The use of secret evidence in the New Zealand House of Representatives

David Wilson

Clerk-Assistant (House)
Office of the Clerk of the House of Representatives, New Zealand

In New Zealand, select committees have had the ability to receive evidence in secret, on their own motion, since 1985. Before that, evidence presented to committees could be made secret only by order of the House of Representatives. The 1985 changes to Standing Orders were sweeping, and established much of the modern committee system. The power to receive secret evidence was modified in 1995 when the Standing Orders were again extensively reformed. The power has been used sparingly by committees and, in recent years, has been used hardly at all. Evidence given to a select committee in private is heard in a closed meeting with strangers excluded, and becomes publicly available only once the committee reports to the House. Evidence given in secret is similarly heard in a closed meeting with strangers excluded, but it remains confidential indefinitely and is delivered into the custody of the Clerk of the House when the committee reports to the House. Secret evidence may only be disclosed by order of the House.[1] While most evidence given to select committees is delivered in a hearing open to the public, the giving of evidence in private has become relatively common. It has been used to provide temporary confidentiality for information that is commercially sensitive for a short time or involves discussion of confidential matters that cannot be divulged until the committee reports to the House. It also has been used to afford a measure of privacy to submitters who do not wish to be reported by the news media. Secret evidence is heard much less frequently. This article examines the nature of evidence that has been heard in secret. Of necessity, it does so in a general way so as not to divulge any of the evidence. And it deals only with secret evidence that has been provided in documents. It is possible that a committee has heard oral evidence in secret without any accompanying submission. The only documentary record of such evidence is an entry in the committee's minutes indicating that secrecy had been accorded. It is not possible, therefore, to analyse the nature of secret oral evidence or the reasons secrecy was accorded.

BACKGROUND TO THE ADOPTION OF SECRET EVIDENCE

In 1985, New Zealand's select committee system was extensively reformed. One of the principal changes was the creation of 13 subject select committees with authority to consider

1 Standing Orders of the House of Representatives, 2008, Standing Order 215.

legislation, petitions, inquiries and to scrutinise the performance of the Executive, within their particular subject areas. These committees were given wider powers to conduct their own business, no longer requiring specific authority of the House on each occasion. Among these powers was the ability for committees to accord secrecy to the evidence they received, if doing so was the only way to obtain the evidence.[2] The power was used infrequently in the next decade. The next major changes to Standing Orders were made in 1995 in preparation for the first election under the MMP system of proportional representation. Among the reforms, the House adopted natural justice procedures. The ability of committees to accord secrecy to evidence was retained and a second reason for doing so was added to the existing ability to declare evidence to be secret when doing so was the only way of obtaining it. Committees could now receive evidence in secret when they were satisfied that it was necessary to do so in order to protect a person's reputation. The need to consider potential damage to a person's reputation as a result of committee proceedings arose in response to the Zealand Bill of Rights Act 1990. The Standing Orders Committee considered the natural justice provisions already in operation in the Australian Senate. It commissioned a report from Philip Joseph, an Associate Professor of Law at the University of Canterbury, which advised that the House was legally obliged to afford the protections of natural justice to persons taking part in committee proceedings.[3] The recommendations of the report were adopted and comprehensive natural justice procedures, including those governing secret evidence, were incorporated into the Standing Orders.[4] An amendment to Standing Orders in 1999 provided for committees to give a person whose reputation might be seriously damaged by secret evidence an opportunity to respond to the allegations, after considering any detriment to the person who gave the evidence. Since the 1995 reforms, the power to declare evidence to be secret has not been changed.

PROCESS FOR DECLARING EVIDENCE SECRET

Secrecy may be accorded to evidence presented to a select committee for either of two reasons:

a. the information the committee wishes to obtain can only be obtained by assuring the person in possession of the information that it will remain confidential
b. the committee is satisfied that it is necessary to accord the evidence secrecy to protect the reputation of any person.

A witness can request that he or she give evidence in secret, or a committee can declare evidence to be secret of its own volition. In either case, the agreement of all committee members present is required to declare evidence to be secret. Secret evidence may be revealed only if the House so orders. If the secret evidence contains allegations that may

2 Report of the Standing Orders Committee on the Review of Standing Orders, 1985, I. 14.
3 Report of the Standing Orders Committee on the Review of Standing Orders, 1995, I. 18A.
4 A more detailed examination of the introduction of natural justice procedures can be found in D. Wilson, The development of natural justice procedures in the New Zealand House of Representatives, *Legislative Studies*, Vol. 13(1), 1999.

seriously damage a person's reputation, a select committee may provide the evidence to the person in question to allow him or her to respond to the allegations. The response is received in secret.

OPERATION OF SECRET EVIDENCE PROVISIONS

Secret evidence has been received by select committees in 68 instances since the 1985 changes to Standing Orders came into force. Some of these instances involved more than one person or organisation providing secret evidence. State sector agencies, including local government, have been the most frequent source of secret evidence, providing it on 44 occasions. Private organisations and individuals have made submissions in secret 24 times. In every instance to date, evidence has been received in secret because the individual or agency concerned would provide it only after receiving an assurance that it would remain confidential.

Table 1: Item of business to which secret evidence related

Item of business	Number of times secrecy has been granted
Bill	30
Financial review	11
Estimates examination	3
Inquiry	14
Petition	9
Investigation of Regulations	1
Total	**68**

One item of note, when considering the items of business to which secret evidence related, is the 13 instances in which State sector agencies have provided secret evidence on bills. State sector agencies usually provide advice, rather than evidence, on bills to committees. All advice on a bill is released to the public once a committee reports to the House. Only an order of the House can accord confidentiality to advice. In the small number of instances that State sector agencies gave secret evidence on bills, it appears that they were not the agencies with policy responsibility for the bills but were giving evidence on sensitive operational aspects of the bills. This secret evidence was received between 1986 and 2002. It is unlikely that secret evidence on bills would be received from State sector agencies in the immediate future. Agencies require the permission of Cabinet to make submissions on bills and recent governments have expressed a strong preference for a whole-of-government approach to bills, rather than the presentation of individual departmental views.[5] Committees expect that agencies appointed to advise them will co-ordinate the provision of information from other State sector agencies.

5 Cabinet Manual 2008, para. 7.103.

They do not usually request evidence on bills from them. Where an agency wishes to provide sensitive information to a committee, it may do so orally. Alternatively, the committee may view and then return written information, rather than table it and make it part of the committee record. Since 1985 most select committees have received secret evidence. The Justice and Electoral Committee, and its antecedent the Justice and Law Reform Committee, has received more secret evidence than any other committee. This is not surprising given that the committee's subject area includes courts, human rights, and justice. The former Justice and Law Reform Committee also covered the wider criminal justice sector, including police, corrections and serious fraud. These subject matters are likely to give rise to sensitive matters, which are the subject of a considerable amount of legislation. The Commerce Committee has accorded secrecy, primarily on the grounds of commercial sensitivity. This reflects its subject areas, which include business development, commerce, and consumer affairs. The transport committees have received commercially sensitive evidence on transport projects in secret. The Health Committee has received secret evidence on matters such as mental health, health treatment, and personal experiences of the public health system.

Table 2: Committees that have received secret evidence

Committee name[6]	Number of instances secret evidence received
Ad hoc	1
Commerce	7
Education and Science	1
Foreign Affairs Defence and Trade	4
Finance and Expenditure	6
Government Administration / Internal Affairs	5
Health	9
Justice and Electoral / Justice and Law Reform	13
Local Government and Environment	3
Maori Affairs	3
Primary Production	6
Regulations Review	1
Social Services	1
Transport and Environment / Transport and Industrial Relations	8
Total	**68**

6 Where a committee's name has been changed the old and new names have been given. New Zealand no longer has Petitions or Statutes Review Committees. Instead the 13 subject committees deal with petitions and legislation relevant to their subject area

REASONS FOR STATE SECTOR AGENCIES GIVING SECRET EVIDENCE

Government agencies have tended to request secrecy to protect commercially sensitive information or to keep sensitive law enforcement, tax, trade, or security information confidential. Commercially sensitive information has usually arisen where the agency concerned has been asked to provide information about commercial operations or contractual obligations during financial review or Estimates proceedings. Even before the current secrecy provisions were adopted, select committees had operated during Estimates examinations under a convention that commercially sensitive information should not be required to be divulged in public.[7] Law enforcement and security information that has been received in secret has disclosed details of investigative techniques or intelligence gathered about criminal activity. The New Zealand Police have, for example, been asked to provide information to select committees on criminal gang activities. This information was provided only when secrecy was granted to prevent investigations being undermined. Other State sector agencies with enforcement powers or security responsibilities have provided secret evidence on similar grounds. Personal information about named individuals has also been sought by select committees from State sector agencies. This information has been received in secret on six occasions, one on which the employment contract of a State sector chief executive was disclosed and one which involved details of medical investigations into child deaths. Evidence on solvent abuse has been received in secret on one occasion, because of the danger of the information being misused by would-be solvent abusers.

Table 3: Reasons for secret evidence (State agencies)

Reason for secrecy	Number of instances secret evidence received
Commercial sensitivity	19
Confidential legal information	5
Disclosing security/law enforcement information	6
Personal information	6
Confidential tax information	1
Diplomatic sensitivity	3
Danger of imitative behaviour	1
Prematurely divulges sensitive negotiations	2
Unknown	1
Total	**44**

7 See, for example, Report of the Government Administration Committee on Vote Capital Participation in Crown and other organisations, 1988, I. 19A, p. 47.

REASONS FOR PRIVATE ORGANISATIONS AND INDIVIDUALS GIVING SECRET EVIDENCE

Secret evidence had been provided before the 1995 amendments to Standing Orders. Issues such as the Homosexual Law Reform Bill in 1985, petitions on drug law reform, and inquiries into undercover police work have all entailed committees receiving evidence that was treated confidentially. In many of the cases where the evidence was given by a private individual, the request for secrecy has had an element of wishing to protect the reputation of a person in the. This has been especially true of submissions on mental health legislation that relate personal experiences. Parties to legal proceedings have given evidence in secret to avoid damaging their own position, while three people have made submissions in secret out of fear of reprisals from gangs. Interestingly, the submissions incurring fear of gang reprisals were made on three separate matters before committees rather than a single inquiry or bill.

Table 4: Reasons for secret evidence (private organisations and individuals)

Reason for secrecy	Number of instances secret evidence received
Commercial sensitivity	6
Confidential legal information	3
Fear of reprisals from gangs	3
Personal information	10
Confidential tax information	1
Prematurely divulges sensitive negotiations	1
Total	**24**

ACCESS TO SECRET EVIDENCE

Secret evidence remains confidential indefinitely, and even members of parliament may not peruse it. While the House can authorise the release of secret evidence, it has not done so to date. The issue has not been addressed in New Zealand but the Australian House of Representatives considered a petition requesting the release of confidential evidence. Confidential evidence given to a 1980 committee inquiry into tyre safety was sought by a party to legal proceedings involving tyre safety. The committee which considered the petition concluded:

> When confidentiality is requested and then given, and even more so when it is promised in advance and thus becomes a pre-condition for receiving information, a “contract”’ has been entered into between a committee and the provider of the information. Such a contract is not enforceable legally. The Committee holds firmly to the view that the House has a strong moral obligation to protect such a contract.

> Not to do so, by authorising release of these documents for use in a court, could seriously impair the future effectiveness of the working of parliamentary committees because witnesses could refuse to be forthcoming in what they say or provide, knowing full well that they could be disadvantaged in court proceedings by release of evidence. What is more the word of the Parliament could amount to nought and the integrity of the institution could be called into question.[8]

The view reached in Australia could apply equally in New Zealand. A committee could, by unanimous agreement, rescind a prior decision to grant secrecy while it still had custody of the evidence. However, once a committee had reported to the House on the matter to which the secret evidence related it would no longer have any authority over the evidence. The secret evidence would be held in the custody of the Clerk of the House and would remain confidential unless the House ordered that it be disclosed. No committee has rescinded a decision to receive evidence in secret. Neither has the House ordered the disclosure of secret evidence. Doing so would undermine the integrity of the select committee process and create understandable reluctance to provide confidential evidence to committees in the future.

SECRET EVIDENCE IN OTHER JURISDICTIONS

Other parliaments take different approaches to confidential evidence, although all of them operate on the assumption that evidence, generally, should be heard in public. In the UK House of Commons, a witness may ask to give evidence in private and may further request that the evidence, once given in private, not be published. The non-publication of private evidence, known as 'side-lining', can be requested when publication of the evidence would be injurious to the character of the witness, or would disclose commercially confidential matters or would be prejudicial to the public interest. In these circumstances, a committee may refrain from publishing the evidence, or may publish parts of it or a summary of the evidence to explain the grounds for its conclusions to the House. As in New Zealand, the House may order that the evidence be laid before it.[9] The Australian House of Representatives operates under similar provisions to the House of Commons for hearing evidence in private and subsequently deciding whether or not to publish it. Reasons for hearing evidence in private include the evidence containing commercially confidential matters, classified material, medical records, or evidence which might disadvantage a witness in litigation. Evidence including serious allegations against third parties, matters that are *sub judice*, or matters about which a Minister may claim a public interest immunity may also be heard in private. Private evidence is not published and is protected from disclosure to the public or the courts by the Parliamentary Privileges Act 1987. It is a contempt of the House to disclose private evidence without the authority of the House

8 Release of Tyre Safety Inquiry Documents. Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure, March 1989. Retrieved on 13 August 2009 from http://www.aph.gov.au/house/committee/reports/1989/1989_PP41.pdf

9 *Erskine May Parliamentary Practice* 23rd edition pp. 761–765.

or a committee.[10] The Scottish Parliament has no provision for giving evidence in secret. However, it has a protocol with the government whereby the Presiding Officer can host all-party briefings on especially sensitive matters raised by a topic under parliamentary scrutiny. Such briefings are held on the understanding that the discussions are not divulged. This enables members to inform themselves on issues without raising confidential matters in public. Scottish committees can hear evidence in private in a similar way to New Zealand committees.[11] Meetings of Welsh Assembly committees may be public or private, although the presumption is always in favour of a public meeting. Standing Orders provide that a committee may meet in private in a specified range of circumstance and witnesses are able to give evidence in private.[12] Committees do not hear evidence in secret.[13] In Ireland the Oireachtas committees may hear evidence in private, but it is uncommon for them to do so. Inquiries that are likely to receive particularly sensitive evidence are usually conducted by special commissions of inquiry.[14] The authority of Irish committees to undertake sensitive inquiries was limited by the Abbeylara case, in which the Supreme Court found that committees do not have the power to conduct inquiries with the purpose of making findings of fact which may impugn the good name of a citizen.[15]

None of the legislatures considered above has a provision for secret evidence similar to that of New Zealand. There is a general presumption that parliamentary committees will be open to the public, and secret evidence runs counter to it. However, it provides a way for members to be informed of matters that may otherwise not be disclosed to them.

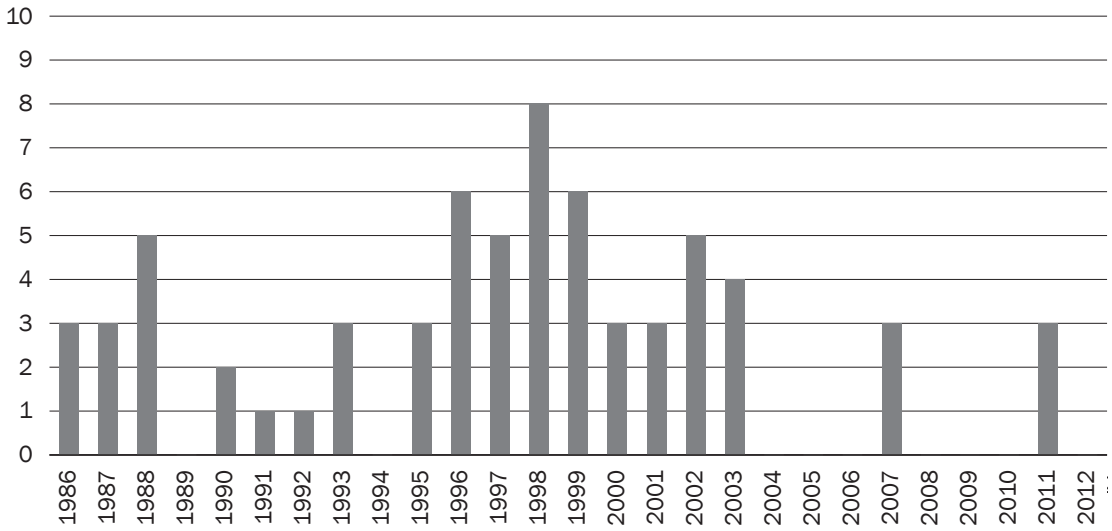
DECREASE IN USE OF SECRECY PROVISIONS

Most of the secret evidence given in New Zealand was received between 1986 and 2004. Since 2004, secret evidence has been received only six times – twice on personal matters related to mental illness, twice because of commercial sensitivity, once because of diplomatic sensitivity, and once to prevent disclosure of law enforcement methods. The availability of evidence has been restricted by the House on rare occasions in recent times. In 1999 the Justice and Law Reform Committee carried out an inquiry into two troubled Police information technology systems. Some of the evidence received in the course of the inquiry related to contractual matters being disputed in court. The committee recommended that the House protect certain evidence until the matters were resolved by the court. The House resolved that the evidence "be retained in the custody of the Clerk of the House and may not, without further order of the House, be disclosed to any person…".[16] Such resolutions of the House are rare because secrecy is usually accorded by select committees. In this instance it was necessary for the House to determine the status of the

10 *House of Representatives Practice* 5th edition, pp. 677–682.
11 Correspondence with the Assistant Clerk, Scottish Parliament, 3 May 2012.
12 Standing Order 17.42.
13 Correspondence with the Procedures Clerk, National Assembly for Wales, 4 May 2012.
14 Correspondence with the Assistant Secretary General, Houses of the Oireachtas Service, 2 May 2012.
15 Ardagh v. Maguire [2002] IESC 21 (11th April, 2002)
16 NZPD 1999, p. 75457.

evidence, since the committee had not received the evidence in secret but later determined that it should be treated thus.[17]

Figure 5: number of instances in which secret evidence received (1986 – 2012)



It is difficult to say for certain why less secret evidence has been received in recent years. There is an important difference between secret evidence received from the State sector and that received from individuals or private-sector agencies. Most evidence from the State sector is provided at a committee's request and in relation to an inquiry or financial scrutiny process. Most evidence from individuals or private-sector agencies is provided at the instigation of the witness and in order to persuade a committee to the witness' viewpoint. In relation to the State sector, it is likely that select committees have become better able to refine and narrow their requests for information so that they are less likely to encompass information that needs to be provided in secret. Committee members may be reluctant to receive secret evidence that they may not refer to subsequently in debate. For committee members, private evidence that can be referred to once a committee has reported is a preferable proposition, and is received comparatively frequently. Committees now have a wider range of ways of hearing evidence available to them. They frequently use video conferences and teleconferences to hear evidence. If witnesses wish to remain anonymous, giving evidence away from the committee meeting room and the news media may meet their need for privacy and they may be less inclined to request that their evidence be received in secret. It is possible that select committees have simply not dealt with any issues that have attracted secret evidence in recent years. It is difficult to generalise about this point since each item of business a committee considers is unique and so is each submitter. Changes in the way society views issues such as mental illness may have rendered witnesses more willing to discuss their views openly. The wide use of social media may have led to people being more open in general about issues that concern or personally

17 Inquiry into CARD and INCIS, 1999, I. 8C

affect them. Technological change has contributed to a stronger expectation of open government, and has vastly increased people's access to a wide variety of information. The Law Commission's recent review of official information legislation stated:

> People seem less willing to trust government to do the right thing and more suspicious of any government activity that takes place in secret. Citizens expect to be able to find out how, why, and by whom government decisions are made and official information legislation, together with technological change, supports and encourages this expectation.[18]

There is significant public, if not official, support for the unauthorised release of classified material by online organisation Wikileaks.[19] There have also been calls for greater transparency in Parliament, particularly in relation to members' expenses. Considerations about receiving evidence in secret may be influenced by the public mood for openness. Whatever the reasons, the fact is that secret evidence makes up a tiny proportion of all evidence submitted to committees. Select committees receive and consider tens of thousands of submissions each year; the most secret evidence received in any one year since 1986 was eight items.

DURATION OF SECRECY

It is unusual for confidentiality provisions to apply indefinitely. Secret evidence given to the New Zealand Parliament remains secret, even after the death of the secret witness. In general, protection of individual privacy applies only to the living.[20] Against a backdrop of increasing openness, Parliament's rules for secret evidence may seem anachronistic. It is difficult to imagine that the release of secret evidence after the death of a witness would cause harm to the witness, although it could still cause harm to family members. On the other hand, evidence has been accorded secrecy because that is only condition under which the witness would give evidence; it would be unfair to change the rules retrospectively. The House may wish to consider amending the Standing Orders so that future evidence received in secret becomes public after 100 years. That would ensure that the witness had died before the evidence was available, and that prospective secret witnesses knew what would eventually happen to their evidence.

18 The Law Commission (2012) *The Public's Right to Know, Review of the Official Information Legislation*, Wellington.

19 UMR Research, Australian views on Julian Assange, 2012. Retrieved from www.umr.com.au/component/k2/item/download/45 on 7 August 2012.

20 See definition of an "individual" in section 2 of the Privacy Act 1993.

CONCLUSION

Evidence to select committees has only ever been heard in secret on rare occasions. In recent years, the use of secrecy provisions appears to have been in decline. Nevertheless, it is important for provision for secret evidence to exist because it provides select committees with access to material that would never come to their attention otherwise. Evidence is usually given in public so that the ideas presented can be discussed and contested before they influence the outcome of a select committee's consideration. Hearing evidence in secret is a significant departure from the normal openness of the select committee evidence-gathering process. Select committees therefore use it sparingly. Secret evidence is of little political value since it cannot be referred to in public at committee meetings and cannot be used in debate in the House. But it can inform committee members about something they would otherwise not learn, and it can be taken into account when making decisions or recommendations, even if it is not referred to overtly. It appears that the existence of a secrecy provision for select committees is still warranted. However, the House may wish to consider whether evidence should remain secret indefinitely in an age of increasing official openness. The fact that secret evidence is used indicates that it still has a purpose in informing committee members. The fact it is used sparingly indicates that it does not impinge greatly on the open approach to hearings of evidence and release of evidence prevailing in the New Zealand Parliament.