**'Informal Evidence' in Committee Inquiries: A Case for its Wider Utilisation**

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**1. INTRODUCTION**

Parliamentary committee inquiries rely on formal evidence. Gathered using the formal powers of committees, its formality is derived from established convention, statute and/or the standing orders of the House, and most commonly takes the form of sworn verbal testimony and written submission. However, committee inquiries are often supported or augmented by what could be termed "informal evidence": fact-finding and stakeholder engagement exercises like private briefings, roundtables and site visits. Committees and committee staff can be left with the challenge of finding a way to use valuable yet "informal" evidence in a form that can support the findings and recommendations of committee reports.

In this paper, I explore the distinctions between formal and informal evidence, and argue that greater utilisation of informal evidence may increase public participation in committee inquiries, particularly for under-represented stakeholder groups. The paper begins by outlining criteria through which formal and informal evidence could be demarcated, before exploring the benefits to using informal evidence and outlining some strategies for its wider use in committee inquiries.

**2. DEFINING FORMAL AND INFORMAL EVIDENCE**

The power to call for evidence is central to the functioning of most parliamentary committees. In the separation of powers between the legislature and executive, the evidence-gathering powers of committees play an important role in the scrutiny of government action and the refinement of legislation and policy. The practice of evidence gathering serves as an important interface between legislatures and polities, offering a forum for debate and discussion in which individuals, interest groups and experts are able to directly engage with their elected political representatives (and vice versa). Claims of knowledge and truth are presented to committees in the form of evidence, and how committees use this evidence can impact the lives and livelihoods of citizens, communities and the wider electorate. For this reason, the institutional, functional and epistemological characteristics of evidence used by committees should be interrogated, rather than taken as given.

Research has tended more towards analyses of who gives evidence to parliamentary committees, the type of committee they give evidence to, and the medium in which evidence is given,[[1]](#footnote-1) rather than exploring the role that informal evidence can play in contributing to committee inquiries. Nonetheless, several authors note a distinction between evidence that is formally submitted or given before a committee (written and oral evidence), and evidence that is gathered through less institutionalised fact-finding and engagement activities.[[2]](#footnote-2)

This latter 'informal' category has conventionally included site visits and roundtables, though the literature notes recent interest in gathering evidence through 'social media, surveys and focus groups'.[[3]](#footnote-3) Bochel and Berthier consider informal evidence within a broader category of 'informal dialogic systems' which also includes 'input through constituents, organised interests and others'.[[4]](#footnote-4) However, my analysis here is limited to those activities that are more likely to involve a committee, as a collective body, rather than private interactions between individual members and external stakeholders.

How might we define informal evidence, as far as parliamentary committees are concerned? As Geddes has observed, parliamentary understandings of evidence tend towards the legalistic.[[5]](#footnote-5) Informal evidence can be described as evidence that lacks a degree of authority or clarity that is otherwise present in a legal formalist conception of evidence, while formal evidence could be defined as that which has been gathered using the formal powers of a committee, whether codified in statute or provided for in a legislature's standing orders. Most Australian jurisdictions have a Parliamentary Committees Act, Privileges Act or other statute that gives committees the powers to send for persons (to give oral evidence), documents and other forms of evidence.[[6]](#footnote-6) In New South Wales, the power to call for evidence is provided for in each House's standing orders or, in the case of statutory oversight committees, within the relevant statute.[[7]](#footnote-7)

There is potential ambiguity in relying on this definition, as some legislatures explicitly provide for committees to conduct activities that may lead to the collection of informal evidence. For example, the NSW Legislative Council's Standing Order 214(d) empowers committees to conduct visits of inspection,[[8]](#footnote-8) which may suggest that informal evidence is nonetheless gathered through formal committee activity. Furthermore, while there are other rules and frameworks that shape the use of evidence – such as guidelines on procedural fairness for witnesses, penalties for refusing to appear before a committee, restrictions on what evidence can be published, and the protections of parliamentary privilege attracted by formal committee proceedings – these exist in varying degrees of codification and clarity across jurisdictions. The reliance on evidence given voluntarily, for example, can lend a degree of informality to established practices of evidence gathering in some jurisdictions.

Moreover, it is worth noting that evidence, in a parliamentary setting, lacks any standards of proof or codified rules of admissibility that are present in other settings. Evidence in criminal trials must reach the standard of proving beyond reasonable doubt, while claims and findings in civil cases and the work of some investigatory bodies, such as anticorruption agencies,[[9]](#footnote-9) rest upon the balance of probabilities.[[10]](#footnote-10) Although committee members and committee staff are likely to have practical understandings of what counts as "reliable" or "useful" evidence, there is no standard of proof that guides the use of evidence by parliamentary committees.

Rather than rely purely on a legal understanding, the definition of formal and informal evidence is dependent on the functional characteristics of evidence gathering and the established conventions of how committees operate. Erskine May describes the common practice of select committees (or portfolio committees, in other jurisdictions), whereby committees 'rely very largely' on written and oral evidence that has been gathered through a process of seeking 'written evidence initially in particular from those whom the committee intends later to invite to give oral evidence, in addition to issuing a general invitation to submit written evidence'.[[11]](#footnote-11) Informal evidence could thus be described as evidence that has been gathered outside of these conventional practices, while also being comparatively lower in the hierarchy of legal formalism.

**3. The Benefits of Greater Utilisation of Informal Evidence**

This section explores potential benefits to committee inquiries utilising informal evidence more frequently and consistently. To begin with, informal evidence gathered through site visits, roundtables and private briefings may suit committee members' preferences. Engaging with stakeholders in less public or more intimate fora may feel more authentic for committee members, particularly for those lower house members who frequently meet with constituents and community interest groups outside the parliamentary precinct and formal committee business. In qualitative studies involving elected members, researchers have identified this preference for informal consultation over more structured and public forms of engagement.[[12]](#footnote-12)

A. *Increasing Stakeholder Participation Through New Methods of Collecting Evidence*

From a stakeholder perspective, there may be benefits to broadening the collection of evidence beyond the conventional practices used most commonly in committee inquiries. A number of Westminster parliaments have explored new mediums and formats for gathering evidence, in order to increase public participation in committee inquiries. The House of Commons' Liaison Committee heard that written submissions can create educational and technical barriers for lay publics seeking to contribute to committee inquiries, due to unequal levels of literacy or socioeconomic and technological disadvantages, and subsequently argued that its select committees should treat audio and video submissions as though they were 'formal evidence'.[[13]](#footnote-13)

The Scottish Parliament has developed its parliamentary engagement strategies over the recent decade, and submissions to committee inquiries can now be made in audio or video formats, British Sign Language and, on a case-by-case basis, using languages other than English.[[14]](#footnote-14) While these examples may represent new ways of collecting evidence from the public that, ultimately, are handled the same way as formal evidence (e.g. video submissions that are transcribed and published as a formal, text-based submissions), they demonstrate the value of rethinking "conventional" evidence gathering practices with a view to increasing participation of citizens for whom traditional processes are less accessible.

B. *Indigenous Australian Stakeholders and Culturally Appropriate Evidence Gathering*

Bridging the divide between formal and informal evidence is also an important consideration for Indigenous Australian stakeholders. Parliaments are the living embodiment of the colonial dismantling of Indigenous law and sovereignty, and the actions or inactions of legislatures have been responsible for myriad negative social, health and economic outcomes for First Nations peoples. The formalist traditions of Westminster parliaments may be alienating or at least culturally inappropriate, particularly where the legalistic conception of committee evidence may intersect with Indigenous experiences of the justice and carceral systems.

While discussing evidence and Indigenous law from the perspective of criminal proceedings, Biber outlines several factors in the questioning of Indigenous witnesses that have relevance for committee inquiries. In Indigenous culture and custom, 'silence may be a meaningful response to a question' and 'what is deemed to be legally "relevant" to the court may be deemed "private" or "secret" in Indigenous culture'.[[15]](#footnote-15) The formal power of a committee to call for evidence, and related penalties for refusing to answer questions asked by a committee, could conflict with a community elder's responsibilities to protect privileged or withheld knowledge.

Requirements that witnesses swear an oath or make an affirmation before giving evidence may also be uncomfortable for Indigenous witnesses. In light of Indigenous over-representation in the justice system, inquiry witnesses may have had lived experience of court proceedings and been subject to cross-examination. For Indigenous stakeholders to have greater input in committee proceedings, consideration of less formal means of evidence gathering would be advantageous – particularly for increasing the participation of lay citizens, rather than relying on civil society groups that are not necessarily representative of Indigenous community interests.

C. *Academic Material as Informal Evidence*

If "informal evidence" is defined as inquiry evidence that has been gathered outside of the formalised and entrenched practices of parliamentary committees, where does that leave academic material? Without delving too deeply into the broader epistemology of evidence and the validity of competing truth claims, the ideal evidence base for an inquiry might include adequate written and oral evidence from researchers with expertise germane to the inquiry's terms of reference. This evidence would commonly support or counter that provided by other inquiry participants, such as: those with lived or idiographic experience of a particular issue; witnesses that advocate on behalf of particular interest groups; and government witnesses with varying degrees of responsiveness and transparency in the face of committee questions.

However, fulsome academic participation in committee inquiries cannot be presumed. As noted by Ray, Young and Grant in their study on committee evidence in Australian federal parliamentary committees, evidence from academic stakeholders is likely to be less commonly cited in committee reports than evidence from government and civil society groups. Where academic sources are used, there is a clear tendency towards written submissions or oral evidence, rather than the use of journal articles.[[16]](#footnote-16) Committees may have powers or resources to commission research papers or draw on parliamentary research services, yet this may be costly, time consuming and nonetheless external to the conventional evidence base of a committee inquiry.

In order to support committee findings and recommendations using academic evidence that – while also vulnerable to vested interest and personal, disciplinary or institutional biases – are at least grounded in research-based practices and subject to peer review and academic debate, committees could consider using academic material that has been sourced and collated outside of formal evidence gathering powers and practices.

**4. Using informal evidence: CHALLENGES and strategies**

This section explores several strategies for how informal evidence could be used more frequently by committees. These include committee staff preparing guidance to members on whether informal evidence is protected by parliamentary privilege, in addition to minimising the risk of publishing informal evidence that contains defamatory content.

*A. Informal Evidence and Parliamentary Privilege*

Whether published informal evidence is protected by parliamentary privilege is an important consideration, particularly if such evidence has been given by vulnerable stakeholders. While the account that follows is only a brief exploration of the complexities of parliamentary privilege, it is likely that informal evidence would be privileged in particular circumstances. Article 9 of the *Bill of Rights Act 1688* is in force in Australian jurisdictions and prevents 'Freedom of speech and debates or proceedings in Parliament' from being 'impeached or questioned in any court or place outside of Parliament'.[[17]](#footnote-17) If a committee resolves to conduct site visits or private roundtables, evidence gathered during these activities may reasonably be considered a proceeding of parliament and thereby protected under parliamentary privilege.

The Commonwealth *Parliamentary Privileges Act 1987* further clarifies proceedings of parliament as 'all words spoken and acts done in the course of, or for purposes incidental to, the transacting of the business of a House or of a committee',[[18]](#footnote-18) including the giving of evidence before a committee. Additional protections may also be present in other statutes, such as Parliamentary Evidence Acts or Defamation Acts. In New South Wales, for example, the *Parliamentary Evidence Act 1901* provides that 'No action shall be maintainable against any witness who has given evidence, whether on oath or otherwise… for or in respect of any defamatory words spoken by the witness while giving such evidence', which may have relevance for unsworn evidence given in informal proceedings.[[19]](#footnote-19)

If it is members' perception that informal evidence is not protected under privilege that is preventing its wider use,[[20]](#footnote-20) briefing material could be provided to committee members to assuage this perception. There are some important caveats, however. Informal evidence would need to be gathered during valid proceedings of a committee, such as if the committee was acting within its terms of reference and if the committee was quorate when meeting.[[21]](#footnote-21) Much like other proceedings of parliament,[[22]](#footnote-22) records of informal evidence may be admissible in a court, and only privileged in particular circumstances.

*B. Case study: Broadcast of a Community Roundtable*

Informal evidence gathering could be supported by guidance for members and participants on how to avoid testing the limits of parliamentary privilege. For example, a NSW Legislative Council inquiry into the commencement of the *Fisheries Management Act 2009* included a "community roundtable" with local cultural fishers. As the roundtable began, the Acting Chair's opening statement included requests that participants 'avoid making adverse comments about others' and 'avoid using people's names and try to keep comments generalised'.[[23]](#footnote-23)

As 'an alternative to a public hearing format',[[24]](#footnote-24) the roundtable had a number of features that were intended to make proceedings less formal to support the participation of Indigenous community representatives. This included seating members and participants around the table in a 'mixed format' – as opposed to members seated to one side and witnesses sitting opposite – and not requiring that community representatives be required to take an oath or make an affirmation.[[25]](#footnote-25) Nonetheless, the informal evidence was recorded by Hansard staff, the Committee resolved to publish the transcript and the evidence was cited in the Committee's report.

*C. Case Study: Published Transcript of an Expert Briefing*

The NSW Legislative Assembly's Committee on Law and Safety participated in an expert briefing that was transcribed and published, without a resolution to broadcast proceedings. The briefing was a backgrounding exercise intended to facilitate 'a greater understanding' of the complex, technical issues germane to an inquiry into embedded networks.[[26]](#footnote-26) The Committee resolved to conduct the expert briefing 'prior to any public hearings and that Hansard transcribe the briefing with a view to it being made public and published on the inquiry webpage'.[[27]](#footnote-27)

Similar to the above example, the use of informal evidence rests upon planning and adequate discussions between committee members, secretariats and stakeholders. Consideration can be given to the degree of visibility or contemporaneousness of evidence given. While the utility of informal evidence is greater when it is transcribed and published, it may not need to be broadcast live (or at all). Using such an approach, committee staff can inform participants in advance that the briefing transcript is likely to be published, while also allowing the committee to decide not to publish it until after the transcript has been reviewed for adverse mention or other potential impacts.

*D. Other Avenues for Using Informal Evidence*

Other strategies could be deployed to ensure greater use of informal evidence and mitigate real or perceived risks of informal evidence not attracting parliamentary privilege. For example, Geddes argues that, in order to enhance evidence use by committees more broadly, informal evidence gathering activities should be formally institutionalised as 'an accepted and valid form of evidence'.[[28]](#footnote-28) Geddes offers a cautious approach to using evidence from site visits, roundtables, focus groups and surveys, whereby 'only an anonymised summary of the activity/information would be published as a formal record/proceeding…'.[[29]](#footnote-29)

Regarding greater use of academic material, such as journal articles or external research reports, this may simply be a case of clarifying (through dialogue with committee members and staff) the circumstances in which using these types of sources within a committee report would be appropriate and beneficial. Guidelines for using evidence outside of core committee activities (public hearings, published submissions, site visits and other less formal activities) could be established, such as criteria for determining "reliable" academic material in supporting or contesting oral evidence, or limiting its use to "filling gaps" in an inquiry's evidence base, once public hearings and responses to questions on notice have concluded.

**5. CONCLUSION**

Greater use of informal evidence in committee inquiries may have the benefit of increasing stakeholder participation, reducing cultural barriers to Indigenous stakeholders' participation, and strengthening an inquiry's evidence based through the use of external academic material. Further research could also explore stakeholder preferences for giving evidence through formal or informal means. While barriers of perception and practicality are not insurmountable, adequate planning and dialogue between committees and committee staff is critical – particularly in the case of providing guidance on the protections of parliamentary privilege. As part of wider efforts to modernise parliaments and increase public participation in democratic processes, parliamentary staff could give more explicit consideration to "formalising the informal" and working with members and stakeholders on ways to broaden inquiry evidence beyond established conventions.

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