



LEGISLATIVE COUNCIL FACT SHEETS

FACT SHEET 3: PARLIAMENTARY PRIVILEGE

The term parliamentary privilege refers to two aspects of the law as it relates to parliament: the immunities of the Houses of Parliament, and the powers of the Houses of Parliament to protect their processes. Both the immunities and powers of Parliament are fundamental to enable it to perform its functions of representing the people, scrutinising the actions of the executive and reviewing and passing legislation. Of particular significance to the Legislative Council are those immunities and powers directly relevant to its scrutiny and legislative review functions, such as the right of free speech, the power to conduct inquiries and call witnesses, and the power to order the production of documents.

Importantly, parliamentary privilege belongs to the House itself, and is not the privilege of any individual member. In *Prebble v Television New Zealand Ltd* the Judicial Committee of the Privy Council stated that:

The privilege protected by Article 9 is the privilege of Parliament itself. The actions of any individual member, even if he has an individual privilege of his own, cannot determine whether or not the privilege of parliament is to apply ... The decision of an individual member cannot override the collective privilege of the House to be the sole judge of such matters.¹

Individual members of Parliament can claim privilege only to the extent that some action, proposed or otherwise, would impede them in carrying out their responsibilities and duties as a member of the House, or adversely affect the proper functioning of the House or a committee.

While parliamentary privilege gives members of Parliament immunities which exceed those possessed by other bodies or individuals, it was never intended to set them above the ordinary law. Members are subject to the criminal law, except in relation to freedom of speech and debates in the context of parliamentary proceedings.

It is for the courts to determine the existence, validity and extent of the powers and immunities of Parliament. However, it is for the Parliament to determine the occasion and manner of the exercise of those powers.²

Sources of parliamentary privilege in New South Wales

There is no statute in New South Wales defining the powers and privileges of the Houses of Parliament, in contrast to other Australian jurisdictions. In all other Australian jurisdictions, with the limited exception of Tasmania, the privileges of Parliament are determined either by reference to the powers and immunities of the British House of Commons or by specific statute, as in the case of the *Parliamentary Privileges Act 1987* (Cth).

¹ [1995] 1 AC 321 at 335.

² *Egan v Willis* (1998) 195 CLR 424 at 446; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

In New South Wales, the powers and immunities of Parliament are:

- derived from the common law, as implied by the common law principle of ‘reasonable necessity’;
- imported by the adoption of the *Bill of Rights 1689*;
- conferred by other legislation.³

The common law principle of ‘reasonable necessity’

In a series of cases in the nineteenth century, the Privy Council decided that the powers and privileges of the Houses of colonial legislatures were more limited in scope and content than those enjoyed by the Houses of the Westminster Parliament. In particular it was held that local legislatures did not possess the same inherent punitive powers as those of the Houses of the Westminster Parliament, but had only such powers of self-protection as were ‘reasonably necessary for the proper exercise of their functions and duties’.⁴

This common law test of ‘reasonable necessity’ continues to apply in New South Wales. However, what is reasonably necessary for the proper exercise of Parliament’s functions changes over time. As Wallace P observed in the New South Wales Supreme Court in *Armstrong v Budd*, the word ‘reasonable’ must be given an ambulatory meaning ‘to enable it to have sense and sensibility when applied’ to contemporary conditions:

[T]he critical question is to decide what is ‘reasonable’ under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists⁵

This was reaffirmed by the High Court in *Egan v Willis* when Gaudron, Gummow and Hayne JJ observed:

What is ‘reasonably necessary’ at any time for the ‘proper exercise’ of the functions of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.⁶

Kirby J amplified this somewhat:

Where, as in the case of the Houses of the New South Wales Parliament, no external reference point has been provided to identify and define the limits of the applicable privileges, the inquiry is even more at large than otherwise it would be. It involves identifying the functions of the House in question and then specifying, by reference to the [Commonwealth] Constitution, statute law and the common law of Parliaments, those powers essential to the existence of the

³ See the Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p 16.

⁴ *Kielley v Carson* (1842) 12 ER 225; *Barton v Taylor* (1886) 11 AC 197; see also *Willis and Christie v Perry* (1912) 13 CLR 592.

⁵ (1969) 71 SR (NSW) 386 at 402, approved in *Egan v Willis and Cabill* (1996) 40 NSWLR 650 at 664.

⁶ (1998) 195 CLR 424 at 454.

House as a chamber of Parliament, or at least reasonably necessary to the performance by that House of its functions as such. The powers which fit those criteria are not frozen in terms of the exposition of the powers of colonial legislatures, whether in Australia or elsewhere.⁷

In essence, the common law test is whether any particular power or immunity is reasonably necessary today, in its present form, for the effective functioning of the House.⁸

Importation of the Bill of Rights 1689

The *Bill of Rights 1689* declares:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The *Bill of Rights 1689* applies in New South Wales under the *Imperial Acts Application Act 1969*. Section 6 of the Act declares, among other things, that the *Bill of Rights*, so far as it was in force in England on 25 July 1828, was and remains in force in New South Wales on and from that day.

As confirmed by the joint judgment in *Egan v Willis*, there is no suggestion that Article 9 of the Bill of Rights has been affected by any Imperial or State Act. Article 9 provides a statutory guarantee of absolute protection for parliamentary freedom of speech and debate in New South Wales.⁹

Other statutory sources of parliamentary privilege

Other statutory provisions that define the powers and privileges of the Parliament include the *Parliamentary Evidence Act 1901*, the *Constitution Act 1902*, the *Parliamentary Papers (Supplementary Provisions) Act 1975*, the *Jury Act 1977*, the *Evidence Act 1995*, the *Parliamentary Precincts Act 1997* and the *Defamation Act 2005*.

These statutes are examined in context later in this paper.

The immunities of the House

The immunities of the House fall into two broad categories. The first is the immunity of members and other persons taking part in ‘proceedings in Parliament’, usually referred to as freedom of speech. This immunity means that members and persons participating in ‘proceedings in Parliament’ cannot be sued or impeached in the courts for anything they may say in those proceedings. The second is the immunity that attaches to the ‘proceedings in Parliament’ as such, including decisions of the Houses and the publication of debates and proceedings.

The freedom of speech in Parliament

By far the most important immunity accorded to members of the Council is the exercise of freedom of speech in parliamentary proceedings.

⁷ *Ibid* at 495-496.

⁸ Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and proceedings of the Committee*, United Kingdom Parliament, Session 1998-99, p 8. This is the test the Committee recommends should apply to the privileges of the Houses of the United Kingdom Parliament.

⁹ *Egan v Willis* (1998) 195 CLR 424 at 445.

Freedom of speech permits members to speak freely during proceedings in the House or in a committee meeting while enjoying complete immunity from prosecution for any comments they may make. This allows members to make statements or allegations that they may otherwise hesitate to make. Lord Cockburn CJ in the case of *Ex parte Wason* put it in these terms:

It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party.¹⁰

Before 1969, absolute privilege for freedom of speech in Parliament applied in New South Wales under the common law doctrine of reasonable necessity. However, since 1969, it has been the statutory adoption of the *Bill of Rights 1689* under the *Imperial Acts Application Act 1969* that is the most important guarantee of the freedom of speech in Parliament.

The legal immunity granted by Article 9 is wide and absolute. It applies not only to members, but also to officers of the House, witnesses before committees and other participants in ‘proceedings in Parliament’. The United Kingdom Joint Committee on Parliamentary Privilege commented in 1999:

Article 9 applies to officers of Parliament and non-members who participate in proceedings in Parliament, such as witnesses giving evidence to a committee of one of the Houses. In more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purpose of or incidental to, any proceedings in Parliament.¹¹

The effect of Article 9 is not to prevent or restrict the disclosure of things said in the course of parliamentary proceedings in the courts,¹² but to preclude the impeachment or questioning of such matters.

The privilege of freedom of speech does not protect a member who repeats or publishes outside the Council statements made inside the chamber. Defamatory statements made in the House and then repeated outside the House leave a member open to libel action, even if the actual defamatory statement was not repeated.¹³ Generally, statements to the effect that ‘I stand by what I said in the House’ or ‘I do not resile from what I said in the House’ have been interpreted by the courts in other jurisdictions as endorsing outside the House words said in the House.¹⁴

While Article 9 provides absolute freedom from outside interference, debate and conduct in the House are still subject to the rules and jurisdiction of the House itself. For example, the *sub judice* convention has been applied to avoid or limit discussion in parliament of matters that could prejudice proceedings before the courts. The rules of order in debate preclude the use of offensive language and the imputation of improper motives and personal reflections on members of either

¹⁰ (1869) LR 4 QB 573 at 576.

¹¹ Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and proceedings of the Committee*, United Kingdom Parliament, Session 1998-99, p 17.

¹² See *Munday v Askin* [1982] 2 NSWLR 369 at 369D-G; see also *Henning v Australian Consolidated Press Limited* [1982] 2 NSWLR 374 at 375B-C.

¹³ See *Beitzel v Crabb* [1992] 2 VR 121 at 128; see also *Buchanan v Jennings* [2001] 3 NZLR 71.

¹⁴ See, for example, *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1.

House (SO 91). The House has power to restrain and discipline members who, by their conduct, offend the House. In addition, the Privileges Committee can be requested to examine and report on matters that are raised by members in debate or in committees.¹⁵

The privilege of freedom of speech is also balanced by the procedure set out in standing orders 202-203, which permits a person who has been adversely referred to in the House to request a right of reply.

The immunity of other ‘proceedings in Parliament’ from impeachment or questioning in the courts

As noted earlier, the immunity under Article 9 of the Bill of Rights extends beyond the protection of members for statements made in the House to other ‘proceedings in Parliament’. However, no definition of ‘proceedings in Parliament’ is provided in the *Bill of Rights 1689*. This gives rise to perhaps the most controversial aspect of Article 9: what constitutes ‘proceedings in Parliament’ and what activities are covered by parliamentary privilege.

In *Erskine May*, ‘proceedings in Parliament’ is broadly described as:

[S]ome formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by a speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee ... Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.¹⁶

At the Commonwealth level, the *Parliamentary Privileges Act 1987* (Cth) provides a definition of ‘proceedings in Parliament’ which expressly includes not only the transacting of the business of a House or a committee, but also words spoken and acts done ‘for the purposes of or incidental to’ the transacting of such business. In New South Wales, in the absence of similar legislation, it is open to the courts to determine what constitutes ‘proceedings in Parliament’.

The term ‘proceedings in Parliament’ clearly denotes the formal transaction of business in the House or a committee, such as the giving of evidence before the House or a committee or the making of a submission to a committee. However, in the case of matters which are only connected with or ancillary to the transaction of such business, the particular circumstances are likely to determine whether or not privilege applies.

For example, correspondence received by members, whether from constituents, Ministers or other members, will generally fall outside the scope of ‘proceedings in Parliament’. However, if a particular communication is directly connected with some specific business to be transacted in the House, such as the delivery of a petition to the member for presentation to the House, or was solicited by the

¹⁵ See Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into Statements made by Mr Gallacher and Mr Hannaford*, Report 11, November 1999; and Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, Report 6, June 1998.

¹⁶ *Erskine May*, 23rd edn, p 110.

member for the express purpose of using in a parliamentary proceeding, it is within the protection of Article 9.¹⁷ Further, if the member takes some action in respect of the communication for the purpose of transacting parliamentary business, it may at that point become part of a proceeding, although that will not have any retrospective effect so as to afford protection in respect of the original communication to the member.¹⁸

Similarly, while the tabling of a document in the House is protected as a ‘proceeding in Parliament’ under Article 9, copies of a tabled document are only protected by that provision if prepared for the purposes of transacting the business of the Parliament.¹⁹

The publication of documents, proceedings, and records of the Parliament

While the publication of documents, proceedings and records of the Parliament clearly falls within the scope of ‘proceedings in Parliament’ under Article 9 of the *Bill of Rights 1689*, absolute privilege also applies to the publication of documents, proceedings and records of the Parliament under section 27 of the *Defamation Act 2005*, which provides:

- (1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.
- (2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if:
 - (a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to):
 - (i) the publication of a document by order, or under the authority, of the body, and
 - (ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law, and
 - (iii) the publication of matter while giving evidence before the body, and
 - (iv) the publication of matter while presenting or submitting a document to the body ...

The protection of section 27 extends to the publication of the proceedings and records of the House and its committees, including reports and committee reports, as well as the debates and Minutes of Proceedings of the House and committees, the Notice Paper, the Questions and Answers Paper and the Statutory Rules Paper. It also applies to the official publication of Hansard, including the ‘galley proofs’,²⁰ and documents published under the authority of the House and its committees.²¹

¹⁷ See *New South Wales Legislative Council Practice*, The Federation Press, 2008, pp 68-69.

¹⁸ *Ibid.* Even if Article 9 does not apply, public interest immunity may be held to attach to the provision of information to members of Parliament. Further, a limited protection of information provided by a public official to a member of Parliament is found in section 19 of the *Protected Disclosures Act 1994*.

¹⁹ *Ibid.*, p 71.

²⁰ The House has authorised publication of the ‘galley proofs’ by standing order 51.

²¹ Publication of documents tabled in the House by the President, a Minister or the Clerk is authorized by standing order 54. Publication of documents tabled by other members is only authorised if the House passes a specific resolution to that effect.

The *Defamation Act 2005* also provides a defence of qualified privilege for any publication of public documents such as Hansard (section 28). Because the defence is one of qualified privilege, it may be defeated if it is shown that publication was not in good faith for public information.

The *Parliamentary Papers (Supplementary Provisions) Act 1975* extends immunity from civil and criminal proceedings, other than proceedings for defamation, for the publication of parliamentary papers under the authority of the House or a Committee.

Minor immunities

There are a number of minor immunities of members of the Houses of Parliament, both at common law and under statute. These include the limited exemption from civil arrest, the exemption from the service of legal process in Parliament, the limited exemption from attendance as a witness in a court or tribunal and the exemption from jury duty.

The powers of the House

The key powers of the Houses of Parliament are:

- the power of the Houses to regulate their own affairs;
- the power to maintain the attendance and service of their members;
- the power to discipline members;
- the power to deal with contempt;
- the power to exclude and remove strangers;
- the power to conduct inquiries and call witnesses;
- the power to order the production of documents.

The power of the House to regulate its own affairs

At common law, a legislative body 'has the right of protecting itself from all impediments to the due course of its proceedings'.²² Reasonable measures to prevent disorderly conduct in the chamber are within the power of such a body.²³

In New South Wales, the common law power of self-regulation has been supplemented by a number of statutory provisions.

Under the *Constitution Act 1902* each House has power to make standing rules and orders regulating, among other things, the orderly conduct of business, subject to the approval of the Governor. The current standing rules and orders of the Council were adopted by the House on 5 May 2004 and approved by the Governor, in accordance with the provisions of section 15 *Constitution Act 1902* on 31 May 2004. The previous standing orders were originally adopted in 1895. The House also adopts sessional orders regulating aspects of its operations in each session of Parliament.

²² *Barton v Taylor* (1886) 11 AC 197.

²³ *Kielley v Carson* (1842) 12 ER 225 at 234.

The *Parliamentary Precincts Act 1997* defines the parliamentary precincts and vests control and management of the parliamentary precincts in the Presiding Officers. It also provides for the management and security of the parliamentary precincts and certain adjoining areas known as the parliamentary zone.

The power to maintain the attendance and service of their members

The Council has the right to maintain the attendance and service of its members. This right is supported by section 15(2) of the *Evidence Act 1995*, which provides that no member of any House of an Australian Parliament can be compelled to give evidence if they would be prevented from attending a parliamentary sitting or a meeting of a committee of which they are a member.

The power to discipline members

The House has a common law power to discipline members adjudged guilty of misconduct or conduct unworthy of the House. This power is ‘protective’ and ‘self-defensive’ only and cannot be used punitively, for example as a disciplinary or coercive measure.

What is punitive, and therefore beyond the power of the Houses of the New South Wales Parliament, depends on both the nature of the action taken and its purpose or objective, in particular whether the action is for the defence of the institution itself. For example, exclusion of a member from parliamentary accommodation, as well as the withdrawal of financial benefits, has been found by the courts to be punitive. To fine or imprison a member might also be judged punitive, regardless of the purpose motivating the House.

Notwithstanding the limitations on its disciplinary power, the Council has a number of sanctions available to discipline its members. These include reprimand and admonishment, apology by the member (and withdrawal of the words spoken), censure, suspension, expulsion. In some instances, the exercise of these powers is regulated through the standing orders such in the case of the suspension of a member (SO 191) and removal of a member from the chamber by order of the Chair (SO 192).

The power to deal with contempt

Meaning of contempt

Erskine May defines contempt as follows:

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.²⁴

²⁴ *Erskine May*, 23rd edn, p 128.

A similar definition is contained in section 4 of the *Parliamentary Privileges Act 1987* (Cth), which provides that:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

A breach of privilege and a contempt of parliament, although often confused, are not necessarily one and the same thing. A breach of privilege occurs whenever any of the rights or immunities of the House and its members are disregarded or attacked by any individual or authority. A contempt occurs whenever an offence is committed against the authority of the House or a committee, and may not always involve a breach of a specific privilege.

The critical feature of contempt is that the relevant conduct must impede or obstruct the House or a committee, or its members or officers, in the performance of their functions, or have a tendency to produce this result. When dealing with contempt, successive committees, both in New South Wales and elsewhere, have determined that for a contempt to be found, the breach must be of such seriousness that it could have a substantial and detrimental impact on the ability of the House, its committee or the member concerned, to function.

In applying such definitions, it is a matter for the House in each case to determine whether or not particular conduct constitutes an improper interference, and consequently a contempt. Accordingly, it is not possible to define all the types of conduct which may amount to a contempt, although guidance can be obtained by considering the types of conduct which have been treated as contempt in the past.²⁵

Dealing with contempt

The Council has an inherent power to deal with contempt under the doctrine of reasonable necessity. The power is self-defensive in nature, and not punitive. The Council has no inherent power to arrest, fine or otherwise punish a member or other person, although it is within the power of the New South Wales Parliament to acquire punitive powers by statutory enactment.

The exercise of the inherent power is regulated by the standing orders. For example, members who engage in disorderly conduct or who refuse to comply with a ruling from the Chair may be removed from the chamber and suspended from the service of the House and its committees for a specified time (SOs 190-194). Visitors may be removed from the precincts of the House for such time as the President directs (197).

The Council also has statutory powers to deal with certain types of contempt. The *Parliamentary Evidence Act 1901* confers on each House power to deal with certain offences by witnesses. For example, a person who fails to comply with a summons to appear and give evidence before the House or a committee, without a just or reasonable excuse, may be apprehended, held in custody

²⁵ For examples of conduct which has been treated as contempt, see *New South Wales Legislative Council Practice*, 2008, pp 95-96.

and brought before the House or committee from time to time.²⁶ A witness who refuses to answer a 'lawful question' is deemed guilty of contempt and may be committed into custody, and gaol if the House so orders, for up to one month.²⁷ A witness summoned to appear and give evidence who wilfully makes a false statement during the course of their evidence is liable to imprisonment for up to five years.²⁸ The penalties provided by the Act have never been invoked, however, as witnesses normally cooperate voluntarily with parliamentary inquiries, and coercion is considered a measure of last resort.

The *Public Works Act 1912* confers certain further powers to punish offences by witnesses before the Joint Standing Committee on Public Works, and to compel the attendance of a witness before that Committee. However, the Committee has not been appointed since 1930, and the relevant powers have never been used.

The power to exclude and remove strangers

The Council has a common law power to exclude and remove strangers from the House and its precincts. The power derives from the common law principle of 'reasonable necessity', and is therefore protective in nature. It would not extend to permit the arrest of strangers, either for disorderly conduct within the chamber or the precincts of Parliament. Nor could the House act against non-members for a punitive purpose.

The exercise of the power to exclude strangers is regulated by the standing orders. For example, the standing orders provide that:

- Only members, a Clerk at the Table or an officer attending on the House may enter any part of the chamber reserved for members while the House is sitting, except in respect of a member breastfeeding an infant (SO 196).
- Distinguished visitors may be admitted to a seat on the floor of the House, by motion without notice (SO 195).
- The President may admit visitors to the President's gallery on either side of the President's Chair (SO 196(2)).
- If a visitor interrupts the proceedings of the Council, the President or Chair of Committees may order the Usher of the Black Rod to remove that person from the precincts of the House and to exclude them from the House for the period directed by the President or the Chair (SO 197).

The power to conduct inquiries and call witnesses

One of the principal functions of the Council is to conduct inquiries into public affairs, including the administration of government. Inquiries are necessary to assist the Council in its legislative function and to identify issues of public importance, to obtain information and to inform the public of the manner in which government is conducted.

The power to conduct inquiries exists even in the absence of any constitutional or statutory

²⁶ *Parliamentary Evidence Act 1901*, ss 7-9.

²⁷ *Ibid*, s 11; the procedure applies in respect of a witness who has been sworn or affirmed under the Act.

²⁸ *Ibid*, s 13

prescription in New South Wales. In *Egan v Willis*, the High Court recognised that, although the New South Wales Parliament lacks any equivalent of section 49 of the Commonwealth Constitution, which expressly confers broad powers on the Houses of the Commonwealth Parliament, the Council is entitled to seek information concerning the administration of public affairs and finances according to the test of ‘reasonable necessity’.²⁹

Parliamentary inquiries are distinguished from other types of inquiries by the power of Parliament to compel witnesses to attend and to answer questions, and the protection of the inquiry process by parliamentary privilege. For the most part, the Council itself does not conduct its own inquiries, but delegates this function, along with the necessary powers, to committees appointed by the House. Committees draw their powers from resolutions of the House, the standing orders, and relevant statutes.

The main features of inquiries in the Council are noted below.

The power to send for and examine witnesses

The Council may conduct inquiries by taking evidence directly from witnesses at the Bar of the House, and there have been two cases in the Council in which persons have addressed the House or been examined at the Bar.³⁰ In most cases, however, inquiries are conducted by committees appointed by the House rather than by the House itself.

Standing order 208(c) provides that a committee has power to ‘send for and examine persons ...’. Normally, witnesses are invited to appear and give evidence before committees, and do so voluntarily. Where necessary, however, a witness may be summoned to attend, under section 4 of the *Parliamentary Evidence Act 1901*.

If a witness refuses to appear before a committee without just cause or reasonable excuse when summoned, the person 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.³¹

The issuing of a summons is an exercise of significant coercive power and should only occur after careful consideration of the repercussions and alternatives, including 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.

Members of the Council or the Assembly may not be summoned to attend and give evidence before a committee. However, they may be invited to appear, and ministers from both the Council and Assembly routinely appear voluntarily to give evidence at budget estimates hearings.

²⁹ (1998) 195 CLR 424 at 454 per Gaudron, Gummow and Hayne JJ.

³⁰ In the first case the Hon Justice Vince Bruce, a Supreme Court judge, was called on to address the House and show cause why he should not be removed from office under section 53 of the Constitution Act 1902. In the second case, the Auditor General attended at the Bar of the House in accordance with a summons and was examined by members of the House in relation to the Appropriation (1997-98 Budget Variations) Bill (No 2) 1998.

³¹ *Ibid*, ss 7 and 8.

There is no immunity for former members or ministers from being summoned under the *Parliamentary Evidence Act 1901*. Privilege only attaches to a member while they are a member of parliament and does not apply in perpetuity to former members and ministers. Any person resident in New South Wales other than a current member of either House may be summoned under the Act to give evidence.

There is no restriction on a committee inviting or summoning ministerial staff as witnesses under the *Parliamentary Evidence Act 1901*. However, it is generally recognised that ministerial staff should not be held accountable for the actions or policy decisions of ministers or their departments.

Public servants may be invited or summoned as witnesses. Committee inquiries established to examine areas of public policy and financial accountability frequently require evidence from senior officers responsible for the implementation of government policy and expenditure.

Section 10 of the *Parliamentary Evidence Act 1901* requires that every witness attending to give evidence before the Council or one of its committees is to be sworn, whether or not the witness is appearing under a summons.

The power to compel answers to a 'lawful question'

Under section 11 of the *Parliamentary Evidence Act 1901*, the Council and its committees have extensive powers to compel a witness to answer a 'lawful question'. Section 11(1) of the Act provides:

Except as provided by section 127 (Religious confessions) of the *Evidence Act 1995*, if any witness refuses to answer any lawful question during the witness's examination, the witness shall be deemed guilty of a 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.

This sanction does not apply, however, to a witness who has not taken an oath or affirmation, regardless of whether or not they were summoned to give evidence.³²

Generally speaking, a question of fact, as opposed to an opinion, relevant to the committee's terms of reference would be a lawful question. This issue was addressed in *Crafter v Kelly*, in which it was indicated that 'the expression "lawful question" ... connotes one which calls for an answer according to law, one that the witness is compellable to answer according to established usage of the law'.³³

In the past, witnesses have raised objections to answering questions or providing documents on a number of grounds:

- the question or request for papers raises issues relating to public interest immunity (previously known as Crown privilege);

³² Walker B, 'Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No 4' (authorised to be published by resolution of the Committee on 6 November 2000), 2 November 2000, pp 15-17.

³³ [1941] SASR 237 at 237. The case concerned the meaning of 'lawful question' in the *Primary Producers Debts Act 1935* (SA).

- the question or request for papers raises issues of commercial-in-confidence;
- the question or request for papers breaches legal professional privilege;
- the witness has a right to privilege against self-incrimination;
- the question breaches the *sub judice* convention;
- the question seeks adverse reflection on another person;
- the question is not relevant to the committee's inquiry;
- the disclosure of information required by the question would be prejudicial to the privacy or the rights of other persons;
- the question asks for an opinion from a departmental officer on a matter of government policy.

Prima facie these claims of privilege and immunity have no application to parliamentary inquiries. However, that does not mean that such claims are ignored. Any claim or right normally afforded in our legal system is usually given serious consideration by committees.

Nevertheless, it is an important underlying principle under the Westminster system of government that the executive remains accountable to the Parliament. Because of this, the powers of Parliament are to be interpreted widely, as is the law of parliamentary privilege, in the interests of the accountability of the executive to Parliament. While many matters remain to be decided in this area, the underlying principle is clear.

False or misleading evidence

Section 13 of the *Parliamentary Evidence Act 1901* governs the giving of false or misleading evidence to a committee:

If any such witness wilfully makes any false statement, knowing the same to be false, the witness shall, whether such statement amounts to perjury or not, be liable to imprisonment for a term not exceeding five years.

This sanction applies equally to all witnesses sworn before the Bar of the House or a committee, and applies irrespective of whether the witness was summoned or not.

While this course of action is available to a committee, it has never been exercised. In most cases where an allegation is made that a witness has provided false or misleading evidence, the committee will offer the person against whom the allegation is made the opportunity to respond.

Legal protection of witnesses

In consequence of the extensive powers of committees to compel attendance of a witness and to compel answers to a 'lawful question', the giving of evidence by witnesses before parliamentary committees is protected not only by Article 9 of the *Bill of Rights 1689* but also by section 12(1) of the *Parliamentary Evidence Act 1901*, which provides:

No action shall be maintained against any witness who has given evidence, whether on oath or otherwise, under the authority of this Act, for or in respect of any defamatory words spoken by the witness while giving such evidence.

Read in conjunction with Article 9 of the *Bill of Rights 1689*, this privilege is absolute. It protects acts done and things said in parliamentary proceedings from legal action, whether in defamation or other legal proceedings. Individual protections include immunity for parliamentary witnesses from being questioned or impeached about evidence given before either House of Parliament or any committee.

Under the *Defamation Act 2005*, there is also a defence of absolute privilege for the publication of defamatory matter while giving evidence before a parliamentary body, including a committee, or while presenting or submitting a document to such a body.³⁴

The power to order the production of documents

While there is no express power to order the production of documents under the *Parliamentary Evidence Act 1901*, the Houses of the New South Wales Parliament have an undoubted common law power to send for and order the production of documents. In recent years, the cases of *Egan v Willis*³⁵ and *Egan v Chadwick*³⁶ have played an important part in defining the common law powers of upper Houses to order the production of documents. It should be noted, however, that those cases were concerned specifically with the power of the Council to order the production of State papers from the executive. The Council's power to order the public at large to produce documents was not considered.

The powers of committees to order the production of documents is an extension of the House's power to order the production of documents, as set out in *Egan v Willis*. In addition, several joint statutory committees have statutory power to 'send for persons, papers and records'. These include the Committee on the Independent Commission Against Corruption, the Committee on the Office of the Ombudsman and Police Integrity Commission, the Committee on Children and Young People, the Committee on the Health Care Complaints Commission, the Legislation Review Committee and the Joint Committee on the Office of the Valuer-General.

³⁴ *Defamation Act 2005*, s 27. See also *Parliamentary Papers (Supplementary Provisions) Act 1975*, s 8.

³⁵ (1996) 40 NSWLR 650; (1998) 195 CLR 424.

³⁶ (1999) 46 NSWLR 563.