Information is power: recent challenges for committees in the NSW Legislative Council

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> Knowledge has always been power, but the management of information has become the key to government. The executive wants the public to receive only the information favourable to it, and strives to manage the release and the presentation of unfavourable information, and to keep much secret. A functioning legislature is essentially an instrument for breaking down that information management in the interest of the public's ability to judge governments.[1]

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed.[2]

Introduction

Information is the life-blood of parliamentary democracy. Information may be obtained by a parliament in a number of ways, one of the most effective of which is through the operation of parliamentary committees. Parliamentary committees gather most information through requests and voluntary provision of submissions and evidence. This paper discusses recent challenges encountered by committees of the Legislative Council in the Parliament of New South Wales in the use of their powers to obtain information when 'mere requests' for this information have been 'unavailing.'

Like many legislatures, the NSW Legislative Council maintains that its powers of inquiry, including the power to order documents from the executive, to call for information covered by statutory secrecy provisions, and to require the attendance of witnesses at hearings, are the same as those of the House. This view has not been embraced by successive state governments.

How should committees respond when their efforts to seek information are contested? Some commentators advise against overreaching. For instance, barrister Bret Walker SC would prefer that both sides exercise 'compromise and civilized restraint' … with as little assistance from the judges as possible'.[3] He counsels Members of Parliament, both individually and collectively, to continue to assert their powers, which in the fullness of time will come to be known as the 'true state of affairs'. In a similar vein, esteemed former clerks, William McKay and Charles Johnson warn committees faced with an uncooperative executive to avoid 'crises which may not have satisfactory endings', but to instead find more ingenious ways around the problem.[4]

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1 Harry Evans, 'My 40 years of Canberra joy', *Crikey.com* (24 July 2009), accessed 10 June 2014.
2 *McGrain v Daugherty* 273 US 135 (1927) at 488.
3 Mr Bret Walker SC, Keynote address. Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 9.
4 William McKay and Charles W. Johnson, *Parliament and Congress, Representation & Scrutiny in the twenty-first century*, (Oxford University Press 2010), p 368.

While certain committee powers may be clarified or their existence put beyond doubt through legislation, legislating in this area is not without risk. There may well come a time when the only way to ensure committees receive the information they need is by taking a matter to its logical conclusion provoking a challenge to the exercise of the relevant power tested in the courts, although again this course of action is fraught with risk. In the meantime, Legislative Council committees seem set to continue to respond to executive recalcitrance by consistently asserting their powers, finding ingenious ways around problems, and by exercising civilised restraint, but never acquiescing in the face of challenges to their powers.

Most of the specific examples provided in this paper arose during an inquiry which concluded with a report to the House on 19 June 2014, by the Legislative Council's General Purpose Standing Committee (GPSC) No. 1.[5] The inquiry concerned allegations of the existence of a culture of bullying within a NSW government entity, WorkCover NSW, ironically the body responsible for regulating work health and safety, including preventing bullying in the workplace. The examples from this inquiry relate to the resolution of difficulties encountered in obtaining information from WorkCover and other government agencies. The paper also briefly describes some recent examples of other committees' approaches to similar difficulties, as well as the experience of Legislative Council committees in dealing with challenges to obtain information from non-government sources.

The power of committees to order State papers

The Legislative Council has a common law power to order the production of State papers from the executive as affirmed by the High Court in *Egan v Willis* (1998). The Council's position is that committees also have the power to order the production of State papers, if this is necessary in the context of a particular inquiry.[6] Indeed the power of committees to 'send for and examine persons, papers records and things' was provided for in the resolution establishing the standing committees in each new Parliament from 1988 until 2004 when these powers were provided for in the standing orders.[7]

Between 1999-2001 documents were provided by the government subsequent to a formal committee order on several occasions.[8] However the situation changed in 2001 when the executive refused to provide certain documents ordered by GPSC No 1 in relation to an inquiry into the workers compensation scheme including the role of WorkCover. This apparent about

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5 General Purpose Standing Committee No 1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW* (2014).

6 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice,* (Federation Press, 2008), pp 538-542. A small number of joint committees have a statutory power to order papers, for example, s71 of the *Health Care Complaints Act 1993* established a joint parliamentary committee which has power to send for persons, papers and records.

7 Legislative Council Committees, Resolutions, Office Holders and Ministerial Representation, 24 May 1995 (49th-53rd parliaments).

8 See for example the Standing Committee on Social Issues, NSW Legislative Council, *Inquiry into Residential and Support Services for People with Disability*, Minutes No 11, 14 October 1999, entry No 2; GPSC No 5, NSW Legislative Council*, Report on inquiry into Northside Storage Tunnel – Scotts Creek Vent*, Report No 9, (2000), pp 142-143; GPSC No 3, NSW Legislative Council *Cabramatta Policing*, Report No 8, (2001), p 264; GPSC No 1, *Inquiry into Multiculturalism – Interim report*, Report No 9, (2000), pp 142- 143.

turn was also reflected in the promulgation in 2003 of 'Guidelines for Public Servants appearing before Parliamentary Committees' which offered the following advice:

> If a Committee requires an officer to hand over documents in the officer's possession at the hearing, the officer should request that the Committee refer the matter to the relevant House for a formal order to be made pursuant to the Standing Orders.[9]

The government's position appears to have been based on advice provided by the Crown Solicitor in September 2001 prepared in response to the order for papers made by GPSC No1. In summary, this advice suggested that while the Legislative Council has the power to compel the production of State papers, it has not been determined that a committee of the Legislative Council has such a power, or can have it delegated to it by the House.[10]

Orange Grove inquiry

In 2004 the Council introduced new standing orders, including SO 208(c) which codified Council committees' common law power to order papers: "A committee has power … to send for and examine persons, papers, records and things." The first real test of the new standing order in relation to committees' power to order documents arose in that same year, during an inquiry into the planning approval process for a shopping centre in western Sydney known as the 'Orange Grove inquiry'.[11]

Twice during that inquiry the committee resolved to order the production of documents from relevant government agencies under SO 208. On the first occasion the Department of Planning and Natural Resources rejected the request on the basis of Crown Solicitor's advice. The committee wrote back to the Director General, noting that that the House had delegated to the committee the power to call for such documents under SO 208. The Director General eventually provided some of the documents voluntarily. On the second occasion, the Premier's Department rejected the committee's order, based on the same legal advice from the Crown Solicitor as that provided previously by the Department of Planning and Natural Resources.

On 11 October 2004 the Chair wrote to the Director General of the Premier's Department on behalf of the committee reiterating the committee's request that the Premier's Department provide the documents, restating its view that the House has delegated to the committee the power to call for the production of documents, and noting that there are numerous precedents of such documents being requested by committees and of government complying with such orders. The Chair noted that the committee viewed non-compliance with such orders most

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9 Premier's Circular No 2003-47, 'Guidelines for appearing before Parliamentary Committees', 17 November 2003.

10 Crown Solicitor Re: Production of Documents to Legislative Council Standing Committee No 1, 28 September 2001. The key difference between the power of the House to order the production of documents and the power of a committee to do so is that, if an order by a committee is resisted, the committee does not have the power to deal with the consequences of that failure as this is the prerogative of the House. See Lovelock and Evans p 541.

11 General Purpose Standing Committee No 4, NSW Legislative Council, *The Designer Outlets Centre, Liverpool*, Report No 11, (2004). A comprehensive discussion of the committee's attempts to order documents can be found in chapter one of the report of Lovelock and Evans, *New South Wales Legislative Council Practice* (Federation Press 2008), pp 538-542.

seriously and that it would be likely to report any such failure to the House for consideration as a possible contempt. The Premier's Department responded by again declining to provide the documents requested, citing continuing uncertainty as to whether the power of the Legislative Council to order the production of documents is delegable, and providing further advice from the Crown Solicitor in relation to this issue.

Soon after, the Council agreed to a motion moved in the House under SO 52 by a committee member to provide the documents. This order of the House, agreed to without division, included a preliminary paragraph reasserting the power of the committee to order the production of documents. The order of the House reads as follows:

> That, **notwithstanding** the inquiry into the approval of the Designer Outlets Centre, Liverpool, being conducted by General Purpose Standing Committee No. 4, and **the power of the committee to order the production of documents**, under standing order 52, there be laid upon the table of the House within 21 days of the date of the passing of this resolution …' [12] [emphasis added]

Another unsuccessful attempt by a committee to order State papers under SO 208 was made during the 2011 Gentrader Inquiry, although this order was complicated by the fact that the Parliament was prorogued and thus the government questioned the legality of the whole inquiry, not just the power to order papers.[13]

WorkCover bullying inquiry

The most recent contest over committees' power to order papers occurred this year during an inquiry into allegations of bullying in WorkCover also conducted by GPSC No 1.[14] At the beginning of the inquiry the committee received a submission from a former WorkCover employee alleging that they had been bullied by a senior WorkCover manager and that the Public Service Commissioner had instigated an investigation into these allegations. Being of the view that this matter warranted further examination, the committee sought a copy of the relevant documents from the Public Service Commissioner on a *voluntary* basis. However, the Commissioner did not provide the documents, citing privacy concerns as grounds for refusal. The committee proceeded to order the papers from the Public Service Commissioner under SO 208 but the Commissioner again declined to provide the documents, this time citing Crown Solicitor's advice which called into question the power of committees to order the production of documents. Intent on securing the documents so as to further its inquiry, the committee resolved that the Chairman seek these documents via an order of the House under SO 52. The motion was agreed to and the documents provided.

While at this point it may seem that the committee's attempts to exert its inquiry powers was once again stymied by a recalcitrant executive, this would be an overly pessimistic view. What

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12 *Hansard*, Legislative Council, 21 October 2004, p 7.

13 A comprehensive discussion of this issue can be found in: Teresa McMichael, 'Prorogation and Principle: The Gentrader Inquiry, government accountability and the shutdown of parliament', *Australasian Parliamentary Review* Vol 27(1) pp 196-206.

14 See GPSC No 1, NSW Legislative Council, *Allegations of Bullying in WorkCover*, (2014), pp 4-13.

actually transpired was a very positive example of a committee strenuously and consistently asserting its inquiry powers, demonstrating civilised restraint in the face of resistance and finding ingenious ways around problems. What is more, the committee, including members from five different political parties, acted at all times in a unified, non-partisan manner in seeking to ensure the required information was forthcoming.

In providing the documents in response to the SO 52 order, the Department of Premier and Cabinet made a claim of privilege over one of the documents on the basis that it contained 'personal information' and so, as per the requirements of the standing order, it could only be viewed by members of the Legislative Council and could not be copied without an order of the House. This meant that committee members were not able to refer to the document during an in camera hearing; they also had to deal with the exquisitely difficult (bordering on tortuous, but nevertheless procedurally correct) challenge of making sure they did not inadvertently disclose matters contained in the privileged document to the witnesses during the in camera hearing, unless they could establish that the witness was already cognisant of the issues therein.

It became apparent to the committee that the privileged status of the documents was an impediment to its ability to fully examine important issues germane to its inquiry and would also restrict what could be published in its report. Accordingly the committee resolved to request that the Chairman, on behalf of the committee, dispute the validity of the claim of privilege, leading to the appointment of an independent legal arbiter to evaluate the validity of the privilege claim, as per the procedure to be followed under the standing order. The independent arbiter, the Honourable Keith Mason AC QC, did not uphold the claim of privilege, finding that the 'privacy concerns that have been advanced [did] not establish a relevant privilege known to law'. On tabling the arbiter's report a committee member moved a somewhat unusual motion in the House to enable a copy of the privileged documents to be provided to the committee for the purposes of its inquiry, an excerpt of which is reproduced below:

2) That, notwithstanding the provisions of Standing Order 52:
   (a) a copy of the documents considered by the legal arbiter to be not privileged be provided to General Purpose Standing Committee No. 1 for the purposes of its inquiry into allegations of bullying in WorkCover NSW;
   (b) subject to paragraph 3 of this resolution, the committee have the power to authorise publication of the documents in whole or in part; and
   (c) the Committee Clerk be authorised to make copies for the use of members during the inquiry.

3) That, in accordance with Standing Order 224:
   (a) the documents provided to the committee may not, unless authorised by the committee, be disclosed to any person other than a member or officer of the committee; and
   (b) in considering whether to make the documents public, the committee take into consideration the report of the Independent Legal Arbiter.[15]

[15] *Minutes*, Legislative Council, 6 March 2014, p 2347.

The House unanimously agreed to this motion, indicating its confidence in the committee's commitment to deal appropriately with the sensitive documents so that it may fully explore its terms of reference. The committee proceeded to hold a second in camera hearing with two key witnesses. The decision of the House to provide a copy of the documents to the committee empowered members to more freely question witnesses and to use some of this evidence in its report, without endangering the privacy of the individuals concerned.

The relevance of Attorney-General (Canada) v McPhee

In correspondence to WorkCover regarding its refusal to provide the ordered documents the committee referred to *Attorney-General (Canada) v McPhee* (2003) 661 APR 164, a case cited frequently by the Legislative Council in support of its position regarding committee powers to order papers. In the absence of any other relevant authority in Australia, the Council views this Canadian case as a leading statement of the common law with regards to the power of committees to order papers. As Cheverie J observed:

> It is my conclusion the Legislative Assembly of Prince Edward Island has the power to summon witnesses and order them to produce documents. This power is constituted by virtue of the fact it is an exercise of inherent parliamentary privilege. The Committee of the House is an extension of the House and possesses the same constitutional power to summon witnesses and order them to produce documents.[16]

However, as the response from the CEO of WorkCover indicates, the Crown Solicitor clearly has a very different view of its relevance:

> Whether or not the decision in *Attorney-General (Canada) v McPhee (2003)* 661 APR 164 reached the correct conclusions about the powers of the Legislative Assembly of Prince Edward Island, the sources of parliamentary privilege in this state are limited to:
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> - Such powers and privileges as are implied by reasonable necessity; and
> - Express statutory sources.

This dismissal of the relevance of Canadian case law to NSW is curious. That former colonial legislatures in Westminster systems in Canada, Australia and elsewhere shared certain inherent powers is unambiguously expressed by the former Chief Justice of the Canadian Supreme Court, Lamer J in the leading case on parliamentary privilege in Canada, *New Brunswick Broadcasting Co v Nova Scotia*:

> In the colonial legislatures in Canada and elsewhere, parliamentary privileges were derived from common law or statute law. In common law, such legislatures were held to have certain inherent powers simply by virtue of their creation. It was not accepted, however, that those powers were as extensive as those of the Houses of Parliament in the United Kingdom simply because they were bodies with analogous functions.[17]

As has been expressed many times in the past, the powers of the Houses of the Parliament of NSW rest on the principle, first established by the Privy Council in *Kielley v Carson* in 1842, that

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16 *Attorney-General (Canada) v MacPhee* (2003) 661 APR 164 at 182.

17 *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 R.C.S, pp 345-346.

independent former colonial legislatures deriving their authority from Imperial statutes, such as the Parliament of NSW, have only such powers and immunities as were 'necessary for the existence of such a body, and the proper exercise of the functions which it is intended to execute'. [18] The same foundation of privilege applies in former colonial legislatures in Canada.

While it may be true that this case would not be binding on a court in NSW, given the powers of the Legislative Assembly of Prince Edward Island are drawn from the same principle of reasonable necessity as those of the NSW Parliament, it is nonetheless persuasive, particularly in the absence of any direct authority on the matter.

A legislative solution?

The committee that recently inquired into bullying allegations in WorkCover was so concerned about the lack of cooperation with its requests for information that it resolved that the secretariat consult with the Clerk of the Parliaments about how to prevent government agencies from refusing to comply with orders for the production of documents by Legislative Council committees under standing order 208(c).[19] The power of committees to order the production of documents is likely to continue to be contentious at least until the courts decide otherwise or the Parliament clarifies this common law power by statutory reform.

Should committees' power to order documents be codified by enacting legislation to that effect? As Enid Campbell notes, clarifying powers with regards to the compulsion of witnesses through the *Parliamentary Evidence Act 1901* was a positive step for the Parliament of NSW:

> There is much to be said in favour of enactment of comprehensive legislation which defines offences by and against parliamentary witnesses … By enactment of legislation of this kind parliaments announce to the public at large what conduct they regard as inimical to the effective discharge of their functions.[20]

Campbell's comments are borne out by the experience of Council committees as will be seen from the discussion below. Our committees rarely confront significant resistance from witnesses who have been requested or summoned to appear at a hearing, with the exception of witnesses summoned to appear before the 2011 Gentrader Inquiry. In this case, several witnesses refused to respond to a summons because their legal advice suggested that their evidence would not be protected by parliamentary privilege because Parliament was prorogued.[21]

While codifying the power of committees to order State papers would put the existence of this power beyond doubt, any move to legislate in relation to the critically important field of parliamentary privilege needs to be approached with caution. Given the strong position of the Legislative Council to hold the executive government to account through the power of the House to order the production of State papers, as confirmed by the *Egan* cases, great care would need to be taken to ensure that any legislative formulation does not in any way, even

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18 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice,* (Federation Press, 2008), p 52.

19 General Purpose Standing Committee No 1, NSW Legislative Council*, Allegations of bullying in WorkCover*, (2014) p 179.

20 Enid Campbell, *Parliamentary Privilege,* (Federation Press, 2003), p 169.

21 General Purpose Standing Committee No 1, NSW Legislative Council, *The Gentrader transactions*, (2011), p 29.

inadvertently, circumscribe that important power. Any such legislation would need to be the subject of particularly careful scrutiny if developed by agencies within the executive government, which naturally have an interest in curtailing rather than confirming or expanding the powers of the Legislative Council and its committees.

Statutory secrecy provisions

Another area of recent disagreement between Legislative Council committees and the executive over committee powers concerns statutory secrecy provisions.

A number of Acts contain provisions that aim to prohibit the disclosure of particular information by making such a disclosure a criminal offence. So for example in NSW, such provisions can be found in our privacy legislation and in the Act regulating the Independent Commission Against Corruption. The position of the Legislative Council, the same as the Australian Senate and other Houses, is that these provisions have no application to Parliament, except by express enactment:

> Statutory provisions of this type … have no effect on the powers of the Houses and their committees to conduct inquiries, and do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees.
>
> The basis of this principle is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a House or a committee … It is also a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.[22]

It is well established at common law that statutes which limit or extend common law rights must be clearly expressed and unambiguous. The principal authority for this position is the decision of the House of Lords in *The Duke of Newcastle v Morris*, in which the Lord Chancellor, Lord Hatherley, observed:

> It seems to me that a more sound and reasonable interpretation of such an Act of Parliament would be, that the privilege which had been established by Common Law and recognised on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute … [23]

Recent legal opinion provided by the NSW Solicitor General and Ms Mitchelmore of Counsel to the NSW Department of Premier and Cabinet is relevant to this matter. This opinion observed that it is reasonably clear that authorities such as Odgers, the Commonwealth Attorney-General and Solicitor General, and Mr Bret Walker SC take the view that statutory non-disclosure provisions could only affect the powers of parliament by express reference or necessary implication. The New South Wales Solicitor General and Ms Mitchelmore went on to state that "We are inclined to agree that this view accords with the role of Parliament in a system of responsible and representative government, although the matter can hardly be free from

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22 Harry Evans (ed) *Odgers' Australian Senate Practice*, (Department of the Senate 13th ed 2012), p 66.
23 *The Duke of Newcastle v Morris* (1870) LR 4 HL 661 at 668.

doubt..."[24] (It should be noted that they do not acknowledge that this power is shared by committees).

It was refreshing to read this opinion, as the NSW Crown Solicitor has previously expressed a very different view, advising government agencies against disclosing information captured by secrecy provisions to parliamentary committees since at least 1988.[25]

Legislative Council committees have consequently been frustrated in their attempts to gain information on the grounds of statutory secrecy on several recent occasions, as discussed below.

Strike Force Emblems

Each year five standing committees of the Legislative Council, which are each responsible for a handful of government portfolio areas, conduct inquiries into the annual Budget Estimates. During a hearing in 2012 by one of these committees tasked with examining the Police portfolio, questions were raised regarding a strike force which had been established to investigate the illegal phone tapping of serving police officers several years before, known as *Strike Force Emblems*. One of the witnesses, a senior police officer, stated that she could not answer questions concerning the strike force because of secrecy provisions of the *Crime Commission Act 2012*. The committee held a deliberative meeting to consider the matter in private but not before the Chair informed the witness (and the media and public gallery) of the power of the committee to ask questions despite statutory secrecy provisions. The committee resolved that questions in relation to *Strike Force Emblems* be adjourned until a supplementary hearing in order to allow the witness and the committee time to obtain legal advice.

In the meantime, the Clerk obtained the advice of Mr Bret Walker SC who confirmed that a person bound by the secrecy provisions in the *Crime Commission Act 2012*, or the *Police Integrity Commission Act 1996* or any relevant provisions which go to confidentiality in the *Police Act 1990* would not be in breach of those provisions if that person disclosed information to a committee of the Legislative Council in answer to questioning by the committee, thus confirming earlier advice he had given on this subject in relation to a different statute in 2000.[26]

By the time of the supplementary hearing, a majority of the committee members had decided that it was no longer desirable to pursue the proposed line of questioning. Importantly, however, while the committee resolved to defer further consideration of the matter until the completion of a review of the taskforce by the NSW Ombudsman (which is still underway), it did so **'notwithstanding the power of the committee to compel answers to questions that would require the disclosure of information that may otherwise be caught by statutory secrecy provisions**.' [emphasis added][27]

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[24] The Solicitor General (Mr Sexton SC) and Ms Mitchelmore, 'Question of Powers of Legislative Council to Compel the Production of Documents from Executive', 9 April 2014, p 8.

[25] Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, (Federation Press, 2008), p 513.

[26] GPSC No 4, NSW Legislative Council, *Budget Estimates 2012-2013*, Report 26, (2012), pp1-2. The Committee's report includes as an Appendix two legal advices from Bret Walker SC, dated 24 October 2012 and 2 November 2000 dealing with the powers of committees to compel answers to questions despite statutory secrecy provisions in legislation.

[27] GPSC No 4, NSW Legislative Council, *Budget Estimates 2012-2013*, Report 26, (2012), p 46-47

Statutory secrecy and the WorkCover bullying inquiry

Similar objections were raised by WorkCover in response to requests for information during the WorkCover bullying inquiry cited earlier, noting Crown Solicitor's advice regarding non-disclosure provisions as grounds for refusing to provide certain information. Frustrated by what they perceived to be WorkCover's overly legalistic approach, GPSC No 1 sought advice concerning WorkCover's objections to providing information on the grounds of statutory secrecy. Members' attention was drawn to legislative reform in Queensland which addressed the impact of parliamentary privilege on statutory secrecy provisions.

In the late 1990s, during a period of significant constitutional reform in that state, the Legislative Assembly Members' Ethics and Parliamentary Privileges Committee noted several instances where the presumption in favour of parliamentary privilege, which has been established by 'high authority', had been challenged. The committee recommended amending the *Constitution Act 1867* to ensure the presumption was upheld by the courts.[28] Following further examination of this issue by the Legal, Constitutional and Administrative Review Committee,[29] a new provision (13B) was inserted into the *Acts Interpretation Act 1954* to enshrine the legal presumption in favour of the powers, rights and immunities of the Legislative Assembly:

> 13B Acts not to affect powers, rights or immunities of Legislative Assembly except by express provision
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> (1) An Act enacted after the commencement of this section affects the powers, rights or immunities of the Legislative Assembly or of its members or committees only so far as the Act expressly provides.
>
> (2) For subsection (1), an Act affects the powers, rights or immunities mentioned in the subsection if it abolishes any of the powers, rights or immunities or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.
>
> (3) In this section—
>
> *rights* includes privileges.

Section 13B of the Queensland legislation appears to be an accurate codification of the common law in NSW regarding the legal presumption in favour of the powers of the Legislative Council. While the merits and disadvantages of such a legislative response to these sorts of issues would need to be carefully considered before being pursued in NSW (as outlined above) the Queensland response is indicative of a parliament's determination to not acquiesce in challenges to its powers.

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[28] Queensland Legislative Assembly Members' Ethics and Parliamentary Privileges Committee Report 26, January 1999, pp19-20 http://www.parliament.qld.gov.au/documents/committees/ETHICS/1998/Powers-of-LA/Report26.pdf

[29] Legal, Constitutional and Administrative Review Committee, *Consolidation of the Queensland Constitution*, Report No 13, April 1999, p 18 9 (thank you to Neil Laurie, Clerk of the Parliament, Queensland Parliament, for referring us to this information.

Requiring the attendance of witnesses

Most witnesses who appear before Legislative Council committees do so by invitation: a summons is only issued where a witness has declined an invitation and the committee feels that their evidence is important to its inquiry.

The power to compel the attendance of witnesses is provided by the *Parliamentary Evidence Act 1901*. Under the Act, any person, except a member of Parliament, may be summoned to give evidence before a committee. If a witness who has received a summons refuses to appear without just cause or reasonable excuse, they can be apprehended under a warrant issued by a judge of the Supreme Court resulting in forced appearance before a committee, remand or discharge of the summons by order of the President.[30] The issuing of a summons, an exercise of significant coercive power, should only occur after careful consideration of the repercussions and alternatives:

> … such as whether the information can be obtained from another witness or by other means, whether the witness's non-attendance will diminish the quality of the evidence obtained by the committee and the political ramifications of summoning a witness, particularly if the witness is a public officer or ministerial adviser.[31]

The following section discusses recent examples of Legislative Council committees requiring and securing the attendance of reluctant witnesses.

Summoning ministerial advisors to the Orange Grove inquiry

From time to time it has been asserted that there is a convention that ministerial advisors should not be required to appear before parliamentary committees.[32] In NSW the convention has been asserted but not accepted, as the following example shows.

During the 2004 Orange Grove inquiry,[33] ministerial staff including the Premier's Chief of Staff, appeared before the committee voluntarily. However, Michael Meagher, the Chief of Staff to the Assistant Planning Minister, subsequently declined the committee's invitation to appear because his Minister had not authorised his appearance. The committee decided that they wished to hear from Mr Meagher and resolved to again invite him to appear. Mr Meagher again declined to appear.

The committee then summoned Mr Meagher under the *Parliamentary Evidence Act 1901*. This was the first time a ministerial staff member had been served with a summons to appear before a parliamentary committee since the formation of the standing committees in the Council in 1988. In response to the summons, Mr Meagher appeared before the committee on 30 August 2004. The committee subsequently invited other ministerial staff to appear before it following Mr Meagher's appearance. All attended voluntarily, including Peter Fraser, the Chief of Staff to the former leader of the Opposition, Mr John Brogden.

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30 *Parliamentary Evidence Act 1901* ss 7 and 8.

31 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, (Federation Press, 2008).

32 See, for example, *Odgers' Australian Senate Practice*, (Department of the Senate, 13th ed, 2012), p 547.

33 A comprehensive discussion of this issue can be found in Chapter 1, General Purpose Standing Committee No 4, NSW Legislative Council *The Designer Outlets Centre, Liverpool*, (2004).

Compelling the attendance of private individuals

Most information of interest to committees, at least most information where there is some resistance to production, is in the hands of executive government agencies. However, from time to time, important information, which may be essential for the purposes of an inquiry, may be held by a private individual or corporation. The following examples illustrate the means recently utilised by Legislative Council committees to exert leverage to obtain non-government information.

In 2009 General Purpose Standing Committee No 4 (GPSC No 4) commenced an inquiry into allegations that property developers and professional lobbyists had exerted undue influence on planning decisions for land at Badgerys Creek (an area of land south west of Sydney that had been talked about as Sydney's second airport for many years). The committee tabled its first and substantive report in November 2009, but tabled a second report a few months later.[34] The need for a second report was triggered by one of the inquiry witnesses, former Senator and high profile political commentator Graham Richardson, failing to respond in writing to questions submitted after his evidence at the committee's hearing.

On 11 November 2009 the committee Chair wrote to Mr Richardson to request that he answer the questions on notice by 19 November 2009. In this letter, Mr Richardson was advised that should he decline to answer the questions on notice, the committee would consider whether to issue him with a summons under section 4 of the *Parliamentary Evidence Act 1901* (NSW) to attend a hearing to give further evidence.

Mr Richardson provided an interim response to the questions placed on notice on 16 November 2009 and questioned the authority under which the committee was acting. The committee Chair responded to Mr Richardson the same day detailing the committee's powers to seek answers to questions on notice.

The committee met in November 2009 to consider the Chair's draft report and to deal with Mr Richardson's outstanding answers to the questions on notice. The committee was of the view that the answers to the questions asked of Mr Richardson may have added to or changed the outcomes of the inquiry and that the failure to respond made it problematic for the committee to complete the task given to it by the House. The committee therefore resolved to table a substantive report on 20 November 2009 and advise the House that the committee required additional time to follow up on this outstanding issue.

The committee subsequently invited Mr Richardson to attend a hearing in December 2009 and answer questions from the committee. Mr Richardson agreed to appear voluntarily and answered members' questions accordingly.

Similarly, in 2010 a Select Committee on the NSW Taxi industry wished to obtain certain information from the Chairman and CEO of the largest taxi car operator in NSW, Cabcharge,

[34] General Purpose Standing Committee No 4, NSW Legislative Council, *Badgery's Creek land dealings and planning decisions*, First Report, (2009) and Second Report, (2010).

Mr Reg Kermode. Mr Kermode was reluctant to attend and there was a lengthy exchange of difficult correspondence between the committee and Cabcharge and its lawyers. Ultimately, and following much deliberation, the committee resolved to indicate to Mr Kermode that should he not accept the committee's further invitation to attend to give evidence, a summons would be issued to require his attendance. Following a further exchange of correspondence, Mr Kermode did indeed appear as a witness, without the committee issuing a summons.[35]

Common to both of these examples was a determination on the part of the two Committees to not acquiesce to direct challenges to the committee's power to require the attendance of witnesses and the provision of answers to questions. It helped that, in both cases, the relevant information was clearly central to the committees' inquiries and that the existence of the power relied upon, summonsing (or threatening to summons) witnesses to appear, was beyond doubt due to its clear, statutory basis.

Conclusion - responding to executive recalcitrance

While Legislative Council committees have successfully asserted their inquiry powers over recent years, they have also met with significant resistance on occasions. How should committees in the Legislative Council and elsewhere respond to further attempts by the executive to reject their requests for information? Bret Walker SC would probably suggest that these committees keep doing what they have been doing, by being "creative" and exercising "civilised restraint". Council committees are doing this by:

- seeking to use their powers judiciously, only exercising formal powers where the information sought is essential to the inquiry, and the information has first been sought through request (more often than not repeated),
- relying where possible on those powers that are beyond doubt (eg the statutory power to summons witnesses and require answers to lawful questions),
- where the relevant power is contested, never acquiescing to challenges to the existence of the power, but finding creative solutions to obtain the necessary information.

Furthermore, committees should continue to ensure there is a strong and clear record of their resolutions in appropriate terms, which continue to assert the existence of their powers, such as:

- the resolutions of the Legislative Council establishing the standing committees in each new Parliament from 1988 until 2004 providing that committees have the power to 'send for and examine persons, papers records and things,'
- those same powers being provided for in the Standing Orders since 2004,
- calling for and receiving documents from the executive government in response committee orders for papers on several occasions between 1999-2001,
- where Committees since that time have resorted to orders for papers through the House to order the production of documents, including in the resolutions of the House a

[35] Select Committee on the NSW Taxi Industry, NSW Legislative Council*, Inquiry into the NSW Taxi industry*, (2010), minutes of proceedings, pp 250, 254.

statement that the information is on the particular occasion being sought through the House 'notwithstanding the relevant committee inquiry and power of the committee to order the production of documents,'

- asserting the power of committees to seek documents or to ask questions that may disclose information covered by statutory secrecy provisions in committee reports, correspondence and statements from the chair, and where it is decided not to exercise those powers in the particular circumstances including in resolutions of the committee and statements from the chair that this decision has been taken 'notwithstanding the power of the committee to compel answers to such questions despite the existence of statutory secrecy provisions in legislation,'
- asserting the power to call ministerial advisers as witnesses, in the face of a claimed convention to the contrary, and
- asserting the powers of Legislative Council committees to operate during prorogation.

The impact and influence, over time, of a body of precedent and resolutions asserting the Legislative Council's view of its powers and those of its committees should not be under-estimated. Responding to a question about the appropriate response to continued assertions about a wide exemption from the requirement to produce Cabinet documents to the House in response to orders for papers, Bret Walker SC last year advised:

> Perhaps the only thing at the moment—but certainly the first thing to be done at the moment—is that the Council and thoughtful individual members of the Council, as well as the Council speaking collegiately, ought to say, "We note that the return is deficient in this fashion; we deplore the deficiency; we maintain that *Egan v. Chadwick* is wrong, and we move on." Fifty years from now, somebody occupying a temporary position, as I had when I was senior counsel for the President in *Egan v. Willis* and *Egan v. Chadwick*, will put together all of those statements, add what Chief Justice Gleeson said about the way in which one understands the extent of powers and, I hope, will then opine, in the circumstances that then obtain that: "It may have taken a long time, but the statement of position by the Legislative Council, long made, now ought to be recognised as the true state of affairs." And that is because the way in which the law is made in this area is not as it is for any other area with which I am familiar. So it is partly what you do but what you do also includes what you say. And as I say, I was reminded of the statements made from time to time between about 1865 and 1875 to the effect of individual members deploring Executive recalcitrance to calls for production of papers. They were useful, I think. The fact that there was a contest between two Houses is in the nature of things. Judges like Murray Gleeson would never be put off that. They would say, "Well, this is the way these things evolve." So I am sorry, I think my best advice to you is to say what you think the position is. Because it is a House of Parliament, what is, shades imperceptibly into what should be. You have powers of creativity.[36]

In a similar vein McKay and Johnson also suggest there is merit in developing a clear statement of the parliamentary view of committee powers:

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[36] Bret Walker SC, Keynote address. Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, (20 September 2013), p 14.

> Wide – but in the last resort unenforceable-committee powers, matched by an equally wide variation in the degree of official cooperation is never likely to produce concord. If a common authoritative interpretation of the scope of committee power to send for 'persons, papers and records' cannot be devised, perhaps a reasoned ex parte statement of the parliamentary view, codifying the many precedents and expedients to which experience has given rise, might be a useful and practical means of ensuring that governments can be held to their own best practice and cannot retreat from it, however tight the corner.[37]

How powerful and useful would such a statement be from and on behalf of not just one House of Parliament, but from a range of parliamentary institutions with a shared heritage and common interest in asserting their powers in the interests of parliamentary democracy?

Postscript

GPSC No 1 tabled its report into allegations of bullying in WorkCover just a few days ago, on 19 June. The committee resolved to place a number of procedural issues arising from the inquiry before the Chairs' Committee (an informal committee consisting of the Chairs of all Legislative Council committees, chaired and convened by the President of the Legislative Council). This includes ways to educate witnesses on their duty to cooperate with requests for information from committees and how to prevent government agencies from refusing to comply with committee orders for papers. The committee also resolved to conduct a follow-up inquiry before the end of 2014 to test the extent to which WorkCover has implemented its recommendations and its commitment to a new and improved workplace culture. It will be interesting to see whether WorkCover adopts a less hostile and more co-operative approach next time around.

[37] William McKay and Charles Johnson, *Parliament and Congress, Representation & Scrutiny in the twenty-first century*, (Oxford University Press, 2010), pp 334-335.