Inquiry into standing order 241—Disclosure of proceedings, evidence and documents of committees

Standing Committee on Administration and Procedure

SEPTEMBER 2014

Report 4

Committee membership

Vicki Dunne MLA (Chair)

Mick Gentleman MLA

Shane Rattenbury MLA

Brendan Smyth MLA

Secretariat

Tom Duncan (Secretary)

Janice Rafferty (Assistant Secretary)

Celeste Italiano (Inquiry Assistant)

Contact information

Telephone 02 6205 0173

Facsimile 02 6205 3109

Post GPO Box 1020, CANBERRA ACT 2601

Email tom.duncan@parliament.act.gov.au

Website [www.parliament.act.gov.au](http://www.parliament.act.gov.au)

Resolution of appointment

In 1995 the Legislative Assembly for the Australian Capital Territory (‘the Assembly’) amended Standing Order 16, which established the Standing Committee on Administration and Procedure (‘the Committee’).

Standing Order 16 authorises the Committee to inquire into and report on, among other things, the practices and procedure of the Assembly.

Terms of reference

On 15 May 2014, Mr Rattenbury MLA, pursuant to notice, moved the following motion which was agreed to by the Assembly:

“That:

(1) standing order 241 (Disclosure of proceedings, evidence and documents) be referred to the Standing Committee on Administration and Procedure for inquiry and report with particular reference to be made to the practice of the New Zealand Parliament; and

(2) the Committee report back to the Assembly at the first sitting in September 2014.”.

Table of contents

[Committee membership iii](#_Toc399327235)

[Secretariat iii](#_Toc399327236)

[Contact information iii](#_Toc399327237)

[Resolution of appointment iv](#_Toc399327238)

[Terms of reference iv](#_Toc399327239)

[Recommendation 1 vi](#_Toc399327240)

[1. Introduction and Conduct of Inquiry 1](#_Toc399327243)

[Background 1](#_Toc399327244)

[Conduct of inquiry 2](#_Toc399327245)

[2 Current practices 3](#_Toc399327246)

[Australian Capital Territory 3](#_Toc399327247)

[Commonwealth 3](#_Toc399327248)

[House of Representatives 3](#_Toc399327249)

[Senate 4](#_Toc399327250)

[New South Wales 5](#_Toc399327251)

[Northern Territory 6](#_Toc399327252)

[Queensland 6](#_Toc399327253)

[South Australia 7](#_Toc399327254)

[Tasmania 7](#_Toc399327255)

[Victoria 8](#_Toc399327256)

[Western Australia 9](#_Toc399327257)

[New Zealand 9](#_Toc399327258)

[Summary of current practices 10](#_Toc399327259)

[3 Conclusion 11](#_Toc399327260)

Recommendation 1

* + - * 1. That Standing Order 241 be amended by inserting a new sub paragraph 241 (ba):

241(ba) Members of the Committee may discuss a committee report with other Members on a confidential basis in the time between the substantial conclusion of the Committee’s deliberations on the report and its presentation to the Assembly.

# Introduction and Conduct of Inquiry

On 15 May 2014, a motion was moved by Mr Rattenbury MLA, pursuant to notice, proposing that the Committee inquire into standing order 241 with particular reference to the New Zealand Parliament practice. The motion agreed to by the Assembly is as follows:

“That:

(1) standing order 241 (Disclosure of proceedings, evidence and documents) be referred to the Standing Committee on Administration and Procedure for inquiry and report with particular reference to be made to the practice of the New Zealand Parliament; and

(2) the Committee report back to the Assembly at the first sitting in September 2014.”.[[1]](#footnote-1)

Background

Over the life of the Assembly a number of committee reports have been produced which dealt with possible unauthorised disclosures of committee proceedings[[2]](#footnote-2) and as recently as May 2014 a matter of an unauthorised disclosure of confidential proceedings of a committee was raised in the Assembly. The matter was given precedence by the Speaker, under standing order 276(e), for a Select Committee on Privileges to be established to consider the issue.[[3]](#footnote-3) A motion to establish a Privileges Committee was negatived after a vote of the Assembly.[[4]](#footnote-4)

In moving the motion to refer the provisions of standing order 241 to the Committee for inquiry and report, Mr Rattenbury made reference to the May debate and the issues it raised in relation to the unauthorised disclosure of committee proceedings and stated that he believed that the current standing order was “at odds with what is probably accepted practice in this Assembly and that we [the Assembly] could consider changes to the standing orders that would ensure protection of privilege for committees without leaving members hamstrung in their work in the Assembly.”[[5]](#footnote-5) Mr Rattenbury also highlighted current practice in the New Zealand Parliament in relation to the confidentiality of committee proceedings and the disclosure that is and is not allowed to occur between parliamentary members in that legislature.[[6]](#footnote-6)

Conduct of inquiry

During the conduct of the inquiry, information was sought from other Australian legislatures and the New Zealand Parliament on their practice in relation to the disclosure of committee proceedings, evidence and documents. This information is contained in Chapter 2 of this report. The Committee met on 4 occasions to discuss the issue. At those meetings members of the committee discussed the current standing order and practice in the Assembly and the intent and implications of the proposed amendment to the standing orders.

# Current practices

Australian Capital Territory

Standing order 241 of the Assembly states that the committee may receive and authorise publication of evidence given before it or documents presented to it and that any evidence, documents, proceedings and reports may not be disclosed or published to a person (other than a member of the committee or Assembly employee if necessary in the course of their duties) unless they have been reported to the Assembly or authorised by the Assembly or the committee. The standing order goes on to indicate that a committee may resolve to authorise a member of the committee to give public briefings on matters related to an inquiry. An authorised member may not disclose evidence, documents, proceedings or reports which have not been authorised for publication. The committee shall determine the limits of the authorisation.

The Assembly’s standing orders also outline the procedures to be followed if the issue of a proposed unauthorised disclosure of committee proceedings occurs. It states that “a committee affected by any unauthorised disclosure of proceedings or documents of, or evidence before, that committee shall seek to discover the source of the disclosure, including by the Chair of the committee writing to all members and staff asking them if they can explain the disclosure”.[[7]](#footnote-7) The standing order goes on to outline that “the committee concerned should come to a conclusion as to whether the disclosure had a tendency substantially to interfere with the work of the committee or of the Assembly, or actually caused substantial interference”.[[8]](#footnote-8) The standing order also states that if the committee concludes that there has been potential or actual substantial interference it shall report to the Assembly and the matter may be raised with the Speaker by the Chair of the committee, in accordance with standing order 276 (which deals with the raising of a matter of privilege).

Commonwealth

* + - * 1. House of Representatives

In the Commonwealth House of Representatives standing order 242 provides that evidence taken by a committee or subcommittee, documents presented to it and proceedings and reports of it, which have not been reported to the House or authorised by the House, the committee or the subcommittee, may not be disclosed or published to a person (other than a member of the committee or parliamentary employee assigned to the committee).

A number of reports relating to the unauthorised publication or disclosure of evidence taken in private, of private deliberations and of draft reports of a committee before presentation to the House have been produced by the Committee of Privileges.[[9]](#footnote-9) In commenting on these reports the *House of Representatives Practice* states that:

The committee’s reports indicate the difficulty of reaching a satisfactory outcome in such inquiries. The committee has expressed the view that complaints in this area should not be given precedence unless the Speaker is of the opinion that there is sufficient evidence to enable the source(s) of disclosure to be identified or that there are such special circumstances (for example, the protection of sources or witnesses) as would warrant reference to the committee.[[10]](#footnote-10)

Given the above, a Member wishing to raise a complaint in this area must raise it in the House at the first appropriate opportunity. The Member is not required to go into the detail of the matter, but must identify the committee and the nature of the concern. The committee in question must then consider the matter—in particular it must consider whether the matter has caused or is likely to cause substantial interference with its work, with the committee system or with the functioning of the House. It must also take whatever steps it can to ascertain the source(s) of the disclosure(s). The committee must inform the House of the results of its consideration and, if it finds that substantial interference has occurred, it must explain why it has reached that conclusion. The issue is then considered by the Speaker, who determines whether or not to allow precedence to a motion on the matter. Should a committee conclude that substantial interference has not occurred the House should be informed accordingly.[[11]](#footnote-11)

* + - * 1. Senate

The Commonwealth Senate prohibits the unauthorised disclosure of committee proceedings to any person other than a member or officer of the committee under its standing orders.[[12]](#footnote-12) An unauthorised disclosure would be a breach of standing orders. If this occurred the relevant committee would report the matter to the Senate, but only after following some detailed steps outlined in Procedural Orders of Continuing Effect Nos 3 and 4 of the standing orders. These steps are similar to those of the House of Representatives and also require the committee to consider the matter in the first instance. Procedural order No 4 contains guidelines which are to be observed by the committee when determining whether the matter should be raised as a matter of privilege. The following outlines the circumstances where a matter should not be raised:

* + disclosure of a committee report in the time between the substantial conclusion of the committee’s deliberations on the report and its presentation to the Senate;
	+ disclosure of other documents prepared by a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event, or where they contain only research or publicly-available material, or where their disclosure is otherwise inconsequential;
	+ disclosure of documents and evidence submitted to a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event; and
	+ disclosure of private deliberations of a committee where the freedom of the committee to deliberate is unlikely to be significantly affected.[[13]](#footnote-13)

The procedure order goes on to outline the kinds of unauthorised disclosure that should be raised as matters of privilege, including:

* + disclosure of documents or evidence submitted to a committee where the committee has deliberately decided to treat the documents or evidence as in camera material, for the protection of witnesses or others, or because disclosure would otherwise be harmful to the public interest;
	+ disclosure of documents prepared by a committee where that involves disclosure of material of the kind specified in the above paragraph; and
	+ disclosure of private deliberations of a committee where that involves disclosure of that kind of material, or significantly impedes the committee’s freedom to deliberate.

In practice, many Senators are participating members of committees and this reduces the incidence of unauthorised disclosure to other Senators, because, as participating members, they are entitled to receive committee documents.

New South Wales

The Legislative Assembly of the Parliament of New South Wales addresses the issue of the disclosure of committee evidence or documents in standing order 297 which outlines that evidence, submissions or other documents and information presented to a committee shall not be disclosed by a member or any other person unless it has been reported to the House or authorised by the House or the committee.

The Legislative Council has a similar standing order,[[14]](#footnote-14) however, its standing order continues by stating that the above rules do not apply to:

* + any proceedings of the committee that are open to the public and news media;
	+ any member of the committee or officers of the House or committee in the exercise or performance of their duties;
	+ press releases or statements made by a member of the committee on the authority of the committee;
	+ written submissions presented to a select committee and authorised to be published by the committee;
	+ any submission or document of the committee referred to any person for comment to assist the committee in its inquiry; and
	+ any document authorised to be published by the committee.

The Legislative Council standing order specifies that any person committing a breach of the standing order may be reported to the House.

Northern Territory

In the Northern Territory Legislative Assembly, divulging details of committee proceedings, evidence or reports unless reported to the Assembly or authorised for publication by the Assembly, the committee or subcommittee is a breach of standing orders.[[15]](#footnote-15) The unauthorised disclosure of evidence is also considered to be a contempt under section 22 of the *Northern Territory Legislative Assembly (Powers and Privileges) Act* and standing order 84 deals with motions concerning contempt.

Queensland

The standing orders of the Queensland Legislative Assembly provide that “divulging the proceedings or the report of a committee or subcommittee contrary to standing orders” may be treated as a contempt.[[16]](#footnote-16) However, the standing orders do not prevent “the disclosure, by a committee ... or by a member of the committee or an officer of the committee, of proceedings to a member of Parliament or to the Clerk or another officer of the House in the course of their duties.”.[[17]](#footnote-17)

Standing order 268 outlines the procedure to be followed if an unauthorised disclosure of committee proceedings or documents is raised, which includes the relevant committee reporting the matter and recommending that it be referred to the ethics committee, in which case the matter stands referred. It goes on to indicate that the Speaker may also draw the attention of the House to a matter and recommend that it be referred to the ethics committee, in which case the matter stands referred. Standing order 270 outlines the procedures to be followed once the ethics committee receives such referrals.

South Australia

Provisions are contained in the standing orders of both Houses of the Parliament of South Australia that address the disclosure of committee proceedings and documents by outlining that the evidence taken by a committee, and documents presented to that committee which have not been reported to the House or Council, may not be disclosed or published by any member of that committee or by any other person.[[18]](#footnote-18)

Tasmania

Standing orders of both Houses of the Parliament of Tasmanian outline that evidence taken by any committee which have not been reported to the House/Council or authorised by the committee, shall not be referred to in the House/Council or published by any member or by any other person.[[19]](#footnote-19) Standing order 363 of the House of Assembly states that the above does not apply to any proceedings of the committee that are open to the public and the media, press releases or statements authorised by the committee and authorised written submissions presented to the committee. Both sets of standing orders continue by outlining that a committee may, in its report, recommend which evidence or documents presented to it that should not be published which includes evidence or documents which:

* + discloses any trade secret or secret process of manufacture;
	+ discloses any private matter of a personal or commercial nature unrelated to the subject- matter of its enquiries;
	+ the committee has resolved unanimously should not be made public; or
	+ the committee has told the witness giving or presenting it that it will not be published.[[20]](#footnote-20)

The standing orders state that any evidence or document which a select committee recommends pursuant to the above standing order not to be published shall remain strictly confidential and shall at no time be referred to in the House by any Member or officer of the House or by any witness or any other person.[[21]](#footnote-21)

Victoria

Both Houses of the Parliament of Victoria contain provisions in their standing orders that deal with the unauthorised disclosure of committee meetings or its documents by stating that deliberative meetings will be conducted in private.[[22]](#footnote-22) The standing orders also provide that “evidence not taken in public and any documents, papers and submissions received by the committee which have not been authorised for publication will not be disclosed unless they have been reported” to the House/Council.[[23]](#footnote-23) Given that further provisions of the standing orders outline that any person/Member who disobeys an order of the House/Council ... may be declared guilty of contempt,[[24]](#footnote-24) unauthorised disclosure to anyone outside the committee may therefore be regarded as contempt.

Standing order 21.01 of the Legislative Council outlines in detail the procedures to be followed in relation to a matter of privilege being raised, including that when the matter is raised with the President, the President will determine as soon as practicable whether the matter merits precedence.

Advice provided by the Clerk of the Legislative Assembly to that Assembly’s Privileges Committee in 2013 stated that the Legislative Assembly “follows a similar procedure, in relation to improper disclosure of committee evidence or proceedings, as adopted by the House of Commons from 1985.”.[[25]](#footnote-25) That procedure includes:

* + the committee carrying out its own investigation to try to discover the source of the leak, in particular asking all members of the committee and the committee’s staff if they can explain the leak;
	+ the committee deciding whether or not the leak constitutes a substantial interference, or the likelihood of such, with the work of the committee or the functions of the House;
	+ the committee making a special report to the House outlining the action it has taken and its conclusions; and
	+ the House deciding whether to refer the matter to the Privileges Committee.[[26]](#footnote-26)

Western Australia

In the Western Australia Legislative Assembly, the standing orders state that “No member of the committee nor any other person will publish or disclose evidence not taken in public including documentary evidence received by the committee unless that evidence has been reported to the Assembly or that disclosure has been authorised, on motion, by the committee.”.[[27]](#footnote-27) The Legislative Council’s standing orders also include that evidence, documents and deliberations may not be disclosed or published by any committee member or person, unless otherwise ordered by the committee or the Council. The Council’s standing orders also outline certain circumstances which would constitute a contempt including:

**14. Unauthorised Disclosure**

A person shall not, without the authority of the Council or a Committee, disclose or publish –

(a) a document submitted to the Council, where the Council has ordered that document not be made public;

(b) any private or *in camera* evidence received by a Committee;

(c) any documentation produced by a Committee; or

(d) any deliberation of a Committee.[[28]](#footnote-28)

New Zealand

Information was also sought from the Parliament of New Zealand given that the Assembly’s resolution required that particular reference be made to the New Zealand practice.

Standing order 236 of the New Zealand Parliament states that the proceedings of a [committee] other than during the hearing of evidence are not open to the public and remain strictly confidential to the committee until it reports, however, it goes on to state that this does not prevent the disclosure, by the committee or by a member of the committee, of proceedings to a Member of Parliament or to the Clerk or another officer of the House in the course of their duties and the disclosure of proceedings in accordance with the standing orders. The *Parliamentary Practice in New Zealand* confirms the intent of the standing order by stating that “members discussing [committee] business among themselves (for example, in caucus) does not constitute a contempt. Any disclosure of proceedings pursuant to the Standing Orders (for example, in order to fulfil natural justice obligations) is authorised.”.[[29]](#footnote-29)

Standing order 236 continues by outlining proceedings which may be disclosed, these include those proceedings that do not relate to any business or decision still before the committee and those proceedings in respect of matters of process or procedure that do not:

* + relate to decisions on matters of process or procedure that are still before the committee; or
	+ include any substantive proceedings relating to business before the committee; or
	+ reflect, or divulge the content of, a report or draft report or the committee’s potential findings.

Summary of current practices

As outlined above the majority of jurisdictions in Australia consider the disclosure of committee proceedings and documents, including draft reports, with the exception of Queensland, constitute a breach of their standing orders. In a number of these jurisdictions the standing orders also outline the procedures to be followed if such a disclosure is raised.

# Conclusion

As outlined in Chapter 2, there are a number of different approaches within Australian jurisdictions in relation to the unauthorised disclosure of committee evidence, proceedings and documents, however, the majority of the standing orders outline in some way that evidence taken by a committee, and documents presented to that committee which have not been reported to the legislature, or authorised by the legislature or committee, may not be disclosed or published by any member of that committee or by any other person.

The standing orders of several legislatures, including the ACT Legislative Assembly, also state that the onus is on the committee itself to discover the source of the disclosure before deciding whether to report the matter to the relevant House or Presiding Officer to be dealt with appropriately.

Chapter 2 highlights the fact that the Legislative Assembly of Queensland and the Parliament of New Zealand both allow for certain committee proceedings to be disclosed to other Members of the legislature and not just members of the relevant committee. This practice allows for limited discussion between all Members of the legislature and could reduce the issue of unauthorised disclosures of committee proceedings arising. As highlighted in the *Parliamentary Practice in New Zealand[[30]](#footnote-30)* the intent of the New Zealand standing order is to allow members discussing committee business among themselves (for example, in caucus). Any disclosure of proceedings pursuant to the standing orders (for example, in order to fulfil natural justice obligations) is also authorised. However, the standing orders for both legislatures provide succinct provisions to ensure that any disclosure is restricted.

In discussing the merits of both the Queensland and New Zealand options, Members of the Committee had differing views that the situation in the Assembly required any changes to standing orders. The Committee considered whether the adoption of a modified form of the standing order that incorporated aspects of both New Zealand and Queensland models would ensure or guard against the unauthorised disclosure of committee deliberations.

It was felt by some Members of the Committee that any changes to standing order 241 would be artificial and there were mixed views as to whether any amendment was necessary.

The purpose of standing order 241 is to protect the confidentiality of committee proceedings and it was felt that any proposal to change it only served to blur the interpretation of “committee proceedings” and weaken the existing protections.

In discussing the rules that apply to disclosure of committee proceedings, the Committee considered the practice of the Australian Senate whereby the disclosure of a committee report in the time between the substantial conclusion of the committee’s deliberations on the report and its presentation to the Senate was not considered to be a matter of privilege under their procedural guidelines.

The Committee was of the view that this was a middle ground approach that preserved the integrity of a committee’s deliberations whilst allowing for discussion once the report was finalised. It was agreed that the “disclosure” should be limited to Members only.

* + - * 1. That Standing Order 241 be amended by inserting a new sub paragraph 241 (ba):

241(ba) Members of the committee may discuss a committee report with other Members on a confidential basis in the time between the substantial conclusion of the committee’s deliberations on the report and its presentation to the Assembly.

Vicki Dunne MLA
Chair

 September 2014

1. MoP 2012-2014/611. [↑](#footnote-ref-1)
2. *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*, Appendix 16, pp 392-6. [↑](#footnote-ref-2)
3. MoP 2012-2014/595. [↑](#footnote-ref-3)
4. MoP 2012-2014/595-6. [↑](#footnote-ref-4)
5. Assembly Debates (2014) 1551. [↑](#footnote-ref-5)
6. Assembly Debates (2014) 1551. [↑](#footnote-ref-6)
7. Standing order 242. [↑](#footnote-ref-7)
8. Standing order 242. [↑](#footnote-ref-8)
9. *House of Representatives Practice*, Sixth edn, p 759. [↑](#footnote-ref-9)
10. *House of Representatives Practice*, Sixth edn, p 759. [↑](#footnote-ref-10)
11. *House of Representatives Practice*, Sixth edn, p 759. [↑](#footnote-ref-11)
12. Senate standing order 37. [↑](#footnote-ref-12)
13. Senate procedural order 4(2). [↑](#footnote-ref-13)
14. Legislative Council of New South Wales standing order 224. [↑](#footnote-ref-14)
15. Legislative Assembly of Northern Territory standing order 274(b). [↑](#footnote-ref-15)
16. Legislative Assembly of Queensland standing order 266(12). [↑](#footnote-ref-16)
17. Legislative Assembly of Queensland standing order 211(2)(a). [↑](#footnote-ref-17)
18. Parliament of South Australia, Legislative Council standing order 398, House of Assembly standing order 339. [↑](#footnote-ref-18)
19. Parliament of Tasmania, Legislative Council standing order 201, House of Assembly standing order 363. [↑](#footnote-ref-19)
20. Parliament of Tasmania, House of Assembly standing order 364, Legislative Council standing order 202. [↑](#footnote-ref-20)
21. Parliament of Tasmania, House of Assembly standing order 365, Legislative Council standing order 203. [↑](#footnote-ref-21)
22. Parliament of Victoria, Legislative Assembly standing order 216, Legislative Council standing order 23.20. [↑](#footnote-ref-22)
23. Parliament of Victoria, Legislative Assembly standing order 217(4), Legislative Council standing order 23.23(2). [↑](#footnote-ref-23)
24. Parliament of Victoria, Legislative Assembly standing order 130, Legislative Council standing order 13.07. [↑](#footnote-ref-24)
25. *Special Report—Investigation into the Improper Disclosure of a Committee Document*, Legislative Assembly Privileges Committee, Parliament of Victoria, February 2014, p 6. [↑](#footnote-ref-25)
26. *Special Report—Investigation into the Improper Disclosure of a Committee Document*, Legislative Assembly Privileges Committee, Parliament of Victoria, February 2014, p 6. [↑](#footnote-ref-26)
27. Legislative Assembly of Western Australia standing order 271(2). [↑](#footnote-ref-27)
28. Legislative Council of Western Australian standing orders, Schedule 4. [↑](#footnote-ref-28)
29. David McGee, *Parliamentary Practice in New Zealand*, Third edn, Wellington, 2005, pp 278-9. [↑](#footnote-ref-29)
30. Paragraph 2.22. [↑](#footnote-ref-30)