17 Witnesses

Introduction

17.1 The Legislative Assembly and its committees have the general power to call for persons, papers and records, that being a power assumed from the House of Representatives under the Self-Government Act. The Assembly can invite or even summon witnesses to appear at the Bar to contribute to its inquiries or deliberations, but has done so on only one, largely formal, occasion. Although both the Senate and the House of Representatives have examined witnesses at the Bar of their respective chambers, it is now very unusual for a parliamentary chamber to bring witnesses before it when acting in an inquisitorial role.[1]

Before the Legislative Assembly Chamber

17.2 The only occasion on which the Assembly invited members of the public to appear before it was in 1997 after the publication of the report *Bringing Them Home*, a report into the removal of Aboriginal children from their families. The Assembly adopted a motion with regard to that report.[2] Subsequent to that motion, a further motion was passed by the Assembly to invite representatives of the ACT's Aboriginal community to address the Assembly on the report and related matters. The motion was in two parts: the first part contained the invitation to the representatives to appear and the second part dealt with procedures for the actual meeting.[3] On the day on which the representatives of the local Aboriginal community appeared, a further motion was passed authorising the recording of proceedings by television networks.[4] The meeting took the form of a series of statements by the representatives. No questions were asked and no debate took place.

17.3 A proposal in 1995 to invite the Secretary of the Trades and Labour Council of the ACT (the peak trade union body) to appear before the Assembly and answer questions with regard to an enterprise bargaining agreement put forward by the government was not pursued. If this were ever to occur, matters that would need to be considered in this type of situation would be the questioning procedure to be followed, the witness's right to consult counsel or advisers and the status of any documents presented by the witness. Under the 1995 proposal, all Members were to be permitted to question the witness; the witness was to be allowed to consult counsel during the hearing and any document produced by the witness was to be deemed to have been tabled.

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1 In 1975 the Senate summoned a number of senior public servants to the Bar of the Senate to answer questions and provide documents in connection with the Senate's examination of what became known as the overseas loans affair. In the event all those summoned cited prior ministerial claims of Crown privilege on their behalf and declined to answer any substantive questions. See *Odgers'*, pp. 471-3. Note that the power of the Senate to summon witnesses was not at issue. The only occasion on which the House summoned witnesses to the Bar was in 1955 in connection with a privilege matter—the Browne and Fitzpatrick case. See *House of Representatives Practice*, pp. 111-2. An interesting precedent comes from the House of Commons in the early 19th century when the former mistress of the then Duke of York was summoned before the House to be questioned with regard to claims that the Duke, then Commander in Chief [the 'Grand Old Duke of York'], had been involved in corruptly selling commissions in the Army. As a result of the details revealed in her lengthy cross-examination—she was described by William Wilberforce as '… elegantly dressed, consummately impudent and very clever… [she] clearly got the better of the tussle'—the Duke resigned his position; see A. Wright and P. Smith, London, 1902, *Parliament Past and Present*, p. 391.

2 MoP 1995-97/687; Assembly Debates (17.6.1997) 1602-17. The terms of the motion contained an apology to the Ngun(n)awal people and other Aboriginal and Torres Strait Islander people in the ACT.

3 MoP 1995-97/705-6.

4 MoP 1995-97/735-6.

17.4 In the 1990s there was some discussion about introducing the practice of regularly inviting representatives of community groups to address the Assembly from the Bar on matters of public interest. The proposal was an election commitment of the then government, which was elected in 1995. The government remained undecided about whether the ACT should take a strictly 'parliamentary' approach to its conduct of business or develop a less formal model by adopting aspects of municipal council practice. It is common in local government for members of the public to address their local councils from the floor.

17.5 In 1996 proposed amendments to the standing orders to allow such a procedure were referred to the Standing Committee on Administration and Procedure.[5] It was proposed that time be set aside in every second sitting week for addresses from the public. The administration and procedure committee would consider applications to appear and recommend to the Assembly groups that were to be invited. The committee noted in its report that such a procedure was unheard of in other parliaments.[6] In view of this:

> The Committee's prime consideration … was whether there was a need to establish such a procedure. It was of the view that there was already an effective avenue through which the community's interests can be voiced – the Committee system.[7]

17.6 The standing committee noted that the committee system provided for a diverse range of inquiries to be undertaken and offered a variety of avenues for public access. In its view the proposal did not address the needs of a 'clientele that is currently disenfranchised'. It concluded that the proposal 'did not offer any advantage … over the existing committee system and … might detrimentally impact on the effectiveness of the work done by Assembly committees'.[8]

17.7 A number of other objections were raised during consideration of the proposal. It was argued as a matter of principle that such a proceeding would diminish the role of Members as representatives of their constituents. The question of extending absolute privilege to the content of addresses that might subsequently be shown to be misleading and the potential for disorder were of great concern. It was noted that witnesses invited to appear before parliamentary committees are responding to specific terms of reference and usually make some written submission in the first instance, thus enabling the committee to have a good idea of the likely content of their oral evidence.

17.8 A member of the committee dissented from the report and supported the proposal. The member argued that the proposed procedure would offer members of the community who were dissatisfied with a committee report the opportunity to take their case to the whole Assembly and that, generally, additional avenues of communication between the community and the Assembly would tend to strengthen the institution. He also disputed whether the practical difficulties of ensuring responsible use of privileged freedom of speech and maintaining order were likely to be any greater for members of the public addressing the Assembly than for the elected Members.[9] The committee's report and the dissenting report were tabled in the Assembly in September 1996 and debated, but no further action was taken on the proposal.

5 MoP 1995-97/298.

6 Where individuals have been invited to address a legislative chamber it has been in exceptional circumstances, not as a regular procedure.

7 Standing Committee on Administration and Procedure, *Addresses to the Assembly—Proposed temporary orders,* 25 September 1996, p. 3.

8 Standing Committee on Administration and Procedure, *Addresses to the Assembly—Proposed temporary orders*, 25 September 1996, p. 5.

9 Standing Committee on Administration and Procedure, *Addresses to the Assembly—Proposed temporary orders*, 25 September 1996, Dissenting Report.

Summoning of witnesses, including Members

17.9 Standing orders 255 and 256 embody the authority of the Assembly and its committees to compel the attendance of witnesses and punish any failure to attend. These powers were powers of the House of Representatives when the Self-Government Act was passed and are, therefore, powers of the Legislative Assembly. The form of a summons is not specified but the Assembly could follow precedents in other parliaments. There is limitation on the Assembly's powers to impose penalties—for example, it may not impose fines or order imprisonment. Failure to appear before a committee and to give evidence, having been ordered to do so, constitutes a contempt and the committee must report the matter to the Assembly. The committee has no authority to punish contempts.

17.10 Neither the Assembly nor its committees has ever used these powers. As noted in paragraph 17.2, the Assembly has invited members of the public to appear before it on only one occasion and Assembly committees rely on cooperation and negotiation when gathering evidence. Both House of Representatives and Senate committees have ordered witnesses to appear, but only rarely. A witness who is reluctant to appear will usually accept an invitation when the power to order an appearance is explained. Witnesses have occasionally asked to be 'ordered' to appear for their own protection. They wanted to make it clear that they were required to give evidence—for example, where their evidence related to 'matters subject to a requirement of confidentiality'.[10]

17.11 The Assembly has never required a Member to 'attend in the Member's place' to be examined by the Assembly (see standing order 257). It is possible that a legislature might wish to do so in the event of an egregious breach of its rules. However, that need has not arisen. Committees have invited Members to appear on numerous occasions, particularly in their capacity as Ministers, but also with regard to questions of privilege and other matters. Again, the issue of compulsion has not arisen. Standing orders 256, 258 and 259 confirm that committees do not have the power to reach decisions on matters relating to the refusal of Members or witnesses to appear and answer questions. These matters must be reported to the Assembly, which then decides on a course of action.

17.12 The House of Representatives and the Senate have the power (via section 49 of the Constitution) to administer oaths or affirmations to witnesses appearing before committees and thus the Assembly also has that power (via the Self-Government Act). The practice of swearing witnesses before committees has been declining in the Commonwealth Parliament since the 1980s and the practice was never adopted in the Legislative Assembly. When Assembly committees take evidence, the chair of the committee reads a brief statement concerning privilege at the commencement of the hearing reminding witnesses of the protection afforded by committee procedures and the witnesses' obligation to tell the truth.

Protection of witnesses

17.13 Witnesses appearing before the Assembly and its committees receive the same protection as that provided by the Commonwealth Parliament. Witnesses are protected against legal action in the courts for anything said in meetings of the Assembly and its committees. This protection also applies to submissions presented to committees and documents prepared incidental to witnesses' appearances before committees.[11] It is important that witnesses be properly advised about the extent of the protections afforded to them and, equally, that those protections not be abused.

10 *House of Representatives Practice*, pp. 651-2; Odgers', p. 423.

11 *Parliamentary Privileges Act 1987* (Cwlth), section 16.

17.14 The Parliamentary Privileges Act sets out clearly that witnesses may not be subjected to pressure or penalty in relation to evidence they may give to committees.[12] These matters are discussed more fully in the Chapter 2: Immunities and powers of the Assembly (Privilege).

17.15 As discussed in this chapter little use has been made of the procedures with regard to the appearance of witnesses before the Assembly Chamber. On those occasions when a witness did appear or such an appearance was contemplated, the Assembly prepared resolutions setting out the specific procedures to be adopted.

17.16 The draft motion to invite the Secretary of the Trades and Labour Council to appear before the Assembly (see paragraph 17.3) proposed to vary the procedure set out in standing order 262 by naming a Member other than the Speaker who would be given the call to ask the first questions of the witness and stating that all Members would have the right to direct questions to the witness. This serves as a reminder that the Assembly may vary the application of standing orders as it sees fit.

17.17 In general, committees have a more informal approach to questioning. The chair may open the questioning of a witness before inviting other members to put questions or may invite a Member with a particular interest in the matter before the committee to ask questions. The chair must ensure that Members have equal opportunity to question witnesses.

17.18 Committees would normally resolve any differences of opinion in private. When a committee member or a witness objects to a question or to the way in which the committee is conducting its business or when a procedural matter arises in the course of a hearing, unless the question can be resolved quickly and amicably, the committee must adjourn its public session and meet in private to resolve the matter.[13]

17.19 Parliamentary privilege protects a legislature from having its proceedings questioned in any other tribunal. Standing order 264 is an expression of part of that protection. Officers of the Assembly cannot be summoned before any court or other tribunal to give evidence in relation to the proceedings of a committee or the evidence it may have received without the express authorisation of the Assembly. To date no authorisation has been given.[14]

Public servants appearing as witnesses before committees

17.20 Public servants are a special category of witness. They play a key role in the accountability of the executive to the legislature. Public servants should be familiar with the content of the *Handbook for ACT Government Officials on Participation in Assembly and other inquiries*. The handbook specifically provides the following advice to public servants appearing before Assembly committees:

> The duty of the public servant is to assist ministers to fulfil their accountability obligations by providing *full and accurate information to the legislature* about the factual and technical background to policies and their administration. [emphasis added].[15]

12 *Parliamentary Privileges Act 1987* (Cwlth), section 12:
13 Standing order 263.
14 And see paragraphs 2.59 and 2.60.
15 Cabinet Office, ACT Chief Minister's Department, *Handbook for ACT Government Officials on Participation in Assembly and Other Inquiries*, June 2004, p. 4.

17.21 It is accepted that public servants cannot be asked questions that require them to offer an opinion on the merits or otherwise of government policy or on the advice that they have given in the formulation of policy.[16] They may be asked to explain a policy or describe alternatives that have been considered but not to canvass the relative merits of various policies. Questions seeking opinions on the merits of policies should be directed to Ministers.

17.22 Public servants should also be given the opportunity to take questions on notice or to refer them to senior officers or their Minister where:

- they are unsure of the status of the information that would be disclosed in the answer;
- they lack sufficient information to provide a complete answer;
- they believe that the question should, properly, be directed to another agency; or
- they believe that the question relates to matters outside the committee's terms of reference.[17]

However, individual public servants should not, of their own volition, decline to provide information to Assembly committees. Such a decision should be made in consultation with the responsible Minister and the reasons for it provided to the committee.

17.23 As mentioned in Chapter 16: Committees, there are a number of grounds on which Ministers, public servants and citizens generally may seek to withhold information from an Assembly committee or to provide that information or evidence in private. These grounds generally relate to public interest immunity, claims to confidentiality based on commercial sensitivity and concerns about individual privacy.

17.24 In a small community like the ACT, it is not uncommon for public servants to appear in a personal capacity to give evidence on some issue of concern to them as citizens. As the government's handbook makes clear, there can be no objection to such a practice. However, public servants should be reminded prior to their giving evidence that when appearing in a 'personal' capacity on matters that are within their professional responsibility as public servants, they should be aware of the potential conflict that may arise with their duties under the Public Sector Management Act, which sets out their responsibilities as public servants.[18]

17.25 There may be circumstances where a public servant wishes to appear before a committee to give evidence in relation to his or her responsibilities as a public servant—for example, as a 'whistleblower' exposing some misuse of executive power. While committees can take such evidence and it would receive the protection of the Assembly, committees should seek to ensure that alternative 'internal' avenues of dealing with the matter have been exhausted and that the issue is of such importance that the breaching of the public servant's obligations under the Act is justified. Regard should also be had to the *Public Interest Disclosure Act 1994*.

17.26 The Assembly would protect a witness from any overt attempt to impose a penalty in these circumstances. However, its capacity to prevent the giving of such evidence having a detrimental effect on a public servant's career in the long term clearly may be limited.

17.27 Public servants appearing before Assembly committees, particularly estimates committees, which tend to be wide ranging and adversarial, will often find themselves defending their agencies. It is perfectly acceptable to represent a departmental or agency

16 *Odgers'*, p. 428.

17 Estimates committees are a special case. It is accepted practice that these committees may range over all aspects of government activity and are not limited by the provisions of the appropriation bills.

18 Cabinet Office, ACT Chief Minister's Department, *Handbook for ACT Government Officials on Participation in Assembly and Other Inquiries*, June 2004, p. 21.

'position' as long as that does not involve misleading the committee or withholding information. It is also reasonable to take advantage of the protections available to public service witnesses. However, agencies should not 'coach' public service witnesses to seek to manipulate the protections available to them—for example, taking questions on notice when the information is readily available and there is no valid reason for not providing it to the committee. Nor should witnesses be drawn into 'political' debates—for example, by offering gratuitous information about the practice of a previous government.

17.28 The Assembly's estimates committee faced these types of issues in 2003 when a Minister declined to answer questions from members, although the information was available to him and no issues of confidentiality arose with regard to it. The Minister acknowledged that he simply wished to present the information in a forum and manner of his own choosing, which he did at a later time on the same day. A subsequent privileges committee inquiry made a finding of contempt against the Minister. The Minister acknowledged during the course of the inquiry that he had an obligation to provide the information to the committee.

17.29 At the same hearings a document came to light on the letterhead of an agency appearing before the committee. The document had been widely circulated within the agency. It contained a list of 'suggested tactical approaches' in dealing with questions in the estimates committee's hearings. Some parts of the document were unexceptionable, merely reminding public servants of their rights and obligations when appearing before a committee. However, it also included advice, characterised as 'flippant and glib', on how to seek to manipulate the proceedings, avoid answering questions, present information selectively and make party political points. A finding of contempt of the Assembly was made against agency officers who were the authors of the document.[19] They were subject to internal agency disciplinary proceedings and seminars were conducted within the agency to familiarise officers with their obligations to the Assembly. The Assembly itself imposed no penalty on the officers.

17.30 To date, the procedural questions associated with summoning public service witnesses in the face of opposition by a Minister and the scope of ministerial claims to public interest immunity have not been tested in the Assembly.

Members of the judiciary called as witnesses

17.31 The independence of the courts from executive or legislative interference is an important aspect of the democratic doctrine of the separation of powers. One manifestation of this separation is the care with which the relationship between the legislature and the judiciary is managed. Legislative Assembly standing order 54 prohibits the use of offensive language against a member of the judiciary and, by convention, Members of the Assembly do not reflect on specific decisions of courts. The Assembly has also tended to adopt a narrow interpretation of the *sub judice* convention by avoiding references to matters before the courts. (See Chapter 10: Rules of debate and the maintenance of order.)

17.32 It is accepted that parliaments may scrutinise the administration of the courts that come within their jurisdiction. For example, it is common practice for officers of the courts to appear before Assembly estimates committees. Committees have also received submissions from ACT magistrates on matters relating to both the administration of the courts and the interaction of the courts with government services in the ACT. The accepted practice of the Assembly is that members of the judiciary or magistracy may be invited, but are not required, to participate in committee inquiries.

19 Both these matters were dealt with in *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer questions in committee hearing and distribution of ACT Health document*, Select Committee on Privileges, November 2003.

17.33 The public accounts committee of the Sixth Assembly, when examining an Auditor-General's report into the administration of the courts, sought submissions from both the Chief Justice of the ACT Supreme Court and the ACT Chief Magistrate. The Chief Justice declined to provide a submission but the Chief Magistrate and another magistrate did; they also appeared and gave evidence at hearings of the committee.

17.34 The Standing Committee on Justice and Community Safety, when inquiring into the Children's Services (Amendment) Bill 1998, received a submission and heard evidence from the Chief Magistrate on the issue of whether the ACT should have special magistrates for hearing cases in the Children's Court.

17.35 Australian legislatures are empowered to call for the removal of judges within their jurisdiction on the grounds of misconduct or incapacity, usually by way of an address to the Governor-General or a state governor. However, the requirement to establish evidence of misconduct or incapacity, while avoiding any suggestion of a politically motivated interference in the judiciary, has presented various Australian parliaments with complex challenges.

17.36 Most notably, the Senate established two select committees to inquire into the conduct of a High Court judge in the 1980s. The second of those committees was assisted by two retired judges, acting as commissioners to give advice to the committee as to both the conduct of its inquiries and its findings. The committee also adopted complex procedures designed to ensure the fairness of its proceedings. The judge in question declined to appear before either select committee and no attempt was made to compel him to appear (the second committee was explicitly denied the power to summon him).

17.37 Despite two parliamentary inquiries and criminal proceedings relating to some of the matters under investigation, the position of the judge remained unresolved and a parliamentary commission, analogous to a royal commission but reporting to the parliament, was established. The ill health and subsequent death of the judge meant that the matters under investigation remained unresolved.[20]

17.38 Other Australian legislatures—for example, Queensland and New South Wales—have adopted the practice of appointing independent commissions to inquire into complaints against members of the judiciary prior to the legislature considering the issue of their removal from office. However, in both cases the judges under investigation appeared before the legislatures when they deliberated on whether to request their removal from office.

17.39 Section 48D of the Self-Government Act gives the Assembly a role in the removal of a judge of the ACT Supreme Court. However, the role is restricted to making a determination as to whether the facts adduced by a judicial commission established to examine 'complaints concerning the conduct or the physical or mental capacity of a judicial officer' amount to grounds for the removal of the person from office, and passing a motion to that effect. In making that determination, the Assembly might choose to hear discussion on what constitutes grounds for removal and might conceivably wish to invite the judge to appear before it before reaching a decision; but the procedure has not been used and the issue has not arisen.

17.40 The provisions in the ACT Self-Government Act requiring the appointment of a judicial commission to determine the facts of a complaint against a member of the judiciary appear to have been informed by the experience of the Commonwealth Parliament referred to in paragraph 17 36 and 17.37.

20 See *Odgers'*, Chapter 20, for a full discussion of these issues.

Adverse mention procedures

17.41 In March 2008 the Assembly adopted adverse mention procedures that were based on resolutions similar to those agreed to by the Senate. These procedures allow witnesses certain rights where they believe that evidence has been given which reflects adversely on them.

CONDUCT OF PRIVILEGE INQUIRIES

17.42 In common with all other legislatures the Assembly possesses certain privileges and immunities from the ordinary law (see also Chapter 2: Immunities and powers of the Assembly (Privilege)). It also has the power to determine and, if necessary, punish actions which constitute breaches of those privileges or contempt of the Assembly. With the passage of time, Australian legislatures, while still jealously guarding their privileges, have become more circumspect in pursuing matters of contempt. It is generally accepted that the dignity of a legislature is better served by this approach than by the aggressive pursuit of possible contempts. The *Parliamentary Privileges Act 1987* (Cwlth) has also made the defence of the privileges of the Commonwealth Parliament, and by extension the Legislative Assembly, a matter for the courts in the first instance.

17.43 Speakers of the Assembly have followed the example of the Commonwealth Parliament in their reluctance to invoke privilege or contempt procedures in cases other than those where it is considered imperative to do so in order to protect the Assembly, its Members and its committees.[21] Speakers have made various alternative suggestions to ensure that the Assembly operates successfully. They have included dealing with an issue by way of an apology;[22] reminding Members of the need to ensure that the rules and standing orders of the Assembly are adhered to; that fair and proper processes are followed; and that confidentiality is maintained.[23]

17.44 On one occasion, there was a question about whether a Minister had offered a Member a position on a proposed select committee in return for her vote to secure a government chair on the committee. The Speaker reminded Members that, in coming to a decision as to whether a matter merited precedence, he had to distinguish between the ordinary cut and thrust of political life in a legislature and attempts to influence Members improperly in the way they perform their duties.[24]

17.45 The Assembly has also been aware that it should consider the possible consequences of acting in defence of its privileges and be sensitive to community attitudes on the issue. On one occasion, a committee inquiring into a possible breach of privilege declined to call departmental officers to give evidence even though there was a high probability that the officials could have thrown some light on the matter under investigation. The committee commented that:

> Whilst it felt it had a legitimate right to obtain this information, that right had to be balanced against the possibility that the Committee's inquiry could be viewed as a witch hunt and if successful could damage careers.[25]

21 Assembly Debates (12.9.1990) 3160.

22 Assembly Debates (18.9.1991) 3462-5. The Member who was the subject of a complaint having made a statement by leave, as did the Member who raised the matter, the Speaker considered the issue resolved.

23 Assembly Debates (16.2.1999) 152-3.

24 Assembly Debates (7.4.2005) 1485.

25 Standing Committee on Administration and Procedures, *Report on the Government Response to the Report of the Select Committee on Estimates 1993-94*, April 1994, paragraph 28.

17.46 The low-key approach to consideration of privilege questions is reflected in the number of matters which have lapsed after an explanation has been offered by the relevant Member or the matter has been thoroughly debated.[26] The overwhelming majority of privilege matters raised in the Assembly relate to the actions of Members or the unauthorised release of committee material and are resolved 'in-house'.

17.47 Matters of privilege and, more particularly, contempt still arise and have to be examined by the Legislative Assembly. Standing order 276 provides that:

> Upon a matter of privilege arising:
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> (a) a Member shall give written notice of the alleged breach to the Speaker as soon as reasonably practicable after the matter has come to the Member's attention;
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> (b) if the matter arises from a statement published in a newspaper, book or other publication, the Member is required to provide the Speaker with a copy of the newspaper, book or publication; …[27]

17.48 The responsibility then rests with the Speaker to determine whether the matter has substance and should be taken further.[28] If the Speaker so decides, the matter is given priority over all other business of the Assembly and the Member who raised it is given the opportunity to move a motion to refer it to a select committee for examination and report. Should the Speaker grant precedence, the Member who raised the matter is not obliged to move a motion of referral, and on occasions motions have not been moved. It is not uncommon for the matter to have been resolved between the giving of written notice to the Speaker and the Speaker making a decision.[29] In March 2008 the Assembly adopted new standing orders 277, 278 and 279. They set out what constitutes a contempt and what criteria the Speaker will use to determine whether a matter merits precedence. The Assembly also adopted new standing order 280 that established procedures for the protection of witnesses before a privileges committee.

17.49 In the early years of the Assembly, privilege matters were referred to the Standing Committee on Administration and Procedures. However, this proved unsatisfactory since on occasion members of the committee were themselves the subject of complaints about possible contempt. In 1995 the standing orders were amended to create the current process. Investigations are now undertaken by select committees on privileges rather than by the standing committee. This ensures that none of the Members involved in the inquiry has any involvement in the matter under examination.

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26 Appendix 15 summarises the 29 matters of privilege that have been raised in the Assembly to the end of the Sixth Assembly. Fourteen were found by the Speaker to merit precedence; after debate no further action was taken on eight of those matters, while five were referred to privilege inquiries. Thirteen matters were adjudged by the Speaker not to merit precedence, though one was nevertheless referred back to the standing committee where the issue originated. In two cases a Member moved for the establishment of a Select Committee on Privileges without reference to the procedures set out in standing order 71.

27 *Legislative Assembly standing orders and other orders of the Assembly*, August 2005.

28 Two Members have given separate notices concerning the same matter. The notices being similar, the Speaker considered them together. See Assembly Debates (17.10.1990) 3753.

29 For example, see Assembly Debates (13.2.1990) 17-8. The matter related to the premature release of a committee report: the Member who raised the matter (the presiding member of the committee) advised that he had consulted with colleagues on the committee and believed that no major damage was done nor was the committee's performance unduly affected; see Assembly Debates (17.10.1990) 3735-7; Assembly Debates (18.9.1991) 3462-5. In these cases the Speaker suggested the matter could best be dealt with by way of an apology; see also Assembly Debates (17.5.1994) 1549-52 and (19.5.1994) 1769-70. The matters concerned submissions made to a board of inquiry inviting the board to have regard to debates in the Assembly. In advising the Assembly on each occasion the Speaker stated that she would be alerting the Board to her statements; see also Assembly Debates (25.9.1997) 3229-30. The Member who raised the matter stated that he would not be moving a motion as the Member complained of was not present to defend himself. He was absent on Assembly business; see also Assembly Debates (9.8.2001) 2828-36.

17.50 While privilege matters have generally been raised using the procedures set out in former standing order 71,[30] it is open to the Assembly to establish a privileges inquiry directly by motion. In 2002 it came to light that a Minister's emails were being interfered with and an inquiry was undertaken by the police.[31] At the completion of the inquiry, the Director of Public Prosecutions advised that no criminal charges would be laid.

17.51 The Minister affected by the interference then moved a motion to establish a select committee on privileges to examine the matter, 'notwithstanding the provisions of standing order 71'. In moving the motion the Minister noted that:

> It has been explained to me there is no[thing] … in the statutes that would allow a criminal charge to be undertaken. That brings the matter back into this Assembly, because I think it is pretty clear that an offence has been committed – not just to me but to the whole Assembly.[32]

The motion was debated at length and passed. It is a useful reminder that contempt of the Assembly is separate from offences under the ordinary criminal law.

17.52 If the Speaker decides that a matter does not merit precedence, he or she must inform the Member who raised the issue, in writing, of this decision. The Speaker may also advise the Assembly of the decision. The Speaker has generally informed the Assembly when matters did not merit precedence. On one occasion, the Speaker having informed the Assembly that a matter did not merit precedence, the Assembly granted leave to a Member to move a motion to refer the matter to the Standing Committee on Administration and Procedures.[33] On a later occasion, a motion proposing the appointment of a select committee to examine a matter was moved pursuant to notice.[34]

17.53 Many possible contempt issues arise in committees, particularly with regard to the release of confidential material, including draft reports. Before invoking the privilege procedures, House of Representatives practice is to ask a committee in the first instance to examine whether the matter complained of has had a substantial impact on the committee's work. This can be seen as a further demonstration of that house's desire to avoid invoking privilege in a heavy handed way. The Assembly has occasionally adopted the same course.[35]

17.54 The Standing Committee on Administration and Procedures recommended the formal adoption of such a practice based on House of Commons and House of Representatives precedents. However, consideration of that report was adjourned and the matter lapsed at the expiration of the Second Assembly.[36]

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30 New standing order 276.

31 Information technology services in the Legislative Assembly (and Ministers' offices) are provided under contract by an external supplier. The breach of the email system was reported to the service provider who took the view that it was a matter for police inquiry; acting on this advice and with the concurrence of the Minister whose email was affected, the Clerk of the Assembly called in the police.

32 Assembly Debates (6.6.2002) 2012. For the debate on the motion, see Assembly Debates (6.6.2002) 2011–4, 2049-62.

33 Assembly Debates (12.9.1990) 3159-64. The motion was negatived. An earlier motion in similar terms had been considered and negatived; see Assembly Debates (16.8.1990) 3018-22.

34 The motion (alleging improper influence of a witness in respect of evidence to be given to a standing committee) was agreed to (Assembly Debates (25.5.2000) 1776-94, 1834-47). However, the resolution on the referral was later rescinded and the original motion was amended to refer the matter to the committee in question (Assembly Debates (25.5.2000) 1897-1924).

35 A motion to appoint a Select Committee on Privileges to examine a matter that had arisen in a committee was agreed to after debate (MoP 1998-2001/879-80, 882-3; Assembly Debates (25.5.2000) 1776-94, 1834-46). Later, the motion was rescinded and reconsidered. The Assembly resolved that the Standing Committee on Planning and Urban Services should inquire into the matter (MoP 1998-2001/891-93).

36 Standing Committee on Administration and Procedures, *Article in the Canberra Times dated 12 November 1993 concerning the Draft Report of the Select Committee on Estimates 1993-94*, 16 December 1993), paragraph 28, recommendation 2.

Proceedings in committee

17.55 When considering matters referred to them, select committees on privileges are governed by the same standing orders as committees generally and they must have regard to any specific terms in their resolutions of appointment. Privileges committees are usually inquiring into the behaviour of a person or persons. They have the capacity to make findings and to recommend the imposition of penalties that may have an adverse effect on the individuals concerned. Therefore they need to ensure that their proceedings are conducted with a maximum of procedural fairness.[37]

Penalties for contempt

17.56 Select committees inquiring into privilege matters may be of the view that a contempt of the Assembly has occurred. The committees may also recommend penalties. The Select Committee of Privileges inquiry into the unauthorised diversion and receipt of a Member's emails[38] made a finding of contempt and recommended that the person involved be required to make a 'prompt and unreserved apology' to the Assembly. Between the tabling of the report and completion of debate on it that person resigned his position as an adviser to a Member of the Assembly. The Assembly did not pursue the matter of the apology.

17.57 The general tendency of Assembly privileges committees has been to avoid recommending the imposition of penalties even where they have made findings of contempt. For example, a committee inquiring into the conduct of estimates committee hearings[39] made findings of contempt against a Minister for refusing to answer questions in the hearing while releasing the relevant material publicly shortly thereafter. The committee also made an adverse finding against two departmental officers. In both cases, the committee accepted that apologies and, in the case of the officials, departmental disciplinary action were sufficient response.

17.58 A privileges committee report on the actions of a committee chair[40] also made a finding of contempt against the committee chair. Again, it imposed no penalty. It is worth quoting the committee's reasons for this as they embody what has been the attitude of the Assembly to the issue of punishment of contempt:

> [The Chair] has admitted her 'mistake' in confusing her roles in both the committee and the Assembly and did disqualify herself from further involvement in the … [committee's] inquiry.
>
> This admission … together with the ordeal of having to undergo this privileges inquiry has prompted this committee to recommend no further action be taken …[41]

17.59 The recommendations of the inquiries discussed in paragraphs 17.57 and 17.58 reflect a trend in the Assembly's handling of privileges matters. It is to avoid imposing punitive penalties, particularly where the person in question makes a prompt apology. In part,

37 See also Chapter 16: Committees, paragraph 16.142 with regard to the availability of legal advice to witnesses. See also Chapter 16: Committees, 16.139 and 16.140.

38 Select Committee on Privileges, *Unauthorised diversion and receipt of a Member's e-mails*, 13 November 2002.

39 Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer questions in committee hearing and distribution of ACT Health document*, 3 November 2003.

40 Select Committee on Privileges, *Report on whether the actions of the Chair of the Standing Committee on Planning and Environment with regard to the distribution of a flyer in her name at the Belconnen Markets did constitute a contempt of the Assembly*, March 2004.

41 Select Committee on Privileges, *Report on whether the actions of the Chair of the Standing Committee on Planning and Environment with regard to the distribution of a flyer in her name at the Belconnen Markets did constitute a contempt of the Assembly,* March 2004, p. 15, paragraphs 5.6 and 5.7.

this reflects an acceptance that most inquiries that result in findings of contempt against individuals indicate that they did not have a clear understanding of the issues involved. There may also be an appreciation on the part of the Assembly that the community would be unlikely to support harsh penalties for what often appear to be obscure or technical breaches.

17.60 Privileges committees are not restricted to the specific issue of breach of privilege or contempt in conducting their investigations. A number of committees have made recommendations or comments on the need for a better understanding of parliamentary privilege and contempt by both Members of the Assembly and witnesses, particularly public servants, appearing before Assembly committees. For example, in 1993 a committee investigating the leaking of a committee draft report recommended that:

> … at the new Members seminar conducted at the commencement of each Assembly new members (and their staff) be advised of their obligations and responsibilities as a member of a committee, with particular regard to the confidentiality of draft reports.[42]

17.61 In response to a more recent report, *Possible unauthorised dissemination of Committee material*, the government department involved initiated training for its officers 'on appropriate committee preparation, behaviour and service from the department'. That privileges committee recommended that the Assembly make seminars on this subject a continuing part of training for departmental officers.[43]

17.62 Privilege committees have also made recommendations with regard to other matters that have contributed to the issues that they have considered. For example, the Select Committee on Privileges that investigated the unauthorised diversion and receipt of a Member's emails identified the management of the Assembly's information technology services as an important contributing factor to the breach of email security and recommended that they be reviewed. The committee also recommended that the status, rights and obligations of volunteers working in Members' offices be clarified and that the code of conduct for Members' and Ministers' staff be strengthened.

17.63 The range of penalties that the Assembly may impose where a finding of contempt is made does have limits. The Self-Government Act excludes the imposition of fines or custodial sentences (subsection 24(4)). The most serious penalty that can be imposed on a Member is suspension from the service of the Assembly.[44] The Assembly could ban a person, including a Member, from the precincts of the Assembly. This would be a serious punishment in the case of a Member's staff or public servants whose responsibilities required regular access to the executive or the Assembly and its committees.

17.64 When considering the appropriate penalty to apply, the committee examining the unauthorised diversion of a Member's emails was aware that to exclude a staff member from the Assembly precincts would make it extremely difficult for that person to continue in his or her position. Indeed, the committee was aware that the practical impact of a finding of contempt against an MLA's staff member would be severe, irrespective of any additional penalty imposed:

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42 Standing Committee on Administration and Procedures, *Article in The Canberra Times dated 12 November 1993 concerning the Draft Report of the Select Committee on Estimates 1993-94*, 16 December 1993, paragraph 28, recommendation 2.

43 Select Committee on Privileges, P*ossible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer questions in committee hearing and distribution of ACT Health document*, 3 November 2003, pp. 12-3.

44 As a consequence of section 8 of the Parliamentary Privileges Act, the Assembly cannot expel a Member. Were the Assembly to suspend a Member for an extended period or for the duration of the Assembly, it would be open to that Member to invoke section 8 and invite a court to decide whether the suspension was *de facto* expulsion and therefore beyond the Assembly's power.

> In view of the adverse effect that this finding of contempt will have on [the person's] professional reputation the committee makes no further recommendation for the imposition of a penalty ….[45]

Proceedings following reports

17.65 The Assembly has a number of options when a committee report is tabled. The current practice is to move that the Assembly 'note' a committee report.[46] This allows the report to be debated. It does not imply support for the findings or recommendations of the report or require any action on the part of the Assembly or any other party.[47]

17.66 In the case of a privileges committee report which recommended that penalties be imposed, a motion to take note of the report would be insufficient to ensure that any further action was taken. The person or persons against whom penalties were recommended might, with justice, argue that the Assembly had reached no decision on either the substance of the contempt or the merit of the penalty[48] and, until it did so, decline to respond to the committee report. Where the Assembly wishes to ensure that the committee's recommendations are implemented, a motion 'That the report be adopted' or a specific motion either 'That the recommendation be adopted'[49] or that a person or persons 'be required to apologise to the Assembly' would have to be moved and passed.

17.67 In 1993 two related matters arising from the Select Committee on Estimates were referred to the Standing Committee on Administration and Procedure as potential breaches of privilege. The committee produced a report in response to each reference. Neither report made a finding against any named person and both reports recommended administrative action on the part of the Assembly and the executive. The motion with regard to the first report was that it be adopted whereas the motion relating to the second was merely that it be noted. The records do not reveal any reason for these different approaches.

17.68 In the case of the second report, the executive did in fact respond to the recommendations relevant to it, but this was in line with standard executive practice to respond to all relevant committee reports. It was not a response to any demand from the Assembly.

17.69 As noted above, the Assembly rarely imposes penalties. In the only recent case where one has done so, the matter was resolved by the resignation of the person in question.[50] Thus, the question of enforcing a penalty has not arisen. Were an individual to decline to accept the penalty imposed, the Assembly would have to consider further action, such as bringing the person before the Bar of the Chamber.

17.70 In practice, serious offences against the Assembly, its Members and committees that may involve penalties beyond admonishment or apology are likely to be dealt with by the

45 Select Committee on Privileges, *Unauthorised diversion and receipt of a Member's e-mails*, 13 November 2002, p. 29.

46 Standing order 254 provides four options when presenting a committee report: that the report be noted, that the recommendations be adopted, that the report be adopted or that consideration of the report be made an order of the day for the next sitting (when a specific motion without notice in connection therewith may be moved). See Chapter 16: Committees.

47 Where committee reports make recommendations with regard to the ACT Executive, the executive has adopted the practice of responding to recommendations within three months. This is not a requirement of the Assembly.

48 There is no requirement on the Assembly to agree with the findings of a committee. In the Strauss case in Britain the House of Commons declined to accept the conclusion of its privileges committee that a Member's correspondence with a Minister constituted a proceeding in parliament.

49 For example, in 1994 the Standing Committee on Administration and Procedure recommended that standing orders 200 and 201 be amended and the committee provided amended texts. The motion before the Assembly, that the report be adopted, was put and passed and as a result the amended texts were included in the standing orders. MoP 1992-94/633.

50 Select Committee of Privileges, *Unauthorised diversion and receipt of a Member's e-mails, 13 November 2002.*

ordinary law. Intimidation or corruption of Members, witnesses or Assembly staff and serious disruption of the Assembly's proceedings[51] could all constitute offences.

17.71 Advice from the ACT Government Solicitor on the application of the Parliamentary Privileges Act argues that only those parts of the Act 'which may properly be described as declaratory of the "powers, privileges and immunities of the House of Representatives and its committees and Members"' would apply to the Assembly. Sections which 'relate to enforcement or administrative detail' would not apply. Thus, for example, sections 12 and 13 of the Act, which create offences in relation to interference with witnesses and unauthorised publication of documents would not, on this view, apply to the Assembly. However, it is open to the Assembly to legislate to make provision for similar penalties in the ACT.

Records of privileges committees

17.72 The records of all select committees, including those inquiring into privilege matters, pass into the custody of the Clerk of the Legislative Assembly after they have reported to the Assembly and ceased to exist.

51 For example, the *Legislative Assembly Precincts Act 2001* and the *Crimes Act 1900*, section 154. The former Act applies to the Assembly precincts and provides extensive authority for the removal of persons from the Assembly precincts. It creates offences of obstruction, behaving in an offensive or disorderly manner and refusal to leave premises when requested to do so. The *Criminal Code 2002*, Chapter 3, includes Members, Ministers and Assembly staff within its definition of 'public official' and includes offences relating to abuse of public office and intention to dishonestly influence a public official.