

CHAPTER 18

THE INQUIRY POWER

One of the principal functions of the Council is to conduct inquiries into public affairs, including the administration of government. Inquiries are sometimes necessary to assist the Council in its legislative function¹ and to identify issues of public importance, to obtain information and to inform the public of the manner in which government is conducted.

As the High Court has observed, anyone can conduct inquiries by asking questions and analysing answers.² The media do so every day. However parliamentary inquiries are distinguished by the power of Parliament to compel witnesses to attend and to answer questions, and the protection of the inquiry process by parliamentary privilege.

THE POWER TO CONDUCT INQUIRIES

The powers of the Parliament to conduct inquiries and to compel witnesses to attend and to answer any 'lawful question' at public hearings draws on the concept of Parliament as the 'Grand Inquest of the Nation'. This term derives from the 1839 decision of *Stockdale v Hansard*, in which Patterson J stated that the House of Commons is:

[T]he grand inquest of the nation, and may inquire into all alleged abuses and misconduct in any quarter, of course in the Courts of Law, or any of the members of them; ...³

It is generally accepted that the inquiry powers of the House of Commons derive not from statute or any other written instrument but by virtue of ancient usage and practice (the *lex et consuetudo Parliamenti*).

As part of its broad inquiry powers, it is also generally accepted that the House of Commons and its committees have the power to call for persons, papers and

1 See *Egan v Willis* (1998) 195 CLR 424 at 440 per Gaudron, Gummow and Hayne JJ.

2 See *Murphy v Lush* (1986) 65 ALR 651 at 655.

3 (1839) 112 ER 1112 at 1185.

things, and to ask questions, and that the House may find individuals in contempt of Parliament if they are deemed not to have complied. Moreover, if the House of Commons makes a decision or takes an action as part of its inquiry powers, those proceedings are unimpeachable. The House is also the judge of its own privileges and has sole power to determine whether someone is in contempt of the House.⁴

The various Australian parliaments have, with the exception of New South Wales and Tasmania, received or adopted by statute the powers and immunities of the House of Commons. At the Commonwealth level, the powers and privileges of the House of Commons are adopted under section 49 of the Commonwealth Constitution, which states:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In New South Wales, in the absence of an explicit statutory power, the Parliament relies on the common law principle of ‘reasonable necessity’ – that is, that the New South Wales Parliament has the powers, rights and privileges necessary for the discharge of its functions. The power exists in the absence of constitutional or statutory prescription according to the often-cited line of reasoning of the United States Supreme Court in *McGrain v Daugherty*⁵ in 1927:

[T]he power of inquiry – with process to enforce – is an essential and appropriate auxiliary to the legislative function ... A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed.⁶

The inherent powers of the Parliament of New South Wales were upheld in the *Egan v Willis*⁷ decisions, in which the courts recognised the interdependence of the legislative and scrutiny functions of Parliament, and the centrality of the institution of Parliament in the operation of responsible government. The decisions established that, although the New South Wales Parliament lacks an equivalent of section 49 of the Commonwealth Constitution, the Council is entitled to seek

4 Laurie N, ‘The Grand Inquest of the Nation: A notion of the past?’, *Australian Parliamentary Review*, Vol 16, No 2, Spring 2001, p 173.

5 (1927) 273 US 135.

6 *Ibid* at 174-175, quoted in Evans H, ‘The Parliamentary Power of Inquiry: Any Limitations?’, *Australasian Parliamentary Review*, Vol 17, No 2, Spring 2002, p 132.

7 (1996) 40 NSWLR 650; (1998) 195 CLR 424.

information concerning the administration of public affairs and finances according to the test of 'reasonable necessity':

What is 'reasonably necessary' at any time for the 'proper exercise' of the 'functions' of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.⁸

It has been variously suggested that the power of individual Australian parliaments to conduct inquiries does not extend beyond their legislative power under the Commonwealth Constitution.⁹ There are even suggestions that the power to conduct inquiries does not extend beyond the *exercise* of legislative power by an individual government.¹⁰ These arguments do not deny a broad power of inquiry – they simply deny the power to establish an inquiry in respect of a subject matter beyond the legislative power of the relevant Parliament, or possibly even the exercise of that legislative power.¹¹ Enid Campbell, writing in 1966, stated:

Whether Australian Houses of Parliament possess the same unrestricted powers of inquiry is questionable. In this country, legislative authority is divided between federal and State parliaments and according to the Judicial Committee of the Privy Council, it is not competent for the federal Parliament to enact legislation investing royal commissions appointed by the federal government with power to compel the attendance and testimony of witnesses ... On general principles, the same must surely apply to parliamentary committees of inquiry.¹²

This position is based in part on two High Court decisions, *Attorney General (Cth) v Colonial Sugar Refining Company Ltd*¹³ and *Lockwood v Commonwealth*,¹⁴ in which individual jurisdictions were deemed not to have the power to establish royal commissions outside of their legislative competence.

In addition, this line of reasoning was given some support in *Attorney General v MacFarlane* concerning the powers of the then Legislative Council of the Northern Territory. In his judgment, Foster J found that, at 1900, the only function committed by the Imperial Parliament to the Commonwealth Parliament was the legislative function and not the inquisitorial function, and that the Legislative Council of the Northern Territory did not possess the powers or function of a grand inquest held by the House of Commons.¹⁵

8 (1998) 195 CLR 424 at 454 per Gaudron, Gummow and Hayne JJ.

9 See Campbell E, *Parliamentary Privilege in Australia*, Melbourne University Press, Melbourne, 1966, pp 164-165. See also Greenwood I and Ellicott R, *Parliamentary Committees: Powers Over and Protection Afforded to Witnesses*, Australian Government Publishing Service, Canberra, 1973.

10 See Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000, p 182.

11 See, for example, Campbell, above n 9, pp 164-165.

12 *Ibid.*

13 [1914] AC 237; (1913) 15 CLR 182.

14 (1953) 90 CLR 177.

15 (1971) 18 FLR 150.

However, the Council does not accept this position. The inquiry power of the Parliament of New South Wales is not simply a power incidental to the Parliament's legislative power, it is a fundamental mechanism to assist the Parliament to discharge its broader functions as an integral part of a system of responsible government. As such, the Council has the same inquiry power as the House of Commons – the 'Grand Inquest of the Nation'.¹⁶

In this regard, the decisions in *Attorney General (Cth) v Colonial Sugar Refining Company Ltd* and *Lockwood v Commonwealth* are largely irrelevant because they essentially concern the exercise of executive power – the power to establish royal commissions. The courts have always been far more circumspect in respect of any moves to constrain the powers of Parliament.

Moreover, at least at the Commonwealth level, the meaning of section 49 of the Commonwealth Constitution is clear – unless limited by legislation, the Commonwealth Parliament has all the powers, immunities and privileges of the House of Commons at the date of federation. There is no suggestion that this power is granted subject to the legislative competence of the Commonwealth.

The leading High Court decision on section 49 is *R v Richards; Ex parte Fitzpatrick and Browne*, in which the High Court provided the following unanimous observations on section 49:

The answer in our opinion lies in the very plain words of s 49 itself. The words are incapable of a restricted meaning ... It is quite incredible that the framers of s 49 were not completely aware of the state of the law in Great Britain and, when they adopted the language of s 49 were not quite conscious of the consequences which followed from it. We are therefore of the opinion that the general structure of this Constitution ... does not provide a sufficient ground for placing upon the express words of s 49 an artificial limitation.¹⁷

This is a clear judicial argument that the framers of the Constitution were well aware that they were providing the Commonwealth Parliament with powers, privileges and immunities equal to those of the House of Commons at the time of federation.

Furthermore, Neil Laurie, the Clerk of the Queensland Parliament, argues:

[T]o admit that there are limits to the inquisitorial powers of the Commonwealth Parliament would necessarily be to admit that the High Court has the power to, in effect, dictate what matters the Commonwealth Parliament can consider and debate. Whilst it is accepted that the High Court has a paramount function to interpret the Constitution and strike down both state and Commonwealth legislation repugnant to the Constitution, it is another matter entirely for the High Court to have the power to stifle the freedom of Parliament to consider matters.¹⁸

16 Laurie, above n 4, pp 178-179.

17 (1955) 92 CLR 165 at 172.

18 Laurie, above n 4, pp 179-180.

These arguments may equally be applied to the inquiry power of the State Parliaments. Nothing in the Commonwealth Constitution directly prevents the State Parliaments from adopting the powers, privileges and immunities of the House of Commons, as most of them have done. Indeed, section 106 of the Commonwealth Constitution guarantees that the constitution of each State shall, subject to the Commonwealth Constitution, continue as at the establishment of the State until altered in accordance with the constitution of the State.

Even in the New South Wales Parliament, which does not have an explicit constitutional or statutory grant of the powers and immunities of the House of Commons, the High Court's decision in *Egan v Willis*,¹⁹ and the subsequent decision of the Court of Appeal in *Egan v Chadwick*,²⁰ support the proposition that under the system of responsible government the investigatory powers of the Council extend to scrutiny of the activities of the executive branch. The High Court decision in *Egan v Willis* established that, although the New South Wales Parliament lacks an equivalent of section 49 of the Commonwealth Constitution, the Council is entitled to seek information concerning the administration of public affairs and finances according to the test of 'reasonable necessity'.

More pragmatically perhaps, even if a limitation exists on the power of the Parliament of New South Wales to conduct inquiries according to its legislative competence, such a limitation 'falls easily to cunning drafting of terms of reference and careful framing of questions'.²¹

WITNESSES

There are two ways in which witnesses may be questioned by members of the Council: by appearing at the Bar of the House or by appearing before a committee of the Council.

Witnesses at the Bar of the House

Witnesses other than members to be examined by the House attend at the Bar of the House. Members to be examined attend in their place.

There have been two cases in the Council in which persons have addressed the House or been examined at the Bar, both of which occurred in 1998.

In the first case, the procedure was used in contemplation of a possible exercise of power under section 53 of the *Constitution Act 1902*, which provides for the removal from office of a judicial officer by an address from both Houses to the

19 (1998) 195 CLR 424.

20 (1999) 46 NSWLR 563.

21 Evans, above n 6, p 134. Evans also notes suggestions that the powers of Australian parliaments to inquire is limited to the boundaries of their power to legislate and also cites the decisions in *Attorney General (Cth) v Colonial Sugar Refining Company Ltd*; *Lockwood v Commonwealth*.

Governor. In that case, the House resolved that, in view of the Report of the Conduct Division of the Judicial Commission of New South Wales concerning the Hon Justice Vince Bruce, a Supreme Court judge, Justice Bruce be called on to address the House in person or by legal representative and show cause why he should not be removed from office.²² The resolution also granted leave to Justice Bruce or his legal representative to 'attend at the Bar of the House' for the purpose of the address.²³ Justice Bruce subsequently accepted the opportunity to attend at the Bar and addressed the House on 16 June 1998.²⁴ Subsequently, a motion for the adoption and presentation of an address to the Governor for his removal from office was negatived on division.²⁵

The second case arose following a report by the Auditor-General raising concerns regarding non-compliance by government departments with legislative requirements relating to the authorisation of expenditure from the Consolidated Fund. In that case, the House resolved that the Auditor-General be summoned under the *Parliamentary Evidence Act 1901* to give evidence at the Bar of the House in relation to the Appropriation (1997-98 Budget Variations) Bill (No 2) 1998.²⁶ Before the motion was passed, the Treasurer moved an amendment seeking to also summon Secretaries to the Treasury and former Treasurers since 1990 to give evidence at the Bar on related issues, but the amendment was defeated on division.²⁷ The Auditor-General was subsequently issued with a summons under the hand of the Clerk. This is the only instance since the passage of the *Parliamentary Evidence Act 1901* when a person has been summoned to the Bar of the House. He attended at the Bar in accordance with the summons and was examined by members of the House.²⁸

There have also been unsuccessful attempts to require the attendance of persons at the Bar of the House. In 1870, a motion that the Gunpowder Export Regulation Bill be recommitted, and that the Collector of Customs be examined at the Bar in relation to the bill, was negatived on division.²⁹ In 1999, the House debated a motion that the Special Minister of State and Assistant Treasurer, the Hon John Della Bosca, attend in his place and explain his failure to act should the proclamation of the commencement of a section of the *Motor Accidents Compensation Act 1999* not occur by a given date.³⁰ The debate was adjourned and remained on the Notice Paper until interrupted by prorogation. In 2000, a cross-bench member

22 *LC Minutes* (27/5/1998) 470, (2/6/1998) 519-529. A notice was also placed on the *Notice Paper* on 3 June 1998 that, contingent on the Hon Justice Vince Bruce being heard at the Bar of the House, Mr Peter Semmler QC and Dr Peter Cashman also be granted leave to be heard at the Bar of the House. The notice was subsequently withdrawn. See *LC Notice Paper* (3/6/1998) 1066.

23 *LC Minutes* (27/5/1998) 470.

24 *LC Minutes* (16/6/1998) 557.

25 *LC Minutes* (25/6/1998) 601-602.

26 *LC Minutes* (29/10/1998) 831-835, (10/11/1998) 841-842.

27 *LC Minutes* (29/10/1998) 831-833.

28 *LC Minutes* (10/11/1998) 841-842.

29 *LC Minutes* (3/3/1870) 27-28.

30 *LC Minutes* (16/11/1999) 219-220.

moved that four senior public servants be summoned to attend at the Bar and give evidence in relation to the M5 East Motorway Ventilation Stack and related matters. The debate was adjourned and the matter lapsed after prorogation of the Parliament for the 2001 periodic election.³¹ In 2005, following the resignation of the Hon Carmel Tebbutt, Minister for Education and Training, as a member of the Council to contest a seat in the Assembly, the opposition unsuccessfully attempted to suspend standing and sessional orders to allow a motion to be moved that the Minister, who was not at that time a member of either House, be summoned to attend and give evidence at the Bar of the House concerning her responsibilities. The motion was negatived on division.³²

There are numerous examples where petitioners for or against a bill have been represented at the Bar of the House by counsel or other representative. The procedure followed in such cases is that a petition is presented to the House setting out how the petitioners' interests are affected by the bill and praying that the House grant counsel leave to attend at the Bar, following which various motions are moved providing for counsel's attendance.³³ For example, in 1955, a group of authors was represented at the Bar of the House in relation to the Obscene and Indecent Publications (Amendment) Bill.³⁴ In the most recent example, in 1986, the New South Wales Bar Association sought to be represented at the Bar in relation to the Judicial Officers Bill but the request was not granted by the House.³⁵ The decreasing use of the procedure in recent years may reflect wider consultation by government with interest groups before bills are introduced and greater use of parliamentary committees in relation to proposed government legislation.

In a number of early cases petitioners on a bill sought to appear at the Bar in person rather than be represented.³⁶ In a number of instances, solicitors promoting private bills for the incorporation of companies were called to the Bar to be examined on the bill and produce the relevant deed of settlement.³⁷

Odgers notes that the Senate has also on occasion required witnesses to appear before the Bar of the Senate.³⁸

Persons who have committed an offence against the House may also be ordered to attend at the Bar to be reprimanded or admonished,³⁹ unless the offender is a

31 *LC Minutes* (31/8/2000) 616-617, (7/9/2000) 641.

32 *LC Minutes* (15/9/2005) 1571-72.

33 *LC Minutes* (19/3/1935) 311, 313, (26/3/1935) 327, (1/7/1936) 203, (9/7/1936) 229-230, (1/12/1953) 106-107.

34 *LC Minutes* (15/3/1955) 148, (16/3/1955) 152.

35 *LC Minutes* (28/10/1986) 403, (30/10/1986) 427.

36 See, for example, *LC Minutes* (19/10/1897) 27, (17/10/1912) 61, (30/11/1915) 179, (8/11/1922) 124.

37 See, for example, *LC Minutes* (16/12/1863) 77, (17/12/1863) 79, (10/3/1863) 149.

38 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, pp 413, 471-472.

39 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, p 162.

member of the House, in which case they may be ordered to attend in their place.⁴⁰ There has never been a case in the Council where an offender has been reprimanded at the Bar of the House. However, in 1996, the Treasurer and Leader of the Government in the Council, the Hon Michael Egan, who had been found guilty of contempt and suspended from the service of the House for the remainder of the day's sitting was ordered to attend in his place at the Table of the House on the next sitting day to explain his conduct.⁴¹ The motion as originally moved required the Minister to attend at the Bar of the House, but the relevant paragraph of the motion was subsequently amended to provide for his attendance in his place, based upon practice in the House of Commons.⁴² In another case, in 2003, the House agreed to a motion that the President invite a member of the House, the Hon Malcolm Jones, to address the chamber forthwith in relation to matters contained in a report by the Independent Commission Against Corruption (ICAC) on an investigation into the member's conduct.⁴³

Witnesses before committees

While the Council may conduct inquiries by taking evidence from witnesses before the Bar of the House, inquiries are normally conducted by a committee appointed by the House.

As discussed in the following chapter, the Council has a comprehensive system of committees, with extensive powers to conduct inquiries and to take evidence. The majority of these powers are delegated by the House, either expressly by resolution appointing the committees, or impliedly, in that they are necessary for the committees to exercise their functions. Other sources of the powers of the committees include legislation, the standing orders and the precedents and practices of the Council. Delegated powers do not exceed the powers of the House.

THE POWER TO SEND FOR AND EXAMINE WITNESSES

Until 1881, there was no statute governing the attendance of witnesses before the Bar of the House or committees. The Council relied on its common law power to require the attendance of witnesses.

In 1881, the passage of the *Parliamentary Evidence Act 1881* provided statutory power to the House and its committees to send for and examine persons. In

40 *Ibid*, p 163. The traditional practice in the House of Commons was that members were reprimanded or admonished standing in their place, unless they were in the custody of the Sergeant-at-Arms, in which case they were brought to the Bar. In more recent times, however, members of that House have been reprimanded by resolution of the House and have not received the House's censure, standing in their place or otherwise.

41 In the event this did not eventuate when Mr Egan instituted court proceedings. See *LC Minutes* (2/5/1996) 115-117.

42 *LC Minutes* (2/5/1996) 116; *LC Debates* (2/5/1996) 704, 709.

43 *LC Minutes* (3/9/2003) 265-266.

moving the second reading of the Parliamentary Evidence Bill in the Assembly, the Hon Robert Wisdom observed:

The object of the bill is to enable either House, and committees of the Houses – including select committees – to examine witnesses on oath with regard to matters which Parliament may deem it desirable to inquire into. The Bill provides for the summoning of witnesses, for their attendance, for their payment, and for penalties for non-attendance; it also provides that any witness giving false evidence shall be punishable for wilful and corrupt perjury.⁴⁴

Nonetheless, despite the passage of the Act, committees of the Council encountered considerable difficulty in relation to the calling of witnesses and taking of evidence during the late 19th century. Four particularly controversial inquiries between 1887 and 1890 – the inquiry into the Law respecting the practice of Medicine and Surgery,⁴⁵ the inquiry into Torpedo Defenses of the Colony,⁴⁶ the inquiry into On Ling⁴⁷ and the inquiry into the Medical Bill⁴⁸ – saw repeated instances where witnesses refused to attend hearings, refused to take an oath or affirmation, declined to answer questions and refused to table documents.⁴⁹ In one instance where the Select Committee on the Medical Bill sought to press a witness to appear and resolved that if he did not appear a warrant would be issued for his apprehension, the police officer⁵⁰ charged with serving the summons was unable to find the witness on two separate occasions. In the event, the Committee examined the police officer instead.⁵¹

The *Parliamentary Evidence Act 1881* was replaced in 1901 by the *Parliamentary Evidence Act 1901*, which continues in force today.

The *Parliamentary Evidence Act 1901*, in conjunction with the standing orders and resolutions of the House, provides committees with powers to compel the attendance of witnesses. Under section 4, any person, except a member of Parliament, may be summoned to give evidence before a committee. This power does not extend, however, to compelling the attendance of a person who is outside the jurisdiction of New South Wales.

44 *LA Debates* (18/8/1881) 727.

45 *LC Journals* (1887) Vol 42, Part 3, pp 325-418.

46 *LC Journals* (1887-1888) Vol 43, Part 2, pp 651-738.

47 *LC Journals* (1889) Vol 45, Part 1, pp 387-398.

48 *LC Journals* (1890) Vol 47, Part 2, pp 1467-1474.

49 *Consolidated Index to the Minutes of Proceedings* (1874-1893) Vol 2, pp 1113-1115.

50 It was only in 1931 that the House adopted the procedure of issuing summons via the Usher of the Black Rod. This followed the receipt of advice from the Assistant Law Officer that 'the proper person to effect service [of a summons] would be a messenger or other officer of House of Parliament'. See 'Report of the Select Committee on the Industrial Conciliation and Arbitration Bill', *LC Journals* (1930-31-32) Vol 5, p 1002.

51 'Report of the Select Committee on the Medical Bill', *LC Journals* (1890) Vol 47, pp 1471-1472.

A summons compels a person to attend before the committee and answer any lawful question. Standing order 208(c) provides that a committee has power to send for and examine persons, papers, records and things. However, a witness is normally invited to appear before a committee and a summons is only issued where a witness has declined such an invitation.

If the House or a committee resolves to summon the attendance of a person, section 4 provides:

(1) Any person not being a Member of the Council or Assembly may be summoned to attend and give evidence before the Council or Assembly by notice of the order of the Council or Assembly signed by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be, and personally served upon such person.

(2) Any such person may be summoned to attend and give evidence before a committee by an order of such committee signed by the Chair thereof and served as aforesaid.

As indicated, a summons to appear before the House is signed by the Clerk. A summons to appear before a committee is signed by the chair of the committee. The summons is personally served by the Usher of the Black Rod,⁵² who must also proffer conduct money and travel costs. Once served, the Black Rod presents to the committee an affidavit of service.⁵³

If a witness refuses to appear before a committee without just cause or reasonable excuse, even though summoned, the person can be apprehended under a warrant issued by a judge of the Supreme Court resulting in forced appearance before a committee, remand or discharge of the summons by order of the President.⁵⁴

Until 2000, the practice of the Council was to serve all witnesses, other than members, with a summons on arrival at a hearing. This was based on the assumption that the protections that relate to giving evidence before a parliamentary committee are predicated on whether a witness has been summoned. However, on advice provided to the Clerk of the Parliaments by Mr Brett Walker SC that this was not the case, this practice is no longer followed, and it is very rare that a witness is formally summoned today.⁵⁵

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

52 As noted above, during the inquiry into the Medical Bill, the police were charged with serving the summons. In modern times, the responsibility of serving a summons rests with the Usher of the Black Rod.

53 *Parliamentary Evidence Act 1901*, s 4.

54 *Ibid*, ss 7 and 8.

55 This advice was provided following the refusal of officers of the Casino Control Authority to answer certain questions on statutory secrecy grounds. See Walker B, 'Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No 4', (authorised to be published by resolution of the Committee on 6 November 2000), 2 November 2000, pp 15-17.

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

A committee may also agree to a request by a witness that a summons be issued. This request may be based on an incorrect belief that this provides greater legal protection, or because the witness may wish to be compelled to attend for other reasons.⁵⁶ This has occurred in the Council since the practice of summoning all witnesses was discontinued in 2000. For example, the Chair of General Purpose Standing Committee No 1 (GPSC 1) issued a summons under section 4 of the *Parliamentary Evidence Act 1901* to the Parliamentary Financial Controller for his attendance at the Budget Estimates hearing of GPSC 1 on Friday, 17 September 2004.⁵⁷ This summons was issued at the request of the Financial Controller, on the basis that he had been directed by the Speaker of the Assembly not to appear before the estimates committees. This continued the practice of previous years, but was discontinued in the 2005 budget estimates process.

Members as witnesses

Under the *Parliamentary Evidence Act 1901*, members of the Council or the Assembly may not be summoned to attend and give evidence before a committee.⁵⁸ However, they may be invited to appear, and ministers from both the Council and Assembly routinely appear voluntarily to give evidence at budget estimates hearings.

The Act also states that the attendance of a member of the Council or the Assembly to give evidence before a committee shall be procured in conformity (so far as practicable) with the mode of procedure observed in the House of Commons.⁵⁹ In the United Kingdom, the Sovereign and members and peers of the other House may not be summoned, although they may be invited to appear as witnesses before select committees. Where members of either House decline an invitation to appear before a committee, the committee should acquaint the House with that fact. On occasion, members have in turn been ordered by the House to attend select committees.⁶⁰

Members of the Council

Council committees have the power to request the attendance of and examine members of the Council (SO 208). The practice is for the chair to write to the member inviting the member to appear.

56 *Odgers*, 11th edn, p 414.

57 GPSC 1, *Budget Estimates 2004-2005*, Report No 26, November 2004, p 13.

58 *Parliamentary Evidence Act 1901*, s 6.

59 *Ibid*, s 5.

60 *Erskine May*, 23rd edn, p 759.

If the member refuses, only an order of the Council can compel the member's attendance.⁶¹ In practice, however, the Council has left it to the discretion of the member whether to attend a committee hearing. For example, in 1993 the Council gave leave for the Council members of the Joint Select Committee Upon Police Administration to appear before and give evidence to the Council's Standing Committee Upon Parliamentary Privilege in relation to its inquiry into the disclosure of *in camera* evidence taken by the Joint Select Committee Upon Police Administration. The Council also requested that the Assembly pass a similar resolution.⁶²

While a committee has no ability to compel a member's attendance, the committee can report their refusal to attend by way of a special report to the House.

The Council has on occasions given leave to its members to appear before committees of the Assembly. In 1915, the Assembly requested that the House give leave for the President of the Council, the Hon Fredrick Flowers, to attend and be examined by the Assembly Select Committee on the Prevalence of Venereal Diseases. Leave was granted to allow for the President to be examined by the Committee 'if he thinks fit'.⁶³ Similarly, in 1983 the Council agreed to a request from the Assembly for two Council members to attend and be examined by the Select Committee Upon Prostitution. Again, the Council agreed to the request for the members to attend and be examined 'if they think fit'.⁶⁴

Members of the Assembly

Under section 4 of the *Parliamentary Evidence Act 1901*, the Council and its committees do not have the power to compel the attendance of members of the Assembly to give evidence, or vice versa.⁶⁵

If a Council committee wishes to formally invite the attendance of a member of the Assembly, it must do so by way of message to the Assembly (SO 123). This requires a notice of motion to be given in the Council, identifying the reasons why the member's appearance is sought. If the Assembly agrees to the request it will give leave to the member to attend if they think fit. If the member chooses not to attend, the Council has no power to compel the member's attendance.

There are many examples from the beginning of bicameralism in New South Wales where the Council has sent a message to the Assembly requesting the attendance of an Assembly member before a committee. For example, in August 1858, the House appointed a select committee to inquire into and report on the St Philip's Parsonage Bill and, being 'desirous to examine' the Hon Robert Campbell

61 *Ibid*, p 758.

62 *LC Minutes* (3/3/1993) 32.

63 *LC Minutes* (16/9/1915) 85.

64 *LC Minutes* (25/8/1983) 111.

65 *Parliamentary Evidence Act 1901*, s 4.

and Mr John Campbell,⁶⁶ a message was sent to the Assembly requesting 'that the Legislative Assembly will give leave to its said member(s) to attend and be examined by the said Committee on such day and days as shall be mutually arranged'. The Assembly agreed to the Council's request, granting leave to the members to attend 'if they think fit'.⁶⁷

In a more recent example, on 16 October 1997, the House sent a message to the Assembly requesting that leave be given to members of the Assembly to appear before and give evidence to the Select Committee on the Proposed Duplication of the North Head Sewerage Tunnel.⁶⁸ The House adjourned at 4.15 pm until 5.30 pm that day. At the commencement of the sitting at 5.30 pm the President reported receipt of a message from the Assembly agreeing to the Council's request.⁶⁹

There have also been instances where a member of the Assembly has been prevented from appearing before a Council committee. On 31 March 1964, the Council sent a message to the Assembly requesting that leave be granted to the Minister for Health to appear before and give evidence to the Select Committee on the Dentists (Amendment) Bill.⁷⁰ The Premier subsequently informed the Assembly that Cabinet had advised the Minister not to appear before the Committee.⁷¹

The Council standing orders do not prevent a committee of the Council from inviting the attendance of a member of the Assembly through more informal procedures. For example, in regard to budget estimates hearings, it has become common practice for the chair of each committee to send written correspondence directly to ministers in the Assembly inviting them to appear before the committee. Since the establishment of the Council's budget estimates process in 1997, ministers have appeared voluntarily according to this process.

Similar to the Council, the Senate practice is that a committee may seek the attendance of a member of the House of Representatives by sending a message to the House, requesting that leave be given to the member or officer to attend.⁷² The Senate standing orders also do not prevent the voluntary appearance by invitation of members and officers of one House before the committees of the other. However, this informal procedure of appearance by invitation is *not* to be used in cases where 'the conduct of individuals may be examined, adverse findings may be made against individuals or disputed matters of fact may be under inquiry'. In such cases, a committee follows the formal process of message and authorisation to appear, which is based on House of Commons procedure.⁷³

66 Both were wealthy Sydney merchants, and both were previous members of the Council before their election to the Assembly. Mr John Campbell was also a trustee of the parsonage of St Philip's.

67 *LC Minutes* (25/8/1858) 68-69.

68 *LC Minutes* (16/10/1997) 114-115.

69 *LC Minutes* (16/10/1997) 120.

70 *LC Minutes* (31/3/1964) 422.

71 *LA Debates* (1/4/1964) 8141-8142.

72 *Odgers*, 11th edn, p 423.

73 *Ibid*, p 424.

Former members and ministers as witnesses

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

There are examples of former ministers who are no longer members appearing before Council committees. For example, in December 2005, the Joint Select Committee on the Cross City Tunnel took evidence from the former Premier, the Hon Bob Carr, and a number of former ministers including the former Treasurer, the Hon Michael Egan, the former Minister for Infrastructure, Planning and Natural Resources and the former Minister for Planning. All appeared voluntarily.⁷⁴

In 2002, the Senate Select Committee Inquiry into a Certain Maritime Incident, known colloquially as the ‘children overboard inquiry’, was at the centre of considerable controversy about the accountability of former ministers to Parliament.

As part of the inquiry, the Select Committee invited the former Minister for Defence to attend and give evidence at a public hearing of the Committee. The former Minister declined this invitation, prompting the Committee to seek the advice of both the Clerk of the Senate and the Clerk of the House of Representatives on its powers to compel the Minister to attend and give evidence.

In advice to the Leader of the Opposition in the Senate dated 19 February 2002, the Clerk of the Senate indicated that the Senate could summon any person in the jurisdiction of Australia, with the exception of current members of the House of Representatives and current State office holders. The Clerk argued that the immunity of current members of the House of Representatives from being summoned to appear before a Senate committee is a matter of comity between the Houses, as set out in their respective standing orders. From this, he emphasised that the immunity that is attached to a minister in the House of Representatives is attached to their status as a *member* of the House of Representatives, not their status as a *minister*. As a result, he argued that, as there is no immunity held by a minister from being summoned to attend a Senate committee hearing, there is certainly no immunity carried over by a former minister.

By contrast, however, the Clerk of the House of Representatives provided markedly different advice. The Clerk suggested that the immunity of current members of one House from being summoned before the other House is not a matter of comity as argued by the Clerk of the Senate, but ‘a legal restriction’ based on sections 49 and 50 of the Commonwealth Constitution, statute and common law. In support, the Clerk cited the position of the House of Commons in 1901 as stated in *Hatsell*:

⁷⁴ Joint Select Committee on the Cross City Tunnel, *Cross City Tunnel, First Report*, February 2006, p 4.

The leading principle, which appears to pervade all the proceedings between the two Houses of Parliament is, That there shall subsist a perfect equality with respect to each other; and that they shall be, in every respect, totally independent one of the other.⁷⁵

From this basis of total independence of the two Houses, the Clerk of the House of Representatives argued that the immunity of existing members of Parliament is continued once they leave Parliament, and extends to matters relevant to their conduct as ministers after their departure.

Both Clerks subsequently sought legal opinions on the matter.

In an opinion provided to the Clerk of the Senate, Mr Bret Walker SC argued that the provisions of section 49 of the Constitution, the *Parliamentary Privileges Act 1987* (Cth) and the powers of the House of Commons at the time of the establishment of the Commonwealth leave no doubt that the Houses of the Commonwealth Parliament have the power to compel the attendance of witnesses, with the exception of existing members of the other House. Mr Walker argued that the immunity against compulsion of existing members of the other House is that 'it is a public duty (not a private interest) of every Member of a House to attend to his or her business in its chamber, freed of extraneous pressures'. However, he argued that former members have 'no public business to attend the meetings of a House or a committee' and that, as such, 'there is no functional rationale for any such immunity'. Mr Walker observed:

I have never seen it suggested that former members of the Executive government trail with them, forever until they die, a personal protective immunity from investigation by the Houses of Parliament of their official conduct, and thus an immunity specifically from compulsory attendance to give evidence in relation to such an investigation. In my opinion, merely to state such a novel suggestion is to doubt its possibility as a matter of law (or political science).⁷⁶

The Clerk of the House of Representatives sought advice from Mr Alan Robertson QC and Professor Geoffrey Lindell. In his opinion, Mr Robertson supported the argument of the Clerk of the House of Representatives that the immunity of members of Parliament is not a matter of comity but a legal restriction, founded in the institutional independence of the two Houses. As stated by Mr Robertson:

[T]he fact that each House has taken the position that independence of the House and of each Member is sufficiently protected by the discretion of each Member does not suggest that the privilege rests merely in comity, if by that term is meant that the privilege rests entirely, or at all, in the discretion of the House seeking to examine the Member of the other House. Instead, it is clear that the privilege is of each House and Member and is recognised by the other House.

75 Hatsell, *Precedents of Proceedings in the House of Commons*, 1818, Vol 3, p 67.

76 Walker B, 'Australian Senate Witnesses - Former Ministers and Ministerial Staff: Opinion', 16 May 2002, published in Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002.

Mr Robertson also extended this immunity to former members, although he did state that this extension appears to be ‘a matter of less certainty’, given that there are no authorities that make express reference to the matter.⁷⁷

Professor Lindell advanced a similar argument, although he noted that ‘in the absence of direct judicial or other authority on the matter ... there can be no certainty that either the Senate or ultimately the courts will uphold that immunity’.⁷⁸

Faced with these conflicting advices and opinions, the Select Committee, by majority, adopted the views of the Clerk of the Senate. The minority, consisting of government senators, did not make a finding on the issue.⁷⁹

Ministerial staff as witnesses

There is no restriction on a committee inviting or summoning ministerial staff as witnesses under the *Parliamentary Evidence Act 1901*. However, while such persons have no immunity against being summoned, it is generally recognised that ministerial staff should not be held accountable for the actions or policy decisions of ministers or their departments.⁸⁰

The issue of inviting and summoning ministerial staff as witnesses occurred during the 2004 General Purpose Standing Committee No 4 (GPSC 4) Inquiry into Approval of the Designer Outlets Centre - Liverpool, known as the ‘Orange Grove inquiry’. During the course of the inquiry, the Committee invited a number of ministerial staff to give evidence. The Premier gave permission to his Chief of Staff to appear, and he voluntarily gave evidence before the Committee, while making it clear that in his opinion the Premier had waived the convention that staffers do not appear. However, the Chief of Staff to the Assistant Planning Minister, Mr Michael Meagher, subsequently declined the Committee’s invitation to appear on the basis that his Minister had not authorised him to appear before the Committee. Despite this, the majority of the Committee decided that they wished to hear from Mr Meagher and resolved to again invite him to appear. Mr Meagher again declined to appear, although he offered to assist the Committee by answering questions on notice.

As Mr Meagher declined to appear voluntarily, the Committee then summoned Mr Meagher under the *Parliamentary Evidence Act 1901*. This was the first time a ministerial staff member had been served with a summons to appear before a parliamentary committee since the formation of the standing committees in the

77 Robertson A, ‘Concerning the Obligations of a Former Member of the House of Representatives to Attend and Give Evidence before the Senate Committee on a Certain Maritime Incident: Opinion’; 26 June 2002, published in Senate Select Committee, above n 76.

78 Lindell G, ‘Comments provided by Professor GJ Lindell on advice given by the Clerks of both Houses of the Commonwealth Parliament’ 22 March 2002, published in Senate Select Committee, above n 76.

79 Senate Select Committee, above n 76, p xv.

80 See, for example, *Odgers*, 11th edn, p 427.

Council in 1988. In response to the summons, Mr Meagher appeared before the Committee on 30 August 2004.⁸¹

The Committee subsequently invited other ministerial staff, and staff of the Leader of the Opposition, to appear before the Committee following Mr Meagher's appearance. All attended voluntarily.

In the Senate, the issue of calling ministerial staff as witnesses also arose during the 'children overboard inquiry' in 2002. In his advice to the Chair of the Select Committee of 22 March 2002, the Clerk of the Senate emphasised that the Senate does not recognise any immunity attached to ministerial staff and that there is no basis for believing they have any immunity that would be upheld in the courts as a matter of law. The Clerk argued that this applies irrespective of whether a staffer is employed under the *Members of Parliament (Staff) Act 1984* (Cth) or the *Public Service Act 1999* (Cth).

By contrast, the Clerk of the House of Representatives argued that a 'reasonable case' could be made for the immunity of ministers who are currently members of Parliament being extended to their staff, based on ministers' need for assistance to perform their roles, especially in the modern complex world of government and administration. Unlike the Clerk of the Senate, the Clerk of the House of Representatives suggested that a distinction could be drawn between employees under the *Members of Parliament (Staff) Act* and employees under the *Public Service Act*.

The Committee, by majority, adopted the views of the Clerk of the Senate. The minority, consisting of government senators, did not make a finding on the issue.⁸²

Public servants as witnesses

There is no restriction on committees inviting or summoning public servants as witnesses. Committee inquiries established to examine areas of public policy and financial accountability frequently require evidence from senior officers responsible for the implementation of government policy and expenditure.

In 2003, the Cabinet Office issued 'Guidelines for Public Servants appearing before Parliamentary Committees' which made the following observation concerning 'lawful' questions:

The Committees only have power to ask 'lawful questions' under the *Parliamentary Evidence Act*. Failure to answer a question which is not a 'lawful' question cannot result in the punishment of the witness. A question may not be a 'lawful question' if the answer is privileged (eg legal professional privilege, public interest immunity - which includes the confidentiality of Cabinet documents - or the privilege against self-

81 GPSC No 4, *The Designer Outlets Centre, Liverpool*, Report No 11, December 2004, pp 5, 109, 161-162, 166.

82 Senate Select Committee, above n 76, p xv.

incrimination) or if the question falls outside of the Committee's terms of reference.⁸³

These guidelines, and previous versions of them,⁸⁴ are not binding on committees. *Prima facie* claims of privilege (for example, legal professional privilege, public interest immunity – which includes the confidentiality of Cabinet documents – or the privilege against self-incrimination) have no application to parliamentary inquiries. However, that does not mean that such claims are ignored. Any claim or rights normally afforded in our legal system are usually given serious consideration by parliamentary committees.

Equally, there is no restriction on the Council or one of its committees inviting or summoning as witnesses public servants of another jurisdiction, provided they are resident in New South Wales. This issue arose in Canada in *Attorney General (Canada) v MacPhee*,⁸⁵ in which the Supreme Court of the Province of Prince Edward Island held that officers of a federal government agency had no immunity from a summons issued by a committee of the Legislative Assembly of the province in the course of an inquiry. In his decision, Cheverie J observed:

In the present case, the Committee is not limited by a provincial statute in the conduct of its inquiry. Its power [to summon employees of a federal government agency] is not dependent upon a provincial statute ...

... Rather, it is exercising its constitutionally protected privilege.⁸⁶

Members of other parliaments as witnesses

There is no restriction on committees inviting or summoning ministers and members of parliaments of other jurisdictions provided they are resident in New South Wales. In practice, however, members of other parliaments and officials of other jurisdictions are only invited to appear before committees of the Council.

Before 1920, the High Court developed the twin doctrines of immunity of instrumentalities and reserved State powers which provided that individual jurisdictions in Australia had the right to disregard and treat as inoperative any attempt by another jurisdiction to control the exercise of its powers. This may well have been interpreted by the courts as applying to a parliamentary inquiry seeking to examine the exercise of power by another jurisdiction, including its ministers.

83 Premier's Circular No 2003-47, 'Guidelines for appearing before Parliamentary Committees', 17 November 2003, para 6.

84 See 'Guidelines for Officers who are witnesses before Parliamentary Committees' (Memorandum 84/2026); 'Guidelines for public sector employees dealing with the Legislative Council's General Purpose Standing Committees' (Memorandum 98-9); 'Guidelines for Ministers dealing with the Legislative Council's General Purpose Standing Committees' (Memorandum 98-10); 'Agency input to statutory and parliamentary committees' (Memoranda 98-33 and 93-8).

85 (2003) 661 APR 164.

86 *Ibid* at 179.

However, in 1920, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*⁸⁷ the High Court read down these doctrines. The Court now insisted on adhering only to the language of the constitutional text read as a whole in its natural sense and in light of the circumstances in which it was made: there was to be no reading in of implications by reference to the presumed intentions of the framers so as to preserve as much autonomy as possible for the States.

Nevertheless, some vestiges of the doctrine of implied immunities have been revived in subsequent High Court judgments. First, the Commonwealth cannot legislate so as to place special burdens or disabilities on State governments. Secondly, the States are immune from Commonwealth legislation that would operate to destroy or curtail the continued existence of the States or their capacity to function as governments.⁸⁸

Based on this reading of the federal system, it is possible that the High Court could place some restriction on the capacity of the Commonwealth Parliament to conduct inquiries that unduly interfere with the organs of the State governments, or vice versa. In one instance in 1996 where a Senate committee sought advice on compelling State members of parliament to appear before it, the advice of the Clerk of the Senate and Professor Dennis Pearce (of the Australian National University) was that the power probably did not exist.⁸⁹

As cited earlier, section 15(2) of the *Evidence Act 1995* provides that a member of a House of an Australian Parliament is not compellable to give evidence if it would prevent the member from attending a sitting of the House or of a committee.

Swearing in of witnesses

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

(1) Every witness attending to give evidence before the Council, Assembly, or a Committee of the Whole shall be sworn at the bar of the House; and the customary oath shall be administered by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be (or in the Clerk's absence by the officer acting for the Clerk).

(2) Every witness attending to give evidence before a Committee other than a Committee of the Whole shall be sworn by the chairman of such Committee.

87 (1920) 28 CLR 129.

88 See, for example, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; and *Re Australian Education Union; Ex parte Victoria* (1995) 128 ALR 609.

89 Senate Select Committee on the Victorian Casino Inquiry, *Compelling Evidence*, December 1996, Parliamentary Papers 359/1996, pp 41-67.

Under the Act, a witness may take an oath on the Bible or other religious text, or may make an affirmation. Requests to take oaths on the Koran and the Torah have become more common in recent years.

The taking of an oath or making of an affirmation lends formality to committee procedures and serves to reinforce the witness's obligation to provide truthful answers. However, it does not affect the privileged status of committee proceedings.

In some cases taking evidence on oath may inhibit a witness's confidence or ability to provide information to a committee. The committee may allow a person to provide information in a less formal manner if it is appropriate to do so. A committee must be mindful that if an unsworn witness is questioned by a committee the evidence cannot be considered an 'examination' under the *Parliamentary Evidence Act 1901* and that sanctions under sections 11 and 13 will not apply. However, this is rarely an issue and one that would be resolved simply by recalling the witness and questioning them under oath.

If a witness refuses to be sworn, or requests not to be sworn, a committee should ask the witness to provide reasons and then deliberate in private to consider the matter. The committee should consider whether to accede to the witness's request or to insist that the witness be sworn. If the committee feels that it is necessary for the witness to be sworn the committee should advise the witness accordingly and explain the rationale for the decision. In general, if a committee proposes to use its powers under the Act, it is best for the committee to proceed without haste ensuring that the witness understands the consequences of their action and has time to seek and consider advice in relation to the way they are interacting with the committee. If the witness maintains their position, the committee would need to consider whether to make a special report to the House.⁹⁰

Legal representation of witnesses

Standing order 225 does not allow a person or organisation to be represented by a solicitor or counsel at a committee hearing unless the committee decides otherwise. Similarly, Senate practice provides that:

[A] committee would not normally grant such an application unless its inquiry involved contentious or complex matters in relation to which a witness might seriously prejudice their interests by ill-advised or hasty answers. Such inquiries are rare.⁹¹

90 There is an example in 1887 during the Select Committee inquiry into the Law respecting the practice of Medicine and Surgery where a witness refused to take an oath or make an affirmation. The witness proceeded to give evidence in any case. See 'Minutes of evidence taken before the Select Committee on the Law respecting the practice of Medicine and Surgery', *LC Journals* (1881-1888) Vol 43, Part 4, p 587.

91 *Odgers*, 11th edn, p 422. See also *Erskine May*, 23rd edn, p 763; and *House of Representatives Practice*, 4th edn, pp 653-655.

However, with the prior permission of the committee, a witness may be accompanied by legal counsel, in an advisory capacity. The adviser cannot give evidence on behalf of the witness, object to procedure or lines of questioning, cross-examine another witness or intervene during the committee's examination of another witness.

This matter arose during the inquiry into the conduct of the Hon Franca Arena by the Standing Committee on Parliamentary Privilege and Ethics in 1998.⁹² In advice to the Committee during the inquiry, the Clerk indicated that, while witnesses cannot be represented by counsel without the leave of the House, they may be *assisted* by legal representatives, 'in the sense that they may consult their legal advisers during hearings and seek their lawyers' assistance in answering questions from the Committee'. The Committee adopted this approach during the inquiry. In addition, due to the highly controversial nature of the inquiry, and in order to ensure procedural fairness, Mrs Arena's lawyers were permitted to:

- submit written questions to be put to other witnesses by members of the Committee on Mrs Arena's behalf;
- make submissions in relation to the Committee's proposed editing of Mrs Arena's evidence before the public release of that evidence;
- make submissions in relation to Mrs Arena's conduct before the Committee commenced its final deliberations.⁹³

Where a witness gives evidence *in camera*, the committee may, at its discretion, permit an adviser to be present if the witness so requests.⁹⁴

Counsel may, however, appear as a witness separately. For example, during the 2001 GPSC 3 Inquiry into Cabramatta policing, counsel for police witnesses was refused the right to appear as counsel but was granted an appearance as a witness in his own right.⁹⁵

The Council does not fund financial assistance for witnesses engaging a solicitor or counsel. However, during the inquiry into the conduct of the Hon Franca Arena cited above, Mrs Arena wrote to the Committee requesting financial assistance for legal representation before the Committee. In this instance, due to the nature of the inquiry, the Council sought funding from Treasury for the legal representation provided to the Hon Franca Arena. Funding was also provided for legal representation for third parties.

92 The inquiry arose following a speech given by the Hon Franca Arena in the Council on 17 September 1997 in relation to an alleged 'cover-up' of high-profile paedophiles.

93 Standing Committee on Parliamentary Privilege and Ethics, *Report on the Inquiry into the Conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998 (*Arena Report*), pp 9-10.

94 See, for example, the Standing Committee Upon Parliamentary Privilege inquiry into the publication of an article appearing in the *Sun Herald* newspaper containing details of *in camera* evidence. During the inquiry, the solicitors for two witnesses were permitted to be present in the capacity of adviser during the taking of *in camera* evidence: Standing Committee Upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald Newspaper containing details of in camera evidence*, October 1993, pp 46-48.

95 GPSC 3, *Cabramatta Policing*, Report No 8, July 2001, pp 2-3.

THE POWER TO COMPEL ANSWERS TO A 'LAWFUL QUESTION'

Under the *Parliamentary Evidence Act 1901*, the Council and its committees have extensive powers to compel a witness to answer a 'lawful question'.⁹⁶ Section 11(1) of the Act provides:

(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.

This sanction does not apply, however, to a witness who has not taken an oath or affirmation, regardless of whether or not they were summoned to give evidence.⁹⁷ In a legal opinion provided to the Clerk, Mr Bret Walker SC observed:

In my opinion, the provisions of sec 10 of the *Parliamentary Evidence Act* impose a prerequisite of an oath or affirmation (relevantly). It follows that the 'examination' referred to in sec 11 is one which involves questions put following that compulsory oath or affirmation. If that prerequisite has not been observed, what ensues is not an 'examination' within the meaning of sec 11, and thus there would be no statutorily deemed contempt of Parliament for refusal to answer.

... On the other hand, although a witness 'attending to give evidence' must be sworn or examined under sec 10, in my opinion the need for a summons by order is not mandatory. The language of sec 4 empowers rather than obliges the issue of a summons. Furthermore, it would be curious if a citizen could not demonstrate respect for and co-operation with the Houses by attending voluntarily to give evidence. Thus, the lack of a summons will not prevent the sanctions under sec 11 being imposed. There is a broad analogy in a court of law, where a witness is not entitled to refuse to answer questions simply because he or she did not require a subpoena in order to step into the witness box.⁹⁸

Generally speaking, a question of fact, as opposed to an opinion, relevant to the committee's terms of reference would be a lawful question. This issue was addressed in *Crafter v Kelly*, in which it was indicated that 'the expression "lawful question" ... connotes one which calls for an answer according to law, one that the witness is compellable to answer according to established usage of the law'.⁹⁹

96 It is notable that, before the passage of the *Parliamentary Evidence Act 1901*, committees were unable to compel answers to questions. For example, during the 1887 Select Committee into the law respecting practice of Medicine and Surgery, a series of witnesses refused to answer questions in relation to medical practice. See *LC Journals (1887) Vol 42, Part 2, pp 316-317*.

97 See Walker, above n 55, pp 15-17.

98 *Ibid*, p 15.

99 [1941] SASR 237 at 237. The case concerned the meaning of 'lawful question' in the *Primary Producers Debts Act 1935 (SA)*.

However, the following questions illustrate some of the complexities and uncertainty surrounding the issue of what is a 'lawful question':

- Can a witness refuse to answer an otherwise 'lawful question' which is self-incriminating, or on the grounds that answering the question would breach public interest immunity or legal professional privilege?
- Can a question be 'lawful' notwithstanding an answer to it requires information to be divulged which would otherwise be prohibited by a statutory secrecy provision?

The issue of statutory secrecy provision was addressed in a legal opinion provided to the Clerk by Mr Bret Walker SC in relation to parliamentary privilege and witnesses before GPSC 4. Mr Walker observed:

A 'lawful question' must have the quality that an answer to it may be compelled by lawful means. A question may be 'lawful' notwithstanding an answer to it requires information to be divulged which would, anywhere else, be prohibited by [statute].¹⁰⁰

Ultimately, however, these questions have not arisen directly for determination by the courts. As a result, any objection to a question must be considered on its merits.

Where a witness, generally in a committee, raises an objection to answering a question, the witness should be invited to state the ground on which the objection is taken. Unless the committee determines immediately that the question should not be pressed, the committee should then consider, in private, whether it will insist on an answer to the question, having regard to the basis of the objection, the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought.

If a committee determines that it does require an answer the witness should be informed of that determination and the reasons for it. As noted, only after the witness has been issued with a summons and has been sworn or affirmed can a witness be required to answer the question or face contempt.

In view of the fact that most witnesses appear voluntarily to give evidence, committees do not generally press witnesses for answers to questions to which they have taken objection.¹⁰¹ It is important to emphasise, however, that while a committee may often accede to an objection to a question by a witness and not exercise its powers to compel an answer, that does not mean that the power does not exist.

Objections to questioning or calls for papers

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

100 Walker, above n 55, p 13.

101 *Ibid.*

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

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

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

Some of these claims of privilege are examined in greater detail below. The *sub judice* convention is discussed in the following chapter.

Public interest immunity

Perhaps the most contentious, and most likely, claim of privilege to be raised during the course of an inquiry is that of public interest immunity, although the earlier expression 'Crown privilege' is sometimes still used.

Public interest immunity in the parliamentary context refers to a claim by the executive that it should withhold information because it is not in the public interest for that information to be disclosed. Public interest immunity in this context potentially conflicts with the executive government's accountability to Parliament through its ministers.

The issue of whether public interest immunity may be claimed in relation to documents was considered in Chapter 17 (Documents). As indicated, in *Egan v Chadwick*, all three members of the Court of Appeal agreed that the Council's power to order the production of documents extended to privileged documents, on the basis that such a power may be reasonably necessary for the exercise of its

legislative function and its role in scrutinising the executive.¹⁰² However, the Court left the actual enforcement of the order for the production of documents to the Council itself.

Each claim to public interest immunity by a witness must be considered on its merits and advice sought prior to a witness being placed in a position where they may be in conflict with the *Parliamentary Evidence Act 1901*.

Commercial-in-confidence

It is not uncommon for witnesses to make a claim that information or documents contain material that is commercial-in-confidence.

Generally, any common law duty or commercial requirement of secrecy would not prevent Parliament or a parliamentary committee from obtaining information, even if it was in respect of private commercial dealings, provided that the disclosure of the information was in the public interest and relevant to the inquiry terms of reference. In most instances, the public interest requires the disclosure of the dealings of government or quasi-government agencies, since the public may ultimately have a financial interest in the obligations undertaken by these bodies. This position was expressed by Sir Laurence Street, the former Chief Justice of the Supreme Court, acting as the independent legal arbiter on a disputed claim of privilege over papers relating to Mogo Charcoal Plant in 2002.¹⁰³

In my view the considerations in favour of disclosure convincingly outweigh the claim of privilege. The description of the magnitude in quantity and time of the Agreement by State Forests that I have quoted above is eloquent of its importance in the public interest. Principles of transparency and accountability plainly outweigh the commercial in confidence considerations and the admittedly prospectively serious implications put forward by State Forests and Australian Silicon Operations when considering a contract for a sale by the State of this magnitude. The administration of the timber resources of the State involves political, ecological and economic considerations of significant public interest and, I repeat, the magnitude of this transaction is such as to expose it to a clearly recognisable obligation of disclosure.¹⁰⁴

The ever-increasing corporatisation and partial privatisation of government services have resulted in an increasing number of commercial-in-confidence claims. In many instances, such claims are made simply on the basis that confidential

102 (1999) 46 NSWLR 563.

103 The Mogo Charcoal Plant was a new mineral processing plant to be located at Lithgow for producing metallurgical and chemical grade silicon from quartz. The operation of the plant required substantial tonnages of charcoal and woodchips to be sourced from State forests. The Timber Supply Agreement entered into between State Forests, Australian Silicon Operations Pty Ltd and the State of New South Wales included the regular supply of up to 200,000 tonnes of timber per year to the plant from State Forests' South Coast Region.

104 Sir Laurence Street, 'Disputed claim of Privilege: Mogo Charcoal Plant, Report of the Independent Legal Arbiter, June 2002, p 10.

commercial dealings have taken place. The proper basis for claims of commercial-in-confidence information is not that there may be a commercially confidential dealing, but that the disclosure of the matter is likely to cause damage to the commercial activity.¹⁰⁵

In some instances, committees may take evidence *in camera* to reduce any damage thought likely to occur through the disclosure of commercially sensitive information.

Statutory secrecy provisions

A number of Acts contain statutory secrecy provisions that aim to prohibit the disclosure of particular information by making such a disclosure a criminal offence. These Acts include the *Casino Control Act 1992*, the *Independent Commission Against Corruption Act 1988* and the *Police Integrity Commission Act 1996*. The objective of such provisions is to protect the functions and objectives of the Act of which the provision is a part. However, they have no application to Parliament, except by express enactment.

Many such Acts also contain a specific provision expressly preserving parliamentary privilege. For example, section 122 of the *Independent Commission Against Corruption Act 1988* provides:

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

A corresponding provision is found at section 145 of the *Police Integrity Commission Act 1996*.

The impact of statutory secrecy provisions on the powers of the Senate and its committees is outlined in *Odgers*:

Statutory provisions of this type do not prevent the disclosure of information covered by the provisions to a House of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry. They have no effect on the powers of the Houses and their committees to conduct inquiries, and do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees.

The basis of this principle is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a House or a committee ... It is also a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.¹⁰⁶

105 Lynch A, 'Commercial in Confidence Claims: The Mantra of the Nineties', Paper presented at the 28th Conference of Presiding Officers and Clerks, Nauru, July 1997.

106 *Odgers*, 11th edn, p 50.

Odgers also argues that Parliament's freedom of speech, as guaranteed under the *Bill of Rights 1689*, is important in this context.

In the early 1990s, these principles were called into question as a result of advice given to the executive government by legal advisers in relation to the operations of the Parliamentary Joint Committee on the National Crime Authority. Despite this, since 1991 the Commonwealth Government has generally adhered to the view that a generic statutory secrecy provision does not affect parliamentary inquiries, 'with only occasional episodes of confusion on the point'.¹⁰⁷

In New South Wales, there have been instances where witnesses before a committee have refused to answer questions on the basis of statutory secrecy provisions.

On 16 June 1988, the Council referred the Police Regulation (Allegations of Misconduct) Amendment Bill to a select committee for consideration and report. In the course of giving evidence before the select committee, the Ombudsman informed the Committee that section 34 of the *Ombudsman Act 1974* would preclude him from divulging certain information. While the Ombudsman did not on that occasion refuse to answer any specific question, as he would be required to give further evidence at a later hearing, the committee resolved to ask the Clerk of the Parliaments to seek the advice of the Crown Solicitor.

In advice of 12 August 1988, the Crown Solicitor indicated:

Section 34(1) binds the Ombudsman and his officers and does so, in my view, regardless of whether 'the Legislature' is bound by the Act. ... there could clearly be a conflict between s 11 of the Parliamentary Evidence Act and s 34 of the Ombudsman Act as the Ombudsman in some situations may not be able to satisfy the requirements of both provisions. Faced with that prospect I consider that a court would be likely to give effect to the specific provisions enacted to apply to the Ombudsman and would regard those provisions as a partial repeal of s 11 of the Parliamentary Evidence Act to the extent of the Ombudsman's obligations under s 34 of his Act.¹⁰⁸

Based on this, the Crown Solicitor argued that neither the Ombudsman nor any officer of the Office of the Ombudsman is required by section 11(1) of the *Parliamentary Evidence Act 1901* to provide information in an answer which would amount to disclosure of information obtained in the course of their office. The matter did not arise when the Ombudsman gave evidence again.

The issue arose again at a budget estimates hearing held by GPSC 4 in 2000. On that occasion, witnesses representing the Casino Surveillance Division of the Department of Gaming and Racing refused to answer questions on the grounds that answers would breach the statutory confidentiality provisions of section 148 of the *Casino Control Act 1992*. Section 148 creates an offence for divulging information acquired in the exercise of functions under the Act.

¹⁰⁷ *Ibid*, p 53. For detailed description of the advice given on the operations of the Parliamentary Joint Committee on the National Crime Authority, see *Ibid*, pp 50-53.

¹⁰⁸ State Crown Solicitor's Office Correspondence, 'Question of whether the Ombudsman may be required to disclose information to a Parliamentary Committee', 12 August 1988, p 4.

Consideration as to whether the questions were compellable centred on whether parliamentary committees fall within the definition of a 'court' under section 148(8) of the Act and whether it could have been the intention of Parliament, in passing the legislation, to instill greater powers in the agencies constituted under the Act than in the House itself or its committees. The Office of Gaming and Racing sought the advice of the Crown Solicitor's Office on the matter. In the Crown Solicitor's opinion, parliamentary committees fall within the definition of a 'court' under the Act and are therefore prohibited from requiring staff to divulge information that is not in accordance with section 148(3) and (4) of the Act.¹⁰⁹

GPSC 4 subsequently requested the Clerk to obtain legal advice on the matter. In advice, Mr Bret Walker SC was of the view that statutory secrecy provisions do not prevent disclosure to the Parliament or its committees and that the general words of section 148 of the *Casino Control Act 1992*:

are not apt to deprive the Council or the committee of its pre-existing power, both at common law and under the Parliamentary Evidence Act, to enquire into public affairs as members see fit. ... [I]n my opinion, it would have required express reference to the Houses including their committees, or alternatively a statutory scheme which would be rendered fatally defective unless its application to the Houses were implied, for the statutory secrecy provisions of the Casino Control Act to have this drastic effect ... And it should not be doubted that the effect is drastic. It would remove important matters of administration from the scrutiny of the electors' representatives. That is no mere incidental or relatively unimportant consequence.¹¹⁰

He further stated:

Section 148 does not create any offence constituted by public servants summoned before the Committee to answer questions about the administration of the Casino Control Act, notwithstanding that full and proper answers would divulge to the Committee ... information which in every other forum or context (apart from the Legislative Assembly) would be information within the embargo imposed by sub-sec 148(1) of the Casino Control Act.¹¹¹

Mr Walker also commented more generally on the impact of Article 9 in his advice to the Council:

[T]he provisions of Article 9 of the Bill of Rights would arguably protect a public servant witness before the Committee from prosecution and punishment in a court, if the public servant were to answer a question in such a way as to divulge information falling within that which it is an offence to divulge.¹¹²

109 Correspondence from Office of the Minister for Gaming and Racing to GPSC 4, 2 August 2000, pp 6-7.

110 Walker, above n 55, p 9.

111 *Ibid.*

112 *Ibid.*

In his subsequent advice on this matter, the Clerk of the Parliaments indicated that, as there is no explicit reference to Parliament or a parliamentary committee in section 148 of the *Casino Control Act 1992*, in his view the provision does not apply to a parliamentary committee, and no offence is created by divulging information to a committee. It is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.¹¹³

The Clerk further noted that under s 148(6), the New South Wales Crime Commission, the Independent Commission Against Corruption and the National Crime Authority are all exempt from the secrecy provisions, permitting information to be divulged to those agencies. Schedule 5 to the *Casino Control Regulation 1995* also exempts other persons and bodies. The Clerk continued:

It seems incongruous that the Parliament intended, in passing the legislation, to instill greater powers in these agencies than in the House itself or its committees.¹¹⁴

In support of this position, the Clerk cited the judgment of Helman J in *Criminal Justice Commission v Dick*:¹¹⁵

More cogent perhaps than those considerations is, however, the implausibility of the proposition that Parliament should have intended by such an indirect means to surrender by implication part of the privilege attaching to its proceedings. The proposition advanced on behalf of the applicants really comes down to an assertion that by providing for a limited immunity for act and omission of the parliamentary commissioner the Parliament intended substantially to derogate from its own privilege. I do not accept that construction of the Act.

Finally, the Clerk noted that another issue not canvassed in the advice of the Crown Solicitor is that, if the statutory secrecy provisions of the *Casino Control Act 1992* did apply to the Parliament, then those provisions would fall foul of the 'manner and form' requirements of section 7A of the *Constitution Act 1902*. Section 7A(1)(a) and (b) provide that the powers of the Council cannot be altered either expressly or impliedly except by referendum in accordance with section 7A. In short, the common law or statutory powers of the Council cannot be abrogated except by legislation passed in the required form.¹¹⁶

The circumstances under which a committee must consider and determine any objection by a witness to answering a question concerning statutory secrecy provisions are rare. In such circumstances, where a witness has difficulty answering a question, they raise their concerns with the committee. In most cases the committee

113 Clerk of the Parliaments, 'Advisory Note: Parliamentary Privilege and Statutory Secrecy Provisions', June 2001, p 4.

114 'Parliamentary Privilege and Statutory Secrecy Provisions', above n 113, p 4.

115 [2000] QSC 272 at [13].

116 'Parliamentary Privilege and Statutory Secrecy Provisions', above n 113, pp 4-5.

will not pursue the line of questioning or will seek the information from an alternative source.

Legal professional privilege

Confidential communications between a person or corporation and their legal representatives, or documents brought into existence for the sole purpose of obtaining or receiving legal advice, even if the communication sometimes involves third parties, are generally classed as being subject to legal professional privilege.

It has been said that the proper functioning of the legal system depends on a freedom of communication between legal advisers and their clients, which would not exist if either could be compelled to disclose what passed between them.¹¹⁷

The Court of Appeal in *Egan v Chadwick* found that the Council's power to call for documents did extend to documents for which legal professional privilege had been claimed, on the basis that such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the executive.¹¹⁸

Spigelman CJ observed that the applicability of the doctrine depends on the context in which the issue of access to information arises, and the relationship between the parties involved.¹¹⁹ Where the context involves the right of a House of Parliament to access legal advice on which the executive has acted, the applicable principle is the common law doctrine of reasonable necessity. Applying the doctrine results in the conclusion that access to such legal advice may be necessary for the House to perform its functions. Spigelman CJ reasoned:

In performing the accountability function, the Legislative Council may require access to the legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision.¹²⁰

Once again, however, each claim by a witness must be considered on its merits and advice sought prior to a witness being placed in a position where they may be in conflict with the *Parliamentary Evidence Act 1901*.

Privilege against self-incrimination

The privilege against self-incrimination, sometimes referred to as the right to silence, is a fundamental right in our legal system that is jealously guarded by the courts. The right or privilege extends so as to protect a person not only from being forced to speak against their interest, but to prevent the person from being forced to produce any document or thing that may incriminate them.

¹¹⁷ See *Baker v Campbell* (1983) 153 CLR 52 at 66 and 135.

¹¹⁸ (1999) 46 NSWLR 563 at 578.

¹¹⁹ *Ibid* at 577-578.

¹²⁰ *Ibid* at 578.

However, in respect of Parliament, under Article 9 of the *Bill of Rights 1689*, no proceeding of Parliament may be questioned or impeached in any court or place outside of Parliament. A similar provision is provided in section 12(1) of the *Parliamentary Evidence Act 1901*. Consequently, evidence by a witness to a parliamentary inquiry could not in any event be used against a witness in a legal proceeding. Documents or other things tabled or presented to a committee are likewise privileged and may not be used in other proceedings.

In most circumstances, however, a committee would seriously consider any request by a witness that they not be obliged to give self-incriminating evidence in public.

EVIDENCE ADVERSELY REFLECTING ON A THIRD PERSON

Witnesses participating in parliamentary proceedings are afforded the same protection of parliamentary privilege that members of parliament enjoy. However, just as members are expected to use this freedom responsibly, the freedom of speech afforded to witnesses is not intended to provide a protected forum for a witness to make false statements or 'adverse reflections' about others.

An 'adverse reflection' is more than a contradiction of the evidence of other parties to an inquiry. For the purposes of its inquiry, a committee usually seeks as many considered views on the subject matter as is reasonably practicable. The views offered to committees often differ, sometimes in a contradicting or conflicting manner. For a statement to amount to an 'adverse reflection', it must involve adverse comment on a person or organisation, rather than on the merits or reliability of their argument or opinion. According to *Odgers*:

[A] reflection on a person must be reasonably serious, for example, of a kind which would, in other circumstances, usually be successfully pursued in an action for defamation. Generally, a reflection of poor performance (for example, that relevant matters have been overlooked) is not likely to be viewed as adverse. On the other hand, a statement that a professional person lacks the ability to understand an important conceptual or practical aspect of their profession and, therefore, is not a reliable witness, would be regarded as an adverse reflection. Reflections involving allegations of incompetence, negligence, corruption, deception or prejudice, rather than lesser forms of oversight or inability which are the subject of criticism in general terms, are regarded as adverse reflections. Mere disagreement with another person's views, methodology or premises is not considered as an adverse reflection.¹²¹

An 'adverse reflection' has the potential to harm not only individuals and organisations, but also to prevent committees conducting their proceedings and taking evidence in an open and transparent manner. Adverse reflections can also divert the focus of an inquiry from the terms of reference and are usually not constructive.

121 *Odgers*, 11th edn, p 418. Note, the reference to 'rules' in this paragraph is a reference to Senate Privileges Resolution 1(11)-(13).

For example, during the General Purpose Standing Committee No 3 (GPSC 3) inquiry into Cabramatta policing in 2002, attempts by witnesses to use the protections of the inquiry process to make adverse reflections on others became increasingly common. In its report the committee noted:

Some of these witnesses made a significant contribution to the original inquiry into Cabramatta Policing, and have worked hard to improve the policing situation in Cabramatta. It is unfortunate that, during the course of this review, these witnesses have used the hearings as an opportunity to attack one another, particularly with reference to 'James', rather than addressing the policing situation in Cabramatta. It is to be hoped that, with the conclusion of this review, these witnesses will return their energies to making a constructive contribution.¹²²

If during a public hearing a committee believes it is about to hear evidence which 'may reflect adversely on a person', the committee must consider whether it would be more appropriate to hear that evidence *in camera*. However, any decision to take the evidence *in camera* should not be made lightly. *In camera* hearings defeat the purpose of parliamentary inquiries of informing the public. In addition, *in camera* evidence gathered by a committee is, by convention, not used by the committee in reporting its conclusions and recommendations. The vast majority of hearings of evidence by committees are conducted in public.¹²³

Where a witness makes an adverse reflection in the course of their evidence, and a committee is not hearing the evidence *in camera*, there are various options available to the committee. They include:

- directing the witness to say no more;
- inviting the identified person to respond;
- considering whether the record of the evidence should be expunged (in exceptional cases only).¹²⁴

When considering which of these procedures should be adopted, a committee needs to balance the potential harm caused by the adverse reflection, the importance of the evidence to the inquiry and the public interest in committees conducting their proceedings and taking evidence in public.

THE GIVING OF FALSE OR MISLEADING EVIDENCE

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

¹²² GPSC No 3, *Review of Inquiry into Cabramatta Policing*, Report No 12, September 2002, p 4.

¹²³ *Odgers*, 11th edn, pp 420-421.

¹²⁴ See, for example, the expunging of the evidence in 1889 as part of the Select Committee on the Petition of Lieutenant Hammond, 'Report of the Select Committee on the Petition of Lieutenant Hammond', *LC Journals* (1889) Vol 45, Part 2, pp 897-898. For a more recent example, see GPSC No 3, above n 122, p 145.

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

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

While this course of action is available to a committee, it has never been exercised. In most cases where an allegation is made that a witness has provided false or misleading evidence, the committee will offer the person against whom the allegation is made the opportunity to respond. The procedures are similar to those applied to persons who have been adversely reflected on by another witness. In general, Council committees are concerned to provide procedural fairness to any person subject to adverse comment, by providing them with the opportunity to respond either in writing or by appearing before the committee. However, there is no automatic right of audience before a committee.

During the 2002 GPSC 3 Review of the Inquiry into Cabramatta policing a number of witnesses alleged that a former Cabramatta detective gave false or misleading evidence to the Committee about a conspiracy to undermine the Minister for Police and the Police Commissioner. A number of media and Police personnel were named and the evidence was subsequently reported in the metropolitan newspapers. The Committee wrote to those persons considered by the Committee to have been adversely reflected on by the detective. While several persons provided written responses to the Committee, two witnesses requested a public appearance before the Committee. The Committee agreed to this request. In its report, the Committee noted that, at that hearing, the witnesses made comments which were judged by the Committee to constitute further adverse mention, 'beyond simply a rebuttal of the original adverse mention'. The Committee concluded:

[T]he various adverse comments made have done nothing to advance the purpose of the inquiry, and are irrelevant to the terms of reference of the committee. The committee has made no use of any of the adverse comments in preparing this report.¹²⁵

LEGAL PROTECTION OF WITNESSES

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

¹²⁵ GPSC 3, above n 122, p 3; see also GPSC 3, *Review of the Inquiry into Cabramatta Policing, Evidence*, 13 August 2002, pp 1-38.

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

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

Under the *Defamation Act 2005*, there is also a defence of absolute privilege for a publication in the course of ‘an inquiry’ made under the authority of either House or both Houses of Parliament.¹²⁶ See Chapter 3 (Parliamentary Privilege) for a detailed discussion of the protections provided under parliamentary privilege.

PROCEDURAL PROTECTION OF WITNESSES

Unlike the Senate, the Council has not adopted a resolution setting out the procedures to be observed by committees for the protection of witnesses.

However, in May 1996, the Standing Committee on Parliamentary Privilege and Ethics published a report entitled *Inquiry into the attendance of witnesses before parliamentary committees*, in which it set out various procedures to be followed when calling public servants and statutory office holders before a committee.¹²⁷

As a result of this report and subsequent developments, the following procedural practices for the protection of witnesses are generally observed by Council committees:

- Parties are normally invited to make a written submission to an inquiry before being invited to give oral evidence.
- Arrangements for determining witnesses are generally left in the hands of the chair of a committee after consultation with the other members of the committee. However, any decision to summon a witness should be determined by a vote of the committee.
- Witnesses are normally invited to appear at a public hearing and summons are only issued where a witness has declined such an invitation.
- Witnesses are normally given reasonable notice of a hearing to which they are invited or summoned to appear, and are supplied with a copy of the committee’s terms of reference, membership and other information prior to appearing before a committee.

126 See also *Parliamentary Papers (Supplementary Provisions) Act 1975*, s 8.

127 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the attendance of witnesses before parliamentary committees*, Report No 2, May 1996.

THE INQUIRY POWER

- Witnesses have the opportunity to give their evidence *in camera*, and any application to do so should be considered by a committee.
- Members are generally expected to ask questions of a witness within the terms of reference of an inquiry.
- Witnesses may be accompanied by, and may consult, an adviser.
- Witnesses may object to answering a question, and committees should consider and determine any objection by a witness.
- Witnesses and other persons may be given an opportunity to respond to any adverse reflections made about them.
- The transcript of evidence is published as soon as possible.

The procedural practices for the protection of witnesses in the Council rest on various sources of authority, including the standing orders, resolutions of the committees and conventional practices.

Committees generally resolve at the commencement of an inquiry to advertise their terms of reference and invite parties to make a written submission to the inquiry, before they may be asked to give oral evidence. Under standing order 221 any person or body may make written or recorded submissions to a committee with respect to any inquiry being conducted by the committee.

Committees also generally resolve at the commencement of an inquiry to set appropriate hearing dates, providing sufficient notice for witnesses to be invited or summoned to attend. Such resolutions are generally made with reference to the committee's reporting date to the House, if applicable.

The arrangements for determining witnesses to be invited to attend a hearing of a committee are generally covered by a resolution passed at the first meeting of a committee. That resolution generally provides that the arrangement for the calling of witnesses is left in the hands of the chair of a committee after consultation with the other members of the committee.

It is rare for a witness to refuse a committee's invitation to give evidence, since a witness is usually very willing to appear before a committee of the Council to assist in its understanding of an issue and to present their views. However, committees may take the unusual step of summoning a witness. Under standing order 208 a committee has power to send for and examine persons, papers, records and things. The issuing of a summons to a witness under the *Parliamentary Evidence Act 1901* is determined by vote of the committee.

A witness invited or summoned to a hearing is provided with a copy of the committee's terms of reference, membership and other information before appearing before a committee.

While a committee will generally provide a witness with reasonable notice of a hearing to which they are invited or summoned to appear, there have been occasions when a committee has sought the cooperation and tolerance of witnesses to

appear at very short notice. For example, during the 2004 GPSC 4 Inquiry into Approval of the Designer Outlets Centre – Liverpool, known as the ‘Orange Grove inquiry’, the Committee on one occasion resolved late in the afternoon to invite witnesses to a public hearing to be held the following morning – less than 24 hours notice.¹²⁸ This instance was a departure from the normal procedure of giving witnesses reasonable notice of a hearing.

A witness may object to answering a question on reasonable grounds, including claims of privilege and immunity, and committees should consider and determine any such objection by a witness. Once again, this became an issue during the Orange Grove inquiry, during which witnesses were subjected to vigorous and often aggressive questioning, and normal procedural fairness in the questioning of witnesses was called into question. On that occasion, the Clerk Assistant Committees made a statement to the members of the Committee regarding parliamentary procedures and behaviour appropriate to Council committees, and the potentially adverse impact of overly vigorous and aggressive questioning on the dignity of the House and the effectiveness of the committee system.¹²⁹

A witness may also request that they give their evidence *in camera*, and any request to do so should be considered by a committee. However under the standing orders there is a presumption that evidence will be taken in public (SO 222).

In camera hearings are held in the presence of committee members, committee staff and Hansard staff only – the media and members of the public are excluded from the hearing room (SO 218(2)). *In camera* proceedings are confidential and evidence given by the witness cannot be disclosed except by resolution of the committee or the House. To do so may constitute a contempt of Parliament.

During the GPSC 3 Inquiry into Cabramatta policing, issues arose about the intimidation of witnesses following the leaking of *in camera* evidence. During the inquiry, four police witnesses tendered *in camera* a written submission to the Committee. The day after the hearing, details of the submission were published in a newspaper. Following the publication of this evidence, the four officers each received what they believed to be a ‘directive memorandum’ from their commanding officer, requiring them to provide details of any information they had concerning publication of the submission.

The Committee made a Special Report to the House concerning both the publication of the confidential evidence and the actions of the Police Service with regard to the four officers, identifying both matters as possible breaches of parliamentary privilege. The Council subsequently referred the Special Report to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report.¹³⁰

128 GPSC 4, above n 81.

129 *Ibid*, p 182.

130 *LC Minutes* (28/6/2001) 1070.

In its subsequent report dated November 2001, the Standing Committee on Parliamentary Privilege and Ethics found that there had been intimidation of the police officers involved and that this had the potential to obstruct GPSC 3 in the performance of its functions. However, the Committee accepted that such a result was not intended by the senior police officers accused of intimidation and recommended that no action be taken against them in the circumstances. Nevertheless, the Committee did make a number of recommendations designed to ensure that senior officers of the Police Service are clearly aware of their obligations relating to parliamentary committees and parliamentary privilege in future, and to strengthen the protection available to police officers who give evidence to parliamentary inquiries. Those recommendations included the development of clear procedures for management when dealing with police officers who give evidence to parliamentary committees, and certain amendments to the *Police Service Act 1990*.¹³¹

Subsequently, on 6 December 2001 the House agreed to a motion, as formal business, adopting the four recommendations of the Standing Committee on Parliamentary Privilege and Ethics and requiring that the President write to the Commissioner of Police informing him of the terms of recommendations 2 and 3 of the Committee, namely:

That Police Management be reminded that intimidation or coercion of police officers who give evidence before parliamentary committees, whether intended or not, in relation to their evidence constitutes a contempt of Parliament.

That the Police Commissioner be advised of the need to develop a clear set of procedures for management when dealing with officers under their command who appear as witnesses before parliamentary inquiries. These procedures should be published and widely circulated to avoid future problems between the Police Service and the Parliament.¹³²

Members of a committee are also generally expected to ask questions within the terms of reference of an inquiry. It is an accepted principle that questions must be relevant to the matter that has been referred to a committee for inquiry and report. There are several examples where members of a committee or a witness have objected to a question or a line of questioning on the grounds that it was outside the committee's terms of reference. Committee chairs and members must give due consideration to any objection raised.¹³³

It is notable that, while committees generally adopt their own procedures to protect witnesses, during the inquiry into the conduct of the Hon Franca Arena

131 Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before GPSC 3 and unauthorised disclosure of committee evidence*, Report No 13, November 2001, p viii.

132 *LC Minutes* (6/12/2001) 1351.

133 See, for example, GPSC 4, *Inquiry into Approval of the Designer Outlets Centre - Liverpool*, Evidence, 11 October 2004, p 25; see also GPSC 5, *Inquiry into the Hunter Economic Zone and the Tomalpin Woodlands*, Evidence, 2 July 2004, p 50.

undertaken by the Standing Committee on Parliamentary Privilege and Ethics in 1998, as cited earlier in this chapter, the Committee engaged outside legal assistance to ensure procedural fairness in the conduct of its inquiry. In its report published in June 1998, the Committee noted:

Because the question of expulsion is a serious one and has wide ramifications beyond the particular case being considered in this inquiry, the Committee wanted to ensure that its actions conformed at all times with the requirements of due process and applicable laws. Accordingly, early in the inquiry the Committee engaged the services of Mr Bernard Gross QC, instructed by Mr Joseph Catanzariti of Clayton Utz, Solicitors, to provide legal assistance to the Committee in this matter. Mr Gross and Mr Catanzariti advised the Committee on a range of matters connected with the conduct of the inquiry, including the lawfulness of steps proposed to be taken by the Committee; the application of relevant principles of procedural fairness/natural justice; and the procedures which should be followed to ensure that the Committee's proceedings did not prejudice current investigations by courts and other bodies.¹³⁴

INTIMIDATION OF WITNESSES

Complaints received from a witness after participating in the proceedings of the committee about the behaviour of any individual, including a member of the committee, are a serious matter and have the potential to undermine the credibility of the committee system.¹³⁵

The Council, unlike many jurisdictions, does not have any legislation, standing orders, sessional orders or resolutions specific to the protection of witnesses.

When considering complaints by witnesses a committee must take all reasonable steps to ascertain the facts of the matter. If the committee reaches a decision that the facts of the case warrant further action, the committee should prepare a special report to the House providing the facts and any conclusions it has reached. There is no provision under the standing orders for a committee to directly refer a matter to the Privileges Committee, although a Chair of a Committee could write directly to the President, who in turn could refer the matter to the Privileges Committee.

There is no obligation for a committee to seek further evidence if it is satisfied that there may have been improper influence on, or threat to, a witness. The committee can submit a special report to the House consisting only of the complaint, any relevant evidence, and a recommendation to the House requesting that the matter be referred to the Privileges Committee. The House then determines whether to

¹³⁴ *Arena Report*, above n 93, p 9.

¹³⁵ Clerk of the Parliaments, 'Process for complaint from a witness regarding intimidation by a Committee member', 16 March 2005; Clerk of the Parliaments, 'Further advice on process for complaint from a witness regarding intimidation by a Committee member', 21 April 2005.

refer the matter to the Privileges Committee. The Privileges Committee may conduct its own inquiry or determine the matter based on the special report.

For example, during the 1997-1998 General Purpose Standing Committee No 2 (GPSC 2) Inquiry into rural and regional New South Wales Health Services, the Committee raised concerns that the Minister for Health, the Hon Dr Andrew Refshauge MP, had attempted to deter a witness, a member of the Board of Directors of the New England Health Service, from giving evidence to the Committee. GPSC 2 tabled a Special Report on the matter in the House on 28 April 1998.¹³⁶

On 29 April 1998, the Council referred the Special Report to the Standing Committee on Parliamentary Privilege and Ethics for determination of whether any contempt or breach of privilege was committed by Dr Refshauge arising from this allegation.¹³⁷ In its report, the Committee concluded that, while Dr Refshauge did make comments critical of GPSC 2, he did not attempt to intimidate the witness or coerce him not to attend the hearing, and therefore no contempt or breach of privilege had been committed in this case.¹³⁸

There are also instances in the Council where it has been alleged that a member has interfered with a witness.¹³⁹ There is no direct precedent to guide the process a committee should adopt regarding such allegations. In general, Council committees follow a process in which they consider the evidence received and determine whether the complaint is sufficiently serious that, if it were proven, it would constitute an attempt to interfere with the inquiry process. If the committee determines there has been a potential contempt of the committee, a special report is presented in the House, for the House to consider a referral to the Privileges Committee. In recognition of the difficulty facing a committee investigating a complaint against one of its own members, it is desirable for a member who is the subject of a complaint to advise the other committee members of their intentions regarding the level of participation that they consider appropriate in future deliberations on the complaint.

This issue arose during a 2005 GPSC 2 inquiry into the operation of Mona Vale Hospital when a witness to the inquiry wrote to the Committee Chair alleging that immediately after the hearing she was approached in an intimidatory manner by a member of the Committee. A second person also wrote to the Committee alleging that she had witnessed the incident. The member involved tabled at a subsequent Committee meeting a written statement of his view of the incident. The member also advised the Committee that he would take no part in the Committee's

136 *LC Minutes* (28/4/1998) 382.

137 *LC Minutes* (29/4/1998) 388-389.

138 Standing Committee on Parliamentary Privilege and Ethics, *Report on special report from General Purpose Standing Committee No 2 concerning a possible contempt*, Report No 9, November 1998, p i.

139 GPSC 2, *Operation of Mona Vale Hospital*, Report No 19, May 2005; Standing Committee on Parliamentary Privilege and Ethics, above n 138.

deliberations on the matter. In its deliberations on the alleged intimidation, the Committee noted that, while it was agreed that the incident had occurred, the two parties involved had a different response to the same facts. In the event, the Committee resolved to take no further action 'other than to note that appearing before a committee inquiry itself can be an intimidating and daunting experience for witnesses, and there was a need for all committee members to exercise caution and sensitivity in any dealing with witnesses'.¹⁴⁰

140 GPSC 2, above n 139, p 5.