

No. 462



SOUTH WALES
LEGISLATIVE COUNCIL

PARLIAMENT OF NEW

STANDING COMMITTEE ON
PARLIAMENTARY PRIVILEGE AND ETHICS

REPORT

ON

INQUIRY ARISING FROM
SPECIAL REPORT OF
ESTIMATES COMMITTEE NO.1

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Standing Committee on Parliamentary Privilege and Ethics, Report No.4

Foreword by the Chair

The matter which is the subject of this inquiry arose during the examination of the Financial Controller of the NSW Parliament at the Legislative Council Estimates Committee hearing on the Legislature in June 1996. At that hearing, the Financial Controller, an officer employed to provide financial and accounting services for the Parliament, refused to provide direct answers to questions from the Estimates Committee. This action was taken at the direction of the Speaker of the Legislative Assembly, who claimed that the Financial Controller is an “officer of the Legislative Assembly”. Following the Estimates Committee hearing, a Special Report from the Estimates Committee was presented to the Legislative Council which drew the attention of the House to the question of whether the Financial Controller’s actions should be referred to this Committee for inquiry and report. The House resolved to refer the Special Report to this Committee on 19 June 1996.

During the course of this inquiry the Committee examined the principles which restrict the right of one House of Parliament to examine officers of the other, and took account of the need for comity and courtesy between the Houses which underlies these principles. However, having studied the development of the office of Financial Controller within the NSW Parliament and the functions which that office performs, the Committee concluded that the Financial Controller is not an officer of the Legislative Assembly solely but an officer of both Houses jointly. Accordingly, in the Committee’s view, the Financial Controller like any other witness is subject to the powers conferred on Legislative Council Committees to summons and examine witnesses, whether such powers are conferred by resolution of the House or by statute.

The Committee also examined the powers of the Legislative Council under the *Parliamentary Evidence Act 1901* to deal with witnesses for contempt, in particular the powers conferred by s. 11 of that Act to sanction witnesses who refuse to answer questions. However, the Committee considered that, in the present case, it would not be appropriate to invoke such powers against the Financial Controller, given that the Estimates Committee did receive answers to its questions (though indirectly), and given that the Financial Controller was directed by the Presiding Officer to act as he did. Therefore, while the Report affirms the status of the Financial Controller as a joint officer within the Parliament, it recommends that no further action be taken in this case.

As Committee Chair, I wish to acknowledge the co-operation and contributions of the Members of the Legislative Council who served on the Committee.

The Committee would like to thank the Clerk to the Committee and Deputy Clerk of the Legislative Council, Ms Lynn Lovelock, the Senior Project Officer, Ms Velia Mignacca, and the Administrative Assistant—Projects in the Office of the Clerk of the Parliament, Ms Juliet Adriaanse.

**The Hon Dr Meredith Burgmann MLC
Chair
Standing Committee on Parliamentary Privilege and Ethics**

Background to the Committee

The Committee was first established as the Standing Committee Upon Parliamentary Privilege by resolution of the Legislative Council on 9 November 1988. It was re-established under the 50th Parliament on 16 October 1991. On 24 May 1995 at the commencement of the 51st Parliament the Committee was reconstituted as the Standing Committee on Parliamentary Privilege and Ethics.

The Committee has two main roles:

- (1) to consider and report on any matters relating to parliamentary privilege which may be referred to it by the House or the President; and
- (2) to carry out certain functions relating to ethical standards for Members of the Legislative Council under Part 7A of the *Independent Commission Against Corruption Act 1988 (NSW)*.

Terms of Reference

The Terms of Reference for the Inquiry are contained in the following Resolution of the Legislative Council, passed on 19 June 1996:

That the Special Report of Estimates Committee No.1, on a possible contempt of the Committee, be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report.

(Minutes No. 23, Wednesday 19 June 1996, Entry no. 3)

The Special report of Estimates Committee No.1 outlined the circumstances giving rise to the Inquiry and requested this Committee to report on specific matters.

Estimates Committee No.1 of the Legislative Council to which was referred, on 30 April 1996, the 1996/97 budget estimates for the Legislature, resolved at a deliberative meeting on 6 June 1996 that a Special Report be presented to the House in order that the House may decide whether the Standing Committee on Parliamentary Privilege and Ethics be requested to report on what action should be taken by the House in relation to the actions of the Financial Controller of the New South Wales Parliament who refused to directly answer questions of the Committee on an instruction from the Speaker of the Legislative Assembly.

(Special Report of Estimates Committee No.1, 17 June 1996)

Committee Membership

The Hon Dr Meredith Burgmann, MLC Australian Labor Party
Chair

The Hon Jenny Gardiner, MLC National Party

The Hon Charlie Lynn, MLC Liberal Party

The Hon John Johnson, MLC Australian Labor Party

The Hon Richard Jones, MLC

The Hon Andrew Manson, MLC Australian Labor Party

The Hon Bryan Vaughan, MLC Australian Labor Party

SECRETARIAT

Ms Lynn Lovelock Clerk to the Committee

Ms Velia Mignacca Project Officer

Ms Juliet Adriaanse Committee Officer

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STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS
INQUIRY ARISING FROM SPECIAL REPORT OF ESTIMATES COMMITTEE NO. 1

Appendices:

- Appendix 1** Minutes of meeting of Estimates Committee No. 1, 30 May 1996.
- Appendix 2** Transcript of meeting of Estimates Committee No. 1, 30 May 1996.
- Appendix 3** *Special Report on a Possible Contempt of the Committee*, NSW Legislative Council Estimates Committee No.1, June 1996. Includes:
- (a) Extract from Minutes of meeting of Estimates Committee No. 1 on 6 June 1996 (Attachment 1 to the *Special Report*);
 - (b) Transcript of supplementary meeting of Estimates Committee No. 1, 6 June 1996 (Attachment 2 to the *Special Report*).
- Appendix 4** Chronology summarising the development of the office of the Financial Controller /Parliamentary Accountant
- Appendix 5** Minutes of the Proceedings

Chapter One

1. BACKGROUND TO THE INQUIRY

1.1 ESTIMATES COMMITTEES IN THE NSW PARLIAMENT

To place the current inquiry in context it is necessary to examine briefly the history of the establishment of Estimates Committees in the New South Wales Parliament.

1.1.1 Appointment of Estimates Committees 1991 - 1996

Estimates Committees have been established each year in the NSW Parliament since 1991. From 1991 to 1994, the Estimates Committees were joint committees (ie appointed by and comprising Members from both Houses).

In 1995, following negotiations between the Government, Opposition and crossbench Members in the Legislative Council, the Legislative Council agreed to the creation of Legislative Council Estimates Committees, comprising Council Members only.¹ In 1996, Legislative Council Estimates Committees were once again appointed although in that year the appointment was opposed by the Government in the Legislative Council.²

Following the establishment of the Estimates Committees in 1996, a message was received in the Legislative Council from the Legislative Assembly requesting the establishment of joint Estimates Committees.³ This request was claimed to be based on s. 5 of the *Constitution Act 1902 (NSW)*, which provides that appropriation bills must originate in the Legislative Assembly.⁴

¹ *Minutes*, No. 16, 17 October 1995, pp. 217 - 220; *Parliamentary Debates* (Legislative Council), 17 October 1995, pp. 1761 - 17.

² *Minutes* No. 6, Tuesday 30 April 1996, pp. 81 - 95; *Parliamentary Debates* (Legislative Council) pp. 492 - 502.

³ *Minutes* No. 10, Wednesday 15 May 1996, p. 138.

⁴ *ibid.*

In response, the Legislative Council forwarded a message to the Assembly disagreeing with this request on various grounds including:

- (a) the Legislative Council, as a House of review, has a right and duty to examine and review all aspects of the operations of the Executive Government; and
- (b) the Executive Government is equally accountable to the people of New South Wales through the Legislative Council, notwithstanding the limitations of section 5 of the *Constitution Act*.⁵

One notable difference between the Estimates Committees established in 1995 and 1996 was the composition of the committees. In 1995, each committee consisted of eight Members, being four Government, two Opposition, and two crossbench Members (4:2:2). This composition, together with the casting vote of the Government appointed Chair, ensured that the Government controlled a majority of votes in each committee. However, in 1996, the composition of the Committees changed to three Government, three Opposition, and two cross bench (3:3:2).

1.1.2 Attendance of Financial Controller at Estimates Committees 1991 - 1995

At the joint Estimates Committee hearings on the Legislature in the years 1991-94, the Financial Controller and the managers of the other parliamentary departments and sections attended in the capacity of advisors to the Presiding Officers.⁶ The Financial Controller did not attend the Legislative Council Estimates Committee hearing in 1995, having been instructed by the Speaker not to attend on the ground that the Speaker considered him to be “an officer of the Legislative Assembly”.⁷

1.2 Resolution establishing Estimates Committees in 1996

⁵ *Minutes* No. 11, Thursday 16 May 1996, p. 147 - 148.

⁶ Reports of the Estimates Committees on The Legislature, 1991 - 1994, List of advisors.

⁷ *Parliamentary Debates* (Legislative Council Estimates Committee No. 1), 26 October 1995, p. 2496.

Three Estimates Committees were established by resolution of the Legislative Council on 30 April 1996.⁸ Paragraph 1 of the resolution provided for the allocation of Ministerial portfolio areas among each of the three Committees.⁹ The Legislature, as a program within the Budget, was allocated to Estimates Committee No. 1.¹⁰

The resolution establishing the Estimates Committees conferred certain powers on those committees, which included:

8. The Committees have power to send for and examine persons, papers, records and things.

...

12. In an Estimates Committee:

...

(b) the Members may ask for explanations from Ministers, or officers of any department of Government, Statutory body or Corporation, relating to each program area, or where possible, proposed income or expenditure or other relevant matter in each program area; ...

1.3 Proceedings before Legislative Council Estimates Committee No. 1

1.3.1 30 May 1996

⁸ *Minutes* No. 6, Tuesday 30 April 1996, pp. 81 - 95.

⁹ *ibid*, p. 91.

¹⁰ *ibid*, p. 91, para. (1)(a).

Legislative Council Estimates Committee No. 1 met on 30 May 1996 to examine the budget estimates for the Legislature. The President of the Legislative Council appeared before the Committee at the hearing, accompanied by various advisors. These advisors included the Clerk of the Parliaments, and the heads of the parliamentary sections and departments which provide services to the Members of both Houses.¹¹ The only section head not present at the hearing was the Financial Controller, the manager of the parliamentary Accounts section. This section provides financial and accounting services to the Members of both the Legislative Council and the Legislative Assembly, as well as to all branches of the parliamentary administration.

At the commencement of the Estimates Committee hearing, after various formal matters had been attended to, the Chair of the Committee reported that she had received correspondence from the Financial Controller indicating that he had been directed by the Speaker of the Legislative Assembly not to attend the hearing.¹² A copy of the Speaker's direction to the Financial Controller was enclosed with the letter. The terms of the direction were as follows:

¹¹ Minutes of Estimates Committee No. 1, 30 May 1996, p. 7.

¹² *Parliamentary Debates* (Legislative Council Estimates Committee No. 1), 30 May 1996, p. 2.

I have to advise that unless the Legislative Assembly otherwise resolves, as an Officer of the Legislative Assembly I direct that you do not attend the hearings of the Estimates Committee on “The Legislature” to be held on Thursday 31 May, 1996 between 7.30 p.m. and 9.30 p.m.¹³

This matter was discussed in the Committee and a motion was moved for the Financial Controller to be summonsed to appear before the Committee that evening.¹⁴ Certain Members of the Committee spoke in support of the motion, arguing that the Financial Controller is an officer who jointly services both Houses¹⁵ and is responsible for the administration of the financial accounts of both Houses.¹⁶ The motion was carried, and the Committee adjourned briefly to enable the summons to be served. However, when the meeting resumed, the Chair reported that it had not been possible to serve the summons as the Financial Controller was not within the premises of the Parliament.¹⁷

The Committee proceeded to examine the budget estimates. During the course of the hearing, the President answered questions from the Committee concerning a range of matters relating to the estimates. However, in relation to two groups of questions (one concerning the resources necessary for meeting occupational health and safety standards;¹⁸ the other concerning the costs of

¹³ *ibid.*

¹⁴ *ibid.*, pp. 2 - 5.

¹⁵ *ibid.*, p. 3.

¹⁶ *ibid.*

¹⁷ *ibid.*, p. 5.

¹⁸ *ibid.*, p. 7.

workers compensation¹⁹) the President indicated that he was unable to provide an answer without expert financial advice.²⁰ Those questions were placed on notice at the hearing.

At the conclusion of the meeting, the Committee adjourned to a date and time to be advised and resolved that the Financial Controller be summonsed to attend before it at that future meeting.

1.3.2 Correspondence incorporated

In response to a question from a member of the Committee during the meeting, the President by leave incorporated into the record a series of correspondence concerning the attendance of the Financial Controller before the Committee. The various items of correspondence are reproduced in full in the Hansard record of the day's proceedings (see Appendix 2, pp. 9-10), but may be briefly summarised as follows:

- (1) Letter from the President to the Financial Controller dated 28 May 1996 requiring the attendance of the Financial Controller at the hearing to assist in the answering of questions relating to the Legislative Council and joint sections and departments which support the Legislative Council.
- (2) Letter from the Speaker to the Financial Controller dated 28 May 1996 directing the Financial Controller not to attend the Estimates Committee hearing.
- (3) Memorandum from the Clerk of the Legislative Assembly to departmental heads dated 29 May 1997 requiring that information concerning the Legislative Assembly not be provided at the Legislative Council Estimates Committee hearing.
- (4) Letter from the Financial Controller to the President dated 30 May 1996 informing the President of the Speaker's direction.

¹⁹ *ibid*, pp. 13-14.

²⁰ *ibid*, p. 7; p. 14.

- (5) Letter from the President to the Speaker dated 30 May 1996 confirming the President's requirement for the attendance of the Financial Controller and addressing the Speaker's claim that the Financial Controller should not attend.
- (6) Memorandum from the President to the Financial Controller dated 30 May 1996 directing the Financial Controller to attend the hearing as the Financial Controller "[is] a joint services employee" and "ha[s] possession of all the financial records of the Legislative Council".

1.3.3 Supplementary Meeting: 6 June 1996

The supplementary meeting of the Committee was held on 6 June 1996. The Financial Controller duly appeared before the Committee at that meeting in response to a summons issued by the Chair under the *Parliamentary Evidence Act 1901 (NSW)*. However, when questioned by a member of the Committee, the Financial Controller stated that he had been directed by the Speaker only to advise the President at the hearing, or alternatively, to take questions on notice and respond subsequently in writing.²¹

The Committee continued its consideration of the budget estimates by questioning the President and the Financial Controller in this manner. Where questions were directed to the Financial Controller, he either advised the President of the answer, or took the question on notice.

At the conclusion of the meeting, the Committee resolved that a Special Report be presented to the House concerning the Financial Controller's refusal to directly answer questions on instruction from the Speaker.²² It also resolved that the House be requested to refer to the Standing Committee on Parliamentary Privilege and Ethics the question of what action should be taken by the House in relation to the actions of "an employee of the Parliament who refuses to answer a question of a committee of the House on an instruction from the Speaker."²³

1.4 Referral of current inquiry to the Committee

The Special Report of Estimates Committee No. 1 was tabled in the Legislative

²¹ *Parliamentary Debates* (Legislative Council Estimates Committee No. 1), 6 June 1996, p. 2.

²² *Special Report on a Possible Contempt of the Committee*, Estimates Committee No. 1, June 1996, Attachment 1 to the Special Report (Extract from the Minutes of the supplementary meeting).

²³ *ibid.*

Council on 18 June 1996 (*Special Report on a Possible Contempt of the Committee* (copy at Appendix 3)). The Special Report referred the matter to the House for determination as to whether the Standing Committee on Parliamentary Privilege and Ethics should be requested to report on:

what action should be taken by the House in relation to the actions of the Financial Controller of the New South Wales Parliament who refused to directly answer questions of the Committee on an instruction from the Speaker of the Legislative Assembly.

On 19 June 1996, the Legislative Council by resolution referred the Special Report to this Committee for inquiry and report.²⁴

Chapter Two

2. ISSUES

2.0 Purpose of this inquiry

As indicated in Chapter 1, the purpose of the current inquiry is to inquire into and report on -

²⁴

Minutes No. 23, 19 June 1996, p. 228.

what action should be taken by the House in relation to the actions of the Financial Controller of the New South Wales Parliament who refused to directly answer questions of the Committee on an instruction from the Speaker of the Legislative Assembly.²⁵

The terms of reference as framed do not specifically require the Committee to address the question of contempt, however that question is raised by the title of the Special Report (*Special Report on a Possible Contempt of the Committee*).

Before determining what action should be taken in relation to this matter, it is necessary to examine certain issues concerning the powers of the Legislative Council and the status of the Financial Controller within the NSW Parliament. These issues are:

- (1) limitations on the powers of Legislative Council committees to examine “officers” of the other House;
- (2) powers to deal with contempt;
- (3) whether the Financial Controller is an officer of the Legislative Assembly.

2.1 “Officers” of the other House

As discussed in Chapter 1, the reason given by the Speaker for directing the Financial Controller as to the manner in which questions should be answered at the Estimates Committee hearing was that the Speaker considered the Financial Controller to be “an officer of the Legislative Assembly”. The examination of officers of one House by committees of the other is the subject of Legislative Assembly Standing Order 368 and rules of parliamentary procedure.

2.1.1 Standing Order 368

At the time of the events which led to this inquiry Legislative Assembly Standing Order 368 provided:

If the Council or one of its committees wishes to examine a Member or officer of the Assembly, the House may authorise the Member to attend if the Member agrees. The House may order an officer to attend.

On 25 September 1996 Standing Order 368 was amended by resolution of the

²⁵

Special Report on a Possible Contempt of the Committee, Estimates Committee No. 1, June 1996, p. 1.

Legislative Assembly by the addition of the following sentence -

An officer means a member of staff employed solely by the Speaker.²⁶

2.1.2 Practice and procedure

Standing Order 368 reflects the rules of parliamentary procedure. According to *Erskine May's Parliamentary Practice*, the procedure observed by the Houses at Westminster is as follows:

If either House wishes to examine any officer of the other House either before the House itself or before any select committee, a message requesting his attendance must be sent to the other House and leave given by it. When leave is given, the words "if he thinks fit" which are used in the case of Members are omitted from the message in reply.²⁷

Several examples of the application of this principle are provided by *Erskine May*, where one House has sought the leave of the other House prior to examining an officer of that House.²⁸

²⁶ *Votes and Proceedings*, 25 September 1996, p. 437.

²⁷ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st edn., Butterworths, London, 1989, p. 677.

²⁸ *ibid*, footnote 3.

A similar principle concerning the examination of “officers” of the other House applies under the Standing Orders of both Houses of the Australian Federal Parliament.²⁹ According to *Odgers’ Australian Senate Practice*, the rationale for this principle is the need for comity and courtesy between the Houses³⁰ and respect for the equality of the powers of both Houses.³¹ As the Houses are equally powerful in relation to the summoning of witnesses, it is desirable that this rule be complied with to avoid conflict and deadlock between the Houses.³²

2.1.3 Interrelation with *Parliamentary Evidence Act*

The principles under the Legislative Assembly Standing Order 368 and parliamentary practice outlined above would apply to Legislative Council committees examining witnesses under powers conferred by resolution of the House.³³ However, they would not override the express terms of a statutory provision conferring broad powers to examine witnesses such as s. 4 of the *Parliamentary Evidence Act*, the provision under which the Financial Controller was summonsed in the present case. This section provides -

4 (1) Any person not being a Member of the Council or Assembly

²⁹ *Odgers’ Australian Senate Practice*, 7th edn., Australian Government Publishing Service, Canberra, 1995, p, 443.

³⁰ *ibid*, p. 51.

³¹ *ibid*, p. 444.

³² *ibid*, p. 51.

³³ Such as the power to “send for and examine persons” conferred by paragraph 8 of the resolution of the Legislative Council establishing the Estimates Committees (*Minutes* No. 6, Tuesday 30 April 1996, p. 92.)

- (2) ... may be summoned to attend and give evidence before a committee of the Council or Assembly.

In relation to this section, the President of the Legislative Council commented during evidence before the Estimates Committee and in correspondence to the Speaker -

The terms of this section authorise a committee to summons "any person" which would include even the Clerks at the Table and officers of the House, and the only persons not covered by that section are in fact Members of the Parliament who would of course require an authorising resolution of the relevant House.³⁴

³⁴

Parliamentary Debates (Legislative Council Estimates Committee No. 1), 30 May 1996, p. 9.

The President expressed the opinion that the terms of the *Parliamentary Evidence Act* would “override subordinate legislation such as Standing Orders”.³⁵

2.2 Powers to deal with contempt

2.2.1 Powers under the *Parliamentary Evidence Act*

Section 11 of the *Parliamentary Evidence Act* provides that a witness before a parliamentary committee who “refuses to answer any lawful question” during examination is deemed guilty of contempt of Parliament. Subsection 1 states:

11(1) If any witness refuses to answer any lawful question during his examination, he shall be deemed guilty of contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or sergeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be.

In the present case, the Financial Controller did not refuse to answer questions from the Committee, but, on instruction from the Speaker, would only answer questions indirectly, by advising the President or by taking questions on notice and responding subsequently in writing. Whether this amounted to a “refusal to answer” within the terms of s. 11 is open to debate. There are no precedents directly relevant to the interpretation of the phrase occurring in the *Parliamentary Evidence Act*. Judicial precedents concerning the meaning of the phrase as it appears in other statutes have generally involved witnesses refusing *outright* to answer, or refusing by prevarication (e.g. fabricating answers).³⁶ Cases involving recalcitrant witnesses before committees or Houses of other Parliaments have also not been directly comparable to the present case, as they have typically involved witnesses refusing outright to answer questions, or giving false or misleading evidence.³⁷

³⁵ *ibid.*

³⁶ E.g. *Coward v Stapleton* (1953) 90 CLR 573; *Keeley v Mr Justice Brooking* (1979) 143 CLR 162.

³⁷ (House of Commons) Erskine May, *op. cit.* p. 116; (Senate) Anne Lynch and Barbara Allan, “Privilege and the Australian Senate; a brief history”, *The Table*, Vol 64, 1996.

Aside from the legal questions concerning the application of s. 11 in this case, there is the question of the appropriateness of invoking such powers in this matter, given that:

- (a) the Estimates Committee did receive answers to its questions, though in an indirect form; and
- (b) the Financial Controller told the Estimates Committee that, were it not for the Speaker's instruction, he would willingly provide the information to the Committee.³⁸

In the Australian Senate, where public servants have refused to answer questions *on instructions* from the Minister, the Senate has been reluctant to make the public servant a scapegoat for the perceived improprieties of the Government, and has sought some means of resolving the matter other than by imposing sanctions on the officer concerned.³⁹

2.2.2 Inherent or implied powers to deal with contempt

In addition to the powers conferred by statute, the Legislative Council has certain inherent or implied powers to deal with persons who disobey its orders or the orders of its committees. As confirmed by the NSW Court of Appeal in *Egan v Willis & Cahill*,⁴⁰ the Legislative Council possesses such inherent or implied powers as are reasonably necessary to its existence and the proper exercise of its functions. Such powers do not extend to the power to punish for

³⁸ Transcript of proceedings of Estimates Committee No. 1, 6 June 1996, p. 3 (attachment to *Special Report on a Possible Contempt of the Committee*, Estimates Committee No. 1, see Annexure 3).

³⁹ Anne Lynch and Barbara Allan, "Privilege and the Australian Senate; a brief history", *The Table*, Vol 64, 1996, pp. 13, 21.

⁴⁰ Unreported decision, 29 November 1996.

contempt,⁴¹ but do embrace coercive powers in some circumstances where necessary to protect the House's procedures or integrity.⁴²

In circumstances where a witness has answered a committee's questions but only by indirect means, it is doubtful whether any coercive measures imposed by the House on that witness would be seen by a Court to fall within the scope of the common law principles, particularly when the witness's actions did not impede the Committee in the performance of its functions.

2.3 Is the Financial Controller an "officer of the Legislative Assembly"?

While the status of the Financial Controller does not affect the powers of the Legislative Council under the *Parliamentary Evidence Act*, it is nevertheless a question of some importance, as the ability of the Legislative Council to scrutinise and control its finances impacts on the independence of the House. To shed light on this question, the following issues are considered:

- (a) historical development of the office of Financial Controller;
- (b) accounting functions in other Australian bicameral Parliaments.

2.3.1 Development of the office of Financial Controller

The chronology set out in Appendix 4 summarises the development of the office of Parliamentary Accountant/Financial Controller within the parliamentary establishment. As indicated in that chronology, the Financial Controller has been referred to in official parliamentary correspondence as being attached to or employed by the Legislative Assembly. However, it is clear from the

⁴¹ *Fenton v Hampton* (1858) 11 Moo PC 347; *Barton v Taylor*, supra; *Willis and Christie v Perry* (1912) 13 CLR 592.

⁴² *Toohy v Melville* (1892) 13 NSWLR 132; *Armstrong v Budd* (1969) 71 SR (NSW) 386.

correspondence that this state of affairs has developed more from a tradition on the part of Presidents and Clerks of the Parliaments of considering the status of the Financial Controller from a perspective of administrative convenience only, and from a failure to perceive the issue as important in the context of the times, rather than from any consideration of principle or of the nature of the work which the Financial Controller actually performs.

There are strong arguments based on both principle and practice in favour of the view that the Financial Controller is a joint officer or employee of both Houses, in the same manner as the managers of the other seven joint service sections and departments. In principle, the accountability of financial and accounting staff to the Legislative Council is of critical significance for the maintenance of the sovereignty and independence of the Council. The fact that the Legislative Assembly has certain preeminence under s. 5 of the *Constitution Act* with respect to parliamentary appropriations does not alter this principle.

In practice, while certain minor accounting functions of a procedural nature are performed by staff in the Legislative Council (eg processing Council Members' accounts and claims prior to payment by the Accounts section) in fact the Accounts section undertakes the majority of accounting functions for the Members and staff of the Legislative Council, and for the sections and departments which service the Legislative Council jointly with the Legislative Assembly. These accounting functions include the preparation of budget estimates and the maintaining of financial records.

Both the previous President of the Legislative Council,⁴³ and the current President⁴⁴ have asserted that the Financial Controller/Parliamentary Accountant is responsible to the Legislative Council in matters pertaining to the Legislative Council, and to the Presiding Officers jointly in matters relating to joint services.

2.3.2 Financial and accounting functions in other Australian bicameral Parliaments

The status of financial and accounting staff in other bicameral Parliaments is a matter which does not often arise for consideration and which is not commonly documented in a readily accessible form. However, briefly, the position in Australia is as follows:

⁴³ President Johnson, Memorandum to the Speaker, 15 May 1989, p. 3; Memorandum to the Parliamentary Accountant, *Legislative Council Accounting Matters*, 19 May 1989.

⁴⁴ *Parliamentary Debates* (Legislative Council Estimates Committee No. 1) 26 October 1995, p. 2499; 30 May 1996, pp. 9, 10 (see Annexure 2).

Commonwealth Parliament

The Parliamentary administration comprises five separate Departments: the Department of the Senate, the Department of the House of Representatives, and three joint Departments (Library; Hansard; and Joint House). Each Department prepares its own estimates, and the estimates for their joint Departments are subject to the approval of both Presiding Officers.

Senate committees examine and report on the estimates for government agencies and the Parliament (except the Department of the House of Representatives). The Committee which reports on the Parliamentary estimates is the Senate Finance and Public Administration Legislation Committee. Officers from the joint Departments have appeared before the Committee.⁴⁵

Victoria

The functions of the parliamentary accountant or financial controller are performed by the Secretary to the Joint House Committee. Estimates Committees were established for the first time in the Victorian Parliament in 1996. These are joint committees.

South Australia

As in Victoria, the Secretary to the Joint House Committee performs accounting functions for all areas of the Parliament. The Secretary appears before *Legislative Assembly* Estimates Committees, and gives evidence in relation to joint services accounts as well as accounts of the Department of the Legislative Assembly.

Western Australia

⁴⁵ Eg, *Hansard*, Finance and Public Administration Legislation Committee, 16 September 1996, pp. 1, 2.

As in the Federal Parliament, there are five parliamentary Departments: two House Departments and three joint Departments (Hansard; Library; Joint House). There is a system of standing Estimates Committees of the Legislative Council, as well as Legislative Assembly Estimates Committees which are re-established each year. At the Legislative Council Estimates Committee hearing concerning the Parliamentary estimates in 1996, the Estimates Committee examined the estimates for the Department of the Legislative Council and the Joint House Department⁴⁶.

Tasmania

Each House Department prepares its own estimates. The joint service areas (Hansard, Printing services, Joint Committees, Catering) are managed by the Legislator-General. The Legislator-General appears before the Estimates Committees, which are *lower House* committees.

⁴⁶

Sixteenth Report of the Standing Committee of the Standing Committee on Estimates and Financial Operations in relation to the Estimates of Expenditure 1996/1997, 20 June 1996, p12.

Chapter Three

3. CONCLUSIONS AND RECOMMENDATIONS

3.1 Having considered the issues and circumstances surrounding the Financial Controller's attendance at Estimate's Committee No.1, the Committee believes that it would not be appropriate to recommend any action against the Financial Controller in this matter. Although he did refuse to directly answer the questions of the Committee, this refusal arose solely from an instruction from the Speaker of the Legislative Assembly. Further he indicated to Estimates Committee No.1 his willingness to provide answers indirectly, either through the President or in writing at a later date, as the circumstances required.

3.2 The Committee has also considered the claim of the Speaker of the Legislative Assembly that the Financial Controller is an officer of the Legislative Assembly, employed solely by the Speaker. The Committee considers that the evidence does not support this claim and that the current status of the Financial Controller is based purely on a series of administrative actions which occurred over a series of years under successive Presiding Officers and Clerks. It is apparent that the position, in common with other departmental and section heads, provides services to Members of both Houses and as such is and should be a joint position. Therefore the Committee finds:

3.3 Conclusions

1. That, in the case referred to the Committee, it is not appropriate to invoke against the Financial Controller of the NSW Parliament the contempt powers conferred on the Legislative Council by s. 11 of the *Parliamentary Evidence Act 1901* or the inherent or implied powers.
2. That the Financial Controller is a joint service officer of both the Legislative Council and the Legislative Assembly, not an officer of the Legislative Assembly as was claimed by the Speaker of the Legislative Assembly in his direction to the Financial Controller.

3.4 Recommendation

1. That, as the Financial Controller did not refuse to answer questions from Estimates Committee No. 1, and as the Special Report of Estimates Committee No. 1 has brought the Speaker's directions concerning the status of the Financial Controller to the attention of the House, no further action be taken in relation to this particular incident.

**Minutes of meeting of
Estimates Committee No.1 on
30 May 1996**

APPENDIX 2

**Transcript of meeting of
Estimates Committee No. 1 on
30 May 1996**

APPENDIX 3

***Special Report on a possible
contempt of the Committee***

**Estimates Committee No.1,
1 June 1996**

APPENDIX 4

Development of office of Financial Controller

- Chronology

APPENDIX 5

Minutes of the Proceedings

Proceedings of the Committee

Note:

At the time the Committee was conducting this inquiry, it was also inquiring into other unrelated matters. Those parts of the Minutes of the Meetings of the Committee which concern the other matters have been deleted from the Minutes appearing below.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No. 35

Monday 25 November 1996

at Parliament House, Sydney at 2.00 pm

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Ms Gardiner

Mr Lynn

Mr Jones

Mr Vaughan

Apologies were received from Mr Johnson and Mr Manson.

Minutes of meeting No. 34 were confirmed, on motion of Mr Vaughan.

The Committee deliberated.

Attendance of Financial Controller at Estimates Committees

Resolved, on motion of Mr Jones: That a position paper be prepared regarding the attendance of the Financial Controller at Estimates Committees.

The Committee adjourned at 2.50 pm, *sine die*.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No. 36

Friday 14 February 1997

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Mr Johnson
Mr Jones

Mr Lynn

Apologies were received from Ms Gardiner, Mr Manson and Mr Vaughan.

Minutes of meeting No. 35 were confirmed, on motion of Mr Lynn.

The Committee deliberated.

Attendance of Financial Controller at Estimates Committees

The Committee discussed various issues relevant to the inquiry.

The Committee adjourned at 11.45 am, sine die.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No. 37

Thursday 27 March 1997

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Ms Gardiner

Mr Vaughan

Apologies were received from Mr Jones, Mr Johnson, Mr Lynn, Mr Manson.

The Committee deliberated.

Attendance of Financial Controller at Estimates Committee

The Committee discussed certain issues raised in the Background Paper distributed to Members of the Committee concerning this inquiry.

The Committee adjourned at 10.45 am, *sine die*.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

MEETING No 39

Thursday 29 May 1997

at Parliament House, Sydney at 9.30am

MEMBERS PRESENT

Dr Burgmann (in the chair)

Ms Gardiner

Mr Johnson

Mr Jones

Mr Lynn

Mr Vaughan

Apologies were received from Mr Manson.

Minutes of previous meeting of 21 May 1997 were confirmed on the motion of Mr Vaughan.

CORRESPONDENCE RECEIVED:

Letter received from the Legislature of Newfoundland, Canada, acknowledging receipt of the report of this Committee titled 'Inquiry into the Establishment of a Draft Code of Conduct for Members', and enclosing copy of relevant legislation.

(21 April
1997)

PAPER TABLED:

Case note on *Rowley v. O'Chee*.

The Committee deliberated.

Resolved, on motion of Mr Jones: That the Chair prepare and submit a draft Report on the Inquiry Arising from Special Report of Estimates Committee No 1.

The Committee considered the draft Report on the Inquiry Arising from Special Report of Estimates Committee No 1.

Chapter 1 read, and agreed to.

Chapter 2 read, and agreed to.

Chapter 3 read.

Resolved, on motion of Mr Johnson: That paragraph 3.4.1 be amended by omitting the word 'matter' at the end of the paragraph, and inserting instead the words 'particular incident'.

Chapter 3, as amended, agreed to.

Resolved, on the motion of Mr Vaughan: That the Report be signed by the Chair and presented to the House in accordance with the resolution establishing the Committee.

Resolved, on the motion of Ms Gardiner: That the Report of the Inquiry Arising from the Special Report of Estimates Committee No 1 as amended, be adopted.

Resolved, on the motion of Mr Jones: That 300 copies of the Report be printed, on recycled paper if possible, after tabling.

The Committee adjourned at 10.00 am, *sine die*.