



THIRTY-EIGHTH PARLIAMENT

REPORT 20

**STANDING COMMITTEE ON PROCEDURE AND
PRIVILEGES**

**ADMINISTERING THE OATH OR AFFIRMATION
TO WITNESSES IN COMMITTEE PROCEEDINGS**

Presented by Hon Barry House MLC (Chairman)

November 2009

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:

“6. Procedure and Privileges Committee

- 6.1 *A Procedure and Privileges Committee* is established.
- 6.2 The Committee consists of the President and the Chairman of Committees, the Deputy Chairmen of Committees (*all ex officio*), and any members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chairman, and the Chairman of Committees is the Deputy Chairman, of the Committee.
- 6.3 With any necessary modifications, SO 326A applies to a co-opted member.
- 6.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the House and its committees, and recommend to the House 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 House or its committees.
- 6.5 Unless otherwise ordered any rule or order under which a matter of privilege stands referred, or is referred, to a committee (however described) for inquiry and report is a reference to the Committee.”

Members as at the time of this inquiry:

Hon Barry House MLC (Chairman)	Hon Helen Morton MLC
Hon Matt Benson-Lidholm MLC (Deputy Chairman)	Hon Max Trenorden MLC
Hon Jon Ford MLC	Hon Ken Travers MLC
Hon Michael Mischin MLC	Hon Giz Watson MLC (Co-opted Member)
Hon Wendy Duncan MLC (Co-opted Member)	

Staff as at the time of this inquiry:

Malcolm Peacock, Clerk of the Legislative Council	Donald Allison, Clerk Assistant (House)
Nigel Lake, Deputy Clerk	Paul Grant, Clerk Assistant (Committees)

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REPORT OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

IN RELATION TO

**ADMINISTERING THE OATH OR AFFIRMATION TO WITNESSES IN COMMITTEE
PROCEEDINGS**

1 REFERENCE AND PROCEDURE

- 1.1 On 15 September 2009 the Standing Committee on Procedure and Privileges (**Committee**) received a letter from the Standing Committee on Estimates and Financial Operations in the following terms:

As you are aware, on 4 December 2007 the Legislative Council ordered, on the recommendation of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, that:

... the Clerk of the Legislative Council and all Committee Chairs ensure that at any Legislative Council committee hearing, an oath or affirmation is administered to all witnesses.

As per this order, the Estimates and Financial Operations Committee (Committee) has adopted this practice and requires all witnesses appearing before it, including Members of Parliament, to take either the oath or affirmation.

During the Committee's recent hearings in relation to the budget estimates, the question of whether this requirement applied to Members appearing before the Committee was raised by the Minister for Mines and Petroleum.

The Committee notes that Members are not required to complete and sign the Witness Information Sheet due to the nature of the oath/affirmation taken by Members on assuming office and queries whether Members should be exempt from taking the oath/affirmation for this same reason.

The Committee asks that the Procedure and Privileges Committee give consideration to whether Members appearing before a committee of the Legislative Council should be required to take the oath/affirmation.

- 1.2 The Committee considered the matter at its meeting on Wednesday, 16 September 2009.

2 BACKGROUND

- 2.1 Up until the late 1990s the Legislative Council committees used the oath or affirmation. Because this was seen as quite intimidating to witnesses not used to giving evidence, the *Witness Information Sheet* was developed. This also provided an opportunity to explain witnesses' rights and obligations to them. Once the *Witness Information Sheet* was signed, as it has the line: "*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.*", the need for the oath or affirmation was seen as superfluous - instead, each witness was simply asked by the relevant committee Chairman at the commencement of a hearing whether the witness had read and understood the *Witness Information Sheet*.
- 2.2 During the early 2000s, when more serious 'judicial-type' fact-establishing inquiries (that is, determining exactly who said what and when) were conducted (as opposed to more general information-gathering inquiries) Members and committee staff queried whether it would be a good idea to re-introduce the oath and affirmation in order to bring it to the forefront of the mind of a witness that he or she should not give false evidence.
- 2.3 In 2007 the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations resolved to administer the oath or affirmation to all witnesses, including Members, during the course of its inquiry.¹ This decision was based on the fact that the Senate Committee of Privileges had administered an oath to witnesses, including Senators, during a 1984 inquiry into an unauthorised disclosure. Furthermore, *Erskine May* notes that the United Kingdom Parliament's Committee on Standards and Privileges had reported that in any future investigation of matters of privilege or of complaints about the conduct of Members, it would be its normal practice to take evidence on oath.²
- 2.4 The Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations was also of the view that the administering of an oath or affirmation to witnesses may assist in any subsequent prosecution under s 57 of the *Criminal Code* for the giving of false evidence.³

¹ Western Australia, Legislative Council, Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, Report, 13 November 2007, p406.

² *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, Butterworths, 22nd Edition, 1997, p654.

³ Western Australia, Legislative Council, Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, Report, 13 November 2007, p406.

- 2.5 On 4 December 2007 the House ordered, on the recommendation of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, that:

... the Clerk of the Legislative Council and all Committee Chairs ensure that at any Legislative Council committee hearing, an oath or affirmation is administered to all witnesses.⁴

3 THE COMMITTEE'S VIEW

- 3.1 The Committee notes that the key arguments for the administration of the oath or affirmation to all witnesses in committee proceedings, including Members, is that the practice:

- a) conveys to the witness the importance of the proceeding and the fact that there are serious penalties for giving false evidence; and
- b) may facilitate a prosecution under s 57 of the *Criminal Code*.

- 3.2 The Committee is of the view that the seriousness of committee proceedings and the need for truthful evidence from witnesses is adequately conveyed by the requirement for witnesses to read, understand and sign the *Witness Information Sheet*. Members do not need to sign the *Witness Information Sheet* due to the oath or affirmation that they are required to take when they take their seat in the House. The oath or affirmation administered to the Members of the Legislative Council upon taking their seats is set out in Schedule E of the *Constitution Act 1889* as follows:

Either —

(a) I, [name], [insert an oath or affirmation according to the Oaths, Affidavits and Statutory Declarations Act 2005] that I will faithfully serve the people of Western Australia as a member of the Legislative Council.

or —

(b) I, [name], [insert an oath or affirmation according to the Oaths, Affidavits and Statutory Declarations Act 2005] that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law and will faithfully serve the people of Western Australia as a member of the Legislative Council.

⁴ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 4 December 2007, p8166.

- 3.3 The Committee is therefore satisfied that both the *Witness Information Sheet* and the oath/affirmation administered to Members upon taking their seat in the House are sufficient to put all witnesses on notice as to the importance of providing truthful evidence to committees.
- 3.4 The Committee also notes that the administering of an oath or affirmation is not an element of the criminal offence of giving false evidence to a parliamentary committee under s 57 of the *Criminal Code*. Section 57 of the *Criminal Code* should not be confused with the offence of ‘perjury’ before the courts under s 125 of the *Criminal Code*. Section 97 of the *Evidence Act 1906* requires all evidence given in any court or before any person acting judicially to have been given under oath. For a perjury prosecution to succeed, an oath must have been administered in accordance with the requirements of s 97. Parliamentary committees are not subject to s 97 of the *Evidence Act 1906*, and so the administering of an oath is therefore not an element of an offence under s 57 of the *Criminal Code*.
- 3.5 The Committee also notes that the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament recommended earlier this year that s 57 of the *Criminal Code* be deleted.⁵ Central to that Committee’s reason for recommending the deletion of s 57 was the practical and theoretical inconsistency of such an offence with parliamentary privilege.
- 3.6 Accepting that the giving of false evidence to parliamentary committees is a matter more appropriately dealt with by the Parliament itself, the Committee notes that, practically speaking, the absence of the administering of an oath or affirmation to witnesses would have no impact on the penalties available to the House to deal with any witness who commits the contempt of giving false evidence.
- 3.7 The Committee is therefore of the view that there is no need for an oath or affirmation to be administered to any witness before a committee.

Recommendation 1: The Committee recommends that the House revoke its order of 4 December 2007 which instructed the Clerk of the Legislative Council and all Committee Chairs to administer an oath or affirmation to all witnesses at any Legislative Council committee hearing.

⁵ Western Australia, Legislative Council, Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament, Report, 7 May 2009, Recommendation 2, pp17-19.



Hon Barry House MLC
Chairman

17 November 2009