
‘Informal Evidence’ in Committee Inquiries: A Case for its Wider Use*

Matthew Johnson¹

A/Director, Committees, NSW Legislative Assembly.

*Peer reviewed article

Abstract: This article explores the concept of 'informal evidence' in parliamentary committee inquiries, and the role it can play supporting more formal and established practices of evidence gathering. Formal evidence most commonly takes the form of sworn verbal testimony and written submission, gathered through the formal powers of a committee. However, committee inquiries are often supported or augmented by informal 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. The article begins by outlining criteria through which formal and informal evidence could be demarcated, before exploring the benefits to using informal evidence and the role it may play in increasing public participation in committee inquiries, particularly for under-represented stakeholder groups.

INTRODUCTION

Parliamentary committee inquiries rely on formal evidence. Gathered using the prescribed powers of committees, the formality of such evidence is derived from established convention, statute and/or the standing orders of the House. In practice, formal inquiry evidence most commonly takes the form of sworn verbal testimony and written submissions.² However, committee inquiries are often supported or augmented by what could be termed ‘informal evidence’: fact-finding and stakeholder engagement exercises like private briefings,

¹ The author wishes to thank Sam Griffith (Clerk Assistant) and Jonathan Elliott (Clerk Assistant) from the NSW Legislative Assembly's Committees team for their feedback and encouragement during the preparation of this article.

² Erskine May, *Erskine May's Treatise on the Law, Privileges and Proceedings of Parliament* (25th ed), London: UK Parliament, 2019, pt 6, 38.31.

roundtables and site visits.³ 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.⁴

In this article, I explore the distinctions and indistinctions between formal and informal evidence, and draw on recent research in parliamentary studies that has explored how committees engage with stakeholders outside of conventional processes.⁵ While the article focuses on the committee systems of Australian jurisdictions, it nonetheless joins the ongoing, international discussion that has explored the growing need for strong engagement between parliaments and publics.⁶ I argue that greater use of informal evidence may increase public participation in committee inquiries, particularly for under-represented stakeholder groups such as culturally and linguistically diverse communities and Indigenous stakeholders. However, using informal evidence is not without practical and procedural challenges, including risk management considerations and the need to protect witnesses and members through parliamentary privilege. The article 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.

HOW DO WE DEFINE 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.⁷ The practice of evidence gathering serves as an important interface between legislatures and politics, offering a forum for debate and discussion in which

³ David Elder and P.E. Fowler (eds), *House of Representatives Practice*, 7th edition, Canberra: Department of the House of Representatives, 2018, p. 691.

⁴ Carolyn Hendriks, Sue Regan and Adrian Kay, 'Public knowledge in contemporary parliamentary committees: Expanded evidence, bounded legitimacy'. *3rd International Conference on Public Policy*, Singapore, 28-30 June 2017, p.15.

⁵ See e.g. Marc Geddes, *Good Evidence: How do Select Committees Use Evidence to Support their Work*, Edinburgh: University of Edinburgh, January 2023, p.3; Danielle Beswick and Stephen Elstub, 'Between Diversity, Representation and 'Best Evidence': Rethinking Select Committee Evidence-Gathering Practice'. *Parliamentary Affairs* 72 2019, pp. 945-964, p. 947.

⁶ See e.g. Inter-Parliamentary Union, *Global Parliamentary Report 2022: Public Engagement in the Work of Parliament*, Geneva: IPU and UNDP, pp. 31-36.

⁷ Geddes, *Good Evidence*, p.35.

individuals, interest groups and experts are able to directly engage with their elected political representatives (and vice versa).⁸ 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 these reasons, the institutional, functional and epistemological characteristics of evidence used by committees should be interrogated, rather than taken as given.

A holistic approach to evidence would necessarily take us beyond the walls of the parliamentary setting. Understanding the nature of evidence, and parallel concepts of ‘fact’, ‘truth’ and ‘knowledge’, has of course been an enduring preoccupation of philosophy and the social and natural sciences. An effort to fully historicise ‘evidence’ would take us through rich debate and contested theory – from the role of sensory experience, human reasoning and social construction in the formation of fact and knowledge,⁹ to methodological detours through the qualitative-quantitative divide and the increasing role that ‘lived experience’ can play in research and analysis – but is largely outside the scope of this article.¹⁰ Yet, as Kelly notes, evidence is ‘hardly a philosopher’s term of art’, and it plays a central role in professional settings ranging from the courtroom and police station to the newsroom and laboratory.¹¹ Evidence is central to the decision-making of the executive and legislature and, in recent decades, there has been increased interest from governments, elected members, public servants and non-government organisations in implementing ‘evidence-based policy’.¹²

The concept of ‘evidence’ – in a parliamentary setting – invokes a unique legal-institutional context, and the notions of ‘formal’ and ‘informal’ evidence present an interesting line of inquiry. Scholarship in parliamentary studies has tended more towards analyses of who gives evidence to parliamentary committees, the type of committee they give evidence to, and the

⁸ Elder and Fowler, *House of Representatives Practice*, p.641

⁹ John Locke, *An Essay Concerning Human Understanding*, Project Gutenberg [1690]; René Descartes, *Meditations on First Philosophy: With Selections from the Objections and Replies*, trans. M. Moriarty, New York: Oxford University Press, 2008 [1641]; Giambattista Vico, *The New Science*, trans. T.G. Bergin and M.H. Fisch, Ithaca, Cornell University Press, 1948 [1744]; Auguste Comte, *System of positive polity*, London: Longmans, Green and co., 1875; Thomas Kuhn, *The Structure of Scientific Revolutions* (2nd ed), Chicago: University of Chicago Press, 1962.

¹⁰ Barbara Hanson, 'Wither Qualitative/Quantitative?: Grounds for Methodological Convergence'. *Quality & Quantity* (42) 2008, pp. 97-111; Ian McIntosh and Sharon Wright, 'Exploring What the Notion of ‘Lived Experience’ Offers for Social Policy Analysis'. *Journal of Social Policy* 48(3) 2019, p. 449

¹¹ Thomas Kelly, 'Evidence'. *Stanford Encyclopedia of Philosophy* (Winter) 2016. Accessed at: <https://plato.stanford.edu/archives/win2016/entries/evidence/>.

¹² Peter Wells, 'New Labour and Evidence Based Policy Making: 1997-2007'. *People, Place and Policy* 1(1), pp. 22-29; The Pew Charitable Trusts, *How Nongovernmental Groups Can Support States in Evidence-Based Policymaking*, Philadelphia and Washington D.C.: Pew Charitable Trusts.

medium in which evidence is given.¹³ The role that informal evidence can play in contributing to committee inquiries has been comparatively less explored. 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.¹⁴

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'.¹⁵ Committees may also use seminars or workshops to support an inquiry. Activities such as these allow committees to gather background information prior to developing formal terms of reference or obtain community views through less public means.¹⁶ Fact-finding exercises can precede a public hearing, and information gleaned informally may then support a line of questioning 'on the record'. Bochel and Berthier consider informal evidence within a broader category of 'informal dialogic systems' which also includes 'input through constituents, organised interests and others'.¹⁷ 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 that may be brought to bear on a committee's work.

How might we define informal evidence, as far as parliamentary committees are concerned? As Geddes has observed, parliamentary understandings of evidence tend towards the

¹³ Hugh Bochel and Anouk Berthier, 'A Place at the Table? Parliamentary Committees, Witnesses and the Scrutiny of Government Actions and Legislation'. *Social Policy & Society* 19(1) 2020, p. 9; Laura Chaqués-Bonafont and Luz M. Muñoz Márquez, 'Explaining interest group access to parliamentary committees'. *West European Politics* 39(6) 2016, p. 1276; Ian Marsh and Darren Halpin, 'Parliamentary Committees and Inquiries', in Brian Head and Kate Crowley (eds), *Policy Analysis in Australia*, Bristol: Bristol University Press, Policy Press, 2015, pp. 137-150, pp. 144-147; Andrew Ray, Arabella Young and Will J. Grant, 'Analysing the types of evidence used by Australian federal parliamentary committees'. *Australian Journal of Public Administration* 81(1) 2022, pp. 279-302, p. 290.

¹⁴ Geddes, *Good Evidence*, p.3; Beswick and Elstub, 'Between Diversity, Representation and 'Best Evidence'', p. 947; Hendriks, Regan and Adrian Kay, 'Public knowledge in contemporary parliamentary committees', pp.14-15.

¹⁵ Geddes, *Good Evidence*, p.3.

¹⁶ Elder and Fowler, *House of Representatives Practice*, p. 691; Department of the House of Representatives (Australia), 'Infosheet 4 – Committees'. Accessed at: https://www.aph.gov.au/about_parliament/house_of_representatives/powers_practice_and_procedure/00_-_infosheets/infosheet_4_-_committees.

¹⁷ Bochel and Berthier, 'A Place at the Table?', pp. 6, 9.

legalistic.¹⁸ In parliamentary settings, informal evidence can be described as that collected through less conventional and public-facing means, when compared with activities like public hearings or written submissions. Informal evidence may be perceived as lacking a degree of authority or clarity that is otherwise present in a legal formalist conception of evidence.¹⁹ Formal evidence, meanwhile, 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.²⁰ 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.²¹ 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.²²

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,²³ while provisions that give committees 'leave to make visits of inspection' are common within House resolutions that establish them.²⁴ This might 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

¹⁸ Marc Geddes, 'The Web of Belief Around 'Evidence' in Legislatures: The Case of Select Committees in the UK House of Commons'. *Public Administration* 99 2021, pp. 40-54, p.41.

¹⁹ Geddes, *Good Evidence*, p.21; Elder and Fowler, *House of Representatives Practice*, p.692.

²⁰ See e.g. 'Chapter 26 – Committees', in Russell D Grove (ed), *New South Wales Legislative Assembly practice, procedure and privilege*, Parliament of New South Wales, 2007, p 7. Accessed at: <https://www.parliament.nsw.gov.au/la/proceduralpublications/Documents/wppbook/Part%201%20Chapter%2026%20Committees.pdf>.

²¹ See, for example: *Parliamentary Committees Act 2003* (Vic), s 28(1); *Parliament of Queensland Act 2001* (Qld) s 25.

²² New South Wales Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House*, adopted 17 November 2022, approved by the Governor 20 February 2023, 80; See for example: *Independent Commission Against Corruption Act 1988* (NSW), s 69(1).

²³ New South Wales Legislative Council, *Standing Rules and Orders of the Legislative Council*, adopted 17 November 2022, approved by the Governor 20 February 2023, p.76.

²⁴ See e.g. Parliament of New South Wales, *Votes and Proceedings of the New South Wales Legislative Assembly*, 11 May 2023, pp.57-58.

parliamentary privilege attracted by formal committee proceedings²⁵ – these exist in varying degrees of codification and clarity across jurisdictions. Moreover, while most parliamentary committees do have formal powers to compel the production of evidence (such as by summoning witnesses), these are often used infrequently.²⁶ A reliance on evidence given voluntarily may lend a degree of informality to established, ‘formal’ practices of evidence gathering.

It is worth noting, however, that evidence in parliamentary proceedings lacks the explicit 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 agencies²⁷ - rest upon the balance of probabilities.²⁸ Although committee members and committee staff are likely to have practical understandings of what evidence is considered reliable, useful and relevant to an inquiry's terms of reference, there is no standard of proof that guides the use of evidence by parliamentary committees. This contrast can be attributed to the distinct outcomes of committee inquiries (findings and recommendations to support policy formation, for example) and judicial decisions (judgements and impositions of penalties relating to individual people).

In an example from 1990, advice provided by the Clerk of the (Australian) Senate to the Chair of the Committee of Privileges cautioned against ‘too readily accepting that [the Committee] has to choose a particular judicially-expounded standard of proof.’ Rather, the Committee should be transparent in the evidence it has chosen to use and be clear in its reasoning, ‘while

²⁵ See e.g. New South Wales Legislative Council, *Procedural fairness resolution*, Parliament of New South Wales. Accessed at:

<https://www.parliament.nsw.gov.au/committees/Documents/Committeebrochures/Procedural%20fairness%20resolution.pdf>; *Parliamentary Evidence Act 1901* (NSW), ss 7-9, s 12; *Independent Commission Against Corruption Act 1988* (NSW), s 70.

²⁶ *Erskine May*, pt 6, 38.31; Vanessa O'Loan, 'The power to compel the attendance of witnesses and the giving of evidence before committees – lessons from the NSW Legislative Council'. *Australasian Parliamentary Review* 38(2) 2023, pp.170-171; Jessica Strout, 'What's at stake when parliamentary committee inquiries rely on voluntary executive cooperation?', *Australasian Study of Parliament Group Annual Conference 2024*, Wellington, 4 October 2024, p. 4. Accessed at: https://www.aspg.org.au/wp-content/uploads/2024/10/Jessica-Strout_Whats-at-stake-when-parliamentary-committee-inquiries-rely-on-voluntary-executive-cooperation.pdf.

²⁷ See for example: *Kazal v Independent Commission Against Corruption* [2013] NSWSC 53 [32].

²⁸ Hock Lai Ho, 'The Legal Concept of Evidence'. *Stanford Encyclopedia of Philosophy*, (Winter) 2021. Accessed at: <https://plato.stanford.edu/entries/evidence-legal/>.

requiring more cogent evidence in proportion to the gravity of the matter in issue.²⁹ This example relates to allegations of contempt, a type of committee inquiry where a committee may more be inclined to seek a formal standard of evidence to support findings or recommendations relating to the conduct of an individual. Nonetheless, it highlights how the type of evidence a committee uses to support its work often relies on the judgement and reasoning (of members and committee staff), rather than on any prescribed rules of evidence.

Returning to my initial question, the definition of formal and informal evidence is dependent on the functional characteristics of evidence gathering and the established conventions of how committees operate. This means that reliance on a purely legal formalist understanding would be misleading. 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’.³⁰

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. Acknowledging that formal evidence may occasionally veer into uncodified convention, voluntary participation and individual judgement should not have the effect of invalidating these established practices of evidence gathering. Rather, if we acknowledge that the boundary between ‘formality’ and ‘informality’ can sometimes be indistinct or porous, it may open the door for greater innovation and flexibility in the types of evidence that can become part of a committee inquiry.

POTENTIAL BENEFITS FROM USING INFORMAL EVIDENCE MORE FREQUENTLY

This section explores potential benefits for committee inquiries if informal evidence were used more frequently or consistently. To begin with, informal evidence gathered through site visits, roundtables and private briefings may suit committee members’ preferences. Members who represent an electorate often meet with constituents and interest groups outside of the

²⁹ Senate Standing Committee of Privileges, Parliament of Australia, ‘Advice No. 5 - Standard of proof for a finding of contempt’. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Tabled_Documents_and_Advices/Advices/Advice-05.

³⁰ *Erskine May*, pt 6, 38.31.

parliamentary precinct and formal committee business.³¹ Engaging with stakeholders in less public or more intimate fora may subsequently feel more authentic or genuine to them. In a qualitative study featuring senior ministers as research participants, researchers have identified a preference for informal consultation over more structured and public forms of engagement.³²

Increasing stakeholder participation through new methods of collecting evidence

By broadening the collection of evidence beyond conventional practices, there may be opportunities to increase the participation of members of the public and stakeholder groups less commonly represented in committee proceedings. Internationally, there is a sense of momentum, where more parliaments are developing strategies to increase parliamentary engagement with the public and vice versa.³³ The Inter-Parliamentary Union has highlighted innovation, inclusivity, and parliamentary cultures that foster engagement as core elements for improving public participation in parliamentary processes.³⁴ By providing a forum for the evaluation and information exchange, parliamentary committees 'might be particularly well-placed to improve the relationship between parliament and the people', so long as sustained efforts are made to seek engagement from segments of the community that participate in inquiries less often.³⁵

A number of Westminster parliaments have explored new 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.³⁶ The Committee subsequently argued that its select committees should treat audio and video submissions as though they were 'formal

³¹ David Wilson and Amy Brier, 'Engaging the public with Parliament in Aotearoa New Zealand'. *Australasian Parliamentary Review*, 37(2) 2022, pp.68-76, p.72.

³² Carolyn Hendriks and Jennifer Lees-Marshment, 'Political Leaders and Public Engagement: The Hidden World of Informal Elite-Citizen Interaction'. *Political Studies* 67(3) 2019, pp.597-617, p. 609.

³³ IPU, *Global Parliamentary Report 2022*, pp. 31-36.

³⁴ IPU, *Global Parliamentary Report 2022*, p. 8.

³⁵ Sarah Moulds, 'Committees of influence: evaluating the role and impact of parliamentary committees'. *Senate Occasional Lecture Series*, Canberra, 30 April 2021, pp. 82-83.

³⁶ House of Commons Liaison Committee, Parliament of the United Kingdom, *The effectiveness and influence of the select committee system* (4th Report of Session 2017-19, 9 September 2019), p. 45.

evidence'.³⁷ The Scottish Parliament has expanded 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.³⁸

Parliamentary committees in Australia have also begun using new methods to increase engagement with culturally and linguistically diverse (CALD) communities. In Victoria and New South Wales, for example, standing committees have translated terms of reference and inquiry promotion materials into languages other than English.³⁹ Ikeda has explored the use of 'Easy English' materials for committee engagement with stakeholders 'for whom plain language is too complex'.⁴⁰ Easy English material uses short sentences that focus on one idea, wording that reflects everyday experience and language usage, and clear formatting that is accompanied by images. Ikeda cites the use of Easy English by a Victorian inquiry into the early childhood engagement of CALD communities but notes its value for a broad range of stakeholders for whom visual or simplified communication may be beneficial (such as people with cognitive disabilities).⁴¹

These examples represent new ways of collecting evidence from the public that, ultimately, would likely be handled in the same way as formal evidence (e.g. video submissions that are transcribed and published as formal, text-based submissions; multilingual approaches to conventional inquiry promotion). There may be a tendency to utilise these methods for inquiries that are explicitly related to CALD communities, though such approaches could be extended to any committee inquiry that is seeking wider community input.

³⁷ House of Commons Liaison Committee, *The effectiveness and influence of the select committee system*, p. 45.

³⁸ The Scottish Parliament, 'Format of Your Submission', *Committees: Submitting Your Views to a Committee*, (Web Page, 2024) <<https://www.parliament.scot/about/information-rights/data-protection/privacy-notice/committees-submitting-your-views-to-a-committee>>; The Scottish Parliament, *Public Engagement Strategy* (Report, 2021), 1.

³⁹ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, 'Inquiry into early childhood engagement of CALD communities'. Accessed at: <https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-early-childhood-engagement-of-cald-communities>; Legislative Assembly Committee on Community Services, Parliament of New South Wales, 'Improving crisis communications to culturally and linguistically diverse communities'. Accessed at: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2870>.

⁴⁰ Miona Ikeda, 'Inclusive not exclusive: parliamentary committees reaching out to CALD communities', *Australasian Study of Parliament Group Annual Conference 2024*, Wellington, 4 October 2024, p. 7. Accessed at: <https://www.aspg.org.au/wp-content/uploads/2024/10/Miona-Ikeda-ASPG-Paper.docx>.

⁴¹ Ikeda, 'Inclusive not exclusive', pp. 7-8; Legislative Assembly Legal and Social Issues Committee, *Inquiry into early childhood engagement of CALD communities*, no. 167, Session 2018-20, Parliament of Victoria, pp. 355-377.

However, the prospect of broader multilingual inquiry engagement raises interesting practical challenges – some of which could be resolved through informal evidence gathering. If using translated and Easy English material increased awareness of committee inquiries in CALD communities, how would committee staff manage a high volume of submissions in a language other than English? Committee secretariats (or parliamentary departments as a whole) may lack the necessary expertise to translate submissions themselves, and paying for external translation services may prove too costly. Utilising ‘informal’ activities, such as surveys or focus groups, could be an opportunity to gain greater multi-lingual community participation with fewer resourcing requirements. For example, a committee could decide which questions to ask community representatives in a focus group or survey, and informal evidence could then be gathered via an interpreter or a survey that is translated into multiple languages. If committees are prepared to consider new ways of collecting evidence – whether by rethinking conventional evidence gathering practices or by expanding the role of informal evidence – more members of the community could participate in committee inquiries.

First Nations 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 a myriad of negative social, health and economic outcomes for First Nations peoples.⁴² If practical reconciliation between First Nations people and Australia's constitutional institutions is to be achieved, active ‘political listening’ is required at the interface.⁴³ As Australia processes the aftermath of the Voice to Parliament referendum, innovation in parliamentary committee processes may make a comparatively modest contribution towards this goal.

The formalist traditions of Westminster parliaments may be alienating to First Nations Australians or at least culturally inappropriate, particularly where the legalistic conception of

⁴² See, for example: Elizabeth Strakosch, 'The technical is political: settler colonialism and the Australian Indigenous policy system'. *Australian Journal of Political Science*, 54(1) 2019, pp. 114-130; Jeremy Walker, 'Silencing the Voice: the Fossil-fuelled Atlas Network's Campaign against Constitutional Recognition of Indigenous Australia'. *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, 15(2) 2023, pp. 105-125, p. 106.

⁴³ Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening'. *Federal Law Review* 48(4) 2020, pp.529-542, p. 529; Sarah Moulds, 'A Toolkit for Evaluating the Effectiveness of Parliamentary Public Engagement'. *University of South Australia Law Review* 5 2023, pp. 1-23, p. 10.

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'.⁴⁴ The formal power of a committee to call for evidence, and related penalties for refusing to answer questions asked by a committee, could potentially conflict with a community elder's responsibilities to protect privileged or withheld knowledge. 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 organisations that do not necessarily represent the full range of diverse Indigenous community interests.

Requirements that witnesses swear an oath or make an affirmation before giving evidence may also be uncomfortable for Indigenous witnesses, given the apparent similarities between giving evidence in a court and doing so in front of a committee. In light of Indigenous over-representation in the justice system, inquiry witnesses may have had lived experience of court proceedings, such as being subject to cross-examination or other legal processes that may contribute to intergenerational trauma. It would also be valuable to consider how essential an oath or affirmation is for hearing formal evidence, in relation to other stakeholder groups who may be under-represented in committee proceedings. For example, children and young people who – depending on their age – may not reach the threshold for being able to consent to taking a formal oath, or who are not comfortable in doing so.

In a report exploring trust in and access to the South Australian justice system, Hora J (U.S., ret.) notes the work of Richard Balfour, who developed a more culturally appropriate oath for use by Aboriginal people who do not speak English.⁴⁵ Translated as, 'You will talk straight, and not say false things', Balfour's proposed oath aimed to assist Aboriginal witnesses in court.⁴⁶ A culturally relevant oath would not be out of place in a committee hearing, given the inclusion of affirmations as a secular alternative to the conventional oath to tell the truth 'so help me

⁴⁴ Katherine Biber, 'Fact-Finding, Proof and Indigenous Knowledge: Teaching Evidence in Australia'. *Alternative Law Journal* 35(4) 2010, p. 208.

⁴⁵ Judge Peggy Fulton Hora (Ret.), *Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System*, Adelaide: Department of Premier and Cabinet (Government of South Australia), 2010, p. 19. Accessed at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1809719_code1398611.pdf?abstractid=1809719&mirid=1.

⁴⁶ Richard Balfour, cited in Hora, *Smart Justice*, p. 19.

God', and acknowledgements of country that have become common at the commencement of public hearings.

Australian jurisdictions vary as to whether a person appearing before committees needs to be sworn or affirmed before giving evidence. Some jurisdictions could be more flexible than others in relaxing these formalities for Indigenous witnesses and other groups less represented in committee inquiries. In Queensland, for example, a committee Chairperson is authorised to administer an oath or affirmation – and may require a person to answer questions under oath or affirmation – however, a person may be excused from doing so (though either excusing or requiring oaths and affirmation may be limited in practice).⁴⁷ In the NSW Legislative Assembly, meanwhile, Standing Order 291 requires that 'Witnesses shall be examined on oath or affirmation.'⁴⁸ The *Parliamentary Evidence Act 1901* (NSW) further states that every witness before a committee is sworn by the Chair, with protections of parliamentary privilege being afforded for doing so.⁴⁹ However, if witnesses did not swear an oath or make an affirmation (in jurisdictions with statutory provisions requiring them to) consideration could be given to protections against legal action provided for in other statutes, such as Defamation Acts.⁵⁰

Outside this question of oaths and affirmations, rethinking evidence gathering may also present parliamentary committees with the opportunity to engage with First Nations witnesses in ways that draw on long-held Indigenous cultural practices. It is important to emphasise here that practices which might be termed 'informal' through a Western parliamentary lens are often anchored in formal Indigenous law and custom. Yarning, for example, involves a forum for truth-telling that is dialogic and collaborative, and is grounded in the Aboriginal relational systems: kinship, ancestry, story-telling and relationships with country.⁵¹

Yarning has not been widely used by parliamentary committees as a means of collecting evidence (formal or informal). In 2024, a NSW Legislative Assembly committee conducted site visits in outback NSW, and hosted a yarning circle involving community representatives and committee members.⁵² In this example, the yarning circle was a private event that preceded a

⁴⁷ *Parliament of Queensland Act 2001* (QLD) s 31.

⁴⁸ New South Wales Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House*, adopted 17 November 2022, approved by the Governor 20 February 2023, 80.

⁴⁹ *Parliamentary Evidence Act 1901* (NSW) s 10(2), s 12.

⁵⁰ *Defamation Act 2005* (NSW), s 27.

⁵¹ Stuart Barlo, 'Yarning as Protected Space: Relational Accountability in Research'. *AlterNative: An International Journal of Indigenous Peoples*, 17(1) 2021, pp. 40-48.

⁵² Committee report likely to be tabled in 2025-26.

traditional public hearing the following day (rather than an activity that explicitly aimed to collect evidence for use in a report). However, it raises the question of whether yarning circles could become an effective method of engagement between parliamentary committees and Indigenous stakeholders. Yarning has been used as a research method in numerous policy studies, including research methods that have transcribed dialogue from a yarning circle.⁵³

Recording, transcribing and publishing a yarn may have value in terms of inquiry evidence and stakeholder engagement. However, trust and reciprocity are fundamental elements in a yarning circle,⁵⁴ and establishing genuine, meaningful rapport between a parliamentary committee and an Indigenous community may be difficult in practice. For example, a committee may only visit a remote community for a limited amount of time, without returning to consult further. While yarning for evidence could become a valuable means of committee engagement, establishing sustained and authentic communication between members and community representatives would likely require significant time and resource commitments, for both members and committee staff.

Academic material as informal evidence

If 'informal evidence' is defined as evidence gathered outside of the formalised and entrenched practices of parliamentary committees, where does that leave academic knowledge? Several authors have examined the various channels through which academic and technical experts are able to inform policy deliberations by parliaments, with committee work being a prevalent avenue for doing so.⁵⁵ The ideal evidence base for an inquiry might include at least some written and oral evidence from researchers with expertise germane to the inquiry's terms of reference. Academic evidence can 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.

⁵³ Michelle Kennedy, Raglan Maddox, Kade Booth, Siad Maidment, Catherine Chamberlain and Dawn Bessarab, 'Decolonising Qualitative Research with Respectful, Reciprocal, and Responsible Research Practice: A Narrative Review of the Application of Yarning Method in Qualitative Aboriginal and Torres Strait Islander Health Research'. *International Journal for Equity in Health* 21(134) 2022, pp.1-22, p. 6.

⁵⁴ Kennedy et. al, "Decolonising qualitative research", p. 12.

⁵⁵ See, for example: Caroline Kenny, 'The impact of academia on Parliament: 45 percent of Parliament-focused impact case studies were from social sciences'. *London School of Economics Blog*, 19 October 2015. Accessed at: <https://blogs.lse.ac.uk/impactofsocialsciences/2015/10/19/the-impact-of-uk-academia-on-parliament>.

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.⁵⁶ Committees may have powers or resources to commission research papers, 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. However, this is potentially difficult in practice. Committee reports focus on hearing transcripts and written submissions as source material, in large part, because these are evidence gathering activities in which the committee is directly engaged. Committee staff may be reluctant to undertake any ‘independent’ literature review to support an inquiry, as members themselves have not participated in gathering this material. As alluded to above, deciding on which kinds of academic evidence should support committee findings – whether longitudinal studies, statistical analyses, in-depth interview, narrative research or any other research methodology – could raise complex questions of epistemology and method that a committee may not wish to engage with.

USING INFORMAL EVIDENCE IN COMMITTEE PRACTICE: CHALLENGES AND CASE STUDIES

Further to the examples above, 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 presents risks to inquiry participants or to other parties referred to in evidence.

⁵⁶ Ray, Young and Grant, 'Analysing the types of evidence used by Australian federal parliamentary committees', pp. 289-290.

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'.⁵⁷ 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',⁵⁸ including the giving of evidence before a committee. 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.

If it is members' perception that informal evidence is not protected under privilege that is preventing its wider use,⁵⁹ 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.⁶⁰ In *House of Representatives Practice*, Elder notes that '[if] a quorum is present', activities such as visits of inspection become 'formal proceedings'.⁶¹ However, much like other proceedings of parliament,⁶² records of informal evidence could potentially be admissible in a court, and only privileged in particular circumstances.

If considering more prominent use of informal evidence in an inquiry, committees and secretariats should be mindful of any risks to inquiry participants or third parties. For example, if an inquiry engages with sensitive issues or there are safety considerations in making evidence public, there would likely be greater value in providing stakeholders with a private forum for

⁵⁷ *Bill of Rights 1688* s 9.

⁵⁸ *Parliamentary Privileges Act 1987* (Cth) s 16.

⁵⁹ See, for example: Geddes, 'Good Evidence', p. 8.

⁶⁰ Russell D Grove, Mark Swinson and Stephanie Hesford, 'Part 2 Chapter 3 – Such Privileges as were Imported by the Adoption of the Bill of Rights', in Russell D Grove (ed) *NSW Legislative Assembly Practice, Procedure and Privilege*, Sydney: NSW Legislative Assembly, 2007, p.5.

⁶¹ Elder and Fowler, *House of Representatives Practice*, p.733.

⁶² See, for example: *Parliamentary Privileges Act 1987* (Cth) s 16(3).

sharing their views with the committee (in line with precautions taken with *in camera* evidence). Committees may also use a combination of public and private activities, depending on the nature of the discussions likely to take place.⁶³

It is also worth emphasising that using informal evidence publicly (such as by citing it in a report) may defeat the purpose of conducting private activities in the first place. For example, committees may hold private briefings with departmental officials. Away from media or political scrutiny, these conversations between senior public servants and members can help to build rapport – which can be valuable when a government department is a lead stakeholder in an inquiry – and stand in contrast to guarded and indirect answers to members' questions that may be provided during a public hearing. There are likely to be numerous circumstances where publishing and using informal evidence would be counterproductive or inadequate in supporting inquiry participants.

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'.⁶⁴

As 'an alternative to a public hearing format',⁶⁵ the roundtable had a number of features that were intended to make proceedings less formal to support the participation of Indigenous community representatives.⁶⁶ This included seating members and participants around the

⁶³ Moulds describes the work of the Parliamentary Joint Committee on Human Rights (Commonwealth), which used frequent private meetings in order to create a 'politically safe forum' for negotiation, compromise and public input during a bill inquiry (Sarah Moulds, 'Committees of influence: Parliamentary committees with the capacity to change Australia's counter-terrorism laws'. *Australasian Parliamentary Review*, 31(2), pp.45-66, p.62).

⁶⁴ The Hon. Mick Veitch, Parliament of New South Wales, *Uncorrected Transcript*, Legislative Council Portfolio Committee No. 4 – Customer Service and Natural Resources, Narooma, 28 July 2022, p. 1.

⁶⁵ Legislative Council Portfolio Committee No. 4 – Customer Service and Natural Resources, Parliament of New South Wales, *Commencement of the Fisheries Management Act 2009*, (Report No. 55, November 2022), p. 62.

⁶⁶ Hendriks, Regan and Kay also describe the use of roundtables in committee proceedings, including the Senate Standing Committee on Community Affairs' use of transcribed and published 'community statement sessions' in 2015 (Hendriks, Regan and Kay, *Policy knowledge in contemporary parliamentary committees*, pp.11-12).

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.⁶⁷ The Committee decided that the roundtable would be broadcast and transcribed, and the evidence was cited in the Committee's report.⁶⁸

Case study: a published transcript from 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.⁶⁹ 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'.⁷⁰

Similar to the above example, the extent to which the use of informal evidence can be successfully integrated into the legitimate functions of parliamentary committees is likely to depend 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 items that may require redaction.

Other avenues for using informal evidence

Other strategies could be deployed to ensure greater use of informal evidence, and to 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

⁶⁷ Legislative Council Portfolio Committee No. 4, *Commencement of the Fisheries Management Act 2009*, p. 62.

⁶⁸ See, for example: Legislative Council Portfolio Committee No. 4, *Commencement of the Fisheries Management Act 2009*, pp. 19-20, 25, 62.

⁶⁹ Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *Embedded Networks in New South Wales* (Report 3/57, November 2022), p. 76.

⁷⁰ Legislative Assembly Committee on Law and Safety, *Embedded Networks*, p. 82.

evidence gathering activities should be formally institutionalised as ‘an accepted and valid form of evidence’.⁷¹ 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 ...’.⁷²

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.

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, practicality and resourcing 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.

⁷¹ Geddes, *Good Evidence*, p. 40.

⁷² Geddes, *Good Evidence*, p. 40.