assistance to the witness, and does not mean that counsel 'represents' the witness at the inquiry as an advocate. This is a marked difference from the traditional role of counsel in litigation. Counsel may not answer questions for, or give evidence on behalf of, the witness.
- 1.7 In some circumstances, for instance departmental legal officers, the legal counsel may be able to give evidence about a certain matter on their own behalf for example, the practical effect of a legislative provision. In such cases they are to be treated as a witness in their own right.
- 1.8 Ministers providing evidence before a committee are often assisted by ministerial advisers in the same manner as they are when the House is considering a bill during Committee of the Whole House. Such advisers are present to assist the minister but do not speak directly to the committee. If they are to speak directly to the committee then they must be treated as appearing as witnesses on their own behalf.

Apply to be heard in private or in camera

- 1.9 Although witnesses are free to apply for evidence to be heard in private or *in camera*, it is explained to each witness (by the Chairman at the commencement of the hearing) that such private/*in camera* evidence may still subsequently become public upon a resolution of either the committee or the Council (if the evidence is 'private') or the Council only (if the evidenced is '*in camera*').

Right of objection / Refusing to answer an irrelevant question

- 1.10 It is rare for the legal objection provided by s7 of the *Parliamentary Privilege Act 1891* to be raised. Under this provision a witness may object to providing an answer or producing a document if the evidence "*is of a private nature and does not affect the subject of inquiry*". This is the only legal ground for objecting to answer a question or produce a document.
- 1.11 It is more common for a witness to object to providing evidence on the basis that it is not relevant to the committee's inquiry. A committee may, and often does, consider the merits of such an objection. It is for the committee to interpret its terms of reference and determine what is within the scope of the inquiry or Bill being examined. If an objection is referred to the House, it is for the House to ultimately decide whether the objection is valid.
- 1.12 Objections to requests for the production of documents based on legal professional privilege and commercial confidentiality, like those based on executive/Crown privilege and public interest immunity should be accompanied by reasons justifying the objections.

Rebut allegations of criminal, improper or unethical conduct / An opportunity to respond to adverse findings

- 1.13 The adverse allegations in question must arise during the course of a witness' evidence before the committee, and also need to be relied upon by the committee in its eventual findings. This second factor (reliance) is not referred to in the standing order but as a matter

of practice it should circumscribe the application of the standing order. Many matters are raised in evidence that may be unfavourable to a person but if they are not relevant to the inquiry and are not relied upon by the committee then they should lie where they fall.

- 1.14 The standing order is confined to dealing with *"persons examined before a committee"*. However, if a committee proposes to make an adverse allegation against any person in the findings of a report (whether or not they have been a witness) then a letter will be sent to that person informing them of such and giving them the opportunity to rebut the proposed adverse finding.
- 1.15 In practice findings should not be made against a person or entity unless they have had an opportunity to provide evidence to the committee and put their side of the story. This opportunity to rebut the nature of the allegation may be provided at a hearing and reflects the common law rule in *Browne v Dunn* (1893) 6 R. 67. However, even if the committee has put an adverse allegation or potential adverse finding to a witness at a hearing, the committee should also, after the draft report has been considered and it has agreed to its preliminary findings, write to the person advising of any adverse finding/s and provide them with an opportunity to respond. The Committee should then consider the person's response, and reflect this consideration in the final adopted report, if appropriate. If balancing evidence is not available (e.g. passage of time, death) then the committee should weigh the evidence that it has received accordingly.
- 1.16 The standing order does not define the meaning of an allegation or *"adverse evidence"*. However general rules of interpretation can be applied. The standing order does not apply to evidence merely on the basis that it is contrary to other evidence. In many cases, the views offered will differ, may contradict each other and may criticise the rationality, accuracy or acceptability of alternative opinions – this is – evidence adverse to another's case not intended to be captured by the standing order.

Opportunity to correct errors of transcription

- 1.17 Only typographical or transcription errors may be corrected on the transcript of evidence. This is noted on the Instructions for Witnesses document sent to witnesses with the uncorrected transcript.
- 1.18 This instruction document also sets out that any corrections by the witness of factual information should be made in a separate cover letter to the committee. If accepted by the committee, a letter of correction is placed on committee's website with the finalised transcript of evidence.
- 1.19 What is a 'reasonable opportunity' is to be considered in the light of every case. The standard request to a witness accompanying an uncorrected transcript email requests a transcript's return by 5pm in 5 business days.

Provide supplementary or new evidence

- 1.20 This involves access to relevant documents or adverse findings or allegations so far as they are relevant to the witness' case.

Appendix 2 — Witness Information Sheet



Committee Hearings Information for Witnesses

Important: Please read the following notes before giving evidence.

Full Name: (Title) (First Name) (Last Name)

Title of Position Held:

Business Name and Address:

Telephone: Email:

Signature: Date:

Introduction

1. A committee hearing is a proceeding in Parliament. As such, you must not deliberately mislead the committee and you must respect the members of the committee and the committee's orders and procedures. If you do not comply with these requirements, you may be subject to legal penalties.

What happens at a hearing?

2. Committees are made up of members of Parliament. Usually there are 3-10 members on a committee.
3. You will be escorted to the committee's meeting room by one of the committee's staff. After you are seated, the chairperson of the committee may ask you to take an oath or affirmation. The chairperson will then ask you:
 - a. to state your full name, address and the capacity in which you appear before the committee; and
 - b. if you have read and understood the information contained in this document.
4. The chairperson may invite you to make an opening statement to the committee.
5. The chairperson will then ask you a series of questions, following which other members of the committee may ask you more questions. With limited exceptions (discussed below) you must answer questions you are asked.
6. The chairperson may invite you to make any additional comments in closing.

Parliamentary privilege

7. Parliamentary privilege provides protection for what is said in parliamentary proceedings, so that, for instance, what is said in such proceedings may not be the basis of a suit in defamation. However, it is only the authorised Hansard report, or that of an accredited media reporter, which is protected when what is said in the proceeding is related outside the confines of Parliament. Similarly, parliamentary privilege means that what you have said to a committee cannot be used against you in civil or criminal proceedings in a court or tribunal. The purpose of parliamentary privilege is to enable parliamentarians and witnesses to speak candidly without fear of legal repercussions.

Your entitlements

8. Any person examined before a Committee is entitled to:
- a. access to relevant documents before and during examination;
 - b. benefit of counsel;
 - c. request that the evidence be deemed private or *in camera*;
 - d. be informed prior to the examination of the right of objection provided by section 7 of the *Parliamentary Privileges Act 1891*;
 - e. a reasonable opportunity to rebut allegations of criminal, improper or unethical conduct made against the witness if the allegations are relevant to the Committee's inquiry;
 - f. a reasonable opportunity to correct errors of transcription in a transcript of evidence;
 - g. an opportunity to provide supplementary or new evidence; and
 - h. any additional entitlements as determined by the Council.

Is your evidence public or private?

9. Most committee hearings are public. In other words, members of the public and the media may attend the hearings and the proceedings may be reported. In contrast, a committee may conduct a private hearing, which means that members of the public and the media may not attend. If you are uncertain as to whether your hearing is private or public, ask the committee's staff before the hearing or the chairman of the committee before you start giving evidence.
10. It is important that any request for the committee to prohibit publication of all or part of your evidence, or your identity, be made *prior* to giving the relevant evidence. You should be prepared to state why you want your evidence to remain confidential. If the committee grants your request, the public and media will be excluded from the hearing.
11. The committee may also decide that all, or part, of the hearing should be in private, particularly if the evidence adversely reflects on a third person or the matter being investigated is subject to legal proceedings.
12. You should note that the committee retains the power to publish any private evidence. The Legislative Council may also authorise publication. This means that even your private evidence may become public.

13. The Committee may decide to broadcast the public hearing on the internet. If this is the case the hearing will also be recorded. If you object to the hearing being broadcast, you should advise staff at the earliest opportunity and provide an explanation for your request not to broadcast the hearing. The Committee will consider your request and you will be advised of their decision.

If you are a public servant

14. Public servants appearing before a committee in that capacity are entitled to refuse to answer a question asking to give an opinion on a matter of policy. The committee must direct all such questions to the responsible Minister.

You must not disclose evidence given in private session

15. You must not publish or disclose any evidence given to a committee in private session unless that evidence has been reported to the Legislative Council in a public document. Premature publication or disclosure may:
 - a. constitute a contempt of the Legislative Council; and
 - b. mean that the publication or disclosure of the relevant material is not subject to parliamentary privilege.

Transcript of your evidence

16. A transcript of your evidence will be made and sent to you for correction of typographical and transcription errors. Please see the letter that will accompany the uncorrected transcript in this regard.

Threats or intimidation

17. If you have been threatened or intimidated by any person in respect of giving your evidence to the committee, you should immediately inform the committee or one of its staff.



THIRTY-NINTH PARLIAMENT

REPORT 39

**STANDING COMMITTEE ON PROCEDURE AND
PRIVILEGES**

**REFERENCE FROM THE HOUSE ON
25 FEBRUARY 2015; STANDING ORDER 97:
STRANGERS IN THE COUNCIL; AND STANDING
ORDER 181: WITNESSES' ENTITLEMENTS**

Presented by Hon Barry House MLC (Chair)

June 2016

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Date first appointed: 24 May 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“1. Procedure and Privileges Committee

- 1.1 *A Procedure and Privileges Committee* is established.
- 1.2 The Committee consists of 5 Members, including the President and the Chair of Committees, and any Members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chair, and the Chair of Committees is the Deputy Chair, of the Committee.
- 1.3 With any necessary modifications, SO 163 applies to a co-opted Member.
- 1.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the Council and its Committees, and recommend to the Council such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the Council or its Committees.”

Members as at the time of this inquiry:

Hon Barry House MLC (Chair)

Hon Adele Farina MLC (Deputy Chair)

Hon Martin Aldridge MLC

Hon Kate Doust MLC

Hon Nick Goiran MLC

Staff as at the time of this inquiry:

Nigel Pratt (Clerk of the Legislative Council) Paul Grant (Deputy Clerk)

Grant Hitchcock (Usher of the Black Rod)

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

ISBN 978-1-925149-67-8

CONTENTS

REPORT.....	1
1 REFERENCE AND PROCEDURE	1
2 REFERENCE FROM THE HOUSE ON 25 FEBRUARY 2015 — RECOMMENDATIONS 2(A) AND 2(C) CONTAINED IN REPORT NO. 29 OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES	1
Background	1
Further review of the recommendations	2
Recommendation 2(a)	2
Recommendation 2(c)	3
Recommendation	4
3 STANDING ORDER 97: STRANGERS IN THE COUNCIL	5
Background	5
Strangers in the Council	5
Recommendation	6
4 STANDING ORDER 181: WITNESSES' ENTITLEMENTS	6
Background	6
Witnesses' Entitlements	7
Recommendation	8

REPORT OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

REFERENCE FROM THE HOUSE ON 25 FEBRUARY 2015; STANDING ORDER 97: STRANGERS IN THE COUNCIL; AND STANDING ORDER 181: WITNESSES' ENTITLEMENTS

1 REFERENCE AND PROCEDURE

- 1.1 On 20 June 2016 the *Procedure and Privileges Committee* ("the PPC") met to discuss a number of items referred to the Committee.
- 1.2 This report canvasses the PPC's deliberations and recommendations in relation to the —
- Reference from the House on 25 February 2015;
 - Standing Order 97: Strangers in the Council; and
 - Standing Order 181: Witnesses' Entitlements

2 REFERENCE FROM THE HOUSE ON 25 FEBRUARY 2015 — RECOMMENDATIONS 2(A) AND 2(C) CONTAINED IN REPORT NO. 29 OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Background

- 2.1 On 25 February 2015 the House considered Recommendations 1 and 2 contained in the *Procedure and Privileges Committee* Report No. 29 — *Review of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament*.
- 2.2 The House agreed to Recommendation 1 which was to acquaint the Legislative Assembly's *Procedure and Privileges Committee* ("the LA PPC") with the report. The corresponding report from the LA PPC was tabled in the Legislative Assembly on 25 November 2015.¹
- 2.3 With respect to Recommendation 2, the House agreed to recommendations 2(b) and 2(d), and resolved the following motion in relation to recommendations 2(a) and 2(c):

That Recommendations 2(a) and 2(c) contained in Report No. 29 of the Standing Committee on Procedure and Privileges, Review of the Report of the Select Committee into the Appropriateness of Powers

¹ Legislative Assembly Standing Committee on Procedure and Privileges, Western Australia, *Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament* (2015).

and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament, be referred to the Procedure and Privileges Committee for further consideration and report.

2.4 Recommendations 2(a) and (c) were as follows:

Recommendation 2: The Committee recommends that the State Government instruct the Parliamentary Counsel to draft a bill or bills to:

- (a) **amend the *Criminal Code* so as to clarify that the proceedings of Parliament may be used as evidence in the prosecution of an offence under sections 55 to 59 of the *Criminal Code*;**
- (c) **amend the constitutional and/or electoral legislation to abolish the ability of a House of the Parliament of Western Australia to expel one of its Members;**

Further review of the recommendations

2.5 On 24 February 2016 the PPC considered the referral of the recommendations arising from the review of the report of the *Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament* (“the Select Committee”)

Recommendation 2(a)

2.6 The PPC reviewed Recommendation 2(a) and makes the following observations.

2.7 The Select Committee had noted difficulties when determining the extent to which the consent of the Parliament is required to release House or committee transcripts or evidence for the prosecution in the courts of the offences under sections 55 to 59 of the *Criminal Code*. Additionally, it was noted by the Select Committee that any prosecution of the provisions may be constrained where the court’s use of House or committee documentation may be interpreted as a breach of Article 9 of the *Bill of Rights*.

2.8 The Select Committee recommended that sections 55 to 59 of the *Criminal Code* be repealed.

2.9 The PPC disagreed with the recommendation of the Select Committee.

2.10 The PPC noted the value in retaining the *Criminal Code* provisions as a deterrent and favoured a clarifying amendment to the provisions rather than the repeal recommended by the Select Committee. The PPC recommended that the Government

instruct Parliamentary Counsel to achieve this outcome; it did not, however, propose a form of words for the recommended clarifying amendment.

- 2.11 On the issue of a clarifying amendment, the LA PPC adopted a contrary view from the recommendation of the PPC. Whilst agreeing that the provisions should be retained in the *Criminal Code*, the LA PPC observed that the provisions are almost never invoked and the need for legislative change in this area is not a pressing issue.

- 2.12 On a further point, the LA PPC noted that a clarifying amendment to the provisions:

*runs the risk of generating greater uncertainty with other statutory provisions which may need to operate on the basis of necessary implication but which have not had clarifying amendments made to them.*²

- 2.13 The PPC has reflected on each of these two points, and in each instance, the PPC is of the view that the House should not proceed with the recommendation at this time.

Recommendation 2(c)

- 2.14 With respect to Recommendation 2(c), the PPC had agreed with the recommendation of the Select Committee that the ability of a House of Parliament to expel one of its Members should be abolished.

- 2.15 During the debate on the referral motion the Attorney General recommended that the PPC reconsider the recommendation and made the following relevant comments:

*The expulsion of a member of this place is one of the powers inherited from the House of Commons. To my knowledge, it has never been used ... the behaviour of a member, may require the removal of the representation of a district or a constituency being taken away by this place or the other place to preserve the integrity and the dignity of Parliament ... if we find we are giving away a power that we one day find is very valuable and may be necessary ... I think it would be a useful thing to consider more fully before the House asks the government to remove one of its powers.*³

- 2.16 On these points, the LA PPC agreed with the Attorney General and observed that the Westminster jurisdictions seldom used the power to expel and the Western Australian Parliament has never expelled one of its Members in either House. The LA PPC

² Legislative Assembly Procedure and Privileges Committee Report No. 9, *Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament*, 8.

³ Western Australia, *Parliamentary Debates*, Legislative Council, 25 February 2016, 633 (Hon Michael Mischin MLC)

recommended that the Parliament of Western Australia retain the power to expel members for contempt of Parliament.

- 2.17 Of particular interest to the PPC were the LA PPC's comments relating to the differing electoral arrangements and methodologies that exist for each House to fill vacancies in their memberships.
- 2.18 In the Legislative Assembly, the existing electoral arrangements provide for by-elections to fill vacancies in the Assembly as they occur. In the instance of a member being expelled from the Assembly, it is possible that the member could simply recontest the vacated seat. In the Legislative Council, however, the electoral legislation would exclude the expelled member and determine the vacancy caused by their expulsion by way of a calculation using the votes cast at the previous election.
- 2.19 These differing electoral arrangements were not an issue initially explored by the PPC during the review of the Select Committee report and may need to be considered further.
- 2.20 On the question as to whether the Council should proceed with the PPC's recommendation on this matter, the PPC notes the comments of Hon Nick Goiran in his contribution on the referral motion:

*I cannot imagine the scenario in which the Legislative Council would want to have a different capacity from the Legislative Assembly. I would not be in favour of the Council not having the capacity to expel and the Assembly having it ... I am persuaded in this instance that, given it has an implication for the whole of the Parliament of Western Australia, it is worthy of reconsideration.*⁴

- 2.21 The PPC has reflected on the electoral arrangements for each House and the comments of the member in relation to its Recommendation 2(c). In this instance, the PPC agrees that the Council should retain its equivalent powers as the Legislative Assembly and the House should not proceed with the recommendation at this time.

Recommendation

- 2.22 Accordingly, the PPC recommends the following —

⁴ Western Australia, *Parliamentary Debates*, Legislative Council, 25 February 2016, 645 (Hon Nick Goiran MLC)

Recommendation 1:

That the House does not proceed with the Recommendations 2(a) and 2(c) contained in the Standing Committee on Procedure and Privileges — Report No. 29 — Review of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament.

3 STANDING ORDER 97: STRANGERS IN THE COUNCIL**Background**

- 3.1 Standing Order 97 deals with the manner in which strangers may be admitted to the floor of the Council and the requirement for strangers to withdraw from the Council during a division, or as ordered by the President.
- 3.2 Standing Order 97 states:

97. Strangers in the Council

- (1) *Only the President may admit strangers onto the floor of the Council.*
- (2) *When a division is called or as otherwise ordered by the President, strangers shall withdraw.*

Strangers in the Council

- 3.3 Aside from the Council Chamber attendants, there are times during parliamentary sittings where strangers are admitted to the floor of the House; for instance, advisors to a Minister or Parliamentary Secretary during the consideration of a Bill in the Committee of the Whole House.
- 3.4 The Standing Order as currently worded considers two scenarios regarding the withdrawal of strangers from the Council —
- a) during a division; or
 - b) as otherwise ordered by the President.
- 3.5 During a division, the practice of the Council is that advisors and other strangers admitted to the floor of the House for a particular purpose either leave the Chamber or withdraw behind the bar of the House.
- 3.6 Whilst the PPC does not propose any significant change to the current practice of the House regarding the application of Standing Order 97, the PPC agrees that the

Standing Order should be clarified so as to make clear that, whether there is a division in the Council or not, the ultimate discretion to admit strangers to the floor of the Council resides solely with the President, or in their absence, the member presiding; strangers are at all times subject to this authority.

- 3.7 In relation to this Standing Order, the PPC proposes that whenever a division is called all strangers shall withdraw from the Council, unless instructed otherwise by the President or member presiding.

Recommendation

- 3.8 Accordingly, the PPC recommends the following clarifying amendment to Standing Order 97 as follows —

Recommendation 2:

That **Standing Order 97(2)** be deleted and the following inserted —

- (2) When a division is called strangers shall withdraw unless otherwise ordered by the President.

4 STANDING ORDER 181: WITNESSES' ENTITLEMENTS

Background

- 4.1 Standing Order 181 sets out certain entitlements available to witnesses examined before a committee of the Council.
- 4.2 Standing Order 181 states:

181. Witnesses' Entitlements

Any person examined before a Committee is entitled to —

- (a) access to relevant documents before and during examination;*
- (b) benefit of Counsel;*
- (c) request that the evidence be deemed private or in camera;*
- (d) be informed prior to the examination of the right of objection provided by section 7 of the Parliamentary Privileges Act 1891;*
- (e) a reasonable opportunity to rebut allegations of criminal, improper or unethical conduct made against the witness if the allegations are relevant to the Committee's inquiry;*

-
- (f) *a reasonable opportunity to correct errors of transcription in a transcript of evidence;*
 - (g) *an opportunity to provide supplementary or new evidence; and*
 - (h) *any additional entitlements as determined by the Council.*

Witnesses' Entitlements

- 4.3 Witnesses' Entitlements were first adopted as Standing Orders of the House on 21 December 1989.⁵ The current Standing Order 181 was adopted by the House on 30 November 2011 following the comprehensive review of the Standing Orders undertaken by the PPC.
- 4.4 The review of the Standing Orders recommended the adoption of a varied arrangement to modernise the Standing Order which included the omission of the words 'Subject to order'. This omission was intended to be captured by new SO 181(h),⁶ however, paragraph (h) considers "additional entitlements as determined by the Council" rather than the ability of a Committee to determine the application or otherwise of the entitlements.
- 4.5 The PPC is concerned that a face value reading of the Standing Order as currently written creates the impression that an absolute entitlement exists for witnesses. The potential for discord to arise between witnesses and a Committee is an undesirable outcome in instances where a Committee is simply exercising its right to determine how to conduct its inquiry.
- 4.6 The PPC is mindful of a potentially detrimental situation occurring whereby a witness seeks to assert an entitlement and thus bring the witness into conflict with the Committee.
- 4.7 It is the view of the PPC that the "entitlements" contained in SO 181 are provided to witnesses in addition to the usual protections afforded to witnesses, and are a courtesy that accords witnesses with a measure of procedural fairness. There may be instances, however, where these entitlements should be subject to the discretion of the Committee and the necessary requirements of the Committee in relation to its inquiry. The entitlements are not entitlements as of a right, which a witness may then use to impede or delay the finalisation of a Committee's inquiry into a certain matter.

⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 21 December 1989, 6881 (Hon R.G. Pike MLC)

⁶ Legislative Council Procedure and Privileges Committee Report No. 22, *Review of the Standing Orders — Comparative Table* (2011), Row 339, 89.

- 4.8 The PPC therefore recommends that the Legislative Council return to the wording used prior to the adoption of the new Standing Orders in 2011 which removed the words ‘Subject to order’.

Recommendation

- 4.9 Accordingly, the PPC recommends an amendment to Standing Order 181 as follows —

Recommendation 3:

That **Standing Order 181** be amended as follows —

To delete “Any” and insert —

Subject to order, any

Hon. Barry House MLC

Chair

28 June 2016