

Private Members' business and appointments of committee positions

2.1 The Australian Constitution was influenced by the doctrine of the separation of powers. However, the Westminster tradition creates a relationship between the legislature and the executive in what the *House of Representatives Practice* describes as a 'fusion of powers.' It is because of this fusion of powers that the legislature must proactively protect its rights against executive dominance. As *House of Representatives Practice* explains:

Although this fusion of powers in the Westminster tradition may be regarded as a strength, it is also recognised as a potential danger. It is accepted to be undesirable for all or any of the two of the three powers to come under the absolute control of a single body. There are therefore checks and balances which prevent the fusion of executive and legislative powers from being complete. The essence of a democratic Parliament is that the policy and performance of government must be open to scrutiny, open to criticism, and finally open to the judgement of the electors. When Government puts its policy and legislation before Parliament it exposes itself to the scrutiny and criticism of an organised Opposition and of its own Members, who may be critical of, and suggest changes to, government policy and administration. Parliament is an important brake on the misuse of executive power of the Government collectively, or Ministers individually. It is essential that there be no erosion of Parliament's role in scrutinising the actions of government, such as might cause the Parliament to become a mere 'rubber stamp' in respect of

government policy. Through the procedures of the House and the will of individual Members, and especially through the institutionalised Opposition, the executive and legislative functions remain sufficiently distinct.¹

- 2.2 The House has faced a period of change in recent years that has tested its practices and procedures. Most significantly, the 2010 election delivered a hung Parliament and an agreement between the major parties and the crossbench on items of parliamentary reform.
- 2.3 The *Agreement for a better Parliament: Parliamentary reform* (the Agreement), which was endorsed by all the major political parties at the time, was intended to bring about cultural change by way of procedural reform and change in some of the practices of the House. The Agreement was based on two principles:
- to confirm 150 local MP's (and by extension their communities) as the foundation blocks of our Australian system of democracy, and increasing the authority of the Parliament in its relationship with the Executive.²
- 2.4 Some of the changes to the standing orders that arose from the Agreement were discontinued or varied at the commencement of the 44th Parliament. Some were specific to the context of the hung Parliament, such as non-aligned chairs of certain committees, and may well have been expected to be reversed on return to majority government. However, there were changes made to the standing orders at the commencement of the 44th Parliament that favoured the Executive to a greater degree than had prevailed in the Parliaments preceding the 43rd Parliament.
- 2.5 The Government of the day should be able to pursue its legislative agenda and be given adequate scope within the Parliament to do so. However, this should not undermine the important separation between the House and the Executive, nor come at the expense of the capacity of the House to scrutinise Executive action. The House and its Members ought to be mindful to safeguard their rights and prerogatives against excessive encroachment by the Executive.

1 *House of Representatives Practice*, 6th edn, pp. 44-45.

2 *Agreement for a better Parliament: Parliamentary reform*, October 2010.

2.6 Over approximately the same period that the House of Representatives was experiencing minority government and the transitions to and from it, the United Kingdom House of Commons was undertaking a range of reforms in an effort to improve the standing of the Parliament after a series of crises seriously undermined public confidence in the institution. A House of Commons Reform Committee was established to investigate ways in which to strengthen the institution.

We believe that the House of Commons has to become more vital an institution, less sterile in how it operates, better able to reflect public concerns, more transparent, and more vigorous in its task of scrutiny and accountability. ... In order to address this we must give Members back a sense of ownership of their own institution, the ability to set its own agenda and take meaningful decisions, and ensure the business of the Chamber is responsive to public concerns.³

2.7 The structural reforms implemented by the House of Commons are proving successful in rebuilding the reputation of the Commons and assisting Members to be more effective in their parliamentary roles. Of particular interest to the Committee are the reforms made to parliamentary control of business and the work of Members through the committee system. These reforms included:

- the establishment of an independent backbench business committee; and
- the election of chairs of committees by the House using a preferential voting system and secret ballot.

2.8 While the House of Commons was addressing its own particular set of circumstances, elements of its response to the crisis are a salient reminder that all Members must safeguard the rights, privileges, and prerogatives that belong to them as Members of the House, independently of their membership of political parties. The remainder of this chapter will consider these new elements of House of Commons' practice and consider their applicability for the House of Representatives.

3 House of Commons, House of Commons Reform Committee, *Rebuilding the House: First report of the session 2008-09*. November 2009, p. 7.

Selecting and programming private Members' business

- 2.9 As a matter of principle, the House should be in control of non-government business. While the House has always accepted that the Government may arrange government business before the House as it thinks fit⁴, the House is responsible for managing non-government business and should be careful not to forfeit this prerogative to the Executive.

History of the Selection Committee

- 2.10 In 1986 on the recommendation of the Procedure Committee, the House established a system for selecting and programming non-government business.⁵ The Selection Committee was initially established by sessional order on 9 December 1987 and became a permanent feature under a standing order adopted on 15 March 1988. It comprised 11 Members, 6 of whom were government Members.⁶
- 2.11 For most of the time since 1987 the Selection Committee has had an important role in managing non-government business. It was not established in the 42nd Parliament⁷ but was re-established in the 43rd Parliament recognising that it was an important mechanism for 'enhancing the participation of all Members in the management of the House of Representatives.'⁸
- 2.12 Currently the Selection Committee is charged with: arranging the timetable and order of committee and delegation business and private Members' business in the House and the Federation Chamber; selecting items of private Members' business and committee and delegation business for referral to the Federation chamber or return to the House; referring controversial bills to committees; and setting speaking times for second reading debates.⁹
- 2.13 The Selection Committee currently consists of eleven members, four ex-officio positions being: the Speaker (or Deputy Speaker in the absence of the Speaker), as Chair of the Committee; the Chief Government Whip or

4 Standing order 45.

5 Standing Committee on Procedure, *Days and hours of sitting and the effective use of the time of the House*, May 1986.

6 Sessional order 28D, *Sessional orders 9 December 1987*; standing order 28D, *Standing and Sessional Orders*, 15 March 1988.

7 During the 42nd Parliament a meeting of the Whips performed this function and made recommendations to the House which were effected when adopted by the House.

8 *Agreement for a better Parliament: Parliamentary reform*, October 2010, Clause 1.

9 Standing order 222.

nominee, the Opposition Whip or nominee, the Third Party Whip or nominee; as well as four government Members and three non-government Members.¹⁰ This is large in comparison with most of the other domestic committees, which are mostly seven or nine members.

- 2.14 While the Selection Committee has generally operated in a collegiate manner, and has adopted principles to guide its decision making¹¹, the ex-officio appointment of Whips, which are party political positions¹², to this committee has institutionalised a system in which it is taken for granted that political parties may exert significant control over the selection and programming of committee and delegation business and private Members' business.

House of Commons Backbench Business Committee

- 2.15 While the Selection Committee has worked effectively, the Procedure Committee considers that its standing and operation would be enhanced by adopting, in its structure and operation, the principles that are manifest in the structure and operation of the House of Commons Backbench Business Committee. These are discussed in the following paragraphs.

- 2.16 Until the implementation of the report of the House of Commons Reform Committee, the House of Commons had no process for involving backbench Members in the selection and allocation of time for non-government business. In November 2009, as part of its reform agenda, the Reform Committee recommended the establishment of a Backbench Business Committee to manage non-government elements of the Commons agenda based on the following objective:

We should seek to enhance the House of Commons' control over its own agenda, timetable and procedures, in consultation with Government and Opposition, whilst doing nothing to reduce or compromise such powers where they already exist.¹³

- 2.17 The Backbench Business Committee membership comprises only backbench Members in proportion to the representation of parties in the House. The Chair of the Committee is elected by the House of Commons as a whole, following procedures that apply to all House of Commons committees (*see below*).

10 Standing order 222.

11 *see House of Representatives Practice*, 6th edn, pp. 575.

12 *House of Representatives Practice*, 6th edn, pp. 55.

13 House of Commons, House of Commons Reform Committee, *Rebuilding the House: First report of the session 2008-09*. November 2009, p. 12.

- 2.18 This highlights the extensive provision in standing order 222 for ex-officio members on the House of Representatives Selection Committee, essentially the Whips of the major parties, and the Speaker (or, in her or his absence, the Deputy Speaker) as the Chair. It is not necessary for the Speaker or Deputy Speaker to chair the Selection Committee. Both these offices have other significant responsibilities and any number of private Members would be competent to undertake the task. Similarly, it is an unnecessary requirement that the Whips, or their nominees, be ex-officio members of the Selection Committee.
- 2.19 Finally, it would be consistent with the purpose of the Selection Committee for there to be at least one crossbench Member appointed to it to ensure that all private Members have representation.
- 2.20 The House of Commons Backbench Business Committee also differs from the Selection Committee in the processes it employs to select items of business for debate.
- 2.21 Commons Members are expected to submit formal applications to the Committee requesting that their business be brought forward for debate. Members may then attend one of the Committee's weekly meetings to present the case for why their item should be selected for debate. Members must indicate what support they have from other Members and how much time they wish to have allocated for the debate. These meetings are open to the public and broadcast.¹⁴ Following the public meeting, the Committee deliberates in private to select business and allocate time for successful applications.
- 2.22 This process not only has the benefit of allowing the public to see how business is planned but it engages Members in the business and procedures of the House. The requirement for Members to demonstrate a measure of support for proposed debates ensures that there will be participation in the debates on items selected. Applications are encouraged to have cross party support. In a much larger House where competition for time is intense, Members are able to utilise their applications to the Committee to demonstrate to constituents what they are doing to progress topical issues in Parliament.¹⁵
-

14 House of Commons *Standing Orders*, February 2016, standing order 152J. *See also*, House of Commons, Backbench Business Committee, accessed 7 March 2016, <parliament.uk/business/committees/committees-a-z/commons-select/backbench-business-committee/how-the-backbench-business-committee-works/>.

15 *See for example* 'MPs to meet Backbench Business Committee to push for beer duty escalator debate' in *The Publican's Morning Advertiser*, 22 October 2012, accessed 8 March 2016 <morningadvertiser.co.uk/Drinks/Beer/MPs-to-meet-Backbench-Business-Committee-to-push-for-beer-duty-debate>

- 2.23 A review of the Backbench Business Committee's early operation found that it had:
- made a significant impact, enhancing the transparency of scheduling non-government business, improving the relevance of Commons debates and showing itself to be an excellent method of holding government to account.¹⁶
- 2.24 The Backbench Business Committee offers an interesting model for the House to consider to better engage Members in the management of House business.

Enhancing the status of private Members' business

- 2.25 The Committee considers that it would enhance the status of private Members' business in the House of Representatives if Members assumed more direct responsibility for justifying the merits of their items of business over the others available for selection and applying for time. Cross party support for an item of business should enhance its chances of selection. Supporting Members would not necessarily be required to agree with the terms of the motion but would support the debate taking place and be willing to participate.
- 2.26 This should lead to more engagement with private Members' business generally, and the selection of topics for debate that generate more interest among Members. The Whips' task may be eased to one where they list speakers for debates rather than having to find them.
- 2.27 The Committee also strongly supports the general principles for the selection and programming of private Members business (see Appendix B). The Selection Committee has previously recommended that the House adopt these principles.¹⁷ The Procedure Committee concurs with this recommendation and considers that the House should adopt these principles as a resolution of continuing effect.
- 2.28 A reformed Selection Committee comprised entirely of private Members, following general principles for the selection and programming of non-government business adopted by the House with continuing effect, and led by a Chair elected by the House as a whole (*see below*), would be a significant reform that would enhance the standing of private Members' business in the eyes of Members and the public at large.
- 2.29 The Committee has also considered the functions of the Selection Committee and considers that the deletion, at the commencement of this

16 Foster, D. 'Going 'Where Angels Fear to Tread: How Effective was the Backbench Business Committee in the 2010-2012 Parliamentary Session' in *Parliamentary Affairs* (2013) 1-19, p. 1.

17 Selection Committee, *Report No. 3*, 21 October 2010.

Parliament, of the capacity to recommend to the House that certain items of private Members' business be voted on was an unnecessary constriction of its role. It should be reinstated.

- 2.30 In respect of the provision empowering the Selection Committee to set speaking times for second reading debates on government bills, the committee makes the observation that this function, which was added when the Selection Committee was re-established in the 43rd Parliament, has never been exercised. Further, the Committee considers that this function is inconsistent with the purpose of a committee whose primary role is to select and program non-government business. It should be deleted.
- 2.31 The Committee supports reform of the Selection Committee to put the selection and programming of non-government business firmly in the control of private Members and to alter the functions of the Committee to affirm its role in respect of non-government business. In summary the changes the committee is recommending are that:
- the Selection Committee consist of nine Members: five government Members and four non-government Members, including one Member from the crossbench;
 - the Chair of the Selection Committee should be elected by the House as a whole following the process recommended later in this chapter;
 - the Selection Committee have the capacity to recommend items of private Members' business to be put to a vote;
 - the function to set speaking times for second reading debates on government bills be deleted; and
 - the House adopt the general principles for the selection and programming of private Members' business by resolution with continuing effect.

Recommendation 1

The Committee recommends that the House adopt the 'general principles relating to the selection of private Members' business' at Appendix B of this report by resolution with continuing effect.

Recommendation 2

The Committee recommends that SO 222 be revised as outlined in Appendix A.

Committee positions

Committee members appointed to the Ministry

- 2.32 It is considered inappropriate for ministers to sit on committees due to the role committees play in scrutinising the Executive. When ministerial appointments take place over the course of a parliament it is common for new ministers to also hold committee memberships until they are discharged from their service on committees by the House. It is generally expected that these Members do not participate in committee business.¹⁸
- 2.33 This creates a potential conflict whereby a member of the Executive remains on a committee with full access to committee records and proceedings. In the case of committee chairs, they may continue to be eligible for an allowance for this duty on top of their ministerial salary until they formally cease to hold the position.
- 2.34 Some statutory committees contain provision in their establishing legislation for a membership to cease if the Member is appointed as a Minister (or Speaker).¹⁹ While there is provision in standing order 229(b) for Members to be appointed to or discharged from committees if the House is not expected to meet for at least two weeks by way of the relevant whip writing to the Speaker, there is usually a short delay in Members being discharged from committees after their appointment.

¹⁸ *House of Representatives Practice*, 6th edn, p. 656.

¹⁹ See for example *Public Works Committee Act 1969*; *Intelligence Services Act 2001*.

- 2.35 It would be quicker, more transparent and administratively simpler if those Members appointed as ministers (including assistant ministers and parliamentary secretaries) were automatically discharged from committee service on appointment as a minister. This can be achieved through an amendment to standing order 229.

Recommendation 3

The Committee recommends that standing order 229 be amended to insert new part (d) to read:

(d) any Member appointed as a minister immediately ceases to be a member of all committees.

Chair and deputy chair appointments

- 2.36 The introduction to this chapter alluded to changes to the standing orders at the beginning of this Parliament which effected a transfer of power from Members of the House to the Executive. The Committee has particular and significant concerns with the amendment to Standing Order 232 that provides for the chairs of general purpose standing committees to be appointed by the Prime Minister and for deputy chairs to be appointed by the Leader of the Opposition.
- 2.37 There are some core issues about the role of committees, their relationship to the House and to the Executive that ought to be considered in any change to procedures affecting their roles and membership. Committees are established and appointed by the House to perform functions that the House itself is not well suited to perform. Committees also have an oversight and scrutiny role over the Executive.²⁰
- 2.38 Prior to this amendment, House general purpose standing committees conducted elections for the positions of chair and deputy chair, and this continues to be the case for joint committees. While parties or party leaders always had significant input to the selection of Members for these roles, the right of a committee to choose its chair was respected and it was not unknown for the party nominees to be opposed and ballots conducted.²¹
- 2.39 The direct appointment of these positions raises the vexed issue as to whom the chair and deputy chair are responsible. As far as possible,

20 *House of Representatives Practice*, 6th edn, p. 639.

21 *House of Representatives Practice*, 6th edn, p. 660.

Committee processes ought to be consistent with those of the House. As the Speaker is elected by and responsible to the House, by extension a chair should be elected by either the House or her or his committee and is, of course responsible to both.

- 2.40 In effecting the change to SO 232, the Executive has appropriated for itself, and the opposition leadership, a function which properly belongs to the House and its Members. It is also inconsistent with the practice for joint committees, which continue to elect their chairs and deputy chairs, no change to this arrangement being possible without the concurrence of the Senate.
- 2.41 In reviewing this matter the Committee is attracted to reforms to committees undertaken by the House of Commons which unequivocally recognise the rights of Members in the way in which committees are appointed. In particular the reforms are:
- committee members to be nominated may be selected by parties in private but the process by which this selection is undertaken must be transparent and democratic;²² and
 - chairs are elected by secret ballot of the whole House.
- 2.42 In proposing the election of chairs by secret ballot of the House, the House of Commons Reform Committee stated:
- It should be for the House and not for the Executive to choose which of its Members should scrutinise the Executive: the House should also have a strong if not decisive influence on the identity of the Chair.²³
- 2.43 The Reform Committee also noted that 'the credibility of select committees could be enhanced by a greater and more visible element of democracy in the election of members and chairs.'²⁴
- 2.44 The House of Commons has now held elections of chairs of committees for two parliaments. To nominate, Members must write a statement of 500 words outlining why they are nominating, their relevant skills and experience and a proposed future programme for the committee. Members nominating must be supported by at least 15 nominators

22 House of Commons, House of Commons Reform Committee, *Rebuilding the House: First report of the session 2008-09*. November 2009, p. 28. Resolution of the House of Commons, 4 March 2010. This reform was in response to criticism that many Members did not have an opportunity to serve on committees as membership was dominated by long-serving Members. This is not an issue of concern for the House.

23 House of Commons, House of Commons Reform Committee, *Rebuilding the House: First report of the session 2008-09*. November 2009, p. 24.

24 House of Commons, House of Commons Reform Committee, *Rebuilding the House: First report of the session 2008-09*. November 2009, p. 24.

including a minimum number from outside their party. The names of nominators and the nominees statements are published on the Order Paper and on the internet, which in turn has generated media and public interest in the process, resulting in greater interest in committee work.²⁵

2.45 In reviewing the reforms to committee chair and membership processes, the House of Commons Liaison Committee stated:

The House should resist any attempt by the front-benches to overturn the [Commons Reform Committee] reforms and make the election of chairs less democratic and representative. Such a retrograde step would harm the standing of select committees in their role of holding to account the Government of the day. A return to appointment of chairs behind closed doors or just within parties would be unacceptable.²⁶

2.46 The Commons Liaison Committee also found that the significance and profile of Commons committees had positively increased and the profile and status of chairs had also risen. The 2015 election of committee chairs was highly contested.

2.47 All Members have a responsibility to protect the rights, privileges, and prerogatives that belong to them as Members of the House against excessive encroachment by the Executive. The effectiveness of committees in performing their scrutiny role is diminished by the perception that chairs are beholden to the Executive by virtue of their appointment. And less effective scrutiny does not lead to better government. Committees report to the House and therefore the House should be responsible for determining the arrangements for the appointment of chairs and deputy chairs. Prior to the 44th Parliament, the House delegated the appointments to these offices to the committees it established.

2.48 The Committee is attracted to the practice in place in the House of Commons where the whole House elects committee chairs. It is a clear and unequivocal expression of the principle that the Members of the House should choose who among them should lead the committees examining

25 UK Parliament website, *Election of House of Commons Select Committee Chairs*, accessed 16 February 2016, <www.parliament.uk/about/how/committees/select/election-of-hoc-select-committee-chairs>. Also see for example: 'Election fever hits House of Commons again.' *The Birmingham Mail* website, accessed 16 February 2016, <birminghammail.co.uk/news/midlands-news/election-fever-hits-house-commons-9431250>. 'MPs vote on sought-after select committee posts' *The Guardian* website, accessed 16 February 2016, <theguardian.com/politics/2015/jun/16/mps-vote-select-committee-chairs>.

26 House of Commons, Liaison Committee, *Legacy report: First report of session 2014-15*, March 2015, p. 8, accessed 16 February 2016, <publications.parliament.uk/pa/cm201415/cmselect/cmliaisn/954/954.pdf>.

issues of public concern and scrutinising government policy and administration.

2.49 In order to effect this change, the Committee proposes the following process:

- on the day that standing and/or select committees are established the Speaker shall issue a call for nominations for positions of Chair to be received within four sitting days;
- only government Members are eligible to nominate, Ministers are not eligible;
- written nominations shall be delivered to the Clerk by 5pm on the closing day of nominations and the Clerk will publish all nominations as soon as practicable after receipt;
- each nomination shall be supported by three Members, at least one of whom must be a Member who is not a member of the same party as the nominee;
- no Member may sign the nomination of more than one Member for Chair of the same committee;
- if there is only one candidate for Chair of a committee, that candidate shall be declared elected without a ballot;
- if there is more than one candidate for Chair of a committee a secret ballot shall be conducted by the Clerk on a sitting day as soon as practicable following the close of nominations;
 - ⇒ all Members of the House shall be eligible to vote, no votes may be given by proxy;
 - ⇒ the ballot shall be open between 9am and 1pm, the Clerk and Deputy Clerk shall count the votes immediately after the close of the ballot, and any Member may act as a scrutineer during the count;
 - ⇒ Members voting shall be given a ballot paper listing the candidates in alphabetical order which must be numbered in order of preference;
 - ⇒ any candidate with more than half of the first preference votes shall be declared elected but if no candidate has more than half of the first preference votes, the candidate with the lowest number of first preference votes will be eliminated and the votes distributed as per the preferences on those ballot papers, and this process shall be repeated until one candidate has over half the preferences;
- The Speaker shall declare the names of successful candidates as soon as practicable after the closure of the ballot;

- A Chair elected under this process will be appointed a member of the committee to which he or she has been elected chair;
 - At the first meeting of a committee, a Deputy Chair shall be elected by the Committee and only non-government Members are eligible to nominate for the position of deputy chair.
- 2.50 All Standing Committees should be subject to this standing order, including the domestic committees except the House Committee and the House Appropriations and Administration Committee.²⁷
- 2.51 The committee is strongly of the view that if the House will not support this reform then, at an absolute minimum, the House should return to the long standing practice in place prior to the 44th Parliament under which committees elected their chairs and deputy chairs.

Recommendation 4

The Committee recommends that standing order 232 be omitted and be replaced with standing order 232 outlined in Appendix A.

The Committee further recommends that standing order 137A as outlined in Appendix A be adopted to give effect to the provisions of standing order 232.

27 Privileges and Members' Interests, Publications, Petitions, Procedure Committees.