



Procedure and Privileges Committee

Closing the Oversight Gap

Joint Standing Committee on the Corruption and Crime
Commission—Terms of Reference

Report No. 11
November 2016

Legislative Assembly
Parliament of Western Australia

Committee Members

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Procedure and Privileges Committee

Closing the Oversight Gap

Joint Standing Committee on the Corruption and Crime Commission—Terms of Reference

Report No. 11

Presented by

Ms Wendy Duncan MLA
Deputy Speaker of the Legislative Assembly

Laid on the Table of the Legislative Assembly on 10 November 2016

Recommendations

- 1) That Standing Order 289 (a) be deleted and the following substituted:
 - (a) monitor and report to Parliament on the exercise of the functions of the –
 - (i) Corruption and Crime Commission;
 - (ii) Parliamentary Inspector of the Corruption and Crime Commission;and
 - (iii) Public Sector Commissioner in relation to functions under the *Corruption, Crime and Misconduct Act 2003*.
- 2) That the Legislative Council be acquainted accordingly and be invited to pass a similar resolution.

Closing the Oversight Gap

Reference

On 19 October 2015 the Chair of the Joint Standing Committee on the Corruption and Crime Commission (the JSCCCC), wrote to the Chair of the Legislative Assembly Procedure and Privileges Committee (the Committee) to bring to the Committee's attention JSCCCC Report No. 21, *Recent Amendments to the Corruption and Crime Commission Act 2003: Some Implications for Western Australia's Integrity Framework*.¹ In this report, the JSCCCC recommended that:

The Standing Committees on Procedure and Privileges in the Houses consider inquiring into amending their Standing Orders describing the functions of the Joint Standing Committee on the Corruption and Crime Commission so that it is expressly empowered to oversee the activities of the Public Sector Commission in relation to the education and minor misconduct matters it will have responsibility for in the *Corruption, Crime and Misconduct Act 2003*.²

On 10 November 2015 the Committee considered this correspondence and resolved to seek further information from the Chair of the JSCCCC and the Attorney General regarding the matters raised and the report's recommendation. Following consultations, on 5 April 2016 the Committee resolved to conduct an inquiry into the appropriateness of amending the terms of reference of the JSCCCC.

Background to the Reference

On 2 April 2014 the Leader of the House, Hon John Day MLA, on behalf of the Premier, Hon Colin Barnett MLA, introduced the Corruption and Crime Commission Amendment (Misconduct) Bill 2014 into the Legislative Assembly. Minister Day outlined that the Bill's main purpose was to:

amend the *Corruption and Crime Commission Act 2003* to transfer the oversight of minor misconduct by public officers from the Corruption and Crime Commission to the Public Sector Commissioner. The CCC's misconduct prevention and education function will also be transferred to and exercised by the Public Sector Commissioner.

...

¹ Western Australia, Legislative Council and Legislative Assembly, Joint Standing Committee on the Corruption and Crime Commission, *Recent Amendments to the Corruption and Crime Commission Act 2003: Some Implications for Western Australia's Integrity Framework*, Report No. 21, June 2015.

² JSCCCC Report No. 21, p. 3.

Matters of minor misconduct comprise the largest number of disciplinary issues concerning public bodies and officers. As the Public Sector Commissioner already has a strong presence in advising, educating and training on disciplinary matters, the transfer of minor misconduct and prevention and education functions from the CCC will complement his current responsibilities.³

The third reading of the Bill was agreed to by the Legislative Assembly on 15 October 2014 and the Bill was passed by the Legislative Council on 2 December 2014. On 1 July 2015 the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* came into force. Section 5 of this Act renamed the *Corruption and Crime Commission Act 2003* to the *Corruption, Crime and Misconduct Act 2003*.

Immediately prior to the amending legislation's proclamation, the JSCCCC tabled Report No. 21, *Recent Amendments to the Corruption and Crime Commission Act 2003: Some Implications for Western Australia's Integrity Framework*. In this report, the JSCCCC noted that its terms of reference, as laid out in both Houses' respective Standing Orders, had not been amended by the Corruption and Crime Commission Amendment (Misconduct) Bill 2014, but remained as framed by the Parliament following the enactment of the *Corruption and Crime Commission Act 2003*.

Legislative Assembly Standing Order 289 provides for the JSCCCC's functions as follows:

289. It is the function of the Joint Standing Committee to –
- (a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
 - (b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
 - (c) carry out any other functions conferred on the Committee under the *Corruption, Crime and Misconduct Act 2003*.⁴

³ Hon John Day MLA, Leader of the House, Western Australia, Parliamentary Debates (*Hansard*), 2 April 2014, p. 1960.

⁴ The equivalent provision in the Legislative Council is provided for in Schedule 1(9) of the Council's Standing Orders.

The report went on to observe that the amended legislation would not:

provide any formal mechanism for an agency or body to oversee the PSC's investigation of minor misconduct matters, such as that currently provided for by the Committee's oversight of the CCC ...⁵

The report further noted that during the second reading debate on the Bill in the Legislative Council, the Attorney General, Hon Michael Mischin MLC, had acknowledged some Members' concerns that the JSCCCC's oversight function would not extend to the Public Sector Commissioner under the new integrity framework and that he had observed, 'Whether Parliament amends its standing orders to accommodate some other oversight is a matter for both Houses'.⁶

As outlined above, the JSCCCC included a recommendation (Recommendation No. 1) in its report that both Houses' Procedure and Privileges Committees:

consider inquiring into amending their Standing Orders describing the functions of the Joint Standing Committee on the Corruption and Crime Commission so that it is expressly empowered to oversee the activities of the Public Sector Commission in relation to the education and minor misconduct matters it will have responsibility for in the *Corruption, Crime and Misconduct Act 2003*.⁷

On 17 September 2015 the Government response to this and the other recommendations in JSCCCC Report No. 21 was tabled in the Legislative Assembly.⁸ With respect to recommendation No. 1, the response was as follows:

It is considered that current oversight over the activities of the Public Sector Commissioner by both the Executive and the Parliament is adequate and no additional oversight of the Public Sector Commissioner by the Joint Standing Committee on the Corruption and Crime Commission (JSCCCC) is warranted.

Following the tabling of this response, the Chair of the JSCCCC wrote to the Chairs of both Houses' Procedure and Privileges Committees to apprise the Committees of JSCCCC Report No. 21 and its recommendations.

Approach by the Committee

Given that the JSCCCC is a joint parliamentary committee and any amendment to the Standing Orders governing its terms of reference would need to be ratified by both Houses, the Committee resolved that the Committee Chair, Hon Michael Sutherland

⁵ JSCCCC Report No. 21, p. 2.

⁶ JSCCCC Report No. 21, p. 2.

⁷ JSCCCC Report No. 21, p. 3.

⁸ Government Response to Report No. 21: Recent Amendments to the *Corruption and Crime Commission Act 2003*: Some Implications for Western Australia's Integrity Framework (Tabled Paper No. 3291).

MLA, should consult with the Chair of the Legislative Council Procedure and Privileges Committee (LC PPC), Hon Barry House MLC, to investigate the most effective way that the Committees could conduct their investigations into the referred matter. The Committee noted that Legislative Assembly Standing Order 281 provides that: 'Each committee will have power to confer with a similar committee of the Council considering similar matters' and that an equivalent provision obtains in the Council under Standing Order 166(b).

On 5 April 2016 the Committee received a letter from the Chair of the LC PPC which proposed a procedure by which the two Committees could progress the matter viz, that the LC PPC would hold a public hearing to which the members of the Legislative Assembly Committee would be invited to attend and be given leave to question the witnesses. Following this joint hearing, the two Committees would pursue their separate inquiries. The Committee acceded to this proposed course of action and accepted the invitation to attend the hearing scheduled for 20 June 2016.

The witnesses invited to attend this hearing and provide evidence were: the Public Sector Commissioner, Mr M.C. Wauchope; the Commissioner for the Corruption and Crime Commission, Hon John McKechnie QC; the Attorney General, Hon Michael Mischin MLC; and the Chair of the JSCCCC, Hon Nick Goiran MLC.

On 9 June 2016, the Commissioner of the Corruption and Crime Commission declined the invitation to attend the hearing, advising the LC PPC that:

... I do not believe that there is anything of value I could add by way of submission. The Commission is not affected one way or another by the answer to the question whether the Public Sector Commission should report to the Joint Standing Committee.

A copy of this correspondence was forwarded to this Committee and appears at Appendix 1.

On 20 June 2016 the hearing took place as scheduled with the Public Sector Commissioner and the Attorney General providing evidence to the Committees. Hon Nick Goiran MLC, as both the Chair of the JSCCCC and a member of the LC PPC, provided his testimony in a private session to both Committees following the hearing.

Evidence

Public Sector Commissioner

The Public Sector Commissioner accepted the opportunity to make an opening statement regarding extending the JSCCCC's terms of reference to include oversight of his minor misconduct function following the commencement of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014*:

it is a matter for Parliament, and we will obviously work with whatever Parliament decides. We do not necessarily take the view that it is necessary but, as I said, we would work with whatever Parliament considers is necessary.⁹

The Public Sector Commissioner then provided an overview of his newly acquired functions:

To assess minor misconduct and to deal with those matters ... but also to undertake a prevention and education function, which is basically, amongst other things, a capacity-building and an awareness-raising program, right across the public authorities that I now have responsibility for ...¹⁰

In response to a question by the Speaker as to how many notifications of minor misconduct since the proclamation of the Act had required the Public Sector Commissioner to 'be actively involved in conducting an investigation or assisting the relevant agency in a material way in conducting an investigation',¹¹ the Public Sector Commissioner advised:

What we are required to do is assess every notification that we get to form a view whether or not it falls within the definition of minor misconduct. We do that on a daily basis. One of our intentions is to do that as quickly as we can and get it into the hands of where it should be. Some have not made the threshold and those ones we send back to the agencies saying, "It's not minor misconduct; you get on with it." A number have fallen into the serious misconduct category or we considered it did. We have had discussions with the CCC and again have moved those across to the CCC as quickly as we can, and vice versa; the CCC have had notifications which they have assessed as minor and have moved that across to us. Where we do assess it as minor misconduct, we do send it back to the public authority to deal with. We require advice of what the outcome is once they have dealt with it, and from time to time we require a report on what they have done.¹²

While advising there were 'several levels of involvement'¹³ in the process, the Public Sector Commissioner underlined that the Public Sector Commission had 'not undertaken any investigations ourselves' and that inquiries into allegations were the responsibility of the agencies from which the referral had originated.¹⁴

Following questioning, the Public Sector Commissioner confirmed that prior to the enactment of the amending legislation there had not been a distinction between minor

⁹ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 1.

¹⁰ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 2.

¹¹ Hon Michael Sutherland MLA, *Transcript of Evidence*, 20 June 2016, p. 1.

¹² Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 2.

¹³ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 2.

¹⁴ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 1.

and serious misconduct in the legislation and that *all* allegations of misconduct had been referred to and dealt with by the Corruption and Crime Commission—and that oversight of this function had been within the jurisdiction of the JSCCC. By contrast, following the amending legislation, a distinction had been made between ‘serious’ and ‘minor’ misconduct, although, in fact, practice was to treat potential allegations of misconduct as ‘serious’, ‘minor’ and ‘other matters’—the last category being those matters which were assessed by agencies as not reaching the threshold of minor misconduct.¹⁵ This tripartite categorising of allegations of misconduct had been the practical outcome of a directive or ‘notification resource’ to public sector agencies formulated and distributed by the Public Sector Commission and the Corruption and Crime Commission in the month following the proclamation of the Act.¹⁶

With respect to minor misconduct, which is covered by s. 4(d) of the now renamed *Corruption, Crime and Misconduct Act 2003*, the Public Sector Commissioner explained that:

Previously, absolutely everything got notified under the notification guidelines that the CCC had. With the changed legislation, minor misconduct is not that minor. It actually could, amongst other things, result in termination of employment. A lot of HR matters fall below that threshold and are dealt with by the agencies that would have previously been included in the stats at the CCC.¹⁷

And further:

[minor misconduct is now at] a higher level than a lot of things that have been notified in the past, which were disciplinary perhaps in nature but not necessarily something that would result in termination of employment. For example, it would have picked up things that we now currently deal with under improvement actions in the Public Sector Management Act, and that would by definition not result in termination of employment but would simply lead to some counselling or some training or whatever.¹⁸

Noting the Public Sector Commissioner’s observation that ‘minor misconduct is not that minor’ and that allegations of minor misconduct were almost always dealt with at agency level, Members sought clarification as to how robust and transparent the agency inquiry process was.

¹⁵ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 5.

¹⁶ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 6.

¹⁷ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 2.

¹⁸ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 4.

Mr J.R. Quigley: Were there any instances where the Public Sector Commission felt that the agency's inquiry was inadequate or not sufficient; in other words, requiring a redirection from the Public Sector Commission?

Mr Wauchope: I am not aware of any, but I would have to check with my people that there were not others that were not brought to my attention that were dealt with in other ways.

Mr J.R. Quigley: So it is a perfect score as far as you are aware—a perfect record in terms of the agency's investigations?

Mr Wauchope: I am not aware of any problems that have been brought to my attention, no, but I can certainly go back and check.

Mr J.R. Quigley: So then, as legislators, what transparent process is there at the moment to check that your assessment of the investigations conducted by the agency has been both fulsome and forensically justified in the result?

Mr Wauchope: I go back to my original point—that is, Parliament at any time could require me to appear before it and justify what we have done. As I said, I am appearing before another committee on Wednesday. I could equally be asked that question by that committee as well. So, the answer is Parliament has the power to satisfy itself if it should so wish.¹⁹

Committee members then questioned the Public Sector Commissioner regarding any right of appeal or complaint mechanism with respect to the handling of the minor misconduct function:

Hon Nick Goiran: Commissioner, if someone has a complaint about the handling of a minor misconduct matter, what avenue is available to the complainant?

Mr Wauchope: Again, without wanting to give a definitive answer, my actions are reviewable by—obviously, depending on what it is, the Auditor General can look at my actions in relation to how I spend money. My administrative actions could be looked at by the Ombudsman. In relation to the actual treatment of a minor misconduct complaint, I could not give you a definitive answer, but I am happy to take that away and come back to you.

Hon Nick Goiran: It is of interest to the committee because obviously, previously, if someone had a complaint about the handling of a misconduct matter, it was very simple for them; they could go to the Parliamentary Inspector of the Corruption

¹⁹ Mr John Quigley MLA and Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, pp. 7–8.

and Crime Commission, but at the moment it looks like we are not really sure who we can go to.²⁰

The Public Sector Commissioner subsequently confirmed that he did not believe there was 'notification given to the complainant about the options that are available to them'.²¹

Attorney General

The Attorney General's opening statement re-affirmed that the Government maintained its view that the current parliamentary and Executive oversight of the Public Sector Commissioner's activities was adequate and that no additional oversight by the JSCCCC was warranted. The Attorney General provided a comprehensive explanation of the Government's rationale for this view:

The point of creating a joint standing committee of Parliament, I would suggest, is because of the extraordinary powers that were vested by the then Corruption and Crime Commission Act on the Corruption and Crime Commissioner—powers that indeed go well beyond the sorts of powers available to the Public Sector Commissioner and heads of the public service; powers that indeed go beyond that of the police commissioner in many respects. It is a body that was established with enormous compulsive powers—the ability, and indeed the necessity in many respects, to operate covertly, and to exercise powers and functions that are not amenable to oversight by any other body other than establishing the Parliamentary Inspector of the Corruption and Crime Commission, who exercises some oversight, but then, knowing that this person, or both of them, are in a sense working outside the ordinary public service system and the ordinary means of oversight because of the sensitivity of the matters that they are dealing with, and the enormous powers that they carry, need some watching of the watchers.

The joint standing committee's responsibilities, I would suggest, were intended not to micromanage the manner in which conduct or misconduct was investigated and the like, but basically the use, abuse or misuse of the powers that are available under the legislation to the Corruption and Crime Commissioner and his or her officers.²²

The Attorney General then expanded on his view that there was adequate existing oversight of the Public Sector Commissioner's activities by the Parliament and various statutory officers including the Auditor General and the Ombudsman. Likewise, he confirmed that the education and corruption prevention functions assigned to the Public Sector Commissioner by the amended legislation were capable of continuing

²⁰ Hon Nick Goiran MLC and Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, pp. 8–9.

²¹ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 9.

²² Hon Michael Mischin MLC, *Transcript of Evidence*, 20 June 2016, p. 2.

oversight by the JSCCCC as its terms of reference authorise it to: 'inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector'.²³

Ombudsman

Given both the Public Sector Commissioner and the Attorney General referred to complainants having the capacity to lodge a complaint with the Ombudsman if they were dissatisfied with the Public Sector Commissioner's or an agency's handling of allegations of minor misconduct, the Committee wrote to the Ombudsman and inquired whether he had received any complaints since the transfer of the minor misconduct function to the Public Sector Commissioner and, if so, how many complaints and how such complaints were reviewed.

The Ombudsman advised that he had not received any complaints with respect to the management of a minor misconduct matter since the transfer of the function to the Public Sector Commissioner. The Ombudsman's letter appears at Appendix 2.

Conclusions

Following the taking of evidence, the Committee considered the range of positions which had been presented during the course of the inquiry.

The JSCCCC's contention was that following the transfer of the minor misconduct function to the Public Sector Commissioner there was a gap in oversight which had the potential to 'impact on the State's integrity framework'.²⁴ The JSCCCC's view was that the Houses should amend its terms of reference to restore its oversight of the handling of minor misconduct allegations.

The Public Sector Commissioner's position was that he did not think it was necessary that the JSCCCC exercise oversight of his minor misconduct function, but he conceded that this matter was one for the Parliament alone to determine and that he 'certainly would work with whatever Parliament decides'.²⁵ He also acknowledged that he was already oversighted by and answerable to parliamentary committees for his actions, although on an intermittent and *ad hoc* basis.

The Government's view, first expressed in its ministerial response to the JSCCCC's Report No. 21 and reiterated by the Attorney General during the hearing, was that the Public Sector Commissioner was already subject to adequate oversight by the Parliament and the Executive. The Committee notes, however, that the Attorney General, during the second reading debate on the Corruption and Crime Commission

²³ Legislative Assembly Standing Order 289 (b).

²⁴ JSCCCC Report No. 21, Chairman's Foreword, np.

²⁵ Mr M.C. Wauchope, *Transcript of Evidence*, 20 June 2016, p. 8.

Amendment (Misconduct) Bill 2014 acknowledged that ‘Whether Parliament amends its standing orders to accommodate some other oversight is a matter for both houses’,²⁶ and in his testimony at the joint hearing he similarly observed: ‘it is ultimately open to both houses of Parliament to agree to extend the joint standing committee’s functions to embrace oversight of the Public Sector Commissioner’s activities in dealing with minor misconduct under the CCM act’.²⁷

The Committee concluded that given the JSCCCC, which has experience and expertise in oversighting the handling of misconduct matters in Western Australia, was of the firm view that the current lack of oversight of the minor misconduct function has the potential to affect adversely the State’s integrity framework, and that the Public Sector Commissioner expressed no objection to the JSCCCC having oversight of this function, it would be a wise precaution for the Parliament to close this oversight gap. The Committee is particularly of this view given observations by the Public Sector Commissioner that minor misconduct is not necessarily that minor. Accordingly, the Committee recommends that the Legislative Assembly amends Standing Order 289 to extend the JSCCCC’s oversight function to include the Public Sector Commissioner in his exercise of the functions transferred to him under the *Corruption, Crime and Misconduct Act 2003*.

The LC PPC in Report No. 42 on this matter, *Joint Standing Committee on the Corruption and Crime Commission—Terms of Reference* has come to a similar conclusion and makes a similar recommendation.

Recommendations

As the terms of reference of the JSCCCC are determined by the Parliament and need to be the same in both Houses’ Standing Orders, both PPCs conferred on potential wording to effect the required change.

Accordingly, the Committee makes the following recommendation:

Recommendations

- 1) That Standing Order 289 (a) be deleted and the following substituted:
 - (a) monitor and report to Parliament on the exercise of the functions of the –
 - (i) Corruption and Crime Commission;
 - (ii) Parliamentary Inspector of the Corruption and Crime Commission;

²⁶ Hon Michael Mischin MLC, Attorney General, Western Australia, Parliamentary Debates (*Hansard*), 2 December 2014, p. 9082.

²⁷ Hon Michael Mischin MLC, *Transcript of Evidence*, 20 June 2016, p. 2.

and

(iii) Public Sector Commissioner in relation to functions under the *Corruption, Crime and Misconduct Act 2003*.

- 2) That the Legislative Council be acquainted accordingly and be invited to pass a similar resolution.



Hon Michael Sutherland MLA
Chairman of the Committee
10 November 2016

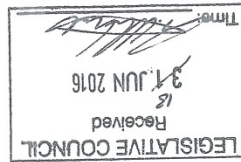
Appendix One

Submission from the Commissioner of the Corruption and Crime Commission



Your Ref:
Our Ref:

JMcK:LR



CORRUPTION
AND CRIME
COMMISSION

9 June 2016

Mr Grant Hitchcock
Usher of the Black Rod
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr Hitchcock

PROCEDURE AND PRIVILEGES COMMITTEE HEARING

I refer to the email correspondence with my Associate during my time on leave.

Having now further considered the matter, I do not believe that there is anything of value I could add by way of submission. The Commission is not affected one way or another by the answer to the question whether the Public Sector Commission should report to the Joint Standing Committee.

I would however, respectfully draw the Committee's attention to the fact that under the *Corruption, Crime and Misconduct Act 2003* the Parliamentary Inspector's functions and powers do not extend to the Public Sector Commission.

Yours sincerely

John McKechnie, QC
COMMISSIONER

CORRUPTION AND CRIME COMMISSION

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Appendix Two

Correspondence from the Ombudsman

Ombudsman Western Australia
Serving Parliament - Serving Western Australians

25 August 2016



Hon Michael Sutherland, MLA
Chair, Procedure and Privileges Committee
Parliament House
PERTH WA 6000

Dear Chair

REQUEST FOR INFORMATION – INQUIRY INTO THE TERMS OF REFERENCE OF THE JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

Thank you for your letter dated 9 August 2016, requesting information relating to the Inquiry into the Terms of Reference of the Joint Standing Committee on the Corruption and Crime Commission.

I can advise the Procedure and Privileges Committee (**the Committee**) that I have not received any complaints with respect to the management of a minor misconduct matter since the transfer of the function to the Public Sector Commissioner.

If I can assist the Committee in any other way, I am delighted to be contacted on 9220 7579 (Direct).

Yours sincerely

A handwritten signature in blue ink, appearing to be "Chris Field".

Chris Field
OMBUDSMAN

Appendix Three

Committee's Functions and Powers

Legislative Assembly Standing Order No. 284 provides the following functions, powers and terms of reference to the Procedure and Privileges Committee —

Procedure and Privileges Committee

284. (1) A Procedure and Privileges Committee will be appointed at the beginning of each Parliament to —

- (a) examine and report on the procedures of the Assembly; and
- (b) examine and report on issues of privilege; and
- (c) wherever necessary, confer with a similar committee of the Council.

(2) Membership of the committee will consist of the Speaker and four other members as the Assembly appoints.

(3) Standing Order 278 will apply except that where possible any report of the committee will be presented by the Deputy Speaker.

(4) When consideration of a report from the committee is set down as an order of the day it will be considered using the consideration in detail procedure