

## SUBCOMMITTEES

Thank you for your letter of 22 March 1994, in which the Committee requests advice in relation to the establishment of subcommittees to hear evidence and make findings for the Committee.

**(a) Whether subcommittees could or should be set up**

Undoubtedly the Senate could empower the Committee to establish subcommittees.

The normal empowering provision enables a committee to appoint subcommittees and to refer to the subcommittees any matters which the committee is empowered to consider. This provision, however, is adapted to committees which simply inquire into general matters of public interest referred to them by the Senate and make recommendations concerning those matters.

Because of the special responsibility of the Privileges Committee, of performing the Senate's judicial function, such a provision would hardly suffice. It would be necessary for any order of the Senate explicitly to empower the Committee to delegate the hearing of evidence and the making of findings to subcommittees, and to specify how the findings of subcommittees are to be conveyed to the Senate. It would also be necessary to provide for the application to subcommittees of the rules applying to the full Committee under Privilege Resolution No 2. These provisions would be necessary not only to make clear how subcommittees are to operate but to avoid challenges to the delegation of matters to subcommittees.

As to whether subcommittees *should* be established, I will turn to that question at the conclusion of this advice.

**(b) What process should be followed in relation to deliberations and findings of a subcommittee?**

It would be appropriate for the empowering resolution of the Senate to provide that the findings of a subcommittee should be conveyed directly to the Senate without modification by the full Committee. Without such a provision, senators who had not heard the evidence would be participating in making the findings, and this would undoubtedly lead to discontent and challenges on the part of persons and their counsel involved in inquiries, as it would be seen as violating the principle of judgment being given only by the tribunal hearing the evidence. It may be that the full Committee would be given responsibility for ensuring that subcommittees follow the processes required by the Senate, so that a person involved in an inquiry could appeal to the full Committee from a subcommittee, as it were, on a question of process, but it would be seen to be anomalous to have the full Committee reviewing the findings of a subcommittee. Just as the courts, however, have difficulty in disentangling questions of law and questions of fact, questions of process and questions of the appropriateness of findings would probably tend to become intermixed.

Provided that the Senate specified how the delegation to subcommittees should work, I think that it would be as immune from legal challenge as the delegation by the Senate to the full Committee. (It is interesting to note that the United States Supreme Court recently upheld the right of the United

States Senate to delegate to a committee the hearing of evidence and the making of findings in impeachment cases, notwithstanding that the United States Constitution says that the Senate should try cases of impeachment.) It would also be immune from internal challenge on procedural grounds.

Given that it can be done, there is the question of whether it should be done, which you ask in your letter.

The subdelegation of the hearing of evidence and the making of findings by the Committee to a subcommittee, even if explicitly authorised and governed by a Senate resolution, would probably be seen as an abridgment of due process in dealing with contempt cases. It would also add to the complexity of the procedures, and, as has been suggested, would provide further grounds for challenges to the conduct of inquiries and the making of findings. The full Committee might be drawn into regularly rehearing cases to satisfy complaints about the conduct of inquiries by subcommittees. In effect, parties to inquiries could seek regularly to exercise their right of appeal to the full Committee.

There could also be a perception of a loss of deliberative capacity on the part of the Committee. There has always been great reluctance to reduce the size of juries in criminal cases from 12 or to allow majority verdicts because it is believed that a jury of 12 has superior deliberative capacity than a lesser number. Similarly a full Committee of seven could be seen as having superior deliberative capacity to a subcommittee of three or four, and is more likely to inspire confidence than its processes and findings.

You mentioned the possibility of a subcommittee of five. Although it is open to the objection of loss of deliberative capacity, the Committee may, as I understand it has in the past, hear evidence and make findings with only five of its members participating without formally forming a subcommittee.

I feel that this advice is not of great assistance to the Committee in overcoming the problem it faces, but it is a difficult problem.

Please let me know if I can provide any further assistance.

If required I could draft an order of the Senate to empower the formation of subcommittees by the Committee.