

Observations on standing and sessional order 344

Relevant issues

- 3.1 Paragraph 1.3 above identified four elements of standing order 344. The elements were
- visitors could be admitted by a committee or subcommittee (but they had no automatic right of admission to hearings);
 - the right of visitors to remain at a hearing was removed if the chair requested him/her/them to leave (withdraw);
 - the right of visitors to remain at a hearing was also removed if any member asked the chair to request his/her/their withdrawal; and
 - there could be no visitors at private meetings or *in camera* hearings.
- 3.2 To these four can be added another element which, in the committee's view, underlies the four identified. The underlying element is that proceedings in committees should be made by agreement of committee members (i.e. a majority) subject to the standing orders of the House. These elements will now be examined further in order to reach a conclusion about whether it is desirable to change standing order 344, either to entrench the terms of sessional order 344 or to make other changes.

Right of admission of visitors to hearings

- 3.3 The House of Representatives standing order relating to the admission of visitors to committee hearings typifies the rules of a number of jurisdictions which, in theory, require action by the committee before visitors are admitted to public hearings (or informal occasions on which evidence is gathered). This is achieved by providing that [visitors] “may be admitted”. Further action would then need to be taken to exclude the visitors.
- 3.4 The jurisdictions which assume visitors do **not** have an automatic right to attend hearings may trace the assumption to the ancient rule of the United Kingdom House of Commons that strangers had no right to attend meetings of the House itself. Hatsell’s *Precedents of Proceedings in the House of Commons, Volume II* [1818, pp. 180 to 182] provides an explanation of the former rule (including its application to committee meetings).
- 3.5 By contrast, other jurisdictions (for example Canada and the current practice of the United Kingdom) start with the proposition that visitors will be admitted to hearings and action need only be taken by the committee to have the visitors excluded.
- 3.6 This issue has not caused any problems and it is not proposed that it be amended. In practice committees generally do not make decisions relating to the admission of visitors (except in relation to *in camera* hearings). The expression in standing order 344 preserves the concept of a committee being in charge of its own proceedings and the committee sees no reason to remove it.
- 3.7 Despite the wording of standing and sessional order 344 the House of Representatives, like other legislatures, has developed a philosophy and practice that assumes that when committees take evidence they will do so in public unless there are persuasive reasons not to do so.
- 3.8 In general committees have taken evidence in public and authorised the resulting transcript of evidence to be published. The transcript is generally placed on the Internet to encourage and facilitate public access to committee work.

Right of chair to request/direct visitors to leave a hearing

- 3.9 When sessional order 344 replaced standing order 344 in February 2003, the right of the chair to initiate the withdrawal of visitors (without having first consulted other members of the committee) was retained. The sessional order states that [visitors] “shall withdraw if requested by the chair or if the committee or subcommittee resolves for their withdrawal”.

- 3.10 Retaining the right of the chair to take immediate action recognises the responsibility of the chair to act immediately in (for example) the following cases:
- to maintain order in the face of disruption from visitors;
 - to protect the dignity of the committee by excluding visitors in the event of disagreement amongst committee members;
 - to protect the interest of witnesses or other individuals in situations where the evidence indicates the witness should have (but did not) raise the option of giving evidence *in camera*; and
 - generally to be in charge of proceedings.
- 3.11 The need for the chair to act quickly in such situations is widely recognised and has been practised on many occasions in the history of committees. It mirrors the Speaker's role in keeping order in the chamber (standing order 52).
- 3.12 However, it need not be implied that the chair has a right to exclude visitors from an open (as opposed to an *in camera*) hearing against the wishes of the majority of the committee. Here the analogy of standing order 314 is apt. This standing order deals with the withdrawal of strangers from the House and Main Committee. This is effected by the Speaker or the Chair forthwith putting the question "That strangers be ordered to withdraw". It is only when the strangers are in the areas of the chamber (or Main Committee room) where they have no right to be that the Speaker or Chair may take unilateral action.
- 3.13 The committee considers that for the practical reasons outlined in 3.9 above, the initiative of the chair should be retained. In the event of the chair's acting without the support of the majority of the committee, it is always open to the committee to resolve to go into private session to consider the matter.
- 3.14 It is submitted that since arguments for retaining the initiative of the chair relate to the immediacy of the situation, once the visitors have withdrawn, the normal control of proceedings by decision of the majority should return. Put simply, the initiative of the chair as expressed in sessional order 344 should not be seen as overturning the presumption that all proceedings in a committee should be determined by the majority.

Right of any member to initiate the withdrawal of visitors

- 3.15 The introduction of sessional order 344 in February 2003 was a response to a dispute about whether an individual member has a right to effect the withdrawal of visitors in a hearing not intended to be *in camera*. There

would be no dispute about this if the individual member had the support of the majority since the matter would have been a routine decision by the committee about the conduct of proceedings.

- 3.16 It has been argued that the purpose of the rule is to support (and emphasise) a right of individual members. A member may wish to examine witnesses in private even though the evidence itself will be made public. This may be desirable, but if so, the normal presumption would be that the committee itself would so decide. It also undermines the presumption that evidence to committees should be public [see *House of Representatives Practice* pp. 659 and 676].
- 3.17 The trigger which would require visitors to withdraw under this part of the standing order is any member asking the chair to make such a request. It appears to have been assumed that if a member asks the chair, the chair has no option but to agree. This is arguable as it puts an individual member in the same position vis a vis the control of proceedings as the chair. In the comparable situation in the House, considered in standing order 314, an individual initiates notice that strangers are present but the Speaker and the will of the House effect a response.
- 3.18 There are other initiatives which may be taken by a single member including preventing leave being taken, calling for a quorum and sending business from the Main Committee to the Chamber. None of these are analogous to an individual member being able to control the proceedings of a committee against the will of the majority.
- 3.19 It was noted in chapter 2 that when the Senate had the same standing order there was an entry in *Odgers' Senate Practice* which interpreted the standing order as implying that the initiative of an individual member (or the chair) meant with the support of the majority of the committee. The 5th edition of *Odgers* stated:

It is submitted that this Standing Order should be interpreted as meaning that strangers may be excluded at the request of any Senator, but only following a majority decision of the committee. The Chairman should exercise his discretion to exclude strangers only in case of misconduct. This interpretation of the rule is consistent with the practice of the Senate, upon which committees should model their own procedures.¹

¹ *Odgers, Senate Practice*, 3rd edition, p. 503.

- 3.20 There is no applicable reference in the current *Odgers* since the standing order has been amended to remove doubt. The current Senate standing order is:

36 Public and private meetings

Persons other than members and officers of a committee may attend a public meeting of a committee but shall not attend a private meeting except by invitation of the committee, and shall always be excluded when the committee is deliberating.

- 3.21 In addition, Senate standing order 35 makes it quite clear that all decisions are majority ones (“The examination of witnesses before a committee shall be conducted by the members of the committee in accordance with procedures agreed to by the committee, subject to the rules of the Senate.”)
- 3.22 While there has been no test of the application of standing order 344 (so far as is known), there appears to have been an assumption that there existed an initiative for an individual member to exclude visitors without the support of the committee. A former Procedure Committee assumed this was so. The 1988 report *Ten years on: A review of the House of Representatives committee system*, commented on standing order 345 which provided that Members of the House attending a hearing “shall withdraw if the committee or subcommittee so resolves”. The comment on the proposal was that Members should only be excluded by resolution of the committee rather than at the request of an individual member.
- 3.23 Having had the opportunity to consider the matter further, the current committee does not accept that such a right ever existed.

Conclusion in relation to initiative of individual member

- 3.24 Decisions about the conduct of hearings should always be determined by the committee (i.e. by the majority of members of a committee). If the standing order appears to suggest a different view, it should be amended to remove doubt.
- 3.25 The committee is satisfied that sessional order 344 achieves this purpose. There should also be an entry in the next edition of *House of Representatives Practice* to clarify the fact that subject to the standing orders of the House, committees should proceed by way of agreement and sessional order 344 should be so interpreted.

Necessity of removing visitors during *in camera* hearings

- 3.26 There is no dispute about the necessity for committees, on occasion, to take evidence *in camera* and to keep the resulting transcript confidential. This point is highlighted to emphasise the fact that the second sentence of

standing (and sessional) order 344 does not relate to *in camera* hearings. It provides for visitors to be required to withdraw even though there is no assumption that the evidence will be confidential. The circumstances are distinct from those in which evidence would be taken *in camera*.

The presumption that committee decisions will be by agreement and not by individual initiative

3.27 As noted in 3.2 above, this presumption underlies the elements of standing order 344. All the submissions on the change to sessional order 344 supported this concept. Chairs affirmed that their committees worked cooperatively and the change to standing order 344 recognised the fact that committee members worked as a team.²

3.28 No evidence indicating problems with sessional order 344 was received.

- **The committee recommends that sessional order 344 should be made a standing order replacing former standing order 344.**
- **The committee further recommends that the new standing order should be interpreted and applied in a manner consistent with the presumption that proceedings of committees should be by agreement. The next edition of *House of Representatives Practice* should make this clear.**

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² For example, Mr D Hawker MP, submission no. 3 and Ms K Hull MP, submission no. 1.