

Chapter 2 Such powers and privileges as are implied by reason of necessity

As already noted, the New South Wales Parliament has never defined in legislation the extent of its privileges nor has it inherited the privileges of the United Kingdom Houses of Parliament. In fact, the Privy Council has held that colonial parliaments are only entitled to such privileges as are reasonably necessary for them to carry out their legislative functions. This view originated from the fact that many of the privileges of the Houses of Parliament at Westminster originated from the authority of Parliament as a court and not as a legislative body. Furthermore, the privileges acquired formed a special body of law and became collectively known as the *lex et consuetudo parliamenti* but had no statutory basis.

Whilst colonial legislatures have not been endowed with the same privileges and powers as those of the Houses at Westminster, the Privy Council did consider that the creation of such bodies implied that certain privileges would need to be conferred in order for them to carry out their functions as legislative bodies. Furthermore, the powers provided were meant to be protective rather than punitive in view of the fact that punitive powers were considered to be characteristic of a court rather than a legislative body.¹

Courts in Australia have consistently expressed the view that privileges conferred on Australian Houses of Parliament, due to the principles of necessity, are not static but should evolve as circumstances change. In *Armstrong v Budd*, Wallace P was of the view that the decisions of the Privy Council regarding the privileges that should be considered reasonably necessary should be “construed and applied in the light of modern conditions and current constitutional situations.”² He goes on to note that this does not mean that Houses of Australian Parliaments have increased their privileges over time but rather that “the word ‘reasonable’ in this context must have an ambulatory meaning to enable it to have sense and sensibility when applied to the conditions in 1969.”³

A similar view was also expressed in *Egan v Willis* where Justice Kirby argued that the cases determined by the Privy Council regarding the privileges of colonial legislatures are of historical value only and that those privileges which are considered reasonably necessary for Houses of Australian Parliaments today should be determined in the context of the federal system of Government in Australia. Justice Kirby argued that in order to define the extent of the privileges conferred on the Houses of the Parliament in New South Wales there is a need to identify:

*...the functions of the House in question and then specifying, by reference to the Constitution, statute law and the common law of Parliaments, those powers essential to the existence of the 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.*⁴

¹ See Dawson, Robert, *Dawson's The Government of Canada*, 6th edition, edited by Norman Ward, 1990 pp. 113-5 where he discusses the application of parliamentary privilege in Colonial Legislatures.

² *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 401.

³ *Ibid*, at 402.

⁴ *Egan v Willis* (1998) 158 ALR 527 at 575.

The following sections set out those privileges that have been deemed by the courts as necessary for a legislative body to carry out its functions. They are:

- freedom of speech;
- power to control its own proceedings;
- power to conduct inquiries;
- power to order the production of documents;
- power to regulate and discipline members as a defensive measure;
- power to remove visitors for disturbing proceedings; and
- immunity from legal proceedings.

It also sets out those privileges, which may exist in other jurisdictions, but have been deemed by the courts as unnecessary for the New South Wales Parliament to carry out its functions, namely:

- freedom from arrest;
- power to punish for contempt; and
- power to order the arrest of a stranger.

2.1 Freedom of speech

Freedom of speech is considered essential in order for Parliament to carry out its role of scrutinising the operation of the Government of the day, and inquiring into matters of public concern. The freedom of speech imported by the adoption of Article 9 of the *Bill of Rights*, which is in force in New South Wales by operation of the *Imperial Acts Application Act 1969*,⁵ will be considered extensively in Chapter 3 of Part Two. However, it should be noted that as far back as 1881 the New South Wales Supreme Court considered that freedom of speech was inherent in all legislative bodies as it was considered necessary for the conduct of the business of Parliament.

This view was expressed in *Gipps v McElhone*⁶ when the privilege of the freedom of speech in Parliament was brought into question. In this case the judges held that the privilege of freedom of speech did not rest upon the *lex et consuetudo* of Parliament, but was based upon the inherent necessity of the case.⁷ In doing so, the judges confirmed that absolute privilege is attached to statements made by a member in the Parliament as such privilege is essential for the conduct of the business of Parliament. Sir William Manning J stated:

*Doubtless there may be members of strong energy, easy credulity, and impulsive temperament who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions for defamation. It is most important there should be perfect liberty of speech in Parliament, even though it may sometimes degenerate into licence.*⁸

⁵ See *Imperial Acts Application Act 1969*, second schedule, part 1, sec. 6.

⁶ *Gipps v McElhone* (1881) 2 LR NSW 18.

⁷ *Gipps v McElhone* (1881) 2 LR NSW 18 at 25 (per Justice Windeyer).

⁸ *Gipps v McElhone* (1881) 2 LR NSW 18 at 24. See also *Chenard & Co. v Joachim Aressol* (1949) AC 127.

This is still the case in modern society. In 2002, the European Court of Human Rights in the *Case of A v the United Kingdom* reiterated the importance of absolute privilege attaching to statements made during the course of parliamentary proceedings. This case considered statements made by a member of the House of Commons, who referred to a constituent as the “neighbour from hell” during a debate on municipal housing policy. In his speech, the member, amongst other things, named the constituent, gave her precise address and made derogatory comments about her and her children. It was claimed by the constituent that her right to a fair trial in court had been violated given the fact that the member’s allegations made under parliamentary privilege could not be submitted in evidence.⁹

The majority of the court (6 out of 7) considered that whilst human rights may at times be abused by members who make allegations or defamatory statements about constituents or other persons as part of parliamentary proceedings, the importance of parliamentary privilege should not be undermined by the creation of exceptions to the immunity. In this instance, the majority of the court considered that whilst the remarks made by the member were unfortunate it could not restrict the absolute privilege attached to statements made as part of parliamentary proceedings on a case-by-case basis as such a precedent would seriously undermine the legitimacy of parliamentary privilege.¹⁰

It is interesting to note that in dissent, Judge Loucaides observed “...there should be a proper balance between freedom of speech in Parliament and protection of the reputation of individuals.” He went on to argue that this balance “can only be achieved through a system which takes account of the individual facts of particular cases on the basis of the relevant conditions and exceptions attached to both rights. Such balancing implies that neither of the two rights should be allowed to prevail absolutely over the other.”¹¹ This viewpoint had previously been rejected in *Prebble v Television NZ Ltd*¹² where it was held that statements made by members in Parliament could not be brought into question by a court of law and that parliamentary privilege overrides other interests. This is because, under a Westminster system of Government, all statements made by members as part of parliamentary proceedings enjoy absolute privilege by virtue of the *Bill of Rights* and cannot be questioned in court.

This freedom of speech also applies to proceedings of committees appointed by the Parliament, including the evidence given by any person to a committee. However, it is only available to an individual member of a committee speaking as part of a duly constituted meeting/hearing of the committee and not otherwise.¹³

⁹ See Summary of the Chamber Judgement in the *Case of A v The United Kingdom*, application number 00035373/97, 17 December 2002, as taken from www.echr.coe.int/Eng/Press/2002/dec/AvtheUKjudexpress.htm

¹⁰ *Ibid.*

¹¹ See the dissenting opinion of Judge Loucaides in the *Case of A v the United Kingdom*, application number 35373/97, 17 December 2002, as taken from <http://www.echr.coe.int/Eng/Judgements.htm> accessed 3 February 2003 where he notes that in a number of European countries absolute privilege does not necessarily apply to defamatory statements made in Parliament or it can be waived by a court.

¹² (1994) 3 NZLR 1.

¹³ For instance protection is not afforded to a member who is sued for statements outside of committee proceedings. See section 3.10.2 of Part Two for further information.

2.2 Power of the House to control its own proceedings

A central issue of parliamentary privilege is the extent to which a House of Parliament should have exclusive control over its own affairs. Apart from the power to control its own proceedings implicit in the *Bill of Rights* whereby the “proceedings in Parliament” cannot be “impeached or questioned” in any other place, Houses of Parliament also have the power to control their own proceedings by regulating the conduct of business of the House, adopting standing rules and orders, maintaining order in the House and controlling publications of the proceedings of the House.¹⁴ Any actions taken by the House may however, be subject to judicial review in order to ensure that they are within the power of the House.

Section 15 of the *Constitution Act 1902* confers the power on both Houses to make rules and orders regulating their “orderly conduct”. It provides:

- (1) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:
 - (a) the orderly conduct of such Council and Assembly respectively, and
 - (b) the manner in which such Council and Assembly shall be presided over in case of the absence of the President or the Speaker, and
 - (c) the mode in which such Council and Assembly shall confer, correspond, and communicate with each other relative to Votes or Bills passed by, or pending in, such Council and Assembly respectively, and
 - (d) the manner in which Notices of Bills, Resolutions and other business intended to be submitted to such Council and Assembly respectively at any Session thereof may be published for general information, and
 - (e) the proper passing, entitling and numbering of the Bills to be introduced into and passed by the said Council and Assembly, and
 - (f) the proper presentation of the same to the Governor for Her Majesty’s Assent, and
 - (g) any other matter that, by or under this Act, is required or permitted to be regulated by Standing Rules and Orders.
- (2) Such Rules and Orders shall by such Council and Assembly respectively be laid before the Governor, and being by him approved shall become binding and of force.

This inherent privilege of the House to control its own proceedings is reflected by the fact that the Governor does not act with the advice of the Executive Council when approving standing orders. The Crown Solicitor has commented that as standing orders are concerned only with the internal management of the Houses each House is the best judge as to what standing orders are necessary.¹⁵

Whilst the power to make rules and orders for the orderly conduct of the Houses has been conferred through the principles of necessity, the statutory prescription that the standing rules and orders must be for the “orderly conduct” of each House means that they are subject to judicial review to ensure they fall within the power of the House to prescribe. For instance, in *Harnett v Crick* it was considered that the courts were able to question the validity of a standing order if such standing order did not relate to “orderly conduct”. The Judicial Committee of the Privy Council noted:

Two things seem clear: (1) that the House itself is the sole judge whether an ‘occasion’ has arisen for the preparation and adoption of a standing order regulating the orderly conduct of the Assembly, and (2) that no Court of law can question the validity of a standing order duly passed

¹⁴ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 180.

¹⁵ Advice received from the Crown Solicitor re: Whether the Governor must act with the advice of the Executive Council when approving standing orders, dated 1 May 2007.

*and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.*¹⁶

While the interpretation of standing orders is a matter exclusively for the authority of each House, it has been established that judicial review can occur in instances where a House has taken some punitive action if its powers have only been conferred by the principle of necessity. As noted previously, colonial legislatures were deemed to have protective but not punitive powers. For instance, in *Barnes v Purcell*¹⁷ Mr Barnes, a member of the Queensland Legislative Assembly, recovered damages from a police officer who, under the authority of the Speaker assisted the Serjeant-at-Arms in enforcing the disciplinary provisions in the Assembly's standing orders, and removed Mr Barnes from the premises.¹⁸

Justice Douglas considered that whilst the House was the sole judge of whether a member should be suspended from the service of the House its power to discipline its members was limited by law and the courts could determine whether such limits had been exceeded. He noted:

*There is no authority for the proposition that Parliament has the exclusive right to construe the standing orders to determine the punishment which may be inflicted upon a member who has been suspended by a resolution of the House. I think it is not within the exclusive power of Parliament to determine such punishment by its own construction of standing orders. The courts in Australia and the Privy Council have construed standing orders to ascertain what power the House of Parliament has to inflict punishment, and it follows that they must have power to examine the extent of such punishment.*¹⁹

Whilst standing orders may be subject to judicial review in order to determine whether a House had the power to make such rules or if punitive action has been taken, if a dispute arises about a House's course of action under a particular standing order, the courts have ruled that the matter is one to be determined by the House. For instance, in *New Zealand Post Ltd v Prebble*²⁰ where a member of Parliament had come into the possession of confidential documents and refused to identify the source of the information, the High Court of New Zealand affirmed that the exercise by members of their parliamentary privilege, including disclosure in the House, is a matter for Parliament.

The matter was subject to a ruling by the Speaker in the House after New Zealand Post Ltd attempted to restrain the member (Mr Prebble) from publicising or otherwise making use of one of its confidential documents. New Zealand Post Ltd also wanted Mr Prebble to give up possession of it and identify his sources, and to obtain a declaration that his actions with respect to the document constituted a breach of confidence. The Speaker ruled that no question of privilege was involved and in doing so he noted that "even if there had been an attempt in legal proceedings to inhibit a member's actions in the House, the court had dealt with the matter with due regard for its privileges by first indicating that no order of the court could extend to Parliamentary proceedings and then dismissing the action."²¹

¹⁶ *Harnett v Crick* (1908) AC 470 at 475-6.

¹⁷ (1946) QSR 87.

¹⁸ See Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, pp. 80-5.

¹⁹ *Barnes v Purcell* (1946) QSR 87 at 103.

²⁰ (2001) NZ 227.

²¹ New Zealand Parliamentary Debates, 27 February 2001, pp. 7912-3.

Similarly, in *Egan v Chadwick*,²² the Court of Appeal considered that the exercise by the New South Wales Legislative Council of its powers was a matter to be determined by the House. In this case, Mr Egan had refused to comply with an order for the production of papers and was subsequently suspended from service of the House. Mr Egan claimed that the House could not compel him to produce documents that would be subject to public interest immunity or legal professional privilege or to determine the validity of such claims.²³

The Court considered the question:

*Is it reasonably necessary for the proper exercise of the functions of the Legislative Council of New South Wales, for its power to require production of documents which at common law, would be protected from disclosure on grounds of legal professional privilege or public interest immunity? Shortly put, is the power of the Legislative Council, recognised in Egan v Willis, a power to call for unprivileged documents only?*²⁴

Chief Justice Spigelman argued that to restrict the powers of the Council in the manner suggested by Mr Egan would be an intrusion by the Court into matters which should be determined by the legislature itself. He noted:

*The common law rule of reasonable necessity for the performance of the functions of a House of Parliament should not, in my opinion, be found to operate in such a way as would require a judge to make decisions of this character. The restriction of the power to call for State papers to unprivileged documents would require the courts to do so, because it involves a balancing exercise in which the importance of information for a Parliamentary function falls to be assessed.*²⁵

The Court of Appeal held that the Council has the power to order the production of documents held by Executive Government. However, the judgment did not compel Mr Egan to hand over the documents in dispute as it was considered that it is for the Council to determine the remedy for any continuing refusal to produce the documents.²⁶

Another recent example of courts refusing to intrude upon the role of the Parliament occurred in *Halden v Marks*.²⁷ In this case, the Supreme Court of Western Australia reconsidered the decision to refuse an application for an interlocutory injunction restraining the proceedings of the Marks Royal Commission. The injunction sought to prevent the Royal Commission from inquiring into the circumstances surrounding the presentation of a petition to the Parliament as it was argued that by doing so parliamentary privilege would be infringed. In considering the matter the Supreme Court of Western Australia noted that there are two main categories where a court will rule on questions of parliamentary privilege. First, in cases where a question of parliamentary privilege is raised in a case already before the court, as, for example, where a party seeks to rely on something said or done in Parliament, and second, in cases where the courts have been asked to review action taken by Parliament to

²² (1999) NSWCA 176.

²³ For more information on this case see Griffith, Gareth, *Egan v Chadwick and other recent developments in the powers of elected Upper Houses*, New South Wales Parliamentary Library, Briefing Paper 15/99, August 1999.

²⁴ *Egan v Chadwick & ORS* (1999) NSWCA 176, paragraph 4.

²⁵ *Egan v Chadwick & ORS* (1999) NSWCA 176, paragraph 53.

²⁶ *Ibid.*, pp. 32-3.

²⁷ (1995) 17 WAR 447.

enforce its proceedings, such as the suspension of a member of Parliament or where Parliament has, by warrant sought to subject a citizen to restraint by arrest.²⁸

In coming to its decision the Full Court noted the need to avoid conflict between Parliament and the courts. It was argued that even if the Parliament did not assert its privileges in relation to the petition that the court was not in a position to do so as the matter was one for the Parliament to deal with.²⁹

On a related issue, a recent case in the Alberta Court of Appeal, Canada, considered whether the payment of expenses of a defamation lawsuit against a Government MLA breached the privilege of the House by undermining parliamentary independence.³⁰ In this case another member of the Legislative Assembly of Alberta, Mr Carter, claimed that the Government's payment of the legal fees for the member out of the Government's Risk Management Fund was illegal. The court, upholding the decision of the lower court, confirmed that "the decision to extend general liability coverage to members of the legislature does not pass the 'necessity' test" and hence is not a matter of parliamentary privilege.³¹ Justice Berger, with whom the Court agreed, argued:

The right to provide general liability coverage to MLA's and to determine eligibility on a case-by-case basis is not necessary for the Assembly to control its own affairs or to function properly. These discretionary benefits are, in my view, not to be likened to the Assembly setting its own budget including salaries. I am not persuaded that a legislative enactment vesting to the Executive Branch control of the discretionary entitlements of parliamentarians threatens the independence of the legislative branch.³²

If the court had determined that such a matter did constitute a breach of parliamentary privilege it could have had all sorts of implications for tribunals such as the Parliamentary Remuneration Tribunal which is responsible for determining the entitlements of members of the New South Wales Parliament.

2.3 Power to conduct inquiries

It is taken that Houses of Parliament under the Westminster system of government have an inherent power to conduct inquiries. In *Egan v Willis* Justice McHugh noted the importance of a House being able to conduct inquiries in order to obtain information on the actions of the Government as part of the Parliament's role in holding the Executive to account. When delivering his judgment Justice McHugh referred to a number of judicial decisions upholding this principle:

In Stockdale, Lord Denman CJ described the House of Commons as "the grand inquest of the nation". In Howard v Gosset, Colridge J said that "the Commons are, in the words of Lord Coke, the general inquisitors of the realm". These statements summarise one of the most important functions of a House in a legislature under the Westminster system, namely, that it is the function of the Houses of Parliament to obtain information as to the state of affairs in their jurisdiction so that they can, where necessary, criticise the ways in which public affairs are being administered and public money is being spent. The Crown through its Ministers governs. Under the system of responsible government, those Ministers are responsible to the

²⁸ *Halden v Marks* (1995) 17 AWR 447 at 462.

²⁹ *Ibid*, at 463.

³⁰ *Carter v Alberta* 2002 ABCA 303.

³¹ *Ibid*, paragraph 23.

³² *Ibid*.

*Parliament. For that system to work effectively, for the Administration to retain the confidence of the Parliament, the Houses of Parliament must have access to information relating to public affairs and public finance which is in the possession of the government of the day.*³³

In fact as far back as the mid 19th century the Privy Council held that Houses of Parliament in Australia had the power to inquire into matters of public interest – in 1855 the Legislative Council of the Parliament of Van Diemen's Land established a select committee to inquire into alleged abuses in the Convict Department.³⁴

The issue of whether a House of Parliament can delegate its power to another person or body to conduct inquiries is unclear. There are a number of British precedents where the House of Commons delegated its authority to investigate to someone else³⁵ and in New South Wales the power to delegate authority has been expressly conferred on the House and its committees by virtue of a number of statutes. For example, section 48A of the *Public Finance and Audit Act 1983* provides for the Public Accounts Committee to appoint a person to conduct a review of the Audit Office, and the House is able to delegate its authority under legislation by establishing a royal commission or a special commission of inquiry to investigate a particular matter.

It has not been tested in New South Wales whether the House or one of its committees is able to delegate its powers in the absence of statutory provisions. In the United Kingdom however it has been held that conducting an inquiry pursuant to an order or resolution of the House includes any inquiry conducted by a person other than a member of the House in accordance with such an order or resolution. In *Hamilton v Al Fayed* it was held that a report of the Parliamentary Commissioner for Standards, produced pursuant to an order of the House, was privileged as if it had been produced by the House itself.³⁶

In New South Wales, the House may appoint a parliamentary committee to conduct formal investigations or it can conduct an inquiry itself. Standing order 324 provides for the summoning of witnesses to attend before the House. Committees appointed by the House possess coercive powers conferred by statute. The *Parliamentary Evidence Act 1901* provides the House and its committees with the express power to summon persons to appear before them. The summons must specify the date, time and place for compliance and witnesses are entitled to reasonable expenses for appearing.³⁷

The House or a committee may order a member to appear without a summons.³⁸ However, should the House or a committee wish to question a member of the other House courtesy dictates that a message is sent to the other House to request it to grant leave for the member to appear. The Legislative Assembly standing orders provide:

³³ *Egan v Willis* (1998) 195 CLR 424, p. 475.

³⁴ See the Privy Council decision in *Fenton v Hampton* (1858) 11 Moo PC 347 which held that the Legislative Council of colonial Tasmania had power to make inquiries.

³⁵ See *Odger's Australian Senate Practice*, edited by Harry Evans, 11th edition, 2004, p. 58.

³⁶ *Hamilton v Al Fayed* (1999) EWCA Civ 1111 (UK Court of Appeal, 26 March 1999).

³⁷ Section 6 of the *Parliamentary Evidence Act 1901*.

³⁸ Section 5 of the *Parliamentary Evidence Act 1901*.

326: *The chair of a committee may request in writing a Member or officer of the House to attend a hearing as a witness. If the Member or officer refuses, the committee shall take no action other than to report the refusal to the House. An officer means a member of staff employed solely by the Speaker;*

327: *If the House or a Committee, upon request wishes to examine a Member or officer of the Council, a message shall be sent requesting the Council to grant leave; and*

328: *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.*

A similar courtesy is afforded by other Parliaments, in that they can only request the attendance of a member of the New South Wales Parliament to attend as a witness before another Parliament and/or its committees. For instance, in 1993 the Senate requested that the Legislative Assembly require the attendance of the Premier to provide evidence before a Senate select committee. After seeking legal advice, the Speaker suggested that the House not take any action in relation to the request noting that:

- The Senate recognises the sovereignty of the New South Wales Parliament and the implication in the Commonwealth Constitution that the various State Parliaments will not interfere with each other by requesting the attendance of the Premier instead of demanding that the House require the Premier to attend before its select committee.
- The Assembly could, and would, rightfully claim the right of attendance of its members to its own service, and to direct otherwise would not have legal force. The Legislative Assembly cannot by resolution change the law.
- If the Senate committee demanded the Premier to attend before it, such a direction would most likely be *ultra vires* of the powers of the Senate in that a House only possesses powers to direct its own members in regard to its own functions and authorities.
- The concept of responsible government requires Ministers to be responsible to the Parliament to which they have been elected; and if the House did demand that the Premier attend, the effect would be to unlawfully bring the Premier to account before another Parliament.
- The attendance of the Premier is requested by the Senate, in his official capacity as Leader of the Executive Government in New South Wales and, in that capacity it would not be competent for this House to direct the Premier in the exercise of a discretion which is his alone to exercise or not.
- The House was thus not empowered to make demand of the Premier in this matter.³⁹

Protection is afforded to any witness before the House or one of its committees by virtue of the *Parliamentary Evidence Act 1901*. Section 12 of the Act states:

No action shall be maintainable 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.

³⁹ PD 19/11/1993, p. 5917.

Advice has been received that neither the penal or protective provisions of the Act would cover unsworn evidence although it would probably be privileged under the *Defamation Act 2005* and arguably would be privileged as a “proceeding in Parliament”.⁴⁰ The Act also provides that if a witness refuses to answer a lawful question they will be deemed to be in contempt of Parliament and may be forthwith given into the custody of the Serjeant-at-Arms or Usher of the Black Rod and, if the House so orders, to gaol for one month.⁴¹ If a witness is found by a court of law to have given false evidence, they will be liable for a term of imprisonment up to five years.⁴²

Beyond these provisions, it is unclear whether a witness can be subject to any other criminal liability. Whilst Article 9 of the *Bill of Rights 1688* provides that the proceedings of Parliament may not be questioned or impeached in a court or place outside Parliament, courts in New South Wales have permitted committee proceedings to be admitted as evidence for such purposes as:

- to assist the defence in a criminal trial to impeach the credit of a prosecution witness;⁴³
- to compare evidence given to a committee with that given by the defendant in criminal proceedings;⁴⁴ and
- to compare evidence given to a committee with that given by a prosecution witness in criminal proceedings.⁴⁵

Whilst power has been conferred to conduct inquiries there is some doubt over the capacity of Houses of Parliament in Australia to inquire into any matter whatsoever. Professor Carney notes that it has been suggested that “the division of powers between the Commonwealth, States and Territories restricts the scope of inquiry of their respective Houses” and that inquiries “may only relate to the exercise of legislative power, on the basis that the Australian Houses never inherited the ‘Grand Inquest’ role of the House of Commons.”⁴⁶ Essentially this means that the power of the New South Wales Parliament may be limited to matters that fall within its legislative capacity.

Given that Houses possess the power to conduct inquiries they must also be equipped to deal with witnesses who fail to appear before such inquiry. However, in 1858 this matter was not so clear. The Privy Council held in *Fenton v Hampton* that the Legislative Council of Van Diemen’s Land had no power to arrest and hold in custody a person judged to be guilty of contempt of the House for his refusal to appear as a witness before a select committee and then his failure to appear before the Bar of the House to explain why. This was due to the fact that the Privy Council had previously held in *Kielley v Carson* that Colonial Parliaments did not have an inherent power to punish for contempts.⁴⁷ Since this time the New South Wales Parliament has enacted legislation to ensure that it is empowered to deal with

⁴⁰ Advice received from the Crown Solicitor re: Questions arising under the *Parliamentary Evidence Act 1901* in relation to the taking of evidence from Aborigines, and in relation to the privilege of witnesses, dated 3 April 1980.

⁴¹ Section 11 of the *Parliamentary Evidence Act 1901*.

⁴² Section 13 of the *Parliamentary Evidence Act 1901*.

⁴³ *R v Saffron*, unreported District Court of NSW, 21/8/1987.

⁴⁴ *R v Murphy* (1986) 5 NSWLR 18.

⁴⁵ *R v Foord*, unreported, 1985.

⁴⁶ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 182.

⁴⁷ *Fenton v Hampton* (1858) 11 Moo PC 347: 14 ER 727.

witnesses who disrupt or interfere with any inquiries. As noted, section 11 of the *Parliamentary Evidence Act 1901* provides for a penalty for the refusal of a witness to answer questions put to them as part of an inquiry. It states:

- (1) 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 Serjeant-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.
- (2) Such warrant shall be a sufficient authority for all gaolers and other officers to hold the body of the person therein named for the term therein stated.
- (3) No person acting under the authority of this section shall incur any liability, civil or criminal, for such act.

Warrants for the arrest of a witness who fails to appear before an inquiry being conducted by the House of one of its committees can be obtained from a Supreme Court judge.⁴⁸

The coercive powers of a House, under the *Parliamentary Evidence Act 1901* or otherwise, apply equally to members of that particular House even if they are Ministers such as in *Egan v Willis* and *Egan v Chadwick* where it was held that the Legislative Council had the power to punish Mr Egan for his failure to comply with an order for the production of papers, which constituted a contempt of the House under general law. This is the case even though New South Wales has no specific powers to punish members for contempt.

The power of the House to order the production of documents is given further consideration below.

2.4 Power to order the production of documents

Houses of Parliament and committees established by them are deemed to have an inherent power to order members and witnesses before them to produce documents. *Egan v Willis* and *Egan v Chadwick* are the two cases which have highlighted in recent times the powers of Houses of Parliament to order the production of documents from the Executive Government.

In *Egan v Willis* the New South Wales Court of Appeal unanimously held that "a power to order the production of state papers...is reasonably necessary for the proper exercise by the Legislative Council of its functions."⁴⁹ In arriving at this decision Chief Justice Gleeson noted that courts in the USA have held that it is a necessary function of a legislature to have the power to order that certain papers be produced to it. He referred to the judgment of the Supreme Court in *Quinn v The United States*⁵⁰ which held that:

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigation...Congress could be seriously handicapped in its efforts to

⁴⁸ Sections 7 and 8 of the *Parliamentary Evidence Act 1901*.

⁴⁹ *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 664.

⁵⁰ *Quinn v The United States* (1954) 349 US 155 at 160 Warren CJ.

*exercise constitutional function wisely and effectively.*⁵¹

Chief Justice Gleeson went on to conclude that the same principle would apply in New South Wales. He argued:

*The capacity of both Houses of Parliament, including the House less likely to be 'controlled' by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.*⁵²

When the matter was appealed to the High Court, the majority (Gaudron, Gummow and Hayne JJ) confirmed that it was reasonably necessary for the Legislative Council to order one of its members, even when they are a Minister, to produce certain papers due to the legislative and scrutiny functions of an Upper House in a bicameral system of responsible government. They argued that:

*A system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament." The point was made by Mill, writing in 1861, who spoke of the task of the legislature "to watch and control the government: to throw the light of publicity on its acts". It has been said of the contemporary position in Australia that, whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government."*⁵³

In his separate judgment, Justice McHugh did not refer to the necessity of a House to be empowered to call for papers in order to fulfil its functions. Rather, he argued that such power was inherent in a legislative chamber. He considered:

*...the powers and privileges of each of the Houses of the Parliament of New South Wales can only be understood by reference to the powers and privileges of the House of Commons and the great constitutional conflicts between the House of Commons on one hand and the Crown, the House of Lords and the courts of law on the other which remained unsettled until the 19th century. As a result, the privileges and powers of each of the Houses of the New South Wales legislature include the power to obtain information from a Minister who is a member of that House...*⁵⁴

Whilst this case clearly established the power of Houses of Parliament to order the production of papers, the issue of whether a House could call for those papers, which were subject to claims of privilege, was not decided. This was the issue considered in *Egan v Chadwick*.⁵⁵

In this case the New South Wales Court of Appeal held that due to the principle that ministers are accountable to the House of which they are a member, access to legal advice provided to the government is reasonably necessary for the Council to perform its functions, and it is for the House to determine the strength of any claim for privilege under public interest immunity or legal professional privilege. The majority (Chief Justice Spigelman and Justice Meagher) did find one restriction on a House of Parliament's power to order the production of documents – those documents which would reveal the deliberations of the Cabinet. For Justice Meagher the restriction was absolute.⁵⁶ However, Chief Justice Spigelman argued that the

⁵¹ As referred to by Gleeson CJ in *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 665.

⁵² *Ibid* (per Gleeson CJ).

⁵³ *Egan v Willis* (1998) 73 ALJR 75 at 84-5.

⁵⁴ *Ibid*, at 89.

⁵⁵ *Egan v Chadwick* (1999) NSWCA 176.

⁵⁶ *Egan v Chadwick & ORS* (1999) NSWCA 176 at paragraph 154 (per Justice Meagher).

restriction depended on the content of Cabinet documents but that those documents which would reveal the actual deliberations of Cabinet would remain confidential as the doctrine of responsible government encompasses the idea of collective Cabinet responsibility and the confidentiality of Cabinet deliberations.⁵⁷

Justice Priestley in dissent argued that no restriction fell on any documents as Government documents are generated at public expense for public benefit. He stated:

*Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.*⁵⁸

Priestley also argued that as Cabinet documents yield to the principle of Government accountability, the Council must have the capacity to call them stating:

*...notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can be to the benefit of the people of a truly representative democracy.*⁵⁹

As previously noted the Court of Appeal's decision in *Egan v Chadwick* did not compel Mr Egan to hand over the documents in dispute as the matter was one for the Legislative Council to resolve. As such it would appear that whilst courts are willing to order that Houses have the power to take action against members and witnesses for refusing to comply with orders for the production of papers, they are not willing to order compliance as it is considered that this is a matter which should be determined by the House.

Whilst it is well established that legislatures are able to compel the production of documents from the Executive if they are not subject to cabinet confidentiality, there is some dispute about the power of committees to compel the production of documents generally. Standing order 288 provides committees with the power to send for persons, papers, records, exhibits and things. However, this power to summons for the production of documents has been refuted by witnesses before statutory committees on the basis that the legislation establishing the various statutory parliamentary committees differs in the manner it confers powers on the committees. For instance, the Joint Committee on the Office of the Ombudsman is provided with the power to order the production of documents from witnesses.⁶⁰ However, the legislation establishing the Public Accounts Committee is silent on whether the committee has the power to send for persons, papers and records, and the Audit Office has obtained a Crown Solicitor advising which indicates the committee does not have the power to require the production of documents. The Crown Solicitor noted:

While the Act recognises that in the course of the exercise by the PAC of its functions documents will be produced to it in evidence and provision is made for such evidence which relates to a secret or confidential matter to be taken in private and for the circumstances in which it can be published, there is no provision in the Act which expressly confers on the PAC

⁵⁷ *Ibid*, at paragraph 56-7 (per Chief Justice Spigelman).

⁵⁸ *Ibid*, at paragraph 135 (per Justice Priestley).

⁵⁹ *Ibid*, at paragraph 143 (per Justice Priestley).

⁶⁰ Section 31G(4) of the *Ombudsman Act 1974*.

*the power to require a person to produce a document (emphasis added).*⁶¹

In earlier advice received by the committee it was argued that the Public Accounts Committee has no inherent power to compel the production of documents, be they confidential or otherwise, and that such a power is not conferred by the *Parliamentary Evidence Act 1901*, which only governs the examination of witnesses before the committee. The Public Accounts Committee has recommended that the legislation establishing it be amended to clarify its powers in relation to the production of documents so that it is consistent with legislation pertaining to other statutory committees.⁶²

Parliamentary committees are limited in the action they can take in regard to any refusal to comply with an order for the production of papers. It could be argued that those committees that have been conferred such power by statute are in a much stronger position in terms of requiring compliance than those without statutory authority. However, it should be noted that *May* notes:

*Disobedience to the order of a committee made within its authority is a contempt of the House by which the committee was appointed. Individuals have been held in contempt who did not comply with orders for their attendance made by committees with the necessary powers to send for persons; as have those who have disobeyed or frustrated committee orders for the production of papers.*⁶³

It is interesting to note that in a judgment handed down in the Prince Edward Island Supreme Court in Canada in January 2003 it was held that parliamentary committees, as a natural extension of the House have an inherent power to summon witnesses and order the production of documents even in the absence of specific authorising legislation.⁶⁴ Given that the Prince Edward Island Legislature is a Westminster style Parliament the arguments in this case may well be applicable to New South Wales.

2.5 Power to regulate and discipline members

Unlike other Parliaments in Australia, the New South Wales Parliament has not, by legislation or resolution, adopted the powers, privileges or immunities of the House of Commons, or declared its privileges and powers in any comprehensive manner. Accordingly, in matters such as suspension and expulsion, the Houses rely on their inherent or implied powers and, in the case of the Legislative Assembly, the standing orders. The nature and extent of the inherent powers of former colonial legislatures is governed by common law principles originally formulated in a series of Privy Council decisions in the nineteenth century. According to these principles, the Houses of such legislatures possess only such powers as are “necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute.” The courts have determined that punitive action does not fall within the scope of this formulation. To be lawful, any action, which a House in New South Wales takes to deal with contempt or obstructions to proceedings, must be “protective” and “self-defensive” and not punitive.

⁶¹ Auditor-General's Report to Parliament for 2001, Volume One at p. 213.

⁶² See Public Accounts Committee, *Inquiry into the Collapse of the NSW Grains Board*, May 2001, p. 52-4.

⁶³ *May*, p. 131.

⁶⁴ See *AG Canada v McPhee and Ors* (2003) PESCTD 06, 14 January 2003.

2.5.1 Power to suspend

The power to suspend members from the service of the House for a defined period of time for wilfully obstructing the proceedings has been held on numerous occasions to be a necessary power for legislatures. Such powers do not permit the suspension of a member unconditionally nor do they provide authority to order a member who has left the Chamber to be arrested and brought back in order to be suspended. In addition, it has been held that a House of Parliament can only use the suspension of a member as a means of self-defence and not for punishment.

In *Barton v Taylor* the Privy Council upheld a judgment on appeal from the Supreme Court of New South Wales that the Assembly had the power to suspend a member from its service. In this case an action had been brought by Mr Taylor, a member of the Legislative Assembly, against the Speaker for removal of his person from the Chamber and preventing him from returning.

Mr Taylor had been named by the Chairman of Committees as having persistently and wilfully obstructed the business of the committee of the whole and was subsequently suspended from the House. Whilst on suspension Mr Taylor resumed his place in the Legislative Assembly where the Speaker requested him to withdraw. Having refused to do so the Serjeant-at-Arms accordingly removed him from the Chamber.

The Privy Council held that legislative bodies had the power to suspend members from the service of the House under the basis of necessity. In so doing it argued that the suspension could only be a protective and not a punitive measure and referred to the judgment of the Privy Council in *Doyle v Falconer* which held that “[t]he powers incident to or inherent in a Colonial Legislative Assembly are ‘such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute’, and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.”⁶⁵

Their Lordships adopted the words of Sir James Colvile in *Doyle v Falconer* which stated:

*If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House while sitting, he may be removed or excluded for a time, or even expelled....The right to remove for self-security is one thing, the right to inflict punishment is another....If the good sense and conduct of the members of Colonial Legislatures prove insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person excluded from the place of meeting, and to keep him excluded.*⁶⁶

In upholding the decision the Privy Council argued that whilst necessity dictates that Houses of Parliament are able to suspend members from the service of the House as a measure of protection or self-defence, this necessity does not confer a power for unconditional suspension. The Earl of Selbourne in delivering the judgment of the Privy Council said:

⁶⁵ *Barton v Taylor* (1886) 11 App Cas 197 at 203.

⁶⁶ *Ibid.*, at 203-4.

[t]he principle on which the implied power is given confines it within the limits of what is required by the assumed necessity....[t]hat necessity appears...to extend as far as the whole duration of the particular meeting or sitting of the assembly in the course of which the offence may have been committed....[t]he power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting, is, in their Lordships' judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be, that the same doctrine of reasonable necessity would authorise a suspension until submission or apology by the offending member....[a] power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse.⁶⁷

He goes on to state that “[t]he resolution pleaded in this case was ‘That Mr A G Taylor be suspended from the service of the House.’ If more was meant than to suspend him for the rest of the then current ‘service’, their Lordships think that it ought to have been distinctly so expressed.” As such “the suspension pleaded in this plea must not be construed as operating beyond the sitting during which the resolution was passed.”⁶⁸

The Privy Council came to a similar conclusion in *Harnett v Crick* where a member of the New South Wales Legislative Assembly was suspended from the House for a defined period of time. In this case, Mr Crick, who was Secretary for Lands had been found guilty of corruption by a Royal Commission on the Administration of the Lands Department for taking bribes. On publication of the Royal Commission’s report the Assembly moved a resolution to consider the findings of misconduct held against Mr Crick. As criminal charges had already been laid against the member with a trial pending the Speaker ruled that the House could not proceed on the matter, because Mr Crick might thereby be prejudiced in certain criminal proceedings. In response the Assembly agreed to a new standing order that would enable the House to suspend a member from the service of the House until such time as the verdict of the jury had been returned. Despite this standing order and Mr Crick’s suspension, he persisted in attending the House, whereupon the Speaker called upon him to withdraw. After refusing to comply the Serjeant-at-Arms, under the Speaker’s direction, removed him from the House.

The Privy Council upheld the decision of the New South Wales Supreme Court, which declared that the Assembly had the power to suspend a member for a limited time. The question at issue was the “validity of the standing order under which [Mr Crick] was suspended.” In doing so their Lordships considered:

If the House...justified temporary suspension, not by way of punishment, but in self-defence, it seems impossible for the Court to declare that the House was wrong in its judgment, and the standing orders and resolution founded upon it so foreign to the purpose contemplated by the Act, that the proceedings must be declared invalid. The suspension...enures only until a verdict be given in the criminal case or the House determines sooner to remove the suspension.⁶⁹

This power to suspend a member from the House also arose in where the power of a House to suspend a member, who as a Minister, did not comply with an order for the production of papers was in contention. The High Court upheld the decision of the New South Wales Court of Appeal which found that “a power to order the production

⁶⁷ *Ibid*, 204-5.

⁶⁸ *Ibid*, at 206.

⁶⁹ *Harnett v Crick* (1908) AC 470 at 476.

of State papers is reasonably necessary for the proper exercise by the Legislative Council of its functions.”⁷⁰ The High Court also held that the Legislative Council had the power to deal with any non-compliance with an order for the production of papers of which suspension is only one measure the House can take.

The majority (Gaudron, Gummow and Hayne JJ) considered that the action taken by the Legislative Council to suspend Mr Egan from the service of the House due to his failure to produce documents in accordance with a resolution of the House was within the Council’s power.⁷¹ Justice Callinan expanded on this by noting that the action taken by the House in suspending Mr Egan was protective of the Council’s legislative powers and the good government of the State and was therefore reasonably necessary in order for the House to carry out its functions.⁷²

This inherent right also extended to members who acted in a disorderly manner when the House was in committee of the whole. Justice Windeyer argued in *Toohey v Melville* that the House is entitled to remove any obstruction from its proceedings in the committee of the whole stage of legislation as it is during normal debate, stating that the Legislative Assembly, when in committee, has the “same power of self-preservation against obstruction caused by intruders or disorderly members of its own body as it has when the Speaker is in the Chair.”⁷³ Legislation is now considered in detail by the House rather than in a committee of the whole. However, the comments made by Justice Windeyer that the House has the power to remove members for disorderly conduct no matter what business is before the House still apply.

2.5.2 Expulsion in the Legislative Assembly

As noted, the courts have determined that punitive action does not fall within the power of colonial Houses of Parliament and that any action such Houses take must be in self-defence. In 1969, the New South Wales Supreme Court confirmed the decisions of the Privy Council which had found that the power of a House of Parliament extended to suspending or expelling a member by way of self-protection in order to ensure its proceedings are conducted without disturbance. In *Armstrong v Budd* the Supreme Court unanimously held:

- (1) That in addition to the powers specifically conferred by the *Constitution Act 1902* the common law confers on each of the Houses of Parliament such powers as are necessary to the existence of the particular House and to the proper exercise of the functions it is intended to execute; and
- (2) That in a proper case a power of expulsion for reasonable cause may be exercised, provided the circumstances are special and its exercise is not a cloak for punishment of the offender.⁷⁴

Chief Justice Herron considered that the New South Wales Legislative Council had the power to expel a member adjudged guilty of conduct unworthy of a member and declare the member’s seat vacant so long as the expulsion was a protective and not a punitive measure. He argued that:

⁷⁰ *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 667 (per Gleeson CJ).

⁷¹ *Egan v Willis* (1998) 73 ALR 75 at 87 (per Gaudron, Gummow and Hayne JJ).

⁷² *Ibid*, at 122 (Per Callinan J).

⁷³ *Toohey v Melville* (1892) 13 LR (NSW) 132 at 137 (per Windeyer J).

⁷⁴ *Armstrong v Budd* (1969) 71 SR (NSW) 386.

...in a proper case a power of expulsion for reasonable cause [can] be exercised provided that the circumstances are special and its exercise is not a cloak for punishment of the offender. On this aspect an analogy is seen in the order that a barrister be disbarred on the ground of unfitness. Such an order is entirely protective and notwithstanding that its exercise may involve great deprivation to the person disciplined, there is no element of punishment.⁷⁵

Justice Wallace also concluded that the Legislative Council had the power to expel a member from its service as a defensive measure and that the power to do so could arise out of conduct outside the Chamber. He stated:

I am of the opinion that the Legislative Council has an implied power to expel a member if it adjudges him to have been guilty of conduct unworthy of a member. The nature of this power is that it is solely defensive – a power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties. The power extends to conduct outside the Council provided the exercise of the power is solely and genuinely inspired by the said defensive objectives. The manner and the occasion of the exercise of the power are for the decision of the Council.⁷⁶

The third judge, Justice Sugerman also agreed stating, “[w]hatever in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary.”⁷⁷

Standing order 254 provides for the expulsion of members from the House:

A Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the Member’s seat declared vacant.

There have been a number of cases of expulsion in the Legislative Assembly.

- In 1881 a member, Mr Baker, was expelled for “conduct unworthy of a Member” namely, the misappropriation of funds.⁷⁸
- In 1890 Mr Crick was expelled having defied the ruling of the Chair in committee of the whole and afterwards having violently resisted the Serjeant-at-Arms when that officer was directed to remove him and further having continued such resistance until other officers rendered assistance, causing a great disturbance and scandal.⁷⁹
- In 1917 a member, Mr Price, was expelled pursuant to the standing orders. Mr Price had been expelled following the findings of a Royal Commission that certain claims made by him in Parliament alleging improper conduct by a Minister were made wantonly, recklessly, and without foundation.⁸⁰

For further information on the expulsion of members see section 23.3 of Part One.

⁷⁵ *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396.

⁷⁶ *Ibid*, at 403.

⁷⁷ *Ibid*, at 405.

⁷⁸ VP 08/11/1881, p. 277.

⁷⁹ VP 13/11/1890, p. 430.

⁸⁰ VP 18/10/1917, p. 128.

2.6 The power to remove visitors for disturbing the proceedings in Parliament

Given that the House has the power to control its own proceedings it follows that the House also has the power to remove any disturbance to its proceedings. In *Willis v Perry* Chief Justice Griffith in the High Court said that:

*...[t]he Speaker undoubtedly has power when any person who is outside the chamber is conducting himself in such a manner as to interfere with the orderly conduct of proceedings in the chamber to have that person removed.*⁸¹

Standing order 260 enables the removal of persons, other than members, from the House. It provides:

A person not being a Member who interrupts the orderly conduct of the business of the House, obstructs the approaches to the House, or causes a disturbance within the precincts of the House, may, by direction of the Speaker, be removed by the Serjeant-at-Arms.

The issue of whether the House has the power to make such rules and orders was considered in *Harnett v Crick* where the Privy Council considered the circumstances of an assault allegation in the Legislative Assembly. The Privy Council held:

*(1) That the House itself is the sole judge of whether an 'occasion' has arisen for the preparation and adoption of a standing order regulating the orderly conduct of the Assembly and (2) that no Court of Law can question the validity of a standing order duly passed and approved, which in the opinion of the House, was required by the urgency of the occasion, unless upon a fair view of all circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.*⁸²

The Privy Council rejected the notion that a standing order had the force of law and operated to prevent the court from inquiring into its validity. Lord MacNaughten in delivering the judgment of the Privy Council referred to the provisions of the *Constitution Act 1902* relating to the Governor's approval of the standing rules and orders of the House and how such provisions do not validate the standing orders as law:

*...the provision in the Act as to the Governor's approval was not intended to have the effect of giving standing orders passed by the Assembly a validity which otherwise they would not have possessed. It seems rather to be a limitation on the powers of the Assembly, making the Governor's approval necessary for the validity of any standing order passed by that body under s.15.*⁸³

Advice from the Crown Solicitor regarding the provisions of the standing order enabling the removal of persons other than members, indicates that as the rule is expressly designed for the protection of the orderly business of the House it is necessary, protective and non-punitive.⁸⁴

On 16 November 1893 the Speaker ordered the Serjeant-at-Arms to arrest a person in the public gallery after the person had been held in contempt by the House for

⁸¹ *Willis v Perry* (1912) 13 CLR 592 at 598.

⁸² *Harnett v Crick* (1908) AC 470 at 465-6.

⁸³ *Harnett v Crick* (1908) AC 470 at 475.

⁸⁴ Advice received from the Crown Solicitor re: Control of Disturbances in Parliament House, dated 16 November 1983.

yelling out during a member's speech. The person was not held in the custody of the Serjeant-at-Arms but was discharged after having been removed from the gallery.⁸⁵ Advice received from counsel indicated that "the Assembly can only authorise the removal of a person, other than a member, who creates a disturbance in the House, and neither the Speaker nor the Assembly can legally interfere with his liberty longer than may be necessary for that purpose."⁸⁶

Another incident occurred in New South Wales in 1983 when a person who had been in the public gallery instituted proceedings for assault against an attendant who had been clearing the gallery at the direction of the Speaker. The person had been continuing to take notes even though she had been warned on numerous occasions over several months that note taking was not permitted in the public galleries. The attendant did not touch the person, but had a verbal altercation about using the correct exit door and had held a door shut against her when directing her to an alternative door. The matter was dismissed by the Court of Petty Sessions after the Magistrate heard evidence of both parties concerned.⁸⁷

The standing orders do not specifically prevent note taking by persons in the public gallery and note taking has been permitted in recent years so long as it does not distract any member of Parliament or the proceedings of the House.⁸⁸

Whether the Speaker has the power to arrest people within the Parliamentary precincts when they are not disturbing the proceedings in the Chamber is a matter of conjecture. In *Willis v Perry* Chief Justice Griffith expressed the view that the Speaker could act to ensure that the proceedings of the House were not disturbed and that this included the removal of persons who were not members of the House.⁸⁹ In this case the High Court upheld an earlier decision of the New South Wales Supreme Court that the precincts of the House referred to in certain standing orders did not include the grounds of Parliament House, but meant the Chamber and its associated area.⁹⁰ The Supreme Court's decision was by no means clear, with Justice Gordon specifically noting that "within the precincts of the said Chamber" meant "outside the Chamber, but in its vicinity"⁹¹, and Justice Ferguson arguing that it meant "in the parliamentary buildings."⁹²

In 1997, the New South Wales Parliament enacted the *Parliamentary Precincts Act 1997* which increased the Presiding Officers' ability to control activities within the Parliament's boundaries. The legislation was enacted to provide a statutory definition of the precincts of the Parliament and to vest its control in the Presiding Officers. The Act ensures that the Presiding Officers have the power to remove visitors from anywhere within the precincts if it is appropriate to do so even if they are not disturbing the proceedings in the House. However, it does not confer the power to

⁸⁵ VP 16/11/1893, p. 128.

⁸⁶ Advice received from Counsel re: Punishment of Strangers for Contempt, dated 27 November 1893.

⁸⁷ Advice received from the Crown Solicitor re: Mrs Majories Lois Edwards v Allan John Henry Hands, Parliamentary Attendant – Allegation of assault, dated 3 March 1982.

⁸⁸ Note taking had been prohibited on the basis that it is only the official publication of the debates (Hansard) that attracts parliamentary privilege. See section 3.10.1 of Part Two for further information on the privilege attaching to the republication of Hansard.

⁸⁹ *Willis v Perry* (1912) 13 CLR 592 at 598.

⁹⁰ *Perry v Willis* (1911) NSW SR 479. See also *Barnes v Purcell* (1946) St R Qd 87.

⁹¹ *Perry v Willis* (1911) NSW SR 479 at 489.

⁹² *Ibid*, at 491.

arrest visitors with a view to holding them in order that they be punished. See section 2.8.3 of Part Two for further information on this issue.

Part 2 of the Act defines the Parliamentary precincts, confers control and management thereof in the Presiding Officers and vests title to the Parliamentary precincts in the corporation. Section 7 provides:

7 Control and management of Parliamentary precincts

(1) Subject to this Act:

- (a) the Parliamentary precincts are under the control and management of the Presiding Officers, and
- (b) the Presiding Officers may take any action they consider necessary for the control and management of the Parliamentary precincts.

(2) Subsection (1) does not affect:

- (a) the powers of each House to control or manage its own affairs and proceedings, and
- (b) the orders of each House in relation to its own affairs and proceedings, and
- (c) the powers of each House in relation to the control and management of so much of the Parliamentary precincts as constitute the chamber of the House concerned or as are used exclusively or principally for the purposes of the House.

The Crown Solicitor has advised that the legislation does not confer control and management of the Parliamentary precincts on the corporation nor does it make acts of the Presiding Officers acts of the corporation.⁹³ Therefore, the corporation and the Presiding Officers have distinct roles and functions with respect to the Parliamentary precincts – the corporation as owner, with (limited) power to deal with land and the Presiding Officers with control and management, but not so as to affect the powers etc. of the Houses.

Section 13 of the Act provides for the constitution of the Corporation of Presiding Officers as a statutory body representing the Crown. It states:

13 Constitution of Corporation

- (1) There is established by this Act a corporation with the corporate name of the Corporation of the Presiding Officers of the Parliament of New South Wales.
- (2) The affairs of the Corporation are to be managed and controlled by the Presiding Officers. Any act, matter or thing done in the name of, or behalf of, the Corporation by the Presiding Officers is taken to have been done by the Corporation.
- (3) Without limiting subsection (2), the Presiding Officers have and may exercise all functions of the Corporation as owner of the Parliamentary precincts.
- (4) The Corporation is a statutory body representing the Crown.

It should also be noted that section 27 of the Act provides that a memorandum of understanding may be entered into between the Presiding Officers and Commissioner of Police regarding the exercise by police officers of functions in the Parliamentary precincts. The failure of police officers to comply with the memorandum of understanding does not of itself invalidate the actions of the police officer.

⁹³ Advice received from the Crown Solicitor re: Security Licences for Parliament House, dated 14 August 1998.

2.7 Immunity from compulsory attendance in court

By convention, members are exempted from jury service.⁹⁴ In New South Wales the practice has been that members are exempt from the duty of attending in court to give evidence so long as the House or a committee of the House is sitting. A member may attend to give evidence in a civil suit while the House is sitting if the House grants a leave of absence. Sections 10 and 15(2) of the *Evidence Act 1995* are relevant to this issue:

10 Parliamentary privilege preserved

- (1) This Act does not affect the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament.
- (2) In particular, section 15(2) does not affect, and is in addition to, the law relating to such privileges.

15 Compellability: Sovereign and others

.....
(2) A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:

- (a) a sitting of that House, or a joint sitting of that Parliament, or
- (b) a meeting of a committee of that House or that Parliament being a committee of which he or she is a member.

Where a member is required to appear in court while the House is sitting, the practice is for the Presiding Officer to write to the Chief Judge or other appropriate officer of the Court claiming the privilege of exemption. If the member wishes to appear and, depending on the circumstances of the particular case, the member may be granted leave of absence to attend, by vote of the House.

The view that the privilege of immunity from legal proceedings is for the Legislature as a whole and not for individual members has meant that the immunity from compulsory attendance in court has been the subject of debate. For instance, Justice Gibbs, acting as a Royal Commissioner, has argued that the functioning of the Legislature and parliamentary proceedings may not be necessarily hindered by the absence of one of its members or officers who had been subpoenaed during parliamentary sittings.⁹⁵

The serving of legal process on members of Parliament is given more detailed consideration in section 5.1 of Part Two.

2.8 Privileges that are not considered necessary for the functioning of the Parliament of New South Wales

2.8.1 Freedom from arrest

Members of the New South Wales Parliament do not have immunity from arrest or imprisonment for an indictable offence. However, due to the privileges enjoyed by

⁹⁴ This convention is given statutory prescription by virtue of Schedule 2 of the *Jury Act 1977* (NSW).

⁹⁵ Queensland Royal Commission into Certain Matters Relating to Members of the Police Force and the National Hotel, Petrie Bight, Brisbane, *Report of the Royal Commission appointed on certain matters relating to members of the Police Force and the National Hotel*, Petrie Bight, Brisbane, 1964, p. 185.

the House and by convention, the police inform the Speaker and President that they have a warrant for the arrest of a member and seek their permission to enter the premises.

In relation to arrest in civil cases there is doubt to what extent members of the New South Wales Parliament are immune. In 1894, in *Norton v Crick*,⁹⁶ it was held that members of the New South Wales Parliament could be arrested on writs of *capias ad satisfaciendum* at any time. Such a writ only applied where the judge was satisfied that a defendant was about to leave the colony without satisfying a judgment against the defendant. The reasoning of the court was that immunity in such cases did not fall within the scope of the inherent or implied powers of the House as it was not reasonably necessary to enable Parliament to function properly. In this case a member of the Legislative Assembly who had been arrested contended that he, in common with all other members of the Assembly, enjoyed the privilege of freedom from arrest similar to that enjoyed by the members of the House of Commons in England. Justice Innes and Justice Foster noted that:

*It is quite clear that the Legislature of this Colony does not enjoy all the privileges which the House of Commons, by virtue of ancient usage and prescription, does enjoy; nor can it be inferred from the possession of certain privileges of the House of Commons by virtue of that ancient usage and prescription that the like privileges belong to or are inherent in a Colonial Legislature.*⁹⁷

The court also considered whether the privilege of freedom from arrest was essential to the existence of such a body as the Legislative Assembly and the proper exercise of its functions. In its judgment, the court said that "...if no such privilege existed in England by *lex et consuetudo* of Parliament, the English Parliament would not under existing circumstances, and considering the present law of arrest, think that such a privilege was necessary in order to enable it duly to discharge its functions."⁹⁸

Professor Carney notes that this throws doubt on the need for such an immunity stating:

*...in Norton v Crick the court easily found that no immunity arose from being served with a writ of capias ad satisfaciendum which is granted only if the defendant is about to leave or abscond to a remote part of the colony without satisfying a judgment debt. Establishment of that ground clearly precluded any view that the immunity was necessary for the member to give service to the House.*⁹⁹

It should be noted that the judgement delivered in *Norton v Crick* differed from an opinion obtained from the Attorney General in 1875 regarding the privilege of freedom from arrest for members of Parliament. The Attorney was of the opinion that such a privilege existed "for a certain period before and after the meeting of Parliament, and even after the dissolution of Parliament, for a convenient and reasonable time for returning home."¹⁰⁰

The opinion noted that the judgments of the Privy Council in *Kielley v Carson*¹⁰¹ and *Fenton v Hampton*¹⁰² "clearly establish...that Colonial Legislatures do not possess

⁹⁶ (1894) 15 LR NSW 172.

⁹⁷ Taken from the *Judgment of the Supreme Court of New South Wales in Norton v Crick – Extract from the Sydney Morning Herald, delivered 22 May 1894 – Ordered to be printed by the Legislative Assembly on 29 May 1894.*

⁹⁸ *Ibid.*

⁹⁹ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000 p. 197.

¹⁰⁰ *Freedom of Members of Parliament from arrest*, Opinion of the Attorney General, ordered by the Legislative Assembly to be printed, 15 July, 1875, p. 2.

¹⁰¹ (1841-42) 4 Moo PC.

certain powers which the House of Commons enjoys by virtue of ancient usage and prescription, and because the *lex et consuetudo Parliamenti* which forms a part of the Common Law of the land, invested the Houses of Lords and Commons with many peculiar privileges.”¹⁰³ The Attorney General also noted that such authorities had deemed that such a privilege was considered “...necessary to the existence of a legislative body and to the proper exercise of the functions which it is intended to execute, and that these powers are granted by the very act of its establishment.”¹⁰⁴

The Attorney General concluded that the freedom from arrest while in attendance upon Parliament is a power which it is necessary for a deliberative Assembly to possess stating that “[i]f one member of the Assembly could be taken and imprisoned under a writ of *Ca. Sa.*, all the members might be so taken and imprisoned, and the business of Parliament would be effectually suspended.”¹⁰⁵

Professor Campbell notes that whilst members can be arrested on writs of *capias ad satisfaciendum* there may be other circumstances such as civil contempt of court, in which limited immunity from imprisonment might be permitted due to the question of underlying necessity.¹⁰⁶

2.8.2 Power to punish for contempts

Contempts are actions which obstruct or impede the House in the performance of its functions, or members or officers in the discharge of their duties, including misleading committees or interfering with witnesses. An action which obstructs the House may be defined as a contempt without being a breach of privilege. *Erskine May* defines contempts as:

*...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.*¹⁰⁷

The Houses of the New South Wales Parliament have not been afforded power, by virtue of the *Constitution Act 1902* or the standing and sessional orders, to deal with members who commit contempts. Despite this, the Assembly has a long history of cases of alleged contempts, dating back to the 1850s. Standing orders 91 and 92 provide for members to declare a contempt or breach of privilege. However, the House can only deal with the contempt in a non-punitive way (i.e. the House cannot fine or imprison members). As previously noted, the House does however, have the power to admonish non-members for contempt and to order their removal from the Chamber for disturbing the proceedings.

The House is able to direct the Attorney General to prosecute contempt in the courts, where it is also punishable under the general law. Such a direction may be given whether or not the House takes action itself. Professor Campbell argues that in New

¹⁰² (1858) 11 Moo PC 347.

¹⁰³ *Freedom of Members of Parliament from arrest*, Opinion of the Attorney General, ordered by the Legislative Assembly to be printed, 15 July, 1875, p. 1.

¹⁰⁴ *Ibid*, p. 1.

¹⁰⁵ *Ibid*, p. 2.

¹⁰⁶ Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, p. 59.

¹⁰⁷ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir William McKay KCB, p. 128.

South Wales this power derives from the principle of necessity as the Privy Council in *Kielley v Carson* held that colonial legislatures possessed the same power in this respect as the House of Commons.¹⁰⁸ Therefore, despite having no specific statutory provisions enabling the House to deal with contempts committed by members, colonial legislatures have been conferred with the power to deal with such contempts under the common law.

With regard to contempts committed outside Parliament, the Privy Council has held that there is no implied power for colonial legislatures to adjudicate upon or punish for such contempts. In *Kielley v Carson* the Privy Council specifically stated that whilst a House may have the power to punish for contempts committed under the common law that power does not extend to past misconduct:

*...such an Assembly has the right of protecting itself from all impediments to the due course of its proceedings. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature.*¹⁰⁹

This was also the case in *Fenton v Hampton*, where a member of the Legislative Council of Van Diemen's Land refused to appear before a committee to which he was summoned to give evidence regarding alleged abuses in the Convict Department. On failing to attend he was summoned to appear before the Bar of the House. When he failed to comply with this summons the Speaker (Mr Fenton) issued a warrant for the apprehension of Mr Hampton "to be held in the custody of the Serjeant-at-Arms during the pleasure of the Council." Mr Hampton was to be held in the custody of the Serjeant-at-Arms until the Governor of the Island prorogued the Council. Following the decision in *Kielley v Carson* the Privy Council noted that:

*The broad basis on which that case rests is, that the House of Assembly in Newfoundland does not possess, as a legal adjudication upon past misconduct, as a contempt of its authority, such alleged contempt having been committed out of the House. Unless, therefore, it can be shown that the Legislative Council of this Colony, a mixed statutory body, possesses powers which the Assembly of Newfoundland, a pure representative body, does not, or unless that case lays the ground for some solid distinction between the nature and character of the alleged contempt there and in the present instance, the decision of the Privy Council appears to me to be conclusive of the question at issue.*¹¹⁰

Similarly, in *Doyle v Falconer*¹¹¹ it was held that the Dominican House of Assembly did not have power to punish contempt though committed in its face and by one of its members. The Privy Council in making its decision referred to its earlier decision in *Fenton v Hampton*.

On 30 August 1955, Speaker Lamb made a statement to the House regarding the powers of the House to punish for contempts of Parliament. He noted that in New South Wales power has not been afforded to the House through the *Constitution Act*

¹⁰⁸ See Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, p. 120.

¹⁰⁹ *Kielley v Carson* (1842) 63 at 88.

¹¹⁰ *Fenton v Hampton* (1858) 11 Moo PC 347: 14 ER 727 at 369.

¹¹¹ (1866) LR 1 PC 328.

1902 nor any other legislation to enable the House to deal with contempts. Speaker Lamb noted:

On 30th October, 1857, Mr Speaker Cooper in the course of a ruling on a complaint said, in effect, that Parliamentary Privilege was not affected unless the matter raised referred to proceedings in this House; to the conduct of any Member in this House in relation to any proceedings in this House; or to the conduct or language of any person (not being a Member of this House) in connection with any proceedings in this House. This statement of Privilege, based upon May's Parliamentary Practice and local precedent, has been the guiding principle of this Assembly since that date.

When, in 1842, the then Council directed the Attorney-General to prosecute (in the Courts of Law) an offender against the privileges of Parliament, the Chief Justice said "It is, however, one thing to admit unqualifiedly that such privilege (i.e. Freedom of Speech in the Legislature) exists, and another thing to hold, which we certainly will not, that to call in question the proceedings of a Legislature...is indictable." In other words, the situation was that, even though a breach of the Law of Parliament had been committed there was no penalty for the Contempt.

Over the years, Privy Council decisions and Opinions of eminent Counsel have followed that early judgment, i.e. until Parliament legislates, it has no power to punish breaches of contempts by fines or commitment.

The Speaker went on to state that:

It must be remembered that breaches of privilege and contempts may also be committed by members themselves. In this event the House may go so far as to expel an offending member. As concerns strangers, the Parliamentary Evidence Act gives to Parliament the power to summon witnesses to give evidence at the Bar of the House or before a Select Committee. Any person refusing to attend may be apprehended and retained in custody, or, if attending and refusing to answer any lawful question, may be gaoled for any period up to one calendar month. A witness wilfully making a false statement and knowing the same to be false is liable to penal servitude not exceeding five years.¹¹²

These specific powers to punish witnesses who refuse to answer lawful questions or wilfully make any false statement are provided in section 11 and 13 of the *Parliamentary Evidence Act 1901*.

What is considered to be a "lawful question" under the Act has not been the subject of judicial interpretation but would appear to mean a question "which calls for an answer according to law, one that the witness is compellable to answering according to the established usage of the law".¹¹³

Advice received on the matter has indicated that certain types of questions would fall outside what is considered to be a lawful question and that witnesses cannot be compelled to answer them. Such questions include those that require answers which:

- are not relevant to the committee's terms of reference, construed broadly;
- would tend to incriminate the witness¹¹⁴;
- require giving an opinion or inference;
- would be against the public interest (public interest immunity);

¹¹² Legislative Assembly Parliamentary Debates, 30 August 1955, pp. 93-4.

¹¹³ *Crafter v Kelly* (1941) SASR 237.

¹¹⁴ See comments by Brennan J in *Hammond v The Commonwealth of Australia and Ors* (1982) 56 ALJR 767 at 772.

- are prohibited by law, such as secrecy laws (does not include moral obligations to secrecy, such as that arising from professional oaths or ethical rules);
- would breach parliamentary privilege;
- would breach legal professional privilege;
- would reveal information for the detection of crime, certain matters relating to the judicial process (e.g. jury deliberations) or communication with a spouse; or
- requires giving a non-expert opinion or inference.¹¹⁵

Any objection to a question must be considered on a case by case basis and on its own merits. It is for a committee to decide, in the first instance, whether a question is lawful and must be answered, but such a decision would be reviewable by a court if the witness was detained for refusing to answer. This follows the reasoning of the High Court in *R v Richards; ex parte Fitzpatrick and Browne*¹¹⁶, where the court considered whether the House was acting within the jurisdiction conferred by statute when committing a person for contempt.

*Armstrong v Budd*¹¹⁷ held that expulsion of a member for committing contempt is permitted in New South Wales so long as it is a defensive and not a punitive action. Professor Carney notes that apart from fines and imprisonment, other measures which have been precluded as punitive include a member's exclusion from parliamentary accommodation¹¹⁸ or the withdrawal of other financial benefits.¹¹⁹

2.8.3 Power to order the arrest of a visitor

In 1870 the Legislative Assembly adopted a standing order to enable it to deal with persons, who were not members, who interrupted or obstructed the House, by providing that the Serjeant-at-Arms could take such persons into custody. It stated:

Any person, not being a Member, who wilfully or vexatiously shall interrupt the orderly conduct of the business of the House, or obstruct the approaches of the House, or occasion a disturbance within the precincts of the House, shall be, by the warrant of the Speaker, committed to the custody of the Serjeant-at-Arms, and shall, by the Serjeant-at-Arms, be detained in custody until discharged by an order of the House.

The current standing order is slightly different in that it does not empower the Speaker to issue a warrant for the arrest of a person who has disturbed or obstructed the proceedings of the House. Standing order 260 provides:

A person, not being a member who interrupts the orderly conduct of the business of the House, obstructs the approaches to the House, or causes a disturbance within the precincts of the House, may, by direction of the Speaker, be removed by the Serjeant-at-Arms.

The standing order which had been adopted in 1870 was considered to be unworkable due to a number of Privy Council decisions in relation to the powers and

¹¹⁵ Advice received from the Solicitor General re: the *Parliamentary Evidence Act*, dated 8 September 1983.

¹¹⁶ (1955) 92 CLR 157.

¹¹⁷ (1969) 71 SR (NSW) 386.

¹¹⁸ *Barnes v Purcell* (1946) QSR 87 as referred to in Gerard Carney, *Members of Parliament: Law and Ethics*, 2000, p. 192.

¹¹⁹ *R v Dickson; Ex parte Barnes* 1947 St R Qd 133 at 136-7 and 141 as referred to in Gerard Carney, *Members of Parliament: Law and Ethics*, 2000, p. 192.

privileges of colonial legislatures. Advice received in 1894 from counsel in relation to the standing order noted:

*...the question of the validity of the standing order...is really decided by the judgments in the cases before the Privy Council of *Kielley v Carson* and *Doyle v Falconer*. In these cases the Privy Council held that a Colonial Legislature has an inherent power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting. Any Member therefore guilty of disorderly conduct in the House whilst sitting may be removed, excluded for a time, or possibly in an extreme case even expelled. This power is deemed to be inherent in every House of Colonial Legislature, being necessary for its self-preservation, and it may be exercised whether the obstruction comes from a Member or from a stranger. But these authorities point out the difference which exists between exercising such a power and inflicting punishment upon the offender. There is no power to inflict punishment inherent in a Colonial Legislature. It can only be conferred by an express enactment. A fortiori there is no power to punish in respect of contempts or misconduct committed beyond the walls of the Legislative Chamber.*¹²⁰

This advice goes on to note that the standing order in providing “that an offender may be committed to the custody of the Serjeant-at-Arms, and detained in custody until discharged by an order of the House, obviously aims at punishing the offence by an imprisonment, the duration of which depends on the pleasure of the House. The authorities we have mentioned are sufficient to show that this standing order is *ultra vires* unless it is legalised by some statute.” In coming to this conclusion counsel considered the provisions of the *Constitution Act 1855*, which authorised the preparing and adopting of such standing rules and orders as shall appear necessary for the orderly conduct of the Council and Assembly respectively. Counsel was of the view that this section “is intended to regulate the mode of transacting the business of Parliament and the conduct of its members, and that it cannot be extended so as to include the case of strangers, who may be guilty of obstructing or interrupting the business of the House, or of such other misconduct as is mentioned in the order.”

The opinion was that “the Assembly can only authorise the removal of a stranger who creates a disturbance in the House, and neither the Speaker nor the Assembly can legally interfere with his liberty longer than may be necessary for that purpose. Should the power of dealing with offenders by imprisonment be considered necessary or desirable, it can only be conferred by statute.”¹²¹

The judgments delivered by the Privy Council on this issue have considered that Colonial Parliaments, unlike the Parliament at Westminster, are not considered to be a court of justice and therefore do not have the power to order the arrest of a stranger for actions made outside the House. For instance, in *Kielley v Carson* the Privy Council held that the Legislative Assembly of Newfoundland had no power to order the arrest of a stranger so that he might be punished for a libel on a member of the Assembly.¹²² In considering this matter, the Privy Council considered whether by law, the power of committing for contempt, not in the presence of the Assembly, is incident to every local legislature. Their Lordships were of the opinion that colonial legislatures did not have any other powers than those that are “...necessary to the

¹²⁰ Taken from *Punishment of Strangers for Contempt: Counsel's Opinion on the Validity of the 107th Standing Order respecting*, dated 27 November 1893, ordered by the Legislative Assembly to be printed, 30 January 1894.

¹²¹ *Ibid.*

¹²² *Kielley v Carson and others*, (1841-42) 4 Moo PC, pp. 83-4.

existence of such a body, and the proper exercise of the functions which it is intended to execute.”¹²³ Their Lordships went on to state that in their view:

*...such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.*¹²⁴

In making this judgment, their Lordships, noted that it has been said that:

*...this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one.*¹²⁵

They went on to argue:

*Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.*¹²⁶

¹²³ *Ibid*, p. 88.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*, p. 89.

¹²⁶ *Ibid*, pp. 89-90.